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NINETIETH REPORT

OF THE

NORTH CAROLINA

UTILITIES COMMISSION

ORDERS AND DECISIONS

ISSUED FROM
JANUARY 1, 2000 THROUGH DECEMBER 31, 2000

NINETIETH REPORT
of the
NORTH CAROLINA UTILITIES COMMISSION

ORDERS AND DECISIONS

Issued from

January 1, 2000, through December 31, 2000

Jo Anne Sanford, Chair

Ralph A. Hunt, Commissioner

Judy Hunt, Commissioner

William R. Pittman, Commissioner

J. Richard Conder, Commissioner

Robert V. Owens, Jr., Commissioner

Sam J. Ervin, IV, Commissioner

North Carolina Utilities Commission
Office of the Chief Clerk
Mrs. Geneva S. Thigpen
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

The Statistical and Analytical Report of the North Carolina Utilities Commission is printed separately from the volume of Orders and Decisions and will be available from the Office of the Chief Clerk of the North Carolina Utilities Commission upon order.

LETTER OF TRANSMITTAL

December 31, 2000

The Governor of North Carolina
Raleigh, North Carolina

Sir:

Pursuant to the provisions of Section 62-17(b) of the General Statutes of North Carolina, providing for the annual publication of the final decisions of the Utilities Commission on and after January 1, 2000, we hereby present for your consideration the report of the Commission's decisions for the 12-month period beginning January 1, 2000, and ending December 31, 2000

The additional report provided under G.S. 62-17(a), comprising the statistical and analytical report of the Commission, is printed separately from this volume and will be transmitted immediately upon completion of printing.

Respectfully submitted,

NORTH CAROLINA UTILITIES COMMISSION

Jo Anne Sanford, Chair

Ralph A. Hunt, Commissioner

Judy Hunt, Commissioner

William R. Pittman, Commissioner

J. Richard Conder, Commissioner

Robert V. Owens, Jr., Commissioner

Sam J. Ervin, IV, Commissioner

Geneva S. Thigpen, Chief Clerk

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DOCKET NO. M-100, SUB 128

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Amendment of Certain Commission	)	ORDER AMENDING
Rules to Correct Address Changes	)	RULES

BY THE CHAIR: It has come to the attention of the Chair that certain Commission Rules as published in the North Carolina Public Utilities Laws and Regulations - 1999 Edition should be amended to update the Commission's and Public Staff's recent address changes. The amendments are as follows:

1. In Commission Rule R1-2(a), the reference to the Commission's address as "P.O. Box 29510, Raleigh, N.C. 27626-0510" should be changed to "4325 Mail Service Center, Raleigh, N.C. 27699-4325", and the reference to the Public Staff's address as "P.O. Box 29520, Raleigh, N.C. 27626-0520" should be changed to "4326 Mail Service Center, Raleigh, N.C. 27699-4326";

2. In Commission Rules R4-2(h) and R4-4(c), the reference to the Public Staff — North Carolina Utilities Commission, Transportation Rates Division's address as "P.O. Box 29520, Raleigh, N.C. 27626-0520" should be changed to "4326 Mail Service Center, Raleigh, N.C. 27699-4326";

3. In Commission Rule R9-2(7), the reference to the Public Staff — North Carolina Utilities Commission, Accounting Division's address as "P.O. Box 29520, Raleigh, N.C. 27626-0520" should be changed to "4326 Mail Service Center, Raleigh, N.C. 27699-4326";

4. In Commission Rules R9-4(b)(5) and R17-2(h), the reference to the Public Staff — North Carolina Utilities Commission, Communications Division's address as "P.O. Box 29520, Raleigh, N.C. 27626-0520" should be changed to "4326 Mail Service Center, Raleigh, N.C. 27699-4326";

5. In Commission Rules R10-24(d), R10-24(e)(4), and in the sample forms in the Appendix to Rule R10-24 entitled, "SAMPLE FORM OF WATER OR SEWER BOND SECURED BY IRREVOCABLE LETTER OF CREDIT OF NONPERPETUAL DURATION" and "SAMPLE FORM OF WATER OR SEWER BOND SECURED BY COMMERCIAL SURETY BOND OF NONPERPETUAL DURATION ISSUED BY CORPORATE SURETY" the reference to the Commission's address as "P.O. Box 29510, Raleigh, N.C. 27626-0510" should be changed to "4325 Mail Service Center, Raleigh, N.C. 27699-4325";

6. In Commission Rules R12-10(h)(4), R12-11(l)(4), and R18-7(f)(3), the reference to the Public Staff — North Carolina Utilities Commission, Consumer Services Division's address as "P.O. Box 29520, Raleigh, N.C. 27626-0520" should be changed to "4326 Mail Service Center, Raleigh, N.C. 27699-4326";

7. In the Appendix to Commission Rule 15-1, NCUC Form RF, Instruction 6, the reference to the address of the Commission's Finance and Budget Group as "Post Office Box 29510, Raleigh, North Carolina 27626-0510" should be changed to "4325 Mail Service Center, Raleigh, North Carolina 27699-4325"; and

8. In the Appendices to Chapters 14 and 14A, both application forms reference the Chief Clerk of the North Carolina Utilities Commission's address as "Post Office Box 29510, Raleigh, North Carolina 27626-0510" and both addresses on the application forms which reference the Chief Clerk's address should be changed to "4325 Mail Service Center, Raleigh, North Carolina 27699-4325."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE CHAIR.
This the 10th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mz040500.01

DOCKET NO. M-100, SUB 128

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Amendment of Certain Commission) ORDER
Rules to Correct Address Changes) AMENDING RULES

BY THE CHAIR: It has come to the attention of the Chair that certain Commission Rules as published in the North Carolina Public Utilities Laws and Regulations - 1999 Edition should be amended to update the Commission's and Public Staff's recent address changes. The amendments are as follows:

1. In Commission Rule R7-37(d), the reference to the Commission's address as "Post Office Box 29510, Raleigh, North Carolina 27626-0510" should be changed to "4325 Mail Service Center, Raleigh, North Carolina 27699-4325", and in the sample forms associated with Rule R7-37 entitled, "SAMPLE FORM OF WATER OR SEWER BOND SECURED BY IRREVOCABLE LETTER OF CREDIT OF NONPERPETUAL DURATION" and "SAMPLE FORM OF WATER OR SEWER

BOND SECURED BY COMMERCIAL SURETY BOND OF NONPERPETUAL DURATION ISSUED BY CORPORATE SURETY" the reference to the Commission's address as "Post Office Box 29510, Raleigh, North Carolina 27626-0510" should be changed to "4325 Mail Service Center, Raleigh, North Carolina 27699-4325"; and

2. In Commission Rule R18-7(f)(3) the reference to the Public Staff — North Carolina Utilities Commission, Consumer Services Division's address as "P.O. Box 29520, Raleigh, N.C. 27626-0520" should be changed to "4326 Mail Service Center, Raleigh, N.C. 27699-4326."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE CHAIR.
This the 14th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz041200.03

DOCKET NO. M-100, SUB 129

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Investigation of Merger Filing Requirements for Electric and Natural Gas Utilities	) ORDER REQUIRING) FILING OF ANALYSES

BY THE COMMISSION: G.S. 62-111 provides that no merger or business combination affecting any public utility shall be made except after application to and approval by the Commission, "which approval shall be given if justified by the public convenience and necessity." This standard is not further defined in the statute, and the Commission has not promulgated any rules specifically regarding merger applications of electric or natural gas utilities.

The Commission initiated an investigation in this docket by Order dated January 28, 2000, to consider the appropriateness of requiring all future applicants seeking approval of requests for authority to engage in mergers or other business combinations within the electric or natural gas industries to file (1) a comprehensive, detailed market power analysis and/or (2) a formal, detailed analysis clearly identifying and quantifying all anticipated benefits, detriments, costs, and savings that could reasonably be expected to be realized or incurred from the proposed merger. The Commission requested comments on whether such analyses should be required to be filed by applicants in future proceedings and on what specific rules or guidelines should be adopted by the Commission to address the issues. The Commission ordered that such analyses be filed by merger applicants on an interim basis pending resolution of the investigation.

On February 15, 2000, the Chair issued an Order making the electric and natural gas utilities cited hereinafter parties to this docket. Comments have been filed by the utilities, the Public Staff, the Attorney General, and the Carolina Industrial Group for Fair Utility Rates (CIGFUR), which was allowed to intervene. A brief summary of the comments follows.

Market Power Analysis

Duke Power, a division of Duke Energy Corporation (Duke) says that the Commission should maintain its focus on the impact of proposed mergers on the services and rates provided to North Carolina consumers. With respect to market power, Duke argues that the Commission should rely upon the analysis and enforcement efforts of the federal agencies charged with protecting competition in the economy, the Federal Trade Commission (FTC) and the Department of Justice (DOJ). These agencies review proposed mergers under the Clayton Act and the Hart-Scott-Rodino Anti-Trust Act. They have developed Merger Guidelines that target market power issues, and they have the experience, resources and personnel to carry out this function. Duke also points out that the Federal Energy Regulatory Commission (FERC) must review and approve mergers in excess of $50,000 within FERC jurisdiction. FERC applies a public interest standard and has continuing regulatory jurisdiction, so it can impose mitigating behavioral conditions to address market power issues and can monitor their effectiveness. Duke says that coordination among reviewing agencies is important to avoid duplicative analysis and the potential for inconsistent outcomes. If deemed necessary, the analysis filed with FERC could be used by the Commission, but materials filed with the anti-trust agencies are confidential by law. Finally, Duke says that there are additional remedies for market power even after merger approval, such as anti-trust laws, private legal actions, and complaints.

Carolina Power and Light Company and North Carolina Natural Gas Corporation (CP&L) argue that issues of market power resulting from mergers should not arise because retail electric and gas markets are fully regulated in North Carolina by the Commission and will be for years to come. Similarly, market power should not be an issue with regard to transmission services because the rates for transmission used to serve bundled retail load are regulated by the Commission, while FERC sets rates and terms for wholesale transmission service. The only market that is not fully regulated is the market for wholesale electric power and, given that FERC has primary jurisdiction in this area, the Commission should rely on the market power analyses submitted to FERC, rather than duplicating FERC's filing requirements.

Virginia Electric and Power Company, d/b/a NC Power (NC Power) believes the proposed filing requirements are duplicative, premature and unnecessary. The proposed market power analysis would duplicate existing, comprehensive reviews conducted by FTC and DOJ and FERC, and state commissions and other interested parties can participate in the federal proceedings. A market power analysis focusing on retail impacts is unnecessary because North Carolina has not yet restructured to allow retail choice.

Public Service Company of North Carolina, Inc. (PSNC), says that many mergers involve utilities providing different services in different states and present little or no potential for market power abuse. Furthermore, market power abuses such as setting prices artificially high are not as prevalent in a regulated market as in a fully competitive market. Requiring a market power analysis with all merger applications would be extremely costly. A better approach would be to exercise discretion and require a market power study only when circumstances warrant.

Piedmont Natural Gas Company, Inc. (Piedmont), believes it inappropriate to require a market power analysis. Federal law provides review of all mergers that are likely to have a substantial effect on competition by FTC and DOJ. Applicants should only have to provide notice that they have complied with these federal requirements. Further, market power studies are expensive and are generally valuable only upon expert analysis. Piedmont says that the Commission does not have such expertise on its staff.

Frontier Energy LLC (Frontier) says that the variety of situations covered by G.S. 62-111 makes it difficult to implement generic filing requirements and that the broad authority granted by the statute allows review and consideration of each case to be tailored to its own. Further, market power may not be exercised in the current regulated environment absent Commission approval or lax oversight.

The Public Staff says that a market power analysis would provide valuable information and should be required as early as possible to expedite the process. The Public Staff lists specific items that should be included in the analysis. The fact that primary responsibility for some of this information may reside with other agencies is no reason to withhold it. The Commission cannot abdicate its authority under North Carolina law and rely upon federal agencies to investigate so important an issue as market power. Further, waiting for federal agencies to act would create the very delays that merger applicants want to avoid. PSNC's approach (to wait and see if an additional investigation of market power is needed, rather than requiring an analysis up front) could cause significant delay if such a study is required in a case. If such analyses are not required in every case, the Commission should provide for delays in its hearing schedule where they are needed.

The Attorney General believes that the Commission should give appropriate weight to all potential anti-competitive effects. Market power is encompassed within the requirement that the Commission consider "all aspects of anticipated service and rates" affected by a merger. Using guidelines of the FTC and DOJ, FERC has developed a Policy Statement that details the factors it will consider in reviewing merger applications. This Commission should do the same. If similar guidelines are used, the extra cost of filing an analysis here will not be great. The Commission should not rely on federal agencies since the federal anti-trust filings are confidential and since federal agencies do not have sufficient resources to ensure adequate review of all the materials filed with them. Retail competition, though not here today, is near and the effects of a merger on competition should be considered. The filing requirement could allow for an exception if a particular merger doesn't impact competition.

CIGFUR agrees with the Public Staff and the Attorney General that merger applicants should be required to file a market power study.

Cost-Benefit Analysis

Duke says that merger applications already provide sufficient information to alert the Commission, Public Staff and other intervenors as to the particular issues that need to be developed in greater detail during discovery and that intervenors have demonstrated skill in using discovery to develop facts relevant to specific transactions. Duke says that FERC once required merger applicants to submit detailed analyses and estimates of future costs and benefits, but found such studies to be of limited benefit and abandoned them. Thus, Duke argues that the Commission should not require applicants to file detailed cost-benefit analyses; however, "the Commission may find it beneficial to set forth a list of the types of information and documents public utilities applicants should provide in merger applications."

CP&L argues that cost savings are just one factor that may be considered in evaluating a merger and that other factors might include qualitative benefits that cannot be quantified, such as increased ability to provide stable and reliable service and enhanced economic development opportunities. Further, projected cost savings, to the extent any exist, will be very preliminary at the time a merger application is filed, and it may be impossible for an applicant to provide detailed quantitative analysis of anticipated benefits, detriments, costs and savings. Thus, CP&L argues that the General Assembly has established a flexible standard for evaluating business combinations and mergers and that the Commission should continue a case-by-case consideration of all applicable benefits, detriments, costs and savings, including both quantitative and non-quantitative factors. Whether an applicant includes a formal quantification of the financial costs and savings expected to result from the proposed merger should be left to the discretion of the applicant, not made a mandatory requirement.

NC Power finds the proposed cost-benefit analysis unnecessary in light of the Commission's broad statutory authority to inquire into all aspects of proposed mergers. The Commission has demonstrated its ability to investigate complex merger proposals and to determine whether a given merger presents benefits that should be shared with ratepayers or costs against which ratepayers should be protected. Each merger is different and no uniform filing requirements are appropriate for all.

PSNC says that the information currently provided in the application and testimony and available through discovery is sufficient and is consistent with the flexibility inherent in the public convenience and necessity standard. However, if the Commission determines that cost-benefit analyses should be filed, PSNC does not oppose the requirement, but suggests that analyses be filed with applicants' testimony rather than with the application. PSNC cautions that such analyses would be speculative and that some mergers are not driven by cost savings at all.

Piedmont does not object to requiring applicants to file "a detailed analysis clearly identifying and quantifying by appropriate categories the significant anticipated benefits, detriments, costs and savings that could reasonably be expected to be realized or incurred from the proposed business transaction." This is slightly different from what was proposed, but Piedmont finds its version more realistic. In planning mergers, savings are often projected by broad categories; time does not permit detailed studies. Piedmont cautions that each merger is different, benefits are often confidential, and time is of the essence. Piedmont warns against permitting mergers to become a forum for unrelated issues.

Frontier says that precise requirements will inevitably be over-inclusive and bring in irrelevant data, or under-inclusive and create loopholes. The current practice of imposing case-specific protections vitiates the need for generic filing requirements.

The Public Staff says that past merger filings have not provided sufficient information for issues to be identified, leading to extensive discovery which has slowed down the process. The Public Staff feels that a cost-benefit analysis would provide valuable information and should be required as early as possible. The Public Staff lists specific items that should be included. Qualitative elements could be included, too. FERC only abandoned such a requirement because most rate issues are matters of state jurisdiction, not federal. If electric rates are frozen as part of electric restructuring, mergers will be the only opportunity to capture savings for ratepayers.

The Attorney General believes that a detailed cost-benefit analysis would provide useful information and would afford parties an opportunity to study and evaluate a merger. The impact on rates and services, assurance that risks will not be borne by ratepayers, measures to preserve Commission authority and to avoid regulatory loopholes are significant issues to be considered in a merger case, and all of these issues should be addressed through an analysis of costs and benefits. FERC tends to rely on open access and competition, rather than cost-benefit studies, in its consideration of mergers, but this approach is untested.

CIGFUR agrees with Public Staff and Attorney General that merger applicants should be required to file a cost-benefit analysis. Applicants should be required to show that quantifiable benefits outweigh risks.

Commission Conclusions

G.S. 62-111 provides that no merger or business combination affecting any public utility shall be made except after application to and approval by the Commission. In State ex. rel. Utilities Commission v. Village of Pinehurst, 99 N.C.App. 224, 393 S.E. 2d 111 (1990), aff'd per curiam, 331 N.C. 278, 415 S.E. 2d 199 (1992), the Court of Appeals applied the public convenience and necessity standard to the proposed sale of a water and sewer system. The Court stated that the Commission

> . . .must inquire into *all* aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the transfer will serve the public convenience and necessity. This comports with the longstanding principle that the public convenience and necessity doctrine "is a relative or elastic theory rather than an abstract or absolute rule. . ." (cite omitted) (emphasis in original) Id., at 229.

The Commission recognizes that wholesale electric competition is increasing and that there has been a recommendation to the General Assembly by the Study Commission on the Future of Electric Service in North Carolina concerning retail electric competition. In addition, certain natural gas consumers currently have access to competitive gas supply and natural gas has become an increasingly important fuel for new electric generation. Utilities are investing billions of dollars in mergers and there is an apparent convergence of the electric and gas industries as utilities strategically position themselves to meet the demands of increasing competition. Over the last few years in North Carolina alone, the Commission has ruled on merger applications involving Duke and PanEnergy, SCANA Corporation and PSNC, CP&L and NCNG, and CP&L and Florida Progress Corporation.

As discussed above, the comments filed in this proceeding by the Attorney General, Public Staff and CIGFUR recommend that merger applicants should be required to file a market power analysis and a cost-benefit analysis. The Public Staff also recommends a specific list of minimum filing requirements which merger applicants should supply in a market power analysis and a cost-benefit analysis. The comments filed by the utilities generally oppose the requirement to file such analyses.

After careful review of the comments filed in this proceeding, the Commission concludes that a market power analysis and a cost-benefit analysis should be filed by all future applicants seeking authority to engage in mergers or other business combinations within the electric or natural gas industries as part of their application. These analyses are relevant and useful information and will assist the parties and the Commission in determining whether or not the merger meets the statutory standard. Further, if such analyses are provided with the application, the Commission believes that delays will be minimized and the Commission will be positioned to rule more expeditiously in such proceedings.

IT IS, THEREFORE, ORDERED that all applicants seeking authority to engage in mergers or other business combinations within the electric or natural gas industries shall file, on the same date that the application is filed, the following information:

1. A Market Power Analysis, including

a. A market power analysis employing the Herfindahl-Hirschman Index or other accepted measurement accompanied by a justification of the method and assumptions used in the analysis;

b. Sensitivity analyses on the impact on market power of significant factors such as deregulation, other mergers, interconnection between merging utilities, and transmission groups (e.g., RTO/ISO/Transco) joined by merging utilities; and

c. Copies of all market power analyses related to the merger that are filed with other state and federal agencies; and

2. A Cost-Benefit Analysis, including

a. A comprehensive list of all material areas of expected benefit, detriment, cost, and savings over a specified period (e.g., three to five years) following consummation of the merger and a clear description of each individual item in each area;

b. A quantification of each individual item (or an explanation as to why a quantification cannot be made) specifying whether it is an annually recurring amount, a single cumulative amount, or a one-time cost or saving;

c. An allocation or assignment of each quantified amount to the merging utilities and their affiliates by regulatory jurisdiction; and

d. Copies of all analyses of expected benefits, detriments, costs, and savings related to the merger that are filed with other state and federal agencies.

ISSUED BY ORDER OF THE COMMISSION.
This the 2nd day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

jc110100.03

DOCKET NO. E-100, SUB 84

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Investigation of Integrated Resource Planning in North Carolina - 1999	) ORDER ADOPTING) INTEGRATED RESOURCE) PLANS

BY THE COMMISSION: North Carolina General Statute 62-100.1(c) requires the North Carolina Utilities Commission (Commission) to "develop, publicize, and keep current an analysis of the long-range needs" for electricity in this State. This includes (1) the Commission's estimate of the probable future growth of the use of electricity; (2) the probable needed generating reserves; (3) the extent, size, mix and general location of the generating plants; (4) arrangements for pooling power to the extent not regulated by the Federal Power Commission (now the Federal Energy Regulatory Commission, or the FERC); and (5) other arrangements with other utilities and energy suppliers.

The purpose of this requirement is "to achieve maximum efficiencies for the benefit of the people of North Carolina." The statute requires the Commission to develop a plan for the future requirements for electricity for North Carolina or the area served by a utility and to consider its analysis in acting upon any petition for construction. In addition, it requires the Commission to submit annually to the Governor and to the appropriate committees of the General Assembly the following: (1) a report of its analysis and plan; (2) the progress to date in carrying out such plan; and (3) the program of the Commission for the ensuing year in connection with such plan.

Commission Rule R8-60 requires that each of the investor-owned utilities and the North Carolina Electric Membership Corporation, (collectively, "the utilities") furnish the Commission with an annual report that contains specific information that is set out in subsection (c) of the rule and provides that the Public Staff and any other intervenor may file its own report, evaluation, or comments regarding the utilities' reports. In addition, Rule R8-62(p) requires certain additional information be included in the reports about the construction of transmission lines.

In its July 13, 1999 Order Adopting Least Cost Integrated Resource Plans And Clarifying Future Filing Requirements in Docket No. E-100, Sub 82, the Commission imposed additional requirements for the Annual Reports. Specifically, the utilities were directed to include a full response to each item of information required by the Rules; appropriate explanations for each item where the information requested is not available; and appropriate explanations referencing the location of information in the filings where such information does not follow the same general order of presentation as contained in the Commission Rules. The Commission further ordered the utilities to adhere to the requirement that each ten-year forecast and plan consist of the ten years <u>next succeeding</u> the annual September 1 filing date. Finally, the Commission required the utilities to file 1999 Annual Reports which included a detailed explanation of the basis for, and a justification for the adequacy and appropriateness of, the level of projected reserve margins and a discussion of the adequacy of the respective utility's transmission system.

GENERAL ORDERS - ELECTRICITY

On or about September 2, 1999, the second Integrated Resource Plan (IRP) filings were made under the current rules by Carolina Power & Light Company (CP&L), Duke Power (Duke), North Carolina Power (NC Power), and North Carolina Electric Membership Corporation (NCEMC). On December 7, 1999, the Public Staff filed its comments on the IRPs filed by the utilities. On December 21, 1999, Duke and NC Power filed responses to the Public Staff comments. CP&L and NCEMC did not file reply comments.

By Order issued October 29, 1999, public hearings were scheduled for the purpose of taking non-expert public witness testimony during the month of January. By Order issued February 10, 2000, the public hearings previously scheduled in Edenton and Raleigh were rescheduled for March 28, 2000, in Raleigh.

Carolina Industrial Group for Fair Utility Rates I and II (CIGFUR) intervened in the proceeding but did not file comments.

UTILITY RESPONSES TO RULES R8-60(c) AND R8-62(p)

The Public Staff comments contained a summary of the information filed by the utilities in response to requirements contained in Rules R8-60 and 62. All of the information filed by the utilities was satisfactory to the Public Staff, except for two instances:

(1) NC Power responded to the requirement for listing wholesale purchase power commitments by stating that "there are no wholesale purchase power commitments included in the ten-year forecast" and that "for purposes of this filing, purchase contracts with non-utility generators are considered 'firm purchases' rather than 'wholesale purchase commitments.'" The Public Staff considered the response "unclear."

(2) NCEMC did not respond to the requirement for the information on transmission lines contained on FERC Form 1. The Public Staff commented that NCEMC is not subject to FERC jurisdiction and thus does not generate the FERC Form 1 information. Nevertheless, as the Public Staff pointed out, the previous Order Adopting Least Cost Integrated Resource Plans And Clarifying Future Filing Requirements, issued July 13, 1999, in Docket No. E-100, Sub 82, required "that future filings by all utilities pursuant to NCUC Rules R8-60 and R8-61 shall include a full response to each item of information required by the Rules."

RESERVE MARGINS

The Commission Order Adopting Least Cost Integrated Resource Plans And Clarifying Future Filing Requirements, issued July 13, 1999, in Docket No. E-100, Sub 82, required "that the filings due September 1, 1999, shall include a detailed explanation of the basis for, and a justification for the adequacy and appropriateness of, the level of projected reserve margins and a discussion of the adequacy of the respective utility's transmission system." The Public Staff's comments contained the following discussion of the utilities' filings in response to the reserve margin portion of the requirement:

(1) CP&L provided an assessment of the adequacy and appropriateness of its level of projected reserves. This assessment indicated that a reserve margin of 15% was adequate. CP&L found that the industry's widely used "one day in ten years" Loss-of-Load Exception (LOLE) criteria would be satisfied by a reserve level of 1,500 MWs, or a reserve margin of approximately 11.7%. CP&L used computer modeling, its own studies, and assessment of capacity assistance from neighboring electric systems to evaluate the reliability criteria. CP&L's survey of other utilities found a range of reserve margins, from 9.8% to 20.5%, with a majority of the utilities' reserves in the range of approximately 15% to 18%. CP&L also believes that the high reliability and small size of planned additions allow lower reserve levels. CP&L expects to attain a 15% reserve margin in all but the first two years of the current ten-year period.

(2) Duke responded that its lowered reserve margin target of 17% was supported by the increased availability of existing generation, shorter lead times for new generation, and the emergence of new purchased power options. Duke's operating experience was also factored into the selection of a 17% reserve margin. Duke reported that between June 1997 and July 1999, there were 15 days when generating reserves dropped below 3%, without factoring in purchases and Demand Side Management (DSM). When purchases and DSM were factored in, the lowest reserve margin reached was 12%. Duke's reserve margin is slightly above the 17% target for the entire ten year planning period.

(3) VEPCO reported that its target reserve margin is 12.5%. VEPCO's planning reserves in the past were established using a 12-hour loss of load criterion. VEPCO, this year, has initiated a review of this reserve planning criterion to evaluate its appropriateness. VEPCO's preliminary results determined that a reserve margin between 12% and 13% should be used as a target. An internal task force determined that a reserve margin of 12.5% would be adequate to cover various contingencies. This 12.5% reserve margin target is the lowest of the three major investor-owned utilities in North Carolina. Furthermore, while it is in the overall range that CP&L found for the utilities surveyed, it is well below the range of 15% to 18% maintained by the majority of the utilities in its survey. As noted earlier, VEPCO's reserves range from approximately 9.4% to 11.1 % for the 2000 to 2009 period, with the lowest levels occurring at the end of this period. VEPCO never reaches its target level of 12.5%, which is the level it plans to use to determine the amount of capacity to acquire in the wholesale market. For example, if VEPCO's reserve margin in the last years of its forecast were at the 12.5% level, its reserves would have to be approximately 500 MWs higher. If VEPCO maintained a 15% reserve margin instead, the reserves would have to be over 900 MWs higher than reported. VEPCO has firm purchases of over 3,000 MWs for each year of the planning period.

(4) NCEMC did not provide an assessment of the adequacy of its reserve margin.

The Public Staff believes that the Commission should continue to require the filing of this reserve adequacy report, including the criteria used to determine reserve margin targets, within the annual IRP reports. The information supplied is important and is not found elsewhere. CP&L and Duke appear to meet their projected reserve margin targets for the planning period. VEPCO misses its target in all years, and its projected reserve margin declines beginning in 2004 and lasting through the end of the planning period. The Public Staff recommends that CP&L and Duke maintain reserve margins of approximately 15% and 17%, respectively. VEPCO should address whether its 12.5% target is adequate, when it is so much lower than CP&L's, Duke's, and the majority of the surveyed utilities and why its reserve margins do not meet even this target.

Duke's response to the Public Staff's comments was as follows:

The VACAR Reserve Sharing Agreement currently provides that the members collectively maintain 1,694 MW of Contingency Reserves. Duke's share is currently 525 MW. Each VACAR member maintains its share of Contingency Reserves, enabling the members to respond to such factors as generation and transmission equipment unavailability. Duke believes that it is inappropriate to create additional reserve measures and requirements.

Duke's 1999 Annual Plan filing stated that continued use of the 17% planning reserve margin target is appropriate at this time. Duke continually reviews the generating system capability, level of potential DSM activities, scheduled maintenance, purchased power availability and transmission capability to assess Duke's capability to reliability meet the customer load. Duke notes that significant changes are taking place in the electric industry. As a result, it may be advisable to deviate from the 17% planning reserve margin target. Future Annual Plan filings will address reserve margins and it is inappropriate to attempt to establish future reserve margins in this manner.

NC Power's response to the Public Staff's comments was as follows:

In the Comments, Public Staff expresses concerns about the adequacy of NC Power's reserve margin target of 12.5%. The reserve margins shown on the Company's response to Item (1) are based on the results of the expansion planning process completed as part of the development of the Company's resource plan. These reserve margins represent the results of the model evaluation, indicating what the system reserves must be to maintain our commitment to providing reliable service to our customers (i.e., twelve loss-of-load hours exclusive of incremental capacity purchases from outside of our system). The Company's model assumptions take into account the very low forced outage rate of its nuclear units, as well as the relatively low forced outage rates of its fossil units. The assumptions also account for the large number of small capacity units on the Company's system which serve to minimize the effect of forced outages and increase overall system reliability.

As noted by the Public Staff in the Comments, an internal task force, determined that a target reserve margin of 12.5% would be adequate to cover various contingencies. Comments at 6. *See* Report at 46. That task force, comprised of various executive level personnel, studied the appropriate target reserve margin needed to balance the concerns related to lower reserve margins resulting from the model evaluation and the uncertainty relating to the level of native load to be served in the near future resulting from total retail choice beginning in 2002 in Virginia. The task force determined that a 12.5 % reserve margin target would be the adequate level to carry on the system at this time.

Since the filing of the Company's resource plan, the Company has issued a Request for Proposals (RFP) with an all-source bid, with preference toward peaking capacity. Bids in response to the RFP are due by January 17, 2000 at which time the Company will evaluate the best option for obtaining the capacity needed to meet the 12.5 % target reserve margin level.

CP&L did not respond to the Public Staff comments.

TRANSMISSION ADEQUACY

The Public Staff's comments contained the following discussion of transmission adequacy:

All of the utilities included a statement regarding their transmission line adequacy as required in the July 19, 1999, Order in Docket No. E-100, Sub 82. However, these statements describe the process for ensuring adequacy rather than providing technical details that would be sufficient for assessing the impact of various planning elements. The Public Staff recommends that the Commission require the utilities to file the following information:

1. A statement on direct utility interconnections/transfer points. For each transfer point provide the voltage level, the transfer capabilities in and out of the system for both the summer and winter seasons, any limitation on generation and purchase power planning, and plans to improve or limit these transfer capabilities over the planning period. Indicate the amount of power passing through these points for wheeling to other utilities and the amounts imported for native loads.

2. A descriptive and quantitative discussion on the impact of the open access policy and power wheeling (wholesale and retail) on the transmission line capabilities and planning.

3. The utilities' needs for building or upgrading transmission lines to meet native load growth during the planning period.

4. The utilities' plans to meet expected power wheeling demand during the planning period.

5. A list of all transmission lines (161 KV and above) that were operated above 80% of design limits. Report at least the following information: maximum line loading, maximum design capability, projected loading growth in MWs during the planning period, schedule for improvements, if any, and anticipated capability improvement resulting from scheduled improvement(s).

6. Impact of loss of one major interconnection or one major line on other lines.

7. The Public Staff recommends that the Commission require the utilities to file this information with the transmission adequacy statement in their next IRP annual reports.

Duke responded as follows:

> The overall Public Staff concern is that utilities responded with statements describing the process for ensuring transmission system adequacy rather than providing technical details that would be sufficient for assessing the impact of various planning elements. The Public Staff is recommending the filing of enormous amounts of data and information. Much of this data is publicly available in the form of reports and models as a result of ongoing joint studies with our interconnected neighbors. Duke opposes this burdensome recommendation and further expresses concern that should the Commission adopt the Public Staff's recommendations to institute a new filing requirement of this magnitude circumvents the appropriate rulemaking process and procedure. However, Duke believes this issue requires more clarity and suggests that a meeting attended by the Public Staff, Duke, CP&L, VEPCO and NCEMC be held to better understand the Commission's needs and suggest an efficient and responsive reporting mechanism.

NC Power responded that it would not object to filing the information recommended by the Public Staff if the Commission should request it.

FILING REQUIREMENTS FOR ECONOMIC DEVELOPMENT AND SELF-GENERATION DEFERRAL RATES

The Public Staff comments contained the following discussion of filing requirements for economic development and self-generation deferral rates:

> By Order issued November 28, 1994 in Docket No. E-100, Sub 73, the Commission adopted Interim Guidelines and Filing Requirements for Economic Development Rates, which also included self-generation deferral rates. CP&L and Duke have approved tariffs for economic development rates, and VEPCO has filed for such approval. The filing requirements state:

> The utility shall review the combined effects of existing economic development rates annually within the approved LCIRP process and file the results in its short-term action plan. . .

Similar language appears in the guidelines for self-generation deferral rates contained in the same Docket. None of the utilities subject to these interim guidelines have complied with these requirements. The Public Staff recommends that the utilities with economic development and/or self-generation deferral rates comply with the filing requirements in their future annual reports pursuant to Rule R8-60.

Duke responded as follows:

> Duke has an economic development rider. There are several customers currently receiving electric service under tariffs subject to the rider. The effects of the addition of and continued service to such customers on Duke's resource planning is reflected within the load forecast data. In future annual report filings, Duke would agree to include the overall peak demand in MW for this class of customers and total annual energy amount. However, to require filing of additional data regarding such rates in connection with the Annual Plan would involve the inclusion of information not relevant to integrated resource planning and would circumvent the appropriate rulemaking process.

NC Power responded that it would comply with the requirement in all future IRP filings.

CONCLUSIONS

Utility Responses to Rules R8-60(c) and R8-62(p)

NC Power did not list the firm purchases from each individual source in its original filing, but its response to the Public Staff comments included a list of individual sources for each firm purchase. The Commission considers the latter NC Power response to be satisfactory.

NCEMC did not respond to the requirement for the information on transmission lines contained on FERC Form 1. The Commission notes that FERC Form 1, pages 422 and 423, requires statistics on existing transmission lines, which are to be filed once every five years. NCEMC has few or no existing transmission lines. FERC Form 1, pages 424 and 425, requires statistics on transmission lines added during the year. NCEMC did not add any transmission lines during the year and reported that it has none under construction. The Commission considers NCEMC's failure to state specifically that it had no information to report under Rule R8-62(p)(1) to be a minor omission, and that NCEMC's overall response to Rules R8-60 through R8-62 is reasonable.

Reserve Margins

The Commission recognizes that the electric power industry is in the midst of a time of economic and regulatory transition and that the resulting changes have led to the rethinking of certain long-accepted industry standards. As a result of these changes and the amount of information contained in the present record, the Commission does not believe that it is appropriate to mandate the use of any particular reserve margin for any jurisdictional electric utility at this time. For this reason, the Commission concludes that it would be more prudent to monitor the situation closely, to allow all parties the opportunity to address this issue in future filings with the Commission, and to consider this matter further in subsequent integrated resource planning proceedings. At this point, the Commission has no reason to believe that existing generation resources are inadequate in light of current conditions. The Commission does, however, want the record to clearly indicate its belief that providing adequate service is a fundamental obligation imposed upon all jurisdictional electric utilities, that it will be actively monitoring the adequacy of existing electric utility reserve margins, and that it will take appropriate action in the event that any reliability problems develop.

The Commission concludes that future filings by all utilities pursuant to Rules R8-60 and R8-61 should continue to include a detailed explanation of the basis for, and a justification for the adequacy and appropriateness of, the level of the respective utility's projected reserve margins.

Transmission Adequacy

The Commission notes that much of the transmission data recommended by the Public Staff is provided in some form or other by each utility for use in the joint engineering studies of system reliability conducted by VACAR and SERC on an ongoing basis. Nevertheless, it is not clear how difficult it would be to compile the data in the form needed for an IRP filing. SERC's report to NERC addresses the same concerns about transmission adequacy, but it does not contain a compilation of the detailed data recommended by the Public Staff.

The Commission is of the opinion that the suggestion by Duke for the interested parties to meet and discuss an efficient and responsive reporting mechanism for transmission adequacy is a good one. The results of such a meeting would be a suitable item for discussion in the next round of IRP filings due September 1, 2000.

The Commission further concludes that future filings by all utilities pursuant to Rules R8-60 and R8-61 should continue to include a discussion of the adequacy of the respective utility's transmission system (161 KV and above).

Load Served Under Economic Development Rates and Self-Generation Deferral Rates

The Commission agrees that a utility review of the impact of its respective economic development rates (and self-generation deferral rates) is required by the Order of November 28, 1994, and notes that such review is specified to be in the context of the IRP process. The Commission concludes that future filings by all utilities pursuant to Rules R8-60 and R8-61 should identify, as applicable, the separate block of MW load representing those customers served under economic development rates and/or self-generation deferral rates.

Approval of IRPs

As indicated in earlier IRP dockets, the Commission is of the opinion that the IRP review is intended to ensure that each utility is generally including all of the considerations in its planning as required by the Commission's Rules; that each utility is generally utilizing state-of-the-art techniques for its forecasting and planning activities; and that each utility has developed a reasonable analysis of its long-range needs for expansion of generation capacity. Also, the Commission is of the opinion that evaluations of individual DSM programs, certificates to construct new generating plants or transmission lines, and individual purchased power contracts should be handled in separate dockets from the IRP proceeding. Consistent with this view, it should be emphasized that inclusion of a DSM program, proposed new generating station, proposed new transmission line or purchased power contract in the IRP does not constitute approval of such individual elements even if the IRP itself is approved.

The Commission concludes that the current IRPs should be approved. No party has argued that the IRP filed by any utility should be rejected. The Public Staff's objections as to completeness of the current IRP filings have been adequately addressed.

IT IS, THEREFORE, ORDERED as follows:

1. That this Order shall be adopted as a part of the Commission's current analysis and plan for the expansion of facilities to meet the future requirements for electricity for North Carolina pursuant to G.S. 62-110(c) ;

2. That the Integrated Resource Plans filed by CP&L, Duke, NC Power, and NCEMC in this proceeding are hereby approved as hereinabove discussed;

3. That future filings by all utilities pursuant to Rules R8-60 and R8-61 shall continue to include a detailed explanation of the basis for, and a justification for the adequacy and appropriateness of, the level of the respective utility's projected reserve margins.

4. That future filings by all utilities pursuant to Rules R8-60 and R8-61 shall continue to include a discussion of the adequacy of the respective utility's transmission system (161 KV and above);

5. That future filings by all utilities pursuant to Rules R8-60 and R8-61 shall identify, as applicable, the separate block of MW load representing those customers served under economic development rates and/or self-generation deferral rates; and

6. That the IRP filings due September 1, 2000, shall include a discussion of efforts by the interested parties to meet and develop an efficient and responsive reporting mechanism for transmission adequacy.

ISSUED BY ORDER OF THE COMMISSION.
This the 21st day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

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DOCKET NO. G-100, SUB 58

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Rulemaking Proceeding to Implement G.S. 62-133.4	)	ORDER AMENDING
Which Authorizes Gas Cost Adjustment Proceedings	)	RULE R1-17(k)(6)(a) and (b)
for Natural Gas Local Distribution Companies	)	TO INCLUDE FRONTIER

BY THE COMMISSION: G.S. 62-133.4(c) requires each natural gas local distribution company (LDC) to submit data annually concerning its cost of gas, volumes of purchased gas, sales volumes, negotiated sales volumes, and transportation volumes for an historical 12-month test period. The Commission is then required, upon notice and hearing, to compare the LDC's prudently incurred costs with costs recovered from its customers during the test period. Subsection (6)(a) of Commission Rule R1-17(k) specifies the annual test period and filing date for each LDC in connection with the annual gas cost review required by G.S. 62-133.4(c). Subsection (6)(b) specifies the schedule of public hearings for each LDC. Since these rules were adopted, the Commission has granted certificates of public convenience and necessity to Frontier Utilities of North Carolina, Inc. These certificates were transferred to Frontier Energy, LLC.

At the Commission's Staff Conference on April 17, 2000, the Public Staff recommended that the Commission amend subsections (6)(a) and (b) of Rule R1-17(k) to include Frontier.

The Public Staff stated that it had discussed the annual review procedure with Frontier, and the parties have agreed to the following schedule: review period, twelve months ended September 30; company filing date, December 1; and hearing date, first Tuesday in March.

The Commission is of the opinion that Rule R1-17(k)(6)(a) and (b) should be amended in accordance with the Public Staff's recommendation.

IT IS, THEREFORE, ORDERED that the amendments to Rule R1-17(k)(6)(a) and (b) shown on Attachment A are adopted.

ISSUED BY ORDER OF THE COMMISSION.
This the 18th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

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ATTACHMENT A

Rule 1-17. Filing of increased rates; application for authority to adjust rates.

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(k) Procedure for Rate Adjustments Under G.S. 62-133.4.

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(6) Annual Review.

(a) Annual Test Periods and Filing Dates. Each LDC shall file and submit to the Commission the information required in Section (k)(6)(c) for an historical 12-month test period. <u>This information shall be filed by Frontier Energy, LLC, on or before December 1 of each year based on a test period ended September 30.</u> This information shall be filed by North Carolina Natural Gas Corporation on or before February 1 of each year based on a test period ended October 31. This information shall be filed by NUI North Carolina Gas on or before July 1 of each year based on a test period ended April 30. This information shall be filed by Piedmont Natural Gas Company, Inc., on or before August 1 of each year based on a test period ended May 31. This information shall be filed by Public Service Company of North Carolina, Inc., on or before June 1 of each year based on a test period ended March 31.

(b) Public Hearings. The Commission shall schedule an annual public hearing pursuant to G.S. 62-133.4(c) in order to compare each LDC's prudently incurred Gas Costs with Gas Costs recovered from all its customers that it served during the test period. <u>The public hearing for Frontier Energy, LLC, shall be on the first Tuesday of March.</u> The public hearing for North Carolina Natural Gas Corporation shall be on the second Tuesday of April. The public hearing for NUI North Carolina Gas shall be on the first Tuesday of September. The public hearing for Piedmont Natural Gas Company, Inc., shall be on the first Tuesday of October. The public hearing for Public Service Company of North Carolina, Inc., shall be on the second Tuesday of August. The Commission, on its own motion or the motion of any interested party, may change the date for the public hearing and/or consolidate the hearing required by this section with any other docket(s) pending before the Commission with respect to the affected LDC.

DOCKET NO. G-100, SUB 82
DOCKET NO. G-9, SUB 439

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. G-100, SUB 82 In the Matter of Petition of Carolina Utility Customers Association, Inc., to Have Interstate Pipeline Refunds Applied to Reduce The Cost of Natural Gas Service by Natural Gas Local Distribution Companies DOCKET NO. G-9, SUB 439 In the Matter of Application of Piedmont Natural Gas Company, Inc., for Permission to Deposit a Certain Anticipated Pipe Line Refund into Piedmont's Customer Gas Cost Deferred Accounts	)	ORDER REQUIRING CREDIT TO CUSTOMERS

BY THE COMMISSION: On October 24, 2000, the Carolina Utility Customers Association, Inc. (CUCA), filed a petition in Docket No. G-100, Sub 82 asserting that the cost of natural gas has increased dramatically since the second quarter of 2000 and is not expected to fall for at least the next several months. CUCA asks the Commission to order each natural gas local distribution company (LDC) to apply natural gas transportation refunds received during the 2000-2001 heating season to reduce the cost of natural gas to end-users. CUCA argues that the public interest would be better served by using these refunds to mitigate gas costs of existing customers, rather than putting the refunds in the expansion funds for new service.

On the same date, Piedmont Natural Gas Company, Inc. (Piedmont), filed a petition in Docket No. G-9, Sub 439. Piedmont asserts that it anticipates receiving an interim partial refund from Transco on or about November 1, 2000, in connection with FERC Docket Nos. RP97-71-000 and RP97-312-000, and Piedmont requests permission to deposit this refund (minus $338,564 which Piedmont asserts it is obligated to put into its expansion fund) into Piedmont's customer gas cost deferred accounts in order to mitigate the high cost of natural gas currently experienced by Piedmont and its customers. Piedmont asserts that its current Three-County expansion fund project (Avery, Yancey, and Mitchell Counties) is ongoing, that Piedmont already has a positive balance in its expansion fund in excess of the amount currently projected for this project, and that deposit of this refund into the deferred accounts will have no negative impact on expansion within Piedmont's service area.

GENERAL ORDERS - NATURAL GAS

The Chair issued an order on October 27, 2000, consolidating the two dockets for purposes of decision and requesting comments. Comments have been filed by the Public Staff, the Attorney General, Piedmont, Public Service Company of North Carolina, Inc. (PSNC), North Carolina Natural Gas Corporation (NCNG), NUI Corporation d/b/a NUI North Carolina Gas (NUI NC Gas), and Toccoa Natural Gas (Toccoa).

The Public Staff states that although the General Assembly has made clear that expansion of gas service into unserved areas is a priority and although supplier refunds are a preferred source of funding for expansion, the Commission nonetheless has discretion to determine the public interest in particular circumstances. The Public Staff argues that the Commission should consider both the level of gas prices and the extent of service in the LDCs' territories in deciding whether to use particular refunds for mitigation of gas costs or for expansion. The Public Staff recommends that the Commission order Piedmont, PSNC, and NUI NC Gas to deposit the Transco refunds in FERC Docket Nos. RP97-71-000 and RP97-312-000[1] into their gas cost deferred accounts. The Public Staff also recommends that the same treatment be ordered for the outstanding balance in Piedmont's expansion fund (approximately $4.5 million) at the time of Piedmont's next annual gas cost review, if it is not needed for an expansion fund project in the meanwhile. Public Staff opposes using NCNG's Transco refund to mitigate gas costs on grounds that NCNG needs supplier refunds for its expansion fund.

The Attorney General believes that the refunds should be used to mitigate gas price increases to the maximum extent possible, that the Commission should explore other sources of funding for LDCs that need money for expansion, and that the refunds should be allocated among customers in a manner that is fair.

CUCA urges a generic, not a company-by-company, approach. CUCA objects to exempting NCNG, arguing that NCNG's expansion fund has been in existence for almost 10 years and that a delay of a few months this winter in order to assist existing customers with exorbitant gas costs will have little impact on currently unserved areas. CUCA also objects to limiting an order to just the refunds in the two Transco dockets. CUCA argues that gas price increases have impacted all customers alike and that the refunds should be handled in a way that will benefit all classes of customers. Finally, CUCA proposes that each LDC report on the status of its expansion fund during its next annual prudence review to see if any changes should be ordered.

Piedmont would consider only the Transco refunds in the two FERC dockets now and would deal with any other refunds on an individual basis later. Piedmont has no objection to the Commission considering what to do with its remaining expansion fund balance in its next annual gas cost review.

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[1] The Public Staff comments estimated these Transco refunds as follows:

NCNG	$ 2.8 million
NUI NC Gas	$ 0.2 million
Piedmont	$ 5.5 million
PSNC	$ 4.3 million

PSNC agrees that refunds should be used to offset rising gas costs. PSNC requests that all refunds that it receives in connection with the two FERC dockets from October 27, 2000, through April 30, 2001, be put into its deferred account for sales customers. PSNC states that its expansion fund already has sufficient funds to complete its current expansion fund project (Madison, Jackson, Swain Counties).

NUI NC Gas agrees to putting its recent Transco refund in its deferred accounts but opposes any order covering other refunds at this time. NUI NC Gas also opposes any order covering its prior refunds, which it proposes to use for an expansion fund.

NCNG urges the Commission to refrain from crediting its refund to a deferred account. NCNG says that any such offset to gas costs would be minor and "will do little to benefit ratepayers." NCNG has an application pending for one expansion fund project (Columbus County) and has identified another one (Montgomery County), and NCNG says that these projects will require "in excess of $37 million" in expansion funds. NCNG has $3.8 million in uncommitted expansion funds now.

Finally, Toccoa says that it will receive a refund from Transco in connection with the two FERC dockets, but that the refund relates to service to customers in Georgia, before Toccoa began service in North Carolina. Toccoa asks to be exempt from any order herein.

The Commission concludes that certain identified supplier refunds, as hereinafter specified, shall be used to mitigate gas costs this winter. The expansion fund statute, G.S. 62-158, provides that funding for expansion funds "may, pursuant to the order of the Commission, after hearing, include: (1) Refunds to a local distribution company from the company's suppliers of natural gas and transportation services pursuant to refund orders or requirements of the Federal Energy Regulatory Commission ...." The statute does not require that all supplier refunds be used for expansion. Instead, supplier refunds are one source of funding for the LDCs' expansion funds, to be used according to the discretion of the Commission. Before enactment of G.S. 62-158, the Commission ordered that supplier refunds be returned to customers. Since enactment of G.S. 62-158, the Commission has almost invariably required that supplier refunds be held for use in the LDCs' expansion funds. To date, the Commission has authorized approximately $110 million of supplier refunds, including interest, to be used for expansion fund projects, and natural gas service has been brought to many previously unserved areas. In 1990, before enactment of G.S. 62-158, the Commission identified 38 counties that did not have natural gas service. Today, as a result of the expansion funds, gas bonds, and other initiatives, there are only 3 counties for which natural gas service has been neither authorized nor applied for. The present order makes a limited exception to the policy of using supplier refunds for natural gas expansion, in response to the extraordinary circumstances presented this winter.

It is undisputed that the cost of natural gas has increased dramatically in recent months and that the bills of all natural gas customers will be significantly impacted this winter. Given this situation, most parties urge the Commission to use the recent supplier refunds to mitigate these high costs, and the Commission concludes that it is in the public interest to do so. To this end, the Commission orders that the interim Transco refunds received by Piedmont, PSNC, NCNG, and NUI NC Gas in connection with FERC Docket Nos. RP97-71-000 and RP97-312-000 and the Columbia refunds recently received by some LDCs in connection with FERC Docket No. IN01-1-000[1] shall be refunded to customers by way of a one-time bill credit. In calculating the credit, the refunds shall be made to customers according to how the monies being refunded were paid in by customers. The credit shall be made in the next possible billing cycle following issuance of this order and shall be accompanied by a notice to be approved by the Commission. Although NCNG opposed returning its refund to customers, the Commission finds that NCNG's customers face the same high gas costs as other LDCs' customers and that all four LDCs should be treated alike. Toccoa shall be exempt from this order since its refund does not relate to service to customers in North Carolina.

This decision is limited in scope and does not reflect any abandonment of the goals of G.S. 62-158. Only those refunds issued in the dockets cited and received by the date of this order shall be affected. Uncommitted funds being held in the LDCs' expansion funds now are not affected.[2] This decision does not jeopardize current expansion fund projects. Currently, two expansion fund projects are underway, one by Piedmont and one by PSNC, and both LDCs state that they already have sufficient expansion funds for these projects. NCNG's proposed expansion fund project for Columbus County is pending before the Commission at this time, but in its recent merger docket Carolina Power and Light Company committed "that it would extend natural gas service through NCNG to Tabor City in Columbus County by June 30, 2001, provided it can obtain proper right-of-way on a timely basis" and the Commission so ordered. See the Order Approving Merger and Issuance of Securities dated August 22, 2000, in Docket No. E-2, Sub 760. The Montgomery County proposal mentioned by NCNG is in a very early stage and has not even been filed with the Commission yet. Finally, this decision does not decide the merits of any future expansion fund project. The present decision merely responds to the high gas costs that all natural gas customers will experience this winter, and provides some small measure of relief.

IT IS, THEREFORE, ORDERED as follows:

1. That the interim partial Transco refunds received by Piedmont, PSNC, NCNG, and NUI NC Gas in connection with FERC Docket Nos. RP97-71-000 and RP97-312-000 and the Columbia refunds received by some LDCs in connection with Docket No. IN01-1-000 up to the date of this Order shall be refunded to customers by way of a one-time bill credit;

2. That the credit shall be made in the next possible billing cycle following issuance of this order and, in calculating the credits, the refunds shall be made to customers according to how the monies being refunded were paid in by customers; and

3. That the credit shall be accompanied by notice in a form to be submitted and approved by the Commission in advance.

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[1] Columbia refunds totaling about $450,000 have recently been made, and the Commission concludes that they should be treated the same as the Transco refunds.

[2] The Commission agrees that Piedmont shall file a report on the status of its expansion fund in connection with its next annual prudence review.

ISSUED BY ORDER OF THE COMMISSION.
This the 21st day of December, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

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Commissioner Judy Hunt dissents.

DOCKET NO. G-100, SUB 82
DOCKET NO. G-9, SUB 439

COMMISSIONER JUDY HUNT, DISSENTING: I dissent primarily because of my strong belief that a hearing (public hearing) should have been held in advance of a commission decision. While I am concerned about high gas prices, I believe that *taking* the time for hearing a wider array of views would have been prudent. This proceeding was conducted as a *paper* hearing only and with comments solicited from a selected list of parties. Other parties, I believe, should have been included and given a chance to be heard (as I initially requested). This would encompass people and groups interested in rural economic development and those who fought for the expansion fund concept which not only received legislative approval but also affirmation in the North Carolina Supreme Court.

To take the time for a hearing would only have extended a decision for a couple of months and the credit ordered here (approximately $5.00 to $7.00 per household), would be just as welcome, if ordered, in March as in January.

While the Commission says in this order that "this decision is limited in scope and does not reflect any abandonment of the goals in G. S. 62-158", I believe that it may be the end of gas expansion fund opportunities. If so, more people should have had an opportunity to be heard and understand the implication of this decision.

\s\ Judy Hunt
Judy Hunt, Commissioner

DOCKET NO. P-100, SUB 99

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Quality of Service Objectives for Local Exchange Telephone Companies	))))))	ORDER REVISING RULE R9-8 TO ADOPT REPORTING REQUIREMENT AND ESTABLISHING SEMIANNUAL SERVICE QUALITY PRESENTATIONS

BY THE COMMISSION: Rule R9-8, which was adopted by the Commission effective December 20, 1988, requires all of the local exchange telephone companies regulated by the Commission, including incumbent local exchange companies (ILECs) and competing local providers (CLPs), to perform and provide service in accordance with certain uniform service objectives set forth in the rule.

The Commission notes that Rule R9-8, as presently constituted, contains no formal reporting requirement by the ILECs and CLPs. In order for the Commission and the Public Staff to better monitor ILEC and CLP compliance with the uniform service objectives set forth in Rule R9-8, the Commission finds good cause to revise the rule to institute a formal monthly reporting requirement. Accordingly, Rule R9-8 is hereby revised effective the date of this Order to incorporate a new subsection (d) as follows:

> (d) Reporting Requirement - Each local exchange telephone company shall file an original and five (5) copies of a report each month with the Chief Clerk of the Commission detailing the results of its compliance with each of the uniform service objectives set forth in this rule. Each company shall report its performance result for each objective for its state service area as a whole and whenever possible, by exchange or district. This report shall be filed no later than twenty (20) days after the last day of the month covered by the report.

The ILECs and CLPs actually providing service to customers in North Carolina shall utilize the format for reporting statewide results which is attached to this Order as Attachment A, beginning with results for the month of December 2000. Companies shall also create a report format to provide information, whenever possible, on each service objective by exchange or district. The report for the month of December 2000, shall be filed no later than January 20, 2001.

The Commission also hereby revises Rule R9-8 effective the date of this Order to eliminate the "Public Paystations Found Out-Of-Order" objective since the service quality of payphones is now governed by the Rules in Chapter 13.

Furthermore, the Commission finds it appropriate to require all ILECs and all CLPs actually providing service to customers in North Carolina to file with the Commission by November 15, 2000, clear, detailed explanations of their measurement procedures for each service objective outlined in

Rule R9-8. The Commission will need this information to evaluate and understand how each company is measuring the results to be reported in its monthly service objective report.

Finally, as part of the ongoing service quality review process, the Commission finds it appropriate to establish semiannual service quality presentations to be held before the Commission. The first of the semiannual service quality presentations will be held on August 15, 2001, at which time, BellSouth Telecommunications, Inc. (BellSouth), Carolina Telephone and Telegraph Company (Carolina), Central Telephone Company (Central), and Verizon South, Inc. (Verizon) will each be required to make a presentation before the Commission. Each of the foregoing Companies will be required to make a presentation detailing the results of its service quality objectives as outlined in Rule R9-8, for the period January 1, 2001 through June 30, 2001, explaining the reasons for any monthly failures to satisfy the objectives in Rule R9-8, and stating how the Company intends to remedy any deficiencies in its performance.

IT IS, THEREFORE, ORDERED as follows:

1. That Rule R9-8 is hereby revised effective the date of this Order, to incorporate a new subsection (d) as follows:

(d) Reporting Requirement - Each local exchange telephone company shall file an original and five (5) copies of a report each month with the Chief Clerk of the Commission detailing the results of its compliance with each of the uniform service objectives set forth in this rule. Each company shall report its performance result for each objective for its state service area as a whole and whenever possible, by exchange or district. This report shall be filed no later than twenty (20) days after the last day of the month covered by the report.

2. That Rule R9-8 is hereby revised effective the date of this Order to eliminate the "Public Paystations Found Out-Of-Order" objective since the service quality of payphones is now governed by the Rules in Chapter 13.

3. That all ILECs and CLPs actually providing service to customers in North Carolina shall file with the Commission by November 15, 2000, clear, detailed explanations of their measurement procedures for each service objective outlined in Rule R9-8.

4. That the ILECs and CLPs actually providing service to customers in North Carolina shall utilize the format for reporting statewide results which is attached to this Order as Attachment A, beginning with results for the month of December 2000. Companies shall also create a report format to provide information, whenever possible, on each service objective by exchange or district. The report for the month of December 2000, shall be filed no later than January 20, 2001.

5. That the Commission will hold semiannual service quality presentations wherein a company will be required to make a presentation before the Commission outlining its results on the service quality objectives outlined in Rule R9-8, explaining the reasons for any monthly failures to satisfy the objectives in Rule R9-8, and stating how the company intends to remedy any deficiencies in its performance.

6. That the first of these semiannual service quality presentations will be held on August 15, 2001, at which time, BellSouth, Carolina, Central, and Verizon will each be required to make a presentation before the Commission. Each of the foregoing Companies will be required to make a presentation detailing the results of its service quality objectives, as outlined in Rule R9-8, for the period January 1, 2001 through June 30, 2001, explaining the reasons for any monthly failures to satisfy the objectives in Rule R9-8, and stating how the Company intends to remedy any deficiencies in its performance.

7. That the Chief Clerk shall serve a copy of this Order on all certificated ILECs and CLPs, including entities with certification applications pending, the Public Staff, and the Attorney General.

ISSUED BY ORDER OF THE COMMISSION.
This the 20th day of September, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

Commissioner Sam J. Ervin, IV did not participate in this decision.

bc091900.02

ATTACHMENT A

COMPLIANCE WITH COMMISSION RULE R9-8
STATEWIDE RESULTS

COMPANY NAME: ______________ MONTH: ___________ YEAR: _______

Description	Objective	Actual Result
Intraoffice completion rate	99% or more	
Interoffice completion rate	98% or more	
Direct dist. dialing completion rate	95% or more	
EAS transmission loss	95% or more between 2 and 10db	
Intrastate toll transmission loss	95% or more between 3 and 12db	
EAS trunk noise	95% or more 30 dbrnc or less	
Intrastate toll trunk noise	95% or more 33 dbrnc or less	
Operator "0" answertime	>=90% w/in 10 seconds or an EAA in seconds	
Directory assistance answertime	>=85% w/in 10 seconds or an EAA in seconds	
Business office answertime	>=90% w/in 20 seconds or an EAA in seconds	
Repair service answertime	>=90% w/in 20 seconds or an EAA in seconds	

Description	Objective	Actual Result
Initial customer trouble reports	4.75 or less per 100 access lines	
Repeat reports	1.0 report or less per 100 access lines	
Out-of-service troubles cleared w/in 24 hrs.	95% or more	
Regular service orders completed within 5 working days	90% or more	
New service installation appts. not met for Company reasons	5% or less	
New service held orders not completed w/in 30 days	0.1% or less of total access lines	
Regrade application held orders not completed w/in 30 days	1.0% or less of total access lines	

DOCKET NO. P-100, SUB 99

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Quality of Service Objectives for Local Exchange Telephone Companies	)))))	ORDER DENYING MOTION FOR RECONSIDERATION BUT CLARIFYING THE COMMISSION'S SEPTEMBER 20, 2000 ORDER

BY THE COMMISSION: By Order dated September 20, 2000, the Commission revised Rule R9-8 to incorporate a new subsection concerning reporting on the service objectives. In said Order, the Commission required all incumbent local exchange companies (ILECs) and all competing local providers (CLPs) actually providing service to customers in North Carolina to file with the Commission by November 15, 2000, clear, detailed explanations of their measurement procedures for each service objective outlined in Rule R9-8. The Commission noted that it will need this information to evaluate and understand how each company is measuring the results to be reported in its monthly service objective report. Further in the September 20, 2000 Order, the Commission incorporated a reporting requirement wherein each local exchange telephone company will be required to file a report on the 20th day of each month beginning on January 20, 2001 with the Chief Clerk of the Commission detailing the results of its compliance with each of the uniform service objectives set forth in Rule R9-8.

On October 10, 2000, Association of Communications Enterprises (ASCENT), Birch Telecom of the South, Inc., Business Telecom, Inc., ConnectSouth Communications of North

Carolina, Inc., DIECA Communications, Inc. d/b/a Covad Communications Company, ICG Telecom Group, Inc., ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom, MCImetro Access Transmission Services, LLC, NewSouth Communications Corp., North Carolina Cable Telecommunications Association, Time Warner Telecom of North Carolina, L.P., US LEC of North Carolina, Inc., and XO North Carolina, Inc., formerly NEXTLINK North Carolina, Inc. (collectively the Joint Movants) filed a Joint Motion to Reconsider or Clarify Order Revising Rule R9-8 to Adopt Reporting Requirement and Establishing Semiannual Service Quality Presentations and Joint Motion to Stay Order During Pendency of Reconsideration and/or Clarification. By their Motion, the Joint Movants requested that the Commission issue an order either (1) exempting CLPs from the new reporting and presentation requirements of revised Rule R9-8 and the September 20, 2000 Order or (2) clarifying that the revised rule and requirements of the September 20, 2000 Order apply to CLPs only insofar as they are offering services to residential customers.

The Joint Movants asserted that the absence of a comment period on the amendment to Rule R9-8 renders it impossible for CLPs to evaluate the basis of the Commission's determination that it had "good cause" to order the Rule revision. The Joint Movants argued that nothing on the face of the Order demonstrates such good cause. The Joint Movants argued that although market mechanisms already provide adequate assurance of compliance with the Rule R9-8 service objectives, the absence of a notice and comment period interfered with the Commission's ability to make that determination.

Further, the Joint Movants argued in their Motion that the Commission's decision imposes additional regulatory requirements on CLPs and is contrary to the deregulatory nature of competitive service and the Commission's own previous decision concerning Rule R9-8.

The Joint Movants also argued that in many cases, a CLP's ability to meet service quality objectives is beyond the control of the CLP and actually rests with the underlying ILEC.

Finally, the Joint Movants asserted that the competitive marketplace is a much more efficient determinative of efficient service than is regulation. The Joint Movants stated that the threat to a CLP of losing a customer is a more effective and efficient means of ensuring high-quality and efficient service than are burdensome reporting requirements and semiannual presentations before the Commission.

By Order dated October 12, 2000, the Chair requested interested Parties to file comments on the Joint Movants' Motion by no later than October 27, 2000.

On October 13, 2000, the Competitive Association (CompTel), a national industry association comprised of competitive telecommunications providers whose members include competitors who are currently certified to provide telecommunications services in North Carolina or who may become certified to provide services in North Carolina in the future, filed a Statement supporting the Joint Movants' Motion. CompTel stated that it supports the Joint Movants' Motion in all respects and for the reasons stated by the Joint Movants, request that the Commission reconsider its September 20, 2000 Order.

On October 27, 2000, comments on the Joint Movants' Motion were received from several Parties.

COMMENTS ON THE JOINT MOVANTS' MOTION

ALLTEL: ALLTEL Carolina, Inc. and ALLTEL Communications, Inc. (collectively ALLTEL) commented that it supports the Joint Movants' request for a stay and reconsideration of the Order. Further, ALLTEL recommended that the Commission initiate a proceeding to receive comments on the standards and to review existing and/or more appropriate alternatives. ALLTEL stated that it believes that increasing regulation in a competitive environment is unnecessary and inappropriate. ALLTEL noted that the standards in Rule R9-8 were established years ago and that ALLTEL believes that any initiative involving extension of the current application of those standards should be undertaken through a comprehensive proceeding providing for comment and review. ALLTEL argued that the Commission's September 20, 2000 Order was issued without prior notice or opportunity for comment and imposes additional and substantial administrative burdens and could be cost prohibitive for carriers operating in a competitive environment.

ALLTEL further argued that increased competition necessarily involves decreased regulation. ALLTEL stated that additional regulatory burdens are contrary to the deregulatory nature of competitive service and to the Commission's previous decision in Docket No. P-100, Sub 133 wherein the Commission concluded that onerous and costly filings, such as price lists, did not have a place in the new competitive local telecommunications environment. ALLTEL stated that the Commission's move now to impose additional reporting requirements is at odds with its own approach to decreasing regulation in a competitive environment.

Finally, ALLTEL stated that it disagrees with the Joint Movants to the extent they attempt to single out competitive providers of residential service for application of the new reporting requirements. ALLTEL argued that competing for residential service is already extremely difficult on its own merits with challenges even beyond those involved in competing for business service. ALLTEL maintained that to increase that difficulty unnecessarily is counterproductive to the Commission's desire to strengthen competition across the entire telecommunications field.

AT&T: AT&T Communications of the Southern States, Inc. and TCG of the Carolinas, Inc. (collectively AT&T) stated that it fully supports the Joint Movants' Motion in all respects, and for the reasons stated in the Joint Movants' Motion, AT&T requests that the Commission reconsider its September 20, 2000 Order as it relates to CLPs in North Carolina. AT&T maintained that it is especially concerned that the regulatory burdens place undue burden and expense on CLPs to develop the tracking mechanisms necessary to comply with the Commission's September 20, 2000 Order. Further, AT&T argued, the requirements are placed upon CLPs during a period when they are dependent on the ILECs for provisioning of UNEs and resold services.

PUBLIC STAFF: The Public Staff stated in its comments that it believes that the Commission acted properly in adopting the new service quality reporting requirements. The Public Staff stated that G.S. 62-33 requires the Commission to keep informed about the service that is being furnished by public utilities. Further, the Public Staff commented that Commission Rule R17-2(g), which every CLP should be familiar with, makes it abundantly clear that the provisions of Rule R9-8 apply to CLPs.

The Public Staff stated that regular testing of service performance and verification of compliance with Commission objectives is integral to that Rule. The Public Staff also noted that the admission of the Joint Movants, at least five of which have been certified as CLPs for over three years, that they still have not implemented procedures for evaluating their service performance simply confirms the need for CLP self-reporting and Commission monitoring.

The Public Staff maintained that the Joint Movants have raised one issue that warrants consideration by the Commission: the claim that CLPs' service performance is often directly dependent upon the performance of the ILECs that interconnect with or resell services to them. The Public Staff noted that the performance standards that the ILECs are obligated to meet in fulfilling their interconnection and resale obligations to CLPs are currently being developed in Docket No. P-100, Sub 133k and a hearing is scheduled for the week of January 8, 2001[1]. The Public Staff stated that it expects the performance standards established by the Commission in that proceeding to be sufficiently stringent to allow the CLPs to meet their service obligations to end user customers under Rule R9-8. The Public Staff noted that until the ILEC performance standards are actually codified, however, the CLPs will have legitimate and understandable concerns about the effects on their own performance.

The Public Staff also stated that the ILECs, unlike the CLPs, have had many years of experience with performance evaluation under R9-8, and most of the ILECs operating in North Carolina today have had general rate cases in which their service quality was investigated by the Public Staff. The Public Staff maintained that given this experience by the ILECs, the Public Staff believes that many of the test procedures currently in use by the ILECs have already passed Commission scrutiny and will require only minor adjustments.

The Public Staff concluded that although the CLPs should have developed procedures for evaluating their service quality by now, the Public Staff believes that it is reasonable to allow the CLPs additional time to refine their service quality testing procedures and to compare them with ILEC procedures. Also, the Public Staff opined that postponing consideration of the filing requirements for CLPs will also give the Commission a better opportunity to focus on the service quality findings of the ILECs. Therefore, the Public Staff recommended that the Commission deny the Joint Movants' Motion and continue to require all ILECs in the State to adhere to the filing and reporting schedules established in the Commission's September 20, 2000 Order, but forebear for the time being from requiring any CLPs to make the November 15 informational filing or to furnish any reports as specified in the Order. Finally, the Public Staff recommended that the Commission pursue the issue of service quality compliance with the CLPs after it has firmly established reporting requirements for the ILECs and issued a final order in Docket No. P-100, Sub 133k.

RHYTHMS: Rhythms Links Inc. (Rhythms) stated in its comments that it is becoming a very active participant in North Carolina's telecommunications market and is offering or will be offering facilities-based, high-speed, data services to customers throughout the State. Rhythms stated that it initially is focusing on deploying xDSL technology to provide high-speed connections to its customers over

[1] By Commission Order Continuing Hearing dated October 31, 2000, the Commission continued the hearing scheduled for January 8, 2001 for an approximately two month period. The Order noted that the Commission would issue an order in the near future detailing revised prefiling and hearing dates.

dedicated lines and that it purchases UNEs, including loops, and collocation arrangements in central offices. Rhythms argued that in the competitive market in which Rhythms is offering its services, it must ensure that its services are of satisfactory quality to its customers. Rhythms maintained that if it is unable to provide services that are satisfactory to its customers, the customers will simply leave Rhythms to purchase services from other competitive providers. Rhythms stated that the ability of customers to regulate service quality by shopping the market renders superfluous the reporting of standardized service quality measurements. Further, Rhythms maintained that the fact that none of its customers has filed a compliant against Rhythms for any reason, including reasons relating to service quality, is further evidence that the imposition of comprehensive reporting requirements is unnecessary at this time.

Rhythms noted that like many CLPs, Rhythms' personnel and financial resources are not limitless, and the onerous reporting requirements imposed by the Commission's September 20, 2000 Order will be extremely taxing for Rhythms' regulatory department. Further, Rhythms stated that the speed and quality in which Rhythms can provide service to its customers is largely dependent on the level of service Rhythms receives from BellSouth. Rhythms argued that while the Commission may be justified in demanding comprehensive data in monthly reports from ILECs who exercise monopoly control and exhibit a history of service quality problems, none of those justifications applies to Rhythms. Rhythms stated that consequently, Rhythms should be exempted from the reporting requirements of Rule R9-8. Rhythms noted that if the Commission declines Rhythms' request for an exemption, then Rhythms requests that the Commission schedule an evidentiary hearing to allow Rhythms to present evidence regarding the matters discussed in its comments.

SPRINT: Sprint Communications Company L.P. (Sprint) commented that the procedural issues raised by the Joint Movants in their Motion are valid ones. Sprint argued that public notice of proposed Commission Rule changes and a comment period thereafter is a fundamental principle of administrative law, finding its basis in legal requirements of due process. Sprint stated that a comment period would have allowed Parties to explain that equivalent forms of regulation for ILECs and CLPs in a competitive market is not appropriate or necessary. Sprint argued that CLPs face tremendous challenges in attempting to attract and retain customers and have strong incentives to service their customers well. Sprint maintained that there are pressures to maintain high quality service which is driven by competition and that therefore formal service quality standards mandated by the Commission are unnecessary.

Sprint further argued that a comment period would have allowed the Parties to comment that end-user service quality reporting requirements impose substantial start-up costs on CLPs and act as unnecessary barriers to entry. Sprint stated that the revised Rule R9-8 would require CLPs to develop and maintain expensive back-office systems to monitor and report compliance with certain measures that may even be obsolete for ILECs. Sprint commented that such requirements create an unnecessary and substantial expense for CLPs.

Sprint stated that it strongly believes that Commission policy should favor and allow, wherever possible, market conditions and customer expectations to dictate the terms and conditions under which telecommunications carriers operate within North Carolina. Sprint argued that consumer choice and preference are the ultimate standard that any telecommunications firm must meet in order to survive in an increasingly competitive marketplace.

Sprint concluded that if the Commission elects not to exempt CLPs from the revised Rule R9-8, Sprint agrees with the Joint Movants that the Rule should apply to CLPs only with respect to the provision of residential services.

TIME WARNER: Time Warner Telecom of North Carolina, Inc. (TWTC) commented that it fully supports the arguments made by the Joint Movants in their Motion. TWTC argued that because of the competitive nature of CLP service, the reports required under the September 20, 2000 Order are irrelevant. TWTC argued that if a CLP is not delivering high quality service, the customer will take its business to a competitor.

TWTC stated that the burden to TWTC of compliance with the Order is explained in the Affidavit of Donald K. Becker - Vice President of the National Operations Center of TWTC. TWTC stated that its service delivery system, as a CLP, is interconnected with the systems of ILECs and therefore many of the service quality standards are simply beyond the control of TWTC. Further, as outlined in Mr. Becker's Affidavit, TWTC, and probably many other CLPs, monitor service quality performance in terms and with standards that have practical meaning in the context of its delivery system, service features, and customer base. Mr. Becker also explained that the interconnection of TWTC and ILECs creates a disentanglement problem. Finally, TWTC through Mr. Becker stated that many of the Rule R9-8 objectives target residential service quality and that TWTC and most other CLPs provide complex services to sophisticated business customers.

Mr. Becker stated in his Affidavit that as a final alternative, the Commission should re-examine the reporting format and permit CLPs to answer "Not Applicable" to those service objectives that are either beyond the control of the CLP or otherwise do not apply to CLPs because the nature of the objective is residential-customer related.
TWTC stated that the Commission should reduce, not increase, the regulatory burdens on CLPs. TWTC stated that the marketplace will be the most effective and efficient monitoring system for enforcing the provisioning of high quality services.

TWTC stated that the experience in other neighboring states that have dealt with this issue is the most instructive. TWTC stated that in Florida, the Public Service Commission has adopted service quality reporting requirements with a market-driven approach. TWTC stated that Florida recognizes that the only service providers requiring regulatory oversight for service-quality purposes are those providing residential dial tone, single-line business dial tone, and dial tone with any combination of the services included as part of basic local telecommunications services as defined in Florida's Administrative Code. TWTC acknowledged that the service provider category referenced by the Florida Commission may very well include CLPs. However, TWTC explained, the Florida rule not only allows the market to regulate the level of service quality but also allows the market to control the quantity and quality of reporting on service quality.

Additionally, TWTC stated that the Tennessee Commission recently issued a notice of proposed rulemaking on the subject of service quality standards and is accepting comments into November 2000. TWTC stated that the proposed Tennessee regulations apply, in relevant part, only to Eligible Telecommunications Carriers, as defined by 47 U.S.C. § 214. Therefore, TWTC stated, the proposed Tennessee rules are directed at basic local exchange service rather than at many of the complex business offerings of many CLPs. TWTC maintained that whether the Commission grants or denies the Joint Movants' Motion, the Commission may still wish to consider the experiences of other states in close proximity to North Carolina as it continues to evaluate Rule R9-8. TWTC argued that market-control models used by Florida and Tennessee would serve the North Carolina telecommunications market well, both from an efficiency standpoint and from an economic standpoint.

TWTC concluded by stating that it supports the arguments made by the Joint Movants in their Motion.

VERIZON: Verizon South Inc. (Verizon) stated in its comments that it does not oppose the Joint Movants' Motion. Verizon noted that it believes that as the telecommunications industry moves toward a more fully competitive market, the Commission should reduce or eliminate, but certainly not increase, service quality standards and allow the competitive marketplace to determine the level of service required by consumers. Verizon stated that it does not oppose the Joint Movants' Motion to Reconsider or Clarify Order Revising Rule R9-8 to Adopt Reporting Requirements and Establishing Semi-Annual Service Quality Presentations and their Joint Motion to Stay Order during pendency of reconsideration and/or clarification. In addition, Verizon urged the Commission to eliminate the new requirements on all local exchange providers.

WORLDCOM (INCLUDING MCIm): WorldCom, Inc., including its subsidiary MCImetro Access Transmission Services, LLC, stated in its comments that the Commission's September 20, 2000 Order creates unnecessary and overly burdensome requirements for CLPs, given that market mechanisms assure service quality by CLPs. WorldCom argued that to apply Rule R9-8 root and branch to CLPs ignores the fundamental fact that CLPs are dependent on ILECs for the very performances that would be measured and reported, as well as the deregulatory trend of the Commission and the competitive industry in general. WorldCom maintained that there is no legitimate way to apply some objectives and reporting requirements to CLPs generally, or to apply Rule R9-8 in its entirety to some CLPs. WorldCom stated that absent any other adequate form of relief, WorldCom requests that the Commission rescind its September 20, 2000 Order.

WorldCom noted that the Commission, in its February 23, 1996 Order Setting Out Regulatory Structure for Competing Local Providers and Promulgating Rules, found that "it is in the public interest that CLPs be exempted from a number of specific statutes and rules." (Page 41 of Order). WorldCom further incorrectly stated that among those rules was Rule R9-8.[1] On November 3, 2000, MCI filed a letter with the Commission acknowledging that its comments incorrectly maintained that

[1] WorldCom failed to note that further down on page 41 of that Order, the Commission stated "CLPs should be required to meet the service standards set out in Rule R9-8." The Commission notes that on March 5, 1996, the Commission issued an Errata Order which stated

> On February 23, 1996, the Commission issued an Order Setting Out Regulatory Structure for Competing Local Providers and Promulgating Rules. Ordering Paragraph 2.w. provided that competing local providers (CLPs) were to be exempt from Rule R9-8 (service objectives for local exchange telephone companies). **This was an error, since the Commission concluded on page 41 of the Order that CLPs should be required to meet the Rule R9-8 service standards.** [emphasis added]

the Commission's February 23, 1996 Order in Docket No. P-100, Sub 133 exempted CLPs from the provisions of Rule R9-8. Therefore, WorldCom's assertion that nothing has changed since 1996 to warrant revision of the rules as they apply to CLPs is not valid since the rules do apply to CLPs.

WorldCom commented that the proper function of governmental regulation is to act as a surrogate for competition where market failure exists. WorldCom postured that in an environment where effective competition exists, competition rather than regulation governs, and regulatory oversight is largely unnecessary. WorldCom stated that the rules of the competitive marketplace are brutally and relentlessly severe: to compete with the ILECs, CLPs must satisfy their customers, and for CLPs to win and retain customers, they must either exceed the service quality levels set forth in the regulations or offer service at prices lower than what the ILECs charge. WorldCom argued that given the lack of a captive ratepayer base for CLPs, as well as high customer acquisition charges, the threat to a CLP of losing a customer is a more effective and efficient means of ensuring high-quality and efficient service than are burdensome reporting requirements and semiannual service presentations before the Commission.

WorldCom stated that the burdens of Rule R9-8 are not insignificant, and provide a disincentive to grow and enter markets not previously subject to competition. WorldCom maintained that CLPs do not currently have systems in place that measure compliance with the service objectives for every call and every service order. Further, WorldCom stated that the systems that some CLPs have in place are national in scope and assume different standards. WorldCom argued that no State in the BellSouth region requires WorldCom to report quality of service information and that outside the BellSouth region, Virginia and (very recently) New York have service quality requirements, some of which are different from those contained in Rule R9-8.

WorldCom, including MCIm, stated that it does not measure, obtain, analyze, or maintain data pertaining to the first seven objectives of Rule R9-8. For the next four objectives (Operator "0" answertime, directory assistance answertime, business office answertime, and repair service answertime) WorldCom obtains and analyzes data for its internal purposes on a national level, subject to service standards that are different from those described in Rule R9-8. WorldCom maintained that it is not possible at present to report that data on a State level. WorldCom further stated that for the next four objectives (Initial customer trouble reports, repeat orders, out-of-service troubles cleared within 24 hours, and regular service orders completed within 5 working days), WorldCom obtains and analyzes data for its internal purposes on a regional level and that it is not possible at present to report this data on a State level. WorldCom commented that for the last three objectives (New service installation appointments not met for Company reasons, new service held orders not completed within 30 days, and regrade application held orders), it may be possible to obtain data on a regional basis, however, WorldCom is still checking into its capabilities to do so.

WorldCom stated that although there has not been enough time for WorldCom to study all of the capital and other expenditures that would be necessary to comply with revised Rule R9-8, WorldCom maintained that it is fair to say that the cost could well be into seven figures.

WorldCom commented that in many cases, a CLP's ability to meet service quality objectives is beyond its control, and CLPs are totally dependent on ILECs for the provisioning of UNEs and resold services.

WorldCom concluded that the Commission should not apply Rule R9-8 to CLPs and that the Commission should rescind its September 20, 2000 Order.

OTHER FILINGS AND ORDERS

On October 27, 2000, The Alliance of North Carolina Independent Telephone Companies (The Alliance), filed a Motion for Stay, Comments, and Further Proceedings. The Alliance requested that the Commission: (1) stay its reporting, presentation, and related requirements set forth in the Commission's September 20, 2000 Order; and (2) initiate further proceedings to investigate the matter of appropriate reporting and presentation requirements for telephone service quality standards including the receipt of comments from all segments of the industry and/or the establishment of an industry task force.

On November 3, 2000, Allegiance Telecom of North Carolina, Inc. (Allegiance) filed a Statement in Support of the Joint Movants' Motion. Allegiance stated that it supports the Motion in all respects, and for the reasons stated in the Motion, requests that the Commission reconsider its September 20, 2000 Order.

By Order dated November 7, 2000, the Commission granted the Parties an extension of time until November 30, 2000 to file the explanations of their measurement procedures. The Order noted that the Commission intended to enter an Order prior to that date addressing the Joint Movants' Motion for Reconsideration or Clarification. By Order dated November 21, 2000, the Commission granted the Parties an additional extension of time until December 15, 2000 to file the explanations of their measurement procedures.

DISCUSSION

The comments received on the Joint Movants' Motion referenced several State Public Utility Commission (PUC) rulings and orders on the issue of reporting requirements for service quality objectives. Below is a summary of each State's proceedings:

FLORIDA: In Florida, Section 25-24.825 of the State's Administrative Code requires companies that provision "residential dial tone, single-line business dial tone and dial tone with any combination of the services included as part of basic local telecommunications services, as defined in s. 364.02(02), F.S." prior to providing service to file and maintain information which contains, among other things, levels of service quality which the company holds itself out to provide for each service. Further, the Florida Administrative Code states that complete information concerning a company's service quality must be made available to Commission Staff upon request.

LOUISIANA: WorldCom stated on page 7 of its comments that Louisiana does require service quality reporting, but WorldCom does not serve local exchange customers there. The Commission was unable to find any additional information on the reporting requirements in Louisiana.

NEW YORK: It appears that the New York PUC requires companies to report service quality data based upon their size. From the information available on the New York PUC website, it appears that CLPs are included in those companies required to report service quality data.

GENERAL ORDERS - TELECOMMUNICATIONS

TENNESSEE: The Tennessee Regulatory Authority has issued a Notice of Proposed Rulemaking wherein an eligible telecommunications carrier (ETC) would be required to provide an adequate level of service to all of its customers and that service adequacy would include quarterly reports on 15 specific service standards. The Tennessee Regulatory Authority defined an ETC as "defined in USAC Title 47, Section 214(e) and is certified by the Authority to receive state or federal universal service support." The criteria for an ETC are as follows:

(1) Offer certain presubscribed services throughout its designated service area either by using its own facilities or by using a combination of its own facilities and resale of another carrier's facilities;
(2) Single-party service;
(3) Voice grade access to the public switched network;
(4) Dual-Tone Multifrequency Signaling or its functional equivalent;
(5) Access to emergency services, e.g. 911 and E911;
(6) Access to operator services;
(7) Access to interexchange service;
(8) Access to directory assistance; and
(9) Toll limitation for qualifying low-income consumers.

Below is a comparison of certain Tennessee service quality standards and service objectives in North Carolina Commission Rule R9-8:

Tennessee	North Carolina
No more than 4 trouble reports per 100 access lines in exchanges serving 5,000 or more access lines	Initial customer trouble reports of 4.75 or less per 100 access lines
No more than 5 trouble reports per 100 access lines in exchanges serving less than 5,000 access lines	Initial customer trouble reports of 4.75 or less per 100 access lines
No less than 95% of out of service trouble reports restored within 24 hours	95% or more out of service troubles cleared within 24 hours
No more than 5% out of service repeat trouble reports	1.0 or less per 100 access lines of repeat trouble reports
No less than 90% DA calls answered within 30 seconds after the last digit is dialed	85% or more DA calls answered within 10 seconds
No less than 90% business office calls answered within 30 seconds after the last digit is dialed	90% or more business office calls answered within 20 seconds
No less than 90% repair office calls answered within 30 seconds after the last digit is dialed	90% or more repair office calls answered within 20 seconds

The Tennessee Regulatory Authority held a hearing to consider its proposed rules as outlined above on November 16, 2000.

VIRGINIA: Chapter 400, Section 80 of the Virginia Commission's Rules states that local exchange companies which exceed 20,000 access lines must report data to the Commission's Division of Communications each month on eight key indicators as outlined in the Rule. Section 180 defines local exchange carriers as all certificated providers of local exchange service whether incumbents or new entrants.

Below is a comparison of certain Virginia service quality standards and service objectives in North Carolina Commission Rule R9-8:

Virginia	North Carolina
6 or fewer trouble reports per 100 access lines per month	4.75 or less per 100 access lines
16% or less repeated trouble reports	1 repeat trouble report or less per 100 access lines
85% or more business office calls answered live within 20 seconds	90% or more business office calls answered within 20 seconds
85% or more repair office calls answered live within 20 seconds	90% or more repair office calls answered within 20 seconds
90% or more service orders completed within five working days	90% or more regular service orders completed within 5 working days

After reviewing all of the comments received on the Joint Movants' Motion and examining the information available from other states (specifically from Tennessee, Florida, and Virginia), the Commission believes that it is reasonable and appropriate to clarify the September 20, 2000 Order to include only those companies which provide basic local residential and business exchange service to customers in North Carolina.

The Commission believes that it has seen some evidence indicating that competition is developing in the business markets in North Carolina. However, the Commission further believes that there has been less evidence that the residential local telecommunications market is competitive to any significant degree. Therefore, the Commission believes that it is reasonable to continue to monitor the service quality for both basic local residential and business exchange service until competition fully develops without question in those markets. This conclusion is substantially consistent with the rules in place or contemplated to be in place in both Virginia and Tennessee.

The Commission is not persuaded by assertions that some CLPs have not developed the appropriate tracking mechanisms to gather the information necessary to demonstrate compliance with Rule R9-8. When CLPs are certified in North Carolina, they must attest that they will comply with the rules and statutes of the State. Commission Rule R17-2(g) specifically states that Rule R9-8 applies to CLPs. The Commission does not understand how CLPs can know they are in compliance with Rule R9-8 when they do not have the appropriate tracking mechanisms in place to demonstrate such compliance.

Further, the Commission finds it appropriate to clarify that resellers of basic local residential and business exchange service and companies that purchase UNEs from ILECs to provide basic local residential and business exchange service are expected to comply with the reporting requirements. However, the Commission finds that if a carrier is not in direct control of the results of a particular objective outlined in Rule R9-8, that carrier may place an "N/A" for not applicable in the report for that particular objective and footnote an explanation of why the results for the objective are not in the company's control. The Commission fully expects companies only to use "N/A" in circumstances where it is clear that the results of the particular objective are not within the company's control; companies should not abuse the use of "N/A" on their reports.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

Based upon careful consideration, the Commission finds it appropriate to deny the Joint Movants' Motion for Reconsideration. Further, the Commission finds it appropriate to clarify that its September 20, 2000 Order on reporting requirements applies only to those carriers providing basic local residential or business exchange service. Therefore, the Commission's conclusions clarify and further amend the Commission's September 20, 2000 Order revising Rule R9-8 as follows:

> (d) Reporting Requirement - Each local exchange telephone company actually providing basic local residential and/or business exchange service to customers in North Carolina shall file an original and five (5) copies of a report each month with the Chief Clerk of the Commission detailing the results of its compliance with each of the uniform service objectives set forth in this rule. Each company shall report its performance result for each objective for its state service area as a whole and whenever possible, by exchange or district. This report shall be filed no later than twenty (20) days after the last day of the month covered by the report. **NOTE:** The inserted clarifying language is underlined.

In light of this finding and the current procedural schedule in this docket, the Commission further finds it appropriate to require the detailed descriptions on the standards by December 29, 2000 and postpone the reporting until March 20, 2001 and monthly on the 20th thereafter.

To assist in monitoring compliance, the Commission hereby directs companies that **do not provide** basic local residential or business exchange service in North Carolina to file a letter stating that fact on or before March 20, 2001. Further, the Commission finds that those companies are not required to file monthly reports thereafter unless and until circumstances change and they do begin to provide basic local residential or business exchange service to customers in North Carolina.

The Commission also is clarifying that resellers of basic local residential and business exchange service and companies that purchase UNEs from ILECs to provide basic local residential and business exchange service are expected to comply with the reporting requirements. However, if a carrier is not in direct control of the results of a particular objective outlined in Rule R9-8, that carrier may place an "N/A" for not applicable in the report for that particular objective and footnote an explanation of why the results for the objective are not within the company's control. The Commission fully expects companies only to use "N/A" in circumstances where it is clear that the results of the particular objective are not within the company's control; companies should not abuse the use of "N/A" on their reports.

In addition, the Commission finds it appropriate to deny The Alliance's Motion. In light of the Commission's review of service quality objectives in other States and the lack of evidence that the standards in Rule R9-8 are unreasonable at this point in time, the Commission does not find good cause to initiate any proceedings to investigate appropriate reporting or presentation requirements for service quality.

Finally, the Commission notes that the Joint Movants and at least one commenter appear to believe that the Commission will hold semiannual service quality presentations wherein every company will be required to make a presentation before the Commission outlining its results on the service quality objectives outlined in Rule R9-8, explaining the reasons for any monthly failures to satisfy the objectives in Rule R9-8, and stating how the company intends to remedy any deficiencies in its performance. The Commission intended in its September 20, 2000 Order only to reserve the right to require a company to make a semiannual service quality presentation before the Commission. Only if the Commission determines that a company's monthly service quality reports indicate problems and/or concerns will the Commission require the company to make a presentation before the Commission. The Commission notes that its September 20, 2000 Order stated that the first of the semiannual service quality presentations would be held on August 15, 2001, at which time, the Order specified that only BellSouth, Carolina, Central, and Verizon would each be required to make a presentation before the Commission. The Commission's September 20, 2000 Order does not require presentations by any other companies at this point in time.

IT IS, THEREFORE, ORDERED as follows:

1. That the Joint Movants' Motion for Reconsideration is hereby denied.

2. That Rule R9-8(d) be, and the same, is hereby amended to read as follows:

(d) Reporting Requirement - Each local exchange telephone company actually providing basic local residential and/or business exchange service to customers in North Carolina shall file an original and five (5) copies of a report each month with the Chief Clerk of the Commission detailing the results of its compliance with each of the uniform service objectives set forth in this rule. Each company shall report its performance result for each objective for its state service area as a whole and whenever possible, by exchange or district. This report shall be filed no later than twenty (20) days after the last day of the month covered by the report.

3. That all ILECs and CLPs actually providing basic local residential and/or business exchange service to customers in North Carolina shall file clear, detailed explanations of their measurement procedures for each service objective outlined in Rule R9-8 by December 29, 2000.

4. That all ILECs and CLPs actually providing basic local residential and/or business exchange service to customers in North Carolina shall file their service quality results beginning with the results for the month of February 2001, on March 20, 2001 and monthly on the 20th thereafter.

5. That companies that **do not provide** basic local residential or business exchange service in North Carolina shall file a letter stating that fact on or before March 20, 2001.

6. That resellers of basic local residential and business exchange service and companies that purchase UNEs from ILECs to provide basic local residential and business exchange service are expected to comply with the reporting requirements. However, if a carrier is not in direct control of the results of a particular objective outlined in Rule R9-8, that carrier may place an "N/A" for not applicable in the report for that particular objective and footnote an explanation of why the results for the objective are not within the company's control. Companies are to only use "N/A" in circumstances where it is clear that the results of the particular objective are not within the company's control; companies should not abuse the use of "N/A" on their reports.

7. That The Alliance's Motion is hereby denied.

8. That the Commission intended in its September 20, 2000 Order only to reserve the right to require a company to make a semiannual service quality presentation before the

Commission. Only if the Commission determines that a company's monthly service quality reports indicate problems and/or concerns will the Commission require the company to make a presentation before the Commission.

ISSUED BY ORDER OF THE COMMISSION.
This the _29th_ day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

bc112700.0

DOCKET NO. P-100, SUB 110

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Establishment of Telecommunications Relay System (TRS), Relay North Carolina	ORDER CONCERNING 711 SERVICE

BY THE COMMISSION: On May 11, 2000, the Public Staff filed a Motion to Require the Filing of Comments Concerning 711 Service. The Public Staff asked the Commission to issue an Order directing all local exchange companies (LECs) and facilities-based competing local providers (CLPs) to file comments concerning their requirements for implementing the 711 service code for intrastate telecommunications relay service (TRS) in North Carolina.

The Public Staff noted that, on February 19, 1997, the FCC released its First Report and Order and Further Notice of Proposed Rulemaking (the "FCC Order") in CC Docket No. 92-105, which addressed the use of N11 codes and other abbreviated dialing arrangements. In the Order, the FCC concluded that a three-digit TRS number would offer significant benefits to persons with hearing or speech disabilities and directed Bellcore to designate 711 exclusively for TRS use. The FCC tentatively concluded that the nationwide implementation of 711 should occur within three years of the effective date of the Order.

Pursuant to the FCC Order, several states have already taken steps to implement 711 service within their borders. Progress has been particularly evident in the ten eastern states that are served by Bell Atlantic, which has taken the lead in supporting the 711 proposal and has made a commitment to absorb the costs of 711 implementation within its service areas. Two Bell Atlantic states, Maryland and Massachusetts, have already begun offering 711 service, and 711 service is scheduled to begin on May 1, 2000 in Pennsylvania. On March 28, 2000, the Virginia State Corporation Commission issued an Order Initiating Investigation and Requesting Comments on the implementation of 711 access to TRS, proposing a possible startup date of June 26, 2000.

In North Carolina, LECs, telephone membership corporations (TMCs), and facilities-based CLPs are likely to implement 711 service by routing incoming 711 calls into a toll-free number that will terminate at Sprint's TRS center. The 711 code would be available for TRS use in addition to all of the currently existing numbers. While several LECs have informally investigated the upgrades that they must make in order to allow the completion of 711 calls, each LEC, facilities-based CLP and payphone service provider (PSP) will need to carefully assess the changes that are required within its own service area. Two of the largest LECs in North Carolina have informally advised the Public Staff that they would be able to implement 711 by simply updating number translations at their host central offices. The Public Staff believes that the updates could be accomplished by most companies at a nominal cost within 90 days from the date that the Commission issues an Order requiring implementation of 711 service.

The Public Staff stated that it believes that the provision of 711 service would offer significant benefits to the hearing and speech impaired community and to the other members of the using and consuming public with whom they communicate. Accordingly, the Public Staff requested that the Commission issue an Order directing each LEC and facilities-based CLP in North Carolina to file comments concerning the changes that must be made in its network to allow the provision of intrastate 711 service. These filings should also describe in detail any extraordinary costs that would be required to implement the new 711 code; provide an estimate of the time that will be required for implementation; and provide any additional comments which the respondent deems appropriate. The Public Staff recommends that the Commission require the filing of these comments no later than thirty days after the date of the Commission order on this issue. The Public Staff also recommends that PSPs be invited to file comments. The Public Staff further recommends that a copy of the order be forwarded to each TMC in North Carolina to allow them the opportunity to voluntarily participate in this process.

On May 16, 2000, the Commission issued an Order Requiring Filing of Comments Concerning 711 Service as follows:

1. That all LECs and facilities-based CLPs be required to file comments in this matter. Such comments shall include:

a. changes that must be made to the network to allow provision of 711 service;
b. a description in detail of any extraordinary costs required to implement 711 service; and
c. such other additional comments as the parties desire to make.

2. That the Chief Clerk send a copy of this Order to all PSP providers and all TMCs. Both PSP providers and TMCs are invited to file comments, and TMCs are invited to voluntarily participate in the provision of 711 service.

Comments

The Commission has received comments from the following:

The Alliance of North Carolina Independent Telephone Companies, together with ALLTEL Carolina Inc. and TDS Telecom (collectively, Alliance) stated that each of its members had reviewed the network requirements necessary to implement utilization of the 711 service codes and had concluded that implementation of the 711 service code should be able to be accomplished with only minor network changes and within the 90 days period suggested by the Public Staff. Moreover, implementation will result in only minimal costs and no extraordinary costs will be incurred based on an evaluation of the Public Staff's proposed plan and assuming there are no major changes. The Alliance noted that N11 codes are a scarce resource and the Commission should weigh this fact in determining when and under what circumstances they should be assigned for dedicated use.

Access Integrated Networks, Inc. stated that it utilizes UNE platform services purchased from BellSouth Interconnection Services and therefore any costs required to implement the 711 service will be provided by BellSouth.

ALLTEL Communications, Inc. stated that only minor network modifications were necessary to provide the 711 service and there would be no extraordinary costs under the current proposal.

BellSouth Telecommunications, Inc. stated that implementation of 711 service will require BellSouth to program all of its switches with translations to automatically route 711 calls to the TRS provider's toll free number. There will be no extraordinary costs associated with the establishment of this service, but there will be certain costs relating to implementation and to network changes. The average cost of adjusting the switches will be less than $250 per switch. The remainder of the network costs include call setup charges and charges associated with the creation and delivery of customer bills. BellSouth said that it is currently testing its ability to program its switches to point abbreviated dialing to a toll free number. This testing is scheduled for completion by July 15, 2000. BellSouth recommended a ninety day timeframe to allow implementation.

Broadband Office Communications, Inc. said that, as a new CLP, it lacks facilities in this State and cannot comment on the 711 proposal. Broadband will comply with any rules adopted by the Commission.

Cardinal Communications of North Carolina, Inc. stated that it is a high-speed data communications and business-class internet service provider utilizing Digitial Subscriber Line (DSL) technology. Cardinal indicated that it cannot provide voice-grade services at this time because it has not deployed the network necessary to switch voice traffic and interconnect with the Public Switched Telephone Network. Cardinal noted that it utilizes Internet Protocol addressing. Its current network only has the technical capability of transmitting data traffic. However, based on the company's background, the implementation of 711 service will not have an adverse effect on Cardinal's network configuration, implementation, and/or costs.

Carolina Telephone and Telegraph Company and Central Telephone Company (collectively, Carolina) believes that 711 service can best be implemented by routing all 711 calls into a toll-free number that will terminate to the relay service center. Incoming 711 calls can be routed into the toll-free number through a translations process in each of Carolina's 54 North Carolina host switches. Two hours of technician time is required per host switch to complete the programming. Carolina does not view these translations costs as extraordinary and will therefore not propose a recovery mechanism, nor will Carolina seek to recover any costs involved with bill messaging or telephone book information. Carolina did request that the Commission allow 90 days from the issuance of a final Commission Order for Carolina to complete and test the translations programming.

CCCNC, Inc. d/b/a Total Connect! stated that it has just received authority to operate in North Carolina and has not yet begun providing service and therefore it has no comments to offer.

CTC Exchange Services adopted by reference the comments of the Alliance, ALLTEL Carolina, Inc. and the TDS Telecom Companies.

CTSI, Inc indicated that, only recently having received authority, it has not yet deployed facilities and therefore cannot provide comments

DSLnet stated that it does not provide any voice services at this time but, when it does, it would implement 711 service as required

GTE South Incorporated stated that, based on its experience in Pennsylvania, all GTE switches would have to be modified to automatically route 711 calls to the TRS. GTE would assign a project manager to coordinate activities. The primary labor cost would be associated with database changes to each switch and there would be other incidental costs associated with project management, establishing local telephone numbers in certain switches, and the distribution of a bill insert message. GTE recommended that the Commission establish a minimum three-month timeframe for implementation.

ICG Telecom Group, Inc. stated that 711 service would require an upgrade in software for its switches, but there would be no extraordinary costs associated with these measures, provided that there was sufficient lead time. ICG suggested six months.

Intermedia Communications, Inc. stated that changes to its network to allow 711 service would entail making changes to the translation tables in its switches. It has identified no extraordinary costs required to implement 711 service.

KMC Telecom, Inc. set out comments identical to those of ICG.

Level 3 Communications LLC informed the Commission that it is not offering or providing any local exchange telecommunication services and therefore does not wish to file any substantive comments.

Madison River Communications, LLC adopted by reference the comments of the Alliance, ALLTEL Carolina, Inc. and the TDS Telecom Companies. In a later filing, Madison River confirmed that implementation of 711 service could be accomplished with only minor network changes within the 90 day period suggested by the Public Staff. There would be only minimal costs for implementation and therefore no extraordinary costs given the present configuration of the proposal.

MCImetro Access Transmission Services, LLC stated that it is a facilities-based CLP which maintains a local switch in Cary, which is connected to a 45 route mile local fiber network serving Cary, Raleigh and surrounding areas. MCImetro is planning a local network for Charlotte and noted that WorldCom has toll switches and toll fiber and microwave routes throughout the State. The cost of implementing 711 access at its local switch should be minimal, perhaps less than $1,000, nor should it require a long period, although there should be a testing period to ensure that the calls process correctly. MCImetro assumes that with its local switch, it would have to add translations, which would "outpulse" either an 8XX number or a local number. The 8XX or local number would be routed through the TRS platform. MCImetro noted that there are other cost issues associated with implementation of 711. Any charges with regard to 8XX database queries should be billed to the owner of the 800 number and participating carriers should not be responsible for incurring the costs of those and usage detail charges, notwithstanding contrary provisions in any interconnection agreements. Appropriate 800 access billing records would need to be generated so that calls would fall into the proper access billing category. Originating TRS traffic routed via a 8XX number is typically regarded as toll. If these calls access the network via 711, then there will be a shift in cost recovery from toll to local, meaning the TRS service provider will over-recover and the LEC or CLP will under-recover. Local switches would ave to recognize 711 as toll and the underlying 800 service provider would have to be charged originating access in order to correct this situation.

Network Plus, Inc. stated that it has not yet deployed facilities and therefore cannot offer comment.

New Edge Network, Inc. stated that implementation of 711 service would not impact its ability to do business.

New South Communications Corp. Incorporated by reference the comments of the Alliance, ALLTEL Carolina, Inc. and TDS Telecom Companies.

NEXTLINK indicated that it concurred with the comments of ICG, KMC, and TriVergent regarding the changes necessary and notice required to implement the 711 service code for TRS in North Carolina.

PaeTec Communications, Inc. stated that it has not yet deployed facilities in this State and therefore cannot provide comments. However, PaeTec will fully comply with any rules the Commission adopts with reference to 711 service once it begins to offer service.

Teligent Services, Inc. stated that it switch would be programmed to direct 711 calls to an 800 number. Teligent would issue a translation request to implement the routing. Although Teligent can support the use of standard translations to route all 711 calls from a Teligent switch to a single toll-free number, the ability to selectively route 711 calls from within one switch to multiple toll-free numbers is not currently feasible. The cost of implementation would be negligible.

Telephone Membership Corporations indicated that no TMC opposes utilization of the 711 code for TRS and will participate in its implementation.

Time Warner Telecom of North Carolina, LP, stated that it currently uses the 711 code of automatic circuit identification announcement. Therefore, that access code would need to be changed in order to implement the 711 service code for TRS. Time Warner would need to be provided the actual 10 digit number of the service along with the identification of the tandem associated with the service and a designate to test with at that office. The translations costs associated with this change would be minimal, since the switches that Time Warner uses are capable of making the required changes and providing the proposed service. No problems in implementation are anticipated provided a reasonable amount of time is allowed.

Town of Pineville had the same comments as ALLTEL Communications, Inc.

TriVergent Communications, Inc. indicated that it does not currently have customers in North Carolina, but would not in any event incur extraordinary expenses were it to implement 711 service. TriVergent said that it needed at least three months advance notice.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that it is in the public interest to require LECs, CLPs, and PSPs to implement the 711 code for intrastate TRS in North Carolina. The Commission further concludes that the costs for implementation of the service should be borne by the companies concerned and that a ninety (90) day implementation period is sufficient.

The Commission appreciates the voluntary participation of the TMCs in implementing 711 service for TRS. For the convenience of the companies, the Commission notes that the contact person for Sprint for technical questions is Paul Ludwick, Senior Product Manager at 913-661-8927 (e-mail address: paul.ludwick@mail.sprint.com). Sprint's North Carolina TRS contact person is Andy Leffler, who may be reached through Relay North Carolina (1-800-735-8262) at 919-875-1242 or 877-437-1242. His e-mail address is andy.leffler@mail.sprint.com.

IT IS, THEREFORE, ORDERED as follows:

1. All ILECs and facilities-based CLPs operating in North Carolina shall modify their switches to translate calls dialed as 711 to the assigned TRS toll free number, 800-735-8262, in order to route 711 dialed calls to the TRS provider.

2. All PSPs shall modify their programmable phones to translate calls dialed as 711 to the assigned TRS toll free number, 800-735-8262, in order to route 711 dialed calls to the TRS provider.

3. Existing TRS toll free numbers shall remain active for those customers who desire to continue using the existing system.

4. ILECs, facilities-based CLPs, and PSPs must implement 711 for public access by no later than November 1, 2000. CLPs without customers must have 711 implemented before adding North Carolina customers for intrastate calling.

5. A bill insert or bill message shall be included, by December 31, 2000, in all customer bills announcing service availability. The content of the insert/message is attached as Appendix A. This bill insert/message should be considered a replacement for the yearly TRS insert/message required by the Commission.

6. The Customer Guide pages of telephone directories shall be updated for the next scheduled publication to include the use of 711 abbreviated dialing access. The existing toll free numbers for NC Relay should continue to be published.

7. TMCs are requested to implement the provisions of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the 18th day of July, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz071200.02

APPENDIX A

RELAY NORTH CAROLINA – IT'S AS EASY AS 7-1-1

Effective November 1, 2000, you can dial 7-1-1 to reach the North Carolina Telecommunications Relay Service (Relay North Carolina) 24 hours a day, every day.

What is Relay North Carolina and how does it work? It is a service that relays a conversation between a person with a speech or hearing disability using a TDD/TTY (Test Telephone) and a hearing person using a regular telephone. The person using the TDD/TTY types his or her conversation and the message is relayed to the other party by a Relay Operator (RO). The RO then relays the hearing person's exact words by typing them back to the TDD/TTY user. All ROs have been specially trained to help conversations flow with ease and accuracy. All calls are handled with strictest confidentiality.

From now on, when you call Relay North Carolina from inside North Carolina, simply dial 7-1-1. You may still use Relay North Carolina by dialing the 800 numbers you currently use. These numbers are 1-800-735-2962 (TDD/TTY) and 1-800-735-8262 (Voice). TTY users should call Sprint Customer service at 800-676-3777 (TTY and Voice) and request that Sprint brand their dedicated lines so that 711 TTY calls will be answered automatically.

For more information on Relay North Carolina, you may call the Relay Customer Service Center at 1-800-735-0533 (TDD/TTY) or 1-800-735-0341 (Voice) or Relay North Carolina Administration Office at 1-800-205-9914 (TDD/TTY) or 1-800-999-5737 (Voice).

DOCKET NO. P-100, SUB 133

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Local Exchange and Local Exchange Access Telecommunications Competition	))	ORDER AMENDING CLP CERTIFICATES

BY THE COMMISSION: Under G.S. 62-110(f1), the Commission is authorized to issue certificates to competitive local providers (CLPs) for the provision of local exchange or exchange access services regardless of whether local service is already being provided in the areas for which the certificates are sought. G.S. 62-110(f2) excepts service areas that are being served by local exchange companies with 200,000 access lines or less located within the State from Commission authorized competition and price plan regulation under G.S. 62-133.5(a). If, however, a local exchange company elects to be regulated under G.S. 62-133.5(a) and the Commission applies the provisions of that section to that company, the Commission must at the same time apply the provisions of G.S. 62-110(f1) to the franchised area and the local exchange and exchange access services offered by that company.

GENERAL ORDERS - TELECOMMUNICATIONS

On September 10, 1999, in Docket No. P-35, Sub 96, the Commission approved a Price Regulation Plan for MEBTEL, Inc., and on September 24, 1999, MEBTEL accepted the Plan. MEBTEL filed revised tariffs in accordance with the Plan on November 30, 1999. Both the Plan and the tariffs have an effective date of January 1, 2000. Effective with the beginning of price plan regulation for MEBTEL, MEBTEL's service area must be considered open to local exchange competition under G.S. 62-110(f1).

The certificates issued to the CLPs in the State currently limit the service areas in which the providers may operate to service areas served by local exchange companies with greater than 200,000 access lines in North Carolina, and the service area of Concord Telephone Company (Concord), in accordance with G.S. 62-110(f2). Concord serves less than 200,000 access lines but entered into a Price Plan effective September 1, 1997. Since the MEBTEL Price Plan became effective on January 1, 2000, the Commission is authorized and required to allow certificated local providers to operate in the MEBTEL service area in addition to those service areas previously authorized.

IT IS, THEREFORE, ORDERED that the certificates of all previously certificated CLPs be and hereby are amended to expand the service areas in which the CLPs are authorized to provide service to include the service area of MEBTEL, Inc., effective January 1, 2000.

ISSUED BY ORDER OF THE COMMISSION.
This the 21st day of January, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz012000.01

DOCKET NO. P-100, SUB 133

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition to Revise Application and Certification Process for Competing Local Providers and Amend Rule R17	)))	ORDER SEEKING COMMENTS AND IMPLEMENTING ON INTERIM BASIS

BY THE COMMISSION: On July 10, 2000, the Public Staff filed a Petition to Revise Application and Certification Process for Competing Local Providers (CLPs) and Amend Rule R17. A copy of the Public Staff's Petition is attached as Attachment A.

Among salient points of the Public Staff's Petition were proposals to streamline the CLP certification process:

a. by adopting a standardized application form for new certificates and for the transfer of existing certificates;

b. by eliminating the distinction between CLPs proposing to offer prepaid service and those not proposing to offer such service;

c. by codifying the rules governing prepaid service, including reporting requirements;

d. by codifying the rules on dialing parity;

e. by adding a requirement that notice of the application be served on all local exchange companies (LECs) operating in North Carolina;

f. by eliminating the requirement for a hearing, unless requested by an interested party; and

g. by deleting the price list requirement.

The Public Staff requested that the application and certificate process described in its Petition be adopted and implemented on an interim basis.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that the Public Staff's Petition should be put out for comment and that good cause exists that it should be implemented on an interim basis. Accordingly, all applications for CLP certification received after the issuance of this Order shall be submitted in the manner prescribed by the Petition and in accordance with the rules revisions set out by it.

IT IS, THEREFORE, ORDERED as follows:

1. That any party wishing to file comments shall do so no later than August 17, 2000. Reply comments from parties other than the Public Staff shall be due no later than August 31, 2000. Parties are encouraged to file collectively. The Public Staff shall file reply comments on September 12, 2000.

2. That all comments or reply comments of greater than 2 pages double spaced in length shall contain an Executive Summary setting forth concisely all material points the party or parties desires to make. Any party recommending a change which will cause an amendment to a rule shall provide precise language in appropriate form to effectuate such change.

3. That the amendments to the Commission rules proposed by the Public Staff in its Petition shall be implemented on an interim basis effective upon the issuance of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the __19th__ day of July, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz071100.03

DOCKET NO. P-100, SUB 133

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition to Revise Application and Certification Process for Competing Local Providers and Amend Rule R17	)))	FINAL ORDER REGARDING CLP APPLICATIONS REVISIONS

BY THE COMMISSION: On July 10, 2000, the Public Staff filed a Petition to Revise Application and Certification Process for Competing Local Providers (CLPs) and Amend Rule R17. The Public Staff explained the proposed changes as follows:

1. G.S. 62-110(f1) authorizes the Commission to issue a certificate of public convenience and necessity to a person applying to offer local exchange or exchange access services as a public utility, after interested parties have had notice and opportunity to be heard, provided that:

> (i) the person is fit, capable, and financially able to render such service; (ii) the service to be provided will reasonably meet the service standards that the Commission may adopt; (iii) the provision of the service will not adversely impact the availability of reasonably affordable local exchange service; (iv) the person, to the extent it may be required to do so by the Commission, will participate in the support of universally available telephone service at affordable rates; and (v) the provision of the service does not otherwise adversely impact the public interest.

2. Until recently, a person seeking CLP certification was required to file an application, pre-file direct testimony, and appear at an evidentiary hearing. In the past few months, applicants have been filing the initial application and any additional information necessary to meet the minimum filing requirements. If the record is sufficient after these filings, the certificate is issued without a hearing.

3. The Public Staff recommends that the Commission further simplify the application process for CLPs and adopt the standard application form attached to the Petition as Appendix A. In most cases, the information elicited in the direct testimony and cross examination can be provided in the proposed application.

4. In addition, the Public Staff proposes changes to Commission Rule R17 in order to implement its recommendation. Appendix B of the Public Staff Petition was the Public Staff's proposed Rule R17, as revised, and Appendix C of the Petition was a mark up of existing Rule R17. Appendix D of the Public Staff Petition was included as a sample certificate of public convenience and necessity for CLPs.

5. The proposed application form and revised Rule R17 are designed to result in (1) an initial application that includes all information normally required to qualify an applicant for certification, and (2) elimination of the required hearing, except where good cause exists.

6. Through other proposed changes to Rule R17, the Public Staff seeks to standardize and streamline the application and review process. Incorporating the standard terms and conditions and the waivers typically associated with prepaid providers into Rule R17 will eliminate the necessity of issuing separate certificates for prepaid providers and non-prepaid providers. As a result, a CLP certified as one type of provider would not need to reapply for another type of CLP certification if it decides to offer the other type of service. If this change is adopted, the Public Staff suggests that the Commission generically modify the authority previously granted to CLPs by authorizing them to operate as both prepaid and non-prepaid providers.

7. Standardizing this process will necessitate additional detail in the monthly access line reports from the CLPs. In order to gauge the development of local competition in the State, the Commission and the Public Staff must be able to distinguish between prepaid and non-prepaid lines. Up to this point, the Public Staff has been able to determine, with some degree of certainty, the number of residential prepaid and non-prepaid lines served by a CLP based on the type of certification it holds. Such a determination will not be possible if a certificate covers both prepaid and non-prepaid authority. Thus, proposed Rule R17 requires each CLP to report its prepaid and non-prepaid lines separately. The Public Staff notes that this additional information would have been necessary eventually, because some providers recently have sought to offer both types of service.

8. Standardized intraLATA dialing parity provisions will also streamline current processes. In its June 15, 1999, Order in Docket No. P-100, Sub 72, the Commission required applicants for CLP certification and CLPs that had customers as of that date to file intraLATA dialing parity plans. CLPs that had not begun offering basic local exchange service were required to file plans not later than 60 days prior to the provisioning of basic local exchange service with 1+ or 0+ access to toll services. To prevent CLPs from filing disparate or incomplete plans, the Public Staff has incorporated the essential elements of intraLATA dialing parity into its proposed Rule R17. The proposed Rule relieves those CLPs that have not yet filed plans from that responsibility and prevents new applicants from creating alternative provisions for dialing parity.

9. The proposed Rule also eliminates the requirement that CLPs file price lists for basic local services. G.S. 62-110(f1) states that, except as provided in G.S. 62-133.5(f), any person receiving a CLP certificate must, until otherwise determined by the Commission, file and maintain with the Commission a complete list of the local exchange and exchange access services to be provided and the prices charged for those services. The Commission has allowed numerous waivers of this requirement. Since the Commission does not regulate the CLPs' rates, eliminating the price list requirement will lighten the burden for existing and prospective CLPs. However, except for services offered pursuant to G.S. 62-133.5(f), CLP rates will still be subject to G.S. 62-140, which prevents unreasonable discrimination. This is consistent with the Commission's treatment of switched and switchless long distance resellers in Docket P-100, Sub 72.

10. The proposed Rule also requires any entity seeking Commission approval to acquire an existing CLP certificate to submit a completed CLP application form as part of its transfer request. This will help ensure that all CLPs are familiar with the Commission's requirements and that the Commission has the requisite information to contact a new CLP after transfer of the certificate. The Public Staff believes that the transfer review process conducted by the Commission Staff and the certification process could proceed simultaneously.

11. In addition, the Public Staff recommends that CLP applications be exempt from the requirement in Rule R1-5(d) that pleadings filed on behalf of a corporation be filed by a member of the Bar of the State of North Carolina. This will eliminate the need for representation by a member of the North Carolina Bar in most cases, unless a public hearing is required, and is consistent with the existing treatment of applications submitted by resellers for long distance service.

12. The Public Staff further recommends that Rule R17 include a provision stating that Customer Service Agreements for prepaid basic local exchange service are subject to periodic review by the Commission and the Public Staff. The Public Staff intends to use this process as the primary means of ensuring that CLPs comply with the Commission's requirements for prepaid basic local exchange service.

On July 19, 2000, the Commission issued an Order Seeking Comments and Implementing on an Interim Basis.

Comments

Associations of Communications Enterprises (ASCENT) seeks clarification on two issues: (1) whether future price list filings will be allowed, and (2) whether the proposed rules will apply to competitive affiliates of incumbent local exchange carriers (ILECs). ASCENT contends that price list filing should be discretionary inasmuch as, in the absence of tariffs, they establish a legal relationship between carriers and end users. Competing local providers (CLPs) should be able to establish business relationships with residence and small business customers on subscription instead of using formal contracts. Otherwise, CLPs may need to change the way they offer and provide service, thus incurring additional costs and administrative burdens, contrary to the Commission's policies. ASCENT also contends that ILEC affiliates should not enjoy the benefits of the streamlined application review process. The competitive advantage inherent in the relationship between ILECs and their affiliates demands that they receive greater regulatory scrutiny in order to check anti-competitive behavior.

Associations for Local Telecommunications Services (ALTS) contends that some of the proposed requirements make the application process more complicated, are repetitive, and do not contribute to the goal of establishing a CLP's technical, managerial, and financial qualifications. ALTS cites the following:

> Question 5 requiring a list of all companies in which any individuals, directors, partners, officers or members of an Applicant are affiliated in the telecommunications industry.
>
> Questions 7 through 10 involving financial capability: question 7 which closely mirrors the prior certification process; question 8 which requests a five-year business plan; question 9 which requests bank loan approval documents, sworn letters of guaranty from third parties, letters of credit and attestation letters from certified public accountants; question 10(a) which requests an explanation of any need to dispose of substantial assets, question 10(e) which requests an explanation of any denial of credit from suppliers, and question 10(h) which requests an explanation of

any legal proceeding that could adversely affect the Applicant's telecommunications business.

ALTS asserts that the proposed form should advise applicants of the right to submit certain information under seal pursuant to G.S. 132-1.1 and that applicants should be notified on the form where they can get a copy of the service list for ILECs. ALTS further asserts that the forfeiture of the original $250 filing fee if an application is not completed correctly is unnecessary and unfair to applicants. Finally, ALTS asserts that the provision requiring the submission of a completed CLP application form as part of a request to acquire an existing CLP certificate is unnecessary and would add delay to the approval process with no commensurate benefits.

Public Staff Reply Comments

In its reply comments, the Public Staff recommended:

1. that the CLPs not be allowed to file price lists or tariffs;

2. that the proposed rules apply to all CLPs whether or not they are affiliated with incumbent LECs;

3. that the term "affiliated" in Question 5 of the application be clarified;

4. that Question 7 be retained and that Questions 8 through 11 be deleted and replaced with less burdensome requirements if the information in Question 7 is not available;

5. that Applicants be advised on the application form that they may file confidential information under "SEAL";

6. that Applicants be advised on the application form where they can obtain copies of service lists;

7. that the statement regarding forfeiture of the filing fee be retained;

8. that a complete application form be submitted with requests to require existing CLP certificates only if the acquiring entity does not already have a CLP certificate;

9. that the Commission adopt the proposed rule revisions on a permanent basis;

10. that the Commission generically modify existing CLP certificates to allow holders to offer both prepaid and non-prepaid service; and

11. that the Commission require prepaid and non-prepaid access lines to be reported separately beginning with the reports to be filed on or before October 15, 2000, for the end of September.

With respect to specific issues, the Public Staff replied as follows:

1. The Public Staff has never advocated the filing and maintaining of price lists by the CLPs. G.S. 62-110(f1) allows the Commission to determine that price lists should not be maintained, and Rule R17-2(h) provides for waivers of the price list requirement. As a practical matter, the Commission does not regulate prices charged by the CLPs except to the extent that they violate G.S. 62-140 and the Commission's rules on deposits and billing practices. Moreover, the Commission has no way to monitor the accuracy or completeness of the lists. Filing price lists under these circumstances implies a level of regulatory oversight that does not exist and may give customers a false sense of security. The burden on the Public Staff and the Commission of being the price list custodians is simply not justified by the public interest. The Public Staff recommends that the Commission state in its order that CLP price lists and tariffs will not be accepted for filing and that existing and pending price lists and tariffs of the CLPs are deemed withdrawn.

2. The Public Staff is well aware of the competitive advantages of ILEC affiliates and the need for careful scrutiny of their activities. However, the Public Staff sees no reason to exempt them from our proposed revisions to Rule R17 and from using our proposed application form. We do not envision separate certification processes for affiliates and non-affiliates of ILECs. The streamlined process the Public Staff proposal allows for a hearing upon the request of any interested party, which seems likely in the case of an ILEC affiliate. In the Public Staff's opinion, there will be ample opportunity for whatever scrutiny is necessary without distinguishing between CLPs on the basis of their affiliations with ILECs.

3. The Public Staff agrees that Question 5, if read too broadly, could be unnecessarily burdensome. The purpose of the question is to alert the Public Staff and the Commission to any relationship between the Applicant and persons with an unsatisfactory record of regulatory compliance. The Public Staff proposes that the question be clarified as follows:

> If any individuals, directors, partners, officers, or members are affiliated with <u>(i.e., own at least a 10% interest in or serve as directors, partners, or members of)</u> any other telecommunications company, provide, as **EXHIBIT D**, a list of the company(ies) and a description of the affiliation.

4. The Public Staff has reconsidered Questions 7 through 11 and the entire issue of financial capability in light of the showing required of other competitive service providers as well as the information provided elsewhere in the application. The Public Staff believes Question 7 should be retained as it is written. However, the Public Staff recommends that Questions 8 through 11 be deleted and replaced with the following:

> 8. If the information in Item 7 is not available, please provide the information below. Applicants may file the appropriate portions of their plans and forecasts if they are sufficiently similar to the items, below, rather than generating new documents.
>
> (a) Annual projected income statement and statement of projected cash flows for each year until net cash is provided by the operating

activities of the applicant or three years, whichever period is longer, as **Exhibit G1.**

(b) Detailed description of the assumptions for each item reflected in the projected income statement and cash flow statement. The description should provide information on key assumptions, including, but not limited to: number of customers, payroll costs, the number of persons employed (including independent contractors), and sources of external funds (banks, investors) as **Exhibit G2.**

(c) Narrative description of the applicant's plan(s) for achieving the projected cash flow amounts set forth in the statement of projected cash flows above as **Exhibit G3.**

(d) Commitment letters, letters of intent, etc. from lenders and investors to provide funds through the first 12 months of operations as **Exhibit G4.**

The remaining questions should be renumbered accordingly.

5. The Public Staff's views on whether information filed by CLPs is public information under the Public Records Act are well known, and the Public Staff is reluctant to recommend what would amount to an invitation to file information under "SEAL". However, since knowledgeable applicants regularly file certain information on a confidential basis, the Public Staff would not oppose making all applicants aware of this option if it would facilitate the application process. The following statement should be added to the first page of the form:

> Any information which the Applicant claims is "confidential" or constitutes a "trade secret" should be clearly marked as such and filed under "SEAL."

6. The Public Staff agrees that it would be helpful to advise Applicants where they can obtain copies of service lists. The Public Staff proposes that the first page of the application contain the following statement:

> A copy of the completed application must be served on each incumbent Local Exchange Company (LEC) in the proposed service territory. A service list may be obtained from the Chief Clerk.

7. The statement regarding forfeiture of the filing fee has been used for years on PSP applications, has been on the reseller application form since 1996, and has caused few if any complaints. As a practical matter, however, applications are seldom required to be resubmitted, so this does not constitute an unnecessary or unfair burden on the Applicants. The Public Staff believes this provision should be retained.

8. The requirement that a complete CLP application form be submitted with requests to acquire existing CLP certificates is intended to close a loophole rather than to impose an additional

burden. If the acquiring entity already has a CLP certificate, a completed CLP application would not be required. If the acquiring entity does not have a CLP certificate, an application is required so that the screening process and introduction to the CLP rules is not bypassed. In that case, the application should be queued as a new application, which under the streamlined process should not cause undue delay after the current backlog is eliminated. The Public Staff recommends that the opening lines of its proposed Rule R17-2(a) be clarified as follows to reflect this intent:

> Any ~~CLP~~ entity other than an existing CLP certificate holder applying for a certificate or for authority to acquire an existing certificate shall complete a CLP application form and make a satisfactory showing to the Commission:

In conclusion, the Public Staff requested the Commission to accept the recommendations in these reply comments and issue an order adopting the proposed amendments on a permanent basis.

Although the Public Staff's recommendations regarding prepaid service were not discussed by either of the commenting parties, the Public Staff reiterated its request that the Commission generically modify existing CLP certificates to allow the holders to offer both prepaid and non-prepaid service. To highlight the requirement in Rule R17-2(k) that CLPs report prepaid and non-prepaid access lines separately, the Public Staff requests the Commission to require compliance with this provision in the reports to be filed on or before October 15, 2000, for the end of September.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, for the reasons as generally set forth by the Public Staff, the Commission concludes as follows:

1. That the amendments to the Commission rules and the establishment of a CLP application form implemented on an interim basis by Order dated July 19, 2000, be made permanent subject to such amendments thereto as the Public Staff has proposed in its September 12, 2000, Reply Comments.

2. That all existing CLP certificates be generically modified to allow the holders to offer both prepaid and non-prepaid service. To highlight the requirement in Rule R17-2(k) that CLPs report prepaid and non-prepaid access lines separately, the CLPS shall file on or before October 15, 2000, for the end of September.

3. That CLP price lists and tariffs will no longer be accepted for filing and that all existing and pending price lists and tariffs of CLPS be deemed withdrawn.

4. That, within one week of the issuance of this Order, the Public Staff revise the CLP application form in accordance with the amendments to the application form approved in this Order and provide to the Commission both a marked-up and clean copy of the relevant portions of Rule R17 reflecting the amendments thereto.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 21st day of September, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz091800.13

DOCKET NO. P-100, SUB 133

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Local Exchange and Local Exchange Access Telecommunications Competition) ORDER MODIFYING COMPOSITE AGREEMENT FILING REQUIREMENTS

BY THE CHAIR: On August 19, 1996, an Order was issued in this docket governing certain aspects of arbitration procedure. Paragraph 4 of Appendix A to that Order reads as follows:

> 4. Between the 30th day and the 45th day after the issuance of the RAO, the petitioning party and the responding party shall jointly file with the Commission for final approval or disapproval a document to be known as the Composite Agreement incorporating all the relevant terms and conditions. This document shall consist of terms and conditions agreed upon by the parties and previously approved by the Commission, terms and conditions agreed upon by the parties but not hitherto approved by the Commission, and terms and conditions decided in the RAO. Those terms and conditions which have been agreed upon by negotiation, including their approval status, and those which have been decided by the RAO, shall be identified as such.

As the Commission has gained experience with arbitration procedures, it has become evident that, if there are objections or motions for reconsideration, the Composite Agreement may be submitted for approval prior to a final disposition of these filings. If the Commission modifies the Recommended Arbitration Order (RAO), then amendments must be filed to the Composite Agreement. The Chair believes that it will be more judicially efficient for the Commission and less burdensome to the parties to provide that, if objections or motions for reconsideration are filed, then the Composite Agreement need not be filed until 30 days after the Commission has ruled on such filings. The Chair further believes that, given the length and complexity of most Composite Agreements, review and approval for such agreements will be expedited if the parties are required to provide a reference sheet to provisions in the Composite Agreement showing their conformity to the Commission's decision in the RAO as it may be modified by subsequent rulings.

Accordingly, Paragraph 4 of Appendix A to the August 19, 1996 Order in this docket is rewritten as follows:

4. Between the 30th day and 45th day after the issuance of the RAO or, if there have been objections to or motions for reconsideration or clarification regarding the RAO, 30 days after the Commission rules on such objections or motions, the petitioning party and the responding party shall jointly file with the Commission for final approval or disapproval a document to be known as the Composite Agreement incorporating all the relevant terms and conditions. This document shall consist of terms and conditions agreed upon by the parties and previously approved by the Commission, terms and conditions agreed upon by the parties but not hitherto approved by the Commission, and terms and conditions decided in the RAO as modified by any subsequent Commission rulings regarding objections or motions for reconsideration or clarification. Those terms and conditions which have been agreed upon by negotiation, including their approval status, and those which have been decided by the RAO, shall be identified as such, and the parties shall provide a reference sheet to provisions in the Composite Agreement showing their conformity to the Commission's decision in the RAO as it may have been modified by subsequent rulings.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE CHAIR.
This the 3rd day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

rg110200.04

DOCKET NO. P-100, SUB 133

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Local Exchange and Local Exchange Access	)	ORDER CONCERNING MOTION
Telecommunications Competition	)	FOR RECONSIDERATION

BY THE COMMISSION: On October 11, 2000, the Joint Movants, a group of competing local providers (CLPs), filed a Joint Motion to Reconsider Final Order Regarding CLP Applications Revisions and Joint Motion to Stay Order During Pendency of Reconsideration.

Specifically, the Joint Movants sought reconsideration of that part of the Final Order in this docket issued on September 21, 2000, in which the Commission among other things, stated that "CLP price lists and tariffs will no longer be accepted for filing and that all existing and pending price lists and tariffs of CLPs be deemed withdrawn." [This was referred to by the Joint Movants as the mandatory "detariffing" requirement, a shorthand term that will be used herein in preference to the inelegant neologism, "de-price-listing." However, the Commission does not believe that price lists and tariffs are equivalent.]

The Joint Movants complained that the issue of mandatory detariffing had been raised only tangentially by the Public Staff's Petition and that the Joint Movants were not aware that the Commission was considering such a significant decision in this proceeding. Joint Movants did concede, however, that ASCENT had addressed the issue in its comments.

The major substantive arguments set forth by the Joint Movants were that mandatory detariffing may impair the validity of existing contracts which refer to or are based on currently filed tariffs. Second, mandatory detariffing prevents the CLPs from availing themselves of the benefits of the "filed-rate doctrine" which is available to local exchange companies (LECs). Under the filed-rate doctrine, the rate a common carrier files with respect to a service is the lawful charge for that service and, even if the customer claims the carrier misrepresented its rate and he relied on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff. Third, immediate mandatory detariffing without a phase-in period subjects many CLPs to differing state and federal requirements and procedures.

With respect to the validity of existing contracts, the Joint Movants noted that CLPs rely on such filed terms and conditions in lieu of requiring a separate contract setting forth every term and condition for every customer. The Commission has created a sort of legal vacuum because, to the extent to which agreements with customers refer to price lists, those terms and conditions may be in doubt. The Joint Movants also maintained that the problem is not limited to the status of CLPs and their retail local service customers but extends to local access service, since the terms, conditions and rates for switched access services are not covered by individual contracts. Furthermore, for customers purchasing both local and long distance, it is not clear whether the terms and conditions set forth in a CLP's tariff would continue to apply. The question of bundled service offerings is also problematical.

With respect to the filed-rate doctrine, the Joint Movants argued that the doctrine retains viability, even though regulatory supervision of CLP tariffs is minimal if not practically nonexistent. The mere fact that filing was allowed is sufficient to invoke the protection of the filed-rate doctrine. The CLPs complained that, with mandatory detariffing, the CLPs would not have the protection of the filed-rate doctrine, while the incumbent LECs (ILECs) would.

Finally, the Joint Movants noted that the Commission's action creates inconsistent filing requirements. The Joint Movants particularly criticized the absence of a phase-in period, noting that the Federal Communications Commission (FCC) had adopted a nine-month period to a detariffed environment regarding domestic long-distance service.

In conclusion, the Joint Movants asked that the Commission reconsider mandatory and immediate detariffing and instead issue an order allowing permissive filing of tariffs by CLPs. If the Commission upholds mandatory detariffing, the Commission should at least grandfather existing tariffs during the life of existing end-user contracts and give the CLPs sufficient time to prepare for detariffing. The Joint Movants also asked that the Commission stay the mandatory detariffing provision of the Order to avoid what the Joint Movants characterized as irreparable harm to CLPs caused by the uncertainty referred to above. They also suggested that the Commission convene an industry working group, consisting of the Public Staff and other interested members of the telecommunications industry, to study issues surrounding the implementation of mandatory detariffing, with this group to report to the Commission concerning its findings and recommendations.

On October 16, 2000, the Commission issued an Order Granting Partial Stay and Seeking Comments. The partial stay allowed permissive filing of price lists of basic local exchange services pending final order and reinstatement of existing price lists should a CLP specifically request such reinstatement.

<u>Attorney General Comments</u>

On November 9, 2000, the Attorney General filed comments arguing that the Commission's decision that CLP price lists and tariffs would no longer be accepted for filing was in the public interest precisely because it will prevent CLPs from invoking the filed-rate doctrine against North Carolina consumers.

The Attorney General observed that requiring the filing of price lists is strictly discretionary with the Commission under G.S. 62-110(f1) and that the original rationale for the filed-rate doctrine was that a monopoly carrier should not be able to discriminate among its customers and offer certain customers rates that were more favorable than those in its tariffs. However, more recently, the filed-rate doctrine has been used increasingly by certain long distance carriers to shield themselves from the consequences of deceptive behavior. Thus, a carrier could filed a tariff stating that its rate is $.30 a minute while its telemarketers call consumers representing that the rate is $.04 per minute but then argue that no restitution is due under the filed-rate doctrine giving precedence to the tariffed rate. The Attorney General noted that the FCC has held that the filed-rate doctrine is harmful to consumers and competition, and it has adopted mandatory detariffing for non-dominant long distance carriers. The FCC found that permissive tariffing is not appropriate because it might not eliminate invocation of the filed-rate doctrine. The FCC's mandatory detariffing policy was upheld recently by the District of Columbia Circuit in <u>MCI WorldCom Inc. v. Federal Communications Commission</u>, 209 F.3d 760 (D.C. Cir. 2000).

The Attorney General further argued that it is appropriate to treat CLPs and ILECs differently in terms of filing price lists and tariffs because CLPs and ILECs are treated differently in terms of how their rates are regulated by the Commission. Those of the ILECs are scrutinized while those of CLPs are not. The CLPs should not be permitted to make use of one of the purported benefits of regulation--the use of the filed-rate doctrine--without actually being regulated in terms of rates by the Commission.

Lastly, the Attorney General indicated that he would not necessarily be opposed to a reasonable transition period, noting that the FCC had adopted a nine-month transition period.

Verizon Comments

On November 9, 2000, Verizon South, Inc. (Verizon) filed comments opposing mandatory detariffing, maintaining that it would have an adverse, anticompetitive effect on both consumers and carriers because, among other things, it would force the parties to spend a significant amount of time and resources to negotiate individual contracts on many issues and would reduce the speed with which carriers could implement new offerings. Permissive detariffing is, according to Verizon, the preferred alternative. Lastly, Verizon argued that the filed-rate doctrine is of limited significance in a competitive marketplace. A carrier abusing the filed-rate doctrine would risk harming its reputation and position in the marketplace.

MCImetro Reply Comments

On November 16, 2000, MCImetro Access Transmission Services, LLC (MCImetro) filed Reply Comments stating its support for the permissive filing by CLPs of price lists and/or tariffs and the continuation of the Commission's stay pending reconsideration. MCImetro criticized what it saw as the inconsistency in the Attorney General's position that permits ILECs to take advantage of the filed-rate doctrine while CLPs could not. MCImetro also pointed to what it saw as the benefits of price lists to both the regulatory authority and the consumer should disputes arise. Detariffing moreover will cause written contracts to be lengthy and complex. MCImetro suggested that the detariffing issues have not been resolved at the interstate level. The FCC originally implemented a nine-month transition period ending January 31, 2001, but has extended that period to April 30, 2001, for mass market consumer services. The FCC could very well extend that date further. At a minimum, there should be a meaningful and reasonable transition period for carriers. Because of this, permissive filing is the right choice for the foreseeable future.

Public Staff Reply Comments

On November 16, 2000, the Public Staff filed Reply Comments. First, the Public Staff observed that Rule 17-2(h) required the filing of initial price lists but allowed the CLPs to request waivers. Twenty-six CLPs have requested and received waivers, all of which have been granted. Effectively, therefore, the Commission has already instituted "permissive detariffing." Second, the Public Staff stated that equating "tariffs" and "price lists" is inaccurate. The Commission regulates tariffs, but price lists, except to the extent that they violate G.S. 62-140 or the Commission's rules on deposits or billing practices, are not scrutinized. Nevertheless, a number of CLPs have filed comments under the price list requirement purporting to be tariffs or which contain terms, provisions, or limitations that go far beyond a mere list of basic services and their prices. Consumers may be misled by this into thinking that such term, condition or price is approved or sanctioned by the Commission. It is for this reason that the Public Staff recommended that the price list requirement be eliminated.

With respect to the filed-rate doctrine, the Public Staff agreed with the Attorney General's comments on this subject. The Public Staff also questioned whether price lists were sufficient to allow a company to avail itself of that doctrine.

Finally, the Public Staff did not oppose that Joint Movants' suggestion as to a transition period. The FCC has recently extended the end of its transition period from January 31, 2001, to April 30, 2001. The Public Staff suggested that this deadline should apply here.

Joint Commenters' Reply

On November 20, 2000, the Joint Commenters filed a Motion for Extension of Time to File Reply Comments, which Motion Is granted. The Joint Commenters expressed doubt that the filed-rate doctrine was necessarily anti-consumer in nature and noted that the Attorney General and Public Staff had provided no evidence that it was. Besides, the Joint Commenters urged, the existence of the filed-rate doctrine would not diminish the Commission's authority or the ability of the Public Staff and Attorney General to challenge anti-consumer practices. In any event, the Commission need not resolve the debate about the applicability of the filed-rate doctrine, this being better left to the courts.

The Joint Commenters also urged that permissive tariffing would provide benefits to the public by helping to level the playing field between ILECs and CLPs, by creating visibility for the competitors' products, and by reducing the administrative burden on CLPs. The Joint Commenters further argued that there was no evidence of consumer confusion regarding the price lists on file.

With respect to the FCC detariffing decision, the Joint Commenters argued that this was scarcely determinative for this Commission's action and applied to long distance, not local, carriers

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that mandatory detariffing should be maintained but that there should be a transition period up to and including April 30, 2001, or such later date as the FCC should select for its detariffing purposes, to allow the carriers to adjust themselves and their customers to the change. Thus, there is intended to be parity between the state and the federal deadlines.

The Joint Movants and those sympathetic to them have raised essentially two arguments in favor of continuing mandatory tariffing. They have argued that they would no longer be able to avail themselves of the filed-rate doctrine should mandatory detariffing be sustained. Second, the Joint Movants argued that a changeover to mandatory detariffing would be inordinately burdensome and runs the risk of creating a "legal vacuum."

The Commission believes that the Joint Movants' arguments concerning the filed-rate doctrine are without merit. As the Attorney General has pointed out, this doctrine is primarily an artifact of an earlier monopoly regulatory environment and may be used by unscrupulous carriers to defraud or oppress consumers. It should not be made available to those whose rates are neither regulated nor reviewed. The Attorney General has aptly pointed out that ILECs and CLPs face significantly different levels of scrutiny with respect to how their rates are regulated (and for that matter in the degree of regulation in general); and CLPs should not be permitted to avail themselves of the "benefits" of regulation without actually being regulated in terms of their rates. It is also noteworthy that the FCC has moved toward mandatory detariffing for non-dominant long distance carriers in preference to permissive tariffing, which it believed might not extinguish the filed-rate doctrine completely with reference to these companies.

The Commission also questions whether price lists such as those that have hitherto been required are even sufficient to invoke the filed-rate doctrine. Thus, the CLPs' reliance on the price list requirement to allow them to use the filed-rate doctrine may be in fact built on a foundation of sand. However, elimination of the price list requirement is justified because it will erode that foundation entirely.

Concerning the Joint Movants' other arguments, the Commission believes those concerns can be accommodated by providing for a transition period for mandatory detariffing up to and including April 30, 2001, or such later date as the FCC may select for its detariffing purposes. This is consonant with what the FCC has done (or may do in further extending the deadline), and it is an appropriate example to follow. In the meantime, permissive filing in accordance with the Commission's October 16, 2000 Order will be permitted.

IT IS, THEREFORE, ORDERED as follows:

1. That the Joint Movants October 11, 2000, Motion to Reconsider be denied.

2. That the October 16, 2000, Order Granting Partial Stay remain in effect until April 30, 2001, or such later date as the FCC may select for the detariffing of certain interexchange carriers.

ISSUED BY ORDER OF THE COMMISSION.

This the 29th day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg112800.02

DOCKET NO. P-100, SUB 133d

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

General Proceeding to Determine	)	ORDER ADOPTING
Permanent Pricing for Unbundled	)	PERMANENT UNE RATES
Network Elements	)	

BY THE PRESIDING COMMISSIONER: On January 28, 2000, the Commission issued its Order Ruling on Comments and Reply Comments Filed Regarding the Cost Studies in this docket. Said Order required BellSouth Telecommunications, Inc. (BellSouth), Carolina Telephone and

Telegraph Company (Carolina), Central Telephone Company (Central), and GTE South, Inc. (GTE) to file new and revised cost studies, supporting documentation, and rates for unbundled network elements (UNEs) and interconnection based on the conclusions of the Commission as outlined in its January 28, 2000, Order. The Order further required the Public Staff, not later than February 28, 2000, to either concur in the accuracy of the incumbent local exchange company (ILEC) filings or file comments setting forth any areas of disagreement with those filings. Further, in its Order, the Commission requested the ILECs to file proposals to refund the difference between revenues collected for services provided under interim prices, subject to true-up, and revenues that would have been collected under the permanent prices established in this docket.

On February 28, 2000, the Public Staff filed its comments on the ILECs' cost studies. The Public Staff stated that it "believes these filings are in compliance with the Commission's Order."

On February 28, 2000, BellSouth and GTE filed their proposals to refund the difference between revenues collected for services provided under interim prices, subject to true-up, and revenues that would have been collected under the permanent prices. Carolina and Central filed their proposal on March 6, 2000. The Presiding Commissioner has reviewed these proposals and authorizes the ILECs to proceed according to their proposals. The ILECs shall complete the true-up process by May 19, 2000 and file a report with the Commission by June 5, 2000 detailing the true-up.

Finally, the Presiding Commissioner notes that by Order dated January 11, 2000, the Chair held the procedural schedule established for the purpose of determining geographically deaveraged UNE rates in abeyance pending further order by the Commission once final UNE rates are established. The Presiding Commissioner notes that geographical deaveraging will be addressed by Commission order in the near future.

IT IS, THEREFORE, ORDERED as follows:

1. That the UNE rates produced from the costs studies filed on February 11, 2000 by BellSouth, Carolina/Central, and GTE (including the revisions filed by GTE on February 28, 2000) are hereby adopted as the final, permanent UNE rates.

2. That the true-up proposals filed by BellSouth, Carolina/Central, and GTE are deemed appropriate.

3. That BellSouth, Carolina/Central, and GTE shall complete the true-up process by no later than May 19, 2000.

4. That BellSouth, Carolina/Central, and GTE shall file a report with the Commission detailing the true-up process by no later than June 5, 2000.

ISSUED BY ORDER OF THE PRESIDING COMMISSIONER.
This the 13th day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

bc031000.01

DOCKET NO. P-100, SUB 133d

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
General Proceeding to Determine	)	ORDER ADOPTING
Permanent Pricing for Unbundled	)	INTERIM LINE SHARING
Network Elements	)	RATES

BY THE COMMISSION: On March 30, 2000, the Commission issued its Order Setting Procedural Schedules in Docket No. P-100, Sub 133d (the unbundled network element - UNE - generic proceeding). In that Order, the Commission ruled, "In addition, the Commission finds it appropriate to address the impacts of the [Federal Communications Commission's - FCC's] Line Sharing Order in the Phase I proceeding. The Commission will first establish interim rates for line sharing and then address line sharing (including setting a permanent price for line sharing) in the Phase I proceeding. To establish interim rates, the Commission is soliciting industry proposals for an interim rate with a comment cycle on the proposals filed."

PROPOSALS FOR INTERIM LINE SHARING RATES

On April 14, 2000, proposals for interim line sharing rates were filed by BellSouth Telecommunications, Inc. (BellSouth), Carolina Telephone and Telegraph Company and Central Telephone Company (jointly referred to as Sprint), GTE South Incorporated (GTE), MCI WorldCom, and the New Entrants[1].

BELLSOUTH: BellSouth filed its proposed interim line sharing rates along with a preliminary cost study supporting those rates.

BellSouth stated that the Line Sharing Cost Study it submitted to support its proposed interim rates incorporates the input modifications made by the Commission previously in Docket No. P-100, Sub 133d. However, BellSouth explained that where appropriate, inputs were revised to reflect a 2000-2002 study period. BellSouth further stated that it utilized the Total Element Long Run Incremental Cost (TELRIC) Calculator previously presented to the Commission in Docket No. P-100, Sub 133d to develop the costs associated with line sharing.

BellSouth explained in its proposal that the Line Sharing UNE unbundles the high frequency portion of the local loop in the end users' serving wire center. BellSouth stated that competing local providers (CLPs) can use this UNE to provide xDSL-based services to their end-user customers. BellSouth stated that the Line Sharing Splitter UNE is provided on a two wire line side copper loop that does not exceed 18 Kilofeet (or 18,000 feet). BellSouth maintained that for each loop, BellSouth

[1] The New Entrants include Adelphia Business Solutions, BlueStar Networks, Inc., Covad Communications, Business Telecom, Inc., DSLnet, Inc., ICG Telecom Group, Inc., Intermedia Communications, Inc., KMC Telecom, Inc., Mpower Communications, New Edge Networks, NorthPoint Communications, TriVergent Communications, and US LEC Inc. of North Carolina.

provides this UNE only to a single requesting carrier and only for use at the same customer address; BellSouth does not provide line sharing if BellSouth is not currently providing analog voice service to the customer. BellSouth explained that in order to unbundle the high frequency portion of the loop, a 2-wire line-side copper loop is terminated at a splitter located in the serving wire center. BellSouth stated that the splitter routes the high frequency portion of the circuit to the CLP's xDSL equipment in the central office.

BellSouth stated that the Line Sharing Splitter UNE consists of four rate elements: (1) J.4.1 - a per splitter system with 96-line capacity; (2) J.4.2 - a per splitter system with 24-line capacity; (3) J.4.2 - a per line activation; and (4) J.4.4 - a per subsequent activity per line arrangement. BellSouth maintained that the per system splitter consists of a 96-line or 24-line capacity for 96 or 24 individual (line) connections for line sharing.

BellSouth made the following specific study assumptions: (1) this UNE will be ordered only on a manual basis; (2) loop conditioning is not included - additional charges apply if conditioning is required; and (3) the end user calls BellSouth for problems related to voice service and calls the CLP for problems related to data service.

BellSouth proposed the following rates:

Line Sharing Splitter, Per System 96-Line Capacity - Monthly Recurring	$152.73
Line Sharing Splitter, Per System 96-Line Capacity - Nonrecurring	$424.61
Line Sharing Splitter, Per System 24-Line Capacity - Monthly Recurring	$38.18
Line Sharing Splitter, Per System 24-Line Capacity - Nonrecurring	$424.61
Line Sharing Splitter, Per Line Activation - Monthly Recurring	$7.10
Line Sharing Splitter, Per Line Activation - Nonrecurring - 1st	$56.92
Line Sharing Splitter, Per Line Activation Nonrecurring - Additional	$28.59
Line Sharing Splitter, Per Subsequent Activity Per Line Arrangement - NRC - 1st	$35.14
Line Sharing Splitter, Per Subsequent Activity Per Line Arrangement -Nonrecurring - Additional	$16.29

GTE: GTE stated that it is proposing two methods for providing line sharing, interim rates for these two methods, and costs in support of the interim rates. GTE maintained that the March 30, 2000 Commission Order setting procedural schedules in Docket No. P-100, Sub 133d does not address, however, the development of terms and conditions for the provision of line sharing to a particular CLP. GTE stated that line sharing is a complex process with evolving technical and provisioning issues that must be resolved before it can be deployed and that specific and detailed terms and conditions should be developed through negotiation. GTE recommended that the Commission adopt its proposed interim line sharing rates as the starting point for negotiations for line sharing agreements in North Carolina and that should the Parties be unable to resolve all issues necessary to finalize these modified agreements, then they are free to petition the Commission for arbitration.

GTE explained that line sharing is the ability of two different service providers to offer separate telecommunications services over the same line, with each provider employing different frequencies to provide such services. GTE stated that the two services occupy different frequencies or bandwidths on a single copper wire pair. GTE maintained that analog voice services generally occupy the low frequency band of the line from 300 to 3,000 hertz (Hz) and data services generally occupy the high frequency band above 20,000 Hz. GTE stated that to provision line sharing, Digital Subscriber Line (xDSL) service is added to a local loop that is being used for traditional voice service by deploying special equipment at each end of the end-user's local loop. GTE maintained that specifically, passive signal filters, or splitters, are installed at each end of the end-user's loop to accomplish this operation. GTE stated that one splitter is installed at the end-user's premise and another splitter at the ILEC's central office. GTE explained that the central office splitter filters the high frequency data traffic signals from the voiceband signals through a pair of copper wires to the Class 5 switch, while permitting the full frequency spectrum, including the digital traffic, through another pair of copper wires to a digital subscriber line access multiplexer (DSLAM) attached to the packet-switched network.

GTE further maintained that collocation is a prerequisite for line sharing. GTE stated that CLPs must have DSLAM equipment, and in some cases splitters, in GTE's central offices. GTE argued that tie-cables must be acquired by the CLPs and installed between the collocation cage and Main Distribution Frame (MDF). GTE stated that the collocation charges are separate from the interim line sharing rates GTE offered in its proposal.

GTE stated that it is proposing to provide CLPs with line sharing using two basic network configurations; one where the CLP owns the splitter and the second where GTE owns the splitter.

GTE stated that it is proposing a recurring and nonrecurring rate for line sharing in its proposal. GTE stated that costs associated with service order processing, provisioning, and central office jumpers will be recovered through GTE's proposed nonrecurring charges. Under the situation where GTE owns the splitter, capital costs associated with the splitters, splitter bays, and cabling between the bays and the GTE MDF, GTE proposes that the costs be recovered through a monthly recurring charge. Further, GTE proposes that in situations where the CLP owns the splitter, there is no recurring charge for the splitter.

GTE stated that line conditioning charges will be considered on a case-by-case basis under its proposal. GTE further stated that it is in the process of determining a charge for trouble isolation, but in the interim, GTE would propose that the charge be considered on a case-by-case basis.

GTE stated that it is not proposing an interim charge to contribute toward the recovery of the local loop costs at this time.

GTE proposed rates however, filed the rates as confidential and proprietary.

MCI WORLDCOM: MCI WorldCom stated in its proposal that it joins the New Entrants' proposal for line sharing. MCI WorldCom, however, stated that it has an additional recommendation with regard to the New Entrants' proposal concerning rates for a splitter. MCI WorldCom proposed that if a CLP wishes to provide service for less than the total number of lines or ports that the splitter would otherwise accommodate, the CLP should have the ability to pay on a per-line or per-port basis. MCI WorldCom explained that if a 96-port splitter has a recurring rate of $51.89 per month, the per-line or per-port rate would be calculated by dividing 96 into that figure. MCI WorldCom stated that its recommendation is consistent with TELRIC principles and the obligations of the ILECs pursuant to the FCC's Line Sharing Order.

NEW ENTRANTS: The New Entrants maintained in their proposal that the FCC established guidelines in its Line Sharing Order to assist state commissions in applying the FCC's UNE pricing rules to line sharing. The New Entrants stated that the FCC concluded that there are five types of direct costs that an ILEC potentially might incur to provide access to line sharing: (1) loops; (2) Operations Support Systems (OSS); (3) cross connects; (4) splitter; and (5) line conditioning.

The New Entrants stated that no cost should be attributed to the loop facility over which line sharing will be provided. The New Entrants maintained that in view of the FCC's presumption that the ILECs' loop costs are fully recovered through their voice services, the Commission should attribute no cost to the loop facility over which line sharing will be provided.

The New Entrants argued that no cost should be attributed to OSS for line sharing. The New Entrants maintained that for the purposes of interim rates, no cost for OSS should be attributed to line sharing. The New Entrants stated that if, after the hearing on the cost studies to be filed for line sharing, the Commission determines that some cost should be attributed to OSS, a rate true-up will enable the ILECs to recover any difference between the interim rate and the permanent rate.

The New Entrants recommended that the rate for line sharing cross connects be the interim rates proposed by the ILECs in their collocation cost studies. The New Entrants stated that the DS0 cross-connect rate is the appropriate rate. The New Entrants maintained that to provide a CLP with access to the high frequency spectrum of the loop, the ILEC must cross connect the loop to the competitor's collocation space in the central office. The New Entrants stated that in the Line Sharing Order, the FCC concluded that the cost of cross connecting loops to competitors' collocation spaces should be the same as installing cross connects for the line sharing UNE. The New Entrants recommended that the interim rates for cross connects proposed by the ILECs in this docket be adopted as the interim rates for cross connects necessary for line sharing.

The New Entrants stated that their proposed interim recurring splitter rates are based on the cost of a Siecor brand splitter priced at $2,600. The New Entrants further stated that their proposed interim nonrecurring splitter rate is based on subject matter expert work times for installation of a 144-port splitter. The New Entrants applied these work times against BellSouth's labor rates previously approved in this docket.

The New Entrants explained that line conditioning refers to the process by which certain devices such as load coils, bridge tap, and repeaters are removed from a copper loop. The New Entrants stated that these devices have been added to improve voice transmission capability, but they impede the efficient transmission of data over the same loop. The New Entrants argued that the cost study submitted by BellSouth in the Intermedia/BellSouth arbitration docket (Docket No. P-55, Sub 1178), with certain adjustments, provides a reasonable basis from which to calculate interim line conditioning rates for all three ILECs. The New Entrants stated that neither GTE, nor Sprint, have filed any proposed rates in North Carolina for conditioning copper loops for use with all varieties of DSL service on any length loop.

The New Entrants proposed the following rates:

Recurring Rate for 96-Port Splitter	$51.89
Nonrecurring Rate for 96-Port Splitter	$376.81
Recurring Rate for 24-Port Splitter	$12.97
Nonrecurring Rate for 24-Port Splitter	$94.08
Recurring BellSouth Rate for Cross Connect	$0.10
Nonrecurring BellSouth Rate for Cross Connect	$2.96
Recurring Carolina Rate for Cross Connect	$0.51
Recurring Central Rate for Cross Connect	$0.55
Recurring GTE Rate for Cross Connect	$0.55
Nonrecurring Load Coil Removal for Loops Less Than 18 Kilofeet	$28.41
Nonrecurring Load Coil Removal for Loops Greater Than 18 Kilofeet	$31.06
Nonrecurring Bridge Tap Removal, Per Pair	$30.70
Repeater Removal for Loops Less Than 18 Kilofeet, Per Pair, Initial	$10.82
Repeater Removal for Loops Less Than 18 Kilofeet, Per Pair, Additional	$9.41
Repeater Removal for Loops Greater Than 18 Kilofeet, Per Pair, Initial	$16.25
Repeater Removal for Loops Greater Than 18 Kilofeet, Per Pair, Additional	$13.42

SPRINT: Sprint also noted that the FCC set forth guidelines that the states may use in pricing the higher frequencies of a loop as an UNE. Sprint explained that FCC guidelines were provided for the following rate elements: (1) local loop; (2) OSS; (3) cross connects; (4) splitter; and (5) line conditioning.

Sprint argued that there are not incremental loop costs created by ordering line sharing. Sprint stated that in its interstate xDSL retail offering, Sprint included no local loop costs in the retail price. Sprint stated that its proposed line sharing rates contain no allocated loop costs.

Sprint stated that since line sharing is a new product/service, Sprint will need to modify its existing OSS in order to implement line sharing for which costs will be incurred. Sprint maintained that it has reviewed its OSS systems and has found that modification will be required. Sprint estimated that $2,187,500 will be incurred to make the known modifications to its OSS to handle line sharing. Sprint argued that using projected demand provided by the various CLPs and a five-year recovery life, recovery of OSS modification costs equates to a monthly recurring rate of $0.76 for the line sharing interim rate.

Sprint further stated that the manual pre-qualification loop inquiry cost should be set in the interim at a nonrecurring cost of $26.74 and that the rate was developed based on Sprint's estimation of how long the necessary work will take.

Regarding cross connects, Sprint stated that they are required to connect the CLPs' xDSL equipment to the ILEC's facility in order for the CLPs to be able to provide xDSL service using a shared line. Sprint stated that the FCC determined that it would be reasonable that if the splitter were located within the ILEC's office, that the cost for a cross connect should be the same for both an entire loop and for the high frequency portion of a loop.

Sprint maintained that there should be no recurring or nonrecurring charge to the CLP for the splitter since Sprint has determined that the CLPs would purchase and install the splitter of their choice by either using an existing collocation space, or negotiating collocation space where needed.

Sprint stated that its loop conditioning methodology is predicated on TELRIC principles. Sprint explained that it has developed separate loop conditioning charges which reflect the operating and cost differences for both of Sprint's North Carolina-based operating entities (Carolina and Central).

Sprint proposed the following rates for Carolina and Central:

Rate Element	Carolina	Central
Recurring Rate for OSS	$0.76	$0.76
Nonrecurring Rate for OSS	$26.74	$26.74
Recurring Cross Connect & Jumpers	$51.39/ 100 pair	$54.79/ 100 pair
Nonrecurring Cross Connect & Jumpers	$22.88/ 3 Jumpers $29.74/ 4 Jumpers	$22.90/ 3 Jumpers $29.76/ 4 Jumpers
Nonrecurring Line Conditioning for Loops <18 Kilofeet	$6.11	$6.58
Loop Conditioning - Engineering Charge Per Loop	$19.87	$19.87
Loop Conditioning - Travel Charge Per Loop	$13.50	$13.50
Loop Conditioning - Removal of Load Coil for Loops >18,000 Feet - Underground	$398.49	$433.45
Loop Conditioning - Removal of Additional Load Coil at Same Time, Location, and Cable - Underground	$1.59	$1.61
Loop Conditioning - Removal of Load Coil for Loops >18,000 Feet - Aerial	$21.54	$26.23
Loop Conditioning - Removal of Additional Load Coil at Same Time, Location, and Cable - Aerial	$1.46	$1.56
Loop Conditioning - Removal of Load Coil for Loops >18,000 Feet - Buried	$21.54	$26.23

Rate Element	Carolina	Central
Loop Conditioning - Removal of Load Coil for Loops >18,000 Feet - Buried	$1.46	$1.56
Bridge Tap & Repeater Removal - Loop Conditioning - Engineering Charge	$19.87	$19.87
Bridge Tap & Repeater Removal - Loop Conditioning - Travel Charge	$13.50	$13.50
Loop Conditioning - Removal of Bridge Tap - Underground	$397.24	$432.16
Loop Conditioning - Removal of Bridge Tap at Same Time, Location, and Cable - Underground	$0.34	$0.33
Loop Conditioning - Removal of Bridge Tap - Aerial	$20.38	$24.97
Loop Conditioning - Removal of Bridge Tap at Same Time, Location, and Cable - Aerial	$0.30	$0.30
Loop Conditioning - Removal of Bridge Tap - Buried	$20.38	$24.97
Loop Conditioning - Removal of Bridge Tap at Same Time, Location, and Cable - Buried	$0.30	$0.30
Loop Conditioning - Removal of Repeater - Underground	$397.24	$432.16
Loop Conditioning - Removal of Repeater at Same Time, Location, and Cable - Underground	$0.34	$0.33
Loop Conditioning - Removal of Repeater - Aerial	$20.38	$24.97
Loop Conditioning - Removal of Repeater at Same Time, Location, and Cable - Aerial	$0.30	$0.30
Loop Conditioning - Removal of Repeater - Buried	$20.38	$24.97
Loop Conditioning - Removal of Repeater at Same Time, Location, and Cable - Buried	$0.30	$0.30

COMMENTS ON INTERIM LINE SHARING PROPOSALS

On April 28, 2000, comments on the proposals for interim line sharing rates were filed by ALLTEL Communications, Inc. (ALLTEL), BellSouth, Carolina, Central, and Sprint Communications Company L.P. (collectively Sprint), GTE, MCI WorldCom, the New Entrants[1], and the Public Staff.

[1] The New Entrants include Adelphia Business Solutions, BlueStar Networks, Inc., Covad Communications, Business Telecom, Inc., DSLnet, Inc., ICG Telecom Group, Inc., Intermedia Communications, Inc., KMC Telecom, Inc., MGC Communications, Inc., New Edge Networks, NorthPoint Communications, TriVergent Communications, and US LEC Inc. of North Carolina.

ALLTEL: ALLTEL filed comments in response to BellSouth's proposal for interim line sharing rates. ALLTEL stated in its comments that the owner of the voice grade line has a duty to notify the xDSL owner in advance about service terminations in order to minimize service interruptions to end users. ALLTEL argued that BellSouth's line sharing proposal does not state how or if it will notify the xDSL provider before the service termination. ALLTEL contended that owners of voice grade lines like BellSouth have an affirmative duty to provide prior notice to xDSL users before the UNE disconnection and that such advance notice is only logical and appropriate in order to minimize service interruptions to end users. ALLTEL also stated that such notice should be sufficient in time to allow the xDSL owners to make alternative service arrangements and to permit notice to the end users if necessary.

ALLTEL also stated in its comments that under BellSouth's line sharing proposal, BellSouth proposes to allow ordering of UNEs only on a manual basis. ALLTEL stated that industry participants including ALLTEL are striving to automate these processes and that in failing to allow for electronic ordering, BellSouth's proposal essentially constitutes a step backwards. ALLTEL recommended that BellSouth's charges for ordering UNEs be computed on a mechanized basis in order to encourage the advancement of automated ordering.

Finally, ALLTEL stated that BellSouth's line sharing proposal does not include line conditioning which suggests that additional charges will apply if it is required. ALLTEL argued that line conditioning should have been included in BellSouth's specific line sharing study assumptions. ALLTEL stated that it supports the methodology employed by the New Entrants in their line sharing proposal filed on April 14, 2000. ALLTEL pointed out that the New Entrants recognized the emphasis the FCC has placed on expediting deployment of xDSL-based advanced services and explained that the FCC found line conditioning to be among the types of direct costs that an ILEC should incur to provide access to line sharing. ALLTEL stated that it supports the contention that it is only appropriate that loop conditioning should have been included in BellSouth's specific study assumptions and that interim rates should be adopted subject to true-up following establishment of permanent rates.

BELLSOUTH: BellSouth asserted in its comments that subsequent to making its initial proposal filing, Covad Communications (Covad), one of the New Entrants in this proceeding, and itself reached a set of negotiated interim rates for line sharing. BellSouth stated that the Parties' proposed interim line sharing rates are subject to true-up once permanent rates are established for line sharing in each State. BellSouth recommended that the Commission adopt the following rates as negotiated between BellSouth and Covad as the interim line sharing rates in North Carolina:

Line Sharing Splitter, Per System 96-Line Capacity - Monthly Recurring	$100.00
Line Sharing Splitter, Per System 96-Line Capacity - Nonrecurring 1st	$300.00
Line Sharing Splitter, Per System 96-Line Capacity - Nonrecurring Add'l	$0.00
Line Sharing Splitter, Per System 96-Line Capacity - Nonrecurring Disconnect Only	N/A
Line Sharing Splitter, Per System 24-Line Capacity - Monthly Recurring	$25.00
Line Sharing Splitter, Per System 24-Line Capacity - Nonrecurring	$300.00

Line Sharing Splitter, Per System 24-Line Capacity - Nonrecurring Add'l	$0.00
Line Sharing Splitter, Per System 24-Line Capacity - Nonrecurring Disconnect Only	N/A
Loop Capacity, Line Activation - Per Occurrence - Monthly Recurring	$6.00
Loop Capacity, Line Activation - Per Occurrence - Nonrecurring 1st	$40.00
Loop Capacity, Line Activation - Per Occurrence - Nonrecurring Add'l	$22.00
Subsequent Activity - Per Occurrence - Nonrecurring - 1st	$30.00
Subsequent Activity - Per Occurrence - Nonrecurring - Add'l	$15.00

BellSouth contended that because of Covad's active involvement in line sharing issues in BellSouth's region and nationwide, the rates proposed reflect an acceptable resolution of interim rates that should be adopted for the CLP industry in North Carolina. BellSouth stated that some of the negotiated rates are even lower than the rates initially proposed by the New Entrants as interim rates.

BellSouth maintained that with respect to loop conditioning, BellSouth and Covad agreed to utilize whatever rates (whether interim or permanent) the respective state commissions established. Therefore, BellSouth proposed that the Commission adopt BellSouth's loop modification rate, filed with the Commission on February 9, 2000 in Docket No. P-55, Sub 1178 (Intermedia/BellSouth arbitration docket) as the interim rates for loop conditioning until such time as permanent rates are established. BellSouth stated that except for one input into the study, the New Entrants appear to agree that BellSouth's cost study provides a reasonable basis from which to calculate interim line conditioning rates for all three ILECs. BellSouth argued that the New Entrants' assumption that only 10 pairs from a 25-pair binder group will be modified at a time is not based on actual network experience, but is rather an obvious attempt by the New Entrants to lower the cost of loop modification by dividing the cost of loop modification by 25 instead of 10. BellSouth has assumed that 10 pairs from a 25-pair binder group will be conditioned at one time and that this assumption is based on BellSouth's experience with network architecture in provisioning both voice and data services. BellSouth argued that the most reasonable approach to loop modification would be to assume that each loop is modified on an individual basis but BellSouth has assumed that 10 pairs in a binder group could be converted at one time in an effort to be as efficient as possible. BellSouth recommended that the Commission adopt the interim line sharing rates negotiated with Covad as outlined previously and BellSouth's loop modification rate as the interim rate for the removal of load coils and bridge taps.

BellSouth asserted that although it has negotiated interim line sharing rates with Covad which the Commission should adopt as the interim rates, BellSouth's April 14, 2000 proposed rates should continue to serve as the appropriate basis for establishment of permanent line sharing rates.

BellSouth stated that it agrees with the New Entrants' assertion that no cost should be attributed to the loop facility over which line sharing will be provided, and, therefore, BellSouth's cost studies do not reflect costs attributed to the loop facility.

BellSouth further stated that the New Entrants' assertion that no cost should be attributed to OSS for line sharing since the additional cost will be *de minimis* is not true. BellSouth argued that the cost to BellSouth to modify its OSS to accommodate line sharing is well in excess of a *de minimis* amount. BellSouth stated that it has hired Telcordia to complete the necessary OSS modifications and that BellSouth's confidential cost studies do nothing more than reflect the proprietary amount Telcordia is charging BellSouth for the work, recovered over a five-year period.

BellSouth stated that the New Entrants' proposal that the Commission adopt the interim cross-connect rates proposed by the ILECs in the collocation docket as the interim rates for line sharing cross connects is not appropriate at this juncture. BellSouth stated that the Commission should adopt the Covad/BellSouth negotiated line sharing rates which do not reflect a separate charge for the cross connect as the interim rates. BellSouth further recommended that the Commission adopt the line activation charge supported by BellSouth's cost studies as the permanent rate. BellSouth stated that the line activation charge includes the labor costs associated with connecting the cross connect to the MDF and these labor costs are incurred both in line sharing situations in which BellSouth provides the splitter and those in which the CLP provides the splitter. Therefore, BellSouth maintained that its proposed cost recovery is appropriate in both circumstances. BellSouth further argued that the New Entrants' proposal regarding the collocation rates is only applicable when the CLP provides the splitter and places it in the CLP collocation space. BellSouth stated that now and until at least June 6, 2000, BellSouth is planning on providing the splitter in all cases and, therefore, the New Entrants' proposal is not applicable. BellSouth recommended that if the industry decides at some point after June 6, 2000 that it is appropriate for the CLP to provide the splitter, then the Commission should revisit the New Entrants' proposal.

Concerning splitters, BellSouth stated that the New Entrants based their proposed interim recurring splitter rates on the cost of a Siecor brand 144-port splitter priced at $2,600. BellSouth argued that the Commission should not consider this assumption without further documentation from the New Entrants since BellSouth's information shows that Siecor does not even manufacture a 144-port splitter. BellSouth also maintained that the New Entrants did not reflect any cost for cabling in their proposed splitter rate and BellSouth's proposed rate for splitters, on the other hand, includes costs for the shelf, plug-ins, and all necessary cabling. BellSouth argued that its splitter rate is more comprehensive and more credible and should be adopted by the Commission as a permanent rate.

Addressing MCI WorldCom's proposal that the CLPs have the ability to pay splitter costs on a per-line or per-port basis, BellSouth maintained that until June 6, 2000, BellSouth plans to provide the splitter in all cases. BellSouth stated that should the industry decide at some point after June 6, 2000 that it is appropriate for the CLP to provide the splitter, the Commission may then choose at that time to revisit MCI WorldCom's proposal.

BellSouth recommended that the Commission adopt BellSouth's cost studies as the basis for both interim and permanent rates for loop modification in North Carolina.

GTE: GTE stated in its comments that it would respond primarily to the interim proposals filed by the New Entrants. GTE argued that its interim proposal does not reflect an interim charge to contribute toward the recovery of local loop costs at this time based on the assumption that it will have the opportunity to recover all of its actual costs, including the total actual cost of the loop, in prices for services and in explicit universal service support. GTE commented that if this does not prove to be the case, then GTE reserves the right to alter its proposed prices for line sharing to address this under-recovery of costs.

GTE commented that the New Entrants' proposal that no OSS cost be attributed to line sharing is not consistent with the FCC's Line Sharing Order. However, GTE maintained, since the Company's costs for OSS modifications related to line sharing are still under development, no charge was proposed by GTE in its interim line sharing proposal. GTE maintained that OSS costs, and the development of OSS rates and charges, related to line sharing should be addressed when permanent line sharing rates are considered later in this docket.

Concerning cross connects, GTE stated that it agrees with the New Entrants that existing collocation cross connect charges should apply to the required connections between the CLP collocation area and GTE's MDF and these existing charges do not include the cost of jumper activity. GTE stated that upon receipt of a CLP line sharing request, GTE will incur the cost of removing the existing jumper (connecting the existing loop to the switch side of the MDF) and running two new jumpers if the CLP owns the splitter and three new jumpers if GTE owns the splitter. GTE stated that additional jumper run/removal activity is required upon disconnection of service. GTE maintained that the interim charges proposed by GTE for cross connects in its April 14, 2000 filing reflect the cost for jumpers as contained in its February 11, 2000 wholesale nonrecurring cost study filed and approved in this docket.

GTE maintained that the New Entrants' proposed line sharing rates for splitters are inappropriate for GTE for three primary reasons. First, GTE argued, the proposed rates are based on estimated costs for BellSouth, not GTE. Second, GTE maintained, the rates are based on a fully equipped 96-port splitter shelf. GTE stated that the third reason the New Entrants' proposed rates for splitters are not appropriate is that the New Entrants do not appear to include all relevant costs necessary for the provisioning of line sharing (i.e., cables and terminal blocks were excluded by the New Entrants).

GTE stated that the New Entrants' proposed interim nonrecurring rates for line conditioning are based on BellSouth's cost studies, with certain adjustments. GTE argued that as in the development of rates for splitters, none of the New Entrants' proposed rates are based on GTE's costs. Also, GTE maintained that the pricing assumption of the New Entrants that all pairs in a cable are conditioned, regardless of the number of conditioned lines requested by the CLP, essentially ensures that the ILEC will not recover its full cost. GTE stated that its practice is to condition those loops for which there has been a bona fide request for conditioning, and that to base the cost recovery on a different practice, i.e., conditioning all loops with the hope of eventually recovering the cost, virtually assures the under-recovery of its costs. GTE stated that it is in the process of developing its costs and proposed rates for line conditioning and, therefore, recommended in its April 14, 2000 line sharing proposal that charges for line conditioning be considered on a case-by-case basis. GTE recommended that until GTE's cost studies are complete and filed with the Commission on June 7, 2000, GTE's proposal for a case-by-case basis charge is the most equitable means of charging for line conditioning.

GTE concluded that its proposed interim line sharing rates are the most appropriate and that no other party has filed rates based on GTE's costs.

MCI WORLDCOM: MCI WorldCom stated in its comments that it concurs in the New Entrants' comments regarding line sharing. However, MCI WorldCom stated that it appears that BellSouth assumed an all copper loop and that DSLAMs may be collocated only in the central office. MCI WorldCom further noted that it appears that GTE also assumed that collocation will occur only at a central office. MCI WorldCom stated that BellSouth's and GTE's assumptions are too limiting under the FCC's Line Sharing Order, Collocation Order, UNE Remand Order, and other Orders. MCI WorldCom also noted that GTE is demanding that CLPs deal with GTE on an individual case basis (ICB) only and that this is inconsistent with TELRIC and, indeed, the very purpose of this docket.

NEW ENTRANTS: The New Entrants stated in their comments that both BellSouth and Sprint conceded in their proposals that no loop cost should be attributed to the high frequency spectrum UNE and that this position complies with the FCC's Line Sharing Order. The New Entrants stated that although GTE's proposal does not address loop costs, GTE does not reflect any loop cost to the proposed interim rate. The New Entrants argued that for this reason, the Commission should find and conclude that no loop costs should be attributed to the high-frequency spectrum UNE offered by any of the ILECs.

The New Entrants stated that the FCC's Line Sharing Order requires that CLPs have the option of purchasing a splitter from the ILEC or purchasing and deploying their own splitter. The New Entrants stated that while GTE's proposal recognized this fact, BellSouth and Sprint did not. The New Entrants recommended that the Commission require both options (i.e., the CLP purchasing the splitter from the ILEC and the CLP purchasing and deploying its own splitter) in its interim line sharing rates. The New Entrants maintained that their proposal for an ILEC purchased splitter is reasonable and should be adopted for the ILEC purchase option.

The New Entrants argued that there is no support for BellSouth's proposed "Line Sharing Splitter - Per Line Activation" charge. The New Entrants stated that BellSouth's proposal violates the FCC's pricing rules. The New Entrants maintained that it appears that this rate element is intended to recover both a $38 million investment in Telcordia Solution Software and another $35 million to implement the software. The New Entrants stated that the implementation cost is derived from the proposed monthly expense of $585,224 x 12 months x 5 years (the Commission approved OSS recovery period). The New Entrants argued that BellSouth would have the Commission authorize recovery of $73 million without any explanation. The New Entrants further maintained that BellSouth's proposed line activation rate also violates fundamental FCC pricing rules which require UNE rates be based on least-cost, most-efficient, forward-looking technology. The New Entrants stated that these pricing principles require that an ILEC's OSS costs be calculated based on the most-efficient, fully mechanized system available for all OSS functions and, in turn, these costs should be recovered in the rates for all UNEs and not just the line sharing UNE. The New Entrants recommended that BellSouth be permitted to recover through the line sharing rates it imposes upon CLPs only the incremental costs specific to modifying a fully functional, fully automated system to accommodate a single additional UNE. The New Entrants argued that BellSouth provided no evidence of whether the $73 million investment would also be used to support BellSouth's own retail shared-line DSL product or, if so, how much of the cost will be attributed to BellSouth. The New Entrants recognized that the Commission is only considering interim rates at this time, but maintained that the complete absence of support for this rate coupled with the enormous expense on which it is based require that the rate not be approved even on an interim basis.

The New Entrants maintained that BellSouth has ignored a fundamental ingredient for line sharing and that loop conditioning rates are essential for line sharing. The New Entrants stated that removing load coils, bridge taps, and repeaters, i.e. line conditioning, is necessary since these devices interfere with high-speed data transmission and are incompatible with digital subscriber line service. The New Entrants argued that the FCC specifically identified loop conditioning as one of the direct costs ILECs would incur in providing unbundled access to the line sharing UNE. The New Entrants stated that BellSouth apparently plans to use ICB pricing for line conditioning and that the Public Staff, the New Entrants, and others opposed ICB pricing for BellSouth's collocation charges last fall at the Commission-ordered meeting on permanent UNE rates. The New Entrants concluded that due to BellSouth's failure to propose loop conditioning rates, the Commission should adopt the New Entrants' proposed rates on an interim basis.

The New Entrants commented that BellSouth assumed a 35% fallout rate in its line sharing proposal. The New Entrants maintained that this rate does not comply with the 10% fallout rate ordered earlier in this docket by the Commission. The New Entrants argued that by ignoring the Commission's Order and more than tripling the fallout rate, BellSouth's nonrecurring charges for line sharing are inflated.

Concerning GTE's line sharing proposal, the New Entrants stated that GTE's proposed "GTE-owned splitter configuration" rate is overinflated in part due to GTE's unreasonable assumption that each line sharing arrangement will be provisioned individually (i.e., that no CLP will order more than one arrangement at a time). Further, the New Entrants argued that GTE's fill factor of 50% is not justified and that GTE's generic 10% engineering factor is excessive. The New Entrants also criticized GTE's ICB line conditioning rates and stated that they violate the FCC's pricing rules. The New Entrants concluded that the deficiencies in GTE's proposal are too substantial to be ignored and as an interim measure, the Commission should adopt the New Entrants' proposed rates.

Concerning Sprint, the New Entrants argued that Sprint has not provided any support for its jumper rates, that Sprint's short loop conditioning rates for loops less than 18,000 feet are reasonable and should be adopted as interim rates, and that Sprint's long loop conditioning rates for loops greater than 18,000 feet are unreasonable.

SPRINT: Sprint stated that there appears to be no differences among the Parties with respect to the issue of loop costs, and, therefore, Sprint assumes that the line sharing rates adopted by the Commission will contain no allocated loop costs.

Sprint further commented that it objects to the New Entrants' position that no interim OSS rates should be established. Sprint maintained that the FCC guidelines provide that OSS costs are recoverable, and that Sprint has prepared the necessary cost studies to confirm and support Sprint's proposed interim OSS rates which accurately reflect Sprint's incremental OSS costs of offering line sharing.

Sprint argued that it objects to the $17.90 disconnect charge in GTE's $54.35 Service Order Nonrecurring Charge since Sprint does not charge Nonrecurring Charges for disconnection and does not believe it is appropriate for any party to do so.

Concerning collocation, cross connects, and jumpers, Sprint objected to GTE's position of charging a Nonrecurring Charge for disconnect operations. Sprint stated that in the case of jumpers, the customer would either be leaving the network or going to another company and that if the customer were going to another company, imposing a disconnect charge could involve double recovery for work completed.

Sprint stated that as far as splitters, GTE should be required to provide costs for 96- and 24-line capacity splitters, and Sprint believes that the 50% fill factor used by GTE is arbitrarily low.

Sprint stated that it objects to several points raised in the proposal of BellSouth, GTE, and the New Entrants concerning line conditioning. Sprint argued that it strongly objects to GTE and BellSouth not providing costs for loop conditioning, and to BellSouth's statement that line sharing is not available on loops in excess of 18,000 feet. Sprint also stated that it objects to GTE's ICB approach to line conditioning and trouble isolation. Sprint argued that the FCC's UNE Remand Order addresses loop conditioning for purposes of providing xDSL capable UNE loops and that the same conditioning is required for line sharing. Sprint maintained that per the FCC, loop conditioning charges are just like other UNE charges and are to be TELRIC and approved by the State Commission. Sprint argued that such charges should not be, and cannot be case-by-case (under 18,000 feet), and GTE and BellSouth should be required to file interim loop conditioning charges consistent with the methodology set forth in Sprint's filing.

PUBLIC STAFF: The Public Staff stated that it has not completed its analysis of the cost support for the Parties' proposed interim rates for line sharing, however, based on its initial review, the rates filed by the ILECs do not appear to be unreasonable for implementation on an interim basis subject to true-up. The Public Staff pointed out that the New Entrants' proposed rates do not appear to distinguish between the ILECs, except for the proposed rates for line sharing cross connects. Also, the Public Staff argued that it does not appear reasonable to assign the same rate for line sharing to each of the ILECs as proposed by the New Entrants. The Public Staff stated that it believes that the line sharing rates proposed by the ILECs should be allowed to become effective as interim rates subject to further investigation and true-up in the Phase I proceeding as scheduled by the Commission.

SUBSEQUENT GTE FILING

On May 9, 2000, GTE filed a letter stating that subsequent to its April 14, 2000 line sharing proposal it filed with the Commission, GTE identified errors in the calculation of the hours used in determining the nonrecurring charges for service orders and jumper runs. GTE filed revised attachments with the proposed line sharing rates which reflect the corrections.

DISCUSSION AND CONCLUSIONS

In Paragraph 134 of the FCC's Line Sharing Order, the FCC stated that with its Order, it was establishing guidelines to assist the states in applying their UNE pricing rules to line sharing when states arbitrate modifications to interconnection agreements or otherwise adopt permanent prices for this new UNE. In Paragraph 138, the FCC concluded that there are five types of direct costs that an ILEC potentially could incur to provide access to line sharing: (1) loops; (2) OSS; (3) cross connects; (4) splitters; and (5) line conditioning.

LOOPS

All of the Parties submitting proposals for interim line sharing rates agreed that there should not be any costs associated with the cost of the local loop reflected in the interim line sharing rates. Therefore, the Commission concludes that it is appropriate to not reflect any cost of the local loop in the interim rates it establishes for line sharing.

COMMISSION CONCLUSIONS: The Commission concludes that it is appropriate to not reflect any cost of the local loop in the Commission-adopted, interim line sharing rates.

OSS

In its initial proposal, BellSouth stated that it had assumed that all of the processing for line sharing would be accomplished manually. However, in its comments, BellSouth stated that it reflected the cost that Telcordia would charge BellSouth to alter its OSS to provide line sharing and to recover the cost over five years. GTE stated that it did not reflect any costs for OSS in its line sharing proposal since it is in the process of developing the costs necessary to modify its OSS. Sprint stated that its proposed OSS component of its line sharing costs is based on cost studies reflecting $2,187,500 worth of cost to modify OSS recovered over a five-year period. The New Entrants proposed that the Commission not include any OSS costs in its interim line sharing rates.

The FCC stated in its Line Sharing Order, Paragraph 146, that

> ". . . incumbent LECs should recover in their line sharing charges those reasonable incremental costs of OSS modification that are caused by the obligation to provide line sharing as an unbundled network element."

Accordingly, the New Entrants' proposal that the Commission not include any OSS costs in interim line sharing rates does not appear appropriate if those costs can be reasonably approximated at this time.

Without any evidence to decide otherwise, the Commission believes that it is reasonable and appropriate, at this time, to reflect the costs to modify OSS as proposed by BellSouth and Sprint in their respective interim line sharing rates. Since GTE's costs of OSS modifications related to line sharing are still under development, GTE did not propose that any OSS costs be reflected in the interim line sharing rates. Therefore, in accordance with GTE's proposal, the Commission agrees that

GTE's interim line sharing rates should not reflect any OSS costs. However, the Commission concludes that if GTE includes OSS costs in its proposed permanent line sharing rates to be filed June 7, 2000, the Commission will allow GTE to reflect those OSS costs in its interim line sharing rates.

COMMISSION CONCLUSIONS: The Commission concludes that it is appropriate to reflect the costs to modify OSS as proposed by BellSouth and Sprint in each of their respective interim line sharing rates. Additionally, since GTE's costs of OSS modifications related to line sharing are still under development, GTE did not propose that any OSS costs be reflected in the interim line sharing rates. Therefore, in accordance with GTE's proposal, the Commission agrees that GTE's interim line sharing rates should not reflect any OSS costs. However, the Commission concludes that if GTE includes OSS costs in its proposed permanent line sharing rates to be filed June 7, 2000, the Commission will allow GTE to reflect those OSS costs in its interim line sharing rates.

CROSS CONNECTS

BellSouth stated in its comments that its new proposed line sharing rates which represent a negotiation between itself and Covad do not reflect a separate charge for cross connects; rather, the costs associated with the cross connects are incorporated as part of the line activation charge. GTE stated that it agrees with the New Entrants that existing collocation cross-connect charges should apply to the required connections between the CLP collocation area and GTE's MDF except that those existing charges do not include the cost of jumper activity. GTE stated that upon receipt of a CLP line sharing request, GTE will incur the cost of removing the existing jumper (connecting the existing loop to the switch side of the MDF) and running two new jumpers if the CLP owns the splitter and three new jumpers if GTE owns the splitter. GTE stated that additional jumper run/removal activity is required upon disconnection of service. GTE maintained that the interim charges proposed by GTE for cross connects in its April 14, 2000 filing reflect the cost for jumpers as contained in its February 11, 2000 wholesale nonrecurring cost study filed and approved in this docket. Sprint stated that its proposed rate for cross connects for line sharing is the same as it is for the entire loop. The New Entrants recommended that the interim rates proposed by the ILECs in their collocation cost studies filed at the beginning of 2000 be used for the interim cross-connect charge in line sharing.

The FCC's Line Sharing Order states at Paragraph 147 that,

> "Cross connections will be required to connect the competitive LECs' xDSL equipment to the incumbent LECs' facilities in order for the competitive LEC to be able to provide xDSL services via line sharing. The incumbent LECs currently provide cross connects to interconnect loops with the collocated facilities of competitive LECs installed in incumbent LEC offices, and the states are setting prices for the cross connects using the TELRIC methodology. We would expect that the costs of installing cross connects for xDSL services in general would be the same as for cross connecting loops to the competitive LECs' collocated facilities, particularly where the splitter is located within the incumbent LEC's MDF. Accordingly, we find it reasonable to establish a presumption that, where the splitter is located

> within the incumbent LECs' MDF, the cost for a cross connect for entire loops and for the high frequency portions of the loops should be the same."

The Commission believes that it is reasonable to adopt the New Entrants' proposal to reflect the cross-connect charges reflected in each ILEC's respective collocation cost study previously filed in this docket and as reflected by the New Entrants in their April 14, 2000 proposal as their respective interim cross-connect charge for line sharing.

COMMISSION CONCLUSIONS: The Commission concludes that it is appropriate to reflect the cost for cross connects as previously filed by each ILEC in its respective collocation cost study filed in this docket and as reflected by the New Entrants in their April 14, 2000 proposal as their specific interim cross-connect charge for line sharing.

SPLITTERS

BellSouth's proposed interim line sharing rates reflecting its agreement with Covad include costs for the shelf, plug-ins, and all necessary cabling in the cost for splitters. GTE's proposed rates for splitters reflects two situations: one where GTE owns the splitter and the other where the CLP owns the splitter. The New Entrants stated that their proposed rates for splitters are based on a $2,600 Siecor splitter. Sprint stated that it reflected no recurring or nonrecurring charges for splitters since CLPs would purchase and install the splitter of their choice. MCI WorldCom stated in its proposal that the Commission should have splitter prices based on a per-line or per-port basis.

The FCC stated in Paragraphs 148 and 149 of its Line Sharing Order that,

> "We concluded supra, that incumbent LECs must either provide splitters or allow competitive LECs to purchase comparable splitters as part of this new unbundled network element. The issue here is the price that incumbent LECs should be allowed to charge for such a device."
>
> "We conclude that, if the incumbent LEC purchases for a competitive LEC the same splitter that it uses itself for providing xDSL services, then a state may require that it only assess the competitive LEC the same amount that it itself pays for a delivered splitter...We further conclude that <u>a competitive LEC, at its option, should be allowed to purchase a splitter that complies with industry standards, and transfer it to the incumbent LEC</u>, in the event that the competitive LEC can complete the transaction more expeditiously or cost effectively than the incumbent LEC. A state may also allow the incumbent LEC to include in its rate structure a charge to recover the cost of installing the splitters." [emphasis added]

It appears based on the FCC's Line Sharing Order that any interim rates for line sharing should reflect two options as recognized by GTE: (1) the ILEC purchases and provides the CLP with the splitter; and (2) the CLP purchases a splitter that complies with industry standards, and transfers it to the ILEC. The Commission believes that Sprint and BellSouth should be required to file proposed additional interim line sharing rates to assume **both** of the options mentioned above. Further, the Commission concludes that it is appropriate to adopt the proposed splitter rates of GTE as GTE's interim rates.

COMMISSION CONCLUSIONS: The Commission finds it appropriate to require Sprint and BellSouth to file proposed interim line sharing rates which reflect **both** assumptions: (1) that the ILEC purchases the splitter and provides it to the CLP; and (2) that the CLP purchases a splitter that complies with industry standards, and transfers it to the ILEC. Further, the Commission finds it appropriate to adopt the proposed splitter rates of GTE as GTE's interim rates.

LINE CONDITIONING

The New Entrants recommended that the Commission adopt line conditioning rates based on the cost study BellSouth filed in the BellSouth/Intermedia Arbitration proceeding, with modification, for all three ILECs. BellSouth stated that its proposed interim rates which reflect its agreement with Covad reflect the rates outlined in the cost study it filed in the BellSouth/Intermedia Arbitration proceeding without the modifications recommended by the New Entrants. Sprint stated that its proposed line conditioning rates are based on TELRIC. GTE's proposed cost studies for permanent line sharing rates in the Phase I UNE docket which would reflect its proposed line conditioning costs are due June 7, 2000. GTE stated that it is in the process of developing its costs for line conditioning and, therefore, proposed an interim ICB rate for line conditioning.

The FCC stated in its Line Sharing Order at Paragraph 150,

> "Finally, we consider the appropriate price an incumbent LEC may charge a competitive LEC to perform line conditioning, where such conditioning is necessary for the provision of shared-line DSL service. In order to prevent incumbent LECs from charging an excessive price for line conditioning, states may require that the conditioning charges for shared lines not exceed the charges the incumbent LECs are permitted to recover for similar conditioning of stand-alone loops for xDSL services. Furthermore, if the incumbent LEC is providing, or has already provided, xDSL service over a particular shared loop, a competitive LEC should not be charged with any line conditioning costs if it wins that customer and seeks access to that shared loop for providing xDSL service."

The Commission notes that BellSouth and Sprint have proposed line conditioning rates, while GTE has reflected an ICB rate until June 7, 2000. The New Entrants' proposal is the same as that reflected by BellSouth, however, the New Entrants recommended a modification to that rate and recommended that the rate also be applied to GTE and Sprint. The Commission believes that it is appropriate to adopt BellSouth's proposed line conditioning rate as reflected in its negotiated rates with Covad and filed on April 28, 2000 and Sprint's proposed line conditioning rate as reflected in its April 14, 2000 filing. For GTE, the Commission concludes that it is appropriate to adopt the line conditioning rate to be provided in GTE's June 7, 2000 cost study filed in Phase I of the UNE docket as GTE's interim line conditioning rate for line sharing.

COMMISSION CONCLUSIONS: The Commission finds it appropriate to adopt BellSouth's proposed line conditioning rate as reflected in its negotiated rates with Covad and filed on April 28, 2000 and Sprint's proposed line conditioning rate as reflected in its April 14, 2000 filing. For GTE, the Commission find it appropriate to adopt the line conditioning rate to be provided in GTE's June 7, 2000 cost study as GTE's interim line conditioning rate for line sharing.

OTHER ISSUES AND CONCLUSIONS

ALLTEL has raised two other issues in its comments on the line sharing proposals which have not been previously addressed in this Order. First, ALLTEL stated that BellSouth's proposal apparently does not address notification to xDSL providers of the termination of service. ALLTEL further commented that BellSouth stated in its proposal that its proposed line sharing rates reflect the manual ordering of the line sharing UNE. The Commission concludes that it will not address these issues in this instant case of setting interim line sharing rates, but will address the issues in the context of the Phase I proceedings scheduled in this docket.

One other issue was raised by MCI WorldCom that the Commission has not previously addressed. MCI WorldCom proposed that the Commission adopt interim rates that would allow the CLP to have the ability to pay for a splitter on a per-line or per-port basis. The Commission concludes that it will not address this issue in this instant case of setting interim line sharing rates, but will address the issue in the context of the Phase I proceedings scheduled in this docket.

ADDITIONAL COMMISSION CONCLUSIONS

The Commission notes that this matter only concerns setting interim line sharing rates and the Commission's March 30, 2000 Order already has stated that these interim line sharing rates will be subject to true-up after the Commission establishes permanent rates in Phase I of the UNE docket. However, the Commission believes that it is appropriate to attempt to set interim line sharing rates that are as close as possible, with the information it now has, to the ultimate permanent rates. Further, the Commission notes that proposed orders and briefs in the Phase I proceeding are not due until October 30, 2000 which implies that the Commission-adopted interim rates for line sharing may be in place for many months. Therefore, the Commission finds it appropriate to adopt the Commission conclusions outlined hereinabove for each of the five types of costs that may be reflected in line sharing rates. Further, the Commission finds it appropriate to require the ILECs to refile their proposed interim line sharing rates by no later than June 14, 2000 incorporating the conclusions of the Commission as set forth in this Order. Additionally, the Commission reiterates that these are only interim line sharing rates that will be subject to true-up when final rates are adopted by further order of the Commission.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth, Carolina/Central, and GTE shall refile interim line sharing rates on June 14, 2000 which reflect the conclusions outlined in this Order.

2. That the rates adopted herein are considered interim line sharing rates that will be subject to true-up when final rates are adopted by further order of the Commission.

ISSUED BY ORDER OF THE COMMISSION.
This the 1st day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

Commissioner Judy Hunt did not participate in this decision.

bc053000.01

DOCKET NO. P-100, SUB 133f

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter	)	ORDER REQUIRING
Lifeline and Link-Up Services Pursuant to	)	LIFELINE/LINK-UP PARTICIPATION
Section 254 of the Telecommunications Act of	)	REPORTS AND REQUESTING
1996	)	SPECIFIC RECOMMENDATIONS
	)	FROM TASK FORCE

BY THE COMMISSION: On March 27, 2000, the Attorney General, on his own behalf and on behalf of the parties participating in the Lifeline/Link-Up Task Force (Task Force), submitted a Report to the Commission pursuant to the Commission's July 29, 1999 Order Expanding Eligibility Criteria to Include Medicaid, LIHEAP, and Federal Housing Assistance. In that Order, the Commission directed the Task Force to continue to meet in order to formulate strategies to increase participation in the Lifeline/Link-Up programs.

The Task Force reported that, while there have been noticeable improvements in the participation rates in the Lifeline/Link-Up programs, portions of North Carolina's low-income population are still not enrolled in the program, indicating that a number of citizens remain uninformed of eligibility standards. The Task Force reported that it had met with Medicaid representatives, LIHEAP representatives, and federal public housing representatives. These representatives are now attending Task Force meetings and participating in them. The Task Force identified several methods for increasing public awareness--for example, a direct mailing from the Division of Medical Assistance (which was done on March 1, 2000), the printing of Lifeline/Link-Up brochures (done with contributions from certain Task Force members), press releases, public service announcements, posters, additional venues for the distribution of brochures, and partnership with police associations.

The Task Force had the following recommendations--that it continue to meet in order to monitor implementation of the Lifeline/Link-Up programs and explore ways to better inform North Carolina citizens of its existence; that the Commission require all regulated local service providers to file a report with the Commission every six months regarding the number of their subscribers receiving Lifeline and Link-Up discounts; and that the Commission, in conjunction with the Task Force, "explore possible ways to provide the task force with a small, predictable amount of money in which to spend on publications and other items designed to increase awareness of the Lifeline/Link-Up programs." With respect to this last recommendation, the Task Force suggested "seeking authority to ear-mark a small portion of the proceeds of the regulatory fee (or other fees received by the Commission) for such purpose or through other means."

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that the first two recommendations of the Task Force should be adopted--i.e, that the Task Force should be continued and that the local service providers (both local exchange companies and competing local providers) should be required to file reports every six months setting out the numbers of their Lifeline and Link-Up customers.

With respect to the third recommendation, the Commission is more equivocal. The Commission recognizes the good work that the Task Force has done and commends those who have made contributions for outreach efforts. The Commission understands the desire for a predictable revenue stream to promote outreach efforts. However, the Commission is skeptical that it can on its own motion divert portions of the Regulatory Fees or other fees to support this project. G.S. 62-302 states in pertinent part: "The fees collected shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public." In our opinion, diverting funds to this purpose, however worthy, does not fall within the authorized purview of this statute.

This is not to say that funds or their practical equivalent cannot be found through other means. First, the Task Force needs to have a particular notion of the outreach it wishes to perform and what the costs would be. Second, it needs to state with more particularity how the outreach should be implemented. For example, the Commission can order regulated telephone companies to provide for bill inserts on a periodic basis or to provide other forms of public notice through various media; but the Commission has no authority over other entities such as social service or police departments. Other options include seeking an appropriation from the General Assembly or providing for more regularized voluntary contributions from Task Force members. Before the Commission can take any action, it will need to have both firm and realistic recommendations from the Task Force.

IT IS, THEREFORE, ORDERED as follows:

1. That the Lifeline/Link-Up Task Force shall continue in existence. The Task Force shall continue to consider strategies for greater outreach and shall, as soon as practicable, present specific recommendations to the Commission which are within the Commission's authority to Order.

2. That all local exchange companies and competing local providers offering Lifeline and/or Link-Up programs to their subscribers shall file reports with the Commission on June 30th and December 31st of each year (beginning with June 30, 2000) stating the number of their subscribers participating in each of the said programs.

ISSUED BY ORDER OF THE COMMISSION.
This the 11th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

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DOCKET NO. P-100, SUB 137

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	ORDER FURTHER
Area Code Relief for North Carolina's 704/910/919	)	REVISING
Numbering Plan Areas	)	NUMBER UTILIZATION
	)	REPORTING
	)	REQUIREMENTS

BY THE CHAIR: On August 20, 1997, the Commission issued an Order addressing area code relief for the North Carolina 704/910/919 area codes. The Order required that an Industry Task Force on number conservation be convened, and that the Task Force file quarterly reports with the Commission which include number utilization information. On March 2, 1999, the Commission issued another Order in this docket that requested that all carriers that have NXX codes in North Carolina complete and file quarterly utilization information in a specified format. The format was shown in an Attachment to the Order. The Commission directed the Task Force to attempt to obtain number utilization information from all carriers for filing with the Commission and to file reports with the Commission, as necessary, of carriers that do not provide such number utilization data. The Chair notes that such reports have not been filed. Finally, in the March 2 Order, the Commission noted that number utilization information is necessary for the Commission to determine the fill levels of the NXX codes in North Carolina.

On November 4, 1999, the Chair issued another Order in this docket finding that there was good cause to further revise the number utilization data filing requirements so that carriers file the data in more detail. Specifically, the Commission required that NXX code holders in North Carolina continue to file utilization data on a quarterly basis, but that they break the information down further, by rate center and by thousands-blocks. The Chair noted that this more detailed information would help the Commission analyze the potential benefits of number conservation measures, such as number pooling, as they become available. Further, it will assist the Commission in determining where such measures may be most helpful in slowing NXX code exhaust. Carriers were requested to file the information in a specific format shown in an Attachment to the Order, beginning with the fourth quarter of 1999.

In this Order, the Chair addresses the number utilization reporting requirements again. The Commission's continuing struggle with the area code exhaust problems in North Carolina is a learning process. As the Commission gains more experience in these issues, it will refine the utilization reporting requirements as it sees fit in order to, where possible, make the information flow more manageable for the Commission and to reduce the burden on North Carolina service providers.

The Chair recognizes that an Order is expected in the relatively near future in the Federal Communications Commission's (FCC's) ongoing rulemaking proceeding on number optimization, CC Docket No. 99-200. Issues surrounding reporting of utilization and forecast data by carriers are raised in that docket and an extensive record on those issues has been accumulated. The Commission (along with many other state commissions) has taken the position that it should have access to utilization and forecast data that is reported and compiled at the national level. The Commission may revisit its local number utilization reporting requirements if, when the national reporting scheme is in place, it is apparent that the Commission will have access to all the data at the national level that it needs to make informed and timely decisions on area code relief and number conservation. Again, the Chair recognizes the burden associated with compiling and reporting this data, and wants to avoid duplication of effort if at all possible. However, it must be ensured that the Commission has access to the data it needs to make the decisions it is charged with making.

Additional Changes to the Reporting Requirements. The more specific utilization data received at the end of 1999 is helpful, and, for those carriers that actually report their utilization data, it gives the Commission a good picture of the actual number usage in given rate centers and area codes. A few changes are necessary to make the information more readily accessible and meaningful. First, there is a minor change to the reporting format to reflect the total numbers utilized. A slightly revised format for reporting the utilization data is shown in Attachment A to this Order. Second, carriers will be required to file, with the more specific utilization data, a one-page executive summary of the data showing each area code, the number of NXX codes the carrier has in that area code, the total numbers utilized, and the overall utilization percentage. A sample executive summary is shown in Attachment B to this Order.

The Chair recognizes that to gather this data and put it in the required format is a significant task in terms of time and staff resources. For that reason, the Chair is reducing the number of times per year that carriers are required to submit this information. Instead of filing quarterly number utilization reports, carriers will be required to file reports twice yearly, or every six months. The updated data will be due on June 30, 2000 followed by a further report on December 31, 2000. This change should reduce the burden on carriers while still giving the Commission sufficient data for its purposes of monitoring and analyzing the number utilization situation in North Carolina area codes.

There is a question regarding the reporting of utilization information for blocks that are held by resellers. It appears that some local exchange carriers (LECs) may be reporting entire thousands-blocks as utilized when, in fact, the block or a subset of the block are actually in the possession of a reseller. In other cases, it appears that the LEC might be reporting zero utilization in a block that is held by a reseller. We recognize that, when a block is held by a reseller, the LEC will not have any idea of the precise utilization within the block that it has given or sold to a reseller. In fact, the reseller holds the block and knows the actual utilization of the block. However, it is misleading when a block of numbers is reported as 100% "utilized" by the LEC or is reported with zero utilization when, in fact, the a reseller holds the block and is using some portion of it. For that reason, the Chair asks that, when reporting their utilization data, LECs identify in some manner those blocks of numbers which are being used by resellers. For the sake of uniformity, the Chair requests that no utilization data be reported for the block by the LEC but that the LEC make a simple notation in its utilization report that the block is held by a reseller. The Chair expects the reseller to provide actual utilization data on all numbers it has available to it, including those provided by a LEC.

Participation In Submission of Utilization Data. The Chair recognizes and appreciates the fact that some carriers have diligently supplied their utilization data on time and in the required format. There are, however, numerous certified local service providers that are simply not providing the utilization data. In December 1999, the Commission received utilization data from approximately 17 carriers.[1] There are approximately 150 certified competing local providers in North Carolina and 16 LECs. That rate of response is unacceptable. The Commission needs this information to fully understand the NXX code exhaust situation in North Carolina. It is only with such information that the Commission can make informed and timely decisions on area code relief and number conservation measures that are in the public interest and the interest of the telecommunications industry in North Carolina.

N.C. General Statute 62-36 provided, in pertinent part, as follows:

> "The Commission may require any public utility to file...special reports concerning any matter about which the Commission is authorized to inquire or to keep informed, or which it is required to enforce...The Commission may issue an order, without notice or hearing, canceling or suspending any certificate of convenience and necessity or any certificate of authority 30 days after the date of service of the order for failing to file the required...report at the time it was due. In the event the report is filed during the 30-day period, the order of cancellation or suspension shall be null and void."

The utilization reports at issue fall into the category of "special reports" and failure to file them can result in the penalties allowed under G.S. 62-36. Again, the Chair recognizes the effort that must be undertaken to gather this data, and for that reason is reducing the number of times per year that the data must be filed. The service providers, however, must do their part as well to ensure that the Commission has the data that it needs.

Notification of Code Requests to the North Carolina Utilities Commission. In an effort to better monitor the number exhaust situation in North Carolina area codes, the Chair is requiring carriers that are subject to the Commission's jurisdiction to notify the Commission when they request NXX codes from the North American Numbering Plan Administrator (NANPA). Carriers that are not subject to the Commission's jurisdiction are requested and strongly encouraged to do so. Carriers

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[1] The carriers from which we received number utilization data in December 1999 include: Adelphia Business Solutions of North Carolina, ALLTEL, AT&T Communications, BellSouth, BellSouth Mobility DCS, Concord Telephone Company, GTE Network Services South, GTE Wireless, Intermedia Communications, ITC Deltacom, Intetech, L.C., MCI WorldCom, North State Telephone, Teligent, Time Warner Telecom, US LEC, and Wilkes Telephone Membership Corporation.

shall notify the Commission by copying the Commission Staff on any written or electronic correspondence with the NANPA regarding code requests. The appropriate Commission Staff e-mail addresses are: duffy@ncucmail.commerce.state.nc.us and szczech@ncucmail.commerce.state.nc.us.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 28th day of February, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg022500.01

Attachment A

NUMBER UTILIZATION REPORT

Company Name:________________
For the Quarter Ended:______________

NPA	NXX	Rate Center	Date NXX Opened
919	715	ABC	XX/XX/XX

Total Numbers Available: 0
Total Numbers Utilized: 10,000
Total Percent Utilization: 100%

Block	Numbers Utilized	Numbers Available	% Utilization
0000-0999	1,000	0	100%
1000-1999	1,000	0	100%
2000-2999	1,000	0	100%
3000-3999	1,000	0	100%
4000-4999	1,000	0	100%
5000-5999	1,000	0	100%
6000-6999	1,000	0	100%
7000-7999	1,000	0	100%
8000-8999	1,000	0	100%
9000-9999	1,000	0	100%

Attachment B

Number Utilization Executive Summary

Company Name: ______________________________

For the Period Ended: _________________________

NPA	Number of NXX Codes	Total Utilized Numbers	Overall Utilization (%)
252	X	Y	(Y/(x*10000))
336			
704			
828			
910			
919			

For questions on the number utilization data, please contact [NAME] at [PHONE NUMBER WITH AREA CODE].

DOCKET NO. P-100, SUB 137
DOCKET NO. P-100, SUB 137b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Area Code Relief for North Carolina's 704/910/919 Numbering Plan Areas In the Matter of Area Code Relief for North Carolina's 919 Numbering Plan Area	)	ORDER ADDRESSING NUMBER OPTIMIZATION MEASURES ORDERED BY THE FEDERAL COMMUNICATIONS COMMISSION AND SEEKING COMMENT ON INDUSTRY RECOMMENDATION FOR RELIEF OF AREA CODE 919

I. Introduction

The problem of rapid exhaust of area codes is one that continues to challenge North Carolina and many other states throughout the country. With the advent of competition in the local exchange market and the increase in the ways numbering resources can be used in new services and technologies, area code exhaust is becoming more and more frequent, with resulting inconvenience and expense for consumers. State and federal regulators, as well as the telecommunications industry, have been working on addressing this extremely complex problem for several years. Efforts have focused both on developing methods of allocating numbers more efficiently and on developing methods of increasing carriers' accountability for the numbering resources they obtain, thus imposing more discipline into the number allocation system.

On March 31, 2000, the Federal Communications Commission released a Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 99-200, *In the Matter of Numbering Resource Optimization* (FCC Order). In the FCC Order, discussed further below, the FCC established a framework for thousands-block number pooling, adopted more stringent and mandatory requirements for carriers reporting number utilization and forecast data, and adopted other "administrative measures" designed to promote more efficient usage of the numbering resource by carriers.

The FCC Order was published in the Federal Register on June 16, 2000, and will thus be fully effective on July 17, 2000. However, there are still many implementation details to be worked out between the FCC, the state commissions, the North American Numbering Plan Administration (NANPA), and the telecommunications industry. The Commission recognizes that it will take some time for certain procedures and mechanized processes to be developed and implemented for all of the requirements in the FCC Order to be carried out. Nevertheless, by way of this Order the Commission intends to make clear that it has an expectation that North Carolina carriers will comply with the FCC Order to the fullest extent possible, even in advance of some of the necessary implementation work being completed. North Carolina citizens should not have to endure the inconvenience, burden, and expense associated with area code relief when there are measures in place that will allow carriers to conserve numbering resources and use them more efficiently. The FCC Order establishes a framework, and more details will become clear as time goes on. However, it is imperative that North Carolina carriers work together now and accept the responsibility of averting the need for area code relief.

The FCC Order should be read in its entirety, and North Carolina carriers are expected to comply with every requirement therein. Below is a discussion of some particular sections of the FCC Order, and the application of those sections to North Carolina carriers in the near term. Again, to avoid duplication, the discussion below only addresses particular points, and does not include a great deal of the detail that is in the FCC Order. Carriers, of course, are expected to be responsible for the entire FCC Order.

II. Number Utilization Reporting Requirements

The FCC established uniformly defined categories of number use in order to enable regular monitoring of how individual carriers are using their numbering resources. The FCC established uniform definitions for six primary categories of number use, which will be employed in new mandatory monitoring and reporting requirements. The six primary categories of number use are: assigned, intermediate, reserved, aging, administrative, and available. The aggregate of all numbers reported should equal the total of numbers given to a service provider.

The FCC concluded that monitoring individual carriers' use of numbering resources is necessary to ensure that numbering resources are efficiently used and that the NANP is not prematurely exhausted. It concluded that all carriers that receive numbering resources should report forecast and utilization data for such numbers in their inventories to the NANPA. The NANPA shall serve as the point of contact for collection of forecast and utilization data. It is to examine each data submission for inconsistencies or anomalies. If any are found, the NANPA shall inform the submitting carrier of its findings, after which the carrier shall have five days to explain the inconsistencies or anomalies, or to resubmit the data. If, after discussions with a carrier, the NANPA preliminarily concludes that the carrier's data are insufficient, then the NANPA shall report that preliminary conclusion to the state commission in the state where the carrier is providing service, and to the FCC's Common Carrier Bureau. The FCC delegated states the authority to make a determination on the validity of the data and to instruct the carrier on how any deficiencies should be remedied. The NANPA shall assign no additional resources to that carrier until the appropriate state commission has resolved all questions regarding the inconsistency or anomaly.

Regarding forecasts, carriers were required to provide year-by-year, five-year projections of their resource needs. They were required to separate initial codes from growth codes in their forecasts. Regarding utilization, carriers were required to report five categories of numbers: assigned, intermediate, reserved, aging, and administrative. The FCC also adopted specific record-keeping requirements for audit purposes. It did not set forth auditing requirements, but anticipates doing so in a subsequent order. Records should be maintained for a period of not less than five years, but they do not have to be reported to the NANPA at this time.

The basic frequency of reporting shall be semi-annually. Each carrier shall submit to the NANPA forecast and utilization data on or before February 1, for the period ending on December 31, and on or before August 1, for the period ending on June 30 of each year. All carriers are to file their first report no later than August 1, 2000.

Regarding the geographic scope of reporting, the FCC concluded that reporting data at the NPA level is sufficient for mandatory semi-annual reporting of historical utilization data. For forecast data reporting, the FCC required non-pooling carriers to report their forecast data at the NPA level and pooling carriers to report their forecast data at the rate center level.

Regarding reporting utilization data at the NXX level or the thousands-block level, the FCC concluded that rural telephone companies in non-LNP areas may report their utilization data at the NXX level. All other carriers must report their utilization data at the thousands-block level. All carriers should use electronic means to track their use of numbering resources. For forecast data, the FCC required that carriers develop their forecasts of numbering resource needs based on whether the forecast is for resources in a pooling or non-pooling NPA and whether they will be pooling. In pooling areas, forecast data shall be reported at the thousands-block per rate center level for pooling carriers and at the NXX level per rate center for non-pooling carriers. In non-pooling areas, forecast data shall be reported at the NXX per NPA level because carriers will receive their resources at this level.

The FCC concluded that the state commissions have legitimate reasons for obtaining disaggregated, carrier-specific data, and granted all states access to the semi-annual reported data, subject to appropriate confidentiality protections. The FCC stated that, in granting states access to the reports, it is eliminating the need for states to require carriers to report utilization and forecast data. Thus, the FCC is superseding the authority it has specifically delegated to some states to require such reporting. *However, the FCC did not supplant independent state authority exercised pursuant to state law unrelated to number administration.* It encouraged state commissions to rely on the FCC's adopted reporting requirements. State commissions were also granted access to other information such as carriers' applications for initial or growth numbering resources, provided they keep such information confidential. State commissions must continue to permit the NANPA to process requests for numbering resources in a timely fashion after receipt of such information.

The FCC ordered NANPA to withhold numbering resources from any U.S. carrier that fails to provide its utilization and forecast information as mandated until such information has been provided.

This Commission has been collecting number utilization data from North Carolina carriers for several years. It has not been delegated authority from the FCC to do so, but has relied on state statutes, including N.C. General Statute 62-36, which provides, in pertinent part, as follows:

> "The Commission may require any public utility to file...special reports concerning any matter about which the Commission is authorized to inquire or to keep informed, or which it is required to enforce...The Commission may issue an order, without notice or hearing, canceling or suspending any certificate of convenience and necessity or any certificate of authority 30 days after the date of service of the order for failing to file the required...report

at the time it was due. In the event the report is filed during the 30-day period, the order of cancellation or suspension shall be null and void."

The next North Carolina-specific utilization reports are due on June 30, 2000. The Commission fully recognizes the proximity in time of those reports to the FCC-required reports on August 1, 2000, and we are eager to avoid duplication of effort and redundant reporting mechanisms. However, the current reality is that it appears that the necessary collection procedures and mechanized data collection means will not be in place by August 1, 2000. The Commission is aware of current discussions between the NANPA and the FCC regarding: the reporting format, what a mechanized system will look like, and other issues surrounding the new forecast and utilization reporting requirements. At this time it is very unclear what will be collected on August 1, 2000. It may be more than what was collected under the old Central Office Code Utilization Study (COCUS), but it seems unlikely that it will be all that is envisioned in the FCC Order. For that reason, and for the time being, we are going to continue to collect the utilization reports that we have been collecting. Once there is a clear process in place for collecting the data in the new national format, and for turning over the data to state commissions in a format that is useful, the Commission will give serious consideration to suspending our state-specific number utilization reporting requirements.

The Commission would like to reiterate the importance of full compliance with the number utilization reporting requirements. The Commission needs this information to get a clear picture of what is happening in North Carolina area codes and make decisions pertaining to area code relief and number conservation. Understanding what information is most helpful to the Commission has been an ongoing process, and the reporting format has been changed as the Commission's knowledge and comprehension of these issues have evolved. The current reporting format was included in a February 28, 2000 Order in Docket No. P-100 Sub 137, and it is the Commission's firm intention to pursue sanctions against certificated carriers who fail to report. We note that we have not received a report since December 31, 1999, because part of our revisions to the reporting requirements involved going from quarterly reporting to semi-annually reporting, and we thus eliminated the March 2000 filing.

III. NXX Code Reclamation

The FCC granted authority to state commissions to investigate and determine whether code holders have "activated" NXX codes assigned to them within specified time frames. State commissions may request proof from all code holders that NXX codes have been activated and assignment of the numbers has commenced. The FCC directed the NANPA to abide by the state commission's determination to reclaim an NXX code if the state commission is satisfied that the code holder has not activated the code within the time specified in the Order. Similarly, the same authority was given to state commissions to direct the pooling administrator in state pooling trials, and the national pooling administrator once national thousands-block number pooling has been established, to reclaim unactivated or unused thousands-blocks. State commissions do not have to follow the reclamation procedures set forth in the CO Code Assignment Guidelines relating to referring the issue to Industry Numbering Committee (INC), as long as the state commission accords the code holder an opportunity to explain the circumstances causing the delay in activating NXX codes.

The definition of placing an NXX code "in service" was clarified to mean not just activation of the code through transmission of the local routing information to the Local Exchange Routing Guide (LERG), but also that the carrier has begun to activate and assign to end users numbers within the NXX code. The FCC required the initiation of reclamation action by NANPA within 60 days of expiration of the assignee's applicable activation deadline, instead of the current 18-month timeframe in the CO Code Assignment Guidelines. These changes to the industry guidelines were all adopted as FCC rules.

The Commission is anxious to begin using this authority to determine if there are unused NXX codes that could be returned to the NANPA and, if so, where those codes are. It appears, at least in some places, that carriers obtain numbering resources almost as a "safety net" and may go a long time without actually assigning numbers to end users. Upon the effective date of the FCC Order, we require that all North Carolina carriers return to NANPA any NXX codes that are "in service" according to the old definition (local routing information published in the LERG) but not according to the new definition (numbers assigned to end users and activated). If there are extenuating circumstances that have led to certain codes not being "activated" according to the new definition, carriers are invited to explain those circumstances to the Commission in writing, and the Commission will determine whether code reclamation is appropriate or inappropriate at that time.

Going forward, we are working with NANPA to develop a process under which the Commission will receive notice of all NXX codes that NANPA has assigned in North Carolina but for which it has not received appropriate activation documentation (i.e., the "Part 4" form). It is our understanding that, currently, NANPA populates EXCEL logs with code assignment information, effective dates, and dates by which carriers are to return the Part 4 form to NANPA. At six months an automatic review program scans the EXCEL logs for all Part 4 forms that are due but have not been received. Then, NANPA sends a first notice via facsimile to the service provider who has not supplied NANPA with a Part 4 or a request for an extension. The service provider has 14 calendar days to respond to NANPA. If no response is received, a second notice is sent via certified mail. The service provider has 30 calendar days to respond to NANPA. NANPA ultimately compiles a list of service providers with outstanding Part 4 forms and submits it to the next scheduled INC meeting for resolution.

Once the FCC Order is effective, we expect NANPA to provide the list of service providers with outstanding Part 4 forms to the Commission, rather than to the INC. The Commission will contact the appropriate carriers as quickly as possible, thus giving them to opportunity to explain why the Part 4 form or forms have not been returned. The Commission will return the list to NANPA with direction to proceed with reclamation for those codes that the Commission determines should be reclaimed. The Commission will notify NANPA if it has determined that an additional extension is appropriate for particular codes. The Commission will work with NANPA to determine the appropriate length of time in which the Commission needs to take action.

All carriers are encouraged to voluntarily return any and all NXX codes that they can return at the present time. If the codes are not being used, they should be returned. The numbering resource shortage is a very real problem in North Carolina, and carriers should be taking whatever steps they can to extend the lives of all North Carolina area codes.

IV. Sequential Numbering Assignment

The FCC adopted a requirement mandating that carriers first assign all available telephone numbers within an opened thousands-block before opening another thousands-block, unless the available numbers in the opened thousands block are not sufficient to meet a customer request. This requirement applies to a carrier's existing numbering resources as well as any new numbering resources it obtains in the future. The FCC stated that the implementation of this requirement to manage thousands-blocks to maximize the availability of clean or lightly contaminated thousands-blocks will increase the efficacy of pooling. Under this requirement, a carrier that opens a clean block before utilizing in its entirety a previously-opened thousands-block should be prepared to demonstrate to the state commission: (1) a genuine request from a customer detailing the specific need for telephone numbers; and (2) the inability on the part of the carrier to meet the specific customer request for telephone numbers from the surplus of numbers within the carrier's currently activated thousands-block. The FCC stated that this requirement should improve carrier efficiency in utilizing numbering resources, while maintaining carrier flexibility in meeting customer demand.

It is unclear in the Order how the sequential numbering requirement is to be enforced by state commissions. There is no process put in place for the state commissions to be notified if a carrier violates the requirements, and there is no way that the state commission would be able to find out in a timely fashion, because by the time an audit or the semi-annual utilization reports uncovered a violation, it could be long after the fact. It appears that, at least initially, there will be a time for which there is no immediate "check" on carriers' compliance.

Nevertheless, the Commission is again reiterating its expectation that North Carolina carriers will immediately begin complying with the sequential numbering assignment requirement when the FCC Order is effective. The Commission agrees with the FCC that the requirement will enhance efficiency in the use of numbering resources, and will prepare carriers for the coming environment on thousands-block number pooling by preserving as many "clean" or minimally contaminated thousands-blocks as possible. The Commission does not yet have delegated authority from the FCC to order number pooling. It is actively pursuing that authority, and sequential numbering assignment should help North Carolina carriers be more prepared for pooling implementation if and when the Commission receives delegated authority. Even if the Commission is unsuccessful in its quest for delegated authority to do number pooling, the national rollout for pooling will be underway as soon as the competitive bidding process for a national pooling administrator is concluded, and will hopefully begin in 2001. Thus, carrier preparation for this national rollout is advised and appropriate.

V. Notification of NXX Code Requests

In the February 28 Order in Docket No. P-100 Sub 137, the we required carriers to copy the Commission on NXX code request that they make to the NANPA. A few, but by no means all, carriers have complied. In the FCC Order, the FCC specifically stated that it would not limit a state commission's access to applications for initial or growth numbering resources. It is the Commission's understanding that NANPA is working on a process by which it will provide such information to the state commissions, but that process is not in place at this time. Therefore, we require North Carolina carriers to continue to submit copies of their applications for initial or growth numbering resources to the Commission, in whatever manner they choose (paper, fax, or e-mail). Further, we clarify that the applications should be sent to the Commission *in advance of the code assignment being made*, preferably at the same time the request is sent to NANPA.

VI. The 919 Area Code

On December 10, 1999, NeuStar, Inc., in its role as the NANPA, filed with the Commission an industry recommendation for relieving the 919 numbering plan area (NPA) or area code in North Carolina. In this Order, the Commission is seeking comment on that recommendation. However, the Commission wishes to stress that it is interested in fully pursuing all practicable number optimization measures before it implements any more area code relief in North Carolina.

The following members of the telecommunications industry in North Carolina participated in the area code relief meeting Morrisville, North Carolina on November 4, 1999, where the industry reached consensus on its recommendation: BellSouth Telecommunications, BellSouth Cellular, Time Warner Telecom, AT&T Wireless, Sprint Mid Atlantic, ALLTEL, AT&T, MCI WorldCom, GTE, and Interpath Communications, Inc. Members of the Commission Staff and the Public Staff attended the meeting as observers.

At the meeting held in Morrisville on November 4, 1999, industry participants considered several relief alternatives to furnish relief before exhaust of the 919 area code. The NANPA states that, in planning for the introduction of a new area code, NANPA and the industry use the NPA Code Relief Planning and Notification Guidelines (INC 97-0404-016) (Industry Guidelines). The Industry Guidelines assist NANPA, the industry, and regulatory authorities within a particular area code in the planning and execution of relief efforts. The Industry Guidelines can be accessed on the Alliance for Telecommunications Industry Solution (ATIS) web site located at www.atis.org/atis/clc/inc/incdocs.htm.

The NANPA's filing states that the 919 area code in North Carolina is projected to exhaust during the second quarter of 2002, which has created a need for an additional area code. To allow sufficient time to prepare for NPA relief and to avoid number exhaust, NANPA notified the Commission and industry members on September 10, 1999 of the need to address NPA relief planning.

Pursuant to the Industry Guidelines, NANPA presented an Initial Planning Document (IPD) which contained descriptions, maps, dialing requirements and the projected lives of each alternative. Overall, six relief alternatives were discussed: an all-services distributed overlay; a concentrated growth overlay which overlays a new relief NPA over a portion of the existing 919 NPA; and four versions of a geographic split that differed according to where the dividing boundary line was placed. The industry proposed no additional alternatives.

According to NANPA, the participants reached consensus to recommend an overlay over the entire 919 area as the most suitable relief plan for the 919 area code. The industry rejected Alternative #2, the concentrated growth overlay, because the overlay boundary would divide existing communities of interest and split local calling areas, creating a mix of seven and ten-digit local dialing and causing customer confusion. The industry participants also eliminated Alternatives #3 and #5, both geographic splits, because the projected lives of the resulting area codes would be significantly unbalanced and the projected life of one area code of each alternative would be too short to provide sufficient relief for the 919 NPA. Industry participants also eliminated the geographic splits proposed in Alternatives #4 and #6 because the split boundary line would divide local calling areas thereby creating a confusing mixture of seven and ten-digit local dialing. Further, the NANPA noted that Alternative #6 divides Wake County and would therefore require a time-consuming and political decision making process to determine which of the geographic area would retain the existing 919 NPA.

The NANPA states that the all services distributed overlay would overlay a new area code on the same geographic area covered by the existing 919 NPA. All current, existing customers would retain the 919 area code and would not need to change their telephone numbers. The NANPA notes that FCC regulations require that ten-digit local dialing be implemented within and between the 919 area code and the new overlay area code. Industry participants also reached consensus to recommend to the Commission a schedule for NPA relief implementation. The schedule includes recommended implementation intervals as well as the "latest possible date" each implementation phase should begin in order to avoid exhaust of the 919 area code.

According to the minutes of the November 4 meeting, the industry also reached consensus to recommend ten-digit local dialing for the recommended overlay in accordance with current FCC regulations. Ten-digit dialing will be required for all local calls, between the 919 area code and the new area code, and within each of the individual area codes. The industry also recommended that ten-digit dialing be required from surrounding areas into the 919 area code, and called for the elimination of strategically assigned (or "protected") central office codes that were assigned to preserve current seven-digit dialing. According to the industry's recommended dialing plan, toll calls would continue to be dialed on a 1 + 10-digit basis.

NANPA stated that, on behalf of the industry, it respectfully requests that the Commission approve the industry's recommended all services overlay as the means of relief for the 919 area code. The industry also requested that the Commission approve its recommended implementation intervals.

The Commission concludes that comments should be sought from the public on the industry recommendation and any alternative proposals and that, accordingly, public notices should be sent by bill insert to all affected subscribers and should be printed in newspapers with circulation throughout the geographic territory covered by the 919 area code. Appendix B, directed to subscribers located within the 919 area code, is to be both published and sent as a bill insert to subscribers in the 919 area code. Appendix C, directed to subscribers outside the 919 area code whose dialing patterns may be affected by the relief plan, is to be sent to those subscribers as a bill insert. The Commission further concludes that comments and reply comments should be sought from interested parties.

IT IS, THEREFORE, ORDERED as follows:

1. That North Carolina carriers will fully comply with the FCC Order in CC Docket No. 99-200.

2. That North Carolina carriers shall continue to file number utilization reports in the format specified by the Commission until further notice. The next reports are due on June 30, 2000.

3. That upon the effective date of the FCC Order, all North Carolina carriers shall return to NANPA any NXX codes that are "in service" according to the old definition (local routing information published in the LERG) but not according to the new definition (numbers assigned to end users and activated). If there are extenuating circumstances that have led to certain codes not being "activated" according to the new definition, carriers are invited to explain those circumstances to the Commission in writing, and the Commission will determine whether code reclamation is appropriate or inappropriate.

4. That members of the general public shall have the opportunity to file comments on the industry's recommended relief plan for area code 919 in accordance with the public notices attached hereto. Such comments shall be submitted not later than August 17, 2000. As the largest local exchange companies (LECs) participating in the development of the recommendation, BellSouth, ALLTEL, Sprint, and GTE shall assume primary responsibility for assuring, with the cooperation of other local exchange companies and telephone membership corporations (TMCs), the publication of the public notice as set out in Appendix A in order to solicit comments from the general public concerning area code relief for area code 919 in North Carolina. Such notice shall be published in newspapers of general circulation throughout the geographic territory covered by the 919 area code and shall cover not less than 1/4 of a page. Such notice shall be published once a week for two consecutive weeks concluding by no later than July 18, 2000. Each LEC/TMC which publishes the attached public notice shall, not later than July 28, 2000, file affidavits regarding such newspaper publication and a list of newspapers used for publication and the dates the notice was published in each newspaper.

5. That the LECs shall send the public notice set forth as Appendix A as a bill insert to each of their respective subscribers located within the 919 area code once during the period beginning on the date of this Order and ending on July 28, 2000.

6. That the LECs shall send the public notice set forth as Appendix B as a bill insert to each of their respective subscribers who are located outside the 919 area code but who have the capability to complete calls to points inside the 919 area code using seven-digit dialing, once during the period beginning on the date of this Order and ending on July 28, 2000.

7. That the TMCs who serve subscribers in the area affected by the proposed plan are hereby encouraged to send bill inserts comparable to those specified in Appendix A and Appendix B, reflecting any seven-digit dialing routes into the 919 area, as appropriate, to their respective subscribers during the period beginning on the date of this Order and ending on July 28, 2000.

8. That the formal parties to this proceeding shall file comments regarding the industry recommendation, or any alternative proposal, not later than July 28, 2000, with reply comments due no later than August 17, 2000. At a minimum, each formal party to this proceeding shall:

a. Provide an executive summary of their comments and reply comments setting out in a concise manner all material issues upon which they comment. The executive summary requirement shall apply to any comments or reply comments exceeding three pages double-spaced.

b. Set out with specificity any alterations they suggest to the industry recommendation. If any commenters recommend a geographic split for area code 919, they shall indicate which counties and exchanges comprise their proposed area codes and, to the extent practicable, the number of access lines therein. Such commenters shall also provide a map of North Carolina by county any, if possible, by exchange, showing the boundaries of any area codes they propose. Those commenters supporting the industry recommendation of an overlay shall indicate if they have any changes to the industry's proposal, and discuss the merits of the overlay as compared to a geographic split. **The industry participants shall fully discuss each of the alternatives which they considered, the pros and cons of each alternative, and the reasons which caused them to choose their recommended alternative and to reject the other alternatives.**

c. File comments and reply comments together with an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files saved in WordPerfect format.

d. Be encouraged to file jointly.

9. That the following are hereby made formal parties to the P-100, Sub 137b docket: Public Staff, Attorney General, all local exchange companies, all telephone membership corporations, all competitive local providers, all interexchange carriers, and any cellular, PCS, or other wireless company which files comments. Any other person desiring to become a formal party to this docket must be granted intervention according to Commission rules R1-3, R1-5, and R1-19.

ISSUED BY ORDER OF THE COMMISSION.
This the 20th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg061900.03

Commissioner Owens did not participate.

APPENDIX A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 137b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Area Code Relief for North Carolina's	)	NOTICE OF OPPORTUNITY
919 Numbering Plan Area (NPA)	)	TO FILE WRITTEN COMMENTS

GENERAL ORDERS - TELECOMMUNICATIONS

NOTICE IS HEREBY GIVEN that on December 10, 1999, the North American Numbering Plan Administration (NANPA) filed with the North Carolina Utilities Commission (Commission) a recommendation made by representatives of the telecommunications industry to provide relief for the 919 area code in North Carolina. The NANPA's filing states that the 919 area code is projected to exhaust during the second quarter of 2002, which has created a need for an additional area code in the geographic area now covered by the 919 area code to ensure the availability of telephone numbers in the future. The number for the new area code will not be announced until after final approval of a relief plan.

TWO AREA CODES AND TEN-DIGIT DIALING

Industry representatives have recommended an overlay as the relief plan for the 919 area code. Under the recommended plan, a new area code would be assigned to cover or "overlay" the entire 919 geographic area using the existing 919 area code boundary lines. This would result in two area codes for the same geographic area. The chief advantage of using an overlay relief plan is that existing telephone subscribers would not have to change area codes or their telephone numbers. When telephone numbers in the 919 area code run out, new residential and business telephone numbers for the area would be assigned from the new area code. The chief disadvantage of using an overlay relief plan is that all local and expanded local calls dialed using seven digits today would have to be dialed using ten digits (919 + seven-digit telephone number or new area code + seven-digit telephone number). A Federal Communications Commission regulation requires ten-digit dialing both between and within the 919 area code and the new overlay code.

The Commission will also consider the extent to which existing seven-digit dialed local and expanded local routes originating outside of the 919 area code and terminating inside the 919 area code should be converted to ten-digit dialed routes.

OTHER SOLUTIONS WERE CONSIDERED

According to the NANPA, the industry examined six relief alternatives before reaching a consensus to recommend the overlay relief plan. Alternative #2 was a "concentrated growth" overlay which would overlay a new relief NPA over a portion of the existing 919 NPA. The other part of the geographic area would not be included in the overlay until the remaining numbers in the 919 area code have been assigned within that area. NANPA states that the industry rejected the concentrated growth overlay because the overlay boundary would divide existing communities of interest and split local calling areas, creating a mix of seven and ten-digit local dialing and causing customer confusion.

Four versions of a "geographic split" plan were also considered. Under these plans, the geographic area covered by the 919 area code would be split into two parts. Roughly half of the affected telephone subscribers would continue to be served through the 919 area code, and half would change to the new area code. Although ten-digit dialing would not be required within area codes, most of the seven-digit dialed calling routes that exist today in the 919 area code would become ten-digit dialed calling routes in both directions if they are split by the new area code boundary. The four split alternatives considered differed according to where the dividing boundary line was placed. The NANPA states that the industry participants eliminated Alternatives #3 and #5, both geographic splits, because the projected lives of the resulting area codes would be significantly unbalanced and the projected life of one area code of each alternative would be too short to provide sufficient relief for the 919 NPA. Industry participants also eliminated the geographic splits proposed in Alternatives #4 and #6 because the split boundary line would divide local calling areas thereby creating a confusing mixture of seven and ten-digit local dialing. Further, the NANPA noted that Alternative #6 divides Wake County.

PUBLIC COMMENT SOUGHT ON INDUSTRY RECOMMENDATION

Persons desiring to send written statements to the Commission should submit their statements supporting or opposing the industry recommendation, or any alternative proposal, on or before August 17, 2000, and should include any information that those persons wish to be considered by the Commission in this matter. Interventions or statements should be addressed to the Chief Clerk, North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, NC 27699-4325. Statements may also be faxed to 919-733-7300.

The Public Staff of the Utilities Commission, through the Executive Director, is required by statute to represent the using and consuming public in proceedings before the Commission. Statements to the Executive Director should be addressed to:

Robert P. Gruber
Executive Director - Public Staff
4326 Mail Service Center
Raleigh, North Carolina 27699-4326
Fax: 919-733-9565

The Attorney General is also authorized by statute to represent the using and consuming public in proceedings before the Commission. Statements to the Attorney General should be addressed to:

The Honorable Michael F. Easley
Attorney General - State of North Carolina
Post Office Box 629
Raleigh, North Carolina 27602-0629
Fax: 919-716-6757

ISSUED BY ORDER OF THE COMMISSION.
This the 20th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

APPENDIX B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 137b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Area Code Relief for North Carolina's	)	NOTICE OF OPPORTUNITY
919 Numbering Plan Area (NPA)	)	TO FILE WRITTEN COMMENTS

NOTICE IS HEREBY GIVEN that on December 10, 1999, the North American Numbering Plan Administration (NANPA) filed with the North Carolina Utilities Commission (Commission) a recommendation made by representatives of the telecommunications industry to provide relief for the 919 area code in North Carolina. The NANPA's filing states that the 919 area code is projected to exhaust during the second quarter of 2002, which has created a need for an additional area code in the geographic area now covered by the 919 area code to ensure the availability of telephone numbers in the future. The number for the new area code will not be announced until after final approval of a relief plan. Introduction of a new area code in the 919 area may affect the way you dial calls to that area.

SOME OF YOUR SEVEN-DIGIT CALLS MAY BECOME TEN-DIGIT CALLS

The Commission is considering a recommendation from the industry to adopt an overlay as the relief plan for the 919 area code. Under the recommended plan, a new area code would be assigned to cover or "overlay" the entire 919 area using the existing 919 area code boundary lines. This would result in two area codes for the same geographic area. Existing telephone subscribers would not have to change area codes or their telephone numbers, but when telephone numbers in the 919 area code run out, new residential and business telephone numbers for the area would be assigned from the new area code. A Federal Communications Commission regulation requires ten-digit dialing both between and within the 919 area code and the new overlay area code. The industry plan calls for all seven-digit dialed routes originating within the existing 919 area to be converted to ten-digiti dialing.

The Commission's decision on the relief plan could also affect subscribers who are located outside the 919 area but who are able to reach subscribers in the 919 area by dialing seven digits. Depending on the plan which the Commission ultimately adopts, subscribers outside the existing 919 area may have to dial ten digits (919 + the seven-digit number or the new area code and the seven-digit number) to reach customers in the 919 area. Examples of routes to and from points outside the 919 area to and from points within the 919 area which may be affected by the change to ten-digit dialing are:

From exchanges in 919 area code to exchanges in 252 area code:
Kenly to Bailey, Lucana, Wilson, Elm City and Stantonsburg
Goldsboro to La Grange and Moss Hill
Louisburg to Spring Hope
Oxford to Henderson

From exchanges in the 919 area code to exchanges in the 910 area code:
Pittsboro, Siler City, Goldston, and Bonlee to Bennett
Olivia to Fayetteville and Lillington
Angier to Dunn and Lillington
Benson to Dunn

From exchanges in the 919 area code to exchanges in the 336 area code:
Mebane to Burlington, Anderson, and Saxapahaw
Hillsborough to Prospect Hill

PUBLIC COMMENT SOUGHT ON INDUSTRY RECOMMENDATION

Persons desiring to send written statements to the Commission should submit their statements supporting or opposing the industry recommendation, or any alternative proposal, on or before August 17, 2000, and should include any information that those persons wish to be considered by the Commission in this matter. Interventions or statements should be addressed to the Chief Clerk, North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, NC 27699-4325. Statements may also be faxed to 919-733-7300.

The Public Staff of the Utilities Commission, through the Executive Director, is required by statute to represent the using and consuming public in proceedings before the Commission. Statements to the Executive Director should be addressed to:

Robert P. Gruber
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The Attorney General is also authorized by statute to represent the using and consuming public in proceedings before the Commission. Statements to the Attorney General should be addressed to:

The Honorable Michael F. Easley
Attorney General - State of North Carolina
Post Office Box 629
Raleigh, North Carolina 27602-0629
Fax: 919-716-6757

ISSUED BY ORDER OF THE COMMISSION.
This the 20th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

DOCKET NO. P-100, SUB 140

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition for Rulemaking to Revise Billing and Collections Procedures for Telecommunications Companies Regarding Local Disconnection and Toll Denial	)	ORDER DIRECTING REVISION OF RULES

BY THE COMMISSION: On June 23, 1998, the Attorney General filed a Petition for Rulemaking requesting that the Commission adopt rules to prohibit two very specific practices: (1) the disconnection of local service for failure to pay for toll and long distance charges (local disconnection) and (2) the global denial of toll service for failure to pay toll charges owed to a particular carrier (global toll denial).

After an oral argument was held on April 12, 1999, the Chair issued an Order requesting negotiations to determine whether a consensus could be reached among the parties to this docket on an appropriate proposal for the Commission regarding local disconnection and global toll denial.

On October 8, 1999, the Attorney General, the Public Staff, the North Carolina Justice and Community Development Center (NCJCDC), and the Telecommunications Industry Group (TIG) filed a Submission of Joint Settlement Proposal (Joint Settlement Proposal). Under the settlement, the central principles agreed to were that (1) disconnection of local telephone service will no longer be allowed for nonpayment of non-local charges and (2) global toll denial will be allowed for nonpayment of long distance charges. In this Joint Settlement Proposal, five issues still in dispute were submitted for Commission determination.

On October 12, 1999, the Commission issued an Order Seeking Comments on the October 8, 1999 Joint Settlement Proposal, including the five controverted issues. Initial comments were filed by AT&T Communications of the Southern States, Inc. (AT&T); BellSouth Telecommunications, Inc. (BellSouth) on behalf of itself and The Alliance of North Carolina Independent Telephone Companies (Alliance);[1] Business Telecom, Inc. (BTI); GTE South Incorporated (GTE); MCImetro Access Transmission Services, Inc. and MCI WorldCom Communications, Inc. (MCI WorldCom); Sprint Communications Company L.P., Carolina Telephone and Telegraph Company, and Central Telephone Company (Sprint); the Public Staff; and the Attorney General. Reply comments were filed by ALLTEL Carolina, Inc. and ALLTEL Communications, Inc. (ALLTEL), AT&T, BellSouth/Alliance, GTE, MCI WorldCom, Sprint, the Public Staff, and the Attorney General.

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[1]The Alliance consists of Citizens Telephone Company, Concord Telephone Company, Ellerbe Telephone Company, LEXCOM, MEBTEL Communications, North State Telephone Company, and Randolph Telephone.

CONTROVERTED ISSUES

ISSUE NO. 1: **Bundled services.** Under subparagraph (c) of paragraph 1(b)(1) of the Joint Settlement Proposal, when a customer fails to pay for a "bundled local service" (i.e., a bundled service that includes local service as defined in 1(a)(2) of the Joint Settlement Proposal), the bundled service may be disconnected, but the telephone utility must provide the customer an opportunity to maintain local service by paying the regulated past due balance owed for local service. Other requirements also apply under subparagraphs (d) and (e) of paragraph 1(b)(1). ***The first question is whether these provisions (c), (d), and (e) should apply to a telephone utility that does not provide local service on an unbundled basis and, if not, whether other restrictions regarding disconnection of bundles should apply to those utilities.*** Essentially, this issue requires the Commission to determine what rules will apply to competing local providers (CLPs) since some CLPs, unlike incumbent local exchange companies (ILECs), do not provide local service on an unbundled basis but instead provide local service combined with other services as part of a bundle.

A related question concerns the definition of "bundled local service." Paragraph 1(a)(2) states that "bundled local service" is a "combination of local service, as defined [in paragraph 1(a)(1)], and one or more other services, either regulated or nonregulated, which are offered either by a local service provider alone, or by a local service provider jointly with one or more other entities..." ***The question is whether the definition should include the following language: "and which are priced below the sum of the rates or prices for the same services on an individual or unbundled basis."***

Initial Comments

ALLTEL: ALLTEL did not file initial comments.

AT&T: AT&T requested that the Commission reject any efforts to use this rulemaking proceeding to impose on carriers the obligation to offer stand-alone local services or to restrict in any other way the ability of carriers to offer bundled local services.

AT&T believes this provision in essence eliminates the entire concept of bundled local service offerings by requiring every carrier to offer stand-alone local service. As with the first sentence of Section 6 of the Joint Settlement Agreement, there is no reason for the application of such provisions to carriers who do not provide or do not intend to provide stand-alone (unbundled) local services. CLPs do not and will not possess market power. There can be no possible concern that any CLP could ever engage in any unlawful tying arrangement.

AT&T suggested that the following revision to Section 1(b)(1)(f) be made to the proposed rules to allow for carriers to provide and disconnect service on a unbundled only basis:

> If the telephone utility does not provide local service on an unbundled basis, subsections (c), (d), and (e) do not apply, and the telephone utility may require the customer to pay the past due balance owed (excluding amounts billed by the telephone utility on behalf of third parties for services other than the bundled service) before bundled service is restored.

In addition, AT&T recommended that the Commission not include in the definition of "bundled local service" any requirement that the bundle of services be "priced below the sum of the rates or prices for the same services on an individual basis." There simply is no reason for this requirement - a bundled service is a bundled service regardless of the price at which it is offered. Moreover, this requirement effectively imposes a requirement that carriers provide a stand-alone service offering, because it presumes that there are services offered on an "individual basis" against which the price of the bundled service may be compared.

BELLSOUTH/ALLIANCE: BellSouth/Alliance believes that all bundled services provided to subscribers in North Carolina should be governed by the same rules. Sound public policy demands the uniform application of important requirements. If the provisions have a sound basis, they should apply in a non-discriminatory way to all participants in the marketplace. The central purpose of this docket is so that customers who cannot pay charges attributable to toll service will not lose their local service. This policy should prevail regardless of which carrier provides their local service. To do otherwise can only result in customer confusion, making it more difficult to communicate the new policy to customers in a consistent, easily understood fashion. Furthermore, if one class of providers has to implement the rules, but another class of providers does not, the rules will play an important role in how the market for local service develops in North Carolina. BellSouth/Alliance believes that if a new entrant can avoid a number of administratively complex billing and collection requirements by simply choosing not to offer stand-alone local service, there is little doubt that few such offerings will be forthcoming.

BellSouth/Alliance pointed out that although the provisions of the Joint Settlement Proposal never mention ILECs and CLPs, this dispute is fundamentally about establishing different regimes for these two different classes of carriers. If a carrier offers stand-alone local service and bundled local service, then the Settlement lays out requirements to ensure that customers subscribing to bundled service will be able to keep their local service even if they do not pay the entire price of the bundle. If a carrier does not offer stand-alone local service but does offer bundled service, then that carrier does not have to afford its customers the same protection. BellSouth/Alliance believes that disparate treatment for CLPs and ILECs is simply not justified.

BellSouth/Alliance is not advocating that the Commission require CLPs to offer stand-alone local service. Rather, BellSouth/Alliance simply ask that the Commission ensure that a CLP that chooses to offer only packages will be required to block the toll portion of the package if the customer fails to pay for that entire package.

BellSouth/Alliance did not specifically address the related question of whether the definition of "bundled local service" should also include the phrase "and which are priced below the sum of the rates or prices for the same services on an individual or unbundled basis."

BTI: BTI stated it believes that a distinction should be made between those telephone utilities that provide local service as a stand-alone offering and those telephone utilities that offer local service only as a component of a bundled arrangement. CLPs are experimenting with and developing innovative telecommunications products and services. Various CLPs, including BTI, bundle local service with long distance service, paging, Internet access, and other products. By combining these products and services into unique bundles, customers benefit from a "one-stop shopping" price that is generally lower than the price of purchasing each item separately. If a customer fails to pay for a bundled service, a CLP should be able to disconnect the customer from all services provided in the bundle.

BTI further stated that it is both impractical and detrimental to consumers to require a CLP to disassemble the bundle and make a special exception to provide a product that it does not offer on a stand-alone basis to a customer who has failed to pay for the bundled service. Requiring a CLP to segregate the price of local service from the bundle will increase costs and serve as a disincentive for CLPs to offer bundled local service to the residential market.

BTI noted that if a customer fails to pay a CLP for bundled local service, and the bundled local service is subsequently disconnected, the customer could obtain local service from the Eligible Telecommunications Carrier (ETC) that provides universal service in the customer's serving area.

BTI urged the Commission not to apply subsections (c), (d), and (e) of Section 1(b)(1) of the Joint Settlement Proposal to telephone utilities that do not provide local service on an unbundled basis.

BTI recommended that the definition of "bundled local service" should not include the italicized verbiage that incorporates pricing.

GTE: GTE recommended that the Commission keep in mind, as it reviews the contested issues, that the focus of the docket is local disconnection and toll denial. This docket should not be used to develop or mandate new regulations that are overly broad and extend beyond the issues at hand.

GTE maintained that there should be regulatory parity between the regulated firms competing within the state. The rationale underlying the quest for parity is fundamental to maintaining the preservation of universal service and reasonable rates. As new firms or CLPs enter the market, common sense dictates that their entry point will be where higher profit margins are anticipated, and that ubiquitous service to residential customers may not be provided for several years by the new firms, if ever. The ILECs are by statute the universal service providers in the areas in which they were certificated to operate on July 1, 1995. In addition, it is GTE's belief that the ILECs have also applied for and received ETC certification from the Commission or appropriate agency. If the CLPs have a regulatory rule advantage over the ILECs in addition to not being required to provide universal service, it would have a deleterious impact on universal service. GTE strongly recommended that in this docket, regulatory parity be maintained related to the local disconnection and global toll denial issues related to bundling products. Should the Commission determine that a limited regulatory parity rule is not in the public interest at this time, then GTE recommended that parity in this docket be maintained at a minimum between ETCs and a different set of rules be maintained between non-ETCs within the state of North Carolina for some interim period of time.

GTE further recommended that this docket is not the appropriate forum for the Commission to adopt new pricing rules relative to bundling as this may well have the result of slowing down innovation and the speed to market concepts envisioned by the General Assembly when House Bill 161 was enacted. The contested language with respect to this issue should not be adopted.

MCI WORLDCOM: MCI WorldCom contended that customers are demanding "bundled" service offerings, which may include packages of local exchange service with other regulated and non-regulated services. Consumers want the convenience of billing and servicing by a single entity. New entrants can provide "bundles" of long distance and local service more economically than distinct, separate offerings of the components of those services. Without the ability to offer such bundles in lieu of traditionally tariffed services, some new entrants would lack the ability to compete against the ILECs in the local exchange market.

MCI WorldCom stated that subsections (c), (d), and (e) of Section 1(b)(1), as currently phrased, state or imply that residential customers who are subject to local disconnection or blocking of all toll services (global toll denial) by a local exchange carrier shall be entitled to unbundled local exchange service even if their current carrier provides only a bundled service offering. The Commission should limit the reach of subsections (c), (d), and (e) of Section 1(b)(1) to those carriers that provide unbundled local service.

MCI WorldCom believes that the definition of "unbundled local services" should not be limited to those services "priced below the sum of the rates or prices for the same services on an individual or unbundled basis." Although bundled services promise to comprise an important part of a competitive telecommunications market, relatively few competing local providers currently offer bundled local services, and it is not clear whether bundled service offerings are presently priced above the sum of their component services. Consumers that tend to buy bundled services are discerning in their choices in the market, and hence do not need "protection" in the form of increased regulation. If the Attorney General or another interested party believes that they need protection, then those concerns may be addressed in another proceeding.

MCI WorldCom stated that the language limiting the definition of "bundled local service" would have the effect of forcing those carriers whose business plans and tariffs do not provide for unbundled local service, to offer such services or cease providing bundled local services. Either result is undesirable as a matter of public policy. As the local exchange market becomes more competitive, there should be less reason to regulate prices or to require carriers to provide services that may not recover costs. Bundling, with its potential for providing more choice as well as savings to consumers, should be encouraged rather than discouraged. Consequently, the subject definition should not be burdened with a price limitation.

SPRINT: Sprint supported exempting telephone utilities offering only bundled local services (and not providing local service on a stand-alone basis) from the requirement to offer customers the option of separately paying for and retaining local service. The exemption applies to those CLPs who have chosen to forgo offering stand alone local service, making the exemption both limited and competitively neutral. The customer of such a CLP currently has local service available from the ILEC, the Commission's designated provider of last resort.

Sprint also supported adding the following language at paragraph 1(b)(1)(f): "If the telephone utility does not provide local service on an unbundled basis, subsections (c), (d), and (e) will not apply, and the telephone utility may require the customer to pay the past due balance owed (excluding amounts billed by the telephone utility on behalf of third parties for service other than the bundled service) before bundled local service is restored."

Sprint stated it sees little value in adding to the definition of bundled local service a requirement that bundles be priced less than their a la carte offerings. Adding the suggested language just raises the question of whether bundles priced equal to or above their a la carte offerings are subject to the same local service breakout requirements as other bundles. Sprint believes the pricing of service packages should not be taken up in this proceeding and is best handled as a tariff approval matter.

ATTORNEY GENERAL: The Attorney General stated he took no position on this issue during the negotiations but has now carefully considered the issue and its potential ramifications and strongly believes the issue is not yet ripe for decision.

The Attorney General pointed out that as circumstances now exist, the Commission lacks the necessary information in order to make a decision on this issue. It is unknown when real competition will arrive in the residential market and on what scale. The Attorney General further pointed out that there are questions as to legal standards that will apply as a result of consolidation and what requirements will be regarding universal service. It is unknown what the residential market will look like, what services will be available from CLPs, what they will cost residential customers, and what the Federal Communications Commission (FCC) and Commission rules governing market will be, or what protections customers will need to maintain local service.

The Attorney General cautioned against the Commission reaching a decision concerning whether certain market players should be allowed to operate under different rules, without having the ability to base the decision on actual market conditions and current regulatory requirements. The result might be to skew the market in favor of one group or the other, to create incentives for CLPs not to become ETCs, or to discourage CLPs from offering local service on an unbundled basis. Other potential dangers likely exist but cannot even be predicted due to the theoretical nature of the issue and the uncertainty regarding what residential competition will look like.

The Attorney General recommended that this issue not be addressed until after the Commission completes its universal service docket, at which time many of the questions surrounding this issue will be resolved.

PUBLIC STAFF: The Public Staff pointed out that adopting the contested language of paragraph 1(a)(2) and requiring that each component of a bundled service be made available to the public separately is likely to be difficult, if not impossible, to enforce. The Commission's regulations do not require CLPs to file their rates, except with respect to basic local service. Consequently, the Commission has no way to know whether a CLP is offering a particular service separately. Some CLPs may be offering bundled services only. Even if the Commission had full knowledge of all services offered and rates charged by CLPs, it would be fairly easy for a company to comply with the contested language of paragraph 1(a)(2) in form, but not in substance, by charging at least as much for the regulated service as it charges for the bundle. This would render the intended safeguard essentially meaningless.

The Public Staff recommended that companies that provide local service only as part of a bundled service be exempted from subparagraphs 1(b)((1)(c), (d), and (e) of the proposal. The Public Staff stated it is not aware of any alternative restrictions on disconnection of bundles that could usefully be imposed in lieu of subparagraphs (c), (d), and (e). Accordingly, the Public Staff recommended that subparagraph (f) be worded as follows:

> If the telephone utility does not provide local service on an unbundled basis, subparagraphs (c), (d), and (e) will not apply, and the telephone utility may require the customer to pay the past due balance owed (excluding amounts billed by the telephone utility on behalf of third parties for service other than the bundled service) before bundled local service is restored.

This approach will not result in harshness to customers who are unable to pay for bundled service provided by CLPs but do want to retain local service on an unbundled basis. These customers can apply for unbundled local service from their local ILECs. All of the State's ILECs currently offer unbundled local service, and this solution is dependent on the ILECs' continued offering of basic local service on an unbundled basis at reasonable rates.

The Public Staff further recommended that, in order to prevent customers from being taken by surprise when the failure to pay for one telephone service leads to the threatened disconnection of numerous other services, the Commission should modify Section 5 of the Joint Settlement Proposal by adding at the end of the section a new subhead entitled "Bill inserts" setting out a requirement that periodic bill inserts be sent to customers subscribing to bundled local service, so as to ensure that these customers are informed as to the effects of nonpayment. The Public Staff provided a revised draft of Sections 5 and 6 of the Joint Settlement Proposal containing its proposed modifications.

Reply Comments

ALLTEL: ALLTEL stated that it agrees with the Public Staff's comments that the proposed language giving rise to this controverted issue "is simply unenforceable, absent major changes in the Commission's CLP regulations." Also, this is a pricing related issue and is not appropriately addressed in this proceeding.

ALLTEL recommended that if the Commission does determine that regulatory parity is in the public interest, then ALLTEL believes, as GTE indicated, that new entrants should not be brought to the same level of regulation that the ILECs are under. Rather, the ILEC regulatory paradigm should be changed to match that of the new entrants.

AT&T: AT&T suggested that the Commission should reject both the BellSouth/Alliance position against different rules for CLPs and ILECs and the Attorney General's position that the Commission defer a decision on this issue until after universal service rules are in place, as contrary to the public interest of North Carolina and its consumers.

In response to the BellSouth/Alliance proposal, AT&T stated that there are already different rules for CLPs and ILECs, reflecting the very real fact that there are obvious differences between CLPs and ILECs. There is an entire section of the Commission's rules which applies only to CLPs, and there are rules which apply to ILECs but not CLPs. Thus, just as the Commission's rules already reflect differences between CLPs and ILECs, so too should the local disconnect rules allow for the provision of bundled service by CLPs without the need to also offer stand-alone local service.

AT&T stated that if the Commission applies the rules as proposed, it will gain absolutely no greater protection for North Carolina consumers, but will substantially hinder innovation and the development of competition for local services in North Carolina. The rules as drafted essentially prohibit CLPs from offering local service only as part of a service bundle. By foreclosing such options, the regulations would eliminate a range of incentives for CLPs to innovate and attract customers. Greater freedom, room to innovate, and the ability to offer unique services are absolute necessities for CLPs - and local competition - to survive. AT&T noted that from a purely practical standpoint, it may prove very difficult for CLPs to design systems and processes to separate stand-alone local services from bundled services.

In response to the Attorney General's proposal, AT&T recommended that the Commission not accept the Attorney General's position that the Commission defer a decision on this issue until after universal service rules are in place. The rules as drafted require CLPs to provide stand-alone local service. Thus, if the Commission does nothing, it will adopt rules that require all CLPs to provide stand-alone local service. The rules will then have to be changed after universal service rules are adopted to allow CLPs the option of providing only bundled local service. Such a process would be much more cumbersome and inefficient than simply resolving this issue now. Rather than do nothing and allow regulations to go into effect that would hinder the ability of CLPs to provide innovative service offerings, the Commission should revise the regulations in accordance with the suggestions in AT&T's original comments which would allow CLPs the ability to provide only bundled local service if they choose to do so. AT&T noted that although it does not agree with the rationale set forth by the Public Staff, AT&T agrees with the language proposed by the Public Staff on this issue.

BELLSOUTH/ALLIANCE: BellSouth/Alliance again stated that sound public policy dictates that all bundled telecommunication services provided to North Carolina consumers should be governed by the same rules. There is simply no credible reason to disparately apply these requirements to consumers of bundled local and long distance service simply because one is a CLP customer and the other is an ILEC customer.

BellSouth/Alliance agrees with the Attorney General's concerns regarding the uniform application of the proposed rules. Although BellSouth/Alliance does not believe that it will ever be necessary to exempt CLPs from Requirement Nos. 1(b), 1(c), (d), and (e), BellSouth/Alliance does not object to the Attorney General's recommendation to defer considering whether to exempt CLPs from these requirements until after the conclusion of the Commission's universal service docket. In the interim, the rules regarding bundled services should apply in a uniform fashion to CLPs and ILECs.

BellSouth/Alliance pointed out that in its initial comments on this point, it stated that it is not advocating that the Commission require CLPs to offer stand-alone local service. It is simply asking that the Commission ensure that a CLP that chooses to offer only packages will be required to block the toll portion of the package if the customer fails to pay for that entire package. This is consistent with how the new requirements will apply to ILECs when an ILEC customer subscribes to a bundled local service.

BTI: BTI did not file reply comments on this issue.

GTE: GTE stated that it was not suggesting that CLPs be forced to unbundle their products or offer a stand-alone local product in its original comments. Rather, GTE was trying to establish the point that ILECs should be given the same regulatory flexibility with respect to the issues in this docket that the CLPs enjoy. Unless the Commission establishes parity between ILECs and CLPs with respect to this docket, the problems associated with disparity can be expected to continue. GTE stated it agrees with the Attorney General that there are very real dangers associated with disparate ILEC and CLP rules associated with local disconnection and toll blocking. However, in addressing these dangers, the Commission does not need to wait on the universal service docket to resolve the disparity with respect to the issues in this docket. The Commission should utilize this proceeding to make the rules related to local disconnection and toll blocking symmetrical between ILECs and CLPs and resolve the other regulatory symmetry issues in the universal service docket. Alteratively, the Commission can rule that all ETCs will operate under the same rules, and all non-ETCs can operate under a separate set of rules.

GTE further noted that it appeared that all commenters either support or do not object to eliminating the contested language in Section 1(a)(2) of the Joint Settlement Proposal, which would set price controls on bundled products. Therefore, GTE urged the Commission not to adopt the contested language, which goes far beyond local disconnection and toll denial issues and enters the realm of pricing.

MCI WORLDCOM: MCI WorldCom stated that the ILECs have alleged no harm would result to them if new entrants do not provide unbundled local service. Consumers would retain the ability to choose service from the ILECs even if a CLP disconnects bundled local service for nonpayment. MCI WorldCom stated it believes that GTE's and BellSouth/Alliance's stance is merely a thinly disguised attempt - under the pretense of principles of "regulatory parity" and "no disparate treatment" - to hinder the development of competition on their home turfs.

MCI WorldCom contended there is no reason to regulate prices or conditions of service of CLPs. Bundling by CLPs, moreover, with its potential for providing choice as well as savings to consumers, should be encouraged rather than discouraged. Thus the Commission should not impose what amounts to an unbundling requirement on CLPs.

MCI WorldCom, in responding to the Public Staff's Comments regarding disconnect notices, stated the phrase "that basic local service is available from at least one other local provider" is unnecessary, since the consumer choosing a CLP or a bundled service product from an ILEC already knows of his or choice to subscribe to unbundled local exchange service from an ILEC. MCI WorldCom also thought the language is somewhat ambiguous as to the obligation of the carrier providing the notice. Along the same lines, MCI WorldCom objected to the Public Staff injecting a new billing requirement that had not been discussed between the parties, and suggested that this not be considered by the Commission because there has been no demonstrated need for these bill inserts.

SPRINT: Sprint stated that its review of the parties' comments regarding whether the definition of bundled local service should include the additional requirement that bundles be "priced below the sum of the rates or prices for the same services on an individual or unbundled basis" shows no support for the above-quoted language. This lack of support and the good reasons for the dearth should lead the Commission to not adopt the language.

In response to the Attorney General's argument, Sprint believes that the parties have presented to the Commission a real policy controversy ready for decision. The controversy directly impacts a presently important means of marketing telecommunications services, and all forecasts of the near future place the bundling of services front and center. The Attorney General's list of telecommunications unknowns and uncertainties does not warrant the Commission neglecting this issue. Sprint agrees with the Public Staff's comment that this proceeding is probably not the last time the subject of service bundling will need to be addressed by the Commission.

In response to the remaining arguments, Sprint believes that it is helpful to separate the disconnect for nonpayment issue from the related universal service issue. Separating the two issues reveals that the proposed rule in this proceeding discriminates in terms of treatment, but not necessarily in terms of impact. In the Commission's universal service proceeding, Sprint argued that the goals of universal service in North Carolina are advanced by requiring all ETCs to offer the local services supported by universal service funding on an unbundled basis to all requesting customers. Sprint's proposal does not prohibit ETCs, either incumbents or CLPs, from providing local service bundles. However, its proposal does match benefits and burdens by requiring takers of universal service subsidies to offer local service on both an unbundled and a bundled basis. The result is that a CLP cannot limit its business to lucrative local service bundles only and also draw universal service support. The Commission should not require CLPs to offer unbundled local services in this proceeding. The issue is more properly addressed in the Commission's universal service proceeding.

ATTORNEY GENERAL: The Attorney General reiterated the reasons addressed in his original comments for not addressing this issue at this time, stated that given the virtual certainty that the Commission will have to address this issue again, and the fact that virtually no customers will be affected by a rule adopted now, it makes little sense for the Commission to make a theoretical decision now. The Attorney General strongly believes that it is not prudent for the Commission to create new rules on this issue of bundling at this time-both because of the inherent dangers of skewing the market and because there is no practical need to do so now. As of now, the Commission (and the parties themselves) lack the information necessary to make a wise decision.

The Attorney General further recommended that, if the Commission decides at this point to defer decision on the issue discussed above, the Commission could strike the sentence in dispute regarding the definition of bundled local service.

PUBLIC STAFF: The Public Staff stated that it is understandable that BellSouth, GTE, and the Alliance wish to be governed by the same competitive rules that apply to CLPs. However, the Commission has never adhered to a policy of strict regulatory parity between ILEC's and CLPs. Since the first CLP regulations were adopted in 1995, CLPs have been authorized to determine for themselves the level of their rates. They have not been required to file their rates, except with regard to basic local service, and recently some CLPs have been granted waivers of the filing requirement for basic local service. Subparagraphs 1(b)(1)(c), (d), and (e) provide that when a customer contracts for bundled local service and is disconnected for nonpayment, he must be allowed to continue receiving local service on an unbundled basis by paying the regulated past due balance owed for local service. It is simply impossible to enforce this requirement against CLPs as long as they are free to fix their own rates. They can too easily evade it by setting the rate for unbundled local service at the same level as the rate for bundled service. Consequently, unless BellSouth, GTE, and the Alliance can persuade the Commission to restructure its entire system of CLP regulation, they have no alternative but to live with this provision.

The Public Staff also asserted that the Commission should likewise decline the Attorney General's invitation to refrain from deciding the first contested issued-the issue relating to the regulatory treatment of bundled services. Although the Attorney General suggests that this issue is unripe for decision, it is in fact a pressing problem that must soon be resolved. Because CLPs are not required to file their rates or service offerings, the Commission has no way to know how many of them are already offering bundled local service. The CLPs' bundled service customers need to know now, not at some indefinite future time, what will happen to them if they fail to pay their bills in full.

Commission Decision

First Question: **Should the provisions (c), (d), and (e) apply to a telephone utility that does not provide local service on an unbundled basis and, if not, what other restrictions regarding disconnection of bundles should apply to those utilities?**

After careful consideration, the Commission is persuaded that the best course of action is to adopt the proposed language of the Public Staff and AT&T to be included as subparagraph (f) which is as follows:

> If the telephone utility does not provide local service on an unbundled basis, subparagraphs (c), (d), and (e) will not apply, and the telephone utility may require the customer to pay the past due balance owed (excluding amounts billed by the telephone utility on behalf of third parties for service other than the bundled service) before bundled local service is restored.

The Commission believes that no harm will be caused to the local residential customer as a result of this decision. As several parties pointed out, customers who do not wish to pay for bundled service provided by CLPs but do wish to have local service on an unbundled basis can apply for unbundled local service from their local ILECs. As for the ILECs' positions on regulatory parity, this Commission, as the Public Staff and other parties pointed out, has never adhered to a policy of strict regulatory parity between ILECs and CLPs.

The Commission reserves the right to revisit this issue as the market evolves and for good cause shown.

Second Question: **Should the definition of bundled local service include the following language: "and which are priced below the sum of the rates or prices for the same services on an individual or unbundled basis"?**

The Commission agrees with the majority of the parties that this language should not be included.

ISSUE NO. 2: **Paragraph 3(b)(2), which deals with treatment of international calls to Information Service Providers (ISPs), contains the statement, "The IXC [interexchange**

carrier] may impose selective toll blocking." ***The issue is whether this statement should be adopted.***

Initial Comments

ALLTEL: ALLTEL did not file initial comments.

AT&T: AT&T contended that the question of charges to international service providers is another issue that was not a part of the Attorney General's original Petition for Rulemaking. The provisions addressing this issue have nothing to do with the disconnection of local service or with global toll denial. They provide instances in which customers may have certain charges removed from their bills, even when those charges were legitimately incurred and billed. Even though the parties agreed to include some measure of such provisions in this proceeding, the Commission should reject any such provisions to which the parties have not agreed.

AT&T further contended that, in this case, the Commission should allow the inclusion of language that would allow IXCs to impose selective toll blocking when a customer fails to pay his or her bill. The provisions in Section 3 give customers the ability to remove from their bills charges for calls to 900 numbers and international service providers, even when such charges were legitimately incurred and billed. Section 3 thus eliminates the ability of IXCs to bill for certain charges.

AT&T stated that there is no reason IXCs should not be able to impose selective toll blocking when a customer fails to pay his or her bill. Selective toll blocking simply means the termination of service by an individual carrier to a particular customer. The provision in dispute would merely allow an IXC to terminate service to a customer who fails to pay valid charges on his or her bill. Without the disputed language, the rules would require IXCs to continue to provide service to customers who fail to pay valid charges on their bill.

BELLSOUTH/ALLIANCE: BellSouth/Alliance did not address this specific issue.

BTI: BTI did not address this specific issue.

GTE: While GTE stated that it did not have a specific recommendation regarding this issue at this time, it did urge the Commission to be cautious when reviewing this issue since the toll provider market in North Carolina is characterized by many entrants, and the limitation of operating conditions that the toll providers have available is probably not in the best interests of a competitive market.

MCI WORLDCOM: MCI WorldCom stated that IXCs are obligated as common carriers to provide services from their tariffs to the public, including "information service providers." At the same time, the interexchange market is highly competitive, and there are multiple IXCs from which a consumer may choose services. Thus, the issue is whether IXCs can be deprived in a competitive market of the means to protect their networks from continued international calls.

MCI WorldCom observed that as an initial matter, the Commission does not appear to have jurisdiction over this issue, since it does not involve those issues concerning which state public service commissions have exercised jurisdiction: e.g., local disconnection, billing by local exchange carriers, billing statements, or intrastate service. The issue involves the ability of IXCs to block their networks as regards international service, so as not to continue to incur costs for which there will be no recovery. MCI WorldCom further stated that this is not an instance in which an IXC blocking its own network can prevent access to other long distance services. The long distance market is competitive. Removal of the subject language, moreover, would increase the costs of providing service which would be passed along to all users of long distance services. Given those costs and the lack of a demonstrated need for removal of the ability of IXCs to engage in selective toll blocking, IXCs should continue to block their own networks as provided for by the subject language.

SPRINT: Sprint stated it strongly supported the inclusion of language expressly allowing IXCs to impose selective toll denial apart from the "three strikes" rule that governs local exchange carrier's imposition of global toll denial. An IXC's relationship with its customers is not that of a common carrier. An IXC is generally free to form and dissolve customer relationships as it sees fit. In the instance of this rule, the Public Staff would require an IXC to continue serving a customer who not once but twice simply refuses to pay to the carrier its own legitimate charges. Sprint encouraged the Commission to respect an IXC's basic business right to selectively toll deny customers for nonpayment of legitimate charges.

ATTORNEY GENERAL: The Attorney General stated that, in order to be consistent with the rest of the provision, the sentence in question should not be included. If an IXC can apply selective toll denial without notice on the first occasion, there would be no purpose in requiring an IXC to provide notice with respect to selective toll denial on the second occasion or allowing the imposition of selective toll denial on the third occasion, as the parties agreed.

PUBLIC STAFF: The Public Staff pointed out that Section 3 of the Joint Settlement Proposal addresses the problems that may arise when a customer objects to charges for calls to information service providers. Subsection 3(a) deals with calls to 900, 976, and similar domestic numbers. It is largely based on the Commission's existing procedure. Subsection 3(b), which deals with calls to international information service providers, is patterned on subsection 3(a) but contains modifications to reflect the fact that calls to international ISPs cannot be blocked without blocking all international calls.

The Public Staff recommended that the Commission should not adopt the language in paragraph 3(b)(2) that "[t]he IXC may impose selective toll blocking." It is not appropriate for an IXC to block a customer's toll service for failure to pay for international ISP calls without adequate notice, as the contested provision would allow. Subsection 3(b), as noted above, is based on the Commission's existing procedure for calls to domestic information service providers (<u>In re Investigation of Billing and Collection Services for 700, 900, and 976 Services</u>). Removing the contested language from subsection 3(b) will make the Commission's requirements for domestic and international ISPs consistent.

The Public Staff pointed out that in addition to being inconsistent with present Commission procedure and being unreasonably harsh, the contested provision is illogical. Paragraph 3(b)(3) provides that on the second and subsequent occasions when a customer fails to pay for calls to an international ISP, "[i]f the IXC does its own billing and intends eventually to apply selective toll denial for nonpayment of such charges, the IXC shall advise the subscriber in writing that any additional charges incurred will not be removed and will result in imposition of selective toll blocking unless the charges are paid." It is not reasonable to authorize selective toll blocking without advance notice to the customer on the first occasion of nonpayment and then require advance notice on the second and subsequent occasions.

Reply Comments

ALLTEL: In its Reply Comments, ALLTEL stated that IXCs should have the option to impose selective toll blocking when a customer fails to pay his or her bill. The proposed language in the Joint Settlement Proposal would merely allow an IXC to terminate service to a customer who fails to pay valid charges on his or her bill. ALLTEL recommends that the Commission allow inclusion of language that would permit IXCs to impose selective toll blocking.

AT&T: AT&T noted that the only dispute on this issue is whether carriers may impose selective toll denial after the first time a customer refuses to pay for calls to international service providers.

AT&T noted that both the Public Staff and the Attorney General suggested that it would be illogical to require carriers to provide advance notice before imposing global toll blocking after the customer fails to pay his or her bill on the second occasion but not require notice before imposing selective toll blocking after the first occasion a customer refuses to pay his or her bill. Both the Attorney General and the Public Staff failed to address the fact that the forms of blocking in question (after the first and second occasions) are not the same. After the second occasion, the carrier is permitted, with notice, to impose global toll blocking, which means that the customer will not be able to place any long distance calls with any long distance carrier. The disputed language, on the other hand, allows only selective toll blocking, without notice, after the first occasion a customer refuses to pay his or her bill.

AT&T contended it is fair and reasonable to allow carriers to impose selective toll blocking in such instances. Just as credit card issuers are not forced to continue to issue credit to customers who refuse to pay their bills, long distance companies should not be forced to continue to provide toll service to customers who refuse to pay their bills. Without the disputed language, the rules would require long distance carriers to continue to provide service to customers who fail to pay valid charges on their bill. Such a requirement clearly would be unreasonable. No carrier should be required to continue to provide service to any customer who refuses to pay for valid charges on his or her bill. The Commission should adopt the proposed language in order to avoid this unreasonable and unconscionable result.

BELLSOUTH/ALLIANCE: BellSouth/Alliance did not file reply comments on this issue.

GTE: GTE stated that it agrees with the original comments of MCI WorldCom wherein MCI WorldCom pointed out that the Commission does not appear to have jurisdiction over this issue. GTE again urged the Commission to be cautious in this matter since elimination of operating conditions that the many providers in the toll market have is probably not in the best interests of a competitive market.

MCI WORLDCOM: In response to the Public Staff's argument that international calls to sex lines should be treated the same as domestic (900) calls to sex lines, MCI WorldCom pointed out that the practical effect of Public Staff's proposal would be that international calls would be treated more leniently than 900 calls, since there would be "three strikes" before such calls could be blocked from an IXC's network. MCI WorldCom stated that there is no demonstrated need for prohibiting IXCs from blocking their own networks to prevent continued calls to international sex lines.

SPRINT: Sprint stated that, along with AT&T and MCI WorldCom, it strongly supported the language allowing IXCs to selectively block customers who fail to pay for calls to international Internet service providers. Sprint noted the inconsistency in the language in paragraphs 3(b)(2) and 3(b)(3) and suggested that it will have to be reconciled, in accordance to how the issue is finally decided, at the time the Joint Settlement Proposal is reduced into rule form.

Sprint argued that the Public Staff is the only party to make a substantive argument against allowing IXCs to selectively block toll on the first occurrence of nonpayment. In response to the Public Staff argument that the language at issue allows blocking to occur without notice, and the rules for international Internet service provider calls should be kept parallel to rules for pay-per-call services, Sprint stated that all selective blocking will be done with appropriate notice, and Sprint commented that the Commission is free to provide for as much in its final rules.

ATTORNEY GENERAL: The Attorney General did not address this issue in his Reply Comments.

PUBLIC STAFF: The Public Staff did not address this issue in its Reply Comments.

<u>Commission Decision</u>

The Commission agrees with the arguments of the Attorney General and the Public Staff that the contested language should be excluded in order that the notice requirements between international and domestic calls to ISPs will be consistent. The Commission therefore concludes that the contested sentence in Paragraph 3(b)(2) to the effect that the IXC may impose selective toll blocking should be excluded.

<u>ISSUE NO. 3</u>: Treatment of business debts more than three years old. Paragraph 4 of the Joint Settlement Proposal bans local disconnection, bundled service disconnection, and global toll denial for nonpayment of debts that are more than three years old. ***The issue is whether Paragraph 4 should apply to business as well as residential customers.***

Initial Comments

ALLTEL: ALLTEL did not file initial comments.

AT&T: AT&T reiterated its position that this issue is far outside the scope of the Petition for Rulemaking brought by the Attorney General, and that, absent any sort of compromise agreement reached by the parties, it is highly inappropriate for the Commission to adopt the rules as proposed by the Attorney General and Public Staff. The Industry Group agreed to adopt the rule as applied to residential customers in the spirit of compromise on the entirety of the proposed rules but never agreed to adopt the rule as applied to business customers, and adoption of the rule as applied to business customers would invalidate the compromise reached by the parties on the remainder of the rules.

AT&T further stated that there is no good reason for adopting such a rule. The rule requires carriers to provide service to a business customer who refuses to pay his or her bill, simply because that bill is more than three years old. The mere fact that a business customer has a debt more than three years should not prohibit a local carrier from disconnecting that customer for nonpayment or from refusing to provide service to that customer. A three year old debt is still a valid debt and may be collected. Moreover, even if a carrier could not collect on the debt, that should not force the carrier to have to provide service to the customer. In essence, the rule would require all carriers to continue to provide service (if the customer has not been disconnected) or to provide service again (if the customer had been disconnected) to a customer, even though that customer refuses to pay the carrier for service.

BELLSOUTH/ALLIANCE: BellSouth/Alliance disagrees with the proposal to extend this practice to businesses. Business customers should bear the responsibility of managing business expenses. The purpose of this docket was to ensure that local service was not disconnected for nonpayment of toll charges, particularly the local service of residential customers who may be less sophisticated than customers like Bank of America. This docket was never intended to provide businesses with a form of debt relief. BellSouth/Alliance recommends that telephone utilities be allowed to deny local service to business customers for nonpayment of charges that were incurred more than three years prior to the date of such denial.

BTI: BTI submitted that a distinction should be made between residence and business customers with respect to bad debts. There is greater societal concern for individuals who cannot meet their financial obligations than for businesses that cannot pay their bills. BTI does not believe that business and residential customers should be treated the same with regard to bad debts and requested the Commission to eliminate the italicized verbiage in Section 4 of the Joint Settlement Proposal.

GTE: GTE stated that one of the underlying purposes of this docket was to determine methodologies to keep and/or increase subscribership as it relates to affordability of accessing the public switched network. The issue of affordability has not historically applied to business rates. It is GTE's view that the issue of affordability can only logically be applied to residential customers. To mandate that the three year old debt rule be mandated for business customers is counter productive to universal service, and it deprives the serving company of one avenue of debt collection of a potentially large amount owed by the end user. The contested language should not be adopted by the Commission.

MCI WORLDCOM: MCI WorldCom stated there is no demonstrated need for businesses to continue to be provided with local exchange service if they cannot or will not pay their phone bills. Their lack of phone service does not adversely affect "universal service." They are not typically subjects of "slamming" or "cramming." The public does not need to subsidize the phone service of businesses that do not pay their bills. There is no need for a provision protecting businesses.

SPRINT: Sprint stated it supports extending the protections of the section, which may or not extend past the normal operation of law, to residential customers only. The public interest and its concern about universal service and network access weighs heaviest with residential customers and only to a lesser extent implicates business customers. Local service subscription by business customers does not rise to the level of being an essential public need requiring or justifying the protection of a three year limit on the denial of local service for a failure to pay local service charges. Other Commission rules such as Rule R12-3 and the pricing of basic local service make a distinction between residential and business customers for the purpose of applying this policy preference.

ATTORNEY GENERAL: As a matter of law, debts beyond three years are barred by the statute of limitations if brought in a court of law. In addition, utilities have an obligation to serve the public. Thus, the current legal requirement which prevents telephone utilities from denying local service for debts more than three years old applies equally to businesses and residences.

PUBLIC STAFF: Section 4 of the settlement proposal provides that a utility may not deny local service to a customer or impose global toll denial for nonpayment of charges that are more than three years old and are unenforceable under the statute of limitations. The contested issue concerning this section is whether it should apply to business customers.

The Public Staff recommends that this section should apply to all customers. The statute of limitations was enacted well over a century ago, long before consumer protection became a major legal concern. It was not designed as a special benefit for vulnerable individuals who must deal with sophisticated business entities. It was adopted in the interest of simple fairness in order to require creditors to pursue their claims with a reasonable amount of diligence. It applies equally to debts owed by businesses and to the personal debts of individuals.

When a utility has failed to pursue a debt for three years and has lost the right to collect it through the court system, it should not be allowed to require payment of the debt as a condition for establishing new service or avoiding global toll denial. The utilities have agreed that this principle should apply to residential customers, and there is no legitimate reason why it should not apply equally to business customers.

Reply Comments

ALLTEL: ALLTEL does not believe the Commission should require carriers to provide service to business customers with debts more than three years old.

BELLSOUTH/ALLIANCE: BellSouth/Alliance stated that it agrees with the unanimous view of the other industry group members that the Commission should not extend the practice of not denying local service to residence customers for debts over three years old to business customers.

The industry group commentators raised a number of compelling reasons why carriers should be allowed to deny service to business customers for debts of any age. BellSouth/Alliance believes that the industry group has amply demonstrated that the universal service concerns that prompted the forgiveness of three year old debts incurred by residential subscribers simply and logically do not apply to the business community.

GTE: GTE stated that extending the three year debt rule to business is not in the public interest. The public interest issues associated with this docket relate to the affordability or the ability of maintaining local access to the telecommunications network. There is not nor has there been a demonstrated need for business customers to be included in the definition of the three year old debt rule. GTE believes that inclusion of the business class of customers in this rule could drive up the cost of uncollectibles for the telecommunications industry and place unwarranted pressure on the rates of residential customers.

MCI WORLDCOM: MCI WorldCom stated that the issue here is whether the carrier should be forced to provide service to a business that has failed previously to pay for that service. The Public Staff's and the Attorney General's reference to the statute of limitations is inapposite, and their stance is misguided. There is no social or economic need to compel a particular carrier to provide a business with phone service if it will not pay its debts.

SPRINT: Sprint did not file reply comments on this issue.

ATTORNEY GENERAL: The Attorney General did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff stated that a telephone company should not be allowed to sleep on its rights for many years, while memories fade and employees with knowledge of the disputed bill move on to other jobs, and then use the overwhelming leverage of service disconnection or denial to force payment of a bill it has lost the right to collect in the courts. The statute of limitations was not enacted solely as a protective measure for the residential consumer. It is a requirement of basic fairness, and it should be applicable to business and residential customers alike.

<u>Commission Decision</u>

The Commission agrees with the Attorney General and the Public Staff that neither residential nor business customers should be disconnected from or denied service for debts which are over three years old and concerning which the utility has not pursued in court. The Commission views this policy as one of fairness. The statute of limitations was not enacted solely as a protective measure for residential customers.

<u>ISSUE NO. 4</u>: Paragraph 6 contains the statement, "Regulated service may not be discontinued for failure to pay nonregulated charges." ***The issue is whether or not this statement should be adopted. Depending on how the Commission decides this issue, the Commission should then conform the last sentence of paragraph 6 (dealing with customer notification) to either include or exclude the words "or other regulated."***

Initial Comments

AT&T: AT&T contended that Section 6 goes far beyond the issue of local disconnection and far beyond the scope of the rules requested by the Attorney General. Section 6 would prohibit any telecommunications carrier from terminating any regulated telecommunications service (such as long distance service) for failure of a customer to pay any charges for any nonregulated service. Nowhere in its Petition did the Attorney General request that the Commission issue such rules nor did any party request such a rule in their initial comments before the Commission. Moreover, at no time in the hearing in this proceeding did any party ever request that the Commission establish a rule so broad in scope, nor set forth any reason or rationale for such a rule.

AT&T further contended that this rule would substantially hinder the ability of any telecommunications carrier to provide a bundle of services which includes regulated and nonregulated services. This rule would prohibit the provider of the bundle of services from disconnecting the bundle when the customer fails to pay for the nonregulated portion of the bundle. Such a rule would fundamentally alter the economics of bundled service and substantially hinder the ability of parties to create and offer such bundles of service. AT&T recommended that the Commission delete the contested sentence.

BELLSOUTH/ALLIANCE: BellSouth/Alliance did not address this specific issue.

BTI: BTI did not address this specific issue.

GTE: GTE stated the contested language in Paragraph 6 has far-reaching implications in the ever changing market place. GTE has already implemented a policy whereby local regulated service will not be disconnected due to the non-payment of nonregulated charges; therefore, from a pragmatic view point, the language is not particularly troublesome. However, the language is philosophically troublesome since a new and potentially very broad regulation is being overlaid on the industry in the context of a docket that is focused upon the disconnection of local services and toll denial. GTE recommended that the Commission not adopt the contested language in Paragraph 6.

MCI WORLDCOM: MCI WorldCom did not address this issue in its initial comments.

SPRINT: Sprint submitted that the contested sentence of Paragraph 6 of the Joint Settlement Proposal should read "*local* service may not be discontinued for failure to pay non-regulated charges," consistent with the Principles in the Joint Settlement Proposal. The primary focus of this docket is and has been an effort to ensure that local service would not be disconnected for nonpayment of other services. In their original petition the Attorney General requested the Commission to prohibit local exchange companies and CLPs from terminating local service as a means to induce payment of toll and long distance charges. Members of the TIG have conceded this issue as it relates to local service; however, the same rationale cannot be applied to other regulated services. IntraLATA toll is highly competitive in North Carolina and carriers should be able to pursue payment as needed.

Sprint further noted that the definitions section of the Joint Settlement Proposal defines local service to include basic local exchange service and any other Commission regulated telephone service, excluding unbundled intraLATA toll. The same section also defines charges for local service. Section 1(b)(1)(a) then grants telephone utilities permission to disconnect local service for past due charges for local service. Together, the provisions clearly identify and state that it is ***local service*** that is deniable and not regulated services. Sprint suggested that this is consistent with present Commission Rule R17-2(o) concerning CLP provision of nonregulated services which require that pages with nonregulated charges include the following statement: "Nonpayment of items on this page will not result in disconnection of your local telephone service; however, collection of unpaid charges may be pursued by the service provider."

ATTORNEY GENERAL: The Attorney General stated that the decisions and rules of the Commission already impose a ban on discontinuance of regulated service for nonpayment of nonregulated charges and adopting such a rule would merely codify the Commission's current policy.

The Attorney General cited the Commission's September 7, 1990 Order Forbidding Cut-Off and Authorizing Blocking for Nonpayment of 900 and 900-like Charges in Docket P-100, Sub 111, where the Commission stated: "The denial of local or long distance service for nonpayment of 900 service denies a substantial right" and "prohibiting cut-off for non-utility related service is not new," where the Commission cited Rule R6-17 prohibiting such activity related to natural gas.

The Attorney General also noted the following Commission rules:

R17-2(n). The public utility services provided by a CLP shall not be disconnected because of a customer's failure to pay for services other than those local exchange or exchange access services provided by the CLP or those services billed by a CLP for a certified interexchange carrier....

R17-2(o) further requires that charges for local exchange and exchange access services be billed separately from other billed services, and on each bill page where nonutility services are stated information be provided about the service provider and the following statement must appear:

> NONPAYMENT OF ITEMS ON THIS PAGE WILL NOT RESULT IN DISCONNECTION OF YOUR LOCAL TELEPHONE SERVICE; HOWEVER, COLLECTION OF UNPAID CHARGES MAY BE PURSUED BY THE SERVICE PROVIDER.

The Attorney General further referenced the Recommended Order Concerning Randolph Telephone Company Application of Payments Policy brought on by the complaint of Housecalls Healthcare Group, Inc., and issued August 20, 1996. The Hearing Examiner stated:

> ...the law is clear that utility service may not be disconnected for non-payment of unregulated charges. *E.g., In the Matter of Mary Gibson and Others Similarly Situated v. Duke Power Company,* Docket No. E-7, Sub 439 (October 31, 1988) all Orders by the Commission in Docket No. P-100, Sub 111 (investigation of billing and collecting for 700, 900, and 976 services); and the Commission's December Order in

this docket ("It is the general understanding in the industry that services cannot be disconnected for failure to pay non-regulated utility charges.")....

PUBLIC STAFF: The Public Staff pointed out that it has historically been the Commission's policy that a utility may not disconnect regulated service because of a customer's failure to pay for unregulated service. The Public Staff recommended that the Commission continue to adhere to this policy as a general rule, making exceptions only when necessary. With the introduction of bundled service, however, the policy will have to be modified as it pertains to CLPs. When a CLP provides a bundled service that includes both regulated and unregulated components, it is providing the two components as a single offering. If a customer fails to pay for the bundled service, clearly the CLP must have the power to discontinue it. If the Commission were to hold that the CLP must continue providing the regulated component and may only terminate the unregulated service, it would be requiring the CLP to offer the regulated component separately - and as previously discussed, the Commission has not imposed and cannot practically enforce such a requirement with respect to those CLPs that provide local service only on a bundled basis. A CLP could easily evade any such requirement by simply terminating the unregulated service and then setting the price of the regulated service at the same rate previously charged for the bundle.

The Public Staff stated it cannot recommend that the Commission adopt the contested sentence of Section 6 of the Joint Settlement Proposal as it is currently written. The Public Staff recommended that Section 6 be modified to read as follows:

> Regulated service may not be discontinued for failure to pay nonregulated charges, except in the case of nonregulated services included in bundled local service offered by a carrier which does not offer unbundled local service. Nonregulated charges will be shown: (1) on a separate page of the bill; or (2) in a separate section of the bill, if the charges are clearly and prominently labeled as such and the section in which they appear is set apart from the regulated charges section; or (3), subject to approval by the Commission, using other formats, so long as the proposed format results in appropriate consumer understanding regarding the nature of the charges. On the same page where the charges appear, customers will be notified that they cannot lose local or other regulated service for nonpayment of these charges, except in the case of bundled local service offerings as identified above.

In addition, the Public Staff recommended that Section 5, concerning information on disconnect notices and billing statements, be modified to reflect this policy exception. The Public Staff further recommended that the three bill messages that currently appear in the "Billing statements" subheading of Section 5 should be replaced.

The Public Staff also believes there are legitimate concerns about the problems that consumers are likely to face if CLPs are allowed to market bundled services without restriction. In particular, there is a danger that customers may not be adequately informed about the nature and implications of bundled services. A customer may sign up for a bundled service consisting of several components, some regulated and some unregulated, without realizing that the entire bundle will be treated as a single service for collection purposes. He may later experience financial problems and decide to pay for the component most essential to him, while allowing the others to be disconnected for nonpayment. Such a customer may be surprised and dismayed to learn that he cannot retain any component of the bundled service except by paying his total bill for the entire bundle. The customer will be confronted with the very same predicament that arises today under the current practice of local disconnection, which the telephone utilities have now agreed to change.

In order to prevent customers from being taken by surprise when the failure to pay for one telephone service leads to the threatened disconnection of numerous other services, the Public Staff recommended that the Commission modify Section 5 of the settlement proposal by adding at the end of the section a new subhead entitled "Bill inserts," setting out a requirement that periodic bill inserts be sent to customers subscribing to bundled local service, so as to ensure that these customers are informed as to the effects of nonpayment.

Reply Comments

AT&T: AT&T reiterated its objection to the inclusion of the sentence stating there is no possible rationale or reason for the sentence. To bring into this proceeding a broader prohibition on discontinuing any regulated service for failure to pay for non-regulated charges would be unfair and inappropriate.

AT&T contended that a review of the support provided by the Attorney General's and Public Staff's Comments reveals no general Commission "policy" prohibiting the disconnection of regulated service for failure to pay nonregulated charges. Rather, only in specific instances, with respect to specific services, has the Commission prohibited discontinuance of a particular service for failure to pay for another service.

AT&T stated that Rule 17-2(n) applies only to CLPs. By definition, a CLP provides local service. Rule 17-2(n) is intended to prevent CLPs from terminating *local service* for a customer's failure to pay for non-local services provided by the CLP. Rule 17-2(o), which effectuates Rule 17-2(n) by requiring a notice on customers' bills, very specifically refers only to disconnection of "local telephone service." It does not in any way suggest that a telecommunications carrier may not discontinue non-local regulated services for failure to pay for nonregulated services, nor is there any other rule that contains such a general prohibition.

AT&T further pointed out that the Commission's 900 Order and its Randolph Telephone Recommended Order apply only to very specific circumstances and issues. The 900 Order applies to a very specific service. In that proceeding, the Commission determined only that customers should not be denied regulated service for their failure to pay for 900 service. No party in that proceeding suggested and the Commission heard no evidence that carriers should be prohibited from discontinuing regulated service for failure to pay for any nonregulated service. The Randolph Telephone Order is even more limited to the facts of the particular incident surrounding the complaint at issue in that case. There is no evidence that the Commission ever intended to suggest that no regulated service could be discontinued for failure to pay for nonregulated charges.

AT&T further stated that the proposed rule would severely impact AT&T's ability to offer its Personal Network service in North Carolina and would effectively impede Sprint, GTE, MCI, or any other long distance carrier from developing and offering any bundled service offerings which include long distance and any other nonregulated services, including wireless, calling card, and Internet. Such a provision would chill the development of bundled service offerings in North Carolina.

AT&T suggested that if the Commission modifies the sentence as Sprint suggests, the sentence should be removed from Paragraph 6 and inserted in Section 1 as Section 1(b)(1(a).

GTE: GTE stated that there had not been any contested language in Paragraph 5 of the Joint Settlement Proposal until the Public Staff submitted comments, which changed the language that had been previous agreed upon. GTE does not take specific exception with the Public Staff's language, however, it should be noted that the Public Staff's language relates to regulated local service, not regulated service. The change to include all regulated service as non-disconnect items should be rejected.

MCI: MCI WorldCom stated that it supports the views expressed by Sprint and AT&T regarding this issue.

SPRINT: Sprint stated it agrees with the assessment of AT&T in its initial comments that a public policy reason for the rule as stated has yet to be placed on the record by any party. The public interest issues raised in this proceeding are fully addressed by the Joint Settlement Proposal's prohibition of disconnecting local service for the non-payment of non-local services. The public interest value of creating secondary protections for unbundled intraLATA toll service (a regulated but not a local service) in cases of nonpayment for voicemail service (a nonregulated service) are undemonstrated. Such secondary protections are bound to create additional administrative difficulties in an already complex regime. Sprint further commented that the Public Staff's language should only be considered standard language that is subject to modification on an individual basis.

PUBLIC STAFF: The Public Staff stated it strongly disagrees with GTE's and AT&T's objection to the contested language in Paragraph 6 of the settlement proposal, which provides that [r]egulated service may not be disconnected for failure to pay nonregulated charges." They assert that this sentence represents a major innovation, and that in GTE's words, "a new and potentially very broad regulation is being overlaid on the industry." At pages 4-5 of his initial comments, the Attorney General has clearly demonstrated that the contested provision is not an innovation at all but only a restatement of the Commission's long-established policy. The purpose of this rulemaking proceeding is to move beyond the Commission's existing policy prohibiting disconnection of regulated service for nonregulated debts by adding to it a rule against disconnecting local service for nonpayment of regulated long-distance charges. Thus, if the Commission were to omit the contested language from Paragraph 6, it would be taking a significant step backward.

The Public Staff also stated that it believes that AT&T's assertion that the Commission should decline to consider the contested language in Paragraph 6 because it is outside the scope of the Attorney General's rulemaking petition is clearly without merit. The fact is that all, not just some, of the controverted issues have been brought within the scope of this proceeding as a result of the parties' negotiations. By signing the submission of Joint Settlement Proposal, the parties agreed that all the controverted issues could be put before the Commission for resolution. The parties were bound by their agreement, and they should not be allowed to withdraw from it now.

Commission Decision

As the Attorney General demonstrated, the contested provision is not an innovation at all but only a restatement of the Commission's long-established policy. The Commission agrees with the Public Staff that omission of the contested language from Paragraph 6 would represent a significant step backward. Therefore, the Commission concludes that the contested language "or other regulated" should remain in the last sentence of Paragraph 6. The Commission also agrees with and adopts the Public Staff's recommended modifications to Paragraphs 5 and 6 filed in their initial comments.

ISSUE NO. 5: **Implementation of the plan.** Paragraph 9 states that Paragraph 4 of the Joint Settlement Proposal should be adopted as soon as possible but no later than 60 days from the date of a Commission Order in this docket. As to the remaining items, implementation should be as soon as possible (such date to be set by the Commission) but no later than July 1, 2000 (with provision for an extension upon request and approval by the Commission.) ***The issue for the Commission is how long the telephone utilities need to implement the requirements other than those set forth in Paragraph 4.***

Initial Comments

AT&T: AT&T did not address this issue.

BELLSOUTH/ALLIANCE: BellSouth/Alliance believes that the implementation dates for this policy change are of critical importance. BellSouth can implement both Items 3 and 4 of the Joint Proposal approximately 60 days after a Commission Order is issued, unless the Commission issues an Order late in 1999. If the Commission were to issue an Order in December, BellSouth may need a few extra weeks due to internal Y2K restrictions to have new procedures in place. Smaller companies may require even more additional time. The 60-day period is required to develop and implement new training for service representatives to use in dealing with customers.

The agreement reached with regard to Item 3 of the Joint Proposal is an entirely new way of treating international calls to ISPs and represents a significant departure from the way such calls are handled today. Under the new procedures, these calls will be treated similarly to 900 calls, although different types of blocking will be offered. These new procedures must be developed, service representatives must be trained, and mechanized screens must be developed to aid the representatives in their "on-line" dialogues with customers. Although BellSouth has already implemented Item 4 of the Joint Settlement Proposal for residential customers, a significant amount of implementation effort will be required on the part of the other companies who are joint signatories to this document. In order to implement this new policy, the agreements between the local and the Outside Collection Agencies (OCAs) must be modified, and the OCA personnel must be trained on the new procedures. In addition, company service representatives must know and understand the new policy so that they do not continue to refuse service to a residential customer with an outstanding debt in excess of three years old.

The remaining items are far more difficult to implement and will require considerably more time. BellSouth/Alliance will require approximately 270 days from the date of the final Commission

Order to implement the remainder of the items. This is a reasonable period of time given the complexities involved with making the needed changes. The most difficult changes are associated with changes to its billing systems and the mechanized systems that allocate partial payments. Today, partial payments are applied first to regulated charges and then to nonregulated charges. Under the new procedures, partial payments will be applied first to local, then to regulated long distance, and then to nonregulated. The systems required to allocate partial payments in a mechanized manner are very complex and extensive programming changes will be required. Once the program changes are made, two to three months of testing will be necessary to ensure that all "bugs" have been eliminated.

In addition, numerous changes to the actual bill format will be required. Once the local disconnection policy is implemented, it is clear that the standard bill format will be insufficient. Verbiage as set forth in Item 5 of the Joint Settlement Proposal will be required on each bill, and regulated charges must be segregated in a different manner. Additionally, the billing and collection contracts with each of the carriers will require renegotiation, since the portion of partial payments that will be received by interexchange carriers will be changing. Finally, new procedures must be developed and service representatives must be trained on the new policy. These procedural changes are totally new to all companies in North Carolina and to the BellSouth region. All procedural and programming changes must be developed "from scratch," i.e. procedures developed for another state cannot be modified to serve North Carolina. BellSouth/Alliance encouraged the Commission to allow the companies sufficient time to test these systems, particularly in light of Y2K, to ensure that all companies are fully ready to implement these significant policy changes.

Due to the complexities associated with making the systems changes required by the Joint Proposed Settlement, BellSouth/Alliance requested 270 days from the date of the Final Order to make the needed changes.

BTI: BTI did not address this specific issue.

GTE: Ongoing demands placed upon software changes and hardware changes include a wide spectrum of events ranging from NPA overlays to the FCC's Truth in Billing docket. GTE stated that it believes Item 4 is implementable within 60 days of the date of this Order and will make concerted efforts to implement the other requirements contained in the Joint Settlement Proposal by July 1, 2000. However, an earlier date is totally unrealistic and the contested language should not be adopted.

MCI WORLDCOM: With respect to Y2K, the Commission has announced a moratorium that will last until February 1, 2000. No non-emergency modifications to a carrier's network or information technology systems will be imposed during this period. If software or hardware cannot be installed or modified to accommodate rule changes until after February 1, 2000, the testing and implementation of those changes will take several months past that date to complete.

MCI WorldCom's own billing systems typically takes six months to implement. A recent notice provision mandated by the Mississippi Public Service Commission for billing statements has taken more than six months to fully implement for all billing platforms. Thus experience would suggest an implementation date no earlier than late in the second quarter of 2000, with a procedure for obtaining waivers from the Commission at a minimum of cost should Y2K-related problems or unforeseen circumstances create a need for additional time.

SPRINT: Sprint stated that it currently has underway two significant business initiatives that will facilitate its compliance with the Joint Settlement Proposal. Given the time line on these initiatives, Sprint believed an implementation date of July 1, 2000, for the Joint Settlement Proposal (with the exception of Paragraph 4) is the most reasonable expectation.

Sprint's first initiative is the introduction of a new bill format which has become Sprint's principle compliance strategy concerning state disconnect for nonpayment rules and the FCC's Truth in Billing rules. Sprint's second business initiative is the reengineering of many of its accounts receivable processes. This initiative includes the standardization and automation of customer account handling procedures across the company (e.g., payment application). As far as disconnect for nonpayment procedures, which today is highly manual in nature, the initiative is handing Sprint service representatives more information tools and resources with which to advise customers and properly service accounts.

ATTORNEY GENERAL: The Attorney General stated that the local disconnect rules are of great importance to North Carolina consumers and should be implemented as soon as possible, but noted that the telephone companies are subject to technical limitations. The parties agreed that while the provisions will be implemented no later than July 1, 2000, the companies could present evidence to the Commission as to why they cannot implement the provisions sooner. The Attorney General stated he would reserve comment until after reviewing the evidence that the companies present. The Attorney General noted and attached a Telecommunications Reports article regarding an Order the FCC issued in its Truth in Billing docket which requires, among other things, that telephone companies show on their bills deniable and nondeniable charges, i.e., which charges can and cannot result in local disconnection if left unpaid, by April 1, 2000.

PUBLIC STAFF: The Public Staff noted that the parties had agreed on an implementation schedule for Section 4 of the Joint Settlement Proposal. The companies should be able to resolve all Y2K difficulties and return to normal operations by February 1, 2000. It is reasonable to assume that any employee training and computer programming required in order to implement the settlement proposal can be carried out within 60 days. Therefore, the Public staff recommends that the Commission set April 1, 2000, as the deadline date for implementing Sections 1-3 and 5-8. The companies will, of course, be free to ask for additional time if their Y2K problems prove to be unexpectedly severe.

Reply Comments

ALLTEL: ALLTEL stated that because of the changes in programming, operations, billing and actual bill format, billing and collection contracts, customer service representative training, and testing required to ensure that all systems are operating properly, it agrees with BellSouth/Alliance's request that implementation occur 270 days from the date of the Commission's Final Order in this docket.

AT&T: AT&T did not file reply comments on this issue.

BELLSOUTH/ALLIANCE: BellSouth/Alliance stated that with the exception of Items 3 and 4 of the Joint Settlement Proposal, which BellSouth/Alliance believes can be implemented within approximately 60 days of a final Commission Order, the other changes required by the proposed rules are substantial and are totally new to all companies in North Carolina and in the BellSouth region. BellSouth/Alliance repeated its request that it be given a 270-day period after the issuance of a final Commission Order within which to implement changes other than those required by Items 3 and 4 of the Joint Proposal. Neither the Public Staff nor the Attorney General has advanced any compelling reason why the necessary changes must be made by April 1, 2000, or even July 1, 2000. The companies affected by the new rules must change legacy systems and processes that have been in place for many years. It is not unreasonable to expect these same companies to require nine months to "undo" these systems and processes to accommodate the demands of new rules, particularly in light of the complications posed by Y2K compliance. BellSouth/Alliance requested the Commission to grant the industry a 270-day period after issuance of a Final Order approving new rules to fully implement the rules.

GTE: GTE stated that the timeline is already established for implementation of the requirements of the Joint Settlement Proposal by July 1, 2000. If a company should need additional time, then the company can request an extension from the Commission. If the disputed language is adopted, then the Commission is placing itself in the position of assuming or knowing the demands that are being placed upon each company and thereby attempting to make a decision about an earlier date. Those decisions are best left with the telecommunications companies involved in the industry efforts, since the companies possess detailed knowledge about their specific obligations and priorities. The disputed language should not be adopted.

SPRINT: The Commission should not feel pressured by the FCC's date of April 1, 2000, as the date for marking and explaining deniable/nondeniable charges, and should recognize that the April 1, 2000 date contemplates already existing and fully implemented state rules that would require only a modified bill presentation. If Sprint's billing and accounts receivable systems and organizations were now in compliance with the myriad of requirements created by the proposal and all that Sprint needed to do was to modify its bill presentation, the April 1, 2000 date would have relevance to this proceeding and issue. Because such is not the case and for the reasons outlined in its initial comments, Sprint will need until July 1, 2000, to fully comply with the Joint Settlement Proposal.

ATTORNEY GENERAL: The Attorney General believes that the local disconnect rules implicate important consumer rights and need to be implemented as soon as possible. The Attorney General agrees that the companies may very well be required to have systems in place to implement most of the billing related provisions by April 1, 2000, pursuant to FCC requirements, and that this is the same implementation date suggested by the Public Staff in its comments. All of the parties have agreed on an implementation date of no later than July 1, 2000.

Further, the Attorney General noted that it is important that the companies devote whatever resources are necessary to meet the Commission's schedule and should take all steps to meet that deadline. Extensions of that date should be entertained only for compelling and unanticipated circumstances.

PUBLIC STAFF: The Public Staff noted that the parties agreed in Section 9 of the Joint Settlement Proposal that the implementation date would be "no later than July 1, 2000." The Public Staff has no doubt that if all the other parties can implement the settlement proposal by July 1, 2000, BellSouth can do it too. Accordingly, the Public Staff encouraged the Commission to set the implementation date for April 1, 2000; but if the Commission decides that the companies should be given more time, the deadline should not be delayed beyond July 1, 2000, at the latest.

Commission Decision

The Commission concludes that implementation for all items except for Paragraph 4 of the Joint Settlement Proposal should be completed by July 1, 2000, at the latest. Any company which cannot complete the implementation by that date may request additional time from the Commission, but the Commission strongly encourages all companies, if possible, to complete implementation before July 1, 2000.

IT IS, THEREFORE, ORDERED as follows:

1. That the Joint Settlement Proposal be, and the same is hereby, accepted as to those issues upon which the parties agreed;

2. That the controverted issues set out in the Joint Settlement Proposal be, and hereby are, decided as set out in this Order; and

3. That the parties to the Joint Settlement Proposal shall submit proposed rules implementing the Joint Settlement Proposal and the Commission decisions on controverted issues by no later than 30 days from the date of issuance of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the _14th_ day of January, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

RC011400.04

Commissioner Judy Hunt joins in Commissioner Ervin's dissent.
Commissioner William R. Pittman concurs in part and dissents in part.
Commissioner Sam J. Ervin, IV dissents in part.

DOCKET P-100, SUB 140

COMMISSIONER ERVIN, DISSENTING:

I respectfully dissent from the majority's conclusion that telephone utilities should be prohibited from denying service to business customers with unpaid bills which cannot be collected through the judicial system because of the expiration of the applicable statute of limitations. I decline to join the position adopted by the majority with respect to this issue for several reasons.

First, I believe that telephone utilities should be given an adequate opportunity to collect payment for the service which they provide. Any limitation placed on the ability of carriers to collect unpaid bills may unfairly burden customers who pay their bills in a proper manner. The majority's decision to require telephone utilities to serve business customers with unpaid bills which cannot be collected through the judicial system places an unnecessary burden on other customers, who may incur higher charges for telephone service than would otherwise be the case because of the inability to use this debt collection technique. The adoption of this prohibition could also be unfair to those seeking to compete with such businesses, since it effectively shifts costs from the non-paying business to a competing business which does pay its bills. In other words, the majority's decision may force a business that pay its bills to subsidize service to a competitor that does not. Thus, I believe that the majority's decision could be inequitable to other customers.

Secondly, I do not believe that the public policy considerations which justify the adoption of a rule prohibiting telephone utilities from denying service to residential customers with unpaid bills which are barred by the statute of limitations are equally applicable to business customers. At least at this point in the development of local telephone competition, many residential customers lack any meaningful alternative to their incumbent local exchange company. Although competitive alternatives for small business customers appear to be limited in many places as well, these limitations seem to be less severe than those which exist in the residential market. In addition, there is ample justification for treating residential and business customers differently with respect to this issue. Put simply, the purposes for which residential customers need telephone service are fundamentally different from the purposes for which business customers need such service. This Commission has never hesitated to make distinctions between customers where appropriate; I believe that this issue involves an instance where a residential-business distinction should be made. As a result, I do not believe that the relevant public policy considerations apply with equal force to residential and business customers.

The Attorney General and the Public Staff both argue that the three year statute of limitations set out in G. S. 1-52(1) applies equally to residential and business customers and that the absence of such a distinction in the relevant statutory provision should be carried over into our rules. In addition, the Public Staff argues that allowing telephone utilities to deny service to a business customer based on a time-barred debt is fundamentally unfair and creates a risk that the customer will be deprived of an adequate opportunity to dispute the validity of the unpaid bill due to the fading of memories caused by the passage of time and the departure of knowledgeable employees to other jobs or other locations. Finally, the Attorney General argues that telephone utilities have an obligation to provide service which would be undercut in the event that the Commission decides to permit service denials under the circumstances at issue here. I do not find these arguments persuasive.

Although there is no question but that civil actions to collect unpaid bills can be time-barred pursuant to G. S. 1-52(1) regardless of whether the underlying bill was incurred by a residential customer or a business customer, that fact should not be deemed dispositive of this issue. All of the "fundamental fairness" arguments advanced in support of the result reached by the majority, including the assertion that statutes of limitation protect all categories of customers, are equally applicable to unregulated businesses; there are not, to the best of my knowledge, any limitations on the ability of unregulated businesses to refuse to serve customers with unpaid, time-barred bills. Thus, the real issue here is whether a telephone utility should be denied the use of a collection technique available to all unregulated businesses. The fact that the protections of the statute of limitations are available to all categories of customers is simply not relevant to this issue, which should be decided on the basis of considerations unique to the provision of telephone service. For the reasons given above, I do not believe that the relevant policy considerations justify extending the prohibition approved by the majority to business customers. The Public Staff's concern about the impact of the passage of time on the ability of a business customer to successfully challenge a disputed bill does not justify the result reached by the majority either. A business customer would, under the approach which I think appropriate, retain the right to contest the validity of the underlying bill before the Commission. An inability to present evidence concerning a bill's validity is just as much of an obstacle to the alleged creditor as it is to the alleged debtor in such a Commission proceeding. Finally, the Commission is the arbiter of the circumstances under which a telephone utility has or has not met any service obligation it may have; the Commission has always permitted telephone companies to deny service to specific categories of customers under certain limited circumstances. For this reason, the Attorney General's "obligation to serve" argument is not genuinely relevant to the present issue. As a result, the arguments advanced in support of the result reached by the majority do not strike me as persuasive.

The result reached by the majority may have unintended consequences which the parties have not even mentioned. According to the agreement of the parties, which the Commission has approved, a telephone utility is still permitted to deny service to a customer against whom a judgment has been obtained or against whom suit has been filed. Acceptance of the position espoused by the Attorney General and the Public Staff and adopted by the majority could well lead to a situation in which telephone utilities attempt to reduce all unpaid bills to judgment, a result which may impose additional burdens on the judicial system, increase the cost of providing telephone service in North Carolina, and hamper efforts by business customers to start over after experiencing financial reverses. Admittedly, these same adverse impacts could occur in connection with the provision of service to residential customers; however, the public policy considerations recited above seem to me to justify a distinction between these two categories of customers for purposes of resolving the present issue. As a result, depriving telephone utilities of the ability to deny service to business customers with time-barred, unpaid bills may cause more problems for both carriers and their business customers than would result from the practice which the Commission has decided to prohibit.

Another argument which one could make in support of the result reached by the majority is that there are other ways of protecting telephone utilities from the adverse impact of restoring service to business customers with unpaid bills which cannot be collected through the judicial system due to the operation of the statute of limitations, such as requiring the customer to make a deposit. Although such deposits could provide telephone utilities with additional protection against the non-payment of future bills, they do nothing to solve the problem caused by the non-payment of the original bill. Thus, I do not believe that the ability to make a customer provide a deposit is an adequate substitute for the practice at issue here.

I would not, however, allow a telephone utility to disconnect or deny service to a current business customer with a bill more than three years old. Assuming that the telephone utility has not, for whatever reason, disconnected or denied service to such a customer prior to the expiration of the statute of limitations, such a time-barred bill should not be used to justify disconnecting or denying service to such a customer after that time. Thus, my disagreement with the majority is limited to its decision to prevent telephone utilities from denying service to former business customers which were disconnected or otherwise did not continue to take service from that telephone utility and then attempted to reestablish service with the same telephone utility following the expiration of the relevant statute of limitations.

The most compelling argument in favor of the result reached by the majority which has occurred to me is the potential difficulty of enforcing a rule of the nature which I am inclined to support. I can, for example, foresee disputes over how a telephone utility should determine which was and which was not the same business customer for purposes of implementing this practice. On the other hand, existing Commission rules have allowed such service denials without apparent problem. As a result, I am not inclined to adopt the result reached by the majority for enforceability reasons. Thus, for all of these reasons, I respectfully dissent from that portion of the majority's decision which prohibits telephone utilities from refusing to provide service to business customers not currently receiving service with unpaid bills which cannot be collected through the judicial system because of the operation of the relevant statute of limitations.

\s\ Sam J. Ervin, IV
Commissioner Sam J. Ervin, IV

DOCKET P-100, SUB 140

COMMISSIONER PITTMAN, CONCURRING IN PART AND DISSENTING IN PART

I respectfully dissent from the majority's conclusion in the first issue that the rules regarding disconnection of service do not apply equally to all carriers. Sound public policy and basic tenets of justice require uniform application of rules absent some compelling reason to discriminate between or among affected parties. The arguments in support of the majority's decision to discriminate in favor of companies who simply do not choose to package a service in a particular way present no such compelling reason. To be sure, this Commission has not adhered to a policy of strict regulatory parity between incumbents and competitors; bending over backwards to spur competition with limited success. Generally, such discrimination has been to remedy or prevent some obvious competitive advantage the incumbent might have because of it's former monopoly. That is not the case here; in fact, the issue is probably one more of not removing a competitive disadvantage. The technological state of telecommunications today is such that arguments citing practical difficulty or some perceived obstacles to innovation are disingenuous. We ought to be competitively neutral whenever and wherever we can absent some compelling reason to do otherwise, and I believe the rule should apply equally to incumbents and competitors alike regardless of how they choose to offer service.

I also respectfully dissent from the majority's conclusion that telephone utilities should be prohibited from denying service to business customers with unpaid bills after the expiration of the applicable statute of limitations. I do so for the same reasons outlined by Commissioner Ervin in his dissent, but for some others as well. In today's telecommunications environment, particularly with the proliferation of alternatives to plain old telephone service, there are fewer and fewer reasons to prohibit the denial of service to business or residential customers who do not pay their bill. Nonetheless, if we are going to do so, we should limit such prohibition to cases of serious personal need, cases which simply do not apply to businesses. Further, the statute of limitations applies to the collection of debts through the courts. There is nothing in common law or modern statutory law which extends such a statute of limitations to other non-judicial remedies such as denying continuing or future service to somebody who has not paid a bill for previous service, and I don't believe that we should either.

I generally concur with the remainder of the majority's decision.

\s\ William R. Pittman
William R. Pittman

DOCKET NO. P-100, SUB 140

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition for Rulemaking to Revise Billing and	)	ORDER
Collections Procedures for Telecommunications	)	PROMULGATING
Companies Regarding Local Disconnection and	)	RULES
Toll Denial	)	

BY THE COMMISSION: On January 14, 2000, the Commission issued the Order Directing Revision of Rules and ordered parties to submit proposed rules on procedures for local disconnection and related matters addressed in this docket. On May 17, 2000, Attorney General Mike F. Easley filed Proposed Rules on behalf of all participants in the Joint Settlement Proposal except MCI Telecommunications Corporation and MCI WorldCom Communications, Inc., (MCI), and asked that these rules be adopted expeditiously so that the local disconnection policies adopted in the Commission's decision may be implemented without delay. The proposed rules submitted by the Attorney General add a new chapter, Rule R12-17, and make complementary revisions to Rule R12-8, Rule R2-9(e), and rules R17-2(n) and (o).

MCI filed Rules Proposed by MCI WorldCom to Implement Order Directing Revision of Rules on March 15, 2000, stating it agreed with the draft rules initially recommended by the Attorney General, then modified by the Telecommunications Industry Group (TIG), and then further modified by the Attorney General and Public Staff, with additional changes proposed by MCI. On March 17, 2000, the Attorney General filed Response to MCI stating that the changes MCI seeks are unnecessary or inappropriate. The Attorney General also pointed out that the rules proposed are based on matters already adopted in the Joint Settlement Proposal and the Commission's January 14th decision. Additionally, MCI has participated in negotiations to finalize proposed rules and a number of MCI suggestions have already been incorporated. The Attorney General stated he does not believe the suggestions raised by MCI now merit much comment as they concern particular details not critical to the policies and rules adopted in this proceeding and tend to focus undue attention on a few points.

On March 17, 2000, the Public Staff in their Response to Filing of Proposed Rules stated that they are in full agreement with the Attorney General's analysis and joins the Attorney General in encouraging the Commission to disapprove MCI's suggestions and proceed expeditiously to adopt the proposed rules filed on behalf of the Attorney General and other participants in the Joint Settlement Proposal.

The proposed rules submitted by the Attorney General on behalf of the parties to the Joint Settlement Agreement (except MCI) are attached to this memo as Appendix A.

MCI's proposed rule changes and the Attorney General's responses are as follows:

Rule R12-17(i)(2)(B) and (C):

MCI proposed rule change: MCI stated it has no objection to reserving the issue of specific bill messaging in this rule as recommended by the Public Staff and Attorney General. MCI supports the proposal that carriers develop their own bill messages consistent with the FCC's Truth-In-Billing requirements and the rules ultimately adopted by the North Carolina Utilities Commission. MCI agrees with the TIG that carriers should be given sufficient time to develop bill messages once the rules are adopted. MCI submitted that at least ninety (90) days are necessary to enable carriers to develop bill message language and communicate with their customers.

Attorney General's response: MCI filed its proposed rules before final details were worked out to address language concerning how customers will be informed about the disconnection policies on their billing statements. Since then, the other parties have reached agreement on those provisions, thus MCI's suggestion is moot about changing the effective date of the rules.

Rule 12-17(a)(4):

MCI's proposed rule change: The rule proposed by the Public Staff and the Attorney General may, or may not, "restrict" a customer subject to global toll denial from dialing 0+ or 0- in order to place a toll call. It is important that the local exchange carrier whose network originates this call "recognize" that the customer is subject to global toll denial, so that a "loophole" in global toll denial does not exist to the detriment of the IXC whose charges have not been paid. So that the global toll blocking in an appropriate case is "recognized" by a carrier that validates operator assisted calls, MCI suggests that "global toll denial" be redefined, to state that it "occurs when the local service provider blocks the end user's access to toll services that could be billed on the local service provider bill."

Attorney General's response: The Attorney General stated that the definition of "global toll denial" was not specifically provided in the Joint Settlement Proposal. However, the language proposed includes significant revisions made to accommodate MCI and AT&T. The wording MCI now proposes was rejected by several parties because it might suggest that global toll denial only blocks toll calls billed by the local provider, and such a broad limitation on global toll denial was not part of the Joint Settlement Proposal. As to MCI's concern about whether global toll denial will block 0+ and 0- calling, the Attorney General noted that Rules R12-17(d)(3)-(5) provide limitations on what global toll denial may block and clarify that billed number screening is included. The Attorney General stated he did not read the Commission's rules as requirements for what local providers *must* block, but rather, what they *may not* block.

Rule R12-17(b)(4):

MCI proposed rule change: MCI suggested that in order for Rule R12-17(b)(4) to be consistent with proposed section (b)(3), a comma should be inserted after "or" in the first line of proposed section (b)(4), and the following phrase (followed by a comma) should thereafter be inserted: "if applicable,". also, the phrase "or is sufficiently current" is unnecessary and introduces ambiguity.

MCI also stated that proposed section R12-17(b)(2), when read with proposed section R12.17(a)(3), states that "bundled local service" is to be disconnected for nonpayment of any charge included in the "bundle." Under proposed sections (b)(2) and (b)(3), when read with proposed sections (b)(4) and (b)(5), the customer has the ability to maintain unbundled local service, if the LEC provides that service. Thus in proposed section (b)(4), the local service offered the customer who had previously used bundled local service, necessarily would be a different service. Otherwise, the customer may take the position that he or she is entitled to maintain the bundled local service, even though the customer is not prepared to pay for non-local services. The phrase "the customer's current" in the first sentence of proposed section (b)(4) is appropriate if the customer has been using unbundled local service, but is not appropriate if the customer has been using bundled local service.

MCI proposed that the first sentence of proposed section 12-17(b)(4) should be changed to read: "If the regulated past due balance owed for local service or, if applicable, the surrogate amount, has been paid in full, the telephone utility will continue to provide the customer with the customer's current local service, if the customer has been using local service that is not bundled. If the customer has been using bundled local service, the telephone utility will provide the customer with local service."

Attorney General's response: In a number of instances where one party has suggested new language that appeared unnecessary or another party found questionable, the Proposed Rules have maintained language already agreed to in the Joint Settlement Proposal. That is the case here. The Attorney General stated he does not agree with the extra comma and words added by MCI are needed, and also disagrees with MCI's argument that the words "or is sufficiently current" are unnecessary and introduce ambiguity. Local providers often refrain farm action until an overdue balance reaches a threshold amount or until a reasonable time has passed, and the rules are not intended to affect that practice.

In response to MCI's proposed change to address a concern that a customer may argue he or she is entitled under Rule R12-17(b)(4) to maintain bundled local service because of present wording that allows the customer to keep their "current local service," the Attorney General stated that the wording MCI now challenges is the same wording MCI agreed to in the Joint Settlement Proposal. Further, MCI's argument is illogical concerning why changes are needed and its wording does not improve the rules. "Bundled local service" and "local service" were both defined in the Joint Settlement Proposal and in the proposed rules, and their meanings are distinct. The present wording states customers may keep their current *local service*, not their current *bundled local service*. The

Attorney General stated that he understands the proposed rules to mean that a customer will be allowed to keep the local portion of their current service by paying the charge for the local service.

Rule R12-17(b)(5):

MCI's proposed rule change: To make proposed section (b)() consistent with section (b)(34), in proposed section R12-17(b)(5) the phrase "unbundled" should be inserted before "local service option," and the phrase, "or, if applicable, the surrogate amount" should be inserted after "regulated past due balance."

Thus the first sentence of proposed section (b)(5) should read: "If a customer's local service has been disconnected for nonpayment, the telephone utility will re-establish local service with the unbundled local service option of the customer's choice, provided that the customer pays the regulated past due balance owed for local service or, if applicable, the surrogate amount."

Attorney General's response: For similar reasons addressed under Rule R12-17(b)(4), MCI's proposal to change language in Rule R12-17(b)(5) is inappropriate and unnecessary.

Rule R12-17(i)(2)(E) and (F):

MCI proposed rule change: The proposed rules would be more clearly stated if proposed section R12-17(i)(2)(E) would follow proposed section R12-17(F). Nationally based carriers must conform to the FCC's requirements, as well as to North Carolina's rules. *The First Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-72, In the Matter of Truth-in-Billing and Billing Format, CC Docket No. 98-170, released May 11, 1999, for example, addresses "deniable" and non-deniable" charges rather than "regulated" and "nonregulated" charges. These terms are not interchangeable, yet the FCC has stated that "deniable" and "nondeniable" charges must be differentiated by the carrier. Thus the FCC "require[s] that carriers clearly and conspicuously [must] identify those charges for which nonpayment will not result in termination of "local service," when "deniable" and "nondeniable" charges are included in a single bill. Therefore, if a carrier complies with the regulated/nonregulated mandate of the Commission, it is possible that it may not be complying with federal Truth-in-Billing. There should be some flexibility allowed in such circumstances. The Public Staff and the Attorney General have recognized federal Truth-in-Billing requires such flexibility, since they have recommended that the billing statements described in proposed R12-17(i)(2)(B) be "reserved," for the time being.

Attorney General's response: MCI does not discuss what will be gained, substantively, from its suggestion that Rule R12-17(i)(2)(E) and (F) be reversed. Instead, MCI's discussion that next follows concerns how FCC requirements under Truth in Billing will mesh with this Commission's policies for local disconnection and related matters in this proceeding. The Attorney General stated the requirements ultimately worked out by all the other parties concerning billing statements in Rules R12-17(i)(2)(B) and (C) satisfy whatever concerns MCI may have on this point.

Whereupon, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that the proposed rules filed by MCI should be rejected for the reasons outlined in the Attorney General's Response and that the proposed rules filed by the Attorney General on behalf of all parties except MCI be promulgated as expeditiously as possible. The Commission strongly encourages the companies, if possible, to complete implementation before July 1, 2000.

IT IS, THEREFORE, ORDERED that the rules set out in Appendix A be promulgated.

ISSUED BY ORDER OF THE COMMISSION.
This 3rd day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mb040300.01

APPENDIX A

Chapter 12 of the Commission Rules is amended by adding a new Rule R12-17 as follows:

R12-17. Disconnection, denial, and billing of telephone service.

(a) For purposes of this rule, the following definitions shall apply:

(1) For purposes of this rule, "Local service" includes basic local exchange service (including extended area service [EAS]), expanded local calling (ELCA), and any other NCUC-regulated telephone service offered by a single corporate entity within a single LATA, except for unbundled Message Telecommunications Service (unbundled MTS).

(2) "Charges for local service" include charges for local service, as defined in Rule R12-17(a)(1), the state sales tax and federal excise tax associated with local service, the subscriber line charge (SLC), the primary interexchange carrier charge (PICC) applied by and on behalf of the local carrier, the local number portability (LNP) charge, and state and federal universal service surcharges applied by and on behalf of the local carrier. "Charges for local service" do not include charges applied by the local carrier on behalf of another carrier or entity, the E911 and telecommunications relay service surcharges or other nonregulated charges, e.g., charges for voicemail, Internet service, inside wiring, customer premises equipment, and wireless service.

(3) "Bundled local service" is a combination of local service, as defined above, and one or more other services, either regulated or nonregulated, which are offered either by a local service provider alone, or by a local service provider jointly with one or more other entities.

(4) "Toll denial" is the blocking of an end user's ability to place intraLATA and interLATA toll calls. Such intraLATA and interLATA toll calls include all interexchange calls which are not included in an end user's charges for local services. "Toll service" includes the provision of such interexchange calls, whether charged to the end user on a per call or flat fee basis. "Global toll denial" occurs when the local service provider blocks the end user's access to toll services, whether offered by the local service provider or an interexchange carrier, by restricting dialing patterns that access toll services in accordance with Rule R12-17(d)(3). "Selective toll denial" occurs when access is blocked to one carrier's toll facilities, but the end user is able to access another carrier's facilities for completion of toll calls.

(5) "Unbundled MTS" is intraLATA measured toll service not provided on a significantly discounted or flat rate basis as part of a package with local service.

(b) No telephone utility may disconnect local service or bundled local service to residence customers for nonpayment of past due charges except in accordance with these principles:

(1) Local service may be disconnected for nonpayment of past due charges for local service provided by the telephone utility as a single corporate entity.

(2) Bundled local service may be disconnected for failure to pay the total past due charges for the service.

(3) Before the local service portion of bundled local service is disconnected, the telephone utility will provide the customer with the opportunity of maintaining local service by paying the regulated past due balance owed for local service or a surrogate amount equal to or less than the past due balance owed for local service.

(4) If the regulated past due balance owed for local service or the surrogate amount has been paid in full or is sufficiently current, the telephone utility will continue to provide the customer with the customer's current local service. If regulated toll service charges remain unpaid, global toll denial may be imposed, after appropriate notice under Commission rules. The notice of global toll denial will also advise the customer that they may subscribe to any local services, as defined in Rule R12-17(a)(1), offered by the utility in accordance with the tariffs on file with the Commission.

(5) If a customer's local service has been disconnected for nonpayment, the telephone utility will re-establish local service with the local service option of the customer's choice, provided that the customer pays the regulated past due balance owed for local service. This provision applies whether service was disconnected before or after implementation of this rule.

(6) If the telephone utility does not provide local service on an unbundled basis, Rules R12-17(b)(3)-(5) will not apply, and the telephone utility may require the customer to pay the past due balance owed (excluding amounts billed by the telephone utility on behalf of third parties for service other than the bundled service) before bundled local service is restored.

(7) A telephone utility may not disconnect a customer's local service, nor impose global toll blocking, for nonpayment of disputed charges.

(8) If a residence customer under global toll denial incurs charges for toll service which are billed on the customer's local telephone bill, by abuse or fraud, which includes the obtaining, or attempting to obtain, or assisting another to obtain or to attempt to obtain, toll service message telecommunications service by rearranging, tampering with, or making connection with any facilities of the telephone utility, or by any trick, scheme, false representation, or false credit device, or by or through any other fraudulent means or device whatsoever, with intent to avoid the payment, in whole or in part, of the regular charge for such service, the telephone utility may discontinue the customer's local service.

(c) Partial payments to telephone utilities.

(1) Partial payments to local service providers will be allocated as follows: first to local service, second to other regulated service, and third to nonregulated service.

(2) Partial payments to long-distance carriers that are not local service providers and do not bill for local service will be allocated as follows: first to regulated long-distance service, and second to nonregulated service.

(d) Global toll denial for residential telephone customers.

(1) A local service provider may impose global toll denial for failure to pay any of the following charges:

(A) Charges for unbundled interLATA toll service and unbundled intraLATA MTS (whether carried by the preferred interexchange carrier (PIC) or by using dial-around services (101XXXX));

(B) Charges for collect interLATA and intraLATA toll calls;

(C) Charges for interLATA and intraLATA toll service that is provided by a third party as part of a bundle offered jointly with the local service provider;

(D) Charges for toll calls made through 8XX toll-free numbers which result in charges for regulated services being billed back on the local service provider bill; or

(E) Charges for international calls to information service providers (ISPs) on the third occasion as addressed in Rule R12-17(g) below.

(2) A local service provider may not impose global toll denial for failure to pay the following charges:

(A) Charges for calls to 900 numbers and other nonregulated charges; or

(B) International calls to ISPs on the first and second occasion as addressed in Rule 12-17(g) below.

(3) When global toll denial is imposed, the local service provider may block the customer's ability to place interLATA and intraLATA toll calls. The customer's current local service will not be impaired and the utility will provide the customer with local service in accordance with Rule R12-17(b)(4). Further, the global toll denial mechanism may not block 8XX toll free numbers; except that a local service provider may choose, at its discretion, to block certain 8XX toll free numbers that result in toll charges being billed on the customer's local telephone bill. Local service providers may also provide, at their discretion, other blocking services to a customer when global toll blocking is imposed, such as blocking of all 8XX toll free numbers, if the customer affirmatively chooses such blocking services.

(4) Global toll denial will not block access to expanded local service or toll service that is included along with local service in a bundle of services for which the customer pays a flat monthly rate.

(5) Global toll denial includes billed number screening.

(e) Regulated service may not be discontinued for failure to pay nonregulated charges, except in the case of nonregulated services included in bundled local service offered by a carrier which does not offer unbundled local service.

(f) No telephone utility providing local telecommunications service or intrastate long distance service shall discontinue a customer's service for nonpayment of Designated Services. For purposes of this rule, the term "Designated Services" means 900 service, 976 service, or 500 or 700 service when such service is used in a 900-like manner. In such cases the telephone utility shall follow these procedures:

(1) If the subscriber is willing to make payments, the telephone utility shall attempt to make reasonable arrangements for payment.

(2) If the subscriber challenges the bill or is otherwise unwilling or unable to pay, the telephone utility shall remove the charges from the customer's bill on the first occasion and shall offer the subscriber free blocking of Designated Services. If the subscriber declines to allow the free blocking, the telephone utility must inform the subscriber in writing that any charges incurred after that date will result in blocking of Designated Services.

(3) On the second occasion that the subscriber challenges the bill, or is unwilling or unable to pay, the telephone utility shall remove the charges from the subscriber's bill and shall impose free blocking of Designated Services on the subscriber.

(g) No telephone utility providing local telecommunications service or intrastate long-distance service shall discontinue a customer's service for nonpayment of international calls to information service providers except as provided herein. In such cases, the telephone utility shall follow these procedures:

(1) If the subscriber is willing to make payments, the telephone utility shall attempt to make reasonable arrangements for payment.

(2) If the subscriber challenges the bill, or is otherwise unwilling or unable to pay, the telephone utility shall remove the charges from the subscriber's bill on the first occasion. The local carrier shall offer the subscriber free global toll denial.

(3) If, after the first occasion, the subscriber incurs additional charges for international calls to information service providers and challenges the bill, or is unwilling or unable to pay, even in installments, the telephone utility shall remove the charges from the subscriber's bill. The local carrier shall offer the subscriber free global toll denial and shall advise the subscriber in writing that any additional charges incurred will not be removed and will result in imposition of global toll denial unless the charges are paid. If the IXC does its own billing and intends eventually to apply selective toll denial for nonpayment of such charges, the IXC shall advise the subscriber in writing that any additional charges incurred will not be removed and will result in imposition of selective toll denial unless the charges are paid.

(4) If the subscriber incurs additional charges for international calls to information service providers after charges have been removed on two previous occasions, and after written notice as described above, and the subscriber refuses to pay the additional charges or to commit to and honor reasonable payment arrangements for the additional charges upon demand, the local carrier may impose global toll denial on the subscriber's lines and the IXC may impose selective toll denial.

(h) Treatment of debts for telephone service that are more than three years old.

(1) No telephone utility may deny local service to a customer for nonpayment of charges that were incurred more than three years prior to the date of such denial, unless the utility filed and is actively pursuing a pending court action or has secured a valid court judgment for nonpayment of local charges within three years of the date when such charges were incurred. No telephone utility may deny bundled local service to a customer for nonpayment of charges that were incurred more than three years prior to the date of such denial; provided that the utility may deny bundled local service to a customer for nonpayment of charges for local or bundled local service if it filed and is actively pursuing a pending court action or has secured a valid court judgment against the customer for nonpayment of such charges within three years of the date when the charges were incurred.

(2) A telephone utility may deny unbundled toll service to customers for nonpayment to that utility of outstanding charges for unbundled toll service that are more than three years old only through selective toll denial. Provided, that this provision shall not impose an affirmative duty on the utility to suspend global toll denial on its own initiative after such

three year period. However, if a customer requests that the utility suspend global toll denial after such time, the utility may not continue to impose global toll denial for nonpayment of such a debt. A telephone utility may impose global toll denial for debts that are more than three years old if the utility filed and is actively pursuing a pending court action or has secured a valid court judgment for nonpayment of such charges within three years of the date when such charges were incurred.

(i) Disconnect notices, billing statements and bill inserts for telephone utilities.

(1) Disconnect notices.

(A) Local carriers.

(i) Disconnect notices for residence customers shall state clearly the minimum amount that must be paid in order to maintain local service and the minimum amount that must be paid in order to maintain both local and toll service.

(ii) Disconnect notices for residence customers who are subject to the imposition of global toll denial shall clearly describe the type of toll blocking that will be imposed if charges for toll services are not paid. The notice shall offer the customer the option of maintaining his or her choice of available local service options and shall inform the customer as to what local service will be provided by the carrier if the customer does not express a preference. The notice shall also advise the customer of his responsibility for paying for any calls that appear on his bill as a result of not blocking ELCA calls.

(iii) For carriers that offer local service on an unbundled basis, disconnect notices for residence customers of offerings that include both local service and other services shall explain the customer's option of maintaining local service by paying the regulated past due balance owed for local service only, and shall specify the amount due to maintain local service. For carriers that offer only unbundled local service, disconnect notices shall clearly state the minimum amount that must be paid in order to maintain the bundled local service, and shall state that basic local service is available from at least one other provider.

(B) IXCs. Disconnect notices shall clearly state the minimum amount that must be paid in order to maintain toll service.

(C) Periodic notification of disconnect policy. Carriers that bill customers for local service and IXCs that bill customers directly shall provide periodic notification of the disconnect policy established by this Rule to all customers through a bill insert or special mailing issued immediately after the implementation of these rules and annually thereafter.

(2) Billing statements.

(A) On each bill page where nonregulated services are stated, or where the services of any provider other than the billing utility are stated, the name of the service provider offering the service and a toll-free contact number or numbers for the service provider shall be clearly shown. The toll-free contact number for the service provider may be a number of the company that handles the inquiry function for the service provider.

(B) Language must appear on the bill clearly explaining the consequences of failing to pay particular charges shown on the bill. Such language must be prominently displayed either on the summary page of the bill or in close proximity to the specific charges to which it applies.

(C) Language, prominently displayed, must also appear on the bill clearly identifying those charges for which nonpayment will not result in disconnection of local service, as well as those charges for which nonpayment will not result in disconnection of any regulated service.

(D) If a telephone utility bills for a bundle of services offered in part by a third-party provider, the name of the third-party provider must be identified on the bill as a co-provider of the bundle.

(E) The billing format must be in accordance with the FCC's Truth in Billing regulations. However, prior to or after the adoption of the FCC regulations, parties in this docket are free to seek additional billing format changes in the public interest.

(F) Nonregulated charges will be shown: (i) on a separate page of the bill; or (ii) in a separate section of the bill, if the charges are clearly and prominently labeled as such and the section in which they appear is set apart from the regulated charges section; or (iii), subject to approval by the Commission, using other formats, so long as the proposed format results in appropriate consumer understanding regarding the nature of the charges. On the same page where the charges appear, customers will be notified that they cannot lose local or other regulated service for nonpayment of these charges, except in the case of bundled local service offerings as identified in Rule R12-17(a)(3).

(3) Bill inserts. Whenever a residence customer subscribes to bundled local service, the customer's first billing statement must be accompanied by a bill insert as set forth below, and a similar bill insert must be sent to the customer annually thereafter. The bill insert shall read as follows:

(A) For local carriers who offer unbundled local service:

You are a subscriber to a bundled local telephone service. ***Please note*** that if you do not pay your ***entire*** bill for bundled local service, ***all*** components of the bundled local service are subject to disconnection. However, before your bundled local service is disconnected, you will be offered the option of maintaining local service by paying the regulated past due balance owed for unbundled local service.

(B) For local carriers who offer only bundled local service:

You are a subscriber to a bundled local telephone service. ***Please note*** that if you do not pay your ***entire*** bill for bundled local service, ***all*** components of the bundled local service are subject to disconnection. You do not have the right to retain selected components of the bundled local service by paying for only those components.

(C) Modification of bill insert requirements may be requested to address jurisdictional conflicts and other legitimate issues on an individual basis.

Rule R12-3(b) is rewritten as follows:

(b) Subject to the additional requirements of Rule R12-17 for telephone utilities, a customer who fails to pay a bill within a reasonable period after it becomes due and who further fails to pay such bill within five (5) days after presentation of a discontinuance of service notice for non-payment of bill (regardless of whether or not service was discontinued for such nonpayment) may be required to pay such bill, together with a reasonable reconnection charge, if service was discontinued after notice as provided in Rule R12-8, and reestablish his credit by depositing the amount prescribed in Rule R12-2 of these rules in case the conditions of service or basis on which credit was originally established have materially changed.

Rule 12-8 is rewritten as follows:

No utility shall discontinue service to a customer or impose toll denial for nonpayment of bill without first having diligently tried to induce the customer to pay the same and until after at least five (5) calendar days' written notice of discontinuance of service to the customer. The written notice may be given by first-class mail, or by other delivery to the premises served, or by other legal means of service of process, and the five (5) days' notice period shall begin to run from the day following deposit of the notice in the post office or from the day of otherwise delivery of the notice to the premises served, or from the day of other legal service. Provided, however, that in the case of any customer who has a record of abuse of or excessive use of metered or toll service for which the customer's deposit would not furnish security for such five (5) days' notice period, service may be discontinued after 24-hour notice. Further provided, that in the case of any residential telephone customer who has a record of abuse of or excessive use of toll service for which the customer's deposit would not furnish security for such five (5) days' notice period, local service may not be discontinued but toll service may be globally denied after 24-hour notice. A report of all such service disconnections or toll denials made on such 24-hour notice under this proviso shall be filed with the Utilities Commission within thirty (30) days after the discontinuance of service.

Rule R12-9(e) is rewritten as follows:

Acceleration of Past Due or Delinquent Date in Rate Cases and with Good Cause -- If a utility with good cause determines that the credit rating of a customer has been jeopardized by unusually extensive use of a metered or toll service, such as long distance telephone service, or by other factors which indicate the likelihood that the customer cannot pay his outstanding bill, and for which the customer's deposit, if there be one, does not furnish adequate security, the utility may accelerate the past due or delinquent date and proceed with disconnect or toll denial procedures under N.C.U.C. Rule R12-8 and R12-17; provided, however, that it must state to the customer in writing its cause for so doing and file a copy of said statement with the Commission.

Rule R17-2(n) is rewritten as follows:

(n) A CLP must abide by all applicable provisions adopted by the Commission for disconnection, partial payments, global toll denial, nonregulated charges, 900 and similar charges, treatment of stale debts, and disconnect notices and billing statements as set forth in Rules R12-17.

Rule R17-2(o) is rescinded.

DOCKET NO. P-100, SUB 140

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition for Rulemaking, to Revise Billing and	)	ERRATA ORDER
Collections Procedures for Telecommunications	)	
Companies Regarding Local Disconnection and	)	
Toll Denial	)	

BY THE CHAIR: On April 3, 2000, an Order Promulgating Rules was issued in this docket. In Appendix A on the last page, the caption for Rule R12-9(e) was set out as follows:

"Acceleration of Past Due or Delinquent Date in Rate Cases and with Good Cause"

That caption should read as follows:

"Acceleration of Past Due or Delinquent Date in Rare Cases with Good Cause"

The Chair concludes that the caption should be corrected as set out above.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE CHAIR.
This the 5th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rz040400.07

DOCKET NO. P-100, SUB 140

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition for Rulemaking, to Revise Billing and Collections Procedures for Telecommunications Companies Regarding Local Disconnection and Toll Denial	))))	ERRATA ORDER

BY THE CHAIR: On April 3, 2000, the Commission issued an Order Promulgating Rules in this docket. In Appendix A, the last sentence of Rule R17(i)(1)(A)(iii) reads as follows:

> "For carriers that offer only unbundled local service, disconnect notices shall clearly state the minimum amount that must be paid in order to maintain the bundled local service, and shall state that basic local service is available from at least one other provider."

The word "unbundled" was an error. The word should be "bundled." The sentence should read as follows:

> "For carriers that offer only bundled local service, disconnect notices shall clearly state the minimum amount that must be paid in order to maintain the bundled local service, and shall state that basic local service is available from at least one other provider."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE CHAIR.
This the 13th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz041200.01

DOCKET NO. P-100, SUB 140

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition for Rulemaking, to Revise Billing and Collections Procedures for Telecommunications Companies Regarding Local Disconnection and Toll Denial	))))	ERRATA ORDER

BY THE CHAIR: On April 13, 2000, an Errata Order was issued, the first paragraph contained a sentence beginning as follows: "In Appendix A, the last sentence of Rule R17(i)(1)(A)(iii) reads as follows:". The rule reference is incomplete. That sentence portion should read: ""In Appendix A, the last sentence of Rule R12-17(i)(1)(A)(iii) reads as follows:".

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE CHAIR.

This the 14th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz041300.04

DOCKET NO. P-100, SUB 143
DOCKET NO. P-19, SUB 355

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-100, Sub 143

In the Matter of Recorded Announcement of Anonymous Call Rejection	)	ORDER REGARDING RECORDED ANNOUNCEMENT OF ANONYMOUS CALL REJECTION
Docket No. P-19, Sub 355	)	
In the Matter of Tariff Filing by GTE South Incorporated To Establish Rates for Anonymous Call Block	)	ORDER ALLOWING TARIFF TO BECOME EFFECTIVE

BY THE COMMISSION: On October 5, 1999, the Commission released an Order addressing an issue pertaining to Caller ID and Anonymous Call Rejection (ACR). Specifically, the Commission addressed the recorded announcement that callers hear when they block their lines and the called party subscribes to ACR.

Caller ID is a service to which customers can subscribe that allows information about calling parties (the name and/or the telephone number) to be passed to called parties, in the form of a readout on a screen. The Caller ID subscriber can then decide whether or not to answer the call based on the passed information. Parties can block their information from being passed to Caller ID subscribers by dialing *67 on a per-call basis, or by blocking their lines so that no outgoing calls include the information. Anonymous Call Rejection (ACR) is a service that some local telephone companies provide that allows their subscribers to prevent calls from "blocked" numbers from ringing their telephone. Persons making calls to other persons with ACR typically hear a recorded announcement. To unblock a blocked line and allow the call to pass to a Caller ID subscriber, the caller must dial *82. It has come to the Commission's attention, however, that the recorded announcement used in North Carolina does not give those instructions to callers whose line is blocked for Caller ID purposes. Here, the recorded message that the caller hears as the call is being rejected simply tells the caller that the call was delivered but the called party did not accept it.

In the October Order, the Commission stated that it was interested in having instructions about how to use *82 to unblock a line on a per-call basis included in the recorded announcements. This would eliminate callers having to find a telephone book or dial an operator to determine how to unblock their lines. The Commission proposed to order the inclusion of *82 instructions in the recorded announcement for all local exchange carriers who provide ACR. The Commission stated that its intention was to issue such an Order within 45 days from the date of the October 5, 1999 Order unless it received comments from the affected telecommunications industry that raised serious issues or indicated that such information in the recorded announcement would not be beneficial. The Commission stated that it understood that, because of equipment limitations, a recorded announcement cannot be longer than 15 seconds, but stated that 15 seconds should be ample time to provide the pertinent information. By way of example, the Commission quoted a Newton's Telecom Dictionary definition of ACR that included the following sample recorded announcement: "We're sorry. The party you have reached is not accepting private calls. To make your call, hang up, dial *82 or 1182 on a rotary phone and re-dial."

COMMENTS

Comments were received from seven parties. Generally, the parties do not believe that there is a problem that warrants the Commission's proposed action.

AT&T. AT&T states that it does not currently provide the service of ACR, but it recommends that the Commission adopt only a "framework" for the language in the announcement. AT&T and other national providers will need the flexibility to develop their messages for use on a nationwide basis.

SPRINT. Carolina Telephone and Telegraph Company and Central Telephone Company (collectively, Sprint) believe that the proposal may create customer confusion, and that any benefits do not outweigh the additional costs and customer inconvenience that would result from the proposal. Sprint's General Subscriber Services Tariffs provide explanation about the Caller ID service. The Tariffs allow customers to block the delivery of their name/number to Caller ID subscribers on either a per-call or per-line basis. Sprint provides those services at no charge to customers. Customers activate per-call blocking by dialing *67 or 1167 before each call. Per-line blocking is on a continuous basis but can be deactivated by customers on a per-call basis by dialing *82 or 1182. Sprint also provides this information in annual bill inserts.

Caller ID subscribers may counter calling parties' use of blocking by subscribing to ACR, which rejects all calls from calling parties who block delivery of their name and number using either per-call or per-line blocking. Sprint's Tariffs provide that the party calling an ACR subscriber will hear a recorded announcement stating that the called party does not accept anonymous calls, and that the caller should hang up and call back with Caller ID unblocked to complete the call. This service is provided to Caller ID subscribers at no extra charge.

Sprint states that, although it currently has approximately 280,000 customers in North Carolina with non-published numbers, and approximately 240,000 with per-line call blocking, it has never had one customer complaint with regard to the ACR announcement in the three years the announcement has been in service. Sprint does not believe that there is any problem that needs to be fixed. Sprint states that the example of an ACR announcement pointed out in the Commission's order does not make a distinction between callers who have blocked delivery of information on a per-line basis and those who have blocked their lines on a per-call basis. Further, Sprint argues that the sample does not remind non-published and non-listed customers of the consequences of pressing *82 or 1182, and will compromise the privacy that the customers pay for. Sprint states that reference to written information can and will give customers more complete information, so the Commission should not assume that callers having to find a telephone book or dial an operator is something to be avoided.

Sprint asserts that the Commission's proposal would create additional costs because the intent of the Commission's proposal cannot be accomplished within the timeframe of Sprint's current message. Sprint states that three additional seconds must be added to its present message to accommodate the Commission's example (at a cost of $70,500), as much as eight additional seconds may be required for a message to adequately distinguish between per-call and per-line blocking (at a cost of $174,000). These figures include the cost of the new recording, the equipment to expand messaging capacity, and labor. Sprint argues that it receives only minimal revenues for these services.

Sprint's Tariffs require it to initially provide new customers with information regarding blocking options in a special mailing. All other customers receive an annual bill insert fully explaining blocking options. Sprint also addresses the subject in the information pages of its telephone directories. Sprint states that these forms of communications are amendable at slight incremental cost, and that if the Commission believes that ACR is not presently being adequately addressed or explained, Sprint will work on appropriate modifications. Sprint believes the subject is best handled in the written notice format as it is today, and does not believe a fifteen second recorded message can serve as an adequate substitute.

ALLTEL. ALLTEL Carolina, Inc. and ALLTEL Communications, Inc. (ALLTEL) state that ALLTEL currently has a recorded announcement which informs the caller that the call cannot be completed unless the caller unblocks his or her line. In order to expand the existing recording to include information on how to use *82 to unblock a line on a per-call basis a non-recurring expense of approximately $15,000 would be incurred. As more customers subscribe to ACR or elect to block their caller information on a per-line basis, the resulting increase in the usage of the recording will increase recurring central office costs as well. ALLTEL states that the Commission must consider these facts when making a decision on this issue.

BELLSOUTH. BellSouth believes that the Commission's proposed change may result in customer confusion. Specifically, BellSouth states that inclusion of a specific reference to *82 in the recorded announcement may confuse customers in states where per-line blocking is not offered.

These out-of-state callers may not be familiar with the *82 code, and *82 code information would not be included in their customer guide pages. If the announcement is revised, these out-of-state callers would dial *67 to block the delivery of their number to the North Carolina subscriber and then hear an announcement telling them to dial *82 and place their call again. These customers may believe they need to dial both *67 and *82 in order to place the call.

BellSouth asserts that there is a lack of "widespread dissatisfaction" with the current announcement. BellSouth further states that changing the announcement will cause the industry to incur costs that are not trivial. If there is a change in the current announcement, and the new announcement does not exceed 15 seconds, such a change will cost BellSouth approximately $100,000 to revise and replace the announcements in its North Carolina central offices. That figure does not include costs associated with revising the methods and procedures that service representatives currently use when speaking with customers. BellSouth states that it will take about six months to make the necessary changes to the announcements. If the revised announcement is longer than fifteen seconds, BellSouth will incur additional expenses because they will have to add more equipment to their central offices to accommodate the longer message. This will further delay implementation of the revised announcement.

BellSouth states that it educates its customers about the availability of per-line blocking and the *82 method of unblocking their line for a specific call through several means. When BellSouth offered ACR in January 1998, it sent bill inserts that fully explained the activation and deactivation of ACR as well as the proper use of per-call and per-line blocking if a calling party received the ACR announcement. Pertinent information is also provided to customers through the following means: (1) customer guide pages which appear in all directories in North Carolina; (2) annual notification for customers that currently explains the ACR feature; (3) materials for new customers that explain blocking and ACR in detail; and (4) communications from BellSouth's service representatives upon initial contact with customers. Because of these customer education efforts, BellSouth is not aware of any complaints that have been filed as a result of the existing ACR announcement. Therefore, BellSouth believes that the proposed change to the ACR announcement is unnecessary.

If the Commission determines that a revised announcement is needed, BellSouth proposes the following verbiage:

> Your call has been properly delivered, but the party you are trying to reach is not accepting calls from callers who do not allow delivery of their telephone number. Hang up, dial *82 and try your call again.

BellSouth proposes that the message not include dialing instructions for customers who use a rotary telephone, saying that all BellSouth access lines are touchtone capable and there is no charge to the customer for that capacity.

GTE. GTE South Incorporated and GTE Communications Corporation (GTE) are not necessarily opposed to the Commission's proposal to order the inclusion of instructions about how to use *82 to unblock a line on a per-call basis in a recorded ACR announcement. GTE already offers ACR in other states and has a recorded announcement in place that very closely matches the sample announcement in the Commission's Order. GTE agrees that a recorded announcement is in the customers' interest, but requests that it be authorized to use its existing ACR announcement in place of the sample announcement. GTE's *82 announcement installed in other states is as follows:

> We're sorry. The number you have reached does not accept blocked calls. If you have complete blocking on your line, please hang up and call back by dialing *82, and the number you are calling.

GTE states that this announcement is already recorded and ready to install in North Carolina where technically feasible. By approving the use of the existing announcement, the Commission would allow GTE to avoid the incremental costs that will be incurred to modify its message, as well as avoid delays in implementing the revised announcement. GTE asserts that its current message provides the customer benefits that the Commission desires.

MCIMETRO. MCImetro Access Transmission Services, LLC (MCImetro) provides neither ACR nor the *82 feature to its end users. As long as the Commission does not require competing local providers (CLPs) to provide *82, or to require a recorded announcement by CLPs that do not provide *82, MCImetro does not oppose a Commission rule that concerns recorded instructions as to how to use *82. Generally, however, MCImetro believes that end users who order a call blocking feature have sufficient access at present to instructions as to how to use that feature, including how to unblock its use.

DR. THOMAS B. CLARK III, M.D. Dr. Thomas Clark filed comments by letter indicating that he agrees that the ACR announcement needs to be changed. He would suggest that the announcement not include language saying, "I'm sorry." In Dr. Clark's view, it is not appropriate for the telephone company to express sadness or happiness about the fact that a call is rejected, or to express any emotion concerning the issue. Dr. Clark suggests the following wording:

> The number you have reached does not accept calls marked private. To make your call, dial *82, or 1182 on a rotary phone, and redial.

GTE TARIFF FILING

GTE has also filed a tariff with the Public Staff to establish rates for ACR. In that filing, GTE proposes to use the same message it suggested in its comments in the generic docket. GTE reiterates that it has installed this message in other states. The proposed feature would be available to residential and business subscribers at a monthly rate of $4.00. GTE has also proposed to add the feature to the lines of all customers who subscribe to its Caller ID services without any change in the rates for those services. GTE has stated that it will provide a bill insert to all subscribers explaining the new feature and the options available to enable completion of calls when they receive the ACR announcement. Another bill insert would announce the availability of the new feature to the existing Caller ID subscribers and provide instructions on its use. On December 20, 1999, the Public Staff recommended that the tariff be allowed to become effective on March 1, 2000. Because of the pending generic docket, the Commission did not act on the Public Staff's recommendation on December 20, 1999.

DISCUSSION

After careful consideration of the record in this proceeding, the Commission concludes that a change in the recorded announcement used with ACR would be beneficial to the general public. Carriers that offer ACR are required to include specific, comprehensible unblocking instructions on their recorded announcements, specifically referencing the dialing of *82. A specific, verbatim message will not be required. Commenters have made persuasive arguments that some flexibility in this area would be beneficial, particularly for those carriers that operate in multiple states. However, all of the announcements should be clear, simple, and succinct, and should not contain telecommunications terms that would not be understandable to lay persons.

Companies may, if they wish, distinguish between per-line blocking and per-call blocking in their recorded announcements. Companies are not required to do so, however, unless a caller who had blocked his call on a per-call basis (dialing *67) would not be able to complete the call if he dialed *82, followed by the number. If there would be no adverse consequences for such a caller, the companies are free not to distinguish between per-line and per-call blocking in their recorded announcements. It is noteworthy that GTE's tariff filing for its proposed offering of ACR indicates that such a caller would be able to complete his call by dialing *82, even if he did not have per-line blocking.[1] The companies should, of course, provide specific information on the differences between per-line and per-call blocking in their telephone directories, bill inserts, and any other written instructional materials.

The recorded announcements proposed by GTE, BellSouth, and Dr. Thomas Clark are all deemed acceptable to the extent they include specific instructions on the use of *82. The Commission concludes that the companies should not be required to provide the special dialing instructions for rotary telephones in their recorded announcements, but urges the companies to provide the instructions for rotary telephones in written materials such as telephone books and bill inserts.

Sprint raised an issue regarding privacy for customers who have their numbers unlisted or non-published. Sprint is concerned that the sample message in the Commission's October 5, 1999 Order does not remind non-published and non-listed customers of the consequences of pressing *82 or 1182 (that their numbers will be passed to the called party), and will compromise the privacy that the customers pay for. Sprint and any other company that chooses to do so are certainly free to explain those consequences in their recorded announcements if they wish. If they do not choose to do so, they can provide detailed and precise information about that particular aspect of the ACR service in their telephone books, bill inserts, and other written instructional materials.

Companies providing the ACR service shall be required to file the amended announcements they intend to use with the Commission and the Public Staff. The Commission can then examine them as needed on a case-by-case basis, or upon request from the Public Staff, and order changes to the

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[1] *See* Dec. 20 Commission Conference Agenda Item No. P9, Communications. It states: "A caller who used Per Call blocking (by dialing *67 before the telephone number) who receives this announcement may either dial *82 followed by the number being called or may attempt the call again by dialing the number they wish to call without first dialing *67. This will allow delivery of the caller's name and number and allow completion of the call to the called party."

proposed announcements if the announcements do not comport with the purposes of this Order. BellSouth and GTE are not required to refile their proposed announcements unless they intend to change them.

Finally, GTE's tariff establishing rates for ACR is allowed to become effective on March 1, 2000.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 21st day of January, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg012100.01

Commissioner Judy Hunt concurs.
Commissioner William R. Pittman dissented from this Order.

DOCKET NO. P-100, SUB 143

COMMISSIONER JUDY HUNT, CONCURRING: While I support the majority order, I strongly favor the message recommended by Dr. Thomas Clark. This message is shorter, clearer, and conveys no emotion or industry terms such as "complete blocking".

/s/ Judy Hunt
Judy Hunt, Commissioner

DOCKET P-100, SUB 143

COMMISSIONER PITTMAN, DISSENTING

I respectfully dissent. The Commission has taken upon itself a task for which it is ill-equipped at best and woefully incompetent at worst, and has established a precedent which it likely will regret. Perhaps this is to what post-monopoly regulation of telecommunications will be reduced: nitpicking the recorded announcement for each optional telecommunication service so that it will suit a seven-member committee.

As the entire telecommunications world struggles with the transition to competition, the temptation to impose regulation in place of market operation continues to be strong. Like worrisome parents who are afraid their children will skin a knee, we seem not to want to take the training wheels off the bike. The services addressed in this order are optional services used by sophisticated consumers of telecommunication services. If they cannot understand how to use them, they will not be profitable to the companies which offer them. It should be up to the offering company whether to use a recorded announcement and what such an announcement will contain.

Telecommunications companies have invested billions of dollars into market research and consumer education methods in order to prepare themselves for competition. Some of the results of those investments are the services in question here and the ways they are marketed, sold and operated. When we substitute our judgment for the operation of the market, we discourage those kinds of investments. Are we to survey the recorded announcements used for directory assistance, call waiting, message services, and the whole growing myriad of optional services to see if they suit us? One can only hope we can restrain our parental impulses in the future and let the companies ride, or fall, on their own.

/s/ William R. Pittman
William R. Pittman

DOCKET NO. P-100, SUB 146

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Central Office Code (NXX) Reclamation	) ORDER ESTABLISHING THE) RECLAMATION PROCEDURE) FOR UNUSED CENTRAL) OFFICE CODES (NXXs)

BY THE COMMISSION: By this Order, the Commission is addressing the procedure for reclaiming central office codes (NXXs) which have not been activated in providing telecommunications services.

I. INTRODUCTION

The problem of rapid exhaust of area codes is one that continues to challenge North Carolina and many other states throughout the country. With the advent of competition in the local exchange market and the increased ways numbering resources can be used in new services and technologies, area code exhaust is becoming more and more frequent with resulting inconvenience and expense for consumers. The proliferation of fax machines, computer modems, cellular phones, and competitive carriers in the local service market have created an unprecedented demand for NXX codes, resulting in the rapid exhaust of numbering resources in North Carolina and nationwide. Without area codes, there are no numbers available for carriers to provide telecommunications service to their customers. In recent years, the solution to this area code exhaust problem has been to establish new area codes. Ultimately, however, there is a limit to the number of area codes which can be established nationwide. Therefore it is in the interest of the general public and industry that conservation measures be implemented.

II. BACKGROUND

The Federal Communication Commission (FCC) issued its Numbering Resource Optimization (NRO) Order In the Matter of Numbering Resource Optimization, CC Docket No. 99-

200, Report and Order and Further Notice of Proposed Rule Making, FCC 00-104, released March 31, 2000, which was effective July 17, 2000. The NRO Order, among other things, delegated additional responsibility to the states in matters of code reclamation and requests by carriers for extensions of time to comply with code activation deadlines. The delegation also allows state commissions to request proof from carriers that NXX codes have been activated and the assignment of numbers has commenced.[1] The North American Numbering Plan Administrator (NANPA) continues to play an active role in monitoring initial compliance with the Central Office Code Assignment Guidelines and generally administering the number assignment process.

Under provisions of the NRO Order, NANPA is no longer permitted to grant extensions of time in which carriers must activate central office codes assigned to them beyond the six-month time frame established in the Central Office Code Assignment Guidelines.[2] In accordance with the NRO Order, NANPA must begin the reclamation process by notifying the state commissions within 60 days after the end of the six-month period if no Confirmation of Code Activation Form, or "Part 4", has been received from the requesting carrier. Under the new rules, NANPA is not to take any action until the state commission provides direction; authority for extensions now rests with the states. In addition, NANPA cannot accept delinquent Part 4s after the six-month deadline.

III. RECLAMATION PROCEDURES

The Commission wishes to institute appropriate procedures to govern the code reclamation process. As a result, the Commission will tentatively establish the following reclamation procedures subject to further modification following the receipt of comments from interested parties.

NANPA will continue to send each carrier a notice during the month when the carrier's Part 4 is due with respect to a particular NXX code. If a carrier does not return Part 4 to NANPA when due, NANPA should then notify the Commission in writing by filing a list of codes for which the Part 4 has not been received in Docket No. P-100, Sub 146. The Commission will then serve a written notice on the carrier(s) that the 6-month deadline to activate a particular NXX code has expired and the carrier shall have fourteen (14) days from the date on the notice within which to file a written request to the Commission for an extension of time to activate the NXX code in Docket P-100, Sub 146. The fourteen day period applicable to the NXX Codes which NeuStar has already declared to be subject to reclamation should commence with the issuance of this Order. Any carrier requesting an extension of time to activate the NXX code should fully explain the circumstances causing the delay in activating the code(s).

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[1] The FCC also modified the definition of an NXX code "in service" to mean that the code holder has begun to activate and assign numbers to end users within the NXX code. Specifically, pursuant to the FCC Order, numbers within an NXX code are properly assigned when they are either working in the Public Switched Telephone Network under an agreement with a specific end user or they are not yet working but have a service order pending to be working in five days.

[2] The Central Office Code Guidelines allowed carriers to ask for and NANPA to grant 90-day extensions.

It is imperative that a carrier must take immediate action once it has been served with notice that the 6-month deadline to activate a particular NXX code has expired. If no written response to the notice is received from the carrier by the Commission, the Commission will direct NANPA to reclaim the NXX code(s) without further notice by the Commission. If a carrier believes that it did activate the code(s) within the 6-month period, then the carrier must provide written proof the code was indeed activated. Any carrier receiving a notice of code reclamation must respond in writing, referencing Docket No. P-100, Sub 146, to the Commission as follows:

Ms. Geneva S. Thigpen, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

If a carrier requests an extension in writing in accordance with these guidelines, the Commission will notify the carrier and NANPA of its decision.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission is concerned about the current availability and usage of numbering resources and the impact of new area codes on consumers. Therefore, the Commission intends to exercise its delegated authority to institute code reclamation. By making more numbers available through reclamation of unused NXX codes, the Commission hopes to relieve some of the problems faced by both consumers and carriers resulting from the proliferation of area codes in the state.

IT IS, THEREFORE, ORDERED as follows:

1. That effective immediately and subject to further order of the Commission, North Carolina carriers shall comply with the reclamation procedure outlined above, pursuant to the FCC Order in CC Docket No. 99-200.

2. That the Commission has been notified by NeuStar, as NANPA, of certain NXX codes which are currently subject to reclamation. Carriers holding these code(s) subject to reclamation must make an appropriate filing under these interim procedures within fourteen (14) days of this Order to avoid immediate reclamation of these NXX code(s). Each carrier which holds one of these NXX codes currently subject to reclamation will receive a copy of this Order by United States Mail, Return Receipt Requested.

3. That any code holder not already a party to this proceeding, if any, is hereby made a party to this proceeding.

4. That any party may file comments suggesting alternatives to the reclamation procedure, as established herein by December 1, 2000.

5. That a copy of this Order be served on all parties to this proceeding and any other entity known to hold an NXX code in North Carolina.

ISSUED BY ORDER OF THE COMMISSION.

This 17th day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

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DOCKET NO. P-100, SUB 146

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Central Office Code (NXX) Reclamation	))))	ORDER ESTABLISHING THE RECLAMATION PROCEDURE FOR UNUSED CENTRAL OFFICE CODES (NXXs)

BY THE COMMISSION: By this Order, the Commission is establishing the procedure of reclamation for central office codes (NXXs) which have not been activated in providing telecommunications services.

BACKGROUND

On November 17, 2000, the Commission issued an Order addressing the procedure for reclaiming central office codes (NXXs) which have not been activated in providing telecommunications services. Comments from any party wishing to suggest alternatives to the procedures as established were due on December 1, 2000.

WorldCom, the only commenting party, suggested that, given widespread and increasing regulatory proceedings in many states' public service commissions involving numbering issues, its Number Administration department and similar divisions of other carriers need a minimum of fifteen (15) business days in which to make the written request as directed in the Order. Also, WorldCom stated that this issue has been discussed in industry meetings regarding NXX reclamation, and there is growing recognition that the industry needs a greater period in which to respond to similar notifications by other state commissions.

RECLAMATION PROCEDURES

After careful consideration, the Commission concludes that, in light of concerns about the current availability and usage of numbering resources and the impact of new area codes on consumers, it should exercise its delegated authority to institute code reclamation. By making more numbers available through reclamation of unused NXX codes, the Commission hopes to relieve some of the problems faced by both consumers and carriers resulting from the proliferation of area codes in the state.

Accordingly, the Commission institutes the following procedures to govern the code reclamation process:

(1) NANPA will continue to send each carrier a notice during the month when the carrier's Part 4 is due with respect to a particular NXX code. If a carrier does not return Part 4 to NANPA when due, NANPA will then notify the Commission in writing by filing a list of codes for which the Part 4 has not been received in Docket No. P-100, Sub 146.

(2) Upon receipt of this information from NANPA, the Commission will then notify the carrier(s) via <u>electronic mail</u> that the 6-month deadline to activate a particular NXX code has expired. The carrier shall have fifteen (15) business days from the date on the electronic notice within which to file a written request to the Commission for an extension of time to activate the NXX code in Docket P-100, Sub 146. Any carrier requesting an extension of time to activate the NXX code shall fully explain the circumstances causing the delay in activating the code(s).[1] If a carrier believes that it did activate the code(s) within the 6-month period, then the carrier must provide written proof the code was indeed activated. Any carrier receiving an electronic notification of code reclamation must respond in writing, referencing Docket No. P-100, Sub 146, to the Commission as follows:

Ms. Geneva S. Thigpen, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

If a carrier requests an extension in writing in accordance with these guidelines, the Commission will notify the carrier and NANPA of its decision by return U. S. Mail.

(3) If no written response to the electronic notification is received from the carrier by the Commission within **<u>fifteen business days</u>**, the Commission will direct NANPA to reclaim the NXX code(s) without further notice by the Commission.

IT IS, THEREFORE, ORDERED as follows:

1. That effective immediately and subject to further order of the Commission, North Carolina carriers shall comply with the reclamation procedure outlined above, pursuant to the FCC Order in CC Docket No. 99-200.

2. That the Commission has been notified by NeuStar, as NANPA, of certain NXX codes which are currently subject to reclamation. Carriers holding these code(s) subject to reclamation must

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[1] The fifteen day period applicable to the NXX codes which NeuStar has already declared to be subject to reclamation will commence with the issuance of the electronic notification.

make an appropriate filing under these procedures within fifteen business (15) days of this Order to avoid immediate reclamation of these NXX code(s).

3. That any code holder not already a party to this proceeding, if any, is hereby made a party to this proceeding.

4. That any party may file comments suggesting alternatives to the reclamation procedure, as established herein by December 29, 2000, and reply comments being filed by January 12, 2001.

5. That a copy of this Order be served on all parties to this proceeding and any other entity known to hold an NXX code in North Carolina.

ISSUED BY ORDER OF THE COMMISSION.
This 21st day of December, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

dh122000.01

DOCKET NO. E-2, SUB 763

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of Carolina Power & Light Company to Move Two of the Combustion Turbine Generators Approved by the Commission for Installation in Rowan County to Richmond County and Application for a Certificate of Public Convenience and Necessity to Attach a 160 MW Heat Recovery Steam Turbine Generator to Two of the Combustion Turbines in Richmond County, North Carolina	ORDER APPROVING APPLICATION

BEFORE: Chairman Jo Anne Sanford, Presiding; and Commissioners J. Richard Conder and Robert V. Owens, Jr.

APPEARANCES:

For Carolina Power & Light Company:

Len S. Anthony, Deputy General Counsel, Post Office Box 1551, Raleigh, North Carolina 27602-1551

For Public Works Commission, City of Fayetteville:

Gearold L. Knowles, Schiff Hardin & Waite, 1101 Connecticut Avenue, N.W., Washington, DC 20036

For the Using and Consuming Public:

Paul Lassiter, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On March 15, 2000, CP&L filed a Petition to move two of the 160 MW combustion turbine generators approved by the Commission in Docket No. E-2, Sub 733, for installation in Rowan County to Richmond County and an application for a Certificate of Public Convenience and Necessity to attach a 160 MW heat recovery steam turbine generator to two of the combustion turbines in Richmond County.

By Order issued April 13, 2000, the Commission scheduled a public hearing for Thursday, June 29, 2000, in Rockingham, North Carolina and an evidentiary hearing on the application for July 6, 2000, in Raleigh, North Carolina. The Commission further required that petitions to intervene be filed on or before June 15, 2000, and that intervenor testimony and exhibits be filed on or before June 21, 2000. CP&L was required to publish notice of these proceedings in a daily newspaper for general circulation in Richmond County prior to the deadline for the filing of petitions to intervene.

The Public Staff intervened in the proceeding pursuant to G.S. 62-15. On June 14, 2000, the Public Works Commission of the City of Fayetteville, North Carolina filed a Petition to Intervene and by Order issued June 22, 2000, the Commission granted such motion.

On June 20, 2000, CP&L filed its Affidavit of Publication of Public Notice as required by the Commission's April 13, 2000, Order. Also on June 20, 2000, CP&L filed a Motion to Cancel the Public Hearing scheduled for June 29, 2000, in Rockingham, North Carolina on the basis that the deadline for intervening in the proceeding had passed and no complaint or other request had been received requesting such a hearing. By Order issued June 22, 2000, the Commission granted CP&L's Motion to Cancel the June 29, 2000, hearing.

On June 29, 2000, the Public Staff filed the affidavit of Michael C. Maness. In the cover letter attached to Mr. Maness' affidavit, the Public Staff represented that it did not object to the Commission canceling the July 6, 2000, evidentiary hearing and entering the prefiled affidavits and testimony of all witnesses into the record.

By letter dated June 30, 2000, CP&L notified the Commission that it had reached agreement with the Public Staff regarding its application to construct the facilities in question and that CP&L, the Public Staff and Fayetteville PWC, the only other intervenor in the proceeding, had agreed to: waive their right to cross-examine all witnesses; and move the Commission to accept all prefiled testimony, affidavits and exhibits into evidence, and cancel the hearing scheduled for July 6, 2000. CP&L therefore moved the Commission to cancel the hearing and filed the affidavit of Verne Ingersoll swearing that his prefiled testimony and supporting exhibits were true and accurate.

By Order issued July 5, 2000, the Commission granted CP&L's Motion to Cancel Hearing and accepting all of the prefiled affidavits, testimony and exhibits into the record.

WHEREUPON, the Commission makes the following

FINDINGS OF FACT

1. CP&L is a public utility subject to the jurisdiction of the Commission.

2 The projected peak demand for electricity on CP&L's system for the years 2001-2004 is: 12,118 MW, 12,457 MW, 12,785 MW, and 12,918 MW, respectively.

3 As of the summer of 2000, CP&L will have approximately 12,307 MW of generating capability. According to CP&L's Application, planned power purchases and generation additions previously approved by the Commission will raise CP&L's generating capability by the summer of 2002 to 14,253 MW. The power sales agreement signed with Duke Power subsequent to the filing of the Application will require the use of a portion of this generating capability.

4 All electric utilities require a margin of generating capacity above the capacity used to serve expected load in order to assure reliable service. For resource addition planning purposes, CP&L uses a target capacity margin of 13%. The addition of 160 MW to its generating capability in 2002 results in a projected capacity margin of 12.7% for that year, given the new power sales agreement with Duke Power.

5. Due to projected growth in the demand for electricity by CP&L's retail customers and firm wholesale customers, it is appropriate for CP&L to add 160 MW to its generating capability by 2002.

6. Due to the impreciseness of forecasting, environmental benefits, CP&L's increasing need to exercise its right to curtail those industrial customers subscribing to curtailable rate schedules, and the price volatility of the wholesale market, the 160 MW of generation necessary to increase CP&L's capacity margin in 2002 should be combined cycle.

7. Combined cycle combustion turbines, which consist of combustion turbines equipped with heat recovery steam generators, are the most cost-effective resource when a generator is needed to run more than approximately 20% of the time, which will be the case for the facility being proposed by CP&L. The combined cycle generating facility proposed by CP&L is a cost-effective resource for meeting CP&L's currently projected resource needs. The Richmond County site, proposed by CP&L as a location of the new combined cycle facility, is appropriate.

8. The granting of the certificate requested by CP&L should be subject to conditions that require it to provide the Commission and the Public Staff (a) reports on its evaluation of responses to the Request For Proposals (RFP) it issued in March 2000, and (b) as part of the next three (3) certificate applications, sufficient support to demonstrate that it has evaluated the value of the facility applied for against comparable alternatives obtained through a timely RFP, advertised publicly, and/or through timely negotiations with a number of potential power suppliers.

9. Relocating two of the Rowan County generating units previously approved by the Commission to the Richmond County site, which is inside CP&L's service area, will enhance service reliability for CP&L's retail customers by reducing CP&L's dependence on other utility transmission systems for importing power to meet customer load. It is, therefore, appropriate for the Commission to issue Certificates of Public Convenience and Necessity in this docket in replacement of those issued in Docket No. E-2, Sub 733, in order to reflect this relocation.

10. The granting of the certificate requested by CP&L should be subject to a condition that requires CP&L to provide the Public Staff, quarterly beginning October 1, 2000, with updated Appendices A and B to CP&L's annual IRP report and a forecast of all wholesale sales, to be made in whole or in part from system resources, with a term of one year or more, which would impact CP&L's system capacity margin and which CP&L believes it has a reasonable probability of consummating during the following ninety (90) days.

11. CP&L's request to relocate two of the combustion turbines approved by the Commission for installation at the Rowan County site to the Richmond County site should be approved and CP&L should be granted a Certificate of Public Convenience and Necessity to attach

a 160 MW Heat Recovery Steam Turbine Generator to two of the combustion turbines previously approved for Richmond County. The granting of this Certificate does not constitute approval of inclusion of the facility's costs in rate base or operating expenses for ratemaking purposes.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, procedural, and jurisdictional in nature and is not controversial.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 2-5

The evidence supporting these findings of fact is contained in the testimony and exhibits of CP&L witness Verne Ingersoll and the affidavit of Public Staff witness Michael C. Maness. As explained by CP&L witness Ingersoll, all utilities require a margin of generating capacity above the capacity used to serve expected load in order to assure reliable service. Generating equipment requires periodic outages to perform maintenance, refuel nuclear plants and repair failed equipment. At any given time during the year, some plants will be out of service and unavailable for these reasons. Adequate reserves must be available to provide for this unavailable capacity and for higher than projected peak demand due to forecast uncertainty and abnormal weather. In addition, some capacity must be available as operating reserve to maintain the balance between supply and demand on a moment to moment basis.

To provide an adequate margin of generating capacity, CP&L uses a target capacity margin of 13% to determine the need for generation additions. Capacity margin is defined as a utility's total generating capability minus peak demand divided by generating capability. Mr. Ingersoll testified that reliability analyses show that for CP&L, a target capacity margin of 13% is appropriate for scheduling generating capacity additions and will provide reasonable assurances that CP&L will have sufficient capacity to meet its customers' needs.

Mr. Ingersoll presented an exhibit (Exhibit No. 2) demonstrating that for the period 1994 through 1999, CP&L's peak load grew by almost 1,800 MW to a summer peak demand of 11,178 MW, which translates into an average growth rate of 356 MW. Mr. Ingersoll's Exhibit 3 shows CP&L's most recent summer peak load forecast. It demonstrates that for the time period 2000 through 2005, CP&L projects that normal load growth will average approximately 360 MW per year. In addition, CP&L's firm long term wholesale contracts require CP&L to provide an additional 650 MW of generating capability by the summer of 2001. As a result, CP&L's summer peak demand is projected to grow to over 12,900 MW in the year 2004.

Mr. Ingersoll's Exhibit No. 4 demonstrates that CP&L will have a total generating capability of 12,307 MW by the summer of 2000. As a result, CP&L's projected summer peak demand in the year 2004 will exceed its existing capacity by more than 600 MW and CP&L must add additional generating resources in order to reliably meet the needs of its customers. Mr. Ingersoll explained that planned power purchases and generation additions previously approved by the Commission, including the Rowan County and Richmond County combustion turbine additions, will raise CP&L's generating capability to 14,253 MW by the summer of 2002. Generating capability drops to 13,790 MW in 2004 upon the expiration of certain purchases. As a result, unless CP&L is allowed to add the heat recovery steam turbine generator addition that is the subject of this proceeding, its capacity margin is projected to be 12.6% in 2002 and 6.3% by the summer of 2004. According to Exhibit No. 4, the addition of the proposed combined cycle facility will raise CP&L's capacity margin to 13.6% in 2002.

Public Staff witness Maness indicated in his affidavit that Mr. Ingersoll's Exhibit No. 4 does not reflect certain changes in CP&L's Resource Plan that occurred after the filing of CP&L's Application. Shortly after the filing of the Application, CP&L signed a new power sales agreement with Duke Power. CP&L was under no prior franchise or contractual obligation to enter into this agreement. As a result of this agreement, CP&L's projected capacity margin as calculated on Exhibit No. 4 would now increase only to 12.7% in 2002, not 13.6%, and would be only 0.1% higher than projected in the absence of both the combined cycle addition and the Duke agreement. Thus, virtually all of the increase in system resources resulting from the addition of the combined cycle component of the Richmond County CTs will be needed to serve or replace power sold to Duke under the new agreement. However, given CP&L's projected reserve margin for 2002 and the results of the Public Staff's review, the Public Staff does not oppose the granting of a certificate for the proposed combined cycle facility, as long as it is accompanied by placing certain requirements on CP&L related to future certificate applications and changes in CP&L's system loads and resources.

No other party presented any evidence regarding these issues or challenged CP&L's testimony. As a result, the Commission finds that it is appropriate for CP&L to add 160 MW to its generating capability in order to increase its forecasted capacity margin. The addition of 160 MW to CP&L's system resources in 2002 is justified both with and without consideration of the new power sales agreement with Duke Power.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6-8.

The evidence supporting these findings of fact is contained in the testimony and exhibits of CP&L witness Verne Ingersoll and the affidavit of Public Staff witness Michael C. Maness. Exhibit No. 5 to Mr. Ingersoll's testimony contains CP&L's projected system load duration curve for the years 2002 through 2004. Mr. Ingersoll explained that a utility's load duration curve demonstrates the level of consistency in electrical demand of the utility system, which dictates the type of generating unit the utility needs to meet customer demand. As a general rule, peaking resources such as combustion turbines are constructed with the intention of running them only during peak load periods or emergency conditions. Therefore, as a rule, they have a low capacity factor, generally less than 20%. Peaking resources have low capital cost but relatively expensive operating costs.

Intermediate facilities are intended to operate more frequently and are subject to daily load variations. As a rule, they operate with capacity factors in the range of 20%-60%. They have higher capital cost than peaking units, but lower operating cost.

Baseload facilities are intended and designed to operate on a near continuous basis. These plants are traditionally called upon to operate in the 60% and greater capacity factor range. Baseload plants typically have high capital cost but very low operating cost. CP&L's load duration curve indicates a need for intermediate generation facilities.

Mr. Ingersoll testified that CP&L has been projecting the need for intermediate capacity in its integrated resource plan filings for many years, including its most recent 1999 IRP filing. Exhibit No. 6 to Mr. Ingersoll's testimony shows that combined cycle combustion turbines, which consist of combustion turbines equipped with heat recovery steam generators, are the most cost-effective resource when a generator is needed to run more than 20% of the time. As a result, combined cycle generation is the resource of choice for both intermediate and baseload duties. CP&L's 1999 IRP projected the need for the first combined cycle facility in 2003. However, the energy market has exhibited extreme price spikes over the past two summers with prices reaching over $5,000 per MW hour. Since combined cycle generation is both a capacity and an energy resource, adding combined cycle capacity in 2002 will reduce CP&L's exposure to volatile energy markets and help ensure CP&L's ability to provide reasonably priced electric energy to its customers.

Mr. Ingersoll further explained that another reason supporting the construction of a combined cycle facility was the tightening of available reserves throughout the United States, including the Southeast. Mr. Ingersoll testified that with the tightening of reserves, and the increasing utilization of CP&L's existing energy resources, CP&L has experienced greater incidences of economy and capacity curtailment of its industrial customers subscribing to curtailable rate schedules. Capacity curtailment is implemented in emergency reserve situations. CP&L implemented its capacity curtailment of participating industrial customers on eleven occasions during 1999, almost double the number of curtailments from the previous year. Economy curtailments allow CP&L to curtail certain participating industrial loads for economy purposes. Economy curtailment is generally implemented prior to operating peaking capacity. However, industrial customers typically opt to pay a higher rate and avoid the curtailment. Because of its lower energy cost, combined cycle generation is typically dispatched ahead of combustion turbine generation and thus reduces CP&L's need for economy curtailments.

Mr. Ingersoll testified that combustion turbine generators can be installed and later retrofitted with a heat recovery steam generator and steam turbine to convert the capacity to combined cycle generation. However, some efficiencies in the construction sequence, such as work force mobilization, are realized by building the combined cycle generation at one time. This construction sequence also eliminates scheduled outage time that would be required for a retrofit of existing combustion turbines.

Mr. Ingersoll also explained that the volatility in oil prices in the recent past also makes the combined cycle generation desirable. The efficient operation of the combined cycle facility will burn less gas than a combustion turbine to produce a megawatt hour of generation, and will reduce generation produced by less efficient combustion turbines burning both gas and oil. These fuel savings will directly benefit customers. Also, a combined cycle generation resource located at Richmond County will spread the costs of gas pipeline capacity over a greater number of megawatt hours, thus reducing the per unit cost.

Mr. Ingersoll further testified that a combined cycle facility fueled by natural gas is the cleanest and most efficient fossil-fueled generation currently available. There are virtually no sulfur dioxide emissions, and nitrogen oxide emissions are approximately one-tenth the level of coal-fired generation utilizing low nitrogen oxide burners. Therefore, the proposed combined cycle generation will provide cleaner air for North Carolina and will help CP&L comply with expected new environmental regulations regarding reduction of nitrogen oxide emissions.

Mr. Ingersoll testified that the heat recovery steam generator will utilize the hot exhaust gases from the combustion turbines to produce steam and generate additional megawatt hours by a steam turbine generator. This type of capacity is the most inexpensive source of reliable intermediate capacity available. Since 1996, CP&L has placed in service or has under construction over 2,400 MW of new combustion turbines and thus has great experience with, and knows the cost of, new turbine capacity. Mr. Ingersoll explained that CP&L has extensive experience in bidding and negotiating the purchase of these types of facilities as well as their installation and construction, further adding to CP&L's knowledge of new generation capacity. Mr. Ingersoll further explained that the combustion turbines, the heat recovery steam generators and the steam turbine generator will be separately acquired by competitive bidding and price negotiation with equipment vendors. These costs represent roughly half of the total project cost and are acquired through competitive bids. The infrastructure, including land, fuel supply, and transmission access, is available at the Richmond County site. Thus, Mr. Ingersoll testified, the cost to CP&L to acquire this new capacity will be at a cost that is equal to or less than the cost to acquire such capacity from another source. The cost of the proposed facility was filed confidentially with the Commission and is contained in Exhibit No. 3 to CP&L's application.

Witness Ingersoll explained that CP&L had fully considered available alternatives, including the wholesale market, before deciding to construct this facility. He explained that CP&L actively competes in the wholesale market for both buying and selling of capacity and energy. CP&L purchased a total of 500 MW of power from four suppliers during the summer of 1999 and had a long-term purchase from Duke Power for 400 MW which ended in 1999. CP&L's current purchases include 300 MW from PECO and 250 MW from AEP. CP&L has negotiated terms to purchase approximately 500 MW from SkyGen's Broad River facility beginning in 2001. In addition, CP&L is currently negotiating with an independent power producer for the purchase of approximately 300 MW of additional capacity. These purchases provide CP&L with valuable information regarding the cost of the capacity and energy on the wholesale market. In addition, CP&L has formally surveyed the power market several times, the most recent being a Request for Proposals (RFP) for 800 MW issued in April of 1997. These requests for proposals have provided CP&L with the benchmarks for judging peaking capacity costs and comparisons with CP&L's self-build peaking options. Mr. Ingersoll testified that CP&L monitors announcements of new generation facilities and will continue to assess the wholesale market for both combustion turbine and combined cycle capacity, and develop comparative data for decisions affecting future resource additions.

Mr. Ingersoll further testified that CP&L has a significant amount of experience negotiating with equipment vendors and participating in the competitive bidding process, and can effectively procure equipment at competitive prices. Mr. Ingersoll explained that CP&L has solicited bids from approximately ten equipment vendors for the heat recovery steam generators and six equipment vendors for the steam turbine generator for the Richmond County addition.

Mr. Ingersoll testified that there are five key factors that CP&L considers in selecting sites for new generation facilities. They are: 1) the availability of adequate natural gas; 2) the proximity to adequate electrical transmission facilities; 3) the ability to obtain air permits for the facility; 4) the availability of adequate water; and 5) the receptiveness of the local community to the facility. Both the Richmond County and Rowan County sites meet all of these criteria and were chosen as new generation sites for both combustion turbine and combined cycle additions. The Richmond County site was chosen for this particular combined cycle facility, because the amount of year-round firm power that may be reliably imported into the eastern portion of CP&L's system is limited due to the available transmission capability. CP&L has an agreement to purchase the output of three combustion turbine generators located on the Duke Power transmission system beginning in 2001. CP&L is also negotiating for possible future off-system power purchases from an independent power producer. Mr. Ingersoll testified that to mitigate any potential transmission constraints for supplying power to CP&L's customers in its eastern control area, it is desirable at this time to build the new capacity at the Richmond County site. Locating the proposed facility in Richmond County will also maximize the efficiency of the infrastructure installed at the site including the gas pipeline.

Public Staff witness Maness stated that the Public Staff had confirmed that CP&L is engaging in several efforts to monitor activity in the wholesale power market on an ongoing basis. However, the Public Staff believes that CP&L should increase its direct interaction with power supply market participants in order to ensure that CP&L has fully considered the wholesale market for future generation resource additions that will be used in whole or in part to serve retail customers, as required by the Order in CP&L's certificate proceeding most recently preceding this Application (Docket No. E-2, Sub 733). The Public Staff also noted that CP&L issued an RFP to the power supply market in March 2000. However, this was the first full-scale RFP issued since 1997, and it was not issued in time for the results to be evaluated along with the Richmond County combined cycle facility prior to CP&L's Application. As a result, the Public Staff proposed, and CP&L did not object to, the following two requirements as a condition of the certificate. These conditions are:

1. That as part of CP&L's next three applications for Certificates of Public Convenience and Necessity to construct generation facilities that will be used in whole or in part to serve CP&L's retail customers in North Carolina, CP&L shall file with the Commission sufficient support to demonstrate that CP&L has evaluated the value of the facility applied for against comparable alternatives obtained through a timely RFP, advertised publicly, and/or through timely negotiations with a number of potential power suppliers, and a description of the results of the evaluations. The offers from an RFP and/or negotiations cited in any application as said support shall have been received by CP&L no more than eighteen (18) months prior to the date of the application, and shall be for reasonable alternatives to the facility applied for. Documentation of the evaluation process and the supporting data for CP&L's conclusions shall be made available to the Public Staff. After the third application filed pursuant to this requirement, CP&L and the Public Staff agree to meet to determine if any changes to this requirement are appropriate.

2. That CP&L shall (a) provide to the Public Staff, every thirty (30) days, interim reports on the progress of CP&L's evaluation of the responses to its RFP issued in March 2000, and (b) file with the Commission, when the evaluation is completed, a final report on the results of the evaluation. These interim and final reports shall describe the results of the evaluation, including specifically the potential impact on the construction of the Richmond and Rowan County facilities.

No other party presented any evidence on this matter. Therefore, the Commission finds that the combined cycle 160 MW generation facility proposed by CP&L is a cost- effective resource for meeting CP&L's currently projected resource needs, and the Commission adopts the two conditions recommended by the Public Staff.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence supporting this finding of fact is contained in the testimony and exhibits of CP&L witness Verne Ingersoll and the affidavit of Public Staff witness Michael C. Maness. Mr. Ingersoll testified that the amount of firm power that may be reliably imported into the CP&L system is limited by the capability of the installed transmission system. This import capability is available to all transmission customers. Once this limited resource is used up, no more power may be reliably imported. The import amount desired by all transmission customers over the next several years is approaching the maximum limit. CP&L has an agreement to purchase the output of three combustion turbine generators totaling 500 MW from the SkyGen Broad River Project beginning June 2001. The Broad River facility is located outside of CP&L's service area in Cherokee County, South Carolina. CP&L is also negotiating with an independent power producer for a possible future purchase of an additional 300 MW which would also be outside of CP&L's service area. Mr. Ingersoll explained that relocating two of the Rowan County generating units to the Richmond County site, which is inside CP&L service territory, would enhance service reliability by reducing CP&L's dependence on other utility transmission systems for importing power to meet customer load. The total number of combustion turbine generators approved by the Commission for installation at the Richmond County and Rowan County sites will remain the same as in the original certificates authorizing these facilities. Mr. Ingersoll testified that relocation of the two combustion turbine generators to the Richmond County site will not result in any additional cost.

Public Staff witness Maness stated in his affidavit that the Public Staff does not oppose the relocation of the two combustion turbine generators. However, the Public Staff recommended that the Commission state in its Order that CP&L cannot construct any additional generation facilities at the Rowan County site over and above the remaining three units now planned unless it is granted additional Certificates of Public Convenience and Necessity by the Commission.

No other party presented any evidence on this issue or objected to CP&L's request to relocate these two turbines. Therefore, the Commission finds that relocation of the generators is reasonable and will enhance service reliability for CP&L's retail customers as described by CP&L. The Commission also wishes to make it clear that unless CP&L is granted additional Certificates of Public Convenience and Necessity for the Rowan County site, it is limited to constructing the three units (480 MW) now planned. Therefore, as part of this Order, the Commission revokes the Certificates issued in Docket No. E-2, Sub 733, and replaces them with the Certificates attached hereto as Appendices B and C.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence supporting this finding of fact is contained in the affidavit of Public Staff witness Michael C. Maness. Mr. Maness stated that the Public Staff is concerned that CP&L's off-system sales activities are making it more difficult for CP&L to maintain an adequate reserve margin to serve its native load and also are accelerating CP&L's addition of new generation resources. As a result, the Public Staff needs to be made aware of significant changes to CP&L's resource plan on a more timely basis. To address this concern, CP&L and the Public Staff agreed to the following condition:

> That every quarter, beginning October 1, 2000, CP&L shall provide the Public Staff with updated Appendices A and B to CP&L's annual IRP report and a forecast of all wholesale sales, to be made in whole or in part from system resources, with a term of one year or more, which would impact CP&L's system capacity margin and which CP&L believes it has a reasonable probability of consummating during the following ninety (90) days. For each sale of 100 MW or greater, CP&L will identify the size, type of sale (e.g. unit sale, native load firm) and the duration. Should CP&L identify a potential sale of 100 MW or greater after the filing of a quarterly report that has a reasonable probability of being consummated before the filing of the next quarterly report, CP&L will promptly notify the Public Staff of such potential sale.

The Commission believes that the provision of such information to the Public Staff will be helpful, and finds that CP&L should be required to provide this information.

EVIDENCE AND CONCLUSION FOR FINDING OF FACT NO. 11

The evidence supporting this finding of fact is contained in the testimony and exhibits of CP&L witness Verne Ingersoll and the affidavit of Public Staff witness Michael C. Maness. Based upon all of the evidence described above as well as the lack of opposition of any other party to this proceeding and CP&L's willingness to agree to the conditions requested by the Public Staff, the Commission finds that it is appropriate and reasonable to allow CP&L to relocate two of the turbines authorized for construction in Rowan County to Richmond County, and to issue a Certificate of Public Convenience and Necessity to attach a 160 MW heat recovery steam turbine generator to two of the combustion turbines previously approved for Richmond County, creating a combined cycle facility, subject to the conditions set forth in this Order. As customary, the Commission notes that the granting of this Certificate does not constitute approval of inclusion of the facility's costs in rate base or operating expenses for ratemaking purposes.

IT IS, THEREFORE, ORDERED as follows:

1. That a Certificate of Public Convenience and Necessity shall be issued to CP&L for the construction of a 160 MW heat recovery steam turbine generator to be attached to two of the combustion turbines installed in Richmond County, North Carolina, and the same is attached hereto as Appendix A.

2. That CP&L shall be allowed to move two of the combustion turbine generators approved by the Commission for installation in Rowan County in Docket No. E-2, Sub 733, to Richmond County. The Certificates of Public Convenience and Necessity issued to CP&L in Docket No. E-2, Sub 733 are hereby revoked, and the Certificates attached to this Order as Appendices B and C are issued to CP&L in replacement thereof.

3. That as part of CP&L's next three applications for Certificates of Public Convenience and Necessity to construct generation facilities that will be used in whole or in part to serve CP&L's retail customers in North Carolina, CP&L shall file with the Commission sufficient support to demonstrate that CP&L has evaluated the value of the facility applied for against comparable alternatives obtained through a timely RFP, advertised publicly, and/or through timely negotiations with a number of potential power suppliers, and a description of the results of the evaluations. The offers from an RFP and/or negotiations cited in any application as said support shall have been received by CP&L no more than eighteen (18) months prior to date of the application, and shall be for reasonable alternatives to the facility applied for. Documentation of the evaluation process and the supporting data for CP&L's conclusions shall be made available to the Public Staff. After the third application filed pursuant to this requirement, CP&L and the Public Staff agree to meet to determine if any changes to this requirement are appropriate.

4. That CP&L shall (a) provide to the Public Staff, every thirty (30) days, interim reports on the progress of CP&L's evaluation of the responses to its RFP issued in March 2000, and (b) file with the Commission, when the evaluation is completed, a final report on the results of the evaluation. These interim and final reports shall describe the results of the evaluation, including specifically the potential impact on the construction of the Richmond and Rowan County facilities.

5. That every quarter, beginning October 1, 2000, CP&L shall provide the Public Staff with updated Appendices A and B to CP&L's annual IRP report and a forecast of all wholesale sales, to be made in whole or in part from system resources, with a term of one year or more, which would impact CP&L's system capacity margin and which CP&L believes it has a reasonable probability of consummating during the following ninety (90) days. For each sale of 100 MW or greater, CP&L will identify the size, type of sale (e.g. unit sale, native load firm) and the duration. Should CP&L identify a potential sale of 100 MW or greater after the filing of a quarterly report that has a reasonable probability of being consummated before the filing of the next quarterly report, CP&L will promptly notify the Public Staff of such potential sale.

ISSUED BY ORDER OF THE COMMISSION.
This the 17th day of August, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg081600.01

APPENDIX A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 763

Carolina Power & Light Company
411 Fayetteville Street Mall
Raleigh, North Carolina 27602

is issued this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
PURSUANT TO G.S. 62-110.1

authorizing construction and operation
of approximately 160 MW of
heat recovery steam turbine generating capacity

located approximately 3 miles south of the Town of Hamlet
near the intersection of State Road 177 and State Route 1990
in Richmond County, North Carolina

subject to the reporting requirements of G.S. 62-110.1(f) and all other orders, rules, regulations and conditions now or hereafter lawfully made by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 17th day of August, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

APPENDIX B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 763

Carolina Power & Light Company
411 Fayetteville Street Mall
Raleigh, North Carolina 27602

is issued this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
PURSUANT TO G.S. 62-110.1

authorizing construction and operation
of approximately 480 MW of
combustion turbine generating capacity

located approximately 9 miles west of Salisbury on U.S. Route 70
in Rowan County, North Carolina

in lieu of the Certificate of Public Convenience and Necessity issued for this site in Docket No. E-2, Sub 733, subject to the reporting requirements of G.S. 62-110.1(f) and all other orders, rules, regulations and conditions now or hereafter lawfully made by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 17th day of August, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

APPENDIX C

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 763

Carolina Power & Light Company
411 Fayetteville Street Mall
Raleigh, North Carolina 27602

is issued this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
PURSUANT TO G.S. 62-110.1

authorizing construction and operation
of approximately 1120 MW of
combustion turbine generating capacity

located approximately 3 miles south of the Town of Hamlet
near the intersection of State Road 177 and State Route 1990
in Richmond County, North Carolina

in lieu of the Certificate of Public Convenience and Necessity issued for this site in Docket No. E-2, Sub 733, subject to the reporting requirements of G.S. 62-110.1(f) and all other orders, rules, regulations and conditions now or hereafter lawfully made by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 17th day of August, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

DOCKET NO. SP-132

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Rockingham Power, L.L.C. for a	)	
Certificate of Public Convenience and Necessity	)	ORDER DETERMINING DISPUTED
to Construct Five Combustion Turbine	)	CONTRACT TERMS
Generators Located off Highway 65 in	)	
Rockingham County, North Carolina	)	

HEARD: Tuesday, February 1, 2000 at 9:30 a.m., in the Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner William R. Pittman, Presiding, and Commissioners J. Richard Conder and Robert V. Owens, Jr.

APPEARANCES:

For Rockingham Power, L.L.C.

Robert W. Kaylor, Robert W. Kaylor, P.A., 225 Hillsborough Street, Suite 480, Raleigh, North Carolina 27603

For Carolina Utilities Customers Association, Inc.

James P. West, West Law Offices, P.C., Suite 1735, 934 Fayetteville Street Mall, Raleigh, North Carolina 27601

For NUI North Carolina Gas

James H. Jeffries IV, Amos Jeffries & Robinson L.L.P., Post Office Box 787, Greensboro, North Carolina 27402

For the Using and Consuming Public

Gisele Rankin, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, NC 27699-4326.

BY THE COMMISSION: On January 29, 1999, Rockingham Power, L.L.C. (Rockingham) filed with the North Carolina Utilities Commission (Commission) an application for a certificate of public convenience and necessity to construct approximately 800 megawatts (MW) of combustion turbine generating capacity in Rockingham County, North Carolina.

On March 31, 1999, Transcontinental Gas Pipe Line Corporation (Transco) filed before the Federal Energy Regulatory Commission (FERC) in Docket No. CP99-278-000 for authorization to construct a delivery point on its interstate pipeline for service to Rockingham. On April 19, 1999, the Commission filed a Notice of Intervention with the FERC in that proceeding, and on May 20, 1999, the Commission protested the attempted bypass of the local distribution company (LDC), NUI Corporation, d/b/a NUI North Carolina Gas (NUI), on both legal and economic grounds. On August 30, 1999, the FERC issued an order denying the Commission's protest and authorizing the construction and operation of Transco's facilities.

On June 15, 1999, the Public Staff filed a Statement of Position in this docket with respect to Rockingham's proposed order filed on June 11, 1999 and on the issue of the proposed bypass of NUI by Rockingham. The Public Staff stated that it did not believe the bypass of NUI served the public interest and that the rejection of the proposed bypass would not necessarily result in higher electricity rates. The Public Staff also noted that the FERC's position that a bypass does not occur when a new customer is directly served by an interstate pipeline has not been tested on appeal. Lastly, the Public Staff stated that "a carefully structured agreement between NUI and Rockingham Power could work to the benefit of all North Carolina ratepayers."

On June 28, 1999, both Rockingham and NUI filed letters with the Commission reporting that they had reached agreement that no bypass of natural gas service by NUI would occur at the Rockingham generating plant and that all natural gas service to the Rockingham plant would be provided through facilities owned and operated by NUI. The letters reported that the parties were continuing to negotiate on the exact rates, terms and conditions for service and that both parties agreed that the Commission would retain jurisdiction to determine the appropriate rates, terms and conditions if the parties could not agree. NUI suggested that, in order to bring the matter to closure, the Commission should adopt a process "with respect to the timing of the submission of disputes regarding rates, terms and conditions of service to the Commission."

On June 30, 1999, the Commission issued an Order Granting Certificate to Rockingham to construct the proposed generating plant conditioned on all natural gas service being provided through facilities owned and operated by NUI. Furthermore, the Order required Rockingham and NUI to continue to negotiate as to the rates, terms and conditions with respect to natural gas service to the generating plant by NUI. The parties were ordered to file within one month from the date of the Order either a mutually satisfactory agreement or a report on the status of their negotiations including each party's last best offer with which the Commission would determine the disputed contract terms.

On July 30, 1999, in compliance with the Commission's order, NUI filed a letter, with exhibits, reporting that no agreement had been reached, stating its last best offer and requesting the Commission to determine contract rates and terms. On August 9, 1999, Rockingham filed a report on Negotiations and Positions Regarding Unresolved Terms setting forth its position and argument with respect to the appropriate contract terms and conditions and what it termed its "final position." On August 17, 1999, NUI filed a Motion to Strike or, in the Alternative, for Leave to Respond, pointing out that Rockingham did not file a report on July 30 as directed by the Commission. NUI stated that Rockingham's report was filed ten days late and consisted almost entirely of a rebuttal of NUI's report and best offer. On August 20, 1999, Rockingham filed a Response opposing the motion to strike but agreeing that NUI should have time to file its own position and argument. NUI filed a Response to Report setting forth its position as to the appropriate contract rates and terms.

By Order issued September 1, 1999, the Commission denied NUI's Motion to Strike and accepted the Response to Report. Oral argument, which was scheduled for October 11, 1999 for the purpose of determining the disputed contract rates and terms, was continued at the request of the parties to allow additional time to negotiate. On January 5, 2000, the Public Staff filed a Motion stating that an impasse had been reached and that it would be necessary for the Commission to determine the disputed contract terms. The Public Staff requested that the matter be rescheduled for oral argument and requested that NUI and Rockingham be required to file at least ten days prior to the oral argument updated reports on the status of their negotiations, including their current best offers and to allow the Public Staff to file a report or otherwise provide an analysis of the parties' updated reports. The Commission issued an Order on January 7, 2000 scheduling an oral argument, requiring NUI and Rockingham to file updated reports on the status of their negotiations on or before January 18, 2000 and allowing the Public Staff to file an analysis of the updated reports by January 24, 2000.

NUI filed its report on January 18, 2000. Rockingham filed its report on January 19, 2000. The Public Staff did not file an analysis.

Oral arguments were heard as scheduled on February 1, 2000. The Public Staff was invited to file its analysis.

The Public Staff filed a confidential Report on May 19, 2000. On May 31, NUI filed a confidential Response to Public Staff's Report and on June 7, 2000, Rockingham filed a letter accepting the recommendations in Public Staff's Report.

BACKGROUND

It is appropriate to address the circumstances that gave rise to the issues before the Commission in this docket. These issues initially arose because Rockingham, an affiliate of Dynegy Power Corp., a Delaware corporation and a wholly-owned subsidiary of Dynegy, Inc., intended to bypass NUI and obtain service directly from Transco.

Dynegy, a corporation with experience building power plants nationwide, is well aware of the FERC's positions on bypass. The FERC supports bypass as part of a "clearly enunciated policy of favoring competition in the gas markets." Transcontinental Gas Pipe Line, *Order Denying Protest and Authorizing Construction and Operation of New Delivery Point Under Blanket Certificate*, 88 FERC. ¶ 61,196 (1999) (Docket No. CP99-278-000). The clarity with which the FERC's policy may have been enunciated makes it no less unfortunate. The FERC's policy ignores an ancient and immutable law of commerce: you cannot compete retail against wholesale. An LDC cannot purchase capacity from an interstate pipeline and then successfully compete against that pipeline to sell that capacity to a customer. Pitting the LDC retailers against the interstate pipeline wholesalers does not enhance meaningful competition. Furthermore, the FERC does not even recognize the direct service of a new customer in an LDC's franchised service territory by an interstate pipeline – the situation in this docket – as a bypass.

The Public Staff's June 15, 1999 filing stated that Rockingham's proposed bypass of NUI was not in the public interest. The Commission strongly agrees. The Commission's concerns over the issue of bypass go beyond the question of whether North Carolina or the FERC should have the power to establish service territories for North Carolina LDCs. The General Assembly of North Carolina has made it crystal clear that it considers the extension of natural gas service to areas of the State that lack gas service to be a matter of great importance, and bypass is a serious threat to that effort.

Since 1989, the General Assembly has passed a number of laws to further the goal of expanding gas service. First, G.S. 62-2(a)(9) establishes that it is the policy of the State to extend gas service to unserved areas. G.S. 62-36A requires LDCs to report every two years on their plans to extend service to unserved areas and the Commission and the Public Staff are required to independently analyze and summarize these plans. G.S. 62-158 allows LDCs to set up expansion funds to subsidize extension of service into areas that otherwise would not be economically feasible and establishes as funding mechanisms the retention of interstate pipeline refunds, surcharges up to 15 cents per dekatherm, and other sources as approved by the Commission. The Commission must approve the use of expansion fund money and should consider the scope of the proposed project, including the number of unserved counties and the anticipated number of customers to be served, the total cost of the project, the extent to which the project is considered feasible, and other relevant factors affecting the public interest. In addition, G.S. 62-133.4 was amended to allow new interstate pipeline demand charges to be passed through as "gas costs" to consumers in the annual purchased gas adjustment proceeding, thereby encouraging the LDCs to add the interstate capacity necessary to support expansion. Furthermore, G.S. 62-36A mandated that the entire State be assigned to an LDC's service territory so that all areas of the state would be eligible for projects built with expansion fund money. Under G.S. 62-36A(b), if an LDC does not extend service to an unserved area in its certificated service territory within three years, it loses its exclusive franchise rights. G.S. 160A-630 allows one or more entire counties that are totally unserved to create a gas district to provide gas service and to issue bonds. With regard to rates, G.S. 62-140(a) allows the Commission to establish higher rates in counties that are substantially unserved to the extent that the rates reflect the actual cost of providing service and upon a finding by the Commission that service would not otherwise become available. Most recently, the General Assembly approved the issuance of $200 million in general obligation bonds to provide grants, loans or other financing to LDCs, "persons seeking gas franchises," state or local government agencies, or other entities for construction of natural gas facilities.

The Commission has taken a number of steps to implement the General Assembly's policy of expanding gas service. The FERC's bypass policy, however, acts to attract large new gas users – such as Rockingham – away from unserved areas and seriously undermines the General Assembly's concerted efforts to expand service.

As recited above, Rockingham and NUI have agreed and informed the Commission that all natural gas service to Rockingham's plant will be provided through facilities owned and operated by NUI. Rockingham and NUI further recognized that this Commission has jurisdiction to determine the appropriate rates, terms and conditions for such service to Rockingham's generating plant. Rockingham and NUI agreed to continue their negotiations and to submit the matter to the Commission for resolution if they could not reach agreement within one month from the date of the Order Granting Certificate.

Rockingham's attempt to bypass NUI created unusual circumstances in this docket. Rockingham contracted with Transco to receive service directly from Transco and then designed and began constructing facilities necessary to receive the gas. Both such activities are normally undertaken by the LDC. Rockingham invested approximately $400,000 in gas facilities. Because of deadlines faced by Rockingham, NUI agreed to allow Rockingham to proceed with the construction of the facilities.

POSITIONS OF THE PARTIES

After much negotiation, NUI and Rockingham have been unable to agree to the rates, terms and conditions of service and have submitted the matter to the Commission for resolution of the following four issues: (1) the term of the contract; (2) the method for determining NUI's return and the duration of the return; (3) the calculation of the annual operations and maintenance (O&M) fee, including the number of hours needed annually and the appropriate overhead allocation factor; and (4) the appropriate escalation factor for the O&M fee.

The Public Staff stated at the hearing that its knowledge of other contracts of this nature was confidential and could not be publicly disclosed. The Public Staff subsequently filed a confidential Report with the Commission which was responded to by both NUI and Rockingham.

1. Contract Term

With regard to the term of the contract, Rockingham asserts that it requires a 40-year contract term for delivery of gas for financing purposes. NUI believes the contract should be no longer than Rockingham's contract with Duke Energy, which extends from as few as three and one-half years up to eight and one-half years at Duke's option. NUI argued that there should be a buy-out in its contract with Rockingham if Duke does not extend the purchase contract. NUI further argued that its contract with Rockingham should be renegotiated at the end of the last extension if Duke does extend the purchase contract. The Public Staff stated at the hearing that the typical term for similar contracts lies between the forty years advocated by Rockingham and the eight and one-half years urged by NUI.

2. Return on Equity

Rockingham, which has already built and paid for the facilities to be owned and operated by NUI, proposes to transfer them to NUI at no cost together with a gross-up to compensate NUI for any income taxes resulting from the transfer. This "contribution-in-aid-of-construction" would result in no increase in NUI's rate base and, therefore, no return to NUI. To provide some "return" to NUI, Rockingham proposes to allow NUI to recover a "return on capital employed" calculated by multiplying NUI's allowed overall rate of return by the annual O&M fees, grossing up again for taxes. NUI's position is that it should be allowed to reimburse Rockingham for the cost of the facilities and charge a demand charge over the length of the contract to recover that cost. The cost of the facilities would be amortized over the length of the contract and NUI would earn its authorized rate of return on the unamortized portion.

3. Operations and Maintenance Fee

With regard to the annual O&M fee, the parties agree on a rate of $100/hour but disagree as to the number of hours needed annually for O&M and the appropriate markup for allocation of overhead expenses. Rockingham argues, based on Dynegy's experience operating similar generating plants, that 114 hours of direct labor per year is more than sufficient for the necessary O&M. In addition, Rockingham, which originally proposed only a 35% overhead markup, agrees to apply a 100% markup on its estimate of 114 hours. NUI originally contended that 254 hours per year were required to operate and maintain the facilities and that a 100% markup should be applied for overhead. In its final position, NUI eliminated two tasks – the inspection and maintenance of filters and interference bond inspections – and reduced its estimate of time required for two more tasks down to agree with Rockingham's estimate. This reduces NUI's estimate of hours down to 188.

4. Operations and Maintenance Escalation Factor

Finally, with regard to the O&M escalation factor, Rockingham argues that, since both materials and labor are involved, the O&M fee should be escalated using the average of the Consumer Price Index (CPI) and the Average Hourly Earnings Index for labor. NUI suggests that if a forty-year contract term is adopted the quarterly O&M fee should be fixed for years one though ten and adjusted annually for inflation based on the CPI for years eleven through forty. It stated, however, that no escalation factor is necessary if the contract is limited to the eight and one-half year term proposed by NUI.

DISCUSSION AND CONCLUSIONS

The Commission first commends NUI and Rockingham for working together on this project to avoid a bypass. In determining appropriate terms and conditions on the remaining disputed items, the Commission has carefully considered the filings of the parties and the oral argument in this docket.

The Commission notes that this is an unusual case. The generating plant was located adjacent to Transco's interstate pipeline, and Rockingham arranged directly with Transco for the construction of a delivery lateral without NUI's involvement. Rockingham also designed the facilities to receive the gas from the new Transco lateral and began construction. Because of Rockingham's tight construction schedule, NUI agreed to Transco's construction of the delivery lateral, to NUI's ownership of a very limited scope of facilities, and to allow Rockingham to proceed with the construction of those facilities. The Commission makes clear that its actions in this docket are based narrowly on the very specific facts of this case. The Commission's determinations in this Order constitute no precedent for future proposed bypasses nor for future arrangements between generators and LDCs.

1. Contract Term

With regard to the contract term, the Commission is not persuaded by Rockingham's argument that it must have a 40-year contract for delivery of gas. A lender is apparently content with a three-and-a-half to eight-and-a-half year sales contract for the power from this generating plant.

The Commission finds it difficult to accept that the same lender would insist on a 40-year contract with a public utility, particularly where the public utility has an obligation to serve.

On the other hand, NUI's insistence on a contract tied to Duke's purchase contract with a buyback is also unacceptable. NUI argues that the Rockingham plant might not serve North Carolina electric customers after the Duke contract expires. It is difficult to see why the location of Rockingham's customers is relevant. As long as those customers buy Rockingham's power, Rockingham should be able to pay its gas bill. Although there is a risk that Rockingham will shut down after the Duke contract expires and that NUI will recover nothing more, given that Rockingham is making a very substantial investment in North Carolina, NUI should be expected to shoulder some risk.

The Commission takes judicial notice that electric utilities depreciate combustion turbines over a 25-year life. The Commission concludes that it is appropriate to recover the costs of NUI's facilities over the reasonable depreciable life of the generating plant they are being constructed to support. The Commission, therefore, determines that a 25-year contract term with no buyout provision is appropriate.

2. *Return on Equity*

With regard to the method and duration of how NUI would earn a return, in normal utility ratemaking a utility earns a return on its invested capital. Rockingham proposes to use an "operating ratio" method of establishing a return in this case. This method is typically employed under G.S. 62-133.1 in setting the rates for water and sewer companies whose facilities are donated by the developer. It is not generally appropriate, however, for setting the rates of a natural gas utility under G.S. 62-133. With regard to whether the facilities should be contributed to NUI or purchased and included in rate base, the Commission is aware that some contracts involving LDCs may have been negotiated that allow for the pre-payment of demand charges. However, in the absence of mutually acceptable contractual terms, a traditional utility ratemaking approach should be relied upon. The Commission determines that NUI should reimburse Rockingham for the facilities and that NUI should earn its 9.16% allowed return on the unamortized portion of its investment, adjusted annually and amortized over the contract period.

3. *Operations and Maintenance Fee*

With regard to the O&M fee, the parties differ in the number of hours required annually to perform the following five tasks: (1) maintaining the pressure recorder; (2) changing charts on the pressure recorder; (3) line locations and inspections; (4) patrolling; and (5) inspecting, testing and repairing instruments.

A significant difference involves a pressure recorder that NUI states is necessary to install. NUI estimates that 52 hours will be required for changing the pressure recorder's chart on a weekly basis. Maintaining the device will require an additional four hours per year, for a total of 56 hours per year. Rockingham argues that no pressure recorder is needed because Transco is installing one; therefore, no O&M hours should be budgeted. Rockingham is willing to accept whatever Transco's equipment indicates. Rockingham argues that, "If there is any problem . . . we can alert [NUI] instantaneously and they can send a person out and they can troubleshoot any problems with the valves." Since Rockingham is willing to take responsibility for informing NUI when problems are encountered, the Commission sees no compelling reason to order Rockingham to pay for installation and O&M for a duplicate pressure recorder.

The Commission further accepts Rockingham's arguments regarding patrolling, line locations and inspections, and inspecting and repairing instruments. The facilities to be operated and maintained by NUI include only 130 feet of pipe and pressure reduction facilities. Therefore, the Commission determines that Rockingham's estimate of 114 hours per year for O&M is appropriate.

With regard to the appropriate overhead allocation factor to be applied in this case, Rockingham agreed to the 100% cost allocation factor on its estimate of 114 hours of direct labor per year. This issue, therefore, is rendered moot.

4. Operations and Maintenance Escalation Factor

With regard to the O&M escalation factor, the Commission finds that Rockingham's recommendation is just and reasonable. The O&M expenses, therefore, shall be escalated annually using the average of the CPI and the Average Hourly Earnings Index for labor.

IT IS, THEREFORE, ORDERED that the parties shall execute and file with the Commission within 7 days of the date of this Order an executed contract for the delivery of natural gas by NUI to Rockingham consistent with the rates, terms and conditions found herein to be appropriate.

ISSUED BY THE ORDER OF THE COMMISSION.
This the __23rd__ day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

rg061300.03

DOCKET NO. E-2, SUB 760

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of CP&L Energy, Inc. to Engage in a Business Combination Transaction with Florida Progress Corporation	)))	ORDER APPROVING MERGER AND ISSUANCE OF SECURITIES

HEARD: Monday, July 17, 2000, at 7:00 p.m., and on Tuesday, July 18, 2000, at 9:30 a.m., Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner William R. Pittman, Presiding; Chair Jo Anne Sanford; and Commissioners Ralph A. Hunt; Judy Hunt; J. Richard Conder; Robert V. Owens, Jr.; and Sam J. Ervin, IV

APPEARANCES:

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BY THE COMMISSION: On February 3, 2000, pursuant to G.S. 62-111 and 62-161 and Commission Rule R1-16, CP&L Holdings, Inc. (CP&L Holdings) filed an Application for authorization to engage in a business combination transaction between CP&L Holdings and Florida Progress Corporation (FPC), and in connection with that transaction, authorization to issue common stock without par value.

On February 23, 2000, Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene, which was allowed by Order dated March 6, 2000.

On March 17, 2000, CP&L filed the Direct Testimony and Exhibits of Bonnie V. Hancock and of Dr. John L. Harris.

On March 21, 2000, the Commission issued its Order scheduling public hearings, requiring the pre-filing of testimony, allowing the filing of petitions to intervene, and requiring CP&L Holdings to give public notice of the Application and of the scheduled hearings. Notice was properly given by CP&L.

By letter dated March 24, 2000 CP&L Holdings notified the Commission that it was changing its name to CP&L Energy, Inc. (CP&L Energy).

On April 7, 2000, Carolina Industrial Group for Fair Utility Rates (CIGFUR II) filed a petition to intervene, which was allowed by Order dated April 13, 2000.

On April 12, 2000, the Attorney General filed its Notice of Intervention.

On May 10, 2000, the North Carolina Electric Membership Corporation (NCEMC) filed a petition to intervene, which was allowed by Order dated May 23, 2000.

On May 15, 2000, the Greenville Utilities Commission and the cities of Rocky Mount, Wilson and Monroe filed a petition to intervene, which was allowed by Order dated May 23, 2000.

On May 25, 2000, the North Carolina Justice and Community Development Center (JCDC) and Glenda Michales et al. filed Petitions to Intervene. On May 31, 2000, CP&L filed Motions to Deny the Petitions to Intervene of JCDC and of Glenda Michales et al. On June 5, 2000, JCDC and counsel for Glenda Michales et al. filed separate Responses to CP&L's Motions to Deny Petitions to Intervene. On June 6, 2000, the Attorney General also filed a response in opposition to the Motion to Deny JCDC's Petition. By Order dated June 12, 2000, the Commission granted both petitions to intervene by JCDC and Glenda Michales et al.

On July 7, 2000, Glenda Michales et al. filed the Direct Testimony and Exhibits of J. Bertram Solomon and of John R. Jolly, Jr.

On July 10, 2000, the Public Staff filed the Testimony and Exhibits of Dr. Ben Johnson.

On July 12, 2000, CP&L Energy filed Motions to Strike the Testimony of J. Bertram Solomon and John R. Jolly, Jr. On July 13, 2000 Glenda Michales et al. filed a Response to the two Motions to Strike Testimony.

On July 13, 2000, CP&L Energy filed the Rebuttal Testimony of Bonnie V. Hancock.

On July 17, 2000, a public hearing was held in Raleigh. No public witnesses appeared at the hearing.

On July 18, 2000, the evidentiary hearing in this proceeding was held as scheduled. At the beginning of the hearing, CP&L Energy and Glenda Michales, et al. informed the Commission that they had reached agreement on all disputed matters and offered into the record a stipulation which was accepted by the Commission. All parties agreed to waive cross-examination of all witnesses and further agreed to allow all pre-filed testimony and exhibits into the record without the sponsoring witness taking the witness stand. The Commission accepted into the record all pre-filed testimony and exhibits and the hearing was adjourned.

Based on the foregoing and all of the parties' testimonies and the exhibits received into evidence during the proceeding and the entire record, the Commission now makes the following:

FINDINGS OF FACT

1. CP&L Energy is a corporation organized and existing under the laws of the State of North Carolina. It is an exempt holding company under the Public Utility Holding Company Act of 1935 (PUHCA). It owns three North Carolina jurisdictional public utilities: Carolina Power & Light Company (CP&L), North Carolina Natural Gas Corporation (NCNG) and Interpath Communications, Inc. CP&L is an electric utility that provides electric generation, transmission, and distribution

services to customers located within its assigned territories in North Carolina. NCNG is a natural gas local distribution company providing natural gas and natural gas transportation services to customers located in its assigned territory. Interpath is a telecommunications company authorized to provide local and interexchange long distance switched and dedicated services throughout North Carolina.

2. FPC is an exempt public utility holding company whose principal public utility subsidiary is Florida Power Corporation, which is engaged in providing wholesale and retail electric service primarily in central and northern Florida.

3. Through its Application to the Commission, CP&L Energy seeks authorization under G.S. 62-111 and G.S. 62-161 to engage in a business combination transaction and for authorization to issue common stock without par value in connection with that transaction. The proposed transaction would make FPC a wholly owned subsidiary of CP&L Energy.

4. If the merger is approved, shareholders of FPC may elect to receive $54.00 in cash for each outstanding share of FPC common stock or a number of shares of CP&L Energy common stock equal to the exchange ratio, subject to proration in the event that FPC shareholders elect to receive more than 65% of the total consideration for the exchange in cash, or more than 35% in CP&L Energy common stock. FPC shareholders will also receive one contingent value obligation for each share of FPC common stock they own. Each contingent value obligation will represent the right to receive contingent payment based upon the net after tax cash flow to CP&L Energy generated by four synthetic fuel plants purchased by FPC in October 1999.

5. Upon the closing of the merger transaction, CP&L Energy will become a registered holding company subject to the jurisdiction of the Securities and Exchange Commission (SEC) pursuant to PUHCA. The Regulatory Conditions approved and adopted by the Commission in Docket Nos. E-2, Sub 753, P-708, Sub 5, and G-21, Sub 387, along with the commitments made by CP&L in that proceeding, when renewed by CP&L Energy's current Application filing with the SEC containing the language required by the conditions approved in the holding company proceeding, are adequate to protect this Commission's jurisdiction from preemption by the SEC subsequent to CP&L Energy becoming a registered holding company.

6. The Regulatory Conditions adopted by the Commission in Docket Nos. E-2, Sub 740 and G-21, Sub 377; Docket Nos. E-2, Sub 753, P-708, Sub 5, and G-21, Sub 387; and this docket, as well as the Code of Conduct previously adopted by the Commission, subject to appropriate revisions to apply to CP&L Energy's merger with FPC, are adequate to assure that there will be no adverse impact on the rates and service of CP&L's and NCNG's customers, that these customers are protected as much as possible from potential harm, and that these ratepayers will receive sufficient benefits from the merger to offset any potential costs, risks, and harms.

7. The Regulatory Conditions agreed to by CP&L Energy and the Public Staff and adopted by the Commission herein are adequate to protect the Commission's jurisdiction from the adverse impacts of any potential preemption by the Federal Energy Regulatory Commission (FERC).

8. The commitments made by CP&L Energy, CP&L and NCNG, including their absorption of all direct and indirect merger costs and the acquisition adjustment that will be created

upon closing, and the rate reduction and continued rate cap, constitute an equitable allocation of benefits and costs between ratepayers and shareholders.

9. The rate concessions agreed to by CP&L Energy and the Public Staff and the benefits to CP&L, NCNG and their customers resulting from the proposed merger adequately offset any potential cost, risk, and/or harms to CP&L's and/or NCNG's customers associated with the merger.

10. The business combination transaction proposed by CP&L Energy is justified by the public convenience and necessity, and the proposed securities issuance in connection therewith are for a lawful object, are compatible with the public interest, are consistent with the proper performance by CP&L Energy, CP&L and NCNG of their service to the public, and will not impair their ability to provide service at just and reasonable rates.

11. The acquisition by CP&L Energy of FPC will not materially impact CP&L Energy's and/or CP&L's market power in North Carolina, or otherwise.

12. CP&L Energy must ensure that CP&L's North Carolina retail customers and NCNG's customers are held harmless from any and all current and prospective liabilities of FPC and its subsidiaries.

EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NOS. 1-4

The evidence supporting these findings of fact can be found in CP&L Energy's Application and in the pre-filed testimony of CP&L Energy witness Hancock and Public Staff witness Johnson. These findings of fact are essentially informational, procedural and jurisdictional in nature and are not controverted.

EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NO. 5

The evidence supporting this finding of fact is found in the record and orders issued by the Commission in Docket Nos. E-2, Sub 753, P-708, Sub 5, and G-21, Sub 387. The Commission takes judicial notice of its Order issued on May 17, 2000 in Docket No. E-2, Sub 753, P-708, Sub 5, and G-21, Sub 387 approving CP&L's Application to convert to a holding company structure and to transfer its ownership to CP&L Energy. The Code of Conduct and Regulatory Conditions adopted in that proceeding along with the commitments made by CP&L in that proceeding, when renewed by CP&L Energy's current Application filing with the SEC containing the language required by the conditions approved in the holding company proceeding, are adequate to protect this Commission's jurisdiction from preemption by the SEC subsequent to CP&L Energy becoming a registered holding company. That Order is now final and the time for an appeal of such Order has passed.

EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NOS. 6-10

The evidence supporting these findings of fact is found in the pre-filed testimony of CP&L witness Hancock and Public Staff witness Johnson. CP&L witness Hancock explained that the merger will benefit CP&L and its customers by creating greater resources and greater diversity of resources and customers, increasing its efficiency, increasing its financial strength, increasing its size in order to withstand possible hostile takeovers, and reducing its operating costs by integrating two strong, but medium-sized, companies. Witness Hancock explained that the combined company will be capable of offering energy and a broad variety of low cost, quality energy-related services to a broader customer base during a time of rapid change in the utility industry.

Witness Hancock elaborated on these benefits by explaining that the combination will strengthen CP&L's ability to maintain investor confidence and to attract and retain capital needed to finance new growth. The financial strength and stability of the combined company should enhance its financing capability and support its growth objectives. In addition, CP&L's and FPC's combined generation portfolio and customer mix are more balanced than either stand-alone company, thus reducing their risk profiles. As a result, CP&L will be better able to expand its service offerings to respond to customer needs and demands, and to manage and absorb the risk and volatility inherent in competitive power supply markets.

Witness Hancock further explained that the merger will allow CP&L to diversify its fuel and generation mix. CP&L's customers will benefit because this will reduce CP&L's dependence upon one type of fuel source and reduce customer exposure to fluctuations in fuel prices. In addition, the merger should improve the efficiency of the merged company's generation resources and operations because CP&L is a summer peaking utility with a significant amount of industrial customer load, while Florida Power is a winter peaking utility with mostly residential load. Thus, the two companies complement each other in both peak loads and customer mix.

Witness Hancock further elaborated that the merger will enhance CP&L's ability to serve its customers in North Carolina by making CP&L a stronger, more viable company, better able to provide stable and reliable services in any market or economic environment. Witness Hancock committed that CP&L will continue to be a good, strong, corporate citizen, headquartered in Raleigh and that all other things being equal, jobs and investments will occur in North Carolina.

Regarding the savings CP&L Energy expects to realize from the merger, Witness Hancock testified that CP&L Energy and FPC estimate the nominal value of synergies from the merger to be at least one hundred million dollars ($100 million) annually. CP&L Energy expects to realize these synergies through (1) the integration of corporate functions; (2) the integration of corporate programs; (3) purchasing economies; (4) fuel procurement; and (5) business optimization. Savings from integration of corporate functions are estimated to be $24-32 million. These are labor related savings, primarily from consolidating corporate and administrative functions into one service company. Savings from integration of corporate programs are also estimated to be $24-32 million. These savings are associated with non-labor cost reductions. Purchasing economies are estimated to be $18-21 million. Fuel procurement savings will be $1-2 million. Finally, business optimization and sharing of "best practices" will yield $24-30 million in annual savings.

Witness Hancock testified that the extent to which these savings will be reflected on the books of each company within the CP&L Energy family will vary by specific initiative and will be dependent on the outcome of the integration and implementation processes. She explained that both utilities will see a benefit from the combination of these corporate functions and programs as the savings are achieved and each utility will continue to allocate its costs consistent with current jurisdictional cost of service methodologies.

Public Staff witness Dr. Johnson disagreed with witness Hancock on certain issues and testified that the merger is driven by issues which are primarily of concern to CP&L Energy's management and shareholders. He explained that most large corporate acquisitions and mergers are undertaken to enhance shareholder value and that this proposed merger is no exception.

Dr. Johnson explained that from a public interest perspective, the additional jobs and economic development the merger brings to North Carolina and the Raleigh area are its primary appeal. He testified that this particular transaction is attractive in large part because it involves a North Carolina utility taking control of a Florida utility. However, he cautioned that there is no guarantee that future mergers or acquisitions will be structured in the same manner or that the combined company will be permanently headquartered in Raleigh and that it is possible that another firm headquartered outside North Carolina may seek to acquire CP&L Energy.

Dr. Johnson also explained that the merger would cause the combined companies to be more highly leveraged. He testified that, while this increase in leverage would bring with it some risks, CP&L Energy's overall cost of capital would decline because it will be relying less on high cost equity. This is a result of the fact that 65% of the purchase price will be paid in cash, which will cause CP&L Energy to issue new debt, thereby extinguishing the majority of FPC's equity capital.

Dr. Johnson then explained that, in general, cost savings realized by a regulated utility will eventually reduce its cost of service and revenue requirement for ratemaking purposes. Savings that are achieved through mergers will ultimately tend to benefit customers, because a utility's rates are set on a cost of service basis. Under traditional rate of return, cost-based ratemaking, customers are ultimately responsible for reimbursing all reasonable and prudent costs incurred by the utility. To the extent these costs decline, the savings will typically be reflected when rates are set.

Dr. Johnson stated that, in order to ensure that the overall benefits of the merger outweigh the costs and risks, so as to justify approval of the transaction by the Commission, CP&L Energy and the Public Staff also agreed to a number of rate reductions. CP&L shall amend its North Carolina retail rate schedules as follows:

- For calendar year 2002, CP&L will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kWh of usage totaling, in the aggregate for the class, $3 million.

- For calendar year 2003, CP&L will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kWh of usage totaling, in the aggregate for the class, $4.5 million.

- For calendar year 2004, CP&L will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kWh of usage totaling, in the aggregate for the class, $6 million dollars.

- For calendar year 2005, CP&L will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kWh of usage totaling, in the aggregate for the class, $6 million.

CP&L Energy also agreed to an additional benefit, to be provided in its 2000 fuel case, whereby CP&L will amend its 2000 fuel case Application to write-off and forego recovery of $10 million of its under-recovered fuel cost for the test period April 1, 1999 through March 31, 2000, and will recover the remaining under-recovered fuel costs determined reasonable by the Commission for that test period over the three year collection period established for its 2001, 2002 and 2003 fuel cases, in three equal installments. No interest will be recoverable by CP&L in connection with this deferral of fuel cost recovery, nor will any deferral amounts be offset against any future fuel cost over-recoveries for purposes of calculating interest on such over-recoveries.

Dr. Johnson testified that the rate reductions and the treatment of under-recovered fuel costs offer real and measurable benefits to North Carolina customers as a result of the merger.

CP&L Energy also agreed that it would extend natural gas service through NCNG to Tabor City in Columbus County by June 30, 2001, provided it can obtain proper right-of-way on a timely basis, and it will increase its annual contributions to economic development projects in Eastern North Carolina by $75,000 for the time period June 1, 2000, through May 31, 2005. Dr. Johnson viewed these commitments as evidence of CP&L's continued commitment to serving North Carolina.

Regarding the costs to be incurred by CP&L Energy in order to accomplish the merger, Dr. Johnson explained that many of these costs will probably be included as "above-the-line" costs of providing utility service, and thus would tend to increase the utility's revenue requirement. However, some of the costs might be classified as non-recurring costs, or they might be categorized as "below-the-line" costs attributable to shareholders, and thus would not be considered for ratemaking purposes. Dr. Johnson explained that as a general principle, ratepayers are expected to reimburse a utility for costs which are incurred for their benefit, but they are not expected to reimburse costs which are primarily or exclusively incurred for the benefit of shareholders.

Dr. Johnson discussed in great length the proper accounting treatment of the goodwill associated with the merger, and, in particular, the extent to which the purchase price for FPC stock exceeded its book value. He explained that CP&L Energy had proposed to offset any savings resulting from the merger with the amortization of the goodwill associated with the merger to the extent that CP&L Energy can clearly demonstrate that such savings were realized as a result of the business combination. Dr. Johnson disagreed with CP&L Energy on this issue, testifying that goodwill should not be recovered from ratepayers, and gave several reasons for his position.

To address this issue, CP&L Energy and the Public Staff agreed to the following conditions:

> All costs of the merger shall be excluded from each of the utilities' accounts, and all direct or indirect corporate cost increases, if any, attributable to the merger shall be excluded from utilities' costs for all purposes that affect each of the utilities' regulated retail rates and charges. For purposes of this condition, the term "corporate cost increases" is defined as costs in excess of the level that each of the utilities (a) would

> have incurred using prudent business judgment, or (b) would have had allocated to it, had the merger not occurred. "Corporate cost increases" shall also include any payments made under change of control agreements, salary continuation agreements, and/or other severance or personnel type arrangements that are reasonably attributable to the merger.
>
> Any acquisition adjustment that results from the business combination of CP&L Energy and FPC shall be excluded from CP&L's and NCNG's utility accounts and treated for regulatory reporting and ratemaking purposes so that it does not affect CP&L's North Carolina retail electric rates and charges and NCNG's natural gas rates and charges. This does not prohibit CP&L from filing additional information showing the acquisition adjustment.

Dr. Johnson further explained that the Regulatory Conditions agreed to by CP&L Energy and the Public Staff are intended to protect the Commission's jurisdiction from preemption by the FERC as a result of CP&L and Florida Power Corporation entering into an integration agreement and to hold CP&L's customers harmless from any unforeseen impacts of implementing the integration agreement and to ensure that existing CP&L generation resources remain committed to the benefit of CP&L's retail customers. The Regulatory Conditions also seek to ensure that the Commission has the opportunity to review and approve on a timely basis CP&L's proposed entry into a regional transmission organization (RTO) and that any risks associated with the time constraints on CP&L to join an RTO are mitigated. The Regulatory Conditions also address any potential adverse consequences of CP&L becoming a registered holding company subject to the full jurisdiction of the SEC and also generally safeguard the Commission's ability to regulate CP&L and protect its customers from any harmful impacts of the merger. The Regulatory Conditions agreed to by CP&L Energy and the Public Staff are set forth in the Ordering Paragraphs of this Order.

No other party to this proceeding objected to any of these proposed conditions. Based upon the testimony of Public Staff witness Johnson and CP&L witness Hancock, the Commission finds that these conditions as well as the conditions and Code of Conduct adopted by the Commission in Docket Nos. E-2, Sub 740, and G-21, Sub 377, and Docket Nos. E-2, Sub 753, P-708, Sub 5, and G-21, Sub 387, adequately protect CP&L's customers from any potential harm from the merger and provide them with significant benefits that adequately offset any potential cost, risk, or harm resulting from the merger, and, therefore, the merger is justified by the public convenience and necessity.

EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NO. 11

The evidence supporting this finding of fact is found in the prefiled direct testimony of CP&L Energy witness Harris and Public Staff witness Johnson. Dr. Harris testified that he had analyzed the impact of the proposed merger on CP&L's market power and the extent to which such change in market power impacts North Carolina customers. He found that the merger in this case will not adversely affect market power in the North Carolina retail market. He explained that rates for service in that market are fully regulated and therefore will not be affected by the merger. In addition, the merger will not affect competition in North Carolina's retail electric markets because FPC does not have the legal authority to participate in those markets.

Regarding the wholesale market, Dr. Harris explained that the merger will not produce any meaningful change in the wholesale power markets in North Carolina. He testified that FPC is not, nor has it ever been, a significant supplier of wholesale power in North Carolina. Consequently, combining CP&L Energy and FPC will have no material impact on the North Carolina wholesale power markets.

Dr. Johnson testified that Dr. Harris' analysis was a competent and consistent application of the approach described by the FERC in its guidelines. However, Dr. Johnson did not believe these guidelines are sufficient to encompass all of the relevant concerns in this proceeding. Dr. Johnson also explained that he was concerned that CP&L examined retail market power in the context of the current regulatory environment and that while CP&L's analysis of this existing market was correct, he felt that CP&L should have considered the emerging trend towards increased competition in the industry in its analysis. However, after explaining the basis for his concerns, Dr. Johnson testified that he agreed with the conclusion reached by Dr. Harris, that is, that the proposed merger will not adversely affect competitive conditions in the relevant markets now. He explained that this is a proposed merger of two utilities that are serving widely separated and economically distinct markets and that they are not likely to become strong rivals, even if retail competition were to be authorized in the future. He also explained that the proposed merger could have positive impacts as well. Dr. Johnson explained that it will allow CP&L to diversify outside North Carolina, which should reduce its exposure to the risk associated with increased competition. By reorganizing and expanding, CP&L is placing itself in a better position to survive and prosper in the increasingly competitive climate it sees over the horizon.

Dr. Johnson further testified that provided reasonable conditions are imposed by the Commission and future developments are monitored carefully, the proposed merger could ultimately serve to benefit consumers by placing one of the major utilities in the State in a stronger position to compete with Duke Power, The Southern Company, and other major utilities. The two conditions recommended by Dr. Johnson and agreed to by CP&L in this regard are as follows:

> CP&L recognizes that the NCUC retains the right to order reasonable modifications to the structure and/or operations of CP&L and/or its affiliates, in accordance with the provisions of Regulatory Condition No. 43 to the NCUC's approval of the holding company formation in Docket Nos. E-2, Sub 753, G-21, Sub 387, and P-708, Sub 5 (Order dated June 17, 2000), as necessary to address changes in the electric industry consistent with North Carolina law.
>
> CP&L agrees to hold North Carolina retail customers harmless from any and all losses associated with or attributable to the six year divestiture by CP&L of 85 megawatts of capacity and energy, as committed to in the merger Application filed with the FERC by CP&L Energy and Florida Progress, and for any and all losses associated with or attributable to the 50 megawatt transmission path made necessary by that same Application.

No other party presented any evidence on this issue nor challenged these two witnesses. The Commission finds the testimony of Drs. Harris and Johnson persuasive and concludes that the proposed conditions are appropriate.

ELECTRICITY - MERGER

EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NO. 12

The evidence supporting this finding of fact is found in the testimony of Public Staff witness Dr. Ben Johnson, CP&L Energy witness Bonnie Hancock, and the testimony of John Jolly and Bertram Solomon presented on behalf of intervenors Glenda Michales et al.

Witnesses Jolly and Solomon explained their concern regarding certain litigation involving FPC and an FPC subsidiary, Mid-Continent Life Insurance Company, pending in Oklahoma State Court. Their concern was two-fold: (1) that the merger might in some manner dissipate FPC assets that might otherwise be available to satisfy a judgment against Mid-Continent Life Insurance Company and/or FPC, and (2) that the cost and/or potential judgment associated with this litigation could increase CP&L's electric rates to its North Carolina customers. To address the second of these concerns, CP&L Energy and the Public Staff agreed to the following condition:

> CP&L's North Carolina retail customers and NCNG's customers shall be held harmless from all current and prospective liabilities of FPC and its subsidiaries, including, but not limited to, the litigation involving Mid-Continent Life Insurance Company, pensions and other employee benefits, decommissioning costs, and taxes.

To resolve the concerns of intervenors Michales' et al., CP&L Energy and these intervenors entered into a stipulation which was offered into and accepted into the record without objection. This stipulation is set forth in Attachment 1 to this Order. Basically this stipulation provides that the condition CP&L entered into with the Public Staff regarding this matter shall be interpreted so as to prohibit CP&L from seeking to include in its North Carolina retail rates any direct or indirect costs associated with the Mid-Continent Life Insurance litigation, including but not limited to attorney's fees, judgments, and increased cost of debt and/or equity. The stipulation also provides that as a result of such commitment, and CP&L Energy's representations to the Commission that FPC will continue to be a going concern and that the merger will not dissipate any FPC assets or earnings available to satisfy any potential judgment arising from the Mid-Continent Life Insurance litigation, the concerns of intervenors Michales' et al. are adequately addressed and they do not oppose the proposed merger.

No other parties presented any evidence regarding these matters or opposed the stipulation. Therefore, the Commission finds it to be in the public interest to approve the stipulation.

CONCLUSIONS OF LAW

1. Under the relevant statutes, G.S. 62-111 and 62-161, the Commission has authority to review all aspects of a proposed merger and securities transactions affecting a public utility and to balance all potential benefits and costs to determine if they should be authorized.

2. Approval should be given to CP&L Energy and FPC's proposed merger and securities transaction only if sufficient conditions are imposed to ensure that (a) the merger will have no known adverse impact on the rates and service of CP&L's and NCNG's ratepayers; (b) CP&L's and NCNG's ratepayers are protected as much as possible from potential harm; and (c) these ratepayers will receive enough benefit from the merger to offset any potential costs, risks, and harms.

3. The approved Regulatory Conditions and Code of Conduct are intended to prevent the merger from having any known adverse impact on the rates and service of CP&L's and NCNG's ratepayers; to protect those ratepayers as much as possible from potential harm; and to provide enough benefits from the merger to offset any potential costs, risks, and harms.

4. Based on its Application of the foregoing standards to the facts of this case, with particular attention paid to the Regulatory Conditions and Code of Conduct, the Commission concludes that the requirements of G.S. 62-111 and G.S. 62-161 have been met, and that the proposed merger and securities transactions should be approved.

Specifically, the Commission concludes that the business combination transaction proposed by CP&L Energy and FPC is justified by the public convenience and necessity, and that the proposed securities transaction in connection therewith is for a lawful object, is compatible with the public interest, is consistent with the proper performance by CP&L and NCNG of their service to the public, and will not impair their ability to provide that service at just and reasonable rates.

IT IS, THEREFORE, ORDERED that CP&L Energy's Application to engage in a business combination transaction and to issue securities in connection therewith, as described herein and in the Application, is approved upon the commitments made by CP&L Energy and upon the following Regulatory Conditions with which CP&L Energy is hereby ordered to comply:

1. CP&L recognizes that the NCUC retains the right to order reasonable modifications to the structure and/or operations of CP&L and/or its Affiliates, in accordance with the provisions of Regulatory Condition 43 to the NCUC's approval of the holding company formation in Docket Nos. E-2, Sub 753, G-21, Sub 387, and P-708, Sub 5 (Order dated May 17, 2000), as necessary to address changes in the electric industry consistent with North Carolina law.

2. CP&L agrees to hold North Carolina retail customers harmless for any and all losses associated with or attributable to the six-year divestiture by CP&L of 85 MW of capacity and energy, as committed to in the merger Application filed with the FERC by CP&L Energy and Florida Progress, and for any and all losses associated with or attributable to the 50 MW transmission path made necessary by that same Application.

3. All costs of the merger shall be excluded from each of the Utilities' utility accounts, and all direct or indirect corporate cost increases, if any, attributable to the merger shall be excluded from utility costs for all purposes that affect each of the Utilities regulated retail rates and charges. For purposes of this condition, the term "corporate cost increases" is defined as costs in excess of the level that each of the Utilities (a) would have incurred using prudent business judgment, or (b) would have had allocated to it, had the merger not occurred. "Corporate cost increases" shall also include any payments made under change-of-control agreements, salary continuation agreements, and/or other severance- or personnel-type arrangements that are reasonably attributable to the merger.

4. Any acquisition adjustment that results from the business combination of CP&L Energy and FPC shall be excluded from CP&L's and NCNG's utility accounts and treated for regulatory reporting and ratemaking purposes so that it does not affect CP&L's North Carolina retail

electric rates and charges and NCNG's natural gas rates and charges. This does not prohibit CP&L from filing additional information showing the acquisition adjustment.

5. CP&L shall amend its North Carolina retail rate schedules as follows:

For calendar year 2002, CP&L will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kwh of usage totaling, in the aggregate, $3 million. For calendar year 2003, CP&L will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kwh of usage totaling, in the aggregate for the class, $4.5 million. For calendar year 2004, CP&L will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kwh of usage totaling, in the aggregate for the class, $6 million. For calendar year 2005. CP&L will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kwh of usage totaling, in the aggregate for the class, $6 million.

6. CP&L will amend its 2000 fuel case Application to write-off and forego recovery of $10 million of its unrecovered fuel costs for the test period April 1, 1999, through March 31, 2000, and will recover the remaining unrecovered fuel cost determined reasonable by the NCUC for that test period over the three-year collection period established for its 2001, 2002, and 2003 fuel cases in three equal installments. No interest shall be recoverable by CP&L in connection with this deferral of fuel cost recovery, nor shall any deferral amounts be offset against any future fuel cost over-recoveries for purposes of calculating interest on such over-recoveries.

7. CP&L will extend natural gas service to Tabor City in Columbus County by June 30, 2001, and increase its annual contributions to economic development projects in eastern North Carolina by $75,000 for the time period June 1, 2000, through May 31, 2005.

8. With respect to the transfer by CP&L to any entity, affiliated or not, of the control of, operational responsibilities for, or ownership of any asset or portion thereof used for the generation, transmission, distribution, or other provision of NCUC-regulated electric power and/or service to customers in North Carolina:

(a) CP&L shall file an Application for approval with the NCUC at least 90 days in advance of the proposed transfer; and

(b) CP&L, CP&L Energy, and/or any other Affiliates shall not commit to or carry out such a transfer except in accordance with all applicable laws and the rules, regulations and orders of the NCUC promulgated thereunder.

9. Any contract regarding CP&L's membership in an RTO must contain a regulatory out clause making CP&L's involvement conditional upon state regulatory approval, as well as federal approval. In addition, to the extent a southeastern RTO does not prove to be viable in time for CP&L to meet its RTO filing commitment to the FERC, any filing at the FERC and any contract related to CP&L joining an RTO other than one with a southeastern focus must contain a provision allowing

the NCUC to require CP&L to withdraw and join a subsequently developed southeastern FERC-approved RTO.

10. CP&L and NCNG agree to meet with and consult with the Public Staff, upon request, regarding plans for significant changes in CP&L's, NCNG's, and/or CP&L Energy's organization, structure (including RTO developments), and activities; the expected and/or potential impact of such changes on CP&L's and NCNG's regulated rates, operations and service; and proposals for assuring that such plans do not adversely affect CP&L's North Carolina retail electric customers or NCNG's regulated natural gas customers. To the extent that proposed significant changes are planned for Florida Power Corporation's organization, structure (including RTO developments), and activities and the consequences of those plans could impact the rates, service and/or costs allocated to CP&L's or NCNG's North Carolina regulated customers, then CP&L's and NCNG's plans and proposals for assuring that those plans do not adversely affect their customers must be included in these meetings. CP&L agrees to inform the Public Staff promptly of any anticipated significant events and/or changes as described above and initiate meetings when necessary.

11. The proposed merger of CP&L Energy and FPC and the resulting participation of CP&L in the proposed System Integration Agreement filed with the FERC as part of the FERC merger Application may adversely affect the NCUC's traditional regulatory authority over CP&L because of the potentially preemptive relationship between the Federal Power Act (FPA) and state law. The following requirements and procedures are intended to protect the NCUC's jurisdiction in that event:

(a) CP&L and/or CP&L Energy shall amend the proposed System Integration Agreement Between Carolina Power & Light Company and Florida Power Corporation (Integration Agreement) filed with the FERC merger Application of CP&L Holdings, Inc. (now CP&L Energy), and Florida Progress Corporation on behalf of their public utility subsidiaries, to provide the following:

i) CP&L's participation in this agreement is voluntary, and CP&L is not obligated to make any purchases or sales pursuant to this agreement; and

(ii) CP&L may not make or incur a charge under this agreement except in accordance with North Carolina law and the rules, regulations and orders of the NCUC promulgated thereunder.

If the Integration Agreement has been approved (or accepted for filing) by the FERC prior to CP&L having an opportunity to amend it as provided above, then CP&L and/or CP&L Energy shall promptly make a filing with the FERC seeking an order approving or accepting the Integration Agreement amended as set forth above.

(b) All future FERC jurisdictional agreements, service schedules and similar arrangements entered into pursuant to the Integration Agreement (or comparable agreements) and filed with the FERC, (a) to which CP&L is a party or (b) which can affect CP&L's costs and revenues, either directly or indirectly through allocation, shall contain the language set forth in subsection (a)(i) and (ii) above.

(c) CP&L and CP&L Energy shall request that the following language be included in any order issued by the FERC approving or accepting a FERC jurisdictional agreement and/or service schedule entered into pursuant to the Integration Agreement (or comparable agreement) to which CP&L or any Affiliate thereof is a party:

> Approval or acceptance of this agreement and/or service schedule in no way precludes the North Carolina Utilities Commission from scrutinizing and disallowing charges incurred or made or allowing or imputing a different level of such charges when setting retail rates for services rendered to customers of affiliated public utilities in North Carolina.

(d) CP&L shall certify to the NCUC that neither CP&L, CP&L Energy, nor any Affiliate thereof has made any filing with the FERC inconsistent with the foregoing. The first such certification shall be made within 30 days of the issuance of the NCUC's order approving the merger and shall be repeated annually thereafter on the anniversary of the first certification.

12. With respect to any transfer by a Utility of the control of, operational responsibilities for, or ownership of any asset or portion thereof used for the generation, transmission, distribution or other provision of regulated electric, natural gas, and/or telecommunications service to retail customers in North Carolina:

(a) No Utility shall commit to or carry out such a transfer except in accordance with these conditions, all applicable law, and the rules, regulations and orders of the NCUC promulgated thereunder; and

(b) No Utility may reflect in rates the value of any such transfer except as allowed by the NCUC.

13. CP&L, NCNG, CP&L Energy, and their Affiliates shall include in any Application to the FERC for approval of any transfer described in the immediately preceding condition the commitment set forth in that condition. CP&L will not transfer the control of, operational responsibilities for, or ownership of any transmission asset to an Affiliate or non-Affiliate without first obtaining NCUC approval.

14. Any filing with the FERC in connection with any asset transfers involving CP&L shall request that the FERC include the following language in its approval order(s):

> Approval of this Application in no way precludes the North Carolina Utilities Commission from scrutinizing and establishing the value of the asset transfer for purposes of determining the retail rates for services rendered to CP&L's customers. It is the FERC's intention that the North Carolina Utilities Commission retain the right to review and determine the value of such asset transfer for purposes of determining retail rates.

15. Neither CP&L, CP&L Energy, nor any Affiliate thereof shall assert or support the assertion in any forum, with respect to any asset transfer transaction described above to which CP&L

is involved and which is subject to the FPA, that the FPA in any way preempts the NCUC from exercising such authority as it may have under all applicable law to (a) review the reasonableness of any commitment entered into by CP&L and mandate, approve or otherwise regulate a transfer of assets by or to CP&L, and/or (b) disallow costs or impute revenues, related to such commitment, to CP&L and scrutinize and establish the value of the asset transfers for purposes of determining the rates for services rendered to CP&L's retail customers. Should any other entity so assert, CP&L, CP&L Energy and/or other Affiliates shall advise and consult with the NCUC and the Public Staff regarding such assertion.

16. CP&L, NCNG, CP&L Energy, and all Affiliates shall take all such actions as may be reasonably necessary and appropriate to hold North Carolina retail ratepayers harmless from rate increases, foregone opportunities for rate decreases, and/or other effects of merger.

17. A copy of all Applications, reports, contracts, rate schedules, or other documents (including attachments, exhibits, and similar items) filed with the FERC by CP&L Energy, any Service Company, the Utilities, other Affiliates, and/or a Nonpublic Utility Operation shall be filed contemporaneously by CP&L with the NCUC and a copy shall be provided to the Public Staff at the time of the filing. CP&L and NCNG also shall file with the NCUC all orders issued by the FERC that directly or indirectly affect CP&L's and/or NCNG's accounting practices, North Carolina-regulated rates, operations, and/or transfer prices or allocations.

18. CP&L may not purchase electricity (and/or related goods and services) from an Affiliate under circumstances where the costs incurred for comparable service (whether directly or through allocation) exceed fair market value, nor may it sell electricity (and/or related goods and services) to an Affiliate for less than fair market value except for emergency interchange transactions.

19. CP&L and its retail customers will continue to bear the cost responsibility for CP&L's premerger system power supply resources and receive the revenues from those resources. CP&L shall ensure that its retail native load customers receive the benefits associated with CP&L's existing system generation assets, including those for which a certificate has been granted as of the closing date of the merger. CP&L and/or any of its Affiliates shall give the NCUC and the Public Staff written notice 30 days prior to filing with the FERC proposed amendments, modifications, or supplements to the Integration Agreement (or comparable agreement) that change or affect that cost responsibility and/or receipt of revenues and/or could potentially have a negative effect on CP&L's North Carolina retail native load customers.

20. The joint planning and coordinated dispatch of CP&L system generation contemplated by the Integration Agreement (and/or future comparable agreements) shall ensure that CP&L's retail native load receives priority with respect to that generation and shall ensure that CP&L's retail native load customers receive the benefits of CP&L owned or controlled system generation resources. CP&L shall continue to serve its retail native load customers in North Carolina with the lowest-cost power it can reasonably generate or purchase from other sources before making power available for off-system sales. To the extent CP&L owned or controlled system generation is made available for off-system sales, the revenues realized by CP&L from such sales shall continue to be used to reduce CP&L's retail cost of service.

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21. CP&L shall not enter into contracts for the sale of energy and/or capacity at native load priority and/or under such terms and conditions as to cause the purchasing entity to fall within the definition of "native load" in the Integration Agreement without first giving the NCUC and the Public Staff written notice 20 days in advance of such a contract being executed.

22. The costs of any resource additions that are allocated or assigned directly or indirectly to CP&L must be treated for ratemaking purposes in accordance with all applicable laws and all NCUC orders, rules and regulations.

23. Changes will be made, if and when necessary, to the required affiliated transactions reports and cost allocation manuals.

24. A copy of all Applications, reports, or other documents filed with the SEC under PUHCA by CP&L Energy, any Service Company, the Utilities, other Affiliates, and/or any Nonpublic Utility Operation shall be contemporaneously filed with the NCUC and provided to the Public Staff. CP&L and NCNG also shall file with the NCUC promptly upon receipt all orders issued by the SEC that directly or indirectly affect any of the Utilities' accounting practices, financings, operations, and/or transfer prices or allocations.

25. CP&L and NCNG shall not take services from nor provide services to Affiliates other than CP&L Services if comparable services can be provided more economically and efficiently by CP&L Services.

26. CP&L and NCNG shall file with the NCUC in this docket annually one week before the effective date of the annual contract the list of services each intends to provide to CP&L Services and/or other Affiliates. Any modifications by CP&L and/or NCNG to this list of services shall be filed with the NCUC at the time CP&L and/or NCNG receive written notice of the modifications.

27. CP&L and NCNG shall file with the NCUC in this docket annually one week before the effective date of the annual contract the list of services each elects to take from CP&L Services. Any modifications by CP&L and/or NCNG to the selection of services shall be filed with the NCUC at the time CP&L and/or NCNG gives written notice to CP&L Services.

28. Any and all proposed changes to CP&L Services' contracts and service contracts between CP&L and/or NCNG and any of their Affiliates must be filed for approval by the NCUC contemporaneously with their being filed with the SEC.

29. CP&L and NCNG shall cooperate fully in any future investigation of power and natural gas marketing activities, including, but not limited to, how those activities are structured, how prices and costs are determined and whether these activities are being conducted in compliance with the relevant codes of conduct.

30. CP&L's North Carolina retail customers and NCNG's customers shall be held harmless from all current and prospective liabilities of Florida Progress Corporation and its subsidiaries, including, but not limited to, the litigation involving Mid-Continent Life Insurance Company, pensions and other employee benefits, decommissioning costs, and taxes.

31. CP&L shall provide to the Public Staff immediately upon execution and/or finalization the Tax Allocation Agreement, plans to consolidate employee benefits plans, and other similar agreements and plans.

32. CP&L and NCNG will continue to take steps to implement and further their commitment to providing superior public utility service following CP&L Energy's acquisition of Florida Progress. To the extent Florida Power Corporation's quality of service practices are found to be superior to CP&L's, CP&L shall incorporate those practices into its own practices to the extent practicable. CP&L and NCNG will work with the Public Staff to ensure the service quality indices are appropriate and to revise them if and when such revisions are necessary.

33. CP&L Energy shall maintain all Utility financial books and records in Raleigh, North Carolina.

34. Subject to subsequent revisions relating to this docket, CP&L, all of its Affiliates, and its Nonpublic Utility Operations shall remain bound by the Code of Conduct approved in Docket Nos. E-2, Sub 753, G-21, Sub 387, and P-708, Sub 5. CP&L shall cooperate in revising the Code as necessary to incorporate the Florida Progress merger.

35. Unless expressly superseded by the conditions contained herein, the conditions agreed to by CP&L and NCNG, and ordered by the NCUC, in Docket Nos. E-2, Sub 740, and G-21, Sub 377, and the conditions agreed to by CP&L, NCNG, Interpath, and CP&L Holdings, Inc., (subsequently CP&L Energy), and ordered by the NCUC in Docket Nos. E-2, Sub 753, G-21, Sub 387, and P-708, Sub 5, remain in full force and effect. In addition, they will be revised and updated as needed to apply explicitly to the FPC merger.

ISSUED BY ORDER OF THE COMMISSION
This the 22nd day of August, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mb032200.01

ATTACHMENT 1

STIPULATION

CP&L Energy and intervenors Michales and Farrimond have agreed to the following stipulation:

1. CP&L agrees that Regulatory Condition No. [30] which states: "CP&L's North Carolina retail customers and NCNG's customers shall be held harmless from all current and prospective liabilities of Florida Progress Corporation and its subsidiaries, including, but not limited to, the litigation involving Mid-Continent Life Insurance Company, pensions and other employee benefits, decommissioning costs, and taxes", shall be interpreted as prohibiting CP&L from seeking to include in its North Carolina retail rates any direct or indirect costs associated with the

Mid-Continent Life Insurance Company litigation, including but not limited to attorneys' fees; judgments; and increased costs of debt and/or equity.

2. The pre-filed testimony of John R. Jolly, Jr. and Bertram Solomon will be entered into the record without objection, however, such witnesses shall not appear or otherwise testify in this proceeding. CP&L waives its right of cross-examination of these two witnesses. Intervenors Michales and Farrimond shall waive cross-examination of all witnesses.

3. Intervenors Michales and Farrimond agree that: (1) the interpretation of Regulatory Condition No. [30] set forth above with the other stipulations entered into by CP&L in this proceeding and (2) CP&L's representations in filings with the North Carolina Utilities Commission that Florida Progress will continue as a going concern and that the merger will not dissipate any Florida Progress assets or earnings available to satisfy any potential judgment arising from the Mid-Continent Life Insurance Company litigation, adequately address their primary concerns regarding the merger of CP&L Energy and Florida Progress Corporation; and that so long as the conditions proposed by the Public Staff and agreed to by CP&L are approved by the North Carolina Utilities Commission in connection with the merger, then they do not object to the merger of these two companies; and they will not appeal any order of the North Carolina Utilities Commission approving the merger of CP&L Energy and Florida Progress Corporation.

DOCKET NO. E-2, SUB 760

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of CP&L Energy, Inc. to Engage	)	ORDER AMENDING
in a Business Combination Transaction	)	ORDER DATED
with Florida Progress Corporation	)	AUGUST 22, 2000

BY THE COMMISSION: On August 22, 2000, the Commission issued an Order Approving Merger and Issuance of Securities in this docket. The Order set forth thirty-five (35) Regulatory Conditions and the Commission ordered CP&L Energy, Inc. to comply with these Regulatory Conditions.

On October 20, 2000, the Public Staff, on behalf of itself, CP&L Energy, Carolina Power and Light Company (CP&L), and North Carolina Electric Membership Corporation (NCEMC), filed a motion requesting that the Commission amend the Order dated August 22, 2000 to include the proposed new Regulatory condition set forth below:

(20a) The loads for which CP&L is the wholesale supplier pursuant to contracts that are in existence and grant native load priority as of the date of the Commission's Order approving this merger are considered to be CP&L's retail native load for purposes of Conditions 19 and 20, above. To the extent (a) CP&L appropriately gives notice of proposed future contracts (as required by

Condition 21, below) that grant native load priority to the North Carolina Electric Membership Corporation (NCEMC); the North Carolina Eastern Municipal Power Agency (NCEMPA); the Fayetteville Public Works Commission; Camden, South Carolina; Waynesville, North Carolina; and/or French Broad Electric Membership Corporation, and (b) the Commission does not affirmatively order CP&L not to enter into such a contract or contracts, then the retail native loads of these wholesale buyers that are served pursuant to said future contracts between those wholesale buyers and CP&L also shall be considered CP&L's retail native load for purposes of Conditions 19 and 20, above. For future contracts that grant native load priority to entities other than the wholesale buyers listed herein for which (a) and (b) above have been met, the retail native loads of those entities shall be considered CP&L's retail native load for purposes of Condition 20, above.

On October 24, 2000, the Commission issued an Order Requesting Comments on the Public Staff's motion. Such comments were required to be filed no later than October 31, 2000.

On October 31, 2000, CP&L filed a letter in which it affirmed to Carolina Utility Customers Association, Inc. (CUCA) and Carolina Industrial Group for Fair Utility Rates (CIGFUR II) that CP&L would provide them with copies of certain reports and notifications that CP&L had previously agreed to provide to the Public Staff. According to CP&L's letter, CUCA and CIGFUR requested CP&L to make this commitment in order to address some or all of their concerns regarding the new proposed Regulatory Condition (20a). No other party filed comments with regard to the Public Staff's motion.

CONCLUSION

After careful consideration of the Public Staff's motion, the Commission concludes that it should amend the Order dated August 22, 2000, in this docket to add the proposed new Regulatory Condition (20a). The Commission notes that no party filed comments in opposition to the Public Staff's motion or the proposed new Regulatory Condition (20a).

IT IS, THEREFORE, ORDERED that the Order in this docket dated August 22, 2000 is hereby amended to include the following additional Regulatory Condition with which CP&L Energy is also ordered to comply:

(20a) The loads for which CP&L is the wholesale supplier pursuant to contracts that are in existence and grant native load priority as of the date of the Commission's Order approving this merger are considered to be CP&L's retail native load for purposes of Conditions 19 and 20, above. To the extent (a) CP&L appropriately gives notice of proposed future contracts (as required by Condition 21, below) that grant native load priority to the North Carolina Electric Membership Corporation (NCEMC); the North Carolina Eastern Municipal Power Agency (NCEMPA); the Fayetteville Public Works Commission; Camden, South Carolina; Waynesville, North Carolina; and/or French Broad Electric Membership Corporation, and (b) the Commission does not affirmatively order CP&L not to enter into such a contract or contracts, then the retail native loads of these wholesale buyers that are served pursuant to said future contracts between those wholesale buyers and CP&L also shall be considered CP&L's retail native load for purposes of Conditions 19 and 20, above. For future contracts that grant native load priority to entities other than the wholesale buyers listed herein for which (a) and (b) above have been met, the retail native loads of those entities shall be considered CP&L's retail native load for purposes of Condition 20, above.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

je110100.04

DOCKET NO. E-2, SUB 765

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application by Carolina Power & Light Company	)	ORDER APPROVING
for Authority to Adjust its Electric Rates and Charges	)	FUEL CHARGE
Pursuant to G.S. 62-133.2 and NCUC Rule R8-55	)	ADJUSTMENT

HEARD: Tuesday, August 8, 2000, at 10:00 a.m., Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; and Commissioners William R. Pittman and Robert V. Owens, Jr.

APPEARANCES:

For the Applicant:

Len S. Anthony, Deputy General Counsel, Carolina Power & Light Company, Post Office Box 1551, Raleigh, North Carolina 27602-1551

For the Public Staff:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For the Carolina Utility Customers Association, Inc. (CUCA):

James P. West, Esq., West Law Office, P.C., Suite 1735, Two Hanover Square, 434 Fayetteville Street Mall, Raleigh, North Carolina 27601

For the Attorney General:

Margaret A. Force, Associate Attorney General, NC Department of Justice, PO Box 629, Raleigh, North Carolina 27602

BY THE COMMISSION: Pursuant to G.S. 62-133.2 and Commission Rule R8-55(e), Carolina Power & Light Company (CP&L or Company) is required to file, at least 60 days prior to the first Tuesday in August of each year, an Application for a change in rates based solely on changes in the cost of fuel and the fuel component of purchased power. On May 31, 2000, CP&L filed a motion for an extension of time to file its annual Application for a change in rates based solely on the cost of fuel. On June 2, 2000, the Commission granted the motion for extension citing a scheduling conflict with the original date and ordered CP&L to file its Application no later than June 9, 2000. On June 9, 2000, CP&L filed its Application along with the testimony and exhibits of Company witness Ronald R. Penny. In its Application, CP&L proposed a decrement of 0.078 cents/kWh (0.081 cents/kWh including gross receipts tax) to the base factor of 1.276 cents/kWh approved in CP&L's last general rate case, Docket No. E-2, Sub 537, or a recommended fuel factor of 1.198 cents/kWh. In its Application, the Company also requested an increment of 0.147 cents/kWh (0.152 cents/kWh including gross receipts tax) for the Experience Modification Factor (EMF) to collect approximately $49.7 million of under-recovered fuel expense experienced during the period April 1, 1999 to March 31, 2000. The Company proposed that the EMF rider be in effect for a fixed twelve-month period.

On June 15, 2000, the Commission issued its Order Scheduling Hearing, Requiring Filing of Testimony and Requiring Public Notice. Citing the scheduling conflict with the first Tuesday in August, the Commission scheduled the hearing for August 8, 2000.

On June 14, 2000, the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II) filed a petition to intervene. The petition was granted by the Commission on June 15, 2000.

On June 30, 2000, Carolina Utility Customers Association, Inc. (CUCA) filed a petition to intervene in the proceeding. The Commission granted CUCA's petition on July 5, 2000. The intervention of the Public Staff is noted pursuant to Commission Rule R1-19(e).

On July 20, 2000, the Attorney General filed a notice of intervention pursuant to G.S. 62-20.

On July 24, 2000, the Public Staff filed affidavits and exhibits of Thomas S. Lam, Michael C. Maness and Randy T. Edwards. No other party filed testimony in this case.

On August 7, 2000, the Company filed the affidavits of publication showing that public notice had been given as required by Rule R8-55(f) and the Commission's Order.

The hearing was held as scheduled on August 8, 2000. At the beginning of the hearing the parties advised the Commission that the parties had agreed to waive cross-examination of all witnesses and that the testimony and exhibits of CP&L witness Ronald R. Penny and the affidavits of Public Staff witnesses Thomas S. Lam, Michael C. Maness and Randy T. Edwards would be copied into the record as if read orally. CP&L, CIGFUR II, CUCA and the Public Staff also advised the Commission that they had entered into a settlement agreement pursuant to which CP&L would amend its Application in this docket to write-off and forego recovery of $10 million of under-recovered fuel expense experienced during the test period and to recover the remaining balance of under-recovered fuel expense associated with the test period, up to $39.7 million, in equal installments over a three-year period beginning with the 2001 fuel case, if the Commission found such costs to be reasonable and prudently incurred. CP&L advised the Commission that it had filed such an amendment just prior to the start of the hearing. The Commission requested the filing of proposed orders on or before August 23, 2000.

Based upon the Company's verified and amended Application, the testimony and exhibits received into evidence at the hearing and the record as a whole, the Commission now makes the following

FINDINGS OF FACT

1. Carolina Power & Light Company is duly organized as a public utility company under the laws of the State of North Carolina and is subject to the jurisdiction of the North Carolina Utilities Commission. CP&L is engaged in the business of generating, transmitting, and selling electric power to the public in North Carolina. CP&L is lawfully before this Commission based upon its application filed pursuant to G.S. 62-133.2.

2. The test period for purposes of this proceeding is the twelve-month period which ended March 31, 2000.

3. CP&L's fuel procurement and power purchasing practices were reasonable and prudent during the test period.

4. The performance of CP&L's nuclear units during the test period was reasonable and prudent.

5. The proper fuel factor for this proceeding is 1.198 cents/kWh.

6. The Company's North Carolina test period jurisdictional fuel expense, adjusted to reflect the temporary EMF factor in effect from September 15, 2000 through September 30, 2000, is $49,661,065.

7. CP&L has agreed to write-off and forego recovery of $10 million of under-recovered fuel cost incurred during the test period and recover the remaining under-recovered fuel cost determined by the Commission to be reasonable and prudent for the test period over the three-year collection period established for its 2001, 2002 and 2003 fuel cost recovery cases in three equal annual installments. The reasonable and prudent amount to be recovered over this three-year period is $39,661,065. No interest will be recoverable by CP&L in connection with this deferral of fuel cost recovery.

8. The effective date for rates established in this proceeding will be October 1, 2000, except for the temporary Experience Modification Rider, which will be effective for service rendered on and after September 15, 2000, through September 30, 2000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, procedural, and jurisdictional in nature and is not controversial.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

G.S. 62-133.2 sets out the verified, annualized information which each electric utility is required to furnish to the Commission in an annual fuel charge adjustment proceeding for a historical twelve-month period. In Commission Rule R8-55(b), the Commission has prescribed the twelve months ending March 31 as the test period for CP&L. All prefiled exhibits and direct testimony submitted by the Company in support of its Application utilized the twelve months ended March 31, 2000, as the test year for purposes of this proceeding. The Company made the standard adjustments to the test period data to reflect normalizations for weather, customer growth, generation mix, and SEPA and NCEMPA transactions.

The test period proposed by the Company was not challenged by any party and the Commission concludes that the test period appropriate for use in this proceeding is the twelve months ended March 31, 2000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

The evidence for this finding can be found in the Company's Application and the monthly fuel reports on file with the Commission. Commission Rule R8-52(b) requires each utility to file a Fuel Procurement Practice Report at least once every ten years, as well as each time the utility's fuel procurement practices change. In its Application, the Company indicated that the procedures relevant to the Company's procurement of coal, uranium and natural gas were filed in the Fuel Procurement Practices Report which was updated in March 2000. In addition, the Company files monthly reports of its fuel costs pursuant to Rule R8-52(a). These reports were filed in Docket No. E-2, Sub 742 for calendar year 1999 and in Docket No. E-2, Sub 762 for calendar year 2000. No party offered any testimony contesting the Company's fuel procurement and power purchasing practices.

The Commission finds and concludes that CP&L's fuel procurement and power purchasing practices and procedures were reasonable and prudent during the test period.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

The evidence supporting this finding can be found in the Company's Application and direct testimony and exhibits of CP&L witness Penny and the affidavit of Public Staff witness Lam.

The Company files with this Commission monthly Fuel Reports pursuant to Rule R8-52 and Base Load Power Plant Performance Reports pursuant to Rule R8-53. These reports were filed in Docket No. E-2, Sub 742 for calendar year 1999 and Docket No. E-2, Sub 762 for calendar year 2000. Witness Penny testified that the Company met the standard for prudent operation as set forth in Commission Rule R8-55(i) based upon the test year actual nuclear capacity factor of 92.95% exceeding the NERC five-year average of 72.79%. The Company's Boiling Water Reactors (BWRs) at Brunswick Units 1 and 2 experienced capacity factors of 90.04% and 86.78% respectively. The Pressurized Water Reactor (PWRs) at Robinson and Harris experienced capacity factors of 95.16% and 99.79% respectively. Public Staff witness Lam verified the Company's test year average capacity factor calculation. No other party offered evidence on this issue.

Based on the evidence, the Commission finds and concludes that the operation of the Company's base load nuclear plants was reasonable and prudent during the test period.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

The evidence supporting these findings can be found in the testimony and exhibits of Company witness Penny and the affidavit of Public Staff witness Lam.

In Penny Exhibit No. 3, the Company calculated a fuel factor of 1.362 cents/kWh based on normalized capacity factors for its nuclear units in accordance with Commission Rule R8-55(c)(1) by using the five-year North American Reliability Council (NERC) Equipment Availability Report 1994-1998 average for BWRs and PWRs. The workpapers included in Penny Exhibit No. 6 show kWh normalization for customer growth and weather at both meter and generation levels and were done in the same manner as past cases. Normalization adjustments were also made for SEPA deliveries and hydro generation. The unit prices used for coal, nuclear, internal combustion turbines, purchases and sales were also calculated in a manner consistent with past cases. The NERC five-year capacity factors for Brunswick Unit Nos. 1 and 2, both BWRs, were normalized at 67.63% and the capacity factors of the Robinson and Harris Units, both PWRs, were normalized at 78.24%. The Company's NERC normalized calculations resulted in a system nuclear capacity factor of 72.79% using this data.

Witness Penny explained in his filed testimony that he could not recommend the 1.362 cents/kWh fuel factor based on the NERC average capacity factors because the Company's nuclear units are expected to significantly outperform the NERC average during the period rates are in effect in this case. Also, witness Penny adjusted coal expense to better reflect anticipated coal contract savings during the time period that rates will be in effect. Therefore, as indicated in his testimony, Company witness Penny recommended adoption of a base fuel factor of 1.198 cents/kWh based on a projected nuclear capacity factor of 90.84% during the time period October 1, 2000, through September 30, 2001. The computation of the 1.198 cents/kWh fuel factor is summarized below:

Generation Type	mWhs	Fuel Cost
Nuclear	25,326,801	$121,457,605
Purchase - Cogen	1,422,800	20,706,633
Purchase - AEP	2,013,900	23,546,200
Purchase - Fay PWC	244,800	9,727,800
Purchase - SEPA	189,756	0
Purchase - Other	1,009,065	24,379,010
Hydro	770,442	0
Coal	31,425,225	501,791,949
IC	464,213	31,683,629
Sales	(5,585,619)	(91,045,590)
Total Adjusted	57,281,383	$642,247,236

Generation Type	mWhs	Fuel Cost
Less NCEMPA		
PA Nuclear		$16,917,988
PA Coal		20,064,043
Harris Buy-back		(1,810,087)
Net System Fuel Expense		$607,075,292
Total Normalized kWh meter sales		50,668,862,266
Fuel Factor (cents/kWh)		1.198

After review of the Company's fuel factor proposal, Staff witness Lam recommended that the Commission approve CP&L's requested base fuel factor of 1.198 cents/kWh. Witness Lam stated in his affidavit that the proposed fuel factor based on a nuclear capacity factor of 90.84% will be more representative of the operation of the Company's nuclear units during the time period when the fuel factor is in effect than the NERC five-year average of 72.79% or the actual test year average of 92.95%. No other party produced any evidence on this issue.

Based on the evidence of record, the Commission determines that the proper fuel factor to adopt in this case is 1.198 cents/kWh based on a nuclear capacity factor of 90.84%. This factor is a reduction of 0.078 cents/kWh (0.081 cents/kWh with gross receipts tax) from the base fuel factor of 1.276 cents/kWh approved in CP&L's last general rate case, Docket No. E-2, Sub 537.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6 AND 7

The evidence supporting these findings can be found in the testimony and exhibits of Company witness Penny and the affidavits of Public Staff witnesses Lam, Maness and Edwards.

G.S. 62-133.2(d) provides:

> The Commission shall incorporate in its fuel cost determination under this subsection the experienced over-recovery or under-recovery of reasonable fuel expenses prudently incurred during the test period . . . in fixing an increment or decrement rider. The Commission shall use deferral accounting and consecutive test periods in complying with this subsection, and the over-recovery or under-recovery portion of the increment or decrement shall be reflected in rates for 12 months, notwithstanding any changes in the base fuel cost in a general rate case . . .

Testimony and exhibits submitted by Company witness Penny indicated that the Company undercollected fuel cost during the test period by $50,589,853 using the base fuel factors approved by the Commission in Dockets No. E-2, Sub 722 and Sub 748. The Company reduced this amount by $928,788, which it expects to collect from September 15 through September 30, 2000, under a temporary EMF as discussed in Evidence and Conclusions for Finding of Fact No. 8. Witness Penny requested an EMF factor of 0.147 cents/kWh (0.152 cents/kWh with gross receipts tax) to collect $49,661,065 of under-recovered fuel cost. Public Staff witness Edwards reviewed the Company's fuel cost and EMF calculations and recommended no adjustments to the Company's calculation of its fuel cost under-recovery.

The Commission notes that recovery of fuel cost from marketer purchases is an important part of the Company's overall fuel cost. In his affidavit, Public Staff witness Maness recommended that the Commission approve the Stipulation reached by the Public Staff, the Attorney General, CP&L, Duke Power Company, and North Carolina Power regarding the proper methodology for determining the fuel cost associated with power purchases from the power marketers and other suppliers (the Marketer Stipulation). The Marketer Stipulation was filed by CP&L with the Commission in Docket No. E-2, Sub 748 and is intended by the parties to be applicable to the 1999, 2000 and 2001 fuel cost proceedings. The Marketer Stipulation allows a utility to use 70% of the energy cost of a purchase as a proxy for the fuel cost component of power purchased from a power marketer. The proxy fuel costs of purchases from other sellers that do not provide actual fuel costs are to be determined using an appropriate ratio.

Public Staff witness Maness testified that he reviewed CP&L purchases from 29 power marketers and other suppliers that did not provide actual fuel cost associated with the purchases. Based on his review of the CP&L purchases and the support data, from which the marketer ratio is derived per the Marketer Stipulation, witness Maness supported the use of the 70% ratio in this case. The use of a ratio to determine marketer fuel cost evolved with the emergence of an active wholesale bulk power market in 1996, which prompted this Commission to address the issue in the 1996 Duke fuel case. In its Order in Duke Power Company's 1996 fuel proceeding, the Commission stated, "When faced with a utility's reliance upon some such form of proof [i.e., a reasonable and reliable proxy] in a future fuel adjustment proceeding, the considerations will be whether the proof can be accepted under the statute, whether the proffered information seems reasonably reliable, and whether or not alternative information is reasonably available." Applying this standard to the evidence presented by witnesses Penny, Maness and Edwards, the Commission concludes that the methodology for determining the fuel cost component of purchases from power marketers and other suppliers as set forth in the Marketer Stipulation is reasonable and will be accepted in this proceeding. No party submitted evidence in this proceeding to suggest that the Commission's reliance on the Marketer Stipulation for purposes of this proceeding would be unreasonable.

In reaching this conclusion, the Commission recognizes that the Marketer Stipulation was not signed by all parties to this proceeding. The Commission recognizes that such partial settlements of a case are not binding on the Commission and will be received into evidence and weighed along with the entire record. Moreover, non-signing parties may contest the terms of the Marketer Stipulation in each proceeding in which it is presented. However, the Commission notes that in this proceeding no party presented evidence supporting any alternative methodology to the one that the Commission has accepted for several years. The Commission can find no good reason to depart from its long-standing approach to this issue based on the present record.

Therefore, the Commission concludes that the test year fuel cost, including the $49,661,065 under-recovery experienced by CP&L during the test period is a reasonable and prudent fuel expense.

At the beginning of the hearing in this proceeding, CP&L, CIGFUR II, CUCA and the Public Staff advised the Commission that they had entered into a settlement agreement regarding the proper cost recovery of CP&L's under-recovered fuel costs associated with the test period in this proceeding. These parties agreed that CP&L would amend its Application in this docket to write-off and forego recovery of $10 million of the under-recovered fuel expense experienced during the test period and recover the remaining balance of under-recovered fuel expense, up to $39.7 million, if the Commission finds such costs to have been reasonably and prudently incurred, in equal installments over the three-year collection period established for its 2001, 2002 and 2003 fuel cost recovery cases in three equal annual installments. No interest will be recoverable by CP&L in connection with this deferral of fuel cost recovery. CP&L filed such an amendment just prior to the start of the hearing.

This settlement agreement means that the EMF applicable to this case will be zero and that in CP&L's next three fuel cases, beginning with the 2001 case, in addition or as an offset to any and all just and reasonable under-recovered or over-recovered fuel costs incurred by CP&L during the test periods associated with those cases, CP&L shall recover one-third of the remaining reasonable and prudent under-recovered fuel costs associated with this case.

In their filed affidavits, Public Staff witnesses Lam and Edwards indicated their approval of the $10 million write-off and amortization of the remaining under-recovery.

The Commission finds the settlement agreement to be a fair and equitable means of allowing CP&L to recover its just, reasonable and prudent fuel costs for the test period. No party to the proceeding challenged in any way the reasonableness, justness or prudence of these fuel costs, nor did they challenge or in any way object to the settlement agreement.

Therefore, the Commission finds and concludes that the settlement agreement entered into by and between CP&L, CIGFUR II, CUCA and the Public Staff should be approved and finds that CP&L shall be allowed to recover $39,661,065 million in equal installments over the three-year collection period established for its 2001, 2002 and 2003 fuel cost recovery cases. One-third of such amount is approximately $13.22 million. No interest shall be recoverable by CP&L in connection with this deferral of fuel cost recovery.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence supporting this finding can be found in the filed testimony and exhibits of Company witness Penny and the affidavit of Public Staff witness Edwards.

CP&L witness Penny asked the Commission to approve a new temporary EMF factor to run from September 15, 2000, through September 30, 2000. This factor is equal to the EMF factor approved by the Commission in CP&L's last fuel case, Docket No. E-2, Sub 748 which expires September 14, 2000. The approved EMF was an increment factor of 0.057 cents/kWh (0.059 cents/kWh with gross receipts tax). Witness Penny explained the Company was asked by the Commission Staff to change the effective date of its future fuel cases from September 15th to October 1st each year. Approving a temporary factor equal to the existing EMF factor will avoid two rate changes for the customers over a short time period. Witness Penny offset additional EMF revenues expected to be collected by the Company during this sixteen-day period by crediting the $928,788 against the requested EMF in this case.

Public Staff witness Edwards did not disagree with the net EMF requested by the Company.

The Commission therefore finds and concludes that a new temporary Experience Modification Rider should be approved to be effective for service rendered from September 15, 2000 through September 30, 2000. CP&L is not required to file any compliance rate schedules showing this temporary factor.

IT IS, THEREFORE, ORDERED as follows:

1. That, effective for service rendered on and after October 1, 2000, CP&L shall adjust the base fuel component in its North Carolina retail rates by an amount equal to a 0.078 cents/kWh decrement (0.081 cents/kWh including gross receipts tax) from the base fuel component approved in Docket No. E-2, Sub 537. Said decrement shall remain in effect until changed by a subsequent Order of this Commission in a general rate case or fuel case.

2. That CP&L shall apply temporary Experience Modification Rider No. 59.6 as described herein in Appendix B to reflect an increment of 0.057 cents/kWh (0.059 cents/kWh including gross receipts tax) for retail rate schedules and applicable riders. The Rider is to remain in effect for service rendered during a sixteen-day time period beginning September 15, 2000, and expiring September 30, 2000.

3. That CP&L shall write-off and forego recovery of $10 million of under-recovered fuel costs associated with the test period in this proceeding and recover $39,661,065 of under-recovered fuel cost in equal installments over the three-year collection period established for its 2001, 2002 and 2003 fuel cost recovery cases.

4. That CP&L shall file appropriate rate schedules and riders with the Commission in order to implement the fuel charge adjustment approved herein not later than seven (7) working days from the date of this Order.

5. That CP&L shall notify its North Carolina retail customers of the fuel charge adjustments approved herein by including the customer notice attached as Appendix A as a bill message to be included on bills rendered during the Company's next normal billing cycle following the effective date.

ISSUED BY ORDER OF THE COMMISSION.
This the _29th_ day of August, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

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APPENDIX A

CP&L BILL MESSAGE

The North Carolina Utilities Commission issued an Order on August 29, 2000, after public hearings and review, approving a fuel charge increase of approximately $29 million in the rates and charges paid by the retail customers of Carolina Power & Light Company in North Carolina. The rate increase will be effective for service rendered on and after October 1, 2000, and will result in a monthly net rate increase of 86 cents for a typical customer using 1,000 kWh per month.

APPENDIX B

Carolina Power & Light Company
(North Carolina Only)

EXPERIENCE MODIFICATION RIDER NO. 59.6

Pursuant to Docket No. E-2, Sub 765, the monthly energy rate for retail rate schedules and applicable rider charges include an increment of 0.059 cents per kilowatt-hour, effective for service rendered on and after September 15, 2000, through September 30, 2000.

DOCKET NO. E-22, SUB 388

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application of Dominion North Carolina Power for Authority to Adjust its Electric Rates Pursuant to North Carolina General Statute 62-133.2 and North Carolina Utilities Commission Rule R8-55) ORDER APPROVING FUEL CHARGE ADJUSTMENT

HEARD: Tuesday, November 7, 2000, at 10:00 a.m. in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina 27603

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; and Commissioners Jo Anne Sanford and William R. Pittman

APPEARANCES:

For Dominion North Carolina Power:

Robert W. Kaylor, 225 Hillsborough Place, Suite 480, Raleigh, North Carolina 27603

For The Using and Consuming Public:

Antoinette R. Wike, Chief Counsel, Public Staff-North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For Carolina Industrial Group for Fair Utility Rates:

Carson Carmichael, Bailey and Dixon, Attorneys at Law, P. O. Box 12865, Raleigh, North Carolina 27605-2865

For the Attorney General:

Leonard G. Green, Assistant Attorney General, North Carolina Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602-0629

BY THE COMMISSION: G.S. 62-133.2 requires the North Carolina Utilities Commission to hold a hearing for each electric utility engaged in the generation and production of electric power by fossil or nuclear fuel within 12 months after the last general rate case order for each utility for the purpose of determining whether an increment or decrement rider is required to reflect actual changes in the cost of fuel and the fuel component of purchased power over or under the base fuel component established in the last general rate case. The statute further requires that additional hearings be held on an annual basis, but only one hearing for each utility may be held within 12 months of the last general rate case. In addition to the increment or decrement to reflect changes in the cost of fuel and the fuel component of purchased power, the Commission is required to incorporate in its fuel cost determination the experienced over-recovery or under-recovery of reasonable fuel expenses prudently incurred during the test year. The last general rate case order for Dominion North Carolina Power (or "the Company") was issued by the Commission on February 26, 1993, in Docket No. E-22, Sub 333. The last order approving a fuel charge adjustment for the Company was issued on December 17, 1999, in Docket No. E-22, Sub 382.

Dominion North Carolina Power filed its fuel charge adjustment application and supporting testimony and exhibits in accordance with North Carolina Utilities Commission Rule R8-55 and G.S. 62-133.2 on September 15, 2000. Dominion North Carolina Power filed testimony and exhibits of the following witnesses: Charles A. Stadelmeier, Supervisor - Regulatory Compliance and Glenn A. Pierce, Regulatory Specialist - Rate Design. The Company also filed information and workpapers required by North Carolina Utilities Commission Rule R8-55(d).

On September 19, 2000, the Commission issued an Order Scheduling Hearing and Requiring Public Notice.

The Carolina Industrial Group for Fair Utility Rates (CIGFUR I) filed a Petition to Intervene on October 11, 2000, which petition was granted on October 16, 2000.

The Attorney General filed Notice of Intervention on October 19, 2000.

On October 19, 2000, the Public Staff made an oral motion requesting an extension of time until October 25, 2000 for the filing of direct testimony and exhibits of the Public Staff and other intervenors. The motion was granted by the Commission on October 20, 2000.

On October 25, 2000, the Public Staff filed the affidavits of Thomas S. Lam, Electric Engineer; Michael C. Maness, Supervisor, Accounting Division, Electric Section; and Mary Ellen Shearon, Staff Accountant, and a Notice of Affidavits. The Notice of Affidavits indicated that the Public Staff's affidavits would be used in evidence in lieu of oral testimony in the absence of a request to cross examine the affiants. No party requested the right to cross examine the Public Staff.

On October 27, 2000, Dominion North Carolina Power filed a Notice of Affidavits, which indicated that the Company would enter its direct testimony into the record by affidavit at the hearing in the absence of an objection from any party. No such objection was raised by any party.

On November 3, 2000, the Company filed its Notice of Publication of this proceeding.

The matter came on for hearing as scheduled on Tuesday, November 7, 2000. The prefiled direct testimony of the Company's witnesses was admitted into the record by affidavit. The affidavits of Public Staff witnesses Lam, Maness and Shearon and the exhibits of all of the witnesses were also admitted into evidence.

Based upon the foregoing, the prefiled testimony and affidavits of Company witnesses Stadelmeier and Pierce and Public Staff witnesses Lam, Maness and Shearon, and the entire record, the Commission makes the following

FINDINGS OF FACT

1. Dominion North Carolina Power is duly organized as a public utility operating under the laws of the State of North Carolina and is subject to the jurisdiction of the North Carolina Utilities Commission. The Company is engaged in the business of developing, generating, transmitting, distributing, and selling electric power to the public in northeastern North Carolina. The Company has its principal offices and place of business in Richmond, Virginia.

2. The test period for purposes of this proceeding is the twelve months ended June 30, 2000.

3. The Company's fuel and power purchasing practices during the test period were reasonable and prudent.

4. The fuel proceeding test period per book system sales are 71,546,481 MWh.

5. The fuel proceeding test period per book system generation is 75,969,466 MWh, which includes various generation as follows:

	MWh
Coal	34,250,532
Combustion Turbine	2,610,821
Heavy Oil	2,152,137
Natural Gas	-0-
Nuclear	27,937,515
Hydro	3,271,204
Pumped Storage (Pumping)	(3,382,262)
Power Transactions	
NUG	3,128,696
Other	9,132,092
Sales for Resale	(3,131,269)

6. The normalized system nuclear capacity factor which is appropriate for use in this proceeding is 89.02%, which is the estimated nuclear capacity factor for the rate year ending December 31, 2001.

7. The increase to system test period sales of 2,468,886 MWh results from an increase of 276,131 MWh associated with customer growth, 1,433,433 MWh of additional customer usage, an increase of 778,841 MWh associated with weather normalization, and a decrease of 19,519 MWh from the restatement of non-jurisdictional ODEC sales from production level to sales level added to fuel test period per book system sales of 71,546,481 MWh.

8. The adjusted test period system generation for use in this proceeding is 78,590,404 MWh, which includes various generation as follows:

	MWh
Coal	36,968,470
Combustion Turbine	2,818,015
Heavy Oil	2,322,916
Natural Gas	-0-
Nuclear	26,489,578
Hydro	3,271,204
Pumped Storage (Pumping)	(3,382,262)
Power Transactions	
NUG	3,376,981
Other	9,856,772
Sales for Resale	(3,131,269)

9. The appropriate fuel prices for use in this proceeding are as follows:

A. The coal fuel price is $13.44/MWh.
B. The nuclear fuel price is $4.29/MWh.

C. The heavy oil fuel price is $36.73/MWh.
D. The natural gas price is $ 0 /MWh.
E. The internal combustion turbine fuel price is $50.05/MWh.
F. The fuel price for other power transactions is $11.06/MWh.
G. Hydro, pumped storage, and non-utility generation (NUG) have a zero fuel price.

10. The adjusted system fuel expense for the July 1, 1999, to June 30, 2000 test period for use in this proceeding is $842,294,969.

11. The appropriate fuel cost rider (Rider A) for this proceeding is an increment of .047¢/kWh, excluding gross receipts tax, or a .049¢/kWh increment, including gross receipts tax.

12. The Company's North Carolina test period jurisdictional fuel expense under-collection as filed is $1,076,092. The adjusted North Carolina jurisdictional test year sales are 3,369,633 MWh.

13. The total jurisdictional fuel expense under-collection which is appropriate for use in establishing the experience modification factor (EMF) in this proceeding is $1,017,927.

14. The appropriate EMF (Rider B) for this proceeding is an increment of .030¢/kWh, excluding gross receipts tax, or a .031¢/kWh increment, including gross receipts tax.

15. The final fuel factor is 1.207¢/kWh, including gross receipts tax.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, procedural, and jurisdictional in nature and is not controverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

G.S. 62-133.2(c) sets out the verified, annualized information which each electric utility is required to furnish to the Commission in an annual fuel charge adjustment proceeding for an historical 12-month test period. In North Carolina Utilities Commission Rule R8-55(b), the Commission has prescribed the 12 months ending June 30 as the test period for Dominion North Carolina Power. The Company's filing on September 15, 2000, was based on the 12 months ended June 30, 2000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

Commission Rule R8-52(b) requires each utility to file a Fuel Procurement Practices Report at least once every ten years, plus each time the utility's fuel procurement practices change. Procedures related to Dominion North Carolina Power's procurement of fossil and nuclear fuels were filed in Docket No. E-22, Sub 335, on April 2, 1993. In addition, the Company files monthly reports of its fuel costs pursuant to Commission Rule R8-52(a).

No party offered or elicited any testimony contesting the Company's fuel procurement and power purchasing practices. In the absence of any evidence to the contrary, the Commission concludes these practices were reasonable and prudent during the test period.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4-6

Company witnesses Pierce and Stadelmeier testified with regard to the July 1, 1999 to June 30, 2000 test period sales, test period generation, and normalized nuclear capacity factor. Company witnesses Pierce and Stadelmeier testified that the test period levels of sales and generation were 71,446,181 MWh and 75,969,466 MWh, respectively. The test period per book system generation includes various generation as follows:

	MWh
Coal	34,250,532
Combustion Turbine	2,610,821
Heavy Oil	2,152,137
Natural Gas	-0-
Nuclear	27,937,515
Hydro	3,271,204
Pumped Storage (Pumping)	(3,382,262)
Power Transactions (Net)	
NUG	3,128,696
Other	9,132,092
Sales for Resale	(3,131,269)

The 34,250,532 MWh of per book system coal generation includes 3,269,637 MWh of ODEC generation and a small amount of natural and refinery gas. The 27,937,515 MWh of per book system nuclear generation includes 1,673,035 MWh of ODEC generation.

Upon review of the Company's filing, Public Staff witness Shearon discovered an error in Dominion North Carolina Power's calculation of May 2000 system kWh sales. The system level of kWh sales was understated. Witness Shearon also discovered a discrepancy between Company witness Pierce's Schedule 3 and Rule R8-55(d)(1) Schedule 1. The Company agreed with these adjustments, and, after the necessary adjustments were made, total per books system MWh sales were increased to 71,546,481 MWh.

Company witness Stadelmeier testified that the Company achieved a system nuclear capacity factor of 93.8% for the July 1, 1999 to June 30, 2000 test period. Witness Stadelmeier normalized the system nuclear capacity factor to a level of 89.02%, which is the estimated nuclear capacity factor for the rate year ending December 31, 2001. Witness Lam agreed that the nuclear capacity factor of 93.8% as achieved by the Company should be normalized to 89.02% as proposed by the Company. No other party offered or elicited testimony on the normalized nuclear capacity factor. In the absence of evidence to the contrary, the Commission concludes that the July 1, 1999 to June 30, 2000 test period levels of sales and generation, as adjusted by Public Staff witness Shearon, are reasonable and appropriate for use in this proceeding. The Commission further concludes that the 89.02% normalized system nuclear capacity factor is reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence supporting this finding of fact is found in the testimony and exhibits of Company witness Pierce.

Witness Pierce testified that, consistent with Commission Rule R8-55(d)(2), the Company's system sales data for the 12-month period ending June 30, 2000 were adjusted by jurisdiction for weather normalization, customer growth, and increased usage. Witness Pierce adjusted total Company sales by 2,468,886 MWh. This adjustment is the sum of adjustments for customer growth, increased usage, and weather normalization of 276,131 MWh, 1,433,433 MWh and 778,841 MWh, respectively, and an adjustment of (19,519) MWh from the restatement of non-jurisdictional ODEC sales from production level to sales level. The Public Staff reviewed and accepted these adjustments.

Based on the foregoing evidence, the Commission concludes that the adjustments due to customer growth, increased usage, and weather normalization of 276,131 MWh, 1,433,433 MWh, and 778,841 MWh, respectively, and an adjustment of (19,519) MWh from restatement of non-jurisdictional ODEC sales from production level to sales level are reasonable and appropriate adjustments for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

Company witness Pierce presented an adjustment to per book MWh generation for the 12-month period ended June 30, 2000, due to weather normalization, customer growth, and increased usage of 2,620,883 MWh, to arrive at witness Stadelmeier's adjusted generation level of 78,590,404 MWh. Witness Lam reviewed and accepted witness Pierce's adjustment to per book MWh generation for the 12-month period ended June 30, 2000, due to weather normalization, customer growth and increased usage. Witness Lam also accepted witness Stadelmeier's adjusted generation level of 78,590,404 MWh which includes various generation as follows:

	MWh
Coal	34,968,470
Combustion Turbine	2,818,015
Heavy Oil	2,322,916
Natural Gas	-0-
Nuclear	26,489,578
Hydro	3,271,204
Pumped Storage (Pumping)	(3,382,262)
Power Transactions	
NUG	3,376,981
Other	9,856,772
Sales for Resale	(3,131,269)

The 36,968,470 MWh of adjusted test period coal generation includes 3,465,815 MWh of ODEC generation. The 26,489,578 MWh of adjusted test period nuclear generation includes 1,623,645 MWh of ODEC generation.

Based on the foregoing evidence and with no other evidence to the contrary, the Commission concludes that the adjustment of 2,620,883 MWh is reasonable and appropriate for use in this proceeding, and that the resultant adjusted fuel generation level of 78,590,404 MWh is reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 9-11

The evidence supporting these findings of fact is found in the testimony and exhibits of Company witnesses Stadelmeier and Pierce and the affidavit of Public Staff witness Lam.

Witness Stadelmeier testified that the Company's proposed fuel factor is based on June 2000 fuel prices as follows: (1) coal price of $13.44/MWh; (2) nuclear fuel price of $4.29/MWh; (3) heavy oil price of $36.73/MWh; (4) natural gas price of $ 0/MWh; (5) internal combustion turbine price of $50.05/MWh; (6) other power transactions price of $11.06/MWh; and (7) hydro, pumped storage, and non-utility generation at a zero fuel price. Witness Lam accepted witness Stadelemeier's fuel prices.

In the absence of any evidence to the contrary, the Commission concludes that the fuel prices recommended by Company witness Stadelmeier and accepted by Public Staff witness Lam are reasonable and appropriate for use in this proceeding.

Company witness Stadelmeier testified that he calculated the level of normalized fuel expenses by multiplying the normalized generation amounts for the Company's generating units by actual June 2000 fuel prices. The level of test year normalized fuel expense resulting from this calculation is $842,294,969. The Public Staff accepted this level of test year normalized fuel expense.

Public Staff witness Lam calculated a proposed fuel factor for the twelve months ended December 31, 2001 by dividing the normalized fuel expense of $842,294,969 by the adjusted level of test year system MWh sales (74,015,367 MWh). This calculation results in a proposed fuel factor of 1.138 cents per kWh (excluding gross receipts tax), as set forth on Lam Exhibit I. The Company accepted witness Lam's calculation. When this fuel factor is reduced by the base fuel component approved in the Company's most recent general rate case (1.091 cents per kWh), the procedure demonstrated on Exhibit No. GAP-1, Schedule 3, the resulting fuel cost Rider A is .047 cents per kWh (excluding gross receipts tax) and .049 cents per kWh (including gross receipts tax).

The Commission concludes that adjusted fuel test period expenses of $842,294,969 and the fuel cost rider (Rider A) increment of .047¢/kWh, excluding gross receipts tax, or a .049¢/kWh increment, including gross receipts tax, are reasonable and appropriate for use in this proceeding. No party opposed this calculation.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 12-14

The evidence supporting these findings of fact is contained in the testimony and exhibits of Company witnesses Stadelmeier and Pierce and the affidavits of Public Staff witnesses Lam, Maness and Shearon.

G.S. 62-133.2(d) requires the Commission to "incorporate in its fuel cost determination under this subsection the experienced over-recovery or under-recovery of reasonable fuel expenses prudently incurred during the test period . . . in fixing an increment or decrement rider. The Commission shall use deferral accounting, and consecutive test periods, in complying with this subsection, and the over-recovery or under-recovery portion of the increment or decrement shall be reflected in rates for 12 months, notwithstanding any changes in the base fuel cost in a general rate case." Further, Rule R8-55(c)(5) provides: "Pursuant to G.S. 62-130(e), any over-collection of reasonable and prudently incurred fuel costs to be refunded to a utility's customers through operation of the EMF rider shall include an amount of interest, at such rates as the Commission determines to be just and reasonable, not to exceed the maximum statutory rate."

Company witness Stadelmeier testified that the Company under-collected its fuel expense by $1,076,092 during the test year ending June 30, 2000. Company witness Pierce testified that the adjusted North Carolina jurisdictional fuel clause test year sales are 3,369,633 MWh. Upon review of the Company's filing, Public Staff witness Shearon discovered an error in Dominion North Carolina Power's calculation of its North Carolina retail fuel under-collection. After making the necessary adjustments, the Public Staff recommended a retail fuel under-collection of $1,017,927, and an EMF increment of .030¢/kWh (excluding gross receipts tax) and .031¢/kWh (including gross receipts tax), calculated by dividing the adjusted under-collection by adjusted North Carolina jurisdictional MWh sales. Dominion North Carolina Power has agreed to this adjustment.

In his affidavit, Public Staff witness Maness recommended that the Commission adopt, for purposes of this proceeding, the 1999 Stipulation reached by the Public Staff, the Attorney General, Carolina Power & Light Company (CP&L), Duke Power Company (Duke), and Dominion North Carolina Power regarding the proper methodology for determining the fuel cost associated with power purchases from power marketers and other suppliers (the Marketer Stipulation). The Marketer Stipulation was filed by CP&L with the Commission on June 4, 1999, in Docket No. E-2, Sub 748, and is intended by the parties to be applicable to the 1999, 2000, and 2001 fuel cost proceedings. The Marketer Stipulation generally provides that for purchases from power marketers, the utility shall assume that the fuel cost component of the purchase equals 70% of the energy portion of the purchase price (subject to adjustment if the ratio, as measured by the utilities' own off-system sales, falls outside the range of 63% to 77%). For purchases from other sellers that do not provide actual fuel costs, the fuel cost component shall be determined using an appropriate ratio.

Public Staff witness Maness testified that during the test year, Dominion North Carolina Power purchased power from a large number of power marketers, as well as from other suppliers who did not provide actual fuel costs. N.C.G.S. 62-133.2 requires that purchased power-related costs recovered through fuel proceedings consist of only the fuel cost component of those purchases. However, in its Order in Duke Power Company's 1996 fuel proceeding, the Commission stated that whether a proxy for actual fuel costs associated with these types of purchases would be acceptable in a future fuel proceeding would depend on, "whether the proof can be accepted under the statute, whether the proffered information seems reasonably reliable, and whether or not alternative information is reasonably available."

As a result of that Order, the Public Staff, Duke, CP&L, Dominion North Carolina Power, and the Attorney General entered into a stipulation in 1997 regarding the proper methodology for determining the fuel cost associated with power purchased from power marketers and other suppliers, and this methodology was accepted as reasonable by the Commission in each of the utilities' fuel proceedings in 1997 and 1998.

Upon expiration of the initial stipulation, the Public Staff performed an analysis of the fuel component of the utilities' off-system sales based on the Monthly Fuel Reports for the twelve months ended October 31, 1998. This analysis, which was similar to the analysis the Public Staff performed in connection with the initial Stipulation, became the basis for the 70% ratio used in the current Marketer Stipulation. The methodology used for the Marketer Stipulation (and thus the 70% ratio) has been accepted by the Commission as reasonable in the 1999 CP&L and NC Power fuel proceedings, and in the 2000 Duke and CP&L fuel proceedings.

Mr. Maness testified that the Public Staff continues to consider it reasonable to use the utilities' off-system sales as a basis for determining the proxy fuel cost as described in the 1996 Duke Order. Because the sales made by marketers and other suppliers utilize the same types of generation resources that the utilities use to make their sales, the Public Staff believes that it is reasonable to assume for purposes of these proceedings that the fuel-to-energy cost ratio inherent in the purchases made by the utilities is similar to the ratio exhibited by the utilities' sales. Additionally, the information used by the Public Staff to determine the off-system sales fuel ratio was derived from the Monthly Fuel Reports filed with the Commission, and, in the opinion of the Public Staff, is reasonably reliable. Finally, the Public Staff is unaware of any alternative information currently available concerning the fuel cost component of marketers' sales made to utilities. Therefore, the Public Staff believes that the methodology underlying the Stipulation meets the criteria set forth in the 1996 Duke Order. Consequently, Mr. Maness recommended that the Commission adopt the Marketer Stipulation filed in Docket No. E-2, Sub 748, for purposes of this proceeding. Mr. Maness also testified that, with the exception of certain limited and immaterial instances, Dominion North Carolina Power calculated its purchased power fuel costs in this proceeding in accordance with the Marketer Stipulation.

Mr. Maness testified that in order to determine whether an update to the 70% ratio should be pursued due to the utilities' off-system sales ratio falling outside of the 63%-77% range, the Public Staff earlier this year performed another review of the utilities' off-system sales for the twelve months ended December 31, 1999. As a result of this review, the Public Staff concluded that the 70% ratio continued to be reasonable under the terms of the Marketer Stipulation. Therefore, Mr. Maness supported the continued use of the 70% ratio in this proceeding.

Applying the standard set forth in the 1996 Duke fuel case Order to the evidence presented in this proceeding by witnesses Stadelmeier and Maness, the Commission concludes that the methodology for determining the fuel cost component of purchases from marketers and certain other suppliers as set forth in the Marketer Stipulation, as well as the continued use of the 70% ratio pursuant to its terms, is reasonable and will be accepted for purposes of this proceeding. Since it is uncontested that Dominion North Carolina Power applied the terms of the Marketer Stipulation to its test year purchased power costs in a reasonable manner, the Commission also concludes that the purchased power fuel costs so calculated are reasonable for purposes of this proceeding.

In reaching this conclusion, the Commission recognizes that the Marketer Stipulation was not signed by all parties to this proceeding. The Commission recognizes that such partial settlements of a case are not binding on the Commission and will be received into evidence and weighed along with the entire record. Moreover, non-signing parties may contest the terms of such settlements in each proceeding in which they are presented. However, the Commission notes that in this proceeding no party presented evidence supporting any alternative to the methodology that the Commission has accepted for several years. The Commission can find no good reason to depart from this approach to this issue based on the record in this proceeding.

Based on the evidence, the Commission concludes that a fuel revenue under-collection of $1,017,927 is appropriate for use in this proceeding and should be collected from customers over a 12-month period. This increment should be in the form of a separate EMF-Rider B.

The $1,017,927 under-collected fuel revenue is divided by the adjusted North Carolina jurisdictional sales of 3,369,633 mWh to arrive at the proposed EMF increment of .030¢/kWh, excluding gross receipts tax, or a .031¢/kWh increment, including gross receipts tax. This reflects the EMF-Rider B increment proposed by Company witness Pierce, as modified by Public Staff witnesses Shearon and Lam. The Commission concludes that, there being no controversy, the proposed EMF increment of .030¢/kWh, excluding gross receipts tax, and .030¢/kWh, including gross receipts tax, is reasonable and appropriate for use in this proceeding, shall become effective on January 1, 2001, and shall expire one year from that date.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

The evidence supporting this finding of fact is cumulative and is contained in the testimony and exhibits of Company witnesses Stadelmeier and Pierce, and the affidavits of Public Staff witnesses Shearon and Lam.

Based upon our prior findings in this proceeding, the Commission finds that the final net fuel factor, including gross receipts tax, approved for use in this case is 1.207¢/kWh.

The fuel factor is determined as follows:

Normalized System Fuel Expense	$842,294,969
System kWh Sales at Sales Level	74,015,367,356
Test Year North Carolina Retail Fuel Underrecovery	$1,017,927
North Carolina Retail kWh Sales at Sales Level	3,369,632,529
Base Fuel Component Approved in Docket No. E-2, Sub 333 (¢/kWh)	1.091
Gross Receipts Tax Factor	1.03327

Fuel Cost Rider A (excluding gross receipts tax) =
[($842,294,969 x 100) / 74,015,367,356] – 1.091 = .047¢/kWh

Fuel Cost Rider A (including gross receipts tax) =
.047 ¢/kWh x 1.03327 = .049¢/kWh

Fuel Cost Rider B (excluding gross receipts tax) =
($1,017,927 x 100) /3,369,632,529 = .030¢/kWh

Fuel Cost Rider B (including gross receipts tax) =
.030 ¢/kWh x 1.03327 = .031¢/kWh

	Effective 1/1/2001 (Including Gross Receipts Tax)
Base Fuel Factor (¢/kWh)	1.127
Fuel Cost Rider A (¢/kWh)	.049
EMF/Rider B (¢/kWh)	.031
FINAL FUEL FACTOR (¢/kWh)	1.207

IT IS, THEREFORE, ORDERED as follows:

1. That effective beginning with usage on and after January 1, 2001, Dominion North Carolina Power shall adjust the base fuel component in its North Carolina retail rates approved in Docket No. E-22, Subs 333 and 335, by an increment (Rider A) of .047¢/kWh, excluding gross receipts tax, or .049¢/kWh, including gross receipts tax;

2. That an EMF Rider increment (Rider B) of .030¢/kWh, excluding gross receipts tax, or .031¢/kWh , including gross receipts tax, shall be instituted and remain in effect for usage from January 1, 2001 until December 31, 2001;

3. That Dominion North Carolina Power shall file appropriate rate schedules and riders with the Commission in order to implement the fuel charge adjustments approved herein not later than five (5) working days from the date of receipt of this Order; and

4. That Dominion North Carolina Power shall notify its North Carolina retail customers of the rate adjustments approved in this proceeding by including the Notice to Customers of Rate Increase attached to this Order as Appendix A as a bill insert with customer bills rendered during the next regularly scheduled billing cycle.

ISSUED BY ORDER OF THE COMMISSION.
This the 13th day of December, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

je120500.01

APPENDIX A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-22, SUB 388

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Dominion North Carolina	)	
Power for Authority to Adjust its Electric	)	NOTICE TO CUSTOMERS
Rates Pursuant to North Carolina General	)	OF RATE INCREASE
Statute 62.133.2 and North Carolina	)	
Utilities Commission Rule R8-55	)	

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission entered an Order in this docket on December 13, 2000, after public hearings, approving an $3,369,633 increase in the annual rates and charges paid by the retail customers of Dominion North Carolina Power in North Carolina. The rate increase will be effective for usage on and after January 1, 2001. The rate increase was ordered by the Commission after a review of Dominion North Carolina Power's fuel expenses during the 12-month test period ended June 30, 2000, and represents changes experienced by the Company with respect to its reasonable costs of fuel and the fuel component of purchased power.

For a typical residential customer using 1,000 kWh per month, the Commission's Order will result in a net rate increase of approximately $1.00 per month from the previously effective rates.

ISSUED BY ORDER OF THE COMMISSION.
This the 13th day of December, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

DOCKET NO. E-7, SUB 661

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application of Duke Power, a Division of Duke Energy Corporation, Pursuant to G.S. 62-133.2and NCUC Rule R8-55 Relating to Fuel Charge Adjustments for Electric Utilities - 2000	) ORDER APPROVING) FUEL CHARGE) ADJUSTMENT)

HEARD: Wednesday, May 10, 2000, at 10:00 a.m. in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Sam J. Ervin IV, Presiding; Commissioners Ralph A. Hunt and Robert V. Owens, Jr.

APPEARANCES:

For Duke Power:

Lara S. Nichols, Senior Counsel, Duke Power, Post Office Box 1244, Charlotte, North Carolina 28201-1244

and

Robert W. Kaylor, Law Office of Robert W. Kaylor, P.A., 225 Hillsborough Street, Suite 480, Raleigh, North Carolina 27603

For the Public Staff:

For the Using and Consuming Public:

Vickie L. Moir, Staff Attorney, Public Staff, North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For Carolina Utility Customers Association, Inc.:

James P. West, West Law Offices, P.C., Suite 1735, 434 Fayetteville Street Mall, Raleigh, North Carolina 27601

BY THE COMMISSION: On March 2, 2000, Duke Power, a division of Duke Energy Corporation (Duke Power, or the Company), filed an Application and accompanying testimony and exhibits pursuant to G.S. 62-133.2 and Commission Rule R8-55 relating to fuel charge adjustments for electric utilities.

On March 9, 2000, the Commission issued an Order Scheduling Hearing, Requiring Filing of Testimony and Requiring Public Notice. On March 13, 2000, the Commission issued an Order on Discovery Guidelines.

Carolina Utility Customers Association, Inc. (CUCA) filed a petition to intervene which was allowed. The intervention of the Public Staff is noted pursuant to Commission Rule R1-19(e).

On April 26, 2000, the Public Staff filed Affidavits of Thomas S. Lam, Electric Engineer, Electric Division, and Randy T. Edwards, Staff Accountant, Accounting Division.

The Public Staff, the Attorney General, Duke Power, Carolina Power & Light (CP&L) and North Carolina Power (NC Power) entered into a Stipulation (Stipulation) regarding the proper methodology for determining the fuel cost associated with power purchases by the electric utilities from power marketers and certain other suppliers. The Stipulation was filed by CP&L on June 4, 1999 in Docket No. E-2, Sub 748 and supersedes the similar stipulation adopted by Commission in Duke Power's 1997 fuel charge adjustment proceeding (Docket No. E-7, Sub 598, Order issued June 17, 1997).

The case came on for hearing as ordered on May 10, 2000. Steven K. Young, Vice President, Rates and Regulatory Affairs of Duke Power, presented direct testimony for the Company. Randy T. Edwards, Staff Accountant, Accounting Division and Thomas S. Lam, Electric Engineer, Electric Division, presented direct testimony on behalf of the Public Staff. No other party presented witnesses and no public witnesses appeared at the hearing.

Based upon the Company's verified Application, the testimony and exhibits received into evidence at the hearing, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Duke Power, a division of Duke Energy Corporation, is a duly organized corporation existing under the laws of the State of North Carolina and is subject to the jurisdiction of the North Carolina Utilities Commission as a public utility. Duke Power is engaged in the business of developing, generating, transmitting, distributing, and selling electric power to the public in North Carolina. Duke Power is lawfully before this Commission based upon its Application filed pursuant to G.S. 62-133.2.

2. The test period for purposes of this proceeding is the 12 month period ended December 31, 1999.

3. Duke Power's fuel procurement and power purchasing practices during the test period were reasonable and prudent.

4. The test period per book system sales are 76,438,824 MWH.

5. The test period per book system generation is 86,369,985 MWH and is categorized as follows:

Generation Type	MWH
Coal	41,306,412
Oil and Gas	662,206
Light Off	-
Nuclear	39,262,895
Hydro	984,771
Net Pumped Storage	(696,275)
Purchased Power	2,325,793
Catawba Contract Purchases	1,233,197
Catawba Interconnection Agreements	1,208,965
Interchange	82,021
Total Generation	86,369,985

6. The nuclear capacity factor appropriate for use in this proceeding is 85%.

7. The adjusted test period system generation for use in this proceeding is 85,985,222 MWH and is categorized as follows:

Generation Type	MWH
Coal	44,287,706
Oil and Gas	754,009
Light Off	-
Nuclear	37,380,782
Hydro	1,848,900
Net Pumped Storage	(681,995)
Purchased Power	2,325,793
Catawba Contract Purchases	70,027
Total Generation	85,985,222

8. The appropriate fuel prices and fuel expenses for use in this proceeding are as follows:

A. The coal fuel price is $13.13/MWH.
B. The oil and gas fuel price is $40.16/MWH.
C. The appropriate Light Off fuel expense is $3,140,000.
D. The nuclear fuel price is $4.37/MWH.
E. The purchased power fuel price is $16.65/MWH.
F. The Catawba Contract Purchase fuel price is $4.36/MWH.

9. Setting fuel costs associated with purchases from power marketers and certain other sellers at a level equal to 70% of the energy portion of the purchase price is reasonable for use in this proceeding.

10. The adjusted test period system fuel expense for use in this proceeding is $739,308,000.

11. The proper fuel factor for this proceeding is .9709¢/kWh; excluding gross receipts tax.

12. The Company's North Carolina test period jurisdictional fuel expense over-collection was $13,049,000. The pro forma North Carolina jurisdictional sales are 51,625,145 MWH.

13. The Company's Experience Modification Factor (EMF) is a decrement of .0253¢/kWh, excluding gross receipts tax.

14. Interest expenses associated with the over-collection of test period fuel revenues amount to $2,355,000, based upon a 10% annual interest rate.

15. The EMF interest decrement is .0046¢/kWh, excluding gross receipts tax.

16. The final fuel factor is .9410¢/kWh, excluding gross receipts tax.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, procedural, and jurisdictional in nature and is not controverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

G.S. 62-133.2(c) sets out the verified, annualized information which each electric utility is required to furnish to the Commission in an annual fuel charge adjustment proceeding for an historical 12-month test period. In Commission Rule R8-55(b), the Commission has prescribed the 12 months ending December 31st as the test period for Duke Power. The Company's filing was based on the 12 months ended December 31, 1999.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

Commission Rule R8-52(b) requires each electric utility to file a Fuel Procurement Practices Report at least once every 10 years and each time the utility's fuel procurement practices change. The Company's updated fuel procurement practices were filed with the Commission in Docket No. E-100, Sub 47, in July 1994 and were in effect throughout the 12 months ended December 31, 1999. In addition, the Company files monthly reports of its fuel costs pursuant to Commission Rule R8-52(a).

No party offered direct testimony contesting the Company's fuel procurement and power purchasing practices. Based upon the fuel procurement practices report and in the absence of any direct testimony to the contrary, the Commission concludes that these practices were reasonable and prudent during the test period.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4-6

The evidence for these findings of fact is found in the testimony of Company Witness Young.

Company Witness Young testified that the test period per book system sales were 76,438,824 MWH and test period per book system generation was 86,369,985 MWH. The test period per book generation is categorized as follows:

Generation Type	MWH
Coal	41,306,412
Oil and Gas	662,206
Light Off	-
Nuclear	39,262,895
Hydro	984,771
Net Pumped Storage	(696,275)
Purchased Power	2,325,793
Catawba Contract Purchases	1,233,197
Catawba Interconnection Agreements	1,208,965
Interchange	82,021
Total Generation	86,369,985

Commission Rule R8-55(c)(1) provides that capacity factors for nuclear production facilities will be normalized based generally on the national average for nuclear production facilities as reflected in the most recent North American Electric Reliability Council's (NERC) Equipment Availability Report, adjusted to reflect the unique, inherent characteristics of the utility facilities and any unusual events.

Witness Young testified that Duke Power achieved a system nuclear capacity factor of 89.66% for the test period and that the most recent (1994-1998) NERC five-year average nuclear capacity factor for all pressurized water reactor units is 78.24%. However, the Company proposed the use of an 85% system nuclear capacity factor to determine the fuel factor in this proceeding as is reflected in Witness Young's testimony and exhibits. Public Staff Witness Lam supported the use of the 85% nuclear capacity factor proposed by the Company. In cross-examination of Witness Young, CUCA questioned the use of an 85% nuclear capacity factor. Witness Young testified that the 85% capacity factor is based upon Duke Power's historic nuclear performance, expected outages and refuelings necessary in the year 2000, reasonable expected performance in the year 2000 and the industry averages for nuclear generation facility performance. No party offered direct testimony contesting the use of nuclear capacity factor of 85% in this proceeding. The 85% nuclear capacity factor proposed by the Company and agreed to by the Public Staff is significantly higher and would result in a lower fuel charge than the applicable NERC five-year average capacity factor of 78.24%.

In its Brief, CUCA advocates the use of an 88% nuclear capacity factor in this proceeding. As support, CUCA cites Duke's achieved system nuclear capacity factor which equaled 89.66% in 1999 and 88% in 1998. However, Duke's system nuclear capacity factor equaled 73% in 1997, 75% in 1996, and 88% in 1995. Further, even CUCA acknowledged that Duke's nuclear performance in 1999 was the best Duke has ever achieved. Given the longer view of Duke's historic nuclear performance as well as the testimony of Witness Young cited above, the Commission rejects the 88% nuclear capacity factor recommended by CUCA for use in this proceeding.

CUCA also raised an issue during the cross-examination of Witness Young concerning Duke's calculation of the fuel cost associated with certain purchases of energy by Duke from the Catawba Joint Owners. When asked why Duke had chosen to use the average fuel costs of Catawba Units 1 and 2, when the purchases apparently only came from Catawba Unit 2, Witness Young testified that the two units are similarly situated and that any difference is immaterial, particularly when it has a true-up mechanism in place. Even CUCA's Brief represents that the difference between the average cost of the two units and the cost of Catawba Unit 2 alone is only $4,000 with a nuclear capacity factor of 85%. Therefore, the Commission concludes that such an adjustment would be immaterial based on the record in this proceeding.

Based upon the agreement of the Company and the Public Staff as to the appropriate numbers, and the record evidence, the Commission concludes that the level of per book sales and generation is reasonable and appropriate for use in this proceeding.

Based upon the requirements of Commission Rule R8-55(c)(1), the historic and reasonably expected performance of the Duke Power system, and the testimony of Witnesses Young and Lam, the Commission concludes that the 85% nuclear capacity factor and its associated generation of 37,380,782 MWH are reasonable and appropriate for determining the appropriate fuel costs in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence for this finding of fact is found in the testimony of Company Witness Young.

Witness Young made an adjustment of a negative 384,763 MWH to per book generation for adjustments relating to weather normalization, customer growth, Catawba retained generation and line losses/Company use, based on an 85% normalized system nuclear capacity factor and, therefore, calculated an adjusted generation level of 85,985,222 MWH.

Witness Lam reviewed and accepted Witness Young's adjusted generation level of 85,985,222. No party contested the Company's adjustments for weather normalization, customer growth, Catawba retained generation or line losses/Company use.

The Commission concludes, after finding a system nuclear capacity factor of 85% reasonable and appropriate in Finding of Fact No. 6, that the adjustment to per book system generation of a negative 384,763 MWH and the resulting adjusted test period generation level of 85,985,222 MWH are both reasonable and appropriate for use in this proceeding. Total generation is categorized as follows:

Generation Type	MWH
Coal	44,287,706
Oil and Gas	754,009
Light Off	-
Nuclear	37,380,782
Hydro	1,848,900
Net Pumped Storage	(681,995)

Purchased Power	2,325,793
Catawba Contract Purchases	70,027
Total Generation	85,985,222

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence for these findings of fact is found in the testimony and exhibits of Company Witness Young and the testimony of Public Staff witnesses Lam and Edwards.

Witness Young recommended fuel prices as follows: (1) coal price of $13.13/MWH; (2) oil and gas price of $40.16/MWH; (3) light off fuel expense of $3,140,000; (4) nuclear fuel price of $4.37/MWH; (5) purchased power fuel price of $16.65/MWH; and (6) Catawba contract purchase fuel price of $4.36/MWH.

CUCA questioned Witness Young about the inclusion of the Department of Energy (DOE) assessment for decontamination and decommissioning of uranium enrichment facilities and the nuclear fuel disposal cost paid to DOE in the Company's cost of nuclear fuel. The Commission, in Docket No. E-7, Sub 408 (October 31, 1986), ordered that the nuclear fuel disposal costs should be included in fuel cost for fuel charge adjustment proceedings held pursuant to G.S. 62-133.2. The Federal Energy Regulatory Commission (FERC), in Docket No. RM 93-18-000, Order No. 557 (September 24, 1993), issued a final rule with respect to accounting and ratemaking treatment of special assessments under the Atomic Energy Act in which it ruled that the DOE assessment at issue here constitutes fuel cost. 18 C.F.R. Part 35. As a result, the Commission concludes that the nuclear fuel disposal costs at issue constitute fuel costs for purposes of this proceeding.

Based upon the agreement between the Company and the Public Staff as to the appropriate prices and the evidence in the record, the Commission concludes that these prices are reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence supporting this finding of fact is found in the testimony and exhibits of Public Staff witness Edwards and Company witness Young. Mr. Edwards testified that during the test year Duke Power purchased power from 28 marketers and other suppliers that did not provide it with the actual fuel costs associated with those purchases. To address this situation, Mr. Edwards recommended that the Commission adopt the Stipulation reached by the Public Staff, the Attorney General, Duke Power, CP&L, and NC Power regarding the proper methodology for determining the fuel cost associated with purchases from power marketers and other suppliers. CP&L filed the Stipulation with the Commission on June 4, 1999, in Docket No. E-2, Sub 748. The Stipulation, which was filed as Edwards Exhibit II in this proceeding, is intended by the parties to be applicable to the 1999, 2000, and 2001 fuel cost proceedings. The Stipulation generally provides that for purchases from power marketers, the utility shall assume that the fuel cost component of the purchase equals 70% of the energy portion of the purchase price. For purchases from other sellers that do not provide actual costs, the fuel cost component shall be determined using an appropriate ratio.

Mr. Edwards testified that in its Order in Duke Power's 1996 fuel proceeding, the Commission stated that whether a proxy for actual fuel costs associated with these types of purchases would be acceptable in a future fuel proceeding would depend on "whether the proof can be accepted under the statute, whether the proffered information seems reasonably reliable, and whether or not alternative information is reasonably available." As a result of this Order, the Public Staff, Duke Power, CP&L, NC Power, and the Attorney General entered into a stipulation in 1997 regarding the proper methodology for determining the fuel cost associated with power purchased from power marketers and other suppliers. The methodology adopted by the parties used the three utilities' own off-system sales as the basis for determining a proxy for the fuel costs associated with applicable purchases. This methodology was accepted as reasonable by the Commission in each of the utilities' fuel proceedings in 1997 and 1998.

Mr. Edwards testified that upon the expiration of the 1997-1998 stipulation, the Public Staff analyzed the fuel component of the utilities' off-system sales set forth in the Monthly Fuel Reports for the twelve months ended October 31, 1998. This analysis, which was similar to that performed by the Public Staff in connection with the earlier stipulation, became the basis for the 70% ratio used in the 1999-2001 Stipulation. The methodology used for the 1999-2001 Stipulation (and thus the 70% ratio) has already been accepted by the Commission as reasonable in the 1999 CP&L and NC Power fuel proceedings. Additionally, although the 1999-2001 Stipulation had not yet been finalized at the time of Duke Power's 1999 fuel proceeding, the underlying analysis was the basis for the Public Staff's recommendation, which was accepted by the Commission, that a 70% ratio be applied to the appropriate purchases in that case. Thus, in each fuel case since the beginning of 1997, the Commission has accepted as reasonable, under the criteria set forth in the 1996 Duke Power case, the use of the utilities' off-system sales to determine a fuel cost proxy for applicable purchases.

Mr. Edwards stated that the Public Staff continues to consider it reasonable to use the utilities' off-system sales as a basis for the proxy fuel cost described above, because the sales made by marketers and other suppliers utilize the same types of generation resources that the utilities use to make their sales. Mr. Edwards also stated that the Public Staff is unaware of any alternative information currently available concerning the fuel cost component of marketers' sales made to utilities. Therefore, the Public Staff recommended that the Commission adopt the 1999-2001 Stipulation for purposes of this proceeding. Duke Power witness Young testified that the Company's fuel costs were calculated in this proceeding pursuant to the terms of the 1999-2001 Stipulation.

The Commission concludes that the methodology underlying the Stipulation, the use of the utilities' own off-system sales to determine the proxy fuel cost for purchases from entities that do not provide actual fuel costs, is reasonable and satisfies the requirements set forth in the 1996 Duke Power fuel case order for purposes of this proceeding. First, the results of applying the methodology can be accepted under G.S. 62-133.2. As the Public Staff has testified, the sales made by marketers and other relevant suppliers are sourced from the same types of generation resources that the utilities regulated by this Commission use to make their sales. The Commission thus finds it reasonable to assume that the fuel-to-energy cost ratio exhibited by the utilities' sales is similar to the ratio inherent in the sales made to Duke Power from the same types of generating resources. Second, the Commission concludes that the information used by the parties to derive the fuel ratio is a reasonably reliable method for ascertaining fuel costs for purposes of this proceeding. According to the Public Staff's testimony, this data was derived from the Monthly Fuel Reports filed by the utilities with the

Commission, which are public reports taken from the utilities' financial records and are subject to Commission review. Third, the methodology is supported by both the Public Staff and the Attorney General, on the one hand, and by the three utilities subject to the fuel clause statute, on the other, parties who represent different and sometimes adversarial interests. Finally, no party to this proceeding has presented evidence of any alternative information available concerning the fuel cost component of purchases made from power marketers or other relevant sellers of power to Duke Power even though such transactions clearly involve the incurrence of fuel costs. The fact that the number is an estimate does not preclude its use. Similarly, the fact that the percentages differ from company to company does not show the use of the proxy to be inappropriate and instead justifies the use of information from multiple sources. Therefore, the Commission concludes that the methodology underlying the 1999-2001 Stipulation meets the criteria set forth in the 1996 Duke Power fuel case Order, and is reasonable for purposes of this proceeding as the method of determining the proxy fuel cost.

In reaching this conclusion, the Commission recognizes that the Stipulation was not signed by all parties to this proceeding. The Commission recognizes that such partial settlements of a case are not binding on the Commission and will be received into evidence and weighed along with the entire record. Moreover, non-signing parties may contest the terms of the Stipulation in each proceeding in which it is presented. However, the Commission notes that in this proceeding no party presented evidence supporting any alternative methodology to the one that the Commission has accepted for several years. The Commission can find no good reason to depart from its long-standing approach to this issue based on the present record. In addition, as recognized by the Commission in the past, use of the Stipulation resolves uncertainty Duke Power and other electric utilities would face regarding the future recovery of fuel costs associated with otherwise economical purchases from power marketers that lower overall costs.

Mr. Edwards was asked several questions on cross-examination regarding fuel ratios calculated using only off-system sales made by Duke Power instead of sales made by all three utilities. Mr. Edwards indicated that the intent of the Stipulation is to consider all three utilities' fuel costs, rather than those of a specific individual company. He stated that the reason for looking at all three utilities together is to obtain a broader range of fuel costs. The Commission recognizes that this approach should give better information regarding the industry average. Duke Power's power purchases are not sourced by Duke Power's generation resources, nor by generation resources that fit exactly the same fuel profile as Duke Power's. It is reasonable to assume that Duke Power's purchases are instead sourced from a wide range of generation resources. Using only the system resources from which Duke Power makes off-system sales to determine the proxy fuel cost for Duke Power's purchases would thus be an unnecessarily narrow approach to the problem when additional data is available to make the calculation more broad-based. Given the large number of power marketers and other suppliers selling power in the wholesale market (28 from which Duke Power purchased in the test year), the Commission agrees with the parties to the Stipulation that the consideration of off-system sales by all three utilities provides a more reasonable and reliable proxy as to the fuel cost component of purchases from a variety of suppliers.

Given the fact that the Commission has concluded that the methodology underlying the 1999-2001 Stipulation is reasonable for purposes of this proceeding, the question remains whether use of the 70% fuel ratio recommended by the Public Staff and the Company is reasonable in this particular proceeding or whether a different or updated ratio should be used. Page 2 of the Stipulation states that, "The 70% ratio may be adjusted if a review of power sales reported to the Commission by the utilities during the most recent 12 months indicates that the total fuel cost to total energy cost ratio for such sales falls outside the range of 63% to 77%. If such ratio falls outside this range, the parties agree they will meet and negotiate the appropriate ratio." CUCA conducted extensive cross-examination of Mr. Edwards regarding whether the ratio experienced in 1999 fell within or outside this range.

In making its determination on this matter, the Commission first notes that it believes that the general approach taken in the Stipulation of identifying a specific ratio to be used for a specific period of time, and then identifying a deadband around that ratio to control whether the ratio might be changed during that period, is reasonable for purposes of this proceeding. The Commission reaches this conclusion for two primary reasons. First, the fuel ratio is by nature a general estimate to be used to determine a proxy fuel cost; it is not a precise calculation of actual fuel costs. Second, under the terms of the Stipulation, the agreed-upon fuel ratio is only in effect for a limited period of time (three years), enhancing the extent to which the proxy is likely to reasonably represent marketer fuel costs. Given these facts, the Commission does not consider it necessary to change the fuel ratio each year during the three-year period for relatively minor changes. The Commission is of the opinion that the 63%-77% deadband set forth in the 1999-2001 Stipulation constitutes a reasonable range to be used to determine whether an adjustment to the fuel ratio during the period is necessary. The 63%-77% range reasonably balances the nature of the ratio as a general estimate with the necessity to recognize significant changes in conditions.

Under cross-examination, Mr. Edwards testified that the Public Staff performed approximately seven analyses of the off-system energy sales for all the utilities to determine whether the 70% ratio was still appropriate. Mr. Edwards specifically identified six of these analyses: weighted average percent of fuel to total energy; simple average; the frequency of transactions during the twelve months ended December 31, 1999; all sales percent of fuel weighted by megawatt hours; average fuel percent to total energy weighted by megawatt hours; and median fuel percent. Mr. Edwards testified that of the approximately seven analyses prepared, one showed the percent of fuel cost to total energy cost to be 63% (the lower percentage of the stipulation band) and four showed the percent of fuel cost to total energy cost to be above 63%.

During cross-examination regarding CUCA Edwards Cross-Examination Exhibit No. 3, Mr. Edwards stated that it contained four of the seven analyses performed by the Public Staff. The labels of three of the columns on that exhibit correspond to three of the six analyses specifically identified by Mr. Edwards: median fuel percent (the second numerical column), fuel percent weighted by megawatt hours (the third numerical column – described by Mr. Edwards as average fuel percent to total energy weighted by megawatt hours), and all sales percent of fuel weighted by megawatt hours (the fourth numerical column). The first numerical column (labeled average fuel percent) was not specifically identified as an analysis by Mr. Edwards. Mr. Edwards' testimony in response to questions from CUCA's counsel also indicated that the weighted average percent of fuel to total energy is shown on CUCA Young Cross-Examination Exhibit No. 3. In addition, Mr. Edwards testified that the simple average equaled 66% including outliers and 64% excluding outliers. The other analysis specifically identified by Mr. Edwards (the frequency of transactions during the twelve months ended December 31, 1999) does not appear to have been included on any exhibit introduced into evidence.

In response to a question from CUCA's counsel, Mr. Edwards indicated that the Public Staff did not rely on any one analysis in deciding whether the 70% should be used. He explained that the Public Staff first looked at the weighted average and simple average analyses, and because there was a wide span between the two, performed further analyses. Mr. Edwards testified that the Stipulation currently in effect is not tied to a certain type of average, and that the Public Staff looked at several methods and variations in evaluating the reasonableness of the 70% ratio. After that evaluation, the Public Staff ultimately recommended that the 70% ratio be used in this proceeding.

Public Staff witness Edwards testified that of the approximately seven analyses performed by the Public Staff, in four of the seven, fuel as a percent of total energy was above 63% and in one it was 63%. The Public Staff recommended continuing to use the fuel ratio of 70% for this proceeding. No other party presented evidence of having performed an original detailed study to determine the appropriate fuel ratio for purposes of this proceeding. Although CUCA introduced several cross-examination exhibits containing various calculations of fuel ratios they are clearly not all of the calculations reviewed during the Public Staff's analysis and were all, with the possible exception of CUCA Edwards Cross-Examination Exhibit No. 1, represented as being prepared by the Public Staff. The Commission thus must give considerable weight to the testimony of the Public Staff describing these exhibits.

As previously discussed, one of the Public Staff analyses specifically identified by Public Staff witness Edwards is reflected on CUCA Young Cross-Examination Exhibit No. 3, and four of the analyses are contained on CUCA Edwards Cross-Examination Exhibit No. 3. It is thus clear from the evidence that a significant portion of the results of the Public Staff's evaluation of the fuel ratio is reflected on these two exhibits. The results observed on these exhibits are mixed. Some of the results are above 63%; some are below 63%; and some are very close to 63%. Mr. Edwards testified that the Public Staff did not rely on simply one analysis, but instead considered the results of several. No other party presented any evidence demonstrating the superiority or inferiority of any particular analysis performed by the Public Staff. Given the fact that some results are within the deadband and some are outside, and, again, that the fuel ratio is a general estimate, the Commission finds that the Public Staff's recommendation to leave the ratio at 70% for purposes of this proceeding is reasonable.

CUCA also introduced CUCA Edwards Cross-Examination Exhibit No. 2 into evidence, which contained calculations of fuel ratios below 63% for 1999. However, the Commission concludes that these calculations should not be given substantial weight, because, according to the undisputed testimony of Mr. Edwards, they were simply a "quick check" to see if the 1999-2001 Stipulation should be reviewed. A document of this type cannot be elevated to the same level as the final result of all the analyses because it was prepared initially and propelled the Public Staff to do these further analyses.

CUCA also cross-examined Mr. Edwards with regard to CUCA Edwards Cross-Examination Exhibit No. 3, apparently at least in part to assert that it alone contained the seven analyses to which Mr. Edwards referred in his testimony. However, Mr. Edwards' testimony clearly indicates to the contrary. Mr. Edwards testified that this exhibit included four of the analyses performed by the Public

Staff. His testimony also indicates that the results for one of the analyses are reflected on CUCA Young Cross-Examination Exhibit No. 3. However, even if CUCA Edwards Cross-Examination Exhibit No. 3 did contain all seven of the analyses performed by the Public Staff, this exhibit shows three results below 63% and four results equal to or greater than 63% for the three-utility average, when rounded.

In summary, therefore, because (1) the practice of identifying a single fuel ratio within a deadband range for a specified period of time is reasonable for the purpose of determining the proxy fuel cost in this proceeding, (2) the Commission considers a 63%-77% range reasonable for the deadband for purposes of this case, (3) the fuel ratio is a only general estimate used for purposes of determining the proxy fuel cost, not a precise calculation, (4) the Public Staff performed the only detailed original study testified to in this proceeding for purposes of evaluating whether the fuel ratio for 1999 was inside the deadband and recommended that the fuel ratio remain at 70%, (5) the results of the Public Staff analyses entered into evidence were mixed, with some results within the deadband and some outside, and (6) it is fair and reasonable to use a proxy to permit the utilities, including Duke Power, to recover the fuel component of economical power purchases which result in lower costs for North Carolina consumers in the absence of more direct fuel cost evidence, the Commission concludes that it is reasonable for purposes of this proceeding to use the 70% fuel ratio initially established in the 1999-2001 Stipulation as the basis for determining the proxy fuel costs for purchases from power marketers and other suppliers that do not provide actual fuel costs.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 10-16

Based upon the agreement between the Company and the Public Staff as to appropriate numbers, as discussed in the Evidence and Conclusions for Findings of Fact Nos. 4-8, and the record evidence, the Commission concludes that adjusted test period fuel expenses of $739,308,000 and the base fuel factor of .9709¢/kWh, excluding gross receipts tax, are reasonable and appropriate for use in this proceeding. This approved base fuel factor is .1323¢/kWh lower than the base fuel factor of 1.1032¢/kWh set in the Company's last general rate case, Docket No. E-7, Sub 487.

Public Staff Witness Edwards recommended two adjustments to Duke Power's filing of actual fuel cost incurred in calendar year 1999, which were agreed to by Duke Power.

The first adjustment recommended by the Public Staff concerns power that Duke Power purchases from certain suppliers for resale to its electric utility customers. An adjustment was made to decrease Duke Power's North Carolina retail actual 1999 fuel expense in the amount of $81,000. This amount consists of a $25,221 adjustment to true-up estimated fuel costs used in the EMF calculation by Duke Power to actual fuel costs for 1999 purchases from the North Carolina Municipal Power Agency, and a $55,893 adjustment to eliminate fuel costs for 1999 purchases from Dayton Power & Light that could not be verified by the Public Staff during its review. This increases Duke Power's filed revenue over-collection of $12,968,000 for a total revenue over-collection of $13,049,000.

The second adjustment recommended by the Public Staff and accepted by Duke Power increased EMF interest by $398,000 for a total EMF interest of $2,355,000. The interest adjustment is related to an adjustment made to fuel costs by Duke Power to recognize compensation for line losses associated with intersystem sales.

G.S. 62-133.2(d) provides that the Commission "shall incorporate in its fuel cost determination under this subsection the experienced over-recovery or under-recovery of reasonable fuel expenses prudently incurred during the test period . . . in fixing an increment or decrement rider. The Commission shall use deferral accounting, and consecutive test periods, in complying with this subsection, and the over-recovery or under-recovery portion of the increment or decrement shall be reflected in rates for 12 months, notwithstanding any changes in the base fuel cost in a general rate case."

The $13,049,000 over-recovered fuel expense is divided by the adjusted North Carolina jurisdictional sales of 51,625,145 MWH to arrive at an EMF decrement of .0253¢/kWh, excluding gross receipts tax and the associated interest of $2,355,000 is likewise divided, producing an EMF interest decrement of .0046¢/kWh. The Commission concludes that the EMF decrement of .0253¢/kWh, excluding gross receipts tax, and the EMF interest decrement of .0046¢/kWh are reasonable and appropriate for use in this proceeding.

Accordingly, the fuel calculation, incorporating the conclusions reached herein, results in a final net fuel factor of .9410¢/kWh, excluding gross receipts tax.

IT IS, THEREFORE, ORDERED:

1. That, effective for service rendered on and after July 1, 2000, Duke Power shall adjust the base fuel cost approved in Docket No. E-7, Sub 487, in its North Carolina rates by an amount equal to an .1323¢/kWh decrease (excluding gross receipts tax), and further that Duke Power shall adjust the resultant approved fuel cost by decrements of .0253¢/kWh and .0046¢/kWh (excluding gross receipts tax) for the EMF and EMF interest decrements, respectively. The EMF and EMF interest decrements are to remain in effect for service rendered through June 30, 2001.

2. That Duke Power shall file appropriate rate schedules and riders with the Commission in order to implement these approved fuel charge adjustments no later than 10 days from the date of this Order.

3. That Duke Power shall notify its North Carolina retail customers of these fuel adjustments by including the "Notice to Customers of Change in Rates" attached as Appendix A as a bill insert with bills rendered during the Company's next normal billing cycle.

ISSUED BY ORDER OF THE COMMISSION.
This the __26th__ day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

mb062600.01

APPENDIX A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 661

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application of Duke Power, a Division of Duke Energy Corporation, Pursuant to G.S. 62-133.2 and NCUC Rule R8-55 Relating to Fuel Charge Adjustments for Electric Utilities - 2000	) NOTICE TO CUSTOMERS) OF CHANGE IN RATES

NOTICE IS GIVEN that the North Carolina Utilities Commission entered an Order on June 26, 2000, after public hearings, approving a fuel charge net rate increase of approximately $19,844,000 on an annual basis in the rates and charges paid by the retail customers of Duke Power in North Carolina. It is intended that the net rate increase will be in effect for service rendered for the period of July 1, 2000 through June 30, 2001. The rate increase was ordered by the Commission after review of Duke Power's fuel expense during the 12-month period ended December 31, 1999, and represents actual changes experienced by the Company with respect to its reasonable cost of fuel and the fuel component of purchased power during the test period.

The change in the approved fuel charge will result in a monthly net rate increase of approximately 38¢ for each 1,000 kWh of usage per month.

ISSUED BY ORDER OF THE COMMISSION.

This the 26th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

DOCKET NO. E-35, SUB 25
DOCKET NO. E-35, SUB 26

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-35, SUB 25 In the Matter of Application of Western Carolina University for Authority to Recover Purchased Power Expense DOCKET NO. E-35, SUB 26 In the Matter of Treatment of Funds Received by Western Carolina University in Settlement of Federal Energy Regulatory Commission Docket No. EC98-23-000	)	ORDER ON PURCHASED POWER COST RIDER

BY THE COMMISSION: On March 10, 1999, in compliance with the Commission's prior Orders in Docket No. E-35, Subs 17 and 19, Western Carolina University (WCU) filed an application in Docket No. E-35, Sub 25 for a change in its Schedule CP Purchased Power Cost Rider, to be effective for bills rendered on and after April 25, 1999, and before April 24, 2000. On April 12, 1999, WCU filed its final proposed Schedule CP Purchased Power Cost Rider, which incorporated actual purchased power costs and revenues through March 1999.

On March 31, 1999, WCU filed a letter with the Commission in Docket No. E-35, Sub 26, regarding $248,194.36 it had received from Duke Power, now a division of Duke Energy Corporation (Duke), and Nantahala Power and Light Company (Nantahala) in settlement of the Duke-Nantahala merger proceeding before the Federal Energy Regulatory Commission (FERC). WCU's letter (1) states that it plans to use these funds for system improvements, for fees related to the refund, and for seeking new sources of wholesale power; (2) asserts that due to limits on the Commission's jurisdiction, it can complete its plans without further Commission action; and (3) requests that the Commission issue no objection to its plans.

The Public Staff presented these matters at the Commission's Regular Staff Conference on April 19, 1999. Because there was not enough time to resolve the Sub 26 issues before the new Sub 25 rider was due to go into effect, the parties agreed that the new rider would be implemented on a provisional basis, with the final rider to be determined upon resolution of the Sub 26 docket. The Commission did this by Order dated April 21, 1999. The Public Staff and WCU filed their comments and reply comments on the issues raised by Sub 26 between October and December 1999.

ELECTRICITY - RATES

BACKGROUND

It appears from the comments herein that the following facts are undisputed, although the parties often draw different interpretations and conclusions from them.

WCU is a state-supported university. At the time in question here, WCU purchased electricity from Nantahala for its own use and for resale to about 2000 retail customers. WCU is not a public utility under the "public utility" definition in the General Statutes, and the Commission does not have the general supervisory power over WCU that it has over public utilites; however, WCU's rates for retail sale of electricity are subject to the Commission's jurisdiction pursuant to G.S. 116-35.

At the time in question here, WCU obtained all of the electricity that it resold from Nantahala at FERC-approved rates. Nantahala generated some of its own electricity and purchased the remainder from Duke. The rates that WCU paid Nantahala were adjusted annually and monthly to insure that Nantahala recovered its costs of serving WCU, including a proportionate share of the cost of electricity that Nantahala purchased from Duke. During the time in question here, Nantahala's purchases from Duke were made pursuant to an Interconnection Agreement. Under this Agreement, Nantahala's monthly payments to Duke for purchased power were based on estimates of the amount of power that Nantahala would need. Since the payments were based on estimates, there were usually differences between the amount Nantahala paid each month and the cost of the electricity it that it actually took each month. These differences between the payments and the cost of the energy actually taken were tracked by charges or credits in an "energy bank" established pursuant to the Agreement. The Agreement provided for the balance in the energy bank to be charged or credited to the extent it exceeded $6,000,000 in either direction at the end of any calendar year, and it also provided for the balance to be brought to zero at termination of the Agreement. As of the end of calendar year 1997, the balance in the energy bank was over $6,000,000 in Nantahala's favor and, pursuant to the terms of the Agreement, Duke began to reflect credits to Nantahala in May 1998. Nantahala treated these credits as a component of purchased power cost to be passed on to WCU. Two such credits were made before the energy bank was terminated. WCU, in turn, flowed these two energy bank credits that it received from Nantahala back to its customers as part of the purchased power cost adjustment proceeding in Sub 25 herein. (The Commission recognizes that WCU interprets these credits differently from the Public Staff, characterizing them as an "accounting entry," but the fact remains that such credits flowed from Nantahala to WCU and flowed from WCU to its ratepayers through WCU's purchased power cost rider.)

The Interconnection Agreement terminated with the Duke-Nantahala merger, which was submitted for approval to FERC and to this Commission in December 1997. In connection with the merger, Duke and Nantahala entered into a settlement with WCU in March 1998. In return for WCU not opposing the merger, Duke and Nantahala agreed to certain concessions, including giving WCU part of the balance in the energy bank as of Feburary 28, 1998. On June 1, 1998, FERC accepted the settlement and authorized the merger. In September 1998, Duke paid WCU $248,194.36 as its share of the balance in the energy bank.

POSITIONS OF PARTIES

The Public Staff contends that this money should be flowed back to WCU's ratepayers pursuant to the terms of WCU's rates. The rates that the Commission has approved for WCU to charge its customers are designed to allow WCU to recover, dollar-for-dollar, what it pays Nantahala for purchased power. This is accomplished by WCU's Schedule CP Purchased Power Cost Rider, which is trued-up on an annual basis. WCU pays Nantahala for electricity and passes the cost on to WCU's ratepayers. On an annual basis, WCU's rates are trued-up to reflect its actual cost of purchased power. The Public Staff believes that the money in question amounts to WCU receiving back a portion of its payments to Nantahala, that the money is therefore a refund of amounts paid by WCU's retail ratepayers for purchased power, and that the money should be flowed back to WCU ratepayers through the Purchased Power Cost Rider. The Public Staff concedes that the Commission cannot order WCU to make particular refunds, as it could under its supervisory power over a public utility, but the Public Staff argues that the Commission can accomplish the same thing through its authority over WCU's rates and its true-up of WCU's Purchased Power Cost Rider. The Public Staff would return the $248,194.36 to WCU's ratepayers over a two-year period beginning in April 2000, with interest at 10% per annum. This would result in a reduction of approximately $.0060 per kWh in WCU's rates. For a hypothetical residential ratepayer using 1000 kWh per month, this reduction would amount to approximately $6.00 per month for 24 months, resulting in a total savings of more than $140.

WCU, on the other hand, disagrees with the Public Staff's analysis. WCU first argues that the money at issue was paid as part of a settlement of the Duke-Nantahala merger and is not rate-related. WCU further argues that even if the money is considered a refund of a portion of the balance in the energy bank, the Commission has no authority to order WCU to refund the money to its ratepayers since the Commission's statutory authority to order refunds, as set forth in G.S. 62-136(c), extends only to public utilities. WCU contends that the Commission has no authority to order WCU to pass the money on to its ratepayers since it is not a public utility. WCU also argues that a refund to current customers would be an unreasonable rate reduction and a preference to those customers. Because of the unique nature and high turnover rate of its customers, which includes a significant number of students, such a refund would only result in a windfall to current customers. After these customers, whose payments likely did not cause the accumulation in the energy bank, quickly move on, another group of customers will have to pay the cost of system improvements. Thus, WCU characterizes its difference of opinion with the Public Staff as a matter of which group of customers should get the benefit of the money received from Duke -- current customers, who have no right to the money and will quickly leave the system, or future customers, who will benefit from the planned system improvements. WCU further argues that the Commission lacks authority to order the university to pay 10% interest to its current customers on the settlement money. In addition to the fact that the Commission has no general refund authority regarding an entity not a public utility, WCU asserts that its investments, which must be deposited with the State Treasurer's office, earn only approximately 5% interest. Thus, it would be unfair to make WCU pay more interest than it could possibly earn on the money. Should the Commission order disbursement of the refund plus 10% interest, WCU requests that it be allowed to disburse all of the refund in a single month. Lastly, WCU asserts that the legal and consulting costs associated with the settlement should be netted out.

DISCUSSION AND CONCLUSIONS

Although WCU is not a public utility, its rates are subject to the jurisdiction of the Utilities Commission pursuant to G.S. 116-35. WCU's Purchased Power Cost Rider, including the true-up component of the rider, were approved as part of WCU's rate structure by a 1993 Order of the Commission in Docket No. E-35, Sub 17. The language of that Order is broadly worded to cover "purchased power expenses." Assuming that the $248,194.36 at issue herein is a part of purchased power costs, the Commission's authority under G.S. 116-35 is sufficient to flow the money back to WCU's customers through the Purchased Power Cost Rider. The Commission concludes that the payment at issue was indeed a return of WCU's share of the balance of the energy bank and that it represented money previously paid by WCU to Nantahala as a purchased power expense and passed on to WCU's customers. The two monthly credits from the energy bank that were received by WCU as a result of the energy bank balance exceeding $6,000,000 at the end of 1997 were treated as purchased power costs, and so should this payment from the energy bank. It would be inappropriate to treat the payment otherwise simply because it was returned to WCU as a lump sum.

With regard to the appropriate rate of interest, the Commission notes that in WCU's 1998 and 1999 purchased power cost adjustment proceedings, WCU itself proposed an interest rate of 10% per annum on WCU's overrecoveries of purchased power costs. The Commission accepted that interest rate in those proceedings and will order the same herein. WCU's request to net out the legal and consulting costs associated with the settlement is denied since the Commission has no authority to factor non-purchased power costs in the calculation of the Purchased Power Cost Rider. The Commission concludes that WCU shall flow the $248,194.36 payment received from Duke to its ratepayers, with interest at 10% per annum, over a two-year period beginning in April 2000, through WCU's next two Purchased Power Cost Rider proceedings.

IT IS, THEREFORE, ORDERED as follows:

1. That WCU's Schedule CP Purchased Power Cost Rider provisionally approved by Order dated April 21, 1999, is allowed to become effective on a permanent basis for bills rendered on and after April 25, 1999, and until April 24, 2000, subject to paragraph 3 herein;

2. That the Purchased Power Cost Rider is approved without prejudice to the right of any party to take issue with the rider in a general rate case; and

3. That WCU shall return the $248,194.36 payment received from Duke to its ratepayers, with interest at 10% per annum, over a two-year period beginning in April 2000, and that this shall be accomplished through a factor in the next two proceedings to establish the Schedule CP Purchased Power Cost Rider for WCU.

ISSUED BY ORDER OF THE COMMISSION.
This the 11th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg041000.01

DOCKET NO. E-35, SUB 25
DOCKET NO. E-35, SUB 26
DOCKET NO. E-35, SUB 27

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-35, SUB 25 In the Matter of Application of Western Carolina University for Authority to Recover Purchased Power Expense DOCKET NO. E-35, SUB 26 In the Matter of Treatment of Funds Received by Western Carolina University in Settlement of Federal Energy Regulatory Commission Docket No. EC98-23-000 DOCKET NO. E-35, SUB 27 In the Matter of Application of Western Carolina University for Authority to Recover Purchased Power Expense	ORDER ON RECONSIDERATION AND APPROVING PURCHASED POWER COST RIDER SCHEDULE "CP" ON A PROVISIONAL BASIS

BY THE COMMISSION: This matter is now before the Commission due to Western Carolina University's (WCU) April 13, 2000, Request for Clarification and Reconsideration of the Commission's Order dated April 11, 2000, in Docket No. E-35, Subs 25 and 26, and WCU's application for a change in its Schedule CP Purchased Power Cost Rider filed on March 8, 2000, in Docket No. E-35, Sub 27. The Commission discusses the procedural history of these dockets herein below.

BACKGROUND

On March 10, 1999, in compliance with the Commission's prior Orders in Docket No. E-35, Subs 17 and 19, WCU filed an application in Docket No. E-35, Sub 25 for a change in its Schedule CP Purchased Power Cost Rider, to be effective for bills rendered on and after April 25, 1999, and before April 24, 2000. On April 12, 1999, WCU filed its final proposed Schedule CP Purchased Power Cost Rider, which incorporated actual purchased power costs and revenues through March 1999.

On March 31, 1999, WCU filed a letter with the Commission in Docket No. E-35, Sub 26, regarding $248,194.36 it had received from Duke Power, now a division of Duke Energy

Corporation (Duke), and Nantahala Power and Light Company (Nantahala) in settlement of the Duke-Nantahala merger proceeding before the Federal Energy Regulatory Commission (FERC). WCU's letter (1) stated that it plans to use these funds for system improvements, for fees related to the refund, and for seeking new sources of wholesale power; (2) asserted that due to limits on the Commission's jurisdiction, it can complete its plans without further Commission action; and (3) requested that the Commission issue no objection to its plans.

The Public Staff presented these matters at the Commission's Regular Staff Conference on April 19, 1999. Because there was not enough time to resolve the Sub 26 issues before the new Sub 25 rider was due to go into effect, the Public Staff and WCU agreed that the new rider would be implemented on a provisional basis, with the final rider to be determined upon resolution of the Sub 26 docket. The Commission did this by Order dated April 21, 1999. The Public Staff and WCU filed their comments and reply comments on the issues raised by Sub 26 between October and December 1999.

After considering the comments and reply comments from the Public Staff and WCU, the Commission issued an Order on April 11, 2000, in Docket No. E-35, Subs 25 and 26. In that Order, the Commission discussed the apparent undisputed facts and positions of the parties and concluded, among other things, that the $248,194.36 payment received by WCU from Duke was indeed a return of money previously paid by WCU to Nantahala as a purchase power expense which was passed on to WCU's customers. Citing G.S. 116-35, the Commission stated that its authority is sufficient to require WCU to flow the $248,194.36 back to WCU's customers as a part of purchased power expenses through the Purchased Power Cost Rider. Further, the Commission noted WCU itself has proposed to include an interest rate of 10% per annum on its overrecoveries of purchased power costs in WCU's 1998 and 1999 purchased power cost adjustment proceedings. Finally, the Commission concluded that WCU's request to net out $6,600.26 for legal and consulting fees associated with the recovery of the $248,194.36 should be denied since the Commission has no authority to factor non-purchased power costs in the calculation of the Purchased Power Cost Rider. Therefore, the Commission ordered WCU to return the $248,194.36 to its ratepayers, with interest at a rate of 10% per annum, over a two year period beginning in April 2000 through a factor in its next two proceedings to establish the Schedule CP Purchased Power Cost Rider.

On April 13, 2000, WCU filed a Request for Clarification and Reconsideration of the Commission's Order dated April 11, 2000, in Docket No. E-35, Subs 25 and 26. On April 14, 2000, the Public Staff filed its response to WCU's Request. That Request is now pending and decided herein below.

Also, on March 8, 2000, in compliance with the Commission's prior Orders in Docket No. E-35, Subs 17 and 19, WCU filed an application in Docket No. E-35, Sub 27, for a change in its Schedule CP Purchased Power Cost Rider, to be effective for bills rendered on and after April 25, 2000, and before April 24, 2001. This initial filing included actual purchased power cost and recovery information only for the period April 1999 - February 2000. On April 7, 2000, WCU filed its final proposed Schedule CP Purchased Power Cost Rider, which incorporated actual purchased power costs and revenues through March 2000.

The net Purchased Power Cost Rider requested by WCU in Docket No. E-35, Sub 27, for use in Schedule CP is an increment of $0.00563 per kWh. This requested factor is made up of three elements. The first is an increment of $0.00645 per kWh to recover estimated purchased power costs for the period April 2000 - March 2001. The second is an Experience Modification Factor (EMF) decrement of ($0.00074) per kWh to return purchased power costs overcollected during the period April 1999 - March 2000. The third is an EMF interest decrement of ($0.00008) per kWh calculated in conjunction with the overcollection of purchased power costs.

The Public Staff presented these matters at the Commission's Regular Staff Conference on April 17, 2000. The Public Staff stated that it had reviewed the calculations of and the support for the components of the rider proposed by WCU in Docket No. E-35, Sub 27, and had no objection to them. The Public Staff also noted, however, that on April 11, 2000, the Commission issued an Order on Purchased Power Cost Rider in Docket No. E-35, Subs 25 and 26, as discussed above. The Public Staff stated that consistent with the April 11, 2000, Order, it had calculated the factor necessary to flow back the first half of the energy bank payment to WCU's ratepayers as a component of the Purchased Power Cost Rider to be approved in Docket No. E-35, Sub 27. The Public Staff's calculations, which it filed separately, produce a decrement factor of ($0.00533) per kWh. The Public Staff recommended that this decrement factor be incorporated into the Purchased Power Cost Rider approved by the Commission in Docket No. E-35, Sub 27, and, therefore, that the Commission approve a net Schedule CP Purchased Power Cost Rider of $0.00030 per kWh.

WCU also appeared at the Commission Staff Conference on April 17, 2000, to argue its Request for Clarification and Reconsideration. The Public Staff presented its response and both parties answered questions from the Commission.

DISCUSSION AND CONCLUSIONS

The Commission has carefully considered WCU's application, the recommendation and calculations of the Public Staff, and the briefs and oral arguments of the parties. The Commission recognizes WCU's unique status among electric suppliers regulated by the Commission in that, since it is a constituent member of the University of North Carolina system, its funds must be deposited with the State Treasurer's office. The Commission further recognizes the truly exceptional nature of the funds which are the subject of Sub 26 in that the funds were received as part of a settlement of the Duke-Nantahala merger proceeding before FERC, that the Commission's Order requiring WCU to flow the money back to its customers through the Purchased Power Cost Rider was issued approximately eighteen months after receipt of the money by WCU, and that the funds represented the repayment to WCU of funds in the energy bank representing overcollection of purchased power costs over a number of years. Upon reconsideration of its April 11, 2000 Order in Docket No. E-35, Subs 25 and 26, the Commission reaffirms its conclusions that the payment at issue was indeed a return of WCU's share of the balance of the energy bank, that it represented money previously paid by WCU to Nantahala as a purchased power expense and passed on to WCU's customers, that the legal and consulting costs associated with the settlement shall not be netted out, and that WCU shall flow the $248,194.36 payment received from Duke to its ratepayers, with interest, through WCU's next two Purchased Power Cost Rider proceedings. However, given WCU's unique status and the singular nature of the circumstances surrounding the receipt of funds which are the subject of Sub 26, the Commission grants reconsideration with regard to the amount of interest to be returned to WCU's ratepayers. Upon reconsideration of its April 11, 2000 Order in Docket No. E-35, Subs 25 and 26, the Commission concludes that WCU shall return to its ratepayers, in addition to the principal amount received from Duke, the actual amount of interest earned on the $248,194.36 while on deposit with the State Treasurer through the time the funds are flowed back to WCU's customers through the Purchased Power Cost Rider.

Therefore, WCU shall calculate the actual amount of interest earned on the $248,194.36 payment received from Duke and shall file on or before May 1, 2000, a further proposed per kWh adjustment to WCU's 2000-2001 Schedule CP Purchased Power Cost Rider to begin the return of the money to WCU's customers through WCU's next two Purchased Power Cost Rider proceedings. The Commission notes that in its filings, WCU requested that if the Commission orders WCU to flow back the $248,194.36 to its customers through the Purchase Power Cost Rider with interest, that WCU alternatively be allowed to return the money to its customers in a single month. To accommodate WCU, the Commission concludes that WCU may, in its discretion, make a filing voluntarily agreeing to return the money to its customers in a single month rather than flow back the money through the Purchased Power Cost Rider as ordered by the Commission. WCU shall coordinate its filing with the Public Staff in either case and shall include workpapers showing the calculations of the total amount of interest and the proposed plan to return the $248,194.36 plus interest to WCU's customers. The Commission shall take WCU's voluntary agreement, if made, into consideration in determining the final Schedule CP Purchased Power Cost Rider to be approved in Docket No. E-35, Sub 27, for 2000-2001.

Further, the Commission concludes that a net Schedule CP Purchased Power Cost Rider of $0.00563 per kWh, proposed by WCU without objection by the Public Staff, should be approved in Docket No. E-35, Sub 27, on a provisional basis, with the final factor to be determined upon approval of a plan to return the funds which are the subject of Docket No. E-35, Sub 26. The net Rider provisionally approved shall consist of the following elements: (1) an increment of $0.00645 per kWh to recover estimated purchased power costs for the period April 2000 - March 2001; (2) an EMF decrement of ($0.00074) per kWh to return purchased power costs overcollected during the period April 1999 - March 2000; and (3) an EMF interest decrement of ($0.00008) per kWh calculated in conjunction with the overcollection of purchased power costs.

IT IS, THEREFORE, ORDERED as follows:

1. That Western Carolina University's Purchased Power Cost Rider, Schedule "CP", which is attached to this Order as Attachment A, is allowed to become effective on a provisional basis for bills rendered on and after April 25, 2000, and shall expire on April 24, 2001, unless adjusted in the interim by Commission Order.

2. That WCU shall calculate the actual amount of interest earned on the $248,194.36 payment received from Duke and shall file on or before May 1, 2000, a further proposed per kWh adjustment to WCU's 2000-2001 Schedule CP Purchased Power Cost Rider to begin the return of the money to WCU's customers through WCU's next two Purchased Power Cost Rider proceedings. WCU may, in its discretion, make a filing voluntarily agreeing to return the money to its customers in a single month rather than flow back the money through the Purchased Power Cost Rider as ordered by the Commission. WCU shall coordinate its filing with the Public Staff in either case and

shall include workpapers showing the calculations of the total amount of interest and the proposed plan to return the $248,194.36 plus interest to WCU's customers.

3. That the provisional Purchased Power Cost Rider is approved without prejudice to the right of any party to take issue with the rider in a general rate case.

4. That Western Carolina University shall give appropriate notice to its retail customers for the Purchased Power Cost Rider by bill insert for the billing cycle beginning April 25, 2000. A copy of this notice shall be filed with the Chief Clerk of the North Carolina Utilities Commission within five days of the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the _20th_ day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mz042000.03

Commissioner Ervin dissents in part.
Commissioners Conder, Owens, and Pittman did not participate in the decision.

DOCKET NO. E-35, SUBS 25, 26 AND 27

COMMISSIONER ERVIN, DISSENTING IN PART:

Although I fully agree with the other conclusions reached by the majority in this case, I respectfully dissent from that portion of the majority's decision which calculates interest on the $248,194.36 "energy bank" flowback amount at a rate of less than 10% per annum. Although I recognize that there are important differences between Western Carolina's electric system and that of an investor-owned utility, I do not believe that those differences justify the result reached by the majority with respect to the interest rate issue.

At the time that Western Carolina sought reconsideration of the Commission's April 11, 2000, order requiring that the $248,194.36 "energy bank" amount received from Duke be flowed back to customers, it argued that the University was required to deposit the disputed funds with the State Treasurer, that Western Carolina could not earn a 10% return on the relevant funds through the State Treasurer's office, and that it was inequitable for the Commission to require the use of a 10% interest rate given this limitation on the University's investment options. Although the majority did not explicitly adopt this line of reasoning in deciding the interest rate issue on reconsideration, its use of the actual interest earned on the "energy bank" flowback amount in computing the total to be returned to customers is tantamount to an acceptance of this logic. Although I do not doubt that Western Carolina has limited investment alternatives, I strongly believe that the majority's interest rate decision rests upon a misapprehension of the purpose for which the payment of interest should be required in instances like this one.

The reason that the Commission has historically required public utilities and other suppliers of utility services to pay interest in connection with refunds, flowbacks, and other similar disbursements is to reflect the fact that customers have been deprived of the use of their money through the payment of rates which were higher than those ultimately deemed appropriate. For this reason, the relevant question which the Commission must resolve in deciding an interest rate controversy like this one is ascertaining the rate necessary to make the adversely-affected customers whole instead of identifying the rate necessary to ensure that the utility or supplier disgorges any benefit it may have obtained from possessing the customers' money. When viewed in this light, the actual return which Western Carolina earned on the flowback amount is not relevant to the selection of an appropriate interest rate. The Commission recognized as much in In re Duke Power Company, Docket No. E-7, Sub 644, Eighty-Third Report of the North Carolina Utilities Commission: Orders and Decisions 200, 209 (1993), when it stated that "[t]he Commission has specified use of a 10% rate notwithstanding the general level of interest rates in the economy on the theory that 10% provides for adequate compensation to ratepayers over the long term considering the fact that a policy of tracking the general level of interest rates in the economy would lead to the denial of fair compensation to the ratepayers when those interest rates exceed the statutory cap of 10%." See also: In re Duke Power Company, Docket No. E-7, Sub 501, Eighty-Second Report of the North Carolina Utilities Commission: Orders and Decisions 173, 182 (1992). As a result, Western Carolina's emphasis on the return which it can earn through the State Treasurer's office is, in my opinion, misplaced.

The record does not contain much information concerning the exact amount necessary to compensate Western Carolina's customers for their inability to use the "energy bank" flowback amount during the relevant time period. Any meaningful analysis of this issue suggests, however, that certain investments available to ordinary residential ratepayers have produced a return in excess of 10% in recent years. Furthermore, the rate of interest on credit card and other debt which might be incurred by Western Carolina's customers during this time period could easily exceed 10% in some instances. As a result, I do not believe that the effective interest rate inherent in the majority's decision adequately compensates Western Carolina's customers for the loss of the use of their money during the relevant time interval.

Admittedly, Western Carolina's argument that requiring the use of a 10% interest rate will reduce the amount of scholarship money available to students has a certain surface appeal. I am well aware of the cost of higher education and the burden which such costs place on many North Carolinians. On the other hand, I do not believe that it is equitable to require Western Carolina's ratepayers to involuntarily forgo adequate compensation for the loss of the use of their money in order to finance the education of others. This is particularly true given that the proposal advanced by the Public Staff and adopted in our April 11, 2000, order which begins the interest rate calculation on the date when Western Carolina received the "energy bank" payment rather than on the date when Western Carolina's ratepayers initially paid the underlying purchased power costs to Western Carolina, is something of a compromise in and of itself. Similarly, Western Carolina's argument that the use of a 10% interest rate would be inappropriate given the length of time that it has taken to resolve this case is equally without merit. Nothing contained in the present record indicates that any of Western Carolina's customers took any action which prolonged the life of this case. As a result, I am not persuaded by any of Western Carolina's prudential arguments in opposition to the use of a 10% interest rate.

I strongly support North Carolina's public institutions of higher education. They perform an immeasurable service to our State. It is always tempting to try to be helpful to one of those institutions. On the other hand, our duty in this instance is to properly regulate the utility services provided by Western Carolina in order to protect the interests of its ratepayers rather than to improve the economic condition of our system of higher education. As a result, for the reasons cited above, I respectfully dissent from the majority's decision with respect to the interest rate issue and would have adhered to our initial decision with respect to this issue.

\s\ Sam J. Ervin, IV
Commissioner Sam J. Ervin, IV

Attachment A

WESTERN CAROLINA UNIVERSITY
Docket No. E-35, Sub 27

SCHEDULE "CP"
PURCHASED POWER COST RIDER (PROVISIONAL)

The customer's bill for each month rendered between April 25, 2000, and April 24, 2001, shall be adjusted by an incremental charge of $0.00563 per kWh as determined to be appropriate by the North Carolina Utilities Commission on a provisional basis. The final factor will be determined upon the resolution by the Commission of certain issues related to the disposition of funds received by Western Carolina University from Duke Energy Corporation and Nantahala Power and Light Company in settlement of the Duke-Nantahala merger proceeding before the Federal Energy Regulatory Commission (Docket No. EC98-23-000).

This rate is determined as follows:

	$/kWh
Factor for estimated purchased power costs for the period April, 2000 - March, 2001	$.00645
Experience Modification Factor to reflect actual results for the period April, 1999 - March, 2000	($.00074)
Experience Modification Factor Interest to reflect the overcollection of expenses for the period April, 1999 - March, 2000	($.00008)
TOTAL RATE	$.00563

Effective for bills rendered on and after April 25, 2000.

This rider shall expire on April 24, 2001, unless adjusted in the interim by Commission Order.

DOCKET NO. E-35, SUB 25
DOCKET NO. E-35, SUB 26
DOCKET NO. E-35, SUB 27

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-35, SUB 25 In the Matter of Application of Western Carolina University for Authority to Recover Purchased Power Expense DOCKET NO. E-35, SUB 26 In the Matter of Treatment of Funds Received by Western Carolina University in Settlement of Federal Energy Regulatory Commission Docket No. EC98-23-000 DOCKET NO. E-35, SUB 27 In the Matter of Application of Western Carolina University for Authority to Recover Purchased Power Expense	ORDER APPROVING PLAN FOR RETURN OF ENERGY BANK FUNDS AND SCHEDULE "CP" PURCHASED POWER COST RIDER

BY THE COMMISSION: On April 20, 2000, the Commission issued in these dockets an Order on Reconsideration and Approving Purchased Power Cost Rider Schedule "CP" on a Provisional Basis. In that Order, the Commission adopted a net Schedule CP Purchased Power Cost Rider for Western Carolina University (WCU) of $0.00563 per kWh, on a provisional basis, for the period beginning with bills rendered on and after April 25, 2000, and expiring on April 24, 2001. The Order stated that the final Rider was to be determined upon approval of a plan to return to WCU's customers the Energy Bank funds received by WCU from Duke Energy Corporation, said funds being the subject of Docket No. E-35, Sub 26. The Commission ordered WCU to calculate the actual amount of interest it had earned on the Energy Bank funds and file a further proposed per kWh adjustment to its Schedule CP Rider to begin the return of the funds to its customers over its next two Purchased Power Cost Rider proceedings. In the alternative, the Commission authorized WCU to make a filing voluntarily agreeing to return the funds to its customers in a single month rather than over two years.

On May 8, 2000, WCU filed with the Commission a proposed method of returning the Energy Bank funds, with accumulated interest, to its customers over approximately a three-month period. Under WCU's proposal, all of the principal amount of the funds, and interest accumulated through April, will be credited to the bills issued to its customers in the latter part of May. WCU will set forth the credit as a separate line item on the bills. The amount credited to each customer will be calculated by dividing the accumulated Energy Bank principal and interest by the actual kWh to be billed to all customers in May, and multiplying the result by the kWh billed to each customer in that month.

Due to the fact that the total Energy Bank credit to customers' bills in May will be greater than the total amount otherwise billed to customers that month for electric service, WCU's proposal contemplates the calculation of interest on the amount of the Energy Bank funds not effectively flowed back to customers, and the crediting of that interest to customers in the next month's bills (and possibly for one or two months thereafter). WCU plans to calculate this interest by application of the actual interest rate used by the State Treasurer's Office for each applicable month to determine interest on WCU deposits. This rate will be applied to the balance of the Energy Bank funds not yet effectively returned to WCU's customers, taking into account the date that the previous month's bills were actually issued by WCU. The interest amount so calculated will be apportioned to each customer and set forth as a separate line item on the customer's bill. WCU anticipates that all of the Energy Bank principal and interest amounts will be effectively returned to its customers no later than the July billing; however, WCU will repeat the monthly calculation and credit process until all of the funds have been effectively returned.

The Public Staff presented this matter at the Commission's Regular Staff Conference on May 15, 2000. The Public Staff stated that it had reviewed WCU's filing and discussed the details of the proposal with employees and representatives of WCU. The Public Staff indicated that as a result of its review, it was in agreement with the general methodology described by WCU in its proposal, and recommended that it be approved. However, due to the fact that the details of the calculations of the various bill credits cannot be known until immediately before the bills for each applicable month are issued, the Public Staff recommended that the Commission reserve the authority to review the flowback process to ensure that it is accomplished in an accurate, reasonable, and appropriate manner. The Public Staff also indicated that WCU had agreed to provide the Public Staff with the calculations of the bill credits for each applicable month as they are developed, so that the Public Staff can monitor the flowback as it proceeds.

The Commission has carefully reviewed WCU's proposal to return the Energy Bank funds to its customers, as well as the recommendations of the Public Staff, and concludes that WCU's proposal should be approved. WCU's proposal meets the intent expressed in the Commission's April 20, 2000, Order to allow WCU to voluntarily return the Energy Bank funds to its customers in a single month rather than over two years. The interest credits that WCU proposes to include on its customers' bills in subsequent months are simply a necessary result of the accumulated Energy Bank amount being greater than the amount normally billed by WCU in a single month for electric service.

The Commission also concludes that due to the fact that the details of the various bill credit calculations to be made pursuant to WCU's proposal are not known at the present time, and cannot be known until immediately before the bills for each applicable month are issued, the Commission should retain authority to review the accuracy and reasonableness of the final amounts flowed back to WCU's customers. Therefore, the Commission concludes that WCU should be required to file a final accounting of its return of the Energy Bank funds to its customers, including the detailed calculations of the rates used to determine the applicable monthly bill credits, no later than 10 days after the bills that contain the final credits are issued. The Public Staff, Attorney General, and any other intervenor of record shall be given 30 days after the date of that filing to file any objections or proposed adjustments to WCU's return of the Energy Bank funds.

Finally, the Commission concludes that with the approval given WCU's proposal in this Order, and the retention by the Commission of the authority to review the implementation of the proposal, the Purchased Power Cost Rider adopted provisionally by the Commission in its Order of April 20, 2000, can be approved for collection over a full 12-month period. Therefore, the Commission concludes that the Schedule CP Purchased Power Cost Rider of $0.00563 per kWh previously adopted provisionally should be approved on a full 12-month basis, subject to the true-up provisions typically applied to WCU's Purchased Power Cost Riders.

IT IS, THEREFORE, ORDERED as follows:

1. That the proposal filed on May 8, 2000 by Western Carolina University to return to its customers the Energy Bank funds received by it from Duke Energy Corporation, with accumulated interest, is approved, subject to adjustment by the Commission upon review of the accuracy and reasonableness of the final amounts flowed back to WCU's customers.

2. That WCU shall file a final accounting of its return of the Energy Bank funds to its customers, including the detailed calculations of the rates used to determine the applicable monthly bill credits, no later than 10 days after the bills that contain the final credits are issued.

3. That the Public Staff, Attorney General, or any other intervenor of record may file any objections or proposed adjustments to WCU's return of the Energy Bank funds no later than 30 days after the filing of WCU's final accounting.

4. That WCU's Schedule CP Purchased Power Cost Rider of $0.00563 per kWh, which was adopted provisionally by Order dated April 20, 2000, is hereby approved for collection over a 12-month period, subject to the true-up mechanism provided for in the Commission's Orders in Docket No. E-35, Subs 17 and 19. The Rider herein approved, which is attached to this Order as Attachment A, is allowed to become effective for bills rendered on and after April 25, 2000, and shall expire on April 24, 2001.

5. That the Purchased Power Cost Rider is approved without prejudice to the right of any party to take issue with the rider in a general rate case.

6. That Western Carolina University shall give appropriate notice to its retail customers of the Energy Bank flowback proposal approved herein by the Commission and the approval of the Schedule CP Purchased Power Cost Rider of $0.00563 per kWh. A copy of this notice shall be filed with the Chief Clerk of the North Carolina Utilities Commission within five days of the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the _15th_ day of May, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz051500.20

ATTACHMENT A

WESTERN CAROLINA UNIVERSITY
Docket No. E-35, Sub 27

SCHEDULE "CP"
PURCHASED POWER COST RIDER

The customer's bill for each month rendered between April 25, 2000, and April 24, 2001, shall be adjusted by an incremental charge of $0.00563 per kWh as determined to be appropriate by the North Carolina Utilities Commission.

This rate is determined as follows:

	$/kWh
Factor for estimated purchased power costs for the period April, 2000 - March, 2001	$.00645
Experience Modification Factor to reflect actual results for the period April, 1999 - March, 2000	($.00074)
Experience Modification Factor Interest to reflect the overcollection of expenses for the period April, 1999 - March, 2000	($.00008)
TOTAL RATE	$.00563

Effective for bills rendered on and after April 25, 2000.

This rider shall expire on April 24, 2001.

DOCKET NO. E-2, SUB 753
DOCKET NO. P-708, SUB 5
DOCKET NO. G-21, SUB 387

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application by Carolina Power & Light Company, Interpath Communications, Inc., and North Carolina Natural Gas Corporation to Transfer Ownership of Carolina Power & Light Company, Interpath Communications, Inc., and North Carolina Natural Gas Corporation to a Holding Company	)	ORDER APPROVING APPLICATION

HEARD: Tuesday, February 8, 2000, at 9:30 a.m. and Tuesday, February 15, 2000, at 1:30 p.m. through Wednesday, February 16, 2000, in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner William R. Pittman, Presiding, Chairman Jo Anne Sanford, and Commissioners Ralph A. Hunt, Judy Hunt, J. Richard Conder, Robert V. Owens, Jr., and Sam J. Ervin, IV

APPEARANCES:

For Carolina Power & Light Company:

Len S. Anthony, Deputy General Counsel, Post Office Box 1551, Raleigh, North Carolina 27602-1551

For Carolina Utility Customers Association, Inc.:

James P. West, West Law Offices, P.C., Suite 1735, 434 Fayetteville Street Mall, Raleigh, North Carolina 27601

For the Carolina Industrial Group for Fair Utility Rates:

Ralph McDonald, Bailey & Dixon, L.L.P., Post Office Box 1351, Raleigh, North Carolina 27602-1351

For Public Works Commission, City of Fayetteville:

Gearold L. Knowles, Schiff Hardin & Waite, 1101 Connecticut Avenue, N.W., Washington, DC 20036

ELECTRICITY - SALE/TRANSFER

For the Using and Consuming Public:

Gisele L. Rankin, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

Margaret A. Force and Leonard G. Green, N.C. Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629

BY THE COMMISSION: On October 15, 1999, pursuant to G.S. 62-111, Carolina Power & Light Company (CP&L), Interpath Communications, Inc. (Interpath) and North Carolina Natural Gas Corporation (NCNG) (collectively, Applicants) filed their Application to Transfer Ownership of CP&L, Interpath and NCNG to a Holding Company. As amended on January 31, 2000, the transfer of ownership will be accomplished by the holders of the common stock of CP&L exchanging their shares for a like number of shares of new holding company common stock and the new holding company becoming the owner of the CP&L common stock formerly represented by the CP&L common stock certificates. CP&L, as owner of NCNG and Interpath, will convey ownership of these two utilities' stock to the holding company as a stock dividend.

On October 25, 1999, Carolina Industrial Group for Fair Utility Rates (CIGFUR) filed a Petition to Intervene. On November 10, 1999, Carolina Utility Customers Association, Inc. (CUCA), the Greenville Utilities Commission (GUC), and the Cities of Rocky Mount, Wilson and Monroe, North Carolina (Cities) filed Petitions to Intervene. On November 24, 1999, the Attorney General filed a Notice of Intervention. On December 13, 1999, the Public Works Commission of the City of Fayetteville (PWC) and the North Carolina Electric Membership Corporation (NCEMC) filed Petitions to Intervene. Each of these petitions were allowed by Commission Order.

On November 3, 1999, the Commission issued an order Scheduling Hearings and Requiring Prefiled Testimony and Public Notice.

On November 12, 1999, CP&L filed the Testimony of John J. Gillen and Larry M. Smith. On January 31, 2000, CUCA filed the direct testimony of Kevin O'Donnell. On February 2, 2000, the Public Staff filed the direct testimony of Scott Hempling. Also on February 2, 2000, Regulatory Conditions and the Code of Conduct agreed to by the Public Staff, CP&L, Interpath, NCNG and CP&L Holdings, Inc. (Holdings) were filed by the Public Staff.

On February 7, 2000, CP&L filed the Rebuttal Testimony of Larry M. Smith. On February 14, 2000, CUCA filed the additional direct testimony of Kevin O'Donnell. Also on February 14, 2000, CP&L filed a Motion to reject the additional direct testimony of Mr. O'Donnell.

On February 15, 2000, CP&L, Interpath, NCNG and the Public Staff jointly filed a Stipulation stating that they each had agreed to support the application subject to the Regulatory Conditions contained in the Stipulation and recommending adoption thereof by the Commission.

This matter came on for hearing as scheduled. At the beginning of the hearing, following oral argument, the Presiding Commissioner granted CP&L's motion to reject the additional direct testimony of Mr. O'Donnell

ELECTRICITY - SALE/TRANSFER

Based on the foregoing, the testimony and exhibits received into evidence at the hearing, and the entire record of this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. CP&L is an electric public utility company under the laws of the State of North Carolina and is subject to the jurisdiction of the Commission. CP&L is engaged in the business of generating, transmitting, distributing and selling electric power in its assigned territory in North and South Carolina.

2. NCNG is a local distribution natural gas public utility incorporated in Delaware, authorized to do business in North Carolina, and subject to the jurisdiction of the Commission. NCNG provides natural gas, propane and natural gas transportation services in south-central and eastern North Carolina. NCNG is a wholly-owned subsidiary of CP&L.

3. Interpath is a telecommunications public utility company under the laws of the State of North Carolina and is subject to the jurisdiction of the Commission. Interpath is authorized to provide local and interexchange, long distance, switched and dedicated services throughout the State of North Carolina. Interpath is a wholly-owned subsidiary of CP&L.

4. Pursuant to G.S. 62-111, CP&L, NCNG and Interpath seek authority from the Commission to transfer their ownership to a new holding company. The transfer of ownership will be accomplished by the holders of the common stock of CP&L exchanging their shares for a like number of shares of new holding company common stock and the new holding company becoming the owner of the CP&L common stock formerly represented by the CP&L common stock certificates. CP&L, as owner of NCNG and Interpath, will convey ownership of these two utilities' stock to the holding company as a stock dividend.

5. In order for CP&L, Interpath and NCNG to obtain Commission approval of the proposed transfer of their ownership to a holding company they must demonstrate that the transfer is justified by the public convenience and necessity.

6. CP&L is currently an exempt public utility holding company under the Public Utility Holding Company Act of 1935.

7. CP&L has diversified its business operations through the ownership of several subsidiaries, including NCNG, Interpath and SRS, Inc.

8. As a result of these diversification activities, CP&L itself, functions as both a holding company and an electric public utility company.

9. The Regulatory Conditions and Code of Conduct adopted herein, which have been agreed to by the Public Staff, CP&L, Interpath and NCNG and committed to by CP&L, Interpath, and NCNG during their testimony, are adequate to ensure that there will be no adverse impact on the rates and service of CP&L's and NCNG's retail ratepayers, that CP&L's and NCNG's ratepayers are

protected as much as possible from potential harm, and that there are sufficient benefits from the transfer of ownership to offset the potential harms and risks.

10. The transfer of ownership of CP&L, Interpath and NCNG to CP&L Holding, Inc., as proposed herein, is justified by the public convenience and necessity.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-5

These findings of fact are essentially informational, procedural and jurisdictional in nature and are not in dispute. The description of the proposed transfer of ownership of CP&L, NCNG and Interpath to a holding company structure is based upon the amended application filed by CP&L herein.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

This finding is based on the Application and the testimony of CP&L witnesses John J. Gillen and Larry M. Smith.

Through its application and the testimony of Witnesses John J. Gillen and Larry M. Smith, CP&L explained that both the natural gas and electric utility industries are subject to the requirements of the Public Utility Holding Company Act of 1935 (PUHCA). PUHCA provides that a public utility (whether it is electric or gas) that wishes to merge with another public utility must either: (1) become a holding company subject to the requirements of PUHCA and the Securities and Exchange Commission (SEC) rules and regulations promulgated pursuant to PUHCA; or (2) avoid becoming a holding company by combining all utility activities into a single corporate entity. As a result of CP&L's (an electric utility) merger with NCNG (a gas public utility), CP&L became a holding company under PUHCA. CP&L did not become a registered holding company subject to the full jurisdiction of the SEC because it qualified for an exemption. This exemption described in Section 3(a)(2) of PUHCA provides that if a holding company itself is predominately a public utility whose operations do not extend beyond the state in which it is organized and contiguous states it qualifies as an exempt holding company. Since following CP&L's acquisition of NCNG, CP&L was the holding company and was and is predominately a public utility whose operations do not extend beyond the state in which it is organized and contiguous states, it qualified for this exemption. No other party to the proceeding challenged or questioned CP&L's representations with regard to the application of PUHCA to its current situation.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

This finding is based on the testimony of CP&L witnesses Gillen and Smith and the testimony of CUCA witness O'Donnell, and the records of the Commission.

The Commission's records, which are public documents, and the testimony of CP&L witnesses Gillen and Smith, and CUCA witness O'Donnell demonstrate that CP&L has diversified its business operations beyond electric utility service. CP&L currently owns NCNG, a local distribution natural gas company, Interpath, a telecommunications company, and SRS, an energy services company. This fact is not in controversy and is admitted by all the parties to this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

This finding is based on the testimony of CP&L witness Larry M. Smith. CP&L witness Smith testified that under CP&L's current corporate structure, CP&L, the corporation, functions as both an electric utility as well as a holding company. Both the electric utility and holding company functions are maintained within CP&L.

None of the other parties to this proceeding challenged CP&L with regard to this issue.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

This finding is based on the testimony of Applicants' witnesses Gillen and Smith, Public Staff witness Hempling, the Stipulation entered into between CP&L, NCNG, Interpath, and the Public Staff, and the record contained in Docket Nos. E-2, Sub 740 and G-21, Sub 377.

Through its application and the testimony of witnesses John J. Gillen and Larry M. Smith, CP&L explained that both the natural gas and electric utility industries are subject to the requirements of PUHCA. PUHCA provides that a public utility (whether it is electric or gas) that wishes to merge with another public utility must either: (1) become a holding company subject to the requirements of PUHCA and the SEC rules and regulations promulgated pursuant to PUHCA; or (2) avoid becoming a holding company by combining all utility activities into a single corporate entity. As a result of CP&L's (an electric utility) merger with NCNG (a gas public utility), CP&L became a holding company under PUHCA. CP&L did not become a registered holding company subject to the full jurisdiction of the SEC because it qualified for an exemption. This exemption described in Section 3(a)(2) of PUHCA provides that if a holding company itself is predominately a public utility whose operations do not extend beyond the state in which it is organized and contiguous states it qualifies as an exempt holding company. Since following CP&L's acquisition of NCNG, CP&L was the holding company and was and is predominately a public utility whose operations do not extend beyond the state in which it is organized and contiguous states, it qualified for this exemption. In their application in this docket, the Applicants acknowledged that the new holding company may no longer be exempt and may be required to register under PUHCA. The Applicants have sought to qualify under a different exemption, that described in Section 3(a)(1) of PUHCA, which requires that the utilities' operations be primarily intrastate in nature. It is unclear whether the holding company will qualify for this exemption.

In Docket Nos. E-2, Sub 740 and G-21, Sub 377, the docket established by the Commission to address CP&L's and NCNG's application to engage in a business combination transaction, the Commission approved a Code of Conduct and set of Regulatory Conditions which are intended to protect NCNG's and CP&L's customers from: (1) all direct and indirect costs of the merger; (2) any potential adverse affects on CP&L's and NCNG's cost of capital; (3) potential deterioration in CP&L's and NCNG's quality of service and increases in rates; (4) the potential for CP&L and NCNG to unreasonably favor their affiliates; (5) any potential harm to competition between gas and electric service; (6) the potential for NCNG to discriminate against other gas customers in favor of CP&L; (7) the potential for discrimination by NCNG against non-affiliated electric generators; and (8) potential bias in electric generation siting.

In this docket, the Applicants and the Public Staff revised the Code of Conduct and established numerous additional Regulatory Conditions in order to ensure that the protections created by the original Code of Conduct and Regulatory Conditions are preserved once CP&L converts to a holding company structure as well as to protect this Commission's jurisdiction to the greatest extent possible if CP&L converts to a registered holding company structure. Regulatory Conditions 1-14 of the Conditions attached to the Stipulation entered into between the Applicants and the Public Staff are the holding company conditions. These Regulatory Conditions are practically identical to those approved by the Commission with regard to the mergers of SCANA Corporation with Public Service Company of North Carolina, Inc. and Dominion Resources, Inc. with Consolidated Natural Gas Company, both of which involved registered holding companies.

Public Staff witness Hempling testified that if CP&L converts to a registered holding company under PUHCA, this Commission's traditional authority to regulate CP&L will become uncertain because of the potentially preemptive relationship between PUHCA and State law. Because of this concern, the Public Staff proposed, and the Applicants agreed to, numerous Regulatory Conditions designed to protect the Commission's jurisdiction from PUHCA preemption growing out of CP&L's formation of a registered holding company. The 14 Regulatory Conditions in question can be broken down into 4 categories: (1) inter-affiliate transactions involving goods and services; (2) inter-affiliate financing transactions; (3) inter-affiliate transfers of assets; and (4) general conditions. Regulatory Condition No. 1 describes procedures related to the Commission's review of inter-affiliate contracts subject to Section 13 of PUHCA. Pursuant to this condition, CP&L and NCNG must obtain Commission permission before engaging in such inter-affiliate transactions. In addition, the contracts themselves must provide that CP&L and/or NCNG may not: (1) make or incur a charge under the contract except in accordance with North Carolina law; or (2) seek to reflect in rates any costs incurred or revenue earned under the contract except as permitted by the Commission. Finally, the SEC must have found that the contracts, including these terms, are not inconsistent with PUHCA, except that no such finding by the SEC is required if no SEC authorization of the contract is required under PUHCA. As a result, a utility's obligation to pay charges under the SEC jurisdictional contract will be limited to those charges determined by the Commission to be consistent with the utility's state law obligations to charge just and reasonable rates. If the utility is not obligated to pay a charge unless it has been filed with and approved by the state commission, it incurs no cost which the state would have to disallow.

Regulatory Condition 2 obligates CP&L and NCNG and their affiliates to refrain from challenging a Commission disallowance on preemption grounds. This condition will assist the Commission by reducing the probability of having to defend its retail ratemaking actions in court.

Regulatory Condition 3 requires CP&L and NCNG to ask the SEC to make explicit the fact that its approval of the creation of a holding company, if such approval is necessary, does not preempt the Commission. Such language in an SEC order will bolster the Commission's position should any preemption challenge later be brought to a Commission order. Regulatory Condition 4 contains the standard language preventing CP&L and NCNG from paying more than market price for any good and/or service purchased under an inter-affiliate transaction.

Regulatory Condition 5 requires any inter-affiliate financing agreements between and among CP&L and NCNG and their affiliates to state that CP&L and NCNG may not commit themselves to terms except in accordance with North Carolina law and the Commission's rules and may not reflect in retail rates financing costs not allowed by the Commission. Regulatory Condition 6 requires CP&L and/or NCNG, if they seek approval from the SEC for the creation of a holding company, to seek language in the SEC approval order stating that the order does not prevent the Commission from exercising its customary powers over CP&L's and NCNG's revenue requirements. Regulatory Condition 7 prohibits CP&L and NCNG from challenging on preemption grounds a Commission review of inter-affiliate financing transactions.

Regulatory Conditions 8-12 attempt to protect the Commission from the risk of preemption regarding the transfer of assets within the corporate family should CP&L become a registered holding company. Under Regulatory Condition 8 where there is a voluntary transfer of assets by a utility to an affiliate, the transferor may not commit to the transaction, and may not reflect the transaction in North Carolina retail rates, except upon terms that are in accordance with North Carolina law and the Commission's decisions.

Regulatory Condition 9 requires CP&L and NCNG to include the commitment made in Regulatory Condition 8 in any application to the SEC for approval of the transaction. Regulatory Condition 10 requires CP&L and NCNG and their holding company to include in their application for approval of the acquisition filed with the SEC a request that the SEC find that approval does not prevent the Commission from altering that structure pursuant to state law by exercising authority over transfers of assets. Regulatory Condition 11 protects the Commission's ability to reflect the proper price associated with transfers and setting North Carolina rates. Regulatory Condition 12 prohibits CP&L and NCNG from asserting preemption by the SEC, thus reducing the probability of future legal challenges to Commission orders.

Regulatory Conditions 13 and 14 are general conditions. Regulatory Condition 13 requires that CP&L and NCNG and their holding company and their affiliates bear the full risk of preemption. It also specifically commits these companies to take such actions as the Commission deems necessary to preserve its jurisdiction and to bear the cost consequences if such jurisdiction is diminished. Finally, Regulatory Condition 14 anticipates the possibility that Congress might repeal PUHCA and requires CP&L and/or NCNG to work with the Public Staff to negotiate any changes to these conditions necessitated by this change in federal law.

None of the other parties to this proceeding, including CUCA, objected to or commented upon the revised Code of Conduct and the Regulatory Conditions agreed to by the Applicants and the Public Staff. CUCA, however, notes that on cross-examination, Public Staff witness Hempling, who proposed the Regulatory Conditions to preserve the Commission's jurisdiction and keep ratepayers in the same place they would be without the Applicants' proposed transfer of ownership, acknowledged that he had neither identified any quantified or quantifiable benefits nor opined that the application was justified by the public convenience and necessity.

The Commission concludes that the revised Code of Conduct and the Regulatory Conditions agreed to by the Applicants and the Public Staff adequately protect the Commission and the utilities' customers from any adverse impact of CP&L's conversion to a holding company structure. To the extent unforeseen or unintended issues arise, any interested party may bring them to the attention of the Commission and the Commission has the authority to take action. The Commission will make the revised Code of Conduct and the Regulatory Conditions express conditions of approval of CP&L's conversion to a holding company structure.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

This finding is based on the testimony of Applicants' witnesses Gillen and Smith and the testimony of CUCA witness O'Donnell.

The Applicants' witness Smith explained that at this point in time, CP&L's diversification activities have been relatively minimal. Under CP&L's current corporate structure, CP&L, as the parent company, performs holding company functions as well as operates as an electric utility. Mr. Smith explained that this business organization, while adequate at the moment, will become inadequate and create greater and greater confusion as CP&L's diversification activities grow and become a larger portion of CP&L's overall business activities. Mr. Smith explained that CP&L has safeguards in place today to ensure that there is adequate separation between CP&L's businesses, however, as these businesses grow it will become necessary to create a greater separation between CP&L's electric utility activities, its telecommunications activities, its gas activities and its holding company activities.

The Applicants' witness Gillen testified that consolidation in the electric industry has become not only a trend, but a necessity. He identified numerous mergers and acquisitions that have occurred just since 1997 and explained that these business combinations have been driven by the need for electric companies to grow to a size large enough to achieve certain economies of scale and to diversify their energy offerings to include both electric and gas. He further explained that if CP&L is to survive and continue to provide adequate, reliable service to its customers in North and South Carolina, it must be able to grow to a size sufficient to enjoy the economies of scale and scope and financial strength enjoyed by these other utilities. According to Mr. Gillen, the dynamics and forces currently impacting the electric industry dictate that CP&L must grow and be in a position to grow or else it exposes itself to the very real possibility of being unable to survive as a stand-alone entity.

The Applicants' witness Smith explained that any business, including a utility, has to plan well in advance to establish the corporate structure necessary to allow it to respond to the changing needs of its industry. He testified that CP&L is in the process now of putting itself in the position to effectively deal with changes in its industry, including the potential for deregulation as well as the trend towards consolidation, and also to establish a corporate structure that allows a more clear separation of its businesses as CP&L continues to diversify in order to survive and prosper.

Witnesses Gillen and Smith also explained that in addition to CP&L's diversification activities and the consolidation of electric and gas companies in the industry, the events occurring in the electric industry with regard to deregulation require CP&L to examine its corporate structure. According to CP&L, the existing problems involved with a holding company also functioning as a utility, the fact that these problems are exacerbated by further diversification, the need for CP&L to further grow and diversify to survive and prepare for possible deregulation all dictate that CP&L find a way to more clearly separate its utility operations from its holding company operations and CP&L's affiliates.

ELECTRICITY - SALE/TRANSFER

According to the Applicants' witness Gillen there are numerous benefits that he believes the Applicants and the Commission will enjoy if CP&L is allowed to convert to the proposed holding company structure. These benefits and advantages include:

(1) The corporate separation and financing flexibility afforded by a holding company structure will increase the holding company's ability to respond to changes in the electric and/or gas industry, markets and regulation. When new business opportunities arise, they can be operated as holding company subsidiaries, enhancing the separation between CP&L's utility operations and those businesses. The separation will insulate CP&L and its customers from the risk associated with operating other businesses.

(2) The holding company structure will permit the use of financing techniques that are more directly suited to the particular requirements, characteristics and risks of the holding company's other businesses, without impact on the capital structure or cost of capital of CP&L.

(3) The other businesses can obtain funds from the holding company, from affiliates other than CP&L or from their own outside financing.

(4) Legally separate entities make management of each business more accountable and regulation less complex, and allows for better evaluation of the success of each business.

The Applicants' witness Smith explained that the proposed holding company structure will allow CP&L and NCNG to more clearly segregate their utility businesses from their non-utility operations. This segregation will provide improved regulatory oversight of CP&L's and NCNG's utility operations because of the clear separation between utility and non-utility activities. Mr. Smith further testified that a parent holding company structure allows a regulated utility to be maintained as a separate legal entity, separate from its holding company. It allows new, regulated and non-regulated entities to be added without affecting the legal entities already under the holding company. In addition, it provides for a clear separation of the capital structure that is supporting each legal entity. It also makes the tracking of costs and revenues between each of the businesses more simple. Finally, he testified that there are now over 66 public utility holding companies in the United States operating electric and gas public utilities in 42 states which indicates that a holding company structure is a common and accepted corporate structure for diversified business activities.

Mr. O'Donnell testified on behalf of CUCA in opposition to the requested ownership transfer to a holding company. According to Mr. O'Donnell, the possibility that CP&L will be required to reorganize in a holding company structure in order to accomplish future mergers is not a sufficient basis upon which to conclude that the Applicants' proposed restructuring is justified by the public convenience and necessity. Mr. O'Donnell testified that a holding company structure is more problematic than beneficial and therefore should not be adopted until necessitated by a merger that provides sufficient ratepayer benefits to offset potential costs and problems associated with the holding company structure.

He also did not believe that the creation of a holding company would allow for clearer segregation of utility versus non-utility income. Mr. O'Donnell testified that cost allocation problems are enhanced as a utility diversifies into new businesses. He also disagreed with the Applicants' witnesses that the creation of a holding company will allow for a clearer separation of capital structure for each subsidiary. In addition, he expressed his opinion that a holding company structure will not insulate CP&L's customers from the risks associated with operating other businesses.

Mr. O'Donnell warned that the creation of a holding company may result in limitations on the Commission's regulatory oversight on CP&L. He also opined that the survival of a utility in a competitive market is dependent upon the ability to operate as a low cost provider rather than the ability to grow. Mr. O'Donnell stated that growth does not necessarily equate to financial strength and may in fact erode financial strength due to the accumulation of debt.

On cross-examination, Mr. O'Donnell acknowledged that CP&L had already diversified into gas, telephone and consulting services, and he explained that such diversification would be detrimental to ratepayers if the regulated entity is subsidizing non-regulated ventures and detrimental to shareholders if the non-regulated ventures lose money. He also agreed that cost allocation, capital structure and rate of return issues exist today.

In rebuttal of Mr. O'Donnell's testimony, Mr. Smith described Mr. O'Donnell's position as opposed to diversification because diversification creates cost allocation, capital structure, and return on equity issues. Mr. Smith acknowledged that diversification creates cost allocation problems, but argued that diversification and growth are necessary. According to Mr. Smith, "it is in the public interest for CP&L to grow, diversify, increase its economies of scope and scale and to survive."

The standard to be applied by the Commission, as in merger proceedings under G.S. 62-111, is whether the proposed transfer of ownership is justified by the public convenience and necessity. The question, therefore, before the Commission is whether there are sufficient identified benefits to offset identified potential harms to the holding company structure to warrant its approval. The Commission specifically notes Regulatory Conditions 43 and 44, which have been agreed to by the Applicants:

> (43) The Utilities agree that the benefits, costs, and associated risks of the Formation and the operation of the Utilities under a holding company structure will continue to be subject to NCUC review as part of this docket or other proceedings. The NCUC retains the right to order modifications to the structure or operations of Holdings, any Service Company, another Utility, another Affiliate, and/or a Nonpublic Utility Operation providing goods or services to the Utilities, and/or to take whatever action the NCUC deems necessary to protect the Utilities' North Carolina regulated customers.
>
> (44) Any approval by the NCUC of the transfer of the Utilities to Holdings shall not be considered, cited, or argued to constitute any finding or predisposition by the NCUC that it is in the public interest for any future diversification, expansion, acquisition, combination, merger, or transfer of control by or

involving Holdings, any Affiliate, any Nonpublic Utility Operations, or other entity within the Holding Company System to occur.

The Commission concludes that the benefits testified to by the Applicants' witnesses, particularly that the holding company structure may simplify Commission oversight of the Applicants' regulated operations, in conjunction with Regulatory Conditions 43 and 44 agreed to by the Applicants, provide ample support for the adoption of the proposed holding company structure while offsetting the potential harms and risks. The Commission notes, as contemplated by these Regulatory Conditions, that it reserves the right to order further changes in corporate structure, if necessary.

CONCLUSIONS OF LAW

1. Under the relevant statute, G.S. 62-111, the Commission has broad authority to review all aspects of the proposed transfer of ownership and to balance all potential benefits and costs to determine if they should be authorized.

2. Approval should be given to CP&L, Interpath, and NCNG's proposed transfer of ownership only if sufficient conditions are imposed to ensure that the transfer will have no known adverse impact on the rates and service of CP&L's and NCNG's ratepayers; CP&L's and NCNG's ratepayers are protected as much as possible from potential harm; and these ratepayers will receive sufficient benefit from the transfer to offset any potential costs, risks, and harms.

3. The Regulatory Conditions and Code of Conduct approved herein are intended to prevent the transfer of ownership from having any known adverse impact on the rates and service of CP&L's and NCNG's ratepayers; to protect those ratepayers as much as possible from potential harm; and to provide sufficient benefits from the transfer to offset any potential costs, risks, and harms.

4. Based on its application of the foregoing standards to the facts of this case, with particular attention paid to the Regulatory Conditions and Code of Conduct approved herein, the Commission concludes that the proposed transfer of ownership is justified by the public convenience and necessity, and that it should be approved.

IT IS, THEREFORE, ORDERED as follows:

1. That CP&L, Interpath and NCNG's application to transfer ownership to a holding company, as described herein and in the amended application, is approved upon the following Regulatory Conditions with which CP&L, Interpath and NCNG are hereby ordered to comply:

For purposes of the following Regulatory Conditions, the following definitions shall be applicable:

Affiliate: Any company or subsidiary, ten percent (10%) or more of the outstanding voting securities (and/or other measures of ownership interest) of which are owned, controlled, or held with power to vote, directly or indirectly, by Holdings, and is thus affiliated with both Holdings and each of the Utilities.

ELECTRICITY - SALE/TRANSFER

CP&L: The public utility operations of Carolina Power & Light Company as defined in G.S. 62-3(23).

Formation: The formation of Holdings and the transfer of stock of the Utilities and/or other Affiliates to Holdings.

Holding Company System: Holdings and all if its Affiliates.

Holdings: The holding company established to hold 100% of the stock of each of the Utilities (including each Utility's Nonpublic Utility Operations) and stock/ownership interests in other Affiliates.

Interpath: The public utility operations of Interpath Communications, Inc., as defined in G.S. 62-3(23).

NCNG: The public utility operations of North Carolina Natural Gas Corporation as defined in G.S. 62-3(23).

NCUC: The North Carolina Utilities Commission.

Nonpublic Utility Operations: All activities engaged in by one or more of the Utilities, involving the sales of goods or services that are not regulated by the North Carolina Utilities Commission.

Service Company: An Affiliate that provides shared goods and/or services to Holdings, one or more of the Utilities, one or more of the other Affiliates, and/or one or more of the Nonpublic Utility Operations.

Utilities (collectively) or Utility (singly): The public utility operations of CP&L, NCNG, and/or Interpath.

REGULATORY CONDITIONS

(1) With respect to any transaction that is subject to Section 13 of the Public Utility Holding Company Act of 1935 (PUHCA), the following requirements and procedures shall apply:

(a) CP&L and/or NCNG shall not engage in any such transaction without first obtaining from the NCUC such decision as is required under North Carolina law accepting the contract that memorializes such a transaction and authorizing the payment of compensation or fees pursuant thereto. CP&L and/or NCNG shall submit each proposed contract to the Public Staff for informal review at least ten days before filing it with the NCUC.

(b) Any such contract shall provide that CP&L and/or NCNG:

(i) may not make or incur a charge under any such contract except in accordance with North Carolina law and the rules, regulations and orders of the NCUC promulgated thereunder; and

(ii) may not seek to reflect in rates any (A) cost incurred under such contract exceeding the amount allowed by the NCUC or (B) revenue level earned under such contract less than the amount imputed by the NCUC.

(c) CP&L and NCNG shall certify that neither CP&L, NCNG, Holdings, nor any Affiliate thereof has made any filing with the SEC inconsistent with such contract. Such certification shall be repeated annually on the anniversary of the first certification.

(d) The SEC shall have found that such contract is not inconsistent with PUHCA, except that no such finding by the SEC shall be required if no SEC authorization of such contract is required under PUHCA.

(2) Neither CP&L, NCNG, Holdings, nor any Affiliate thereof shall assert in any forum, with respect to any transaction to which CP&L and/or NCNG is involved and which is subject to Section 13 of PUHCA, that PUHCA in any way preempts the NCUC from reviewing the reasonableness of any commitment entered into by CP&L and/or NCNG and from disallowing costs or imputing revenues, related to such commitment, to CP&L and/or NCNG. Should any other entity so assert, CP&L, NCNG, their affiliated holding company and any Affiliate thereof shall not support any such assertion and shall, upon learning of such assertion, so advise and consult with the NCUC and the Public Staff regarding such assertion.

(3) CP&L, NCNG, Holdings or all three shall request the SEC to include the following language in any order issued approving the creation of the holding company and its acquisition of CP&L and NCNG (the acquisition):

> Approval of this application in no way precludes the North Carolina Utilities Commission from scrutinizing and disallowing charges incurred or made or allowing or imputing a different level of such charges when setting rates for services rendered to customers of affiliated public utilities in North Carolina.

(4) Neither CP&L nor NCNG shall take any service from an Affiliate under circumstances where the costs incurred for that service (whether directly or through allocation) exceed fair market value.

(5) With respect to any financing transaction entered into between and/or among CP&L, NCNG, and Holdings and/or any one or more of its other Affiliates, any contract memorializing such transaction shall provide that CP&L and/or NCNG:

(a) may not enter into any such financing transaction except in accordance with North Carolina law and the rules, regulations and orders of the NCUC promulgated thereunder; and

(b) may not reflect in rates the effect of any capital structure or debt and/or equity costs except as allowed by the NCUC.

(6) CP&L, NCNG, Holdings or all three shall include in any application for approval of the acquisition filed with the SEC pursuant to PUHCA a request that the SEC include the following statement in its approval order(s):

> The SEC further finds that its approval of this acquisition or future financing arrangements does not preclude the NCUC or other regulatory authority from setting rates based on the assumption of a capital structure, a corporate structure, debt costs or equity costs that varies from the structure(s) or cost(s) approved in this Order.

(7) Neither CP&L, NCNG, Holdings, nor any other Affiliate thereof shall assert in any forum, with respect to any financing transaction with which CP&L and/or NCNG is involved and which is subject to PUHCA, that PUHCA in any way preempts the NCUC from exercising any lawful authority it may have over such financings or that the NCUC is precluded from setting rates based on the capital structure, corporate structure, debt costs, or equity costs that it finds to be appropriate for ratemaking purposes. Should any other entity so assert, CP&L, NCNG, their affiliated holding company and other Affiliates shall not support any such assertion and shall, upon learning of such assertion, so advise and consult with the NCUC and the Public Staff regarding such assertion.

(8) With respect to the voluntary transfer by CP&L, NCNG, or any Affiliate thereof to nonjurisdictional operations, an Affiliate, and/or a nonaffiliate of the control or ownership of any asset or portion thereof used for the generation, transmission, distribution or other provision of electric and/or natural gas service to customers in North Carolina:

(a) CP&L, NCNG, Holdings, and any Affiliate shall not commit to or carry out such a transfer except in accordance with North Carolina law and the rules, regulations and orders of the NCUC promulgated thereunder; and

(b) CP&L and NCNG may not reflect in rates the value of any such transfer subject to PUHCA except as allowed by the NCUC.

(9) CP&L, NCNG, Holdings and Affiliates shall include in their application for approval of the acquisition filed with the SEC pursuant to PUHCA the commitment set forth in Regulatory Condition 8 above.

ELECTRICITY - SALE/TRANSFER

(10) CP&L, NCNG, Holdings and Affiliates shall include in their application for approval of the acquisition filed with the SEC pursuant to PUHCA a request that the SEC include the following statement in its approval order(s):

> CP&L, NCNG, their holding company and affiliates recognize that the NCUC wishes to preserve its state law authority, under present or future state law, to require approval of transfers of control or ownership of any asset or portion thereof from CP&L, NCNG, or one or more of their affiliates to nonjurisdictional operations, affiliates, or nonaffiliates. Without conceding their right to assert that the NCUC does not and should not have such authority, CP&L, NCNG, their holding company and affiliates request the SEC to state, in its order approving the instant acquisition, that the SEC does not intend its approval of the acquisition to preclude a future state commission order mandating or otherwise exercising state authority over such a transfer of assets.

(11) Any filing with the SEC in connection with asset transfers involving CP&L and/or NCNG shall request that the SEC include the following language in its approval order(s):

> Approval of this application in no way precludes the North Carolina Utilities Commission from scrutinizing and establishing the value of the asset transfer for purposes of determining the rates for services rendered to CP&L's and/or NCNG's customers. It is the SEC's intention that the North Carolina Utilities Commission retain the right to review and determine the value of such asset transfer for purposes of determining rates.

(12) Neither CP&L, NCNG, Holdings, nor any Affiliate thereof shall assert in any forum, with respect to any asset transfer transaction to which CP&L and/or NCNG is involved and which is subject to PUHCA, that PUHCA in any way preempts the NCUC from (a) exercising such authority as it may have under North Carolina law to mandate, approve or otherwise regulate a transfer of assets by or to CP&L and/or NCNG, or (b) scrutinizing and establishing the value of the asset transfers for purposes of determining the rates for services rendered to CP&L's and/or NCNG's customers. Should any other entity so assert, CP&L, NCNG, Holdings or other Affiliates shall not support any such assertion and shall, upon learning of such assertion, so advise and consult with the NCUC and the Public Staff regarding such assertion.

(13) With respect to the Affiliate transactions, asset transfers, and financings described in the preceding conditions, CP&L, NCNG, Holdings and any Affiliates thereof shall bear the full risk of any preemptive effects of PUHCA. The previous sentence includes, but is not limited to, agreement by CP&L, NCNG, Holdings, and all Affiliates to take all such actions as may be reasonably necessary and appropriate to

hold North Carolina ratepayers harmless from rate increases, foregone opportunities for rate decreases or other effects of such preemption. Such actions include, but are not limited to, filing with and obtaining approval from the SEC of such commitments as the NCUC deems reasonably necessary to prevent such preemptive effects.

(14) If PUHCA is amended or replaced by future legislation, representatives of CP&L, NCNG and Holdings shall meet with the Public Staff promptly after the passage of such legislation and negotiate in good faith whether and how these conditions have been affected by such legislation and whether they should be revised or removed. In the event the parties are unable to reach agreement within a reasonable time after passage of such legislation, the unresolved issues shall be submitted to the NCUC for resolution.

(15) CP&L and NCNG shall file with the NCUC, and provide a copy to the Public Staff, a copy of all applications, reports, or other documents filed with the SEC under PUHCA by Holdings, any Service Company, the Utilities, other Affiliates, and/or a Nonpublic Utility Operation. CP&L and NCNG also shall file with the NCUC all orders issued by the SEC that directly or indirectly affect any of the Utilities' accounting practices, financings, or operations, and/or transfer prices or allocations affecting the Utilities.

(16) Unless explicitly superseded by the conditions contained herein, the conditions agreed to by CP&L and NCNG, and ordered by the NCUC, in Docket Nos. E-2, Sub 740, and G-21, Sub 377, remain in full force and effect.

(17) All costs of the Formation and all direct and indirect corporate cost increases, if any, attributable to the Formation shall be excluded from each of the Utilities' utility accounts, and also shall be excluded from its utility costs, for all purposes that affect its regulated retail utility rates and charges. For purposes of this condition, the term "corporate cost increases" is defined as costs in excess of the level that each of the Utilities (a) would have incurred using prudent business judgment, or (b) would have had allocated to it, had the Formation not occurred. "Corporate cost increases" shall also include any payments made under change-of-control agreements, salary continuation agreements, and/or other severance- or personnel-type arrangements that are reasonably attributable to the Formation.

(18) Subject to future orders of the NCUC, and to the extent they affect the Utilities' costs of providing public utility service, all administrative and general expenses of Holdings, the Utilities, other Affiliates, and the Nonpublic Utility Operations shall be distributed for North Carolina retail ratemaking purposes by either direct assignment, allocation, or such other means as the NCUC may determine are necessary to assure that the relationships between and among Holdings, the Utilities, other Affiliates, and the Nonpublic Utility Operations are consistent with the Code of Conduct approved by the NCUC (or any subsequent replacement thereof).

(19) Each of the Utilities shall file a cost allocation manual with the NCUC within nine months after the Formation. Each cost allocation manual shall describe how all direct, indirect, and other costs will be charged to capital projects, Holdings, any of the other Utilities, other Affiliates, and/or the Nonpublic Utility Operations. In that connection, each of the Utilities will perform a detailed review of the common costs to be allocated and allocation factors to be used. Within nine months after the Formation, the Utilities shall each provide a list of items considered to be the shared services of the Utilities and the basis for each determination. If the organization of any of the Utilities' public utility operations changes, the affected Utilities will file with the NCUC any resulting changes to their cost allocation manuals.

(20) Within nine months after the Formation, the Utilities shall file with the NCUC a cost allocation manual for each Service Company, any Affiliate, or Nonpublic Utility Operation providing goods and services to any of the Utilities, and for Holdings, should Holdings provide any such goods or services. Each cost allocation manual shall describe how all direct, indirect, and other costs of such provider of goods and services will be charged between and among Holdings, each of the Utilities, other Affiliates, and the Nonpublic Utility Operations, and shall include a detailed review of the common costs to be allocated and the allocation factors to be used. On or prior to the date each such cost allocation manual is filed, each of the Utilities shall file a list of the services and goods that are provided or are anticipated to be provided shortly thereafter by a Service Company, other Affiliate, Holdings, or a Nonpublic Utility Operation. None of the Utilities shall commit to any cost allocation that would result from any changes to such cost allocation manual or list of services and goods until ten days after they have filed such changes with the NCUC. If the organization of any of the Utilities changes, the affected Utilities will promptly file with the NCUC any resulting changes to any affected cost allocation manual.

(21) The Utilities are required to seek out and buy all goods and services from the lowest cost provider of comparable goods and services. To this end, each of the Utilities must conduct periodic market price studies for goods and services it receives from Holdings, any Service Company, another Affiliate, or a Nonpublic Utility Operation, which allows assessment of whether it could have acquired the services at a lower market cost from nonaffiliated providers, or whether it could have provided the service itself at lower cost.

(22) Whenever requested by the Public Staff, one or more of the Utilities shall meet and consult with the Public Staff regarding plans for significant changes in their organization and structure, the impact of such plans on their rates, operations, and service, and proposals for assuring that such plans do not adversely affect their North Carolina regulated electric customers. If one or more of the Utilities is planning or considering such changes, the affected Utilities shall notify the Public Staff in writing.

(23) Any affected Utilities shall file notice with the NCUC 90 days prior to the initial transfer or any subsequent significant transfer of any services, functions, departments,

employees, rights, obligations, assets, or liabilities from any of the Utilities to a Service Company, Holdings, another Affiliate, or a Nonpublic Utility Operation.

(24) The Utilities shall each file annual reports of affiliated transactions with the NCUC in a format prescribed by the NCUC. The first reports on affiliated transactions shall be filed on March 31, 2001, for activity through December 31, 2000, and annually thereafter on March 31.

(25) Transactions between and among each of the Utilities, Holdings, other Affiliates, and the Nonpublic Utility Operations shall be reviewed regularly by the Utilities' internal auditors. The Utilities shall make available for review by the Public Staff and the NCUC all workpapers relating to these internal audits and all other internal audit workpapers, if any, related to affiliate transactions, and shall not oppose Public Staff and NCUC requests to review relevant external audit workpapers.

(26) CP&L will file with the NCUC revisions to its electric cost of service manual to reflect any changes to the cost of service determination process made necessary by the Formation, any subsequent alterations in the organizational structure of Holdings, the Utilities, other Affiliates, or the Nonpublic Utility Operations, or other circumstances that necessitate such changes.

(27) In accordance with North Carolina law, the NCUC and the Public Staff will continue to have access to the books and records of each of the Utilities, Holdings, other Affiliates, and the Nonpublic Utility Operations.

(28) The revenues from certain CP&L electric utility wholesale transactions are (a) allocated in part to CP&L's North Carolina retail operations in CP&L's North Carolina retail cost of service study and/or (b) treated in part as a credit to jurisdictional fuel expenses in CP&L's annual North Carolina retail fuel proceedings. To the extent commitments to CP&L's wholesale customers relating to the Formation are made by or imposed upon CP&L, the effects of which serve to increase the North Carolina retail cost of service and/or North Carolina retail fuel costs under reasonable cost allocation practices traditionally followed by CP&L and approved by the NCUC, those effects shall not be recognized for North Carolina retail cost of service or ratemaking purposes.

(29) For North Carolina electric retail cost of service/ratemaking purposes, wherever such costs would affect the determination of Harris Purchased Capacity and Energy Costs calculated pursuant to CP&L's Power Coordination Agreement (PCA) with the North Carolina Eastern Municipal Power Agency (NCEMPA):

(a) all costs of the Formation and all direct and indirect corporate cost increases, if any, attributable to the Formation shall be excluded from CP&L's utility accounts and/or costs. For purposes of this condition, the term "corporate cost increases" is defined as costs in excess of the level that CP&L (i) would have incurred using prudent business judgment or (ii) would have had allocated to it, had the Formation not occurred. "Corporate cost increases" shall also include any payments made under change-of-control agreements, salary continuation agreements, and/or other severance- or personnel-type arrangements that are reasonably attributable to the Formation; and

(b) subject to future orders of the NCUC, all administrative and general expenses of Holdings, the Utilities, other Affiliates, and the Nonpublic Utility Operations shall be distributed for North Carolina retail ratemaking purposes by either direct assignment, allocation, or such other means as the NCUC may determine are necessary to assure that the relationships between and among CP&L, Holdings, other Affiliates, and the Nonpublic Utility Operations are consistent with the Code of Conduct approved by the NCUC (or any subsequent replacement thereof).

(30) The Utilities, other Affiliates, the Nonpublic Utility Operations, and Holdings shall be bound by the Code of Conduct approved by the NCUC. The Code shall be considered the minimum conditions to which the Holding Company System is agreeing and shall not preclude the NCUC from amending the Code later to incorporate additional conditions. If necessary, the Code will be modified if there is a change in the organizational structure of Holdings, the Utilities, other Affiliates, and/or the Nonpublic Utility Operations, changes in the structure of the electric or natural gas industry, or if other changes occur that warrant such amendments.

(31) Each of the Utilities will continue to take steps to implement and further its commitment to providing superior public utility service to North Carolina retail customers following the Formation. CP&L and NCNG will work with the Public Staff to continue to monitor and improve service quality in the manner required by the merger conditions set forth in Docket Nos. E-2, Sub 740, and G-21, Sub 377.

(32) With respect to the voluntary transfer by any of the Utilities, Holdings, another Affiliate, and/or a Nonpublic Utility Operation to Holdings, one of the Utilities, another Affiliate, and/or a Nonpublic Utility Operation of the control or ownership of any asset or portion thereof used (i) for the generation, transmission, distribution, or other provision of NCUC-regulated electric power and/or service to customers in North Carolina, (ii) for the transmission, distribution or other provision of NCUC-regulated natural gas service to customers in North Carolina, or (iii) for the provision of NCUC-regulated telecommunications services to customers in North Carolina:

(a) the entity whose asset or assets are the subject of a proposed transfer shall file an application for approval with the NCUC at least 90 days in advance of the proposed transfer; and

(b) the Utilities, Holdings, other Affiliates, and/or the Nonpublic Utility Operations shall not commit to or carry out such a transfer except in accordance with North Carolina law and the rules, regulations and orders of the NCUC promulgated thereunder.

(33) CP&L's Nuclear Decommissioning funds shall not be used in full or in part for the purpose of the Formation or any other purpose other than providing financial assurance for decommissioning the Harris, Brunswick, and Robinson nuclear power stations owned by CP&L.

(34) Holdings, the Utilities, other Affiliates, and the Nonpublic Utility Operations shall keep their respective accounting books and records on an on-going basis in a manner that will allow all components of the cost of capital to be identified easily and clearly for each of the Utilities on separate bases.

(35) To the extent the cost rates of any of the Utilities' long-term debt (more than one year), short-term debt (one year or less) or preferred stock are or have been adversely affected by the transfer of ownership, through a downgrade or otherwise, a replacement cost rate to remove the effect will be used for all purposes affecting any of the Utilities' rates and charges. This replacement cost rate will be applicable to all financings, refundings, and refinancings. This procedure will be effective through each Utility's next general rate case. As part of each Utility's next general rate case, any future procedure relating to a replacement cost calculation will be determined. This condition does not indicate a preference by any party for any specific debt rating or preferred stock rating for any of the Utilities on current or prospective bases.

(36) Each Utility will identify as clearly as possible long-term debt (of more than one year duration) issued by the respective utility, with either (a) the assets that are or will be utilized to provide service to the respective Utility's regulated utility customers or (b) the respective Utility's existing debt to be replaced with the new debt issuance.

(37) The cost of capital conditions included elsewhere herein shall also apply, for North Carolina retail cost of service/ratemaking purposes, in all instances in which the cost of capital affects the determination of Harris Purchased Capacity and Energy Costs calculated pursuant to CP&L's PCA with NCEMPA.

(38) The cost of capital conditions also will apply to each respective Utility's determination of its maximum allowable AFUDC rate, the rate of return applied to any of the Utility's deferral accounts and regulatory assets and liabilities that accrue a return, and any other component of the Utility's cost of service impacted by the cost of debt and/or preferred stock. NCNG will continue to apply an interest rate of 10% to its Deferred Gas Cost and Price Sensitive Volume Adjustment Accounts.

(39) With respect to all financings, the following shall apply:

(a) For all types of financings (i) for which the Utilities and/or their subsidiaries are the issuers of the respective securities and (ii) from which any proceeds will be made available to the Utilities and/or their subsidiaries, the Utilities and/or their subsidiaries shall request approval from the NCUC in accordance with G.S. 62-160 through G.S. 62-169 and NCUC Rule R1-16. Generally, the format of these filings should be consistent with past practices. A "shelf registration" approach (similar to Docket No. E-2, Sub 738) may be requested.

(b) For all financings for common stock plans that involve the monthly, quarterly, or other periodic issuances of common stock for dividend reinvestment, direct purchase, employee incentives, and/or other similar programs, Holdings, the Utilities and/or their Affiliates shall request approval from the NCUC in accordance with G.S. 62-160 through G.S. 62-169 and NCUC Rule R1-16. Generally, the format of these filings should be consistent with past practices.

(c) For all major common stock and any preferred stock, debt, and other financings (i) for which Holdings and/or its other Affiliates (not the Utilities and/or their subsidiaries) are the issuers, (ii) from which the Utilities and/or their subsidiaries receive funds, and (iii) that involve an effect on the respective Utility's rates and services, Holdings and/or its other Affiliates (not the Utilities and/or their subsidiaries) shall request approval from the NCUC in accordance with G.S. 62-160 through G.S. 62-169 and NCUC Rule R1-16.

(d) For all major common stock and any preferred stock, debt, and other financings (i) for which Holdings and/or its other Affiliates (not the Utilities and/or their subsidiaries) are the issuers, (ii) from which the Utilities and/or their subsidiaries receive funds, and (iii) that will not involve an effect on the respective Utility's rates and services, Holdings and/or its other Affiliates shall file with the NCUC the following: advance notification and a demonstration that such a financing will not affect the respective Utility's rates and services. Such demonstration shall be filed by a date that allows at least 30 days for review by the NCUC and the Public Staff.

(e) For all major common stock and any preferred stock, debt, and other financings (i) for which Holdings and/or its other Affiliates (not the Utilities and/or their subsidiaries) are the issuers and (ii) from which no proceeds will be made available to the Utilities or their subsidiaries, Holdings and/or its other Affiliates (not the Utilities and/or their subsidiaries) shall file with the NCUC the following: advance notification and a demonstration that such a financing will not affect any Utility's rates and services. Such demonstration shall be filed by a date that allows at least 30 days for review by the NCUC and the Public Staff.

(f) All securities issuances or financings that are associated with a merger, acquisition, or combination must be filed in conjunction with the information requirements (application or demonstration of no effect) and deadlines stated in Regulatory Condition 41.

(40) These conditions do not supersede any orders or directives that have been or will be issued by the NCUC regarding the issuance of specific securities by the Utilities. Any issuance of securities in conjunction with the establishment of Holdings does not

restrict the NCUC's right to review, and if deemed appropriate, adjust the respective Utility's cost of capital for ratemaking purposes for the effect of these securities.

(41) For all proposed mergers, acquisitions, or combinations involving Holdings, the Utilities, and/or other Affiliates, advance notification shall be filed with the NCUC within ten days of the signing of a contract, letter of intent, or other form of agreement and at least 180 days prior to the proposed closing date for the proposed merger, acquisition, or combination. For a merger, acquisition, or combination that is believed to have an effect on any of the Utilities, an application for approval pursuant to G.S. 62-111 shall be filed at least 180 days prior to the closing date for a merger, acquisition, or combination. For a merger, acquisition, or combination that is believed to have no effect on any of the Utilities, a demonstration of no effect shall be filed at least 180 days prior to the closing date for a merger, acquisition, or combination.

(42) Consistent with North Carolina law, for any acquisition, combination or merger by or involving Holdings, a Utility, one of more of the other Affiliates, one or more of the Nonpublic Utility Operations, or another entity within the Holding Company System over which the NCUC has jurisdiction, the NCUC will have full authority to consider and reflect appropriately any cost savings, synergies, and/or other benefits, as well as take appropriate action with respect to any potential harm, to North Carolina customers resulting from such acquisition, combination, or merger.

(43) The Utilities agree that the benefits, costs, and associated risks of the Formation and the operation of the Utilities under a holding company structure will continue to be subject to NCUC review as part of this docket or other proceedings. The NCUC retains the right to order modifications to the structure or operations of Holdings, any Service Company, another Utility, another Affiliate, and/or a Nonpublic Utility Operation providing goods or services to the Utilities, and/or to take whatever action the NCUC deems necessary to protect the Utilities' North Carolina regulated customers.

(44) Any approval by the NCUC of the transfer of the Utilities to Holdings shall not be considered, cited, or argued to constitute any finding or predisposition by the NCUC that it is in the public interest for any future diversification, expansion, acquisition, combination, merger, or transfer of control by or involving Holdings, any Affiliate, any Nonpublic Utility Operations, or other entity within the Holding Company System to occur.

(45) Neither Holdings, the Utilities, nor any other Affiliate shall assert, with respect to Holdings' acquisition of Florida Progress Corporation, that any party has waived its right in the merger proceeding to pursue cost savings, if any, that may be realized by the creation of Holdings and the transfer to it of the Utilities. Further, if no application is filed with the NCUC for approval of the Florida Progress merger within six months of any NCUC order approving the transfer of the Utilities to Holdings, then neither Holdings, the Utilities, nor any other Affiliate shall object to the NCUC

initiating a proceeding to investigate the amount, if any, of cost savings realized by the Utilities as a result of the creation of Holdings and the transfer of the Utilities thereto.

2. That the Code of Conduct attached hereto as Appendix A, is hereby approved, and CP&L, Interpath and NCNG are hereby ordered to comply therewith.

ISSUED BY ORDER OF THE COMMISSION.
This the 17th day of May, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mz051700.04
(Please contact the Chief Clerk's Office for a copy of Appendix A.)
Commissioner Sam J. Ervin, IV concurs.

DOCKET NO. E-2, SUB 753
DOCKET NO. P-708, SUB 5
DOCKET NO. G-21, SUB 387

COMMISSIONER SAM J. ERVIN, IV, CONCURRING:

Although I agree with the ultimate result reached by the majority and much of its reasoning, I write separately to indicate my limited disagreement with the majority's reasoning and the basis for my conclusion that the result reached by the majority is consistent with the relevant provisions of the Public Utilities Act.

The standard which the Commission must apply in determining whether to approve establishment of the proposed holding company is set out in G. S. 62-111(a), which provides that "[n]o franchise now existing . . . shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity." At times when the Commission "is adjudging public convenience and necessity in the context of proposed transfers . . . under G. S. 62-111(a), it must inquire into all aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the proposed transfer will serve the public convenience and necessity." State ex rel. Utilities Commission v. Village of Pinehurst, 99 N.C. App. 224, 229, 393 S.E. 2d 111 (1990), aff'd 331 N.C. 278, 415 S.E. 2d 199 (1992). Although the public convenience and necessity "is a relative or elastic theory rather than an abstract or absolute rule" and must be determined by analyzing "[t]he facts in each case," State ex rel. Utilities Commission v. Casey, 245 N.C. 297, 302, 96 S.E. 2d 8 (1957), the fact that "a proposed transfer will not adversely affect service to the public" "cannot be a sufficient condition for satisfying the . . . public convenience and necessity test under" G. S. 62-111(a). Village of Pinehurst, 99 N.C. App.

at 228. As a result, the Commission cannot approve establishment of the proposed holding company without determining that the benefits to the public resulting from that action, either as originally proposed or as conditioned, outweigh any potential harm to the public relating to the proposed transaction.

The majority has decided in approving the creation of the proposed holding company that "the benefits testified to by the Applicants' Witnesses, particularly that the holding company structure may simplify Commission oversight of the Applicants' regulated operations, in conjunction with Regulatory Conditions 43 and 44 agreed to by the Applicants, provide ample support for the adoption of the proposed holding company structure while offsetting the potential harms and risks." Although I agree that the record provides adequate support for approval of the proposed holding company, I am concerned about the appropriateness of the majority's reliance upon all of "the benefits testified to by the Applicants' Witnesses," which include such considerations as the perceived necessity for further diversification, the perceived need for CP&L to participate in future mergers, and similar factors. As I understand the relevant statutory language, our decision to approve or disapprove a particular transfer should depend upon definite information which is currently in the Commission's possession. The present application has not been coupled with any specific merger approval application or similar proposal. Without more definite information than is contained in the present record, I cannot conclude that facilitating future merger activity or additional diversification would serve the public convenience and necessity. Thus, I am unable to concur in the majority's decision to approve the creation of the proposed holding company on the basis, at least in part, of the alleged benefits of some future merger or diversification program, the merits of which I am simply not in a position to evaluate at this time.

The only issue which is ripe for decision by the Commission is whether the creation of the proposed holding company, considered in the light of current conditions, would serve the public convenience and necessity. As a result, the Commission's decision in this case must hinge upon a balancing of the potential ill effects of the proposed transaction, if any, against the benefits which will result from approval of the proposed transaction under current conditions, if any. The only potential harms which any party has identified as likely to flow from the creation of the proposed holding company are the risk of federal preemption arising from the impact of the Public Utility Holding Company Act and certain alleged accounting and cost of capital determination problems. The principal benefit which would allegedly stem from the creation of the proposed holding company at the present time is the enhanced corporate accounting and financing flexibility described by the Applicants' witnesses. As a result, the proper resolution of this proceeding must depend upon the relative weight one believes should be assigned to these considerations.

The potential harms claimed for the proposed transaction, considered in conjunction with the conditions proposed by the Applicants and the Public Staff, do not strike me as entitled to overwhelming weight. Although the danger of federal preemption of the Commission's regulatory powers under the Public Utility Holding Company Act is a legitimate concern, the regulatory conditions proposed by the Public Staff and accepted by the Applicants are comprehensive and appear to do everything possible to preserve the Commission's regulatory authority. As a result, unless one believes that the mere risk of federal preemption, standing alone, justifies rejection of the proposed transfer, which is a position that I do not accept, one should not give the risk of federal preemption undue weight in the decision of this matter. The claimed difficulty of making proper accounting allocation and cost of capital determinations does not strike me as entitled to significant weight in the ultimate balance either. The same essential accounting and cost of capital determination issues exist under CP&L's current corporate structure; for that reason, I do not believe that the creation of the proposed holding company is likely to increase the severity of these perceived problems and could well have the opposite effect. Thus, I do not believe that either of the potential harms identified in the record are entitled to a great deal of weight in the ultimate balancing process.

I do, however, believe that the accounting and financing flexibility described by the Applicant's witnesses is entitled to material weight in the ultimate balancing process. Although CP&L and its subsidiaries are required to allocate costs at the present time, I am satisfied that the adoption of the proposed holding company structure will facilitate more accurate and understandable review of the relevant corporate accounting decisions. Similarly, I believe that the adoption of the proposed holding company structure will, at least in this instance, improve the parent corporation's overall ability to provide financing for both regulated and unregulated subsidiaries in an appropriate and cost-effective manner. Finally, I agree that a greater reliance upon legally separate entities will facilitate improved intra-corporate accountability and permit a better evaluation of the success (or lack thereof) of each of the businesses in which the Applicants are currently engaged. Although I agree that many of the steps which may be taken to achieve these ends following the creation of the proposed holding company are possible under the Applicants' current corporate structure and although I am certainly not persuaded that the establishment of a holding company would invariably be in the public interest, I am, on balance, persuaded that the holding company structure proposed here would facilitate implementation of the accounting and financing improvements described by the Applicants' witnesses to a greater extent than would be the case under the existing corporate structure.

The ultimate balancing of these various considerations is a difficult process. In other words, this is a very close case. At bottom, however, I am satisfied that the organizational benefits outlined above outweigh the potential harms described in the record, particularly given the comprehensive conditions proposed by the Public Staff and agreed to by the Applicants. As a result, I concur in the Commission's decision to approve the creation of the proposed holding company without completely concurring in the reasoning adopted by the majority.

\s\ Sam J. Ervin, IV
COMMISSIONER SAM J. ERVIN, IV

DOCKET NO. G-44, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Application of Albemarle Pamlico Economic Development Corporation and Carolina Power & Light Company for a Certificate of Public Convenience and Necessity to Operate as a Local Distribution Natural Gas Company in the 14 Unserved Counties in Eastern North Carolina, the Exclusive Franchises to Provide Natural Gas Service to these Counties, and Natural Gas Bond Funds to Pay for the Uneconomic Portion of the Project	ORDER GRANTING CERTIFICATE AND APPROVING USE OF BOND FUNDS

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on Wednesday, April 12, 2000, at 9:30 a.m.

BEFORE: Chair Jo Anne Sanford, Presiding, and Commissioners Ralph A. Hunt, Judy Hunt, William R. Pittman, J. Richard Conder, and Sam J. Ervin, IV

APPEARANCES:

For Albemarle Pamlico Economic Development Corporation:

Thomas P. Nash, IV, Trimpi, Nash, & Harmon, 200 N. Water Street, Elizabeth City, North Carolina 27909

For Carolina Power & Light Company and Eastern North Carolina Natural Gas Company, LLC:

Bentina Chisolm, Associate General Counsel, Post Office Box 1551, Raleigh, North Carolina 27602

For North Carolina Electric Membership Corporation:

Thomas K. Austin, Associate General Counsel, 3400 Summer Boulevard, Raleigh, North Carolina 27616

For Weyerhaeuser Corporation:

Benjamin R. Kuhn, Kilpatrick Stockton, 3737 Glenwood Avenue, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Gisele L. Rankin, Staff Attorney, Public Staff-North Carolina Utilities Commission, Post Office Box 29520, Raleigh, North Carolina 27626-0520

NATURAL GAS - CERTIFICATE

BY THE COMMISSION: On August 10, 1999, Carolina Power & Light Company (CP&L) and the Albemarle Pamlico Economic Development Corporation (APEC) filed a letter of intent to seek natural gas bond funds to extend natural gas service to 14 counties in Eastern North Carolina. The Commission issued an order scheduling proceedings on the letter of intent.

On October 26, 1999, CP&L and APEC filed an application requesting (1) a certificate of public convenience and necessity to own and/or operate natural gas facilities as a public utility in the counties of Currituck, Camden, Pasquotank, Gates, Perquimans, Chowan, Washington, Tyrrell, Dare, Hyde, Pamlico, Jones, Carteret and Pender; (2) the exclusive franchises to provide natural gas service in these counties; and (3) sufficient natural gas bond funds to pay for the uneconomic portion of a proposed project to serve these 14 unserved counties. The testimony of Robert F. Caldwell and Jimmie Dixon was filed along with the application. As originally filed, the total cost of such a project was estimated to be $197.5 million, and its negative net present value (NPV) was estimated to be $186 million.

On December 6, 1999, the Commission issued an order scheduling the application for hearing in Raleigh on April 12, 2000. The order established a procedural schedule leading up to the hearing and required CP&L and APEC to provide public notice. Both the order and the notice provided that the April 12 hearing would only consider bond funds for the first phase of the proposed project, which would serve Currituck, Camden, Pasquotank, Gates, Perquimans, and Chowan Counties (hereinafter referred to as Phase One). CP&L filed the affidavits of publication on March 28, 2000.

By a petition dated December 16, 1999, Carolina Utility Customers Association, Inc. (CUCA), sought to intervene, which was allowed by the Commission. Weyerhaeuser Corporation (Weyerhaeuser), North Carolina Electric Membership Corporation, and Columbia Gas Transmission Corporation filed petitions to intervene on January 14, February 10, and February 15, 2000, respectively. These were allowed. The intervention of the Public Staff was noted pursuant to Commission Rule R1-19(e).

A motion to amend the application was filed on March 21, 2000, in order to substitute a limited liability company (LLC) as the applicant for both the certificate and the gas bond funds. The amended application indicated that the LLC, composed of APEC and CP&L as the only members, would be the sole owner of the certificate of public convenience and necessity and the sole applicant for gas bond funds. The LLC was subsequently identified as Eastern North Carolina Natural Gas Company, LLC (Eastern). The motion also sought to amend the application to revise certain calculations in order to estimate the total cost of the project at $203.1 million and the negative NPV at $195.6 million. The negative NPV of Phase One was estimated at $51.2 million.

On April 3, 2000, the Public Staff filed the joint testimony and exhibits of Eugene H. Curtis, Jr., Director, Natural Gas Division; Thomas W. Farmer, Jr., Director, Economic Research Division; and James G. Hoard, Supervisor, Natural Gas Section, Accounting Division. Weyerhaeuser filed the testimony of Carl W. West, on April 3, 2000.

CP&L filed a motion on April 3, 2000, for reconsideration of the Commission's order allowing CUCA to intervene, arguing that CUCA lacks standing in this proceeding. CUCA filed a response on April 5, 2000. On April 6, 2000, CP&L filed a response to CUCA's response. The

Commission set CP&L's motion for reconsideration for oral argument and subsequently granted CP&L's motion and denied CUCA's petition to intervene.

CP&L filed a statement on April 5, 2000, clarifying that while the applicants were only asking the Commission to award them $51.2 million in gas bond funds at this time for the first phase of the project, they were requesting that the Commission reserve for their exclusive use an additional $144.4 million, for a total of $195.6 million.

On April 10, 2000, the joint rebuttal testimony of Robert F. Caldwell and John F. Hughes, Jr., was filed. Attached to that testimony were the executed agreement forming Eastern and the executed construction, operation and maintenance agreement between CP&L and Eastern.

The case was heard as scheduled on April 12, 2000. The motion to amend the application was allowed. Public witnesses included Norma Mills, General Counsel to Senator Marc Basnight, who delivered his comments for the record, and Representative William C. Owens, Jr., who represents Currituck, Camden, and Pasquotank Counties, and part of Perquimans County in the General Assembly.

Eastern presented the testimony of Robert F. Caldwell and John F. Hughes, Jr. Witness Hughes adopted the prefiled testimony of Jimmie Dixon. The Public Staff presented the testimony of Eugene H. Curtis, Jr., Thomas W. Farmer, and James G. Hoard as a panel. Without objection, Weyerhaeuser submitted the testimony of Carl W. West by an affidavit.

Based on the application and amended application, the testimony and exhibits received into evidence at the hearing, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. CP&L is an public utility under the laws of North Carolina generating, transmitting and distributing electric power in its service territory in North Carolina. In addition to other utility and non-utility businesses, CP&L owns North Carolina Natural Gas Corporation (NCNG), a natural gas public utility providing natural gas service to a number of counties in Eastern North Carolina.

2. APEC is a North Carolina non-member, non-profit, tax-exempt corporation created to encourage infrastructure and economic development in Eastern North Carolina, including the provision of natural gas service to the 14 counties in Eastern North Carolina that do not have any natural gas service at this time.

3. Eastern has been substituted as the applicant for both the certificate of public convenience and necessity and gas bond funds requested in this docket. Eastern is an LLC composed of CP&L and APEC as the only members. Eastern will be the sole owner of the certificate, the sole recipient of gas bond funds, and the exclusive provider of natural gas service in the 14 counties.

4. CP&L should form a separate company no later than December 31, 2000, to hold its membership in Eastern, and the separate company's operations should be segregated from CP&L's electric utility business and NCNG's natural gas utility business. Prompt implementation of adequate

cost allocation and record keeping procedures by CP&L, CP&L's separate company, and Eastern is necessary to ensure adequate regulatory oversight of regulated operations and to ensure that costs are properly tracked.

5. Eastern requests a certificate of public convenience and necessity to own and/or operate natural gas facilities as a public utility in the counties of Currituck, Camden, Pasquotank, Perquimans, Chowan, Gates, Washington, Hyde, Tyrrell, Dare, Pamlico, Jones, Carteret and Pender. The Commission's order of December 6, 1999, scheduled a hearing on the request for a certificate for all 14 counties.

6. The county, municipal and business leaders of these 14 counties desire natural gas service and view the addition of natural gas infrastructure in their area as vital to economic growth. There is a need for natural gas service in the area. The extension of natural gas infrastructure into North Carolina's unserved counties has long been the focus of efforts by the General Assembly, the Commission and the Public Staff.

7. Eastern has the ability to contract for the installation of the proposed natural gas system, to maintain, repair and operate it reliably, to meet all safety requirements, to finance the system on reasonable terms, and to obtain adequate, reliable and reasonably priced interstate capacity and gas supplies. Eastern has met the Commission's standards for receiving a certificate of public convenience and necessity.

8. It is in the public interest for Eastern to construct, own, and operate, or otherwise make arrangements for the construction and operation of, natural gas facilities to serve Currituck, Camden, Pasquotank, Gates, Perquimans, Chowan, Washington, Tyrrell, Dare, Hyde, Pamlico, Jones, Carteret and Pender Counties. Accordingly, Eastern should be granted a certificate of public convenience and necessity for the 14-county area and the exclusive right to provide natural gas service within these counties.

9. The Commission's order of December 6, 1999, provided that the April 12 hearing would consider the amount of gas bond funds to be approved for only Phase One of the proposed project, which involves the six northeastern counties of Currituck, Camden, Pasquotank, Gates, Perquimans, and Chowan. The appropriate amount of gas bond funds to be approved for the remaining eight counties not contained in Phase One is therefore beyond the scope of the present decision.

10. The six counties that are the subject of Phase One do not have any natural gas service and are "unserved areas" as that term is used in G.S. 62-2(9), G.S. 62-159, and Commission Rule R6-90.

11. Only economically infeasible projects can be approved for use of gas bond funds pursuant to G.S. 62-159, and an economically infeasible project is defined as one with a negative NPV. Phase One is economically infeasible in that additional funds are required in order for it to have an NPV of zero.

12. Phase One, as originally proposed, involved the construction of a 12-inch pipeline from Ahoskie to Colerain and then two miles across the Chowan River. Due to concerns about cost and environmental permitting delays, the Public Staff developed an alternative route. The Public Staff recommended that a ten-inch pipeline be constructed beginning at an interconnect with the 16-inch pipeline owned by NCNG at Tunis and proceeding to Winton and then along Route 13/158 across the Chowan River into Gates County. The river crossing at Route 13/158 is approximately one-fourth of a mile wide. The alternative route costs approximately $2.2 million less than the route proposed by Eastern and has less potential for environmental delays.

13. The Public Staff recommended that the diameter of the steel pipe for the mainline between Smalls Crossroads and Elizabeth City should be reduced from Eastern's proposed ten inches to eight inches and that the mainline between Elizabeth City and Camden should be reduced from Eastern's proposed eight inches to six inches. Downsizing the mainline reduces construction costs by approximately $1.8 million. The Public Staff's recommended system design for Phase One provides adequate capacity to support economic development over the long-run to the areas of the six counties with the best prospects for economic development.

14. Project development costs of $1.1 million, including approximately $55,000 of legal and engineering costs incurred by APEC's predecessor organization, Albemarle Regional Energy Authority (AREA), are appropriately incorporated in the cost of constructing the system for purposes of determining the negative NPV of Phase One.

15. The estimated cost of constructing the transmission and distribution system for Phase One (excluding the cost of service attachments) as approved herein is $44.3 million. Including an additional $1.5 million for inflation and project development costs, the total cost of the natural gas infrastructure for Phase One is $45.8 million.

16. The NPV studies performed by Eastern and the Public Staff differ with respect to following assumptions: the inflation rate, how inflation is applied to cash flows, the tariff rates for residential service, the margins on deliveries to large users that use heavy oil as an alternative fuel, the conversion schedule for small customers, the discount rate, and the inclusion of APEC economic development costs.

17. The appropriate inflation rate to incorporate in the NPV study is 2.2%. The inflation rate of 2.2% should be applied to all cash flow items reflected in the NPV study as recommended by the Public Staff.

18. The tariff rates for residential service recommended by the Public Staff are reasonable and appropriate and should be incorporated into the NPV study.

19. The appropriate *margin* rate to reflect in the NPV study for large users that use heavy oil as an alternative fuel is $.35 per dekatherm.

20. The small customer conversion schedule recommended by Eastern is reasonable and should be incorporated into the NPV study.

21. The appropriate discount rate to utilize in the NPV study is 8.69%. The discount rate is based on a capital structure composed of 47% debt and 53% common equity with a cost rate of 8% for debt and a return on equity of 12.1%.

22. It is not appropriate to include any APEC economic development costs in the NPV study.

23. It is appropriate to waive the 75% limit on reimbursements in Commission Rule R6-92(b) and to reimburse Eastern 100% of its actually incurred costs up to the negative NPV approved for Phase One. Construction activity should be carefully monitored to ensure that construction occurs in such a way that partial completion would still result in a fully functioning system.

24. Eastern and the Public Staff shall calculate the negative NPV of Phase One, and thus the amount of gas bond funds to be awarded, by incorporating the above decisions into a new NPV study, assuming that the bond proceeds will not be considered taxable income, and shall file the results thereof within five days. The Commission will issue a further order upon receipt of the results of the calculation, contingent only upon the issue of whether the bond funds will be taxable.

25. If the bond fund proceeds are considered taxable income, the negative NPV will be more than if they are not considered taxable. Eastern shall keep the Commission informed as to its progress in securing a private letter ruling from the IRS and shall file the ruling with the Commission upon receipt. A further order setting forth the final negative NPV and final gas bond award amount will be necessary after Eastern has filed the ruling.

26. The Purchased Gas Adjustment Procedures (Rider A) proposed by Eastern, with the exception of the negotiated loss provisions, are appropriate and should be implemented. The initial fixed gas cost collection rates approved for Eastern in connection with Rider A are as follows:

Residential	\$1.5605
Small General Service	\$1.2025
Large General Service - Firm	\$0.7033
Large General Service - Interruptible	\$0.4893

27. Eastern shall not implement a Weather Normalization Adjustment mechanism at this time.

28. The Economic Variances Regulated Assets Procedures (Rider C) proposed by Eastern shall not be implemented. Instead, Eastern is authorized to defer the total amount of operations and maintenance (O&M) expenses incurred during the first eight years of operations or until the first rate case order, whichever occurs first, and the total amount of deferred O&M expenses for Phase One of the project is capped at $8 million. Interest shall be accrued on the account at the annual rate of 8.69%.

29. Eastern shall be encouraged to pursue an arrangement with Virginia Natural Gas Company (VNG). If Eastern is successful in entering into such an agreement, Eastern shall remit

75% of the margins above its incremental costs (including a reasonable return on investment) on such transactions to the State's gas bond fund for use on future natural gas expansion projects.

30. Eastern may file for approval to use bonds funds for the remaining phases of its proposed project after applying the above NPV decisions and submitting proof as to why its proposed routes and designs are most economical, including a new study of alternatives for providing natural gas service to the remaining Eastern counties. The Commission will evaluate such filings in accordance with the proper view of the evidence submitted by all parties and the applicable law.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 1 AND 2

The evidence supporting these findings of fact is contained in the application and amended application and is uncontroverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 3

The evidence supporting this finding of fact is contained in the testimony and exhibits of Eastern witnesses Caldwell and Hughes (Eastern Panel) and in the testimony of Public Staff witnesses Curtis, Farmer, and Hoard (Public Staff Panel).

According to the rebuttal testimony and exhibits filed with the Commission on April 10, 2000, Eastern is an LLC that was formed on April 10, 2000, pursuant to the Limited Liability Company Agreement of Eastern North Carolina Natural Gas Company, LLC (Formation Agreement). CP&L and Eastern also entered into a contact entitled Construction, Operation and Maintenance Agreement By and Between CP&L and Eastern North Carolina Natural Gas Company, LLC (CO&M Agreement), dated April 10, 2000, which also was filed that same day. Pursuant to the CO&M Agreement, CP&L has agreed to construct and operate Eastern's proposed gas system. The Formation Agreement establishes the LLC that is seeking the certificate and bond funds in this proceeding. The sole members of Eastern that are identified in the Formation Agreement are CP&L and APEC. Thus, as a result of these agreements, CP&L has become a member of an LLC that will provide natural gas service to 14 counties in Eastern North Carolina, and it has committed to construct, operate and manage the system that will provide that service. CP&L is an electric utility certificated to provide retail electric service in parts of North and South Carolina. Although it owns NCNG, a local distribution company (LDC), CP&L itself does not presently hold a certificate to provide natural gas service.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 4

The evidence supporting this finding of fact is contained in the testimony of the Eastern Panel and in the testimony of the Public Staff Panel.

The Public Staff Panel testified that CP&L has not set up a separate company to hold its membership interest in the LLC and segregate this business activity from its electric utility business. It further testified that good business practices require that a separate company be formed to properly account for the business activities conducted pursuant to the Formation and CO&M Agreements. In addition, the Public Staff noted that the North Carolina LDCs have typically not participated directly in LLCs, such as those formed in connection with the Cardinal Pipeline and the Pine Needle LNG projects, but rather have formed separate subsidiaries to be the member. The Public Staff testified that formation by CP&L of a separate company would permit the business activities related to CP&L's participation in Eastern to be clearly segregated from CP&L's regulated electric operations, its regulated natural gas operations currently conducted by NCNG, and its various non-utility operations. The Public Staff Panel testified that such segregation should protect CP&L's electric ratepayers from any liability associated with CP&L's participation in the LLC. Segregation will facilitate adequate regulatory oversight of CP&L's regulated electric operations and NCNG's regulated natural gas operations. In addition, the Public Staff Panel testified that a separate company for this business activity will make it simpler to track costs and the financial records for the company will reflect the revenues it generates, the costs it incurs and any shared service costs attributable to it.

In rebuttal testimony, the Eastern Panel testified that it did not believe that formation of a separate subsidiary is necessary because, if CP&L were set up a separate subsidiary, the new subsidiary would be little more than a piece of paper on file with the North Carolina Secretary of State's office. The Eastern Panel further testified that CP&L has, is and will use proper cost tracking and cost allocation methodologies to account for all costs associated with its involvement in and with Eastern and that these same methodologies would be used if a separate subsidiary is created.

The Commission notes that in Docket Nos. E-2, Sub 753, P-708, Sub 5, and G-21, Sub 387, which involved a request for approval to transfer the ownership of CP&L, NCNG and Interpath Communications, Inc., to a holding company, CP&L argued that as it diversifies and its businesses grow, it is necessary to create greater separation between CP&L's businesses, its electric utility activities, its telecommunications activities, its natural gas activities, and its holding company activities. While the thrust of CP&L's arguments in that proceeding were to support the creation of a holding company, the same reasoning applies to the separation of one of CP&L's natural gas utility businesses from its electric utility business. Based on the foregoing, the Commission concludes that CP&L should form a separate company to hold its membership interest in Eastern and that this business activity should be segregated from its electric utility business. Such separation is essential to ensure that CP&L's electric accounts do not contain costs related to Eastern and that Eastern's accounts do not contain costs related to CP&L's retail electric operations. This is of utmost importance in the context of this proceeding to ensure that Eastern's requests for bond fund disbursements reflect accurate allocations and costs. Lack of adequate record keeping and cost allocation procedures could delay and complicate the reimbursement process. Therefore, CP&L, CP&L's new separate company holding its membership interest in Eastern, and Eastern shall ensure that adequate cost allocation and record keeping procedures are implemented.

Finally, the creation of a separate company will require amendments to the Formation Agreement and perhaps to the CO&M Agreement. In addition, the Commission notes that these agreements were executed and filed on April 10, 2000, two days before the hearing in this docket. Nothing in this Order shall be construed as approval of these contracts nor can this Order be construed as approval of any costs or arrangements for ratemaking purposes. The Commission expressly reserves the right to consider these agreements in future proceedings as appropriate.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 5-8

The evidence supporting these findings of fact is contained in the application and amended application, and in the testimony of Senator Basnight, Representative Owens, the Eastern Panel and the Public Staff Panel and is uncontroverted.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 9-11

The evidence supporting these findings of fact is contained in the testimony of the Eastern Panel and the Public Staff Panel.

Eastern indicated its intent to construct the proposed project in phases, beginning with Phase One serving the six counties in the northeastern corner of the State. The Commission, in its order dated December 6, 1999, scheduled a hearing on the request for a certificate for all 14 counties and the amount of gas bond funds to be awarded for Phase One of the proposed project. Based on the Commission's order, the Public Staff did not perform a detailed investigation or provide testimony regarding the negative NPV of any subsequent phases of the project. The Commission concludes that any request for bond funds for phases subsequent to Phase One is beyond the scope of this proceeding.

The six counties in Phase One do not have any natural gas service and no party contests that they qualify as "unserved areas" within the meaning of G.S. 62-2(9), G.S. 62-159, and Commission Rule R6-90. Under the terms of G.S. 62-159, only economically infeasible projects can be approved for use of gas bond funds. An economically infeasible project is defined as one with a negative NPV. It is uncontested in this proceeding that Phase One is economically infeasible in that additional funds are required in order for it to have an NPV of zero.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 12-15

The evidence supporting these findings of fact is contained in the application and amended application and in the testimony of the Eastern Panel and the Public Staff Panel.

Eastern proposes a project that will provide natural gas service to 14 unserved counties in Eastern North Carolina in five phases. Phase One, as proposed by Eastern, consists of approximately 157 miles of steel transmission pipeline and 74 miles of distribution mains. In its original application, Eastern proposed a pipeline that would originate at Transcontinental Gas Pipe Line Corporation's (Transco) delivery point in Ahoskie, North Carolina, and run easterly towards Colerain in Bertie County, then cross the Chowan River into Chowan County near Smalls Crossroads. The run from Ahoskie to Smalls Crossroads would consist of 12-inch steel pipe. From Smalls Crossroads, six-inch steel pipeline laterals would run northerly along Routes 32 and 37 to Gatesville and southerly along Route 32 to Edenton.

The mainline, as proposed by Eastern, would be a ten-inch steel pipeline that would continue easterly along State Road 1032 towards Hertford. At Hertford, the mainline would begin running along Route 17, cross the Perquimans River, and continue easterly to Elizabeth City. At Elizabeth City, six-inch steel pipeline laterals would run northwesterly along Route 17/158 and southeasterly along Route 34. The mainline, which would be reduced to an eight-inch steel pipeline after passing through Elizabeth City, would continue east across the Pasquotank River along Route 158 towards Camden, where the mainline would be reduced to a six-inch steel pipeline, and then on to Belcross. At Belcross, the mainline would continue along Route 168 terminating at Sligo. At Sligo, six-inch steel pipeline laterals would be extended northerly on Route 168 to Moyock and southerly on Route 168 to Maple. The proposed Phase One project also involves the installation of 388,400 feet of distribution mains in the six counties.

The Public Staff Panel testified that it had two concerns regarding Eastern's proposed route and design for Phase One of the project. One concern was that the route originally proposed by Eastern involves a two-mile crossing of the Chowan River at Colerain with a 12-inch pipeline. The Public Staff expressed concern that the original route proposed by Eastern could be susceptible to cost overruns and environmental permitting delays. The Public Staff, therefore, developed an alternative route and an estimate of its construction costs. The second concern related to the size of portions of the mainline. The Public Staff Panel recommended that the steel pipe diameter for the two segments of the mainline proposed by Eastern be reduced. The Public Staff Panel testified that downsizing the mainline would reduce construction costs by approximately $1.8 million and still provide adequate capacity to support economic development over the long-run to the areas of the six counties with the best prospects for economic development.

The following table summarizes the construction cost estimates provided by the parties. The source of the Eastern data is the amended application, Phase One NPV tab. The source of the Public Staff data is Public Staff Panel Exhibit 1.

Natural Gas Infrastructure for Phase One
Summary of Construction Cost Estimates

	Transmission System	Distribution System	Total Infrastructure
Eastern proposal, amended application:			
Estimated uninflated construction costs	$43,100,000	$5,100,000	$48,200,000
Uninflated system development costs	900,000	200,000	1,100,000
Subtotal	44,000,000	5,300,000	49,300,000
Inflation adjustment	390,000	80,000	470,000
Estimated cost of infrastructure -Eastern	44,390,000	5,380,000	49,770,000
Public Staff Adjustments:			
Mainline reroute	(2,155,967)		(2,155,967)
Mainline downsize	(1,772,968)		(1,772,968)
Change in inflation adjustment	(47,437)	38,950	(8,487)
Estimated cost of infrastructure - Public Staff	$40,413,628	$5,418,950	$45,832,578

The alternative route recommended by the Public Staff involves a ten-inch pipeline beginning at an interconnect with the 16-inch pipeline owned by NCNG at Tunis and proceeding northerly to Winton and then along Route 13/158 across the Chowan River into Gates County. The river crossing at Route 13/158 is approximately one-fourth of a mile wide. Once in Gates County, the pipeline would continue along Route 13/158 and then continue along Route 158 towards Gatesville. At

Gatesville, the pipeline would continue along Route 37 south towards Smalls Crossroads. Beginning at Smalls Crossroads the pipeline would follow the same route as that proposed by Eastern.

The Public Staff Panel included in its construction cost estimate for the alternative route an additional 11 miles of ten-inch pipe to incorporate the impact on the NPV study of the charges NCNG would likely seek for interconnecting with its pipeline at Tunis. The Public Staff Panel testified that it presumed Eastern would pay NCNG a rate that reflects no more than Eastern's costs of constructing the facilities between Tunis and the Transco interconnect at Ahoskie. The alternative route (including the Ahoskie to Tunis facilities) for Phase One costs approximately $2.2 million less than the route proposed by Eastern and has less potential for delay due to environmental reasons. The Public Staff informed the Commission that while Route 13/158 may be widened within the next few years and the Department of Transportation's plans would need to be considered, the installation of the pipeline for the alternative route should not be affected.

The Public Staff Panel testified that project development costs of $1.1 million, including approximately $55,000 of legal and engineering costs incurred by APEC's predecessor organization, Albemarle Regional Energy Authority (AREA), have been incorporated in the cost of constructing the system as proposed by Eastern and that the AREA project development costs are a reasonable item to include in determining the appropriate amount of bond funds to be awarded for Phase One of the project.

The Eastern Panel agreed to the Phase One system design changes recommended by the Public Staff, except it indicated that if it were to build from Ahoskie rather than interconnect with NCNG, it would propose a 12-inch line. In addition, the Eastern Panel testified that the pipeline sizes may need to be increased to meet the needs of Virginia Natural Gas Company (VNG), assuming a contract can be reached. The Panel also testified, however, that VNG would be required to pay for the increased costs associated with any change to pipe sizing to meet their requirements. In addition, with regard to providing gas service to Phase Two, the Eastern Panel proposed that it construct either (1) an interconnect to NCNG on its Robersonville Line or (2) a 12-inch diameter pipeline directly from Ahoskie to Plymouth in Washington County. Eastern estimated that the Phase Two rerouting would reduce the cost of the 14-county project by $900,000. The Eastern Panel estimated $2,200,000 in savings for Phase One plus $900,000 for Phase Two, for a combined savings from the new route of $3,100,000.

The Commission concludes that the system design changes recommended by the Public Staff for Phase One are appropriate, but that Eastern should have the flexibility to increase the pipeline sizes, at its own cost, should a gas supply contract be reached with VNG. If Eastern is successful in entering into such an agreement with VNG, 75% of the margins above Eastern's incremental costs (including a reasonable return on investment) on such transactions shall be remitted to the State's gas bond fund for use on future gas expansion projects. Because the scope of this proceeding does not encompass an investigation of Phase Two of the project, Eastern's proposed Phase Two modifications will not be addressed at this time.

Based on the foregoing and the Commission's findings regarding inflation, the Commission concludes that the estimated cost of constructing the transmission and distribution system for Phase One (excluding the cost of service attachments) properly includable in the NPV study to determine the amount of gas bond funds to be awarded Eastern for Phase One is $44.3 million. Including an additional $1.5 million of costs for inflation and project development costs, the total cost of the natural gas infrastructure that should be reflected in the Phase One NPV study is $45.8 million.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 16-25

The evidence supporting these findings of fact is contained in the testimony of the Eastern Panel and the Public Staff Panel.

The Public Staff recommended that the Commission award Eastern $37,235,456 in gas bond funds for Phase One, as compared with Eastern's amended request of $44,200,000. In addition to the difference in the cost of the natural gas infrastructure, which has been addressed above, the NPV studies performed by Eastern and the Public Staff differ with respect to how inflation is reflected in the study, the appropriate tariff rates for residential service, the appropriate margins on deliveries to large users that utilize heavy oil as an alternative fuel, the conversion schedule for small customers, the appropriate NPV discount rate, and the inclusion of APEC economic development costs. The Commission will discuss these issues individually.

Inflation

The initial testimony of CP&L witness Caldwell assumed an inflation rate of 2.25% in CP&L and APEC's NPV study. In the amended application, the inflation rate was revised to 2.2%, but no support was provided. In its prefiled testimony, the Public Staff Panel concluded that the proper inflation rate for use in this docket was 2.2%. This rate was based on a forecasted compound average growth rate in the inflation rate for public utility structures for the period 2000 through 2024 from DRI's U.S. Economy, the 25-Year Focus, Summer 1999.

The Commission agrees with the consensus that the proper inflation rate for the NPV study is 2.2%. This rate reflects an estimated 24-year compound average growth rate to the year 2024 for public utility structures from DRI's long-range forecast. This approach has been used in all prior gas expansion cases, is based on sound reasoning and the best available projected information, and is appropriate for a 40-year NPV study. The Commission concludes that the proper inflation rate for use in this docket is 2.2%.

The Eastern Panel proposed in its rebuttal testimony that its inflation rate be applied to capital costs and operating and maintenance expenses, but that an inflation rate of 1.82% be applied to all margins, except industrial margins. No inflation was applied to large users' (industrial) margins. The Eastern Panel testified that inflating margins by the same percentage as expenses overstates the revenue that Eastern can expect to enjoy through future rate adjustments authorized by the Commission, which serves to penalize Eastern. According to the Eastern Panel, however, inflating margins by 1.82% exactly offsets the cost increases from inflation and restores margins to their Commission-authorized levels.

The Public Staff Panel recommended that inflation at the rate of 2.2% be applied to all cash flow items, i.e., all margins and all costs and expenses. The Public Staff Panel testified that this practice is consistent with standard procedures for NPV studies and previous Commission orders in gas expansion projects. Further, the application of the same inflation rate to all margins is consistent with the assumption of an inflation rate in the discount rate. The Public Staff Panel concluded that the net effect of Eastern's application of an inflation rate of only 1.82% on selected margins is to increase the amount of bond funds requested.

The Commission believes that Eastern's application of different inflation rates to various cash flow items is not proper. Eastern's approach is not consistent with previous orders of this Commission, and Eastern has not provided sufficient evidence to convince the Commission to change its position. Further, to the extent that an inflation rate has not been applied to all margins, the shortfall will come out of the bond funds. The Commission concludes that an inflation rate of 2.2% should be applied to all cash flow items included in the NPV study.

Tariff Rates for Residential Service

Eastern proposed in its amended application that the customer facilities charge for residential service be set at $7.26 per month and that the commodity charges be set at $7.15 per dekatherm (dt) for winter usage and $6.85 per dt for summer usage. The seasonal commodity charge rates equate to an average annual commodity charge (based upon a benchmark of $2.50 per dt) of approximately $7.08 per dt.

The Public Staff recommend that residential rates be increased by approximately $0.42 per dt to an average rate of $7.50 per dt and that the customer facilities charges be increased by $1.24 per month to $8.50 per month. The Public Staff Panel testified that these rates will be very competitive with the alternative fuels in the area and that the rates are comparable to the rates of the other North Carolina LDCs. The Public Staff further testified that the tariff rates for this start-up LDC should be low enough to compete with alternative fuels but high enough to generate margins sufficient to cover the cost of the service connection, the related operating costs, 100 feet of distribution main, and provide at least some net margin to the LDC. The Public Staff Panel concluded that the residential rates proposed by Eastern do not meet that standard and should be increased. The Public Staff Panel reasoned that if these rates are not increased, taxpayers will be required to subsidize the operating costs of Eastern's gas system in addition to the construction costs. The Eastern Panel responded in its rebuttal testimony that it would not object if the Commission orders Eastern to raise its proposed residential rates.

The Commission concludes that the tariff rates for residential service recommended by the Public Staff are reasonable and appropriate and should be incorporated in the NPV study. Based on the foregoing, the Commission concludes that the customer facilities charge for residential service should be set at $8.50 per month and that the commodity charges, based upon a benchmark of $2.50 per dt, should be set at $7.57 per dt for winter usage and $7.27 per dt for summer usage.

Margin Rate for Heavy Oil Users

The estimated margins on deliveries to large users are reflected in Eastern's NPV study net of the rate discounts that Eastern anticipates will be necessary to compete with alternative fuels. Eastern reflected margins (before deducting fixed gas costs) of $.25 per dt for potential interruptible heavy oil customers and $1.00 per dt for potential interruptible #2 oil customers, which equate to negotiations of $1.15 per dt for heavy oil customers and $0.40 per dt for interruptible #2 oil customers off the $1.40 per dt tariff rate. No discounts were anticipated by Eastern for interruptible and firm propane customers. The Public Staff Panel agreed with the margins reflected by Eastern for all large users, except those that use heavy oil. The Public Staff Panel testified, based on an analysis of alternative fuels, that the margin for heavy oil customers should be increased from $.25 per dt to $.35 per dt.

The Eastern Panel agreed that the $.35 per dt margin rate for heavy oil users used by the Public Staff in its NPV study reflected an accurate alternative fuel price. The Eastern Panel, however, testified that its proposed $.25 per dt margin rate for heavy oil users was intended to provide a $.10 per dt reduction as a specific incentive, primarily for economic development considerations (attracting new industry to the 14-county area), plus encouraging companies that are there now to sign up. Eastern acknowledged that such an incentive rate was not permissible under its proposed tariffs and that Commission approval would be required before it could offer such an incentive rate. Eastern also testified that, to the extent any revenues get added to the project that are not identified in the current NPV study, those revenues would improve the project.

The Commission concludes that the appropriate margin rate to reflect in the NPV study for large users that use heavy oil as an alternative fuel is $.35 per dt. Because the NPV study used to determine bond fund financing does not include any loads from either the expansion of current industrial entities or the subsequent location of new industrial entities, economic development rates for new customers are not relevant to the NPV study. Eastern may propose an economic development rate schedule in the future if it deems it necessary to attract new load, but it has not filed such a tariff as part of this application.

Small Customer Conversion Schedule

The Eastern Panel testified that its NPV study reflected conversions of homes and small businesses to natural gas over a 16-year period, as compared to the Public Staff's 10-year conversion schedule. The Public Staff Panel testified that, with the implementation of a moderately aggressive marketing effort, significant conversions to natural gas should occur during the first ten years Eastern is in operation. The Public Staff modified the conversion schedule for small customers and increased O&M expenses by $75,000 per year in years two and three to reflect the costs of such a marketing effort.

The Eastern Panel testified that the acceleration proposed by the Public Staff assumes that at least half of the ultimate customers in Phase One will convert at the beginning of year two. The Eastern Panel further testified that the Public Staff's conversion timetable is unrealistic and that it would be impossible for half of all Phase One customers to convert by the beginning of year two because Phase One will not be completed by that time. The Eastern Panel also explained that if the conversion does not occur as quickly as the Public Staff claims, rates will have to increase for small customers and that this increase would be in addition to the increase in residential rates already agreed to by Eastern. Eastern expects a slow conversion rate because of the newness of natural gas to the area and the cost of converting from other fuels to natural gas.

The Commission concludes that the conversion rate proposed by Eastern more realistically reflects anticipated conversions while not causing too much of an increased risk to rates. The Commission will adopt Eastern's small customer conversion schedule and, as a result, will not adopt the $75,000 increase in the budget for marketing proposed by the Public Staff.

Discount Rate

The initial testimony of CP&L witness Caldwell assumed a discount rate of 8.448916% in CP&L and APEC's NPV study. The explanation of and support for this rate was that the CP&L corporate weighted average cost of capital was used, which reflects the CP&L corporate standard for regulated investments. This discount rate included a 13% return on equity, which is .25% above CP&L's last Commission-approved return. In the amended application, the discount rate was revised to 8.717424%, apparently to reflect higher cost rates for debt and preferred stock. In its rebuttal testimony, Eastern proposed a discount rate of approximately 8.69%. This was based on its agreement with the Public Staff's recommendations on capital structure ratios and cost of debt, which were based on a representative LDC, but a higher return on equity than the 11.1% return recommended by the Public Staff. The Eastern Panel testified that its proposed 12.1% return on equity reflected the cost of equity for a newly formed, unique company with no customers in an area where growth can be expected to be slow, and whose rates and costs are based upon a myriad of assumptions. The Eastern Panel testified that Eastern believed that the vast majority of its proposed project is uneconomic, which makes it very risky, and that its proposed 12.1% return on equity reflects the higher risks of this new start-up company.

The Public Staff recommended a discount rate of 8.158364%, based on a capital structure composed of 47% debt at an interest rate of 8% and 53% common equity with a return on equity of 11.1%. The Public Staff Panel testified that its discount rate was derived from current market-based costs of capital for a representative LDC that could construct and operate the project. The Public Staff derived its cost of capital components from data for a representative group of 15 LDCs using data for the 24 LDCs that are covered in the Value Line Investment Survey, Standard Edition. From this group, nine companies were eliminated due to dividend reductions, merger activity, or organizational changes.

The Public Staff further testified that the debt cost was derived by adding an average of 30-year A and BBB utility bond spreads to Treasuries to a forecast of 30-year Treasuries. The common equity cost rate was derived from a discounted cash flow (DCF) analysis performed on the representative group. Value Line 12-month forecasted dividend yields were averaged over the last six months for these companies. The average forecasted dividend yield for the representative group of companies is 5.2%. It was determined from historical and forecasted growth rates that a reasonable growth rate for the representative group was 5.9%. The combination of the 5.2% dividend yield and the 5.9% growth rate results in an 11.1% cost of common equity. The pre-tax interest coverage implied by the capital structure ratios and a 47% debt rate are consistent with a debt rating in the A range for an LDC.

The Commission finds Eastern's testimony on this issue persuasive. Eastern is unlike any other LDC in this State. Eastern is constructing a completely new natural gas distribution system into territory that is without natural gas service and where the projected load and expected revenues are minuscule compared to the cost of the project. There is no question but that this project is more risky than an existing, well-established, operating LDC with a customer base that generates revenues sufficient to cover the costs of the system. Based on the evidence presented on this issue, the Commission concludes that the appropriate discount rate to utilize in the NPV study is 8.69%. This discount rate is based on a capital structure composed of 47% debt and 53% common equity with a cost rate of 8% for debt and a return on equity of 12.1%.

APEC Economic Development Costs

Eastern reflected $400,000 of annual costs in the NPV study for APEC economic development costs beginning in year three. An amount of $250,000 is reflected for year two. Eastern stated that these proposed expenditures are for the promotion of commercial and industrial growth in the franchised area with hopes of reducing the area's prevailing unemployment rate and raising the existing property tax base. Section 4.11 of the LLC agreement states the following with regard to these costs:

> APEC Cost Reimbursement. Annually, APEC shall submit to the Company a budget and cash flow statement demonstrating APEC's total costs as well as a justification on an activity basis of those costs (to facilitate NCUC standards of prudency) equal to or less than the amount approved by the NCUC for inclusion in the Company's rates. Until January 1, 2005, unless changed in a general rate case proceeding, Company shall not pay APEC for any such costs in excess of the amount approved by the NCUC for inclusion in rates. Thereafter, such costs may increase by 2.5% a year and the Company shall pay APEC such costs. Provided however, the Company, with the vote of at least one CP&L Director, may approve payment to APEC in excess of the amount approved by the NCUC.

A proposed APEC budget was submitted with Eastern's rebuttal testimony.

The Public Staff Panel testified that consistent with past Commission practice, such costs should not be recovered through utility rates and that the computation of the amount of bond funds awarded in this proceeding should not incorporate such large payments for local economic development activities. The Public Staff Panel further testified that it had been advised by counsel that the intent of the legislature was for gas bond proceeds to be used to construct natural gas infrastructure and provide funds to cover the negative NPV of a project that includes that infrastructure and normal operations and maintenance expenses. The Panel suggested that such costs might more appropriately be addressed as an incentive program after the certificate has been awarded and outside of the gas bond context. Expected benefits, reporting requirements, accounting matters (expensing versus deferring costs), and other issues could be addressed at that time. The Public Staff Panel estimated that inclusion of these expenses in the NPV analysis would increase the amount of gas bond funds needed by approximately $4.5 million. The Public Staff also recommended that APEC might be funded through the increased tax revenues of the local governments in the franchised area.

The Commission agrees with the Public Staff that gas bond funds should not be utilized to fund APEC. APEC is a separate organization from the utility, its mission is broad, and its activities are more akin to local government activities than to utility activities. Further, the Commission recognizes that other options may be available for funding APEC. As recommended by the Public Staff, Eastern's gas operations will generate tax revenues for the local governments through property and gas taxes. The evidence indicates that the local governments in the Phase One area alone will receive approximately $300,000 in property taxes and gas tax revenues as a direct result of Eastern's investment in the region and gas deliveries to customers. When the project is expanded beyond these six counties, additional tax revenues will be generated which should easily exceed $400,000. The local governments could allocate a portion of the new tax revenues to APEC.

Waiver of 75% Progress Payment Rule

In their original application, CP&L and APEC requested that the Commission waive Commission Rule R6-92(b), which provides for reimbursement of only 75% of actual expenditures as progress payments, with the remainder of the negative NPV being paid at the final accounting. The Public Staff Panel testified that the rationale for the 75% progress payment rule was to ensure that a recipient of expansion funds has some of its own capital invested in the project, so as to provide it with an incentive to complete the project. Using the 75% progress payment provision would require more bond funds to compensate Eastern for the delay in reimbursement. Because full reimbursement earlier would save a significant amount of bond funds that could be used in other unserved counties, the Public Staff recommended that the Commission waive the progress payment provision and allow 100% reimbursement of actual expenditures from the beginning, up to the approved negative NPV. The Public Staff Panel recommended that construction activity be monitored carefully to ensure that partial completion would result in a fully functioning system.

The Commission concludes that it is appropriate to waive the limit on reimbursements to 75% of actually incurred costs, which is contained in Commission Rule R6-92(b), and to authorize the reimbursement of Eastern at 100% of its actually incurred costs up to the negative NPV approved for Phase One. Construction activity should be carefully monitored to ensure that construction occurs in such a way that partial completion would still result in a fully functioning system.

Bond Award

The decisions set forth above will have to be incorporated into a new NPV study in order to determine the negative NPV for Phase One of the project, and thus the amount of gas bond funds to be awarded. The Commission requests that Eastern and the Public Staff make a new calculation, assuming that the bond proceeds will not be considered taxable income, and file the results thereof within five days.

Taxability of the Bond Proceeds

Eastern is seeking a private letter ruling from the IRS on whether the bond proceeds would be considered taxable income. If the proceeds are considered taxable income, the amount of bond funds required for the project would increase significantly.

Eastern shall keep the Commission informed as to its progress in securing a private letter ruling and Eastern shall file the IRS ruling with the Commission as soon as the ruling is received. The Commission will issue a further order in this proceeding setting forth the final negative NPV and final gas bond award amount after Eastern has filed the ruling.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 26 AND 27

The evidence supporting these findings of fact is contained in the application and amended application and in the testimony of the Eastern Panel and Public Staff Panel. These findings of fact are uncontroverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 28

The evidence supporting this finding of fact is contained in the application and amended application and in the testimony of the Eastern Panel and Public Staff Panel.

The Public Staff recommended that the Economic Variances Regulated Assets Procedures (Rider C) proposed by Eastern not be implemented. Instead, the Public Staff recommended that Eastern be authorized to defer the total amount of operations and maintenance (O&M) expenses incurred during the first six years of operations or until the first rate case order, whichever occurs first, and that the total amount of deferred O&M expenses for Phase One of the project be capped at $6.0 million. The Public Staff Panel testified that interest should be accrued using the Public Staff's recommended discount rate.

Eastern agreed with the Public Staff recommendation, except it believed the cap on deferred O&M expenses should be increased from $6 million to $8 million and that the deferral period be extended from six years to eight years. The Public Staff, in its proposed order, recommended that the Commission increase the number of years to eight, but keep the cap at $6 million.

The Commission concludes that Eastern should be authorized to defer the total amount of O&M expenses incurred during the first eight years of operations or until the first rate case order, whichever occurs first. The Commission has evaluated the difference between Eastern and the Public Staff regarding the appropriate cap for deferred O&M expense and has determined that the difference is a direct result of the parties' respective returns on equity. Based on earlier conclusions regarding the discount rate, it is appropriate for deferred O&M expenses to be capped at $8 million, and that the appropriate rate at which to accrue interest on the account is 8.69%.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 29

The evidence supporting this finding of fact is contained in the testimony of the Eastern Panel and the Public Staff Panel and is uncontroverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 30

The evidence supporting this finding of fact is contained in the testimony of the Eastern Panel and the Public Staff Panel.

The testimony filed by Eastern indicated that it would construct the project in five phases, beginning with the six counties in Phase One. Eastern's original testimony asked for bond funds for Phase One, stated that additional requests would be filed for subsequent phases, and asked the Commission to place these additional requests ahead of all other requests. Later, Eastern filed a Clarification Statement asking the Commission to "earmark" money for the entire project, not just Phase One, for Eastern's exclusive use. At the hearing, the Commission was urged to "maintain the regional approach to this entire project." In its proposed order, Eastern stated that it should only have to provide cost estimates prior to construction of subsequent phases and then submit disbursement requests and "disbursement shall be made and no further proceedings held."

The Public Staff stated that, under Commission Rules, Eastern must file requests for subsequent phases of the project, to be noticed and heard just like this one. The Public Staff did not perform a detailed investigation or provide testimony regarding the negative NPV of any phases beyond Phase One. Nonetheless, based on its limited investigation of the subsequent phases, the Public Staff expressed concerns about the proposed system design. The Public Staff Panel testified that the system proposed by Eastern is very expensive and may require more gas bond funds than will be available. The Public Staff Panel encouraged the Commission to make the best use of the available gas bond funds and proposed that the Commission require Eastern, with the participation of NCNG, to perform a detailed study of alternative routes and designs for providing natural gas service to the eight counties not contained in Phase One. Such a study should consider the feasibility of extending Eastern's system off the NCNG system at various take-off points, rather than building a new transmission line connecting all phases of Eastern's system. Eastern took the position that it had already done such a study, pointing to Exhibit 4 of its rebuttal testimony. The Public Staff testified that Exhibit 4 represents a good start, but that more should be required.

As previously discussed, it is beyond the scope of this proceeding to consider the route, design and NPV of the proposed project subsequent to Phase One. Still, it is appropriate to give some indication of how Eastern might proceed as to the rest of its proposed project. Both G.S. 62-159(b) and Commission Rule R6-9(c) require the Commission to consider requests for bond funds on a project-specific basis. Eastern has described its proposed project in terms of five phases. Pursuant to the Commission's order of December 6, 1999, only Phase One was scheduled for hearing and bond funds have been approved for only Phase One. A new request or requests for approval to use bond funds for the subsequent phases must be filed and scheduled for hearing just as Phase One was heard. If Eastern chooses to file a single request covering all subsequent phases, the Commission is willing to consider all subsequent phases at once. The Commission will evaluate such request(s) in accordance with its proper view of the evidence submitted by all parties and the applicable law. However, the Commission concludes that before any further request(s) for bond funds is filed, Eastern should thoroughly analyze alternative routes and designs with the goal of reducing costs, as recommended by the Public Staff.

Although it is still early in the Commission's administration of the bond funds, it is already clear that there will be more requests for funds than funds available. It is also clear that one goal of the bond fund legislation is to maximize the infrastructure that can be built and the customers served with the funds available. G.S. 62-159 provides for the Commission to consider "the scope of a proposed project, including the number of unserved counties and the number of anticipated customers that would be served, the total cost of the project, the extent to which the project is considered feasible, and other relevant factors affected the public interest" in deciding how bond funds will be used. The Commission is heeding the charge that it distribute the available bond funds in the public interest. The Commission must ensure that bond funds are used wisely and that as many unserved counties and customers as possible benefit.

The Commission applauds the savings realized with respect to the revised route and design for Phase One. The Public Staff suggested alternatives, to which Eastern agreed, that saved approximately $4 million in bond funds. This represents millions of dollars that can now be used for remaining unserved areas. The Commission applauds Eastern and the Public Staff for these savings and urges a similar collaborative effort with respect to the route and design of subsequent phases. To that end, the Commission will require Eastern to undertake a study of alternative routes and designs for the subsequent phases. We urge Eastern to seek the Public Staff's input during this study and to provide the results of the study to the Public Staff. This study shall address, as well as other matters, the possibility of extending Eastern's system off the NCNG system at various take-off points and shall evaluate whether attaching to the NCNG system and paying NCNG for the necessary system strengthening and upgrading can provide an adequate level of service to Eastern at less cost. We hope that, working together, Eastern and the Public Staff can agree on the most efficient route and design. If they cannot, the alternative design proposals for the subsequent phases will be addressed by the Commission when the next request(s) for funding is heard.

We urge Eastern and the Public Staff to take the time necessary for a thorough study, but to complete this study as expeditiously as possible. Once the study is completed and request(s) for funding filed, the Commission will do its part to expedite matters by its willingness to consider the remaining phases as one project.

IT IS, THEREFORE, ORDERED as follows:

1. That a certificate of public convenience and necessity to provide natural gas service in Currituck, Camden, Pasquotank, Gates, Perquimans, Chowan, Washington, Tyrrell, Dare, Hyde, Pamlico, Jones, Carteret and Pender Counties, attached hereto as Appendix A, is hereby granted to Eastern;

2. That Phase One of Eastern's proposed project is hereby approved for funding from the proceeds of gas bond funds in accordance with the decisions made hereinabove;

3. That Eastern and the Public Staff shall make a calculation of the negative NPV for Phase One of the project consistent with this order, assuming that the gas bond funds are found not to be taxable, and shall file the results thereof within five days and that the Commission will issue a further order setting forth the amount of gas bond funds to be awarded for Phase One (subject only to paragraph 4 below), which will then be authorized for disbursement upon Eastern's submittal of reimbursement requests and compliance with Commission Rule R6-92, except as specifically waived herein;

4. That Eastern shall keep the Commission informed as to its progress in securing a private letter ruling from the IRS and shall file the ruling with the Commission as soon as the ruling is received and the Commission will issue a further order at that time;

5. That Eastern shall undertake a new study of alternatives for providing natural gas service to the eight counties in the subsequent phases of its proposed project and shall file request(s) for authority to use additional bond funds for those subsequent phases, to be scheduled and heard by the Commission;

6. That CP&L shall form a separate company no later than December 31, 2000, to hold its membership in Eastern and this company's operations shall be segregated from CP&L's electric utility business and that CP&L, Eastern, and the separate CP&L company formed to hold its membership in Eastern shall ensure that adequate cost allocation and record keeping procedures are implemented;

7. That Eastern's rates and tariffs, as modified herein, are approved and Eastern shall file tariffs with the Commission in compliance with this Order;

8. That it is appropriate to waive the provision in Commission Rule R6-92(b) limiting reimbursements to 75% of actually incurred costs and to allow Eastern to be reimbursed for 100% of its actually incurred costs up to the negative NPV approved for Phase One and that Eastern shall file reports and a final accounting with respect to Phase One as required by Commission Rules R6-92 and R6-93, except as specifically waived herein, and sufficient information so that the Commission can monitor construction activity;

9. That Eastern is authorized to defer a maximum of $8 million of O&M expenses that it incurs during the first eight years after it begins providing gas service; and

10. That Eastern shall file periodic reports on its discussions with VNG and if Eastern is successful in entering into a gas supply agreement with VNG, Eastern shall remit 75% of the margins above its incremental costs (including a reasonable return on investment) on such transactions to the State's gas bond fund for use on future gas expansion projects.

ISSUED BY ORDER OF THE COMMISSION.
This the 15th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg061500.01

Commissioner Owens did not participate in this decision.

NATURAL GAS - CERTIFICATE

APPENDIX A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. G-44, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

EASTERN NORTH CAROLINA NATURAL GAS COMPANY

is granted this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

to provide natural gas utility service

in

Currituck, Camden, Pasquotank, Gates, Perquimans, Chowan, Washington, Tyrrell, Dare, Hyde, Pamlico, Jones, Carteret and Pender Counties, North Carolina

subject to any orders, rules, regulations, and conditions now or hereafter lawfully made by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 15th day June 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

DOCKET NO. G-40, SUB 2

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Frontier Energy, L.L.C., for Approval to Use Proceeds of Natural Gas Bond Funds to Finance the Negative Net Present Value of the Cost of a Project to Extend Natural Gas Service Into Warren County	)))))	ORDER APPROVING USE OF NATURAL GAS BOND FUNDS

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on November 30, 1999

BEFORE: Commissioner William R. Pittman, Presiding, Chair Jo Anne Sanford, and Commissioners Ralph A. Hunt, Judy Hunt, J. Richard Conder, Robert V. Owens, Jr., and Sam J. Ervin, IV

APPEARANCES:

For Frontier Energy, L.L.C.:

M. Gray Styers, Jr., Kilpatrick Stockton, L.L.P., 3737 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Paul Lassiter, Staff Attorney, Public Staff - North Carolina Utilities Commission, Post Office Box 29520, Raleigh, North Carolina 27626-0520

BY THE COMMISSION: On August 6, 1999, Frontier Energy, L.L.C. (Frontier) filed a Letter of Intent pursuant to G.S. 62-159 and Commission Rules R6-90 through R6-94 stating Frontier's intent to file an application to use proceeds of the natural gas bond funds (Bond Funds) made available by the Clean Water and Natural Gas Critical Needs Bond Act of 1998 (Natural Gas Bond Act) to finance the negative net present value (NPV) of the cost of a project to extend natural gas service into Warren County (Warren County Project) which did not have natural gas service at that time. The Commission issued an Order Setting Construction Deadlines and Scheduling Proceedings on Letter of Intent on August 17, 1999. In that Order, the Commission authorized Frontier to proceed with construction in Warren County without prejudice to its right to request and receive Bond Funds based on the entire cost of the Warren County Project, should the Commission decide to approve such.

On September 20, 1999, Frontier filed its Application seeking approval to use Bond Funds for the Warren County Project. Frontier pre-filed the joint testimony and exhibits of witnesses Joseph M. Rivera, Rodger R. Schwecke and David G. Schiller. The Commission issued its Order Scheduling Hearing and Providing Notice on September 23, 1999.

On November 16, 1999, Frontier filed a Motion to Amend Application and Testimony, along with an Amended Application and Amended Joint Testimony of witnesses Rivera, Schwecke and Schiller, all reflecting a change in the NPV of the Warren County Project. On November 19, 1999, the Commission issued its Order granting Frontier's Motion to Amend Application and Testimony.

The Public Staff filed the Joint Testimony of witnesses Jeffrey L. Davis, Thomas W. Farmer and Kirk Kibler on November 17, 1999.

This matter came on for hearing on November 30, 1999, as previously scheduled and noticed. Testimony and exhibits were presented by Frontier's witnesses Rivera, Schwecke and Schiller. The Public Staff presented its witnesses Davis, Farmer and Kibler, who recommended that the Commission approve Frontier's application for Bond Funds. Allen Kimball testified as a public witness in support of Frontier's application. No testimony was presented in opposition to Frontier's application.

Based on the filings herein and the testimony and exhibits introduced at the hearing, the Commission makes the following:

FINDINGS OF FACT

1. Frontier is a limited liability company organized and existing under the laws of the State of North Carolina and is engaged in the business of transporting, distributing, and selling natural gas in North Carolina. Frontier is a "public utility" as defined in G.S. 62-3(23) and a "natural gas local distribution company" (LDC) within the meaning of G.S. 62-159 and the Commission's Rules and Regulations. Frontier's public utility operations are subject to the jurisdiction of this Commission.

2. Frontier has properly applied to use proceeds of Bond Funds to finance the negative NPV of the cost of a project to extend natural gas service into Warren County and is in compliance with G.S. 62-159 and Commission Rules R60-90 through R6-94. Frontier has given the required notice of its application.

3. At the time of the filing of the application, Warren County did not have natural gas service and was therefore an "unserved area" as that term is used in G.S. 62-2(9), G.S. 62-159 and Commission Rule R6-90.

4. Frontier proposes to extend a transmission pipeline from the Transcontinental Gas Pipeline Corporation (Transco) tap at the North Carolina/Virginia state line south to U.S. Highway 158, where it will fork west to the Manson and Soul City areas and east to the town of Norlina and then south to the town of Warrenton. Distribution mains will be constructed from this transmission pipeline, primarily in the towns of Norlina and Warrenton.

5. The proposed system will be composed of approximately 8.5 miles of 6-inch steel pipe, 15 miles of 6-inch plastic pipe, 4 miles of 4-inch plastic pipe, and 30 miles of 2-inch plastic pipe, almost all of which will be installed in public rights of way and along streets and roads. Exhibit 4 of the Amended Application contains maps showing the proposed pipeline routes.

6. As of the hearing, Frontier had commenced construction of the first phase of the transmission pipeline and proposed to have natural gas service available in January 2000. Subsequent to the hearing, Frontier filed a letter on February 14, 2000, giving notice of plans to serve its first customer in March 2000. Construction of the transmission pipeline to Norlina and Warrenton is proposed for the first half of year 2000.

7. The total projected cost of the Warren County Project is $4,972,737, including the effects of inflation. This sum consists of $3,323,000, without inflation, related to transmission facilities and the balance related to the distribution system, including service attachments, and inflation.

8. Commission Rule R6-81(b)(1) defines "economically infeasible" as a project which has a negative NPV. The Warren County Project is economically infeasible in that it must receive additional funds of $2,404,850 in order to have a NPV of zero. Frontier has requested that the Commission approve the use of $2,404,850 of Bond Funds for the Warren County Project.

9. The Public Staff has investigated Frontier's application and supporting workpapers, performed a market study, and conducted a field investigation of Warren County. The Public Staff supports Frontier's application for approval to use $2,404,850 of Bond Funds for the Warren County Project.

10. The Commission previously granted Frontier's predecessor, Frontier Utilities of North Carolina, Inc. (Frontier Utilities), a certificate of public convenience and necessity authorizing it to provide natural gas service in Warren County. In that proceeding, Frontier Utilities maintained that it would rely on private financing for its Warren County Project. Changes in circumstances and more refined and detailed cost projections and market assessments warrant Frontier's current request for Bond Funds.

11. The availability of natural gas in Warren County will be an important energy resource and will promote economic and community development and lower energy costs to industrial, commercial and residential customers in Warren County. Frontier's plans to serve Warren County have already yielded benefits in the location of a new CVS Pharmacy distribution facility and the expansion of the Chesapeake Paper corrugated cardboard plant in the County. Considering the scope of the proposed project, the number of anticipated customers by class that will be served, the total cost of the proposed project, the extent to which the project is feasible, and the need and desire of Warren County for natural gas, Frontier's application to use Bond Funds for the Warren County Project is in the public interest and should be approved.

12. Frontier's application for use of the proceeds of Bond Funds for the Warren County Project in the amount of the project's negative NPV of $2,404,850 is approved, subject to the conditions set forth herein and specifically subject to the condition that Frontier shall construct the full transmission and distribution facilities as proposed herein and set forth in Exhibits 1 and 4 of its Amended Application.

13. The commitments of Frontier, the conditions set forth in this Order, and the existing regulatory process provide adequate safeguards to insure the construction of the project as proposed,

to the benefit of Warren County, consistent with the intent and provisions of the Natural Gas Bond Act, and without detrimental effects on Frontier's other ratepayers.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

The evidence for this finding of fact is found in the application, the Commission's official records, and the testimony of Frontier's witnesses. This finding of fact is essentially informational, procedural, and jurisdictional in nature. No party presented any evidence to the contrary.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

The evidence for this finding of fact is found in the application, the testimony and exhibits of Frontier, and the testimony of the Public Staff.

The Public Staff's testimony outlined the history of the Bond Funds. The Natural Gas Bond Act authorized bonds for water and natural gas infrastructure. The portions relevant to this proceeding are found in G.S. 62-159, which authorizes the Commission to provide funding through the proceeds of general obligation bonds for construction of natural gas facilities in unserved areas that would otherwise not be economically feasible to construct. On November 3, 1998, North Carolina voters approved the issuance of $200 million in general obligation bonds for such natural gas expansion. On November 16, 1998, the Commission initiated a rulemaking proceeding to implement G.S. 62-159, and on March 8, 1999, the Commission issued an order adopting Commission Rules R6-90 through R6-94. By Order of August 4, 1999, the Commission amended Commission Rule R6-90 and adopted NPV guidelines to be used for administering G.S. 62-159.

Frontier filed its application for approval to use Bond Funds and prefiled testimony and exhibits in support thereof on September 20, 1999. Frontier subsequently filed an amended application and amended testimony and exhibits. The information provided includes a geographic description of the Warren County Project (Exhibit 1), statements regarding permitting and licensing, a market study, an engineering study (Exhibit 4), an NPV study, a description of Frontier's service capabilities, a construction schedule, and a timetable for disbursement of Bond Funds. Frontier's NPV study was conducted consistent with the guidelines adopted by the Commission. Frontier provided public notice of these proceedings by publication in The Warren Record consistent with the Commission's Order of September 23, 1999. An Affidavit of Printer's Proof has been filed.

The Public Staff witnesses confirmed that Frontier's filing is complete and in compliance with the applicable statutes and Commission Rules. The Commission concludes that Frontier has complied with the requirements of G.S. 62-159 and Commission Rules R6-90 through R6-94.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

The evidence for this finding of fact is found in Frontier's application, the testimony of Frontier's witnesses, the testimony of the Public Staff witnesses, and the testimony of public witness Allen Kimball. It is uncontroverted that no part of Warren County had natural gas service when Frontier's application was filed. The Commission authorized Frontier to commence construction in Warren County without prejudice to its right to request and receive Bond Funds in this docket.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4-6

The evidence for these findings of fact is found in Frontier's application and the testimony and exhibits of Frontier's witnesses.

Frontier's witnesses testified that the company intends to construct the transmission system in two phases. The first phase will extend from the Transco tap at the North Carolina/Virginia state line east to U.S. Highway 1, then along U.S. Highway 1 to North Carolina State Route (NCSR) 1210. The line will proceed south along NCSR 1210 and then west along U.S. Highway 1/158 toward the Manson and Soul City area. Eight and one-half miles of six-inch steel pipe will be utilized from the Transco tap to the district regulator station located north of U.S. Highway 158. The remainder of Phase I will consist of six-inch polyethylene pipe. Phase II of the transmission system will consist of six-inch polyethylene pipe to provide service to Warrenton and Norlina. Phase II will extend east along U.S. Highway 1/158 to U.S. Highway 158/401 and then south along that road and U.S. Highway 401. Distribution lines will be constructed from this transmission system, primarily in the towns of Norlina and Warrenton, and will consist of four-inch and two-inch polyethylene pipe. When completed as proposed, the entire system will be composed of approximately 8.5 miles of 6-inch steel pipe, 15 miles of 6-inch plastic pipe, 4 miles of 4-inch plastic pipe, and 30 miles of 2-inch plastic pipe.

As of the hearing, Frontier had entered into a contract with A&L Underground, Inc., to construct Phase I of the project and had begun construction. Frontier's contract with A&L Underground called for construction to be completed by December 17, 1999, but Frontier filed a motion notifying the Commission that construction would be continuing until January 20, 2000. Subsequent to the hearing, Frontier filed a letter on February 14, 2000, giving notice of plans to serve its first customer in March 2000. Concurrent with rights-of-way and permit acquisitions for Phase II, Frontier will be negotiating with contractors, ordering pipe and other facilities and taking other actions that will permit it to begin putting pipe in the ground for Phase II next spring. Frontier has committed to have gas available to the Norlina City Gate by May 1, 2000, and to the Warrenton City Gate by June 15, 2000. Distribution lines to customers will be constructed during the third and fourth quarters of 2000.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 7-8

The evidence for these findings of fact is found in the testimony of the Frontier witnesses and the Public Staff witnesses and in Frontier's application, specifically Exhibit 5 to the Amended Application, which is the NPV analysis performed consistent with the Commission's guidelines.

Frontier's construction costs reflect its actual contract with A&L Underground, Inc., for Phase I of the transmission system, as well as Frontier's experience in 1998 and 1999 during construction of over 110 miles of pipeline in Surry, Wilkes, and Yadkin Counties. Based upon this data, Frontier's witnesses testified that the proposed system will cost $4,972,737. Frontier intends to construct the transmission system in two phases. The expected cost for Phase I of the transmission system is $2,511,000, uninflated; the expected cost for Phase II of the transmission system is $812,000, uninflated. The expected cost for the entire project -- after adjusting for meters, service lines, regulators and inflation -- is $4,972,737, as shown in Exhibit 5 of Frontier's Amended

Application. The Public Staff witnesses testified that they had reviewed Frontier's costs and found them to be acceptable in light of other pipeline construction projects with which they were familiar.

Frontier's witnesses testified that Frontier had conducted a marketing survey from which it identified 1,165 potential residential customers and 48 potential commercial customers in the towns and along the highway corridors of Warren County. Frontier identified 10 potential industrial, large commercial and institutional facilities that would qualify under Frontier's rate schedules. Frontier's Exhibit 3 provides the results of the survey. Based on the location of residential, commercial and industrial customers determined in the marketing survey, Frontier designed a system to provide natural gas service in the county as cost-effectively as possible. Piping was routed to customers as efficiently as possible, accounting for expected load growth and areas of future expansion. Distribution facilities will be installed on road easements and will be routed based on existing utilities in the easements. Detailed maps of Frontier's proposed system for Warren County are included in Exhibit 1 to Frontier's Amended Application.

From these efforts, Frontier could reasonably project costs, revenues and income from the project and input this information into an NPV analysis consistent with the Commission's guidelines. This analysis indicates a negative NPV for the project of $2,404,850, as shown in Frontier's Exhibit 5. The Public Staff reviewed Frontier's projections and inputs, as well as the NPV analysis itself, and determined that Frontier had correctly calculated the NPV of the project.

The Commission concludes, based on Frontier's application and testimony and the Public Staff's testimony that the total cost projection for the project is reasonable and is appropriate for use in Frontier's NPV calculation and that Frontier's calculation of the negative NPV of the proposed project is fair and reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for this finding of fact is found in the testimony of the Public Staff witnesses.

The Public Staff witnesses testified that they had conducted an extensive investigation of Frontier's filings, including a review of construction cost estimates, market projections, financial data, and all assumptions and methodologies used in the NPV study. In addition, the Public Staff evaluated the industrial market, alternative fuel prices, NPV study, and the other components of Frontier's application. The Public Staff conducted its investigation through data requests, discussions with Frontier personnel, discussions with other state agencies, customer surveys to ascertain potential loads, and independent research. The Public Staff supports Frontier's application.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence for this finding is found in the testimony of the Frontier witnesses, the Public Staff witnesses, and public witness Allen Kimball.

In early 1997, in Docket No. G-38, Sub 1, this Commission granted Frontier Utilities, Frontier's predecessor, a certificate of public convenience and necessity to provide natural gas service to Warren County. In that proceeding, Frontier Utilities claimed that the project would be financed with investor funds and would not require expansion funds pursuant to G.S. 62-158. The cost estimates used by Frontier Utilities in its 1996 pro forma projections for Warren County were based upon construction estimates compiled in 1994 when Frontier Utilities was preparing its application for a certificate of public convenience and necessity for four counties in northwestern North Carolina. The customer estimates used by Frontier Utilities in 1996 were derived from the number of water meters in Warren County, without the aid of a formal market study to consider the actual location of the customers or the cost of running pipe to them. Public Service Company of North Carolina, Inc., voluntarily relinquished its certificate for Warren County to Frontier Utilities, and Frontier Utilities' application was uncontested. Frontier Utilities' certificate for Warren County was subsequently transferred to Frontier on March 9, 1998, in Docket Nos. G-40 and G-38, Sub 3

Frontier's witnesses in this docket testified that the current cost calculations for Warren County, which are considerably higher than the 1996 projections, are based on Frontier's actual contract with A&L Underground, Inc. (which was the low bidder for Phase I of the transmission system) and Frontier's actual experience with pipeline construction costs in 1998-99. Frontier witness Schiller testified that, in addition to a rapid rise of construction costs in general in North Carolina over the last five years, extensive pipeline construction in the Northeast has accelerated the rise in pipeline construction costs even further.

In addition, the current project includes 23.5 miles of 6-inch pipe, rather than 4-inch pipe. Frontier witness Schiller explained that the larger diameter pipe was needed (1) to serve the CVS Pharmacy distribution facility, which will be at the very end of the system and which was not part of the Frontier Utilities plan, and (2) to provide more consistent gas delivery at lower pressure in the system. The larger pipe will not only improve the quality of service, but also facilitate the attachment of farm taps for residential customers who live along the transmission pipeline route. Furthermore, the route of the transmission system now proposed is approximately 23.5 miles, as compared to the originally projected length of 16.5 miles.

Also, higher rates and higher alternative fuel cost assumptions were used in 1996, resulting in much higher margins for large industrial customers than will be realized now. Frontier has now applied to charge the same rates approved for its Four-County area (originally approved in Docket Nos. G-38 and G-9, Sub 357 and adopted by Frontier in Docket Nos. G-38, Sub 3 and G-40) in all of its service territory, including Warren County. Frontier does not want to have different rates for different counties or for Warren County customers to be charged the highest natural gas rates in the entire State. The lower rates result in lower margins generated on each dekatherm sold, which in turn reduces the economic feasibility of the project.

Finally, the original plans for Warren County included a much larger load for tobacco drying than that supported by the current status and prognosis for that industry. It is uncontroverted that Frontier's current market study and system optimization efforts are much more detailed and thorough than Frontier Utilities' original work.

The Public Staff testimony confirmed that changed circumstances support Frontier Energy's current application for the use of Bond Funds. The Public Staff explained that the natural gas system described in the current filing, while basically the same project as that of Frontier Utilities, has some significant differences in the assumptions incorporated into the overall financial planning. The most significant differences include a reduction in rates that customers will be charged, a higher estimate of construction costs, a reduction in the number of anticipated residential and commercial customers, and a change in Frontier's capital structure.

The Commission concludes that changes since Frontier Utilities' certificate proceeding warrant Frontier's current request for Bond Funds. Denying Frontier's request would either be detrimental to Frontier's customers in other counties by ultimately shifting the burden of this infeasible project to their rates or would be detrimental to Warren County by limiting the scope and size of the system that could be built there. This situation is not dissimilar to instances in which other LDCs have requested additional monies from their expansion funds after changed circumstances created higher construction costs than originally estimated. However, the Commission is very cognizant of the finite resources provided by the Bond Funds and the need for natural gas infrastructure in other unserved areas. This conclusion is limited to this unique situation. Other requests for use of Bond Funds will be evaluated on a case-by-case basis.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The evidence for this finding of fact is found in Frontier's application, the testimony of the Frontier and Public Staff witnesses, and the testimony of Allen Kimball.

The Frontier witnesses testified that the proposed Warren County Project meets the objectives of G.S. 62-159 and G.S. 62-2(9) in that it promotes economic development and the public welfare by providing natural gas infrastructure in currently unserved areas. Based upon average wages earned by its citizens, Warren County is a Class I county eligible for economic development incentives under the Bill Lee Act, G.S. 105-129. Witness Kimball confirmed this. He testified that Frontier's plans to provide natural gas service to Warren County was a necessary prerequisite for the site selection of a regional distribution center for CVS Pharmacy, which will create 600 new jobs and raise the median annual income of Warren County residents by $1,250. Frontier's Warren County Project also resulted in a $30 million expansion of the Chesapeake Paper corrugated cardboard plant, creating an additional 100 jobs. Frontier's witnesses testified that the proposed system can support future growth in demand and will be able to meet the area's long-term energy needs, which will assist in attracting industry and promoting economic development in this largely rural area of the State.

The Public Staff witnesses testified that Frontier's proposed pipeline is routed and designed to provide adequate gas service to the areas of Warren County with the best prospects for economic development and that the proposed rates achieve a reasonable balance between the interests of the State's taxpayers and the prospective Warren County customers.

For all of these reasons, the Commission concludes that the use of Bond Funds to finance the negative NPV of Frontier's Warren County Project will promote economic development, is consistent with the objectives and purposes of G.S. 62-2(9) and G.S. 62-159, and is in the public interest and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 12-13

The evidence for these findings of fact is found in the testimony of the Frontier and Public Staff witnesses.

The Public Staff recommended that the Commission approve the use of Bond Funds for the purpose of constructing, at a minimum, the following facilities: a meter station at the Frontier interconnection with Transco, at least 45,000 feet of 6-inch steel pipe, at least 75,000 feet of 6-inch plastic pipe, a city gate station at Norlina, and a city gate at Warrenton. In response to questions from the Commission, Frontier indicated that it will construct not only these facilities, but also additional distribution mains and other facilities as described in Frontier's application "precisely as ... proposed, period, end of sentence, no more regulatory qualifications." Frontier witness Schwecke agreed that the Company is obligated "to do it minimally to the extent ... currently proposed." Given Frontier's commitment at the hearing, the Commission finds it appropriate to require that Frontier construct not just the minimum facilities cited by the Public Staff, but the full transmission and distribution facilities set forth in Exhibits 1 and 4 of its Amended Application and that this requirement be made a specific condition of the Commission's approval of the use of Bond Funds by Frontier, enforceable by show cause proceedings.

The Commission finds that the conditions set forth in this Order and the current regulatory process provide adequate mechanisms for monitoring the project and holding Frontier accountable for building the Warren County Project as proposed and accountable for the responsible expenditure of Bond Funds for its Warren County Project. Frontier will be required to file all reports as required by Commission Rules R6-92 and R6-93, which provide for project status reports, a final accounting of expenditures, and biennial reports with sufficient information to evaluate when and if the project becomes economically feasible. If at any time the Warren County Project is determined by the Commission to have become economically feasible, the Commission will require Frontier to remit appropriate funds related to the project pursuant G.S. 62-159(b) and Commission Rules.

The Commission finds, based on the testimony and the evidence as a whole, that the total projected cost of the Warren County Project is $4,972,737, that the negative NPV of the project is $2,404,850, and that $2,404,850 in Bond Fund proceeds and an investment by Frontier of $2,567,887 will make the project feasible. Based on the foregoing findings, the Commission concludes that Frontier's request for Bond Fund proceeds in the amount of $2,404,850 to finance the negative NPV of the Warren County Project should be approved.

IT IS, THEREFORE, ORDERED as follows:

1. That Frontier's proposed Warren County Project is hereby approved for funding from the proceeds of Bond Funds in the amount of $2,404,850, which is the negative NPV of the project;

2. That the disbursement of up to $2,404,850 to Frontier as reimbursement of up to 75% of actual amounts paid for the construction and operation of an intrastate pipeline and local distribution system to provide natural gas service to Warren County is hereby authorized upon Frontier's submittal of reimbursement requests and compliance with Commission Rule R6-92;

3. That Frontier shall construct the full transmission and distribution facilities set forth in Exhibits 1 and 4 of its Amended Application as a specific condition of the Commission's approval of the use of Bond Funds by Frontier, enforceable by show cause proceedings;

4. Frontier's rates, tariffs, and service regulations as approved by the Commission's Order dated July 14, 1999, in Docket No. G-100, Sub 78, are hereby approved and authorized for Frontier's service to Frontier's customers in Warren County, in lieu of any previously approved rates, tariffs, and service regulations; and

5. That Frontier shall file reports and a final accounting as required by Commission Rules R6-92 and R6-93.

ISSUED BY ORDER OF THE COMMISSION.
This the 16th day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

RG031600.03

Commissioner Ervin files a concurring opinion, in which Commissioner Pittman joins.

DOCKET NO. G-40, SUB 2

COMMISSIONER ERVIN, CONCURRING:

I fully concur with the result reached by the Commission in this proceeding and with the logic upon which the Commission based its decision to approve Frontier Energy, L.L.C.'s (Frontier Energy), request to use natural gas expansion bond funds to facilitate the extension of service to Warren County. I reach this decision, however, with considerable reluctance in view of the earlier promise made by Frontier Energy's predecessor, Frontier Utilities of North Carolina, Inc. (Frontier Utilities), to serve Warren County using funds provided by investors rather than money from an expansion fund.

The record clearly reflects that, at the time the Commission authorized Frontier Utilities to serve Warren County in lieu of Public Service Company of North Carolina, Inc. (PSNC), Frontier Utilities represented to the Commission that extending service to Warren County was economically feasible and that Frontier Utilities would extend service to Warren County using traditional financing, effectively implying that it would not seek assistance from an expansion fund established pursuant to G. S. 62-158. At the time that Frontier Utilities received the certificate for Warren County, such an expansion fund was the only form of non-traditional financing readily available to local distribution companies seeking to construct economically infeasible service extension projects. When the certificates authorizing Frontier Utilities to serve the Four County area and Warren County were transferred to Frontier Energy, Frontier Energy indicated that it intended to abide by the commitments made by Frontier Utilities, including those relating to the extension of service to Warren County. As a result, I had always understood that Frontier Energy would extend natural gas service to Warren

County without the use of non-traditional financing such as money from an expansion fund or the gas expansion bond fund.

I regarded this commitment by Frontier Utilities and Frontier Energy as of considerable importance to North Carolina's efforts to extend natural gas service to unserved areas such as Warren County. As everyone involved in North Carolina's gas expansion effort is aware, the amount of non-traditional funding available for economically infeasible service extension projects is not unlimited. Under these circumstances, the willingness of Frontier Utilities and Frontier Energy to extend natural gas service to Warren County using traditional financing produced direct benefits to other unserved areas by making bond funds not needed in Warren County available for use elsewhere. For that reason, I was quite concerned when Frontier Energy sought Commission approval to use gas bond fund money for the purpose of extending natural gas service to Warren County.

I must confess that I was initially inclined to vote to require Frontier Energy to extend service to Warren County using investor funds in accordance with the earlier commitment made by Frontier Utilities and reaffirmed by Frontier Energy. After much reflection and with considerable hesitation, I have decided that the Commission is correct in deciding to approve Frontier Energy's amended application for bond fund support. This decision to rethink my original inclination to require Frontier Energy to carry out Frontier Utilities's commitment had little to do with Frontier Energy's emphasis upon changes in cost estimates and customer count information occurring since the time that Frontier Utilities received the right to serve Warren County. Any deficiencies in the cost estimates and customer count information which Frontier Utilities presented to the Commission in 1997 are directly related to the investigation made by Frontier Utilities at the time that it sought a certificate for Warren County and Frontier Energy's acceptance of Frontier Utilities' earlier commitments when it obtained control of the certificates previously issued to Frontier Utilities. As a result, I would not normally be inclined to relieve Frontier Energy from its responsibility for carrying out Frontier Utilities' earlier commitment and do so here only because there seem to be compelling reasons for reaching a different result.

My ultimate conclusion that Frontier Energy's amended application should be approved is driven by two major factors. First, there is no question but that Warren County is the type of community which the gas bond fund was intended to assist. Secondly, the fact that Frontier has elected to reduce the rates charged to customers in Warren County to the same level as those in the Four County area; the fact that new gas load has already come to Warren County, inevitably changing the nature of the project from that originally projected by Frontier Utilities; and the fact that the facilities which Frontier Energy currently intends to build in Warren County appear to represent an improvement over Frontier Utilities' original design suggests that approval of Frontier Energy's proposal would result in tangible benefits for the citizens of Warren County over and above those which would flow from a decision to require Frontier Energy to honor Frontier Utilities' original commitment. As a result, I agree that circumstances have changed sufficiently from the time that the Commission awarded the certificate to provide natural gas service in Warren County to Frontier Utilities to justify approval of Frontier Energy's amended application.

I would be less than honest, however, if I did not express my concern about any future reluctance on the part of Frontier Energy to honor the commitments made by Frontier Utilities to the Commission and to the people of North Carolina. At the time that it received the right to provide natural gas service in the Four County area and Warren County, Frontier Utilities represented that it would build a rural gas distribution system unlike any previously seen in this state, one which would reach large numbers of residential, commercial, and agricultural customers who would not be served by a more traditional system. As I understand the Commission's orders awarding the franchise for the Four County area to Frontier Utilities, this commitment to build a rural distribution system was an important factor in the Commission's decision to rule in Frontier Utilities' favor. Any failure by Frontier Energy to build a gas distribution system in either the Four County area or in Warren County which closely resembles those described in the proceedings in which Frontier Utilities obtained the right to serve the Four County area or in this proceeding will strike me as a very serious problem potentially worthy of further action by the Commission. Although the significant change in circumstances described above has persuaded me that Frontier Energy's amended application ought to be approved in this instance, I want to be clearly understood that I expect Frontier Energy to honor the commitments made by Frontier Utilities and that I will do what I lawfully and reasonably can do to ensure that Frontier Energy carries out the commitments originally made by Frontier Utilities.

/s/ Sam J. Ervin, IV
COMMISSIONER SAM J. ERVIN, IV

Commissioner Pittman joins in this concurring opinion.

DOCKET NO. G-40, SUB 3
DOCKET NO. G-40, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. G-40, SUB 3

In the Matter of
Application of Frontier Energy, L.L.C., for Approval to Use Proceeds of Natural Gas Bond Funds to Finance the Negative Net Present Value of the Cost of a Project to Extend Natural Gas Service Into Alleghany County

DOCKET NO. G-40, SUB 4

In the Matter of
Application of Frontier Energy, L.L.C., for Approval to Use Proceeds of Natural Gas Bond Funds to Finance the Negative Net Present Value of the Cost of a Project to Extend Natural Gas Service Into Ashe County

ORDER APPROVING USE OF NATURAL GAS BOND FUNDS

NATURAL GAS - EXPANSION

HEARD: Tuesday, May 16, 2000, at 9:30 a.m., in Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina 27602

BEFORE: Commissioner Sam J. Ervin, IV, Presiding, Chair Jo Anne Sanford and Commissioners J. Richard Conder, Ralph A. Hunt, and Judy Hunt

APPEARANCES:

For Frontier Energy, L.L.C.:

M. Gray Styers, Jr., Kilpatrick Stockton, L.L.P., 3737 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Paul Lassiter and Vickie Moir, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On August 13, 1999, Frontier Energy, L.L.C. (Frontier), filed two separate letters of intent pursuant to G.S. 62-159 and Commission Rules R6-90 through R6-94 advising of plans to file applications to use proceeds of natural gas bond funds made available by Session Law 1998-132, the Clean Water and Natural Gas Critical Needs Bond Act of 1998, to finance the negative net present value (NPV) of a project to extend natural gas service into both Ashe and Alleghany Counties.

On August 24, 1999, the Commission issued orders scheduling proceedings on the letters of intent. The Commission established a deadline for competing letters of intent. No competing letters of intent were filed.

On December 22, 1999, Frontier filed a motion to consolidate, its original application and supporting exhibits, and the pre-filed joint testimony of Joseph M. Rivera, Rodger R. Schwecke and David G. Schiller. In its motion, Frontier requested that the two proceedings initiated by the separate letters of intent be consolidated. The Commission granted Frontier's motion on January 11, 2000. Thereafter, the Commission issued an order that established deadlines for interventions and for intervenor testimony and rebuttal testimony and set Frontier's application for hearing on May 16, 2000.

Subsequently, on April 7, 2000, Frontier filed a motion to divide hearing requesting the Commission to proceed with the hearing on Frontier's application to use bond funds for Phases I, II and IV to provide service to Ashe County (Ashe County project) consistent with its scheduling order, but to separate the hearing and consideration of Phases III and V to serve Alleghany County for hearing at a future date. The Commission granted Frontier's motion on April 12, 2000. On April 26, 2000, Frontier filed its revised NPV calculation for the Ashe County project only.

On May 3, 2000, Frontier filed a motion to amend its application and testimony, an amended application, and the amended testimony of William Purcell, Schwecke and Schiller reflecting refinements in the NPV analysis of the Ashe County project. Witness Purcell was substituted for, and adopted the previously filed testimony of, witness Rivera. By the amended application and testimony, Frontier requested $9,278,768 in bond funds to finance the negative NPV of the Ashe County project. On May 8, 2000, the Commission issued an order granting Frontier's motion to amend.

The Public Staff filed the joint testimony of Jeffrey L. Davis, Thomas W. Farmer and Kirk Kibler on May 4, 2000. In this testimony, the Public Staff recommended that the Commission approve $9,278,768 in bond funds for the Ashe County project as described in the amended application and Frontier testimony. No other parties intervened or filed testimony.

The evidentiary hearing on Frontier's amended application was conducted on May 16, 2000. At the hearing, a number of local and state officials testified as public witnesses in support of Frontier's amended application, including John Marsh (Chairman, Ashe County Board of Commissioners), Greg Edney (West Jefferson Town Manager), Representative Rex Baker, Jennings Grey (Customer Service Manager, Oldham Saw Company), Don Adams (Alleghany County Manager), and Patrick Woodie (Executive Director, New River Community Partners).

Frontier witnesses Purcell, Schwecke and Schiller, testified as a panel. Frontier requested leave to file supplemental testimony, which the Commission granted, and supplemental testimony was also presented by the panel.

The Public Staff presented its panel of witnesses Davis, Farmer and Kibler, who recommended that the Commission approve Frontier's amended application for the Ashe County project. No evidence was offered in opposition to Frontier's request.

Based on the filings, the testimony and exhibits introduced at the hearing, and the Commission's record of this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. Frontier is a limited liability company organized and existing under the laws of North Carolina and engaged in the business of transporting, distributing and selling natural gas in North Carolina. Frontier is a public utility as defined in G.S. 62-3(23) and a natural gas local distribution company within the meaning of G.S. 62-159 and the Commission's Rules and is subject to the jurisdiction of this Commission.

2. Frontier has properly applied to the Commission to use natural gas bond funds to finance the negative NPV of its Ashe County project and has provided proper notice of its application.

3. Ashe County does not currently have natural gas service and is therefore an "unserved area" as that term is used in G.S. 62-2(9) and G.S. 62-159 and Commission Rule R6-90. No party has ever proposed to provide natural gas service to Ashe County other than in this proceeding.

4. Frontier proposes to extend a transmission pipeline from its existing facilities in Wilkesboro westward to Deep Gap and Boone, and from Deep Gap north to West Jefferson and

Jefferson. Distribution mains will be constructed from the transmission pipeline in Jefferson and West Jefferson.

5. The proposed system will be composed of approximately 20 miles of 10-inch steel pipe, 16 miles of 6-inch steel pipe, 6 miles of 6-inch plastic pipe, 8 miles of 4-inch plastic pipe, and 77 miles of 2-inch plastic pipe, almost all of which will be installed in public rights-of-way and along streets and roads.

6. Frontier will commence construction of Phase I of the Ashe County project within 30 days of the Commission's order or notice of decision awarding bond funds in the amount requested.

7. The total projected cost of the Ashe County project is $16,151,211, including the effects of inflation. This sum consists of $9,859,217 related to transmission facilities and the balance for the distribution system, including service attachments and inflation.

8. Commission Rule R6-81(b)(1) defines "economically infeasible" as a project which has a negative NPV. The Ashe County project is economically infeasible in that it must receive additional funds of $9,278,768 in order for the project to have a NPV of zero. Frontier has requested that the Commission approve the use of $9,278,768 in bond funds for the Ashe County project.

9. The Public Staff has investigated Frontier's amended application and supporting workpapers, performed a market study, and conducted a field investigation of Ashe County. The Public Staff recommends that the Commission approve $9,278,768 in bond funds for the Ashe County project.

10. The availability of natural gas in Ashe County will be an important energy resource and will promote economic and community development and lower energy costs to industrial, commercial and residential customers in Ashe County. Public witnesses presented extensive testimony that natural gas will greatly benefit the community and assist in economic development efforts. In addition, the local governments of Ashe and Alleghany Counties, the City of West Jefferson, and the Town of Jefferson each approved resolutions, which are matters of record, supporting Frontier's request for bond funds. Considering the scope of the proposed project, the number of anticipated customers by class that will be served, the total cost of the proposed project, the extent to which the project is infeasible, and the need and desire of Ashe County for natural gas as expressed by the public witnesses, Frontier's proposed Ashe County project, financed in part by bond funds, is in the public interest and should be approved.

11. The commitments of Frontier, the conditions set forth in this Order, and the existing regulatory process provide adequate safeguards to ensure the construction of the project as proposed, to the benefit of Ashe County, and without detrimental effect on Frontier's other ratepayers.

12. The Ashe County project proposed by Frontier is in accordance with G.S. 62-2(9) and G.S. 62-159 and should be approved for funding in the amount of $9,278,768 from natural gas bond funds, subject to the conditions set forth herein.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

The evidence for this finding of fact is contained in Frontier's amended application, the Commission's official files, and the testimony of Frontier's witnesses. This finding of fact is essentially informational, procedural and jurisdictional in nature. No party presented any evidence to the contrary.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

The evidence for this finding is found in the amended application, the testimony and exhibits of Frontier, and the testimony of the Public Staff.

The Public Staff's testimony outlines the history of the natural gas bond funds. Session Law 1998-132, the Clean Water and Natural Gas Critical Needs Bond Act of 1998, authorized bonds for water and natural gas infrastructure. The portions relevant to this proceeding are codified at G.S. 62-159, which authorizes the Commission to provide funding through the proceeds of general obligation bonds for construction of natural gas facilities in unserved areas which are not economically feasible to construct. On November 3, 1998, North Carolina voters approved the issuance of $200 million in general obligation bonds for natural gas expansion. On November 16, 1998, the Commission initiated a rulemaking proceeding, and on March 8, 1999, the Commission issued its Order Adopting Rules R6-90 through R6-94 for implementing G.S. 62-159. By Order dated August 4, 1999, the Commission amended portions of these Commission Rules and also adopted NPV guidelines to be used in administering G.S. 62-159.

On December 22, 1999, Frontier filed its consolidated application for approval to use bond funds for Ashe and Alleghany Counties and pre-filed testimony and exhibits in support thereof. Subsequently, Frontier moved to divide the hearing so that Phases I, II and IV in Ashe County would proceed as scheduled. The Commission granted Frontier's motion, and on May 3, 2000, Frontier filed the amended application, testimony and exhibits which are the basis of this proceeding. Frontier's testimony describes their ten exhibits and how they meet the requirements of Commission Rule R6-90. The information provided includes, but is not limited to: a geographic description of the Ashe County project (Exhibit 1), statements regarding permitting and licensing, a market study, an engineering study (Exhibit 4), an NPV study, a description of Frontier's service capabilities, tariffs, a construction schedule, and a timetable for disbursement of bond funds. Frontier's NPV study was conducted consistent with the NPV guidelines adopted in the Commission's Order dated August 4, 1999. Frontier provided public notice of these proceedings by publication in the Jefferson Post and Alleghany News, and an affidavit of publication was filed.

The Public Staff conducted an investigation and confirmed that Frontier's filing was complete and in compliance with the applicable statutes and Commission Rules. The Commission concludes that Frontier has complied with the requirements of G.S. 62-159 and Commission Rules R6-90 through R6-94.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

The evidence for this finding is found in Frontier's amended application, the testimony of Frontier's witnesses, the testimony of the Public Staff witnesses, and the testimony of several public witnesses. It is uncontroverted that no party has ever proposed providing natural gas service to Ashe County other than in this proceeding and that no part of Ashe County currently has natural gas service.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4-6

The evidence for these findings is found in Frontier's amended application and the testimony and exhibits of Frontier's witnesses.

Frontier's witnesses testified that Frontier intends to construct the proposed natural gas system for Ashe County in three phases. The first phase of the transmission system will consist of 20 miles of 10-inch steel pipe that will extend westward from Wilkesboro to Deep Gap along the rights-of-way of U.S. Highway 421. The second phase of the transmission system will consist of 16 miles of 6-inch steel pipe extending north from Deep Gap at the intersection of U.S. Highways 421 and 221 to West Jefferson along Highway 221. From West Jefferson, Frontier will extend approximately 6 miles of 6-inch plastic distribution header to Jefferson. In the final phase, distribution main consisting of approximately 85 miles of 4-inch and 2-inch polyethylene pipe will be constructed in Jefferson and West Jefferson.

Frontier's witnesses testified that Frontier will enter into a contract for the first phase of the transmission pipeline and begin construction within thirty days of the Commission's final order or notice of decision awarding bond funds in this docket. Frontier recognizes that its original plans to serve Watauga County included a 6-inch steel pipeline along the same route as Phase I of this Ashe County project. Frontier testified, and the Public Staff confirmed, that a 6-inch pipeline would be inadequate to serve Ashe County (and eventually Alleghany County). Accordingly, Frontier now proposes to increase the size to 10 inches in order to serve Ashe County. It proposes to assign a portion of the cost of this transmission pipeline to the Ashe County project based upon the incremental additional cost of the 10-inch steel pipe necessary and required to serve customers in Ashe County. We agree that this is appropriate for a number of reasons.

The original plans by Frontier Utilities of North Carolina did not contemplate extending natural gas service to Ashe or Alleghany County. Accordingly, that original system was not designed to accommodate future loads from customers in those counties. The pipeline from North Wilkesboro to Boone was proposed to be only 6-inch steel pipe. In contrast, Frontier is proposing in this docket 20 miles of 10-inch steel pipe to Deep Gap. This increase in pipe size is necessary to serve Ashe County and represents a significant incremental cost over what would be incurred if Ashe County remains unserved. It is uncontroverted that the incremental cost of increasing the pipe size is $3,628,020.

In addition, currently the closest natural gas pipeline to Ashe County is Frontier's transmission main in North Wilkesboro. If any other party desired to serve Ashe County, it would probably connect with Frontier's system in North Wilkesboro, construct its new system from this point (with

100% of right-of-way and construction costs being allocated to Ashe County) and, in addition, pay Frontier for transportation of gas from Transco to the start of this new system.

If the transmission pipeline to Deep Gap were sized and constructed to serve only Watauga County, Frontier could, in theory, construct a separate transmission pipeline to serve Ashe County. Such a pipeline would be part of the NPV analysis for the Ashe County project and would no doubt be much more expensive than the proposed incremental cost of the pipeline to Deep Gap. Moreover, by using the same pipeline for both this area and Watauga County, Frontier reduces the number of crossings of the Blue Ridge Parkway and of the sensitive streams and rivers that flow down the eastern side of the Blue Ridge Mountains and lowers the overall cost of serving Ashe County.

For these reasons, the Commission concludes that it is appropriate to assign the incremental cost of increasing the size of the transmission pipeline from North Wilkesboro to Deep Gap to the Ashe County project, since that pipeline has not yet been built and will, in fact, be sized and used to provide natural gas supply and capacity for Ashe County.

Frontier's construction schedule calls for construction of Phase I of the Ashe County project to be completed by December 31, 2000. Frontier plans to complete construction of Phase II by October 1, 2001. Construction of the final phase of the Ashe County project will begin in the summer of 2001 and continue over the next two and one-half years. In this phase, distribution lines to customers will be constructed along the streets of Jefferson and West Jefferson.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 7-8

The evidence for these findings of fact is found in the testimony of Frontier's witnesses and the Public Staff witnesses, as well as Frontier's amended application and particularly Exhibit 5, which is the NPV analysis performed consistent with the Commission's guidelines.

Frontier's construction cost reflect estimated cost for Phase I of the transmission system, as well as Frontier's experience during construction of over 140 miles of pipeline in Surry, Watauga, Wilkes, Yadkin, and Warren Counties in 1998, 1999, and 2000. Based upon this data, Frontier's witnesses testified that the system proposed herein would cost $16,151,211. The Public Staff agreed with these cost calculations.

The expected cost for the assigned cost of Phase I of the system is $3,628,020 (uninflated); the expected cost for Phase II of the system is $6,121,102 (uninflated); and the expected cost for the last phase is $4,810,717 excluding meters, service lines and regulators. The expected cost for the entire Project is $16,151,211 after adjusting for meters, service lines, regulators and inflation as shown in Exhibit 5 of Frontier's amended application. The Public Staff witnesses testified that they had verified Frontier's costs and had found them to be accurate and appropriate in light of other pipeline construction projects with which they are familiar.

Frontier projects that it will spend $10,550,100 during 2000 for the transmission pipeline to Deep Gap, of which $3,628,020 is requested to be assigned to the Ashe County project. Frontier will spend $8,103,884 in the second year of the project and $2,022,505 in the third year. Pursuant to Commission Rule R6-92, Frontier is to be reimbursed for 75% of total expenditures during construction with the balance of the funds disbursed upon Frontier's filing a final accounting approved by the Commission after completion of the last phase of the Ashe County project. Exhibit 10 to Frontier's amended application sets forth the amounts and timetable for the disbursements of bond fund proceeds.

Frontier's witnesses testified that Frontier had conducted a marketing survey from which it identified 2,529 potential residential and 410 potential commercial customers in the towns and along the highway corridors of Ashe County. Frontier also identified seven potential industrial, large commercial and institutional facilities to which natural gas service will be available. Exhibit 3 to Frontier's amended application provides the results of the surveys. Based on the location of residential, commercial and industrial customers determined in the marketing survey, a model system was designed to provide natural gas service in the county as cost-effectively as possible. Piping was routed to customers as efficiently as possible accounting for expected load growth and areas of future expansion. These distribution facilities will be installed on road easements and will be routed based on existing utilities in the easements. Detailed maps of Frontier's proposed core system for Ashe County were included in Exhibit 4 to Frontier's amended application.

From these efforts, Frontier projected costs, revenues and income from the project and factored this information into the NPV analysis consistent with the Commission's guidelines. This analysis indicated a negative NPV for this project of $9,278,768, as shown in Exhibit 5 to Frontier's amended application. The Public Staff reviewed Frontier's projections and inputs, as well as the NPV analysis itself, and determined that Frontier had correctly calculated the NPV of the project.

The Commission concludes, based on Frontier's testimony, amended application and exhibits, and the Public Staff's testimony that the total cost projection for the project is reasonable and appropriate for use in Frontier's NPV calculation and that Frontier's calculation of the negative NPV of the proposed project is fair and reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for this finding is found in the testimony of the Public Staff witnesses.

The Public Staff witnesses testified that they had conducted an investigation of Frontier's filings including a review of construction cost estimates, market projections, financial data, and all assumptions and methodologies used in the NPV study. In addition, the Public Staff evaluated the industrial market, alternative fuel prices, and the other components of Frontier's amended application. The Public Staff conducted its investigation through data requests, discussions with Frontier personnel, discussions with local and state officials, customer surveys to ascertain potential loads, and independent research. As a result of this investigation, the Public Staff concluded and recommended (1) that, from an engineering/accounting/financial calculation perspective, the appropriate negative NPV for this project is $9,278,768 and (2) that, from a policy perspective, the Commission should approve this amount of bond funds for construction of the Ashe County project.

NATURAL GAS - EXPANSION

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence for this finding is found in Frontier's amended application and in the testimony of Frontier and the Public Staff, as well as the extensive public witness testimony in support of Frontier's Ashe County project.

Frontier's witnesses testified that the proposed Ashe County project meets the objectives of G.S. 62-159 and G.S. 62-2(9) in that it promotes economic development and the public welfare by providing natural gas infrastructure in currently unserved areas. Based upon average wages earned by its citizens, Ashe County is a Tier 1 county eligible for the maximum economic development incentives available under the Bill Lee Act, G.S. 105-129. As discussed above, Frontier has identified 2,529 potential residential and 410 potential commercial customers in Ashe County to which it will make natural gas available. Frontier also identified seven potential industrial, large commercial and institutional facilities. Frontier's witnesses further testified that Frontier has designed the proposed system to support future growth in demand and to meet the area's long-term energy needs, which will assist in attracting industry and promoting economic development in this largely rural area of the State. Frontier's proposed pipeline is routed and designed such that it will provide adequate gas service to the areas of Ashe County with the best prospects for economic development, and the proposed rates will achieve a reasonable balance between the interests of the State's taxpayers and the prospective Ashe County customers.

According to the public witness testimony, Ashe County has a high unemployment rate compared to other areas of the State, is a Tier 1 county qualifying for the highest level of economic development incentives to attract industry to this region, and desires natural gas service to aid future economic development activities. As evidence of the bright prospects for future economic development if Ashe County receives natural gas service in the near future, several public witnesses testified that existing, expanding, and new industries will be able to use natural gas for the first time and recognize immediate cost savings as a result. According to witness Grey of Oldham Saw Company, which relocated to North Carolina in 1998 and employs 320 local residents in Ashe County, the availability of natural gas service will mean substantial cost efficiencies that will enable the company to offer more benefits to its employees. Patrick Woodie, Executive Director of New River Community Partners, an organization devoted to preserving the history, culture, natural resources, and economy of Northwestern North Carolina, testified that natural gas service would enable one of the companies his organization recruited to the area, Bristol Compressors, to realize immediate cost savings of approximately $100,000 annually. In addition, witness Woodie commented that he does not foresee Frontier's proposed line presenting any environmental problems due to construction and operation of a new natural gas system in this part of the State. Furthermore, according to witness Marsh, Chairman of the Ashe County Board of Commissioners, the public school system in Ashe County is interested in converting to natural gas to save energy costs, particularly in light of upcoming new school construction.

Representative Baker, on behalf of himself and Representatives Hiatt and Wilson, expressed support for Frontier's bond fund application and testified that local Ashe County officials have done an outstanding job in economic development and industrial recruitment but have identified natural gas as a critical element in their continuing efforts. Finally, the governing bodies of Ashe County, Alleghany County, the Town of Jefferson, and the City of West Jefferson, each passed resolutions supporting Frontier's bond fund application because of the advantages that natural gas will bring to this area.

For all of these reasons, the Commission concludes that the utilization of bond funds to finance the negative NPV of Frontier's Ashe County project will promote economic development, is consistent with the objectives and purpose of G.S. 62-2(9) and G.S. 62-159, and is in the public interest and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 11-12

The evidence for these findings of fact is found in the testimony of Frontier and the Public Staff.

The testimony and evidence presented by Frontier in this proceeding is uncontroverted and supported by all of the public witnesses as well as by the Public Staff. In its testimony before the Commission, the Public Staff witnesses stated that the amount of bond funds requested by Frontier is appropriate and recommended Commission approval of $9,278,768 in bond funds for the Ashe County project.

The Commission finds that the conditions and requirements set forth in this Order and the current regulatory process, in general, provide adequate mechanisms for monitoring the project and holding Frontier accountable for building the Ashe County project as proposed and accountable for the responsible expenditure of bond funds for its Ashe County project. Frontier will be required to file all reports as required by Commission Rules R6-92 and R6-93 which provide for detailed project status reports, a final accounting of expenditures, and biennial reports with sufficient information to evaluate when and if the project becomes economically feasible. If at any time the Ashe County project is determined by the Commission to have become economically feasible, the Commission will require Frontier to remit appropriate funds related to the project pursuant to G.S. 62-159(b) and Commission Rules.

The Commission finds, based on the testimony and the evidence as a whole, that the expected cost of the Ashe County Project is $16,151,211, that the negative NPV of the project is $9,278,768, and that $9,278,768 in bond fund proceeds and an investment by Frontier of $6,872.443 will be required to make the project feasible. Based on the foregoing findings, the Commission concludes that Frontier's request for bond fund proceeds in the amount of $9,278,768 to finance the negative NPV of the Ashe County project is appropriate and should be approved. Disbursement of this amount will depend upon sale of natural gas bonds by the State Treasurer. Further, nothing in this Order shall bind the Commission to accept any particular cost of capital, discount rate, or inflation rate in any future proceeding before the Commission.

IT IS, THEREFORE, ORDERED as follows:

1. That Frontier's proposed project to extend natural gas service to Ashe County is hereby approved for funding from natural gas bond funds in the amount of $9,278,768, which is the negative NPV of the project;

2. That Frontier's Ashe County project shall include the facilities set forth in its amended application and in the testimony of witnesses Purcell, Schwecke and Schiller;

3. That the disbursement of bond funds as authorized herein as reimbursement of up to 75% of actual amounts paid for the project to provide natural gas service to Ashe County, is hereby authorized upon Frontier's submittal of reimbursement requests and compliance with Commission Rule R6-92;

4. That Frontier shall construct the full transmission and distribution facilities set forth in Exhibits 1 and 4 of its amended application as a specific condition of the Commission's approval of the use of bond funds by Frontier, enforceable by show cause proceedings;

5. That Frontier's service rates, tariffs, and service regulations as approved by the Commission's Order dated July 14, 1999, in Docket G-100, Sub 78, and adjusted in subsequent purchased gas cost adjustment proceedings, are hereby approved and authorized for Frontier's service to Frontier's customers in Ashe County; and

6. That Frontier shall file reports and a final accounting as required by Commission Rules R6-92 and R6-93.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

rg062900.04

Commissioners Pittman and Owens did not participate in this decision.

DOCKET NO. G-9, SUB 408

Before the North Carolina Utilities Commission

In the Matter of
Application of Piedmont Natural Gas Company, Inc., for Authorization to (1) Transfer Supplier Refunds and Interest to Its Natural Gas Expansion Fund and (2) Use Expansion Funds to Provide Service to Avery, Mitchell and Yancey Counties) ORDER APPROVING ADDITIONAL FUNDING

HEARD: June 22, 2000, at 9:30 a.m., Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Judy Hunt, Presiding; Commissioners William R. Pittman and Robert V. Owens, Jr.

APPEARANCES:

For Piedmont Natural Gas Company, Inc.:

Jerry W. Amos, Amos, Jeffries & Robinson, L.L.P., Post Office Box 787, Greensboro, North Carolina 27402

For the Using and Consuming Public:

Antoinette R. Wike, Chief Counsel, Public Staff - North Carolina Utilities Commission, 430 North Salisbury Street, Raleigh, North Carolina 27603

BY THE COMMISSION. On November 19, 1998, the Commission issued an order authorizing Piedmont Natural Gas Company, Inc. (Piedmont) to transfer $8,220,807.78 in supplier refunds and interest to its natural gas expansion fund and to use up to $26,260,530 of expansion funds to provide service to Avery, Mitchell and Yancey Counties (the Three County Project). The total estimated cost of the project (after adjustments) was $31,949,196. On May 20, 1999, the Commission issued an order that increased the amount of expansion funds to be applied to the Three County Project from $26,260,530 to $27,773,206 to cover the costs associated with a change in pipeline routing through Pisgah National Forest.

On May 10, 2000, Piedmont filed an application and supporting testimony requesting an additional $11,072,457 in expansion funds for the Three County Project. By letter filed on June 7, 2000, Piedmont reduced the additional amount requested to $10,753,484. Piedmont requests an order authorizing it to fund construction of the Three County Project from its expansion fund up to $38,526,690.

The Commission issued an order on May 23, 2000, scheduling a hearing.

On June 12, 2000, the Public Staff filed an affidavit of Eugene H. Curtis, Jr., Director – Natural Gas Division, and James G. Hoard, Supervisor – Natural Gas Section, Accounting Division.

The evidentiary hearing took place on June 22, 2000, as scheduled. Nick Emanuel, Vice President – Engineering, Coy H. Jeans, III, Manager of Construction, and Robert O. Pritchard, Director – Corporate Planning testified for Piedmont. The Public Staff offered the affidavit of Curtis and Hoard. No other parties offered any evidence at the hearing.

Based upon the testimony, exhibits and affidavit presented at the hearing and the record as a whole, the Commission makes the following:

NATURAL GAS - EXPANSION

FINDINGS OF FACT

1. Piedmont, a corporation with its principal office in Charlotte, North Carolina, is engaged primarily in the business of transporting, distributing and selling natural gas to customers in North Carolina, South Carolina, and Tennessee. Piedmont is a public utility as defined in Chapter 62 of the North Carolina General Statutes subject to the jurisdiction of this Commission.

2. Piedmont is properly before the Commission, pursuant to Commission Rule R6-84(e), requesting permission to use additional funds from its expansion fund for its previously approved expansion project to provide natural gas service to Avery, Mitchell and Yancey Counties.

3. Piedmont originally planned to begin construction on the Three County Project on May 1, 2000, and, based on that start date, to complete construction by October 15, 2000. If approval of additional funding is received in time to begin construction by July 31, 2000, and barring circumstances beyond its control, Piedmont believes the majority of the project can be completed by December 15, 2000.

4. The major reasons for the increase in the cost of the Three County Project are unanticipated costs as a result of conditions imposed by state and federal environmental regulators, increased right-of-way costs, increased contractor labor due primarily to the need to excavate more rock than previously anticipated and increases in the overall length of the transmission pipeline segment from Morganton to Spruce Pine.

5. The additional costs of the Three County Project have increased the negative net present value (NPV) by $10,753,484.

6. Piedmont has in excess of $13.0 million in uncommitted supplier refunds available for the Project.

7. The Public Staff has verified the additional costs and determined that the additional costs increase the negative NPV of the project in the amount computed by the Company. The Public Staff recommended that the Commission grant Piedmont's request for additional funding from its expansion fund for the project.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 - 2

The evidence supporting these findings is contained in the official files and records of the Commission, Piedmont's application and exhibits, and the testimony and exhibits of Piedmont witnesses Emanuel, Jeans and Pritchard. These findings are essentially informational, procedural or jurisdictional in nature and are based on evidence uncontested by any of the parties.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3 - 7

The evidence supporting these findings is contained in the application, in the testimony of witnesses Emanuel, Jeans and Pritchard, and in the affidavit of Curtis and Hoard. Witnesses Emanuel and Jeans testified to the increased construction costs, and witness Pritchard testified that these increased costs increased the negative NPV by $10,753,484. Curtis and Hoard testified through affidavit that they verified the additional costs and that the additional costs increase the negative NPV of the project in the amount testified to by witness Pritchard. This evidence was uncontested.

The record shows that bids from the contractors who will construct the transmission system were approximately $7.5 million higher than the original estimate and the bids from the contractors who will construct the distribution system were approximately $.8 million higher than the original estimate. The additional contractor costs result primarily from the following factors: various environmental requirements - $3.0 million; higher levels of rock than originally anticipated - $3.5 million; the use of private rights-of-way rather than highway rights-of-way between Spruce Pine and Burnsville - $.8 million; higher than anticipated costs of acquiring private rights-of-way due to increases in land values - $.5 million; the installation of an additional 1.12 miles of pipeline between Morganton and Burnsville as a result of pipeline route adjustments to accommodate property owners, the discovery of several unanticipated natural barriers, and unanticipated elevation fluctuations - $1 million; additional contractor costs for the distribution systems - $.8 million; and additional contingency costs, project supervision costs and overhead costs - $2 million. The additional costs were offset, in part, by reduced border and regulator costs - $.1 million.

The record further shows that Piedmont has uncommitted supplier refunds of $13.0 million available for the project, which is more than the additional expansion funds required by the increase in the project's negative NPV.

Based on the uncontroverted evidence and the recommendation of the Public Staff, the Commission finds and concludes that Piedmont's request for additional funding from its expansion fund for the Three County Project is justified and should be granted.

IT IS, THEREFORE, ORDERED as follows:

1. That Piedmont is hereby authorized to transfer an additional $10,753,484 in supplier refunds and interest currently in escrow to its expansion fund, and

2. That the Commission's orders of November 19, 1998 and May 20, 1999 are hereby amended to increase the amount of funding for Piedmont's proposed project to extend natural gas service to Mitchell, Avery and Yancey Counties from $27,773,206 to $38,526,690, which is the negative NPV of the project.

ISSUED BY ORDER OF THE COMMISSION.
This the 13th day of July, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg071200.02

DOCKET NO. G-5, SUB 410

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition by Public Service Company of North Carolina Inc., for Approval of a Proposed Expansion Project And Withdrawal of Funds from Expansion Fund	)))))	ORDER GRANTING CERTIFICATE AND APPROVING FUNDING FROM EXPANSION FUND

HEARD: Tuesday, May 9, 2000, at 9:30 a.m., Commission Hearing Room, Dobbs Building, 430 N. Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner William R. Pittman, Presiding, and Commissioners Judy Hunt, and Sam J. Ervin, IV

APPEARANCES:

For Public Service Company of North Carolina, Inc.:

Allyson K. Duncan, Kilpatrick Stockton, 3737 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612

For Carolina Utility Customers Association, Inc.:

James P. West, West Law Offices, Suite 1735, Two Hannover Square, 434 Fayetteville Street Mall, Raleigh, North Carolina 27601

For the Using and Consuming Public:

Paul L. Lassiter, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On December 30, 1999, Public Service Company of North Carolina, Inc. (PSNC) filed an application with the Commission pursuant to G.S. 62-2(9), G.S. 62-158, and Commission Rule R6-84 for approval of an expansion project that would extend natural gas service into Madison, Jackson and Swain Counties, and for the withdrawal of funds from its expansion fund to reduce the negative net present value (NPV) of the project to zero. With its application, PSNC submitted the prefiled testimony of Bruce P. Barkley, Director - Rates & Regulatory Administration and Rodney W. Myers, Director - Planning and Design.

The proposed project involves two separate extensions from PSNC's existing transmission pipelines, involving a total of approximately 57 miles, and four distribution systems. The first extension starts from the transmission terminus northwest of Asheville and runs northeast to Mars Hill. The second extension starts at the terminus of PSNC's transmission system in Waynesville and runs west to Bryson City. PSNC estimated the cost to construct the proposed transmission facilities to be $21,698,216, and the cost to construct distribution systems to be $8,734,862, including service attachments. PSNC estimated the total cost of the proposed project, including $291,500 of other plant involving a new office and equipment, to be $30,724,578. Considering the impact of inflation, the total estimated cost is $31,426,122. PSNC originally presented a summary of the NPV analysis of the proposed project, calculated in a generally accepted manner as required by Rule R6-84(a)(3), in Barkley Exhibit 1. According to this exhibit, the amount required to provide an NPV of zero for the estimated cash flows over 40 years is $30,044,234.

On January 21, 2000, PSNC filed a supplement to its application requesting that the Commission issue a certificate pursuant to G.S. 62-110 to PSNC to provide natural gas service to Madison, Jackson and Swain Counties in the event that PSNC's certificate to serve those counties expired on August 16, 1999, by operation of G.S. 62-36A(b).

On February 9, 2000, the Commission issued an order scheduling a hearing on PSNC's application, requiring public notice, adopting discovery guidelines and establishing a procedural schedule.

On February 23, 2000, Carolina Utility Customers Association, Inc. (CUCA) filed a petition to intervene, which the Commission granted on March 6, 2000.

On April 19, 2000, the Public Staff filed the joint testimony and exhibits of Jan A. Larsen, Utilities Engineer, Natural Gas Division; Calvin C. Craig III, Financial Analyst, Economic Research Division; and Julie G. Perry, Staff Accountant, Natural Gas Section, Accounting Division.

On April 25, 2000, CUCA filed a motion to dismiss the petition with prejudice, which the Commission denied by order dated May 2, 2000.

On May 2, 2000, PSNC filed the supplemental testimony of Bruce P. Barkley and one exhibit consisting of resolutions from the Madison County Board of Commissioners, the Jackson County Board of Commissioners and the Swain County Board of Commissioners, as well as resolutions from Mars Hill, Sylva and Bryson City, all supporting PSNC's application.

The hearing was held as scheduled. Five public witnesses appeared and testified at the hearing. Senator Stephen Metcalf from the 28th Senate District, Senator McDaniel Robinson from the 29th Senate District, Senator Bob Carpenter from the 42nd Senate District, Representative Phillip Haire from the 52nd House District, and Dale Carroll of Advantage West, the Western North Carolina Regional Economic Development Commission, appeared and testified in support of the application. The pre-filed testimony of PSNC and the Public Staff was presented. During witness Barkley's direct examination at the hearing, he stated that PSNC agrees with the Public Staff's proposed NPV adjustments for purposes of this proceeding, and he reduced the request for expansion funds to $28,383,370.

Following the hearing, PSNC and the Public Staff filed a joint proposed order and CUCA filed a brief.

Based upon the application, the testimony of the parties and the entire record in this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. PSNC is a corporation duly organized under the laws of the State of South Carolina having its principal office and place of business in Gastonia, North Carolina. PSNC operates a natural gas system for the transportation, distribution and sale of natural gas within a franchised area consisting of all or parts of twenty-five counties in central and western North Carolina as designated in PSNC's certificates of public convenience and necessity issued by this Commission.

2. PSNC is engaged in providing natural gas utility service to the public and is a public utility as defined in G.S. 62-3(23).

3. PSNC currently does not provide natural gas service to any portion of Madison, Jackson and Swain Counties and, at this time, no other entity has applied for a certificate or for funding to serve the area.

4. The proposed project is the only plan before the Commission seeking to bring natural gas service to these three counties. The proposed project will facilitate the construction of facilities and the extension of natural gas service in those counties consistent with State policy as articulated in G.S. 62-2(9), and it is justified by the public convenience and necessity as set forth in G.S. 62-110.

5. PSNC has demonstrated that it is in the public interest for the Commission to award it a certificate of public convenience and necessity to operate as a natural gas local distribution company in Madison, Jackson and Swain Counties and to grant PSNC the exclusive franchise to serve these counties.

6. Madison, Jackson and Swain Counties currently have no natural gas service and thus constitute "unserved areas" as that term is used in G.S. 62-2(9) and G.S. 62-158 and defined in Commission Rule R6-81.

7. PSNC is properly before the Commission upon its application for approval of an expansion fund project filed pursuant to G.S. 62-158 and Commission Rule R6-84.

8. The proposed project involves two extensions of PSNC's transmission pipelines, involving a total of approximately 55.5 miles of six-inch steel pipe and 1.9 miles of four-inch steel pipe and the building of four distribution systems. The first extension begins at the terminus of PSNC's transmission system northwest of Asheville and runs northeast to Mars Hill in Madison County. PSNC will install approximately 16.9 miles of six-inch diameter steel pipeline from the terminus to Mars Hill. The second extension starts at the terminus of PSNC's transmission system in Waynesville and runs southwest to Sylva, then northwest to Cherokee, then southwest to Bryson City. PSNC will install approximately 13.3 miles of six-inch steel pipe from Waynesville to Sylva, and another 25.4 miles of six-inch steel pipe from Sylva to Bryson City.

9. The proposed project will also include distribution facilities in Mars Hill, Sylva, Cherokee and Bryson City which will be composed of various combinations of two to eight-inch plastic and steel pipe. The distribution pipe will be installed in public rights-of-way in and along streets and roads to the extent possible. It will be installed in private rights-of-way where necessary.

10. As required for providing service to future loads, PSNC plans to install a compressor to maintain adequate pressure at the Bryson City and Sylva city gate inlets while keeping nominal operating pressures below the maximum operating pressure (MAOP) of 500 psig. Given the cost of the alternative -- installing larger pipe -- compression is the more cost-effective option for ensuring that the affected transmission pipeline can carry sufficient gas to satisfy peak demands on the expansion facilities without the pressures exceeding the MAOP. Because of the uncertain timing of the installation of the compressor, PSNC did not include the cost in its NPV analysis.

11. PSNC estimated that the total cost to construct the proposed project, including $291,500 of other plant pertaining to a new office and equipment, would be $30,724,578. Considering the impact of inflation, the total estimated cost would be $31,426,122.

12. PSNC presented a summary of the NPV analysis of the proposed project, calculated in a generally accepted manner as required by Rule R6-84(a)(3). It was estimated that the amount required to provide an NPV of zero for the estimated cash flow over 40 years would be $30,044,234.

13. The Public Staff made certain adjustments to PSNC's estimate as shown on the Public Staff's joint testimony and exhibits filed on April 19, 2000, which reflect the amount required to provide an NPV of zero for the estimated cash flows over 40 years of $28,383,370.

14. At the hearing, PSNC agreed to the Public Staff's proposed adjustments for purposes of this proceeding, and revised its request for reimbursement from the expansion fund downward to $28,383,370.

15. The pipeline route proposed is the most direct, cost-effective route to serve the area covered by the expansion project and will also maximize potential attachments of gas customers and utilize existing corridors to facilitate construction.

16. PSNC's design and location of the proposed pipeline and distribution mains for this project are appropriate.

17. It is reasonable to assume that the construction and operation of natural gas facilities in these counties will assist in economic and industrial growth in the area over time.

18. The nature and amount of natural gas usage by new industrial and large commercial facilities that may locate in the area covered by the expansion project, but which are not currently in existence, cannot be quantified with the degree of certainty appropriate for inclusion in the NPV calculation. To the extent that industrial and large commercial growth occurs, PSNC's system will benefit, and additional system modifications may be required.

19. Funding from PSNC's expansion fund in an amount up to $28,383,370, the negative NPV of the proposed project for Madison, Jackson and Swain Counties, should be approved. PSNC should have sufficient funds in its expansion fund when needed for the acquisition of rights-of-way and construction of the proposed project.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-3

These findings of fact are supported by PSNC's application, the testimony and exhibits filed by PSNC and the Public Staff, the Commission's orders in this proceeding, and the Commission's files and records. The findings are informational, procedural or jurisdictional in nature and are not contested by any party.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4-5

These findings of fact are supported by PSNC's application, the testimony and exhibits of PSNC's witnesses, the Public Staff's witnesses, the public witnesses, and the Commission's files and records in this proceeding.

To entitle PSNC to a certificate of public convenience and necessity, it must show an element of public need for the proposed service. State ex. rel. Utilities v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d. 100 (1966). The resolutions of the local governing bodies of the three counties, the testimony of the elected representatives, and the public policy of the State as articulated in G.S. 62-2(9) amply demonstrate that need.

The consensus of the public witnesses is that natural gas is an infrastructure requirement that is critical to economic development and, therefore, an improved quality of life and standard of living for the citizens of the area. Several public witnesses testified specifically to the fact that the lack of natural gas availability places Madison, Jackson and Swain Counties at a competitive disadvantage with respect to the recruitment of industry. According to Representative Haire, Swain County has the highest unemployment of any county in the state, and the need for the types of resources that will assist in attracting employers is great. Witness Dale Carroll with Advantage West, the Western Regional Economic Development Commission, testified that, as a rule of thumb, one-third of industrial recruits require natural gas. The availability of natural gas will strengthen the ability of such organizations as Advantage West to market and promote these three counties to prospective industries. As witness Barkley explained in his testimony, PSNC assumes a zero growth rate for large quantity customers for purposes of its NPV analysis, but that is largely because estimates of conversions or new customers would be speculative at this time. While new industry may locate in the area, it may also be offset by efficiency improvements or the use of alternative fuels by other industry. Although the availability of natural gas is not a guarantor of growth, it will improve these counties' economic development potential by allowing them to compete for industry with natural gas needs, which they cannot do now.

The Commission also notes the public need of the residential customers to be served. The proposed distribution systems will make natural gas available to about 300 homes in the first year and 400 homes each year thereafter. Assuming the annual attachment rate of 5% which occurred in

McDowell County, PSNC can expect to serve 75 residential customers at the end of year four, a number that should continue to grow as existing systems require replacement.

The Public Staff's witnesses testified that the Commission should issue PSNC the certificate to serve Madison, Jackson and Swain Counties. In the opinion of the Public Staff, because PSNC already provides natural gas service in contiguous Buncombe, Haywood and Transylvania Counties, and has presented the Commission with the only viable plan for providing gas services to the counties in this docket, it has demonstrated both its willingness and ability to meet the public need.

Finally, the Commission cannot overlook the public policy rationale behind the creation of expansion funds. G.S. 62-2(9) constitutes legislative recognition that the extension of natural gas to unserved areas in order to promote the public welfare is a matter of State policy. A fortiori, the award of a certificate to an applicant seeking to provide that service also serves a public need.

On the basis of the foregoing, the Commission concludes that the issuance of a certificate of public convenience and necessity to PSNC to serve Madison, Jackson, and Swain counties is in the public interest.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6-7

These findings of fact are supported by PSNC's application, the testimony and exhibits of PSNC's witnesses, the Public Staff's witnesses, the public witnesses, and the Commission's files and records in this proceeding. These findings of fact are not contested by any party.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 8-11

These findings of fact are supported by PSNC's application, the testimony and exhibits of PSNC's witnesses, the testimony and exhibits of the Public Staff's witnesses, and by the record in this proceeding. Myers Exhibit 2 includes a map showing the proposed transmission route and distribution systems.

With respect to the proposed compressor, PSNC plans to install the compressor to maintain pressure to Jackson and Swain Counties if and when future loads require it. The compressor was not included in the NPV analysis because it is uncertain when it will be needed. PSNC's application states that PSNC "may seek funding from its Expansion Fund when it becomes necessary to install this compressor." In its brief, CUCA asks that the Commission's order specify that PSNC must apply for approval to add the compressor and provide a new NPV analysis before using any expansion funds to pay for the compressor. CUCA fears opening the door to expansion projects "that are not finite in scope." The Commission agrees with CUCA that the expansion funds requested and approved herein do not include funds for the compressor and that PSNC would have to file another application if it wants to use expansion funds to add the compressor in the future. The Commission makes no commitment now as to whether such a new application would be allowed.

NATURAL GAS - EXPANSION

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 12-14

These findings of fact are supported by PSNC's application, the testimony and exhibits of PSNC witness Barkley, the testimony and exhibits of the Public Staff's witnesses, and the record in this proceeding.

The Public Staff witnesses recommended ten separate adjustments to PSNC's prefiled NPV analysis. PSNC did not contest any of these adjustments at the hearing. The Commission finds each of these adjustments to be reasonable and appropriate for inclusion in the NPV analysis in this docket.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 15-16

These findings of fact are supported by PSNC's application and the testimony and exhibits of PSNC witness Myers.

Witness Myers testified that PSNC primarily considered five factors in the design and location of the proposed facilities: the ability of the proposed facilities to serve the projected loads, the ability of PSNC's existing facilities to serve the projected loads, the ability of the proposed routes to serve possible future loads, permission to install pipelines in highway rights-of-way controlled by the North Carolina Department of Transportation, and an economic comparison of the rights-of-way, construction, and material costs of various alternative designs. Based on these criteria, PSNC selected proposed transmission pipeline routes that are located primarily on the shoulders of state roads. This minimizes the right-of-way acquisition, grading, timber clearing and other land preparation costs, and lowers the project cost significantly. PSNC designed the routes of the primary proposed distribution systems to serve the commercial and industrial customers that expressed an interest in converting to natural gas.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

This finding of fact is supported by PSNC's application, the testimony and exhibits of PSNC's witnesses and the testimony of the public witnesses.

The Boards of Commissioners of Madison, Jackson and Swain Counties passed resolutions describing the extent to which natural gas service is a major factor in their ability to recruit industry. The resolutions express the counties' critical need to diversify their local economies and raise the standard of living. The counties see the availability of natural gas as a resource to help reverse the growing gap between the State's urban and rural areas. The public witnesses, elected representatives and a member of the Regional Economic Development Commission for Western North Carolina all testified eloquently in support of the proposed project. Senator Metcalf spoke of the extent to which the state's urban prosperity has not reached the rural mountains and the need for natural gas as an economic developmental tool. Representative Haire addressed the need for resources to bring prospective employers to an area with the highest unemployment in the state. Public witness Carroll stressed industries' need for natural gas not only for space conditioning, but for manufacturing processes as well.

PSNC witness Barkley testified that the public welfare is served by the introduction of natural gas into a previously unserved area. He testified that economic developers have informed PSNC on numerous occasions that the availability of natural gas is critical to their ability to attract industry and that industrial growth brings commercial and residential growth and improved economic conditions to an area.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

This finding of fact is supported by PSNC's application and the testimony of PSNC witness Barkley.

Witness Barkley testified that any attempt to estimate the growth of large industrial consumption would be speculative at this time. While the availability of natural gas will help in attracting new industrial customers and thereby serve one of the objectives of the expansion fund legislation, the characteristics and timing of such growth cannot be predicted. Natural gas usage by industrial and large commercial customers varies widely and is subject to offsetting variables as well. Witness Barkley testified as to other factors -- such as air quality regulations, underground energy storage, and lower boiler maintenance -- that could make it economical and convenient for industries using other fuels to switch to natural gas.

Although the Commission finds it reasonable to assume, as did the General Assembly, that the availability of natural gas will prove attractive to industrial customers, it is not possible to predict at this time what the future natural gas load will be or what additional natural gas facilities will be necessary in order to connect that load. Accordingly, loads for industrial facilities that do not presently exist cannot be included in the NPV calculation.

In its brief, CUCA notes that neither PSNC nor the Public Staff include any new industrial growth in the NPV analysis. CUCA argues that job growth is the purpose and expectation of the expansion fund statute and, therefore, that either the NPV analysis is wrong or the purpose of the expansion fund statute will not be served by this project. For the reasons discussed above, and consistent with past expansion fund decisions of the Commission, the Commission concludes that this project will assist in economic growth but that the nature and amount of new usage cannot be quantified with enough certainty to include in the NPV analysis. The Commission rejects CUCA's argument.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 19

This finding of fact is supported by PSNC's application, the testimony and exhibits of PSNC witness Barkley, and the testimony of the Public Staff witnesses.

CUCA argues in its brief that expansion funds can only be used within an LDC's territory, that Madison, Jackson and Swain Counties are not within PSNC's territory, and therefore that expansion funds cannot be approved for these counties. CUCA argues that the problem cannot be solved by first granting a certificate for the counties to PSNC and then approving use of expansion funds since, according to CUCA, PSNC must offer a firm commitment to serve the counties based on funding other than expansion funds before a certificate of public convenience and necessity can be granted to PSNC. CUCA made the same argument in its a motion to dismiss dated April 25, and the Presiding Commissioner denied that motion by order of May 2. That order reasoned:

> The motion to dismiss is denied. The Presiding Commissioner does not believe that the General Assembly intended to limit use of expansion funds to the franchised territories of the LDCs as they stood at the time the statute was enacted. Given this conclusion, there is no reason why the Commission cannot consider granting a certificate for an area and approving use of expansion funds for that area in the same docket. Use of expansion funds will not be approved unless the certificate is granted; once the certificate is granted, the funds can be approved for use "within the company's franchised service territory." Combining the two requests in one docket is clearly more efficient of time and resources than two separate, consecutive proceedings. The Presiding Commissioner finds nothing unlawful in this procedure; the language from the Piedmont decision cited by CUCA [346 NC 558, at 583] is perhaps dicta and is certainly distinguishable from the present situation on the facts.

The Commission again rejects CUCA's argument.

For the reasons set forth herein and based upon the evidence presented at the hearing, the Commission concludes that the proposed project is in accordance with the General Statutes and Commission Rules and that funding from PSNC's expansion fund in an amount up to $28,383,370, the negative NPV of the project, should be approved.

In its application, PSNC reported that after reimbursements for its Alexander County project, the balance in its expansion fund would be approximately $25 million. PSNC anticipates that its expansion fund will generate interest and receive additional pipeline refunds prior to the completion of this proposed project. The Public Staff expects that PSNC will have sufficient funds to construct the project without relying on any alternate funding mechanism. To arrive at this conclusion, the Public Staff calculated the projected balance of PSNC's expansion fund at the proposed completion date of the project assuming its current balance, adding the anticipated monthly interest that will be earned, and subtracting encumbered amounts for prior expansion fund projects and anticipated withdrawals for the construction of this system.

IT IS, THEREFORE, ORDERED as follows:

1. That PSNC is granted a certificate of public convenience and necessity, attached hereto as Appendix A, to provide natural gas service to Madison, Jackson and Swain Counties;

2. That PSNC's proposed project to extend natural gas service to Madison, Jackson and Swain Counties is hereby approved for funding from PSNC's expansion fund in the amount of $28,383,370;

3. That disbursement of up to $28,383,370 for this project from PSNC's expansion fund in accordance with applicable Commission Rules is hereby authorized; and

4. That PSNC shall file reports as required by Commission Rules and shall request progress payments, for reimbursements for actual amounts paid by PSNC, pursuant to the provisions of Commission Rule R6-85(b) and such requests shall be handled as provided by that Rule.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

rg062900.01

APPENDIX A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. G-5, SUB 410

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

is granted this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

to provide natural gas utility service

in

Madison, Jackson and Swain Counties, North Carolina

subject to any orders, rules, regulations,
and conditions now or hereafter lawfully made
by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 29th day of June 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

DOCKET NO. G-9, SUB 422

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Proceeding to Determine Whether	)	
Piedmont Natural Gas Company, Inc.,	)	ORDER ON
Is Providing Adequate Service to	)	FORFEITURE
Certain Counties in Its Franchise	)	PROCEEDING
Territory	)	

BY THE COMMISSION: In June 1995, the North Carolina General Assembly amended G.S. 62-36A(b) to provide that "any local distribution company that the Commission determines is not providing adequate service to at least some portion of each county within its franchise territory ... within three years of the time the franchise territory is awarded ... shall forfeit its exclusive franchise rights to that portion of its territory not being served." This amendment is commonly referred to as the "use-it-or-lose-it" legislation.

On March 19, 1996, the Commission adopted Rule R6-63 to implement the statute. Rule R6-63(d) provides that even if the natural gas utility was not providing service as of the forfeiture date, it will be allowed a two-year grace period if it has met certain conditions by the forfeiture date. If these conditions are met, the natural gas utility will be given two years from the forfeiture date to provide service.

On August 16, 1996, the Commission issued certificates of public convenience and necessity franchising Avery, Yancey and Mitchell Counties to Piedmont Natural Gas Company, Inc. (Piedmont). August 16, 1999, was the forfeiture date for these counties.

On October 22, 1999, the Commission initiated a use-it-or-lose-it proceeding in this docket for Piedmont as to Avery, Yancey and Mitchell Counties "to determine whether Piedmont was providing adequate service to at least some portion of each of these counties as of August 16, 1999, and, if the Commission finds that Piedmont was not providing adequate service to at least some portion of any such county, to order that Piedmont forfeit its exclusive franchise rights to that portion of its territory not being served." The Order scheduled a hearing for February 2, 2000, and provided for public notice. The Order and notice stated that the hearing would be canceled if no issues are raised by testimony or written statements filed with the Commission. Piedmont filed the testimony of Robert O. Pritchard in this proceeding on December 6, 1999. On January 10, 2000, the Public Staff filed its Statement of Position.

On January 24, 2000, the Commission issued its Order Canceling Hearing, canceling the hearing in this docket and providing that the docket would be decided on the testimony and written statements filed herein.

Based on the prefiled testimony and the records of the Commission, the Commission makes the following:

FINDINGS OF FACT

1. Piedmont is a public utility engaged in the business of owning and operating transmission and distribution lines and other facilities for furnishing natural gas service to the public in its franchise territory in North Carolina, pursuant to certificates of public convenience and necessity granted by this Commission.

2. Piedmont's franchise territory includes Avery, Yancey and Mitchell Counties which were franchised to Piedmont by Commission Order of August 16, 1996, and which are the subject of this proceeding. August 16, 1999 was the forfeiture date by which Piedmont had to be providing adequate service to at least some portion of each of these counties to avoid the loss of its exclusive franchise rights.

3. Commission Rule R6-63(d) provides that a natural gas utility will be deemed to be "providing adequate service," even though it "has not actually begun providing service," if the following conditions are met:

(i) the natural gas utility has completed a substantial amount of design process/service for the construction of natural gas facilities into at least some portion of the county, such as the preparation of engineering design for pipe size and capacity parameter, rectifier facilities, route location, materials specifications, construction specifications and drawings by an engineer sufficient to indicate the facilities to be built; or

(ii) the natural gas utility has begun to acquire rights-of-way for the construction and operation of natural gas facilities in the county; or

(iii) by at least six months before the applicable date set forth in subsection (b)(i) or (ii) above, the natural gas utility filed an application that complies with the Commission's applicable orders and rules for use of expansion funds for the construction of facilities into at least some portion of the county; and

(iv) it appears likely that the construction of the facilities will be completed and service will be provided within two years of the applicable date set forth in subsection (b)(i) or (ii) above.

The natural gas utility has to meet one of the first three conditions, plus the fourth condition to get the grace period. If these conditions are met, no forfeiture will be ordered and the natural gas utility will be given two years to complete construction of natural gas facilities and begin providing service.

4. Piedmont filed an application, which is judicially noticed, for approval of an expansion fund project to serve Avery, Yancey and Mitchell Counties in Docket No. G-9, Sub 408 in June of 1998. The Commission approved the project by orders of November 19, 1998, and May 20, 1998. It appears likely that Piedmont will complete construction of the facilities and provide service in Avery, Yancey and Mitchell Counties by August 16, 2001.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-4

The evidence in support of these findings is contained in the testimony of Piedmont witness Robert O. Pritchard and the Public Staff's Statement of Position.

Piedmont filed an expansion project for the three counties subject to this proceeding in June 1998, thus satisfying condition (iii). Witness Pritchard testified that work is progressing as planned for facilities to be in place in the three counties by November 2000, thus satisfying condition (iv). The Public Staff agrees that Piedmont is entitled to the grace period. The Commission concludes that Piedmont has met the conditions of Commission Rule R6-63(d) and that, in the sense of Rule R6-63(d), Piedmont was providing adequate service to Avery, Yancey and Mitchell Counties as of August 16, 1999. Piedmont will be allowed a two-year grace period as to Avery, Yancey and Mitchell Counties.

IT IS, THEREFORE, ORDERED that as to Avery, Yancey and Mitchell Counties, Piedmont is hereby given until August 16, 2001, within which to complete construction of its proposed natural gas facilities for these counties and to begin providing service, or be subject to a show cause proceeding on forfeiture of its exclusive franchise rights as provided in Rule R6-63(d).

ISSUED BY ORDER OF THE COMMISSION.
This the 31st day of January, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg012800.01

Chairman Sanford and Commissioner Pittman did not participate.

DOCKET NO. G-5, SUB 405

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Proceeding to Determine Whether	)	
Public Service Company of North	)	ORDER ON
Carolina, Inc., Is Providing Adequate	)	FORFEITURE
Service to Certain Counties in Its	)	PROCEEDING
Franchise Territory	)	

BY THE COMMISSION: In June 1995, the North Carolina General Assembly amended G.S. 62-36A(b) to provide that "any local distribution company that the Commission determines is not providing adequate service to at least some portion of each county within its franchise territory ... within three years of the time the franchise territory is awarded ... shall forfeit its exclusive franchise rights to that portion of its territory not being served." This amendment is commonly referred to as the "use-it-or-lose-it" legislation.

On March 19, 1996, the Commission adopted Rule R6-63 to implement the statute. Rule R6-63(d) provides that even if the natural gas utility was not providing service as of the forfeiture date, it will be allowed a two-year grace period if it has met certain conditions by the forfeiture date. If these conditions are met, the natural gas utility will be given two years from the forfeiture date to provide service. The Commission issued an Order on March 17, 1999, in Docket No. G-21, Sub 373 interpreting the grace period conditions. That Order concluded that the conditions for the grace period must be interpreted strictly.

On August 16, 1996, the Commission issued certificates of public convenience and necessity franchising Cherokee, Graham, Swain, Jackson, Macon, Clay, and Madison Counties to Public Service Company of North Carolina, Inc. (PSNC). By subsequent Order of December 8, 1998, in Docket No. G-41, Sub 0, the Commission re-assigned Macon County and withdrew the certificate issued to PSNC for Macon County. August 16, 1999, is the forfeiture date for these newly assigned counties, except Macon.

On October 22, 1999, the Commission initiated a use-it-or-lose-it proceeding in this docket for PSNC as to Cherokee, Graham, Swain, Jackson, Clay and Madison Counties "to determine whether PSNC was providing adequate service to at least some portion of each of these counties as of August 16, 1999, and, if the Commission finds that PSNC was not providing adequate service to at least some portion of any such county, to order that PSNC forfeit its exclusive franchise rights to that portion of its territory not being served." The Order scheduled a hearing for February 1, 2000, and provided for public notice. The Order and notice stated that the hearing would be canceled if no issues are raised by testimony or written statements filed with the Commission. PSNC filed the testimony of Bruce P. Barkley in this proceeding on December 6, 1999. On January 10, 2000, the Public Staff filed its Statement of Position. PSNC filed an Answer on January 19, 2000.

On January 24, 2000, the Commission issued its Order Canceling Hearing, canceling the hearing in this docket and providing that the docket would be decided on the testimony and written statements filed herein.

Based on the prefiled testimony and the records of the Commission, the Commission makes the following:

FINDINGS OF FACT

1. PSNC is a public utility engaged in the business of owning and operating transmission and distribution lines and other facilities for furnishing natural gas service to the public in its franchise territory in North Carolina, pursuant to certificates of public convenience and necessity granted by this Commission.

2. PSNC's franchise territory includes Cherokee, Graham, Swain, Jackson, Clay and Madison Counties which were franchised to PSNC by Commission Order of August 16, 1996, and which are the subject of this proceeding. August 16, 1999 was the forfeiture date by which PSNC

had to be providing adequate service to at least some portion of each of these counties to avoid the loss of its exclusive franchise rights.

3. Commission Rule R6-63(d) provides that a natural gas utility will be deemed to be "providing adequate service," even though it "has not actually begun providing service," if the following conditions are met:

> (i) the natural gas utility has completed a substantial amount of design process/service for the construction of natural gas facilities into at least some portion of the county, such as the preparation of engineering design for pipe size and capacity parameter, rectifier facilities, route location, materials specifications, construction specifications and drawings by an engineer sufficient to indicate the facilities to be built; or
>
> (ii) the natural gas utility has begun to acquire rights-of-way for the construction and operation of natural gas facilities in the county; or
>
> (iii) by at least six months before the applicable date set forth in subsection (b)(i) or (ii) above, the natural gas utility filed an application that complies with the Commission's applicable orders and rules for use of expansion funds for the construction of facilities into at least some portion of the county; and
>
> (iv) it appears likely that the construction of the facilities will be completed and service will be provided within two years of the applicable date set forth in subsection (b)(i) or (ii) above.

The natural gas utility has to meet one of the first three conditions, plus the fourth condition to get the grace period. If these conditions are met, no forfeiture will be ordered and the natural gas utility will be given two years to complete construction of natural gas facilities and begin providing service.

4. PSNC has no current plans to serve Graham, Clay, or Cherokee Counties.

5. PSNC filed an application, which is judicially noticed, for approval of an expansion fund project to serve Madison, Jackson, and Swain Counties in Docket G-5, Sub 410 on December 30, 1999. PSNC's application indicates that it will complete service to the counties by May 2003. PSNC witness Barkley testified that PSNC plans to complete construction in one of these counties during 2000, in another during 2001, and in the third prior to December 31, 2002. On January 21, 2000, PSNC supplemented its application to request that the Commission issue PSNC a new certificate for these three counties if its original certificate for the counties is found to be forfeited by virtue of G.S. 62-36A(b).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-5

The evidence in support of these findings is contained in the testimony of PSNC witness Barkley, the Public Staff's Statement of Position, and the records of the Commission.

PSNC has no current plans to serve Graham, Clay, or Cherokee Counties and witness Barkley testified that PSNC does not intend to begin planning for these counties before 2003. PSNC filed an application on December 30, 1999, seeking to use expansion funds to serve Madison, Jackson, and Swain Counties. Witness Barkley testified that PSNC plans to complete construction to these counties prior to December 31, 2002; however, PSNC's application includes a schedule for the project that indicates it will complete service to the counties by May 2003. This application does not satisfy grace period condition (iii) because it was not filed six months before the forfeiture date. PSNC's testimony in this docket does not address conditions (i) or (ii). The proposed expansion fund project does not satisfy condition (iv); this condition requires that it be likely that service will be completed within two years after the forfeiture date (which would be by August 2001), but PSNC doesn't plan to complete the expansion project until the end of 2002, according to Barkley, or May 2003, according to the expansion project application. PSNC witness Barkley conceded that the application does not meet the grace period conditions, but asked that PSNC's franchise rights not be disturbed. The Public Staff recognized that PSNC has not met the conditions for a grace period as to Madison, Jackson, and Swain Counties, but said that PSNC is the "most viable alternative" for providing service to these counties and should be given two years to serve them. However, PSNC is not planning to complete service within two years and the standard for the grace period is not the "most viable alternative"; the standard is the four conditions set out in the Commission Rule R6-63(d), and PSNC has not met those conditions. The Commission cannot adopt the Public Staff's position. The Commission's recent March 1999 Order took a strict view of the grace period conditions; it concluded that the conditions have to be strictly interpreted since the grace period is an exception to the statute. Applying that precedent here, forfeiture must be ordered as to Madison, Jackson, and Swain Counties. Foreseeing this possibility, PSNC has asked that it be given a new franchise for these three counties in order for its expansion project to proceed. The Commission will establish a procedural schedule for the expansion project application in Docket G-5, Sub 410 and will proceed with that docket.

IT IS, THEREFORE, ORDERED that PSNC shall hereby forfeit its exclusive franchise rights to Cherokee, Graham, Swain, Jackson, Clay and Madison Counties.

ISSUED BY ORDER OF THE COMMISSION.
This the 31st day of January, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg012800.02

Chairman Sanford and Commissioner Pittman did not participate.

DOCKET NO. G-3, SUB 230

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application of NUI Corporation d/b/a NUI North Carolina Gas, for Approval of Gas Costs and Gas Purchasing Policies for the Period May 1, 1999 through April 30, 2000.))))) ORDER ON ANNUAL REVIEW OF GAS COSTS

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on September 12, 2000

BEFORE: Commissioner Sam J. Ervin IV, Presiding, Commissioner Judy Hunt and Commissioner J. Richard Conder

APPEARANCES:

For NUI North Carolina Gas:

James H. Jeffries IV, Amos, Jeffries & Robinson, L.L.P., Post Office Box 787, Greensboro, North Carolina 27402

For the Public Staff:

Vickie L.Moir, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On July 3, 2000, NUI Corporation d/b/a NUI North Carolina Gas (NUI North Carolina Gas or the Company) filed testimony and exhibits relating to the annual review of its gas costs under G.S. 62-133.4(c) and Commission Rule R1-17(k)(6) for the period May 1, 1999, through April 30, 2000.

On July 7, 2000, the Commission issued its Order Scheduling Hearing, Requiring Filing of Testimony, Discovery Deadlines and Requiring Public Notice. This Order established a hearing date of Tuesday, September 12, 2000, set dates for prefiled testimony, and required NUI North Carolina Gas to give notice to its customers.

On August 10, 2000, Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene in this proceeding which was subsequently allowed by the Commission by Order dated August 15, 2000.

The direct testimony and exhibits of Company witnesses Rudy Mach and Thomas E. Smith were filed on July 3, 2000. Company witnesses Mach and Smith presented the annual gas cost information required by Commission Rule R1-17(k)(6), testified to the prudence of the Company's gas costs and gas purchasing practices during the review period, and proposed a new temporary increment and new temporary decrements in the Company's rates.

The direct testimony of Public Staff witnesses Jan A. Larsen and James G. Hoard was filed on August 28, 2000. Public Staff witnesses Larsen and Hoard made one correction to NUI North Carolina Gas' review period commodity gas costs, testified that the Company's gas costs (as adjusted) and gas purchasing practices during the review period were prudent, and agreed with the Company's proposed new temporary increment and proposed new temporary decrements for the Company's rates based on the Company's deferred account balances at April 30, 2000.

Company witnesses Mach and Smith prefiled rebuttal testimony on September 8, 2000, in which they agreed with the adjustment to review period commodity gas costs made by the Public Staff. No other party filed testimony.

On September 8, 2000, the Company and the Public Staff filed a Stipulation which resolved all issues in the case as between the Company and the Public Staff. As part of the Stipulation, the Company and the Public Staff waived hearing, the appearance of witnesses and the right to cross-examination.

On September 12, 2000, the matter came on for hearing as scheduled in Raleigh. No public witnesses appeared. The only parties that appeared were the Company and the Public Staff. Consistent with the Stipulation, the prefiled testimony and exhibits of the following witnesses were admitted into the record without their appearance on the stand: for the Company, Rudy Mach, Accounting Manager for NUI North Carolina Gas and Thomas E. Smith, Director of Energy Planning for NUI North Carolina Gas and for the Public Staff, Jan A. Larsen, Utilities Engineer and James G. Hoard, Assistant Director, Accounting Division.

Based on the testimony and exhibits received into evidence and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. NUI North Carolina Gas is an operating division of NUI Corporation which is a corporation organized under the laws of the state of New Jersey and duly registered to do business in North Carolina.

2. NUI North Carolina Gas is engaged in the business of transporting, distributing, and selling natural gas in a franchised area which consists of all of Rockingham County and part of Stokes County in the northern Piedmont region of North Carolina.

3. NUI North Carolina Gas is a public utility as defined by G.S. 62-3(23) and is subject to the jurisdiction of this Commission and is lawfully before this Commission upon its application for annual review of gas costs pursuant to G.S. 62-133.4(c) and Commission Rule R1-17(k)(6).

4. NUI North Carolina Gas' testimony, exhibits, affidavits of publication and published hearing notices are in compliance with the provisions of the North Carolina General Statutes and the Rules and Regulations of this Commission.

5. The test period for review of gas costs in this proceeding is the 12 months ended April 30, 2000.

6. During the period of review, the Company incurred total gas costs of $9,923,264 which consisted of fixed gas costs of $2,134,507, commodity gas costs of $6,885,464, and other gas costs of $903,293.

7. At the end of the review period, the balances in the Company's deferred accounts were, respectively, a debit of $51,124 in the Sales Customer Only account and a credit of $233,358 in the All Customers account.

8. NUI North Carolina Gas' gas purchasing policies are prudent and NUI North Carolina Gas' gas costs during the review period were prudently incurred and, after adjustment by the Public Staff, properly accounted for.

9. NUI North Carolina Gas should be permitted to recover 100 percent of its prudently incurred gas costs.

10. NUI North Carolina Gas currently has in place temporary decrements of ($0.00138/therm) relating to sales only customers and the following temporary decrements relating to all customers: Rate Schedule 101 (Residential) - ($0.0171/therm); Rate Schedule 102 (Small General) - ($0.00167/therm); Rate Schedule 104 (Large General) - ($0.00093/therm); Rate Schedule 105 (Interruptible) - ($0.00049/therm).

11. Based upon the balances of the Company's deferred accounts at April 30, 2000, the current temporary decrements in NUI North Carolina Gas' rates should be discontinued and an increment of $0.00137/therm for sales only customers should be implemented and temporary decrements should be implemented for all customers as follows: Rate Schedule 101 (Residential) - ($0.01039/therm); Rate Schedule 102 (Small General) - ($0.01016/therm); Rate Schedule 104 (Large General) - ($0.00565/therm); Rate Schedule 105 (Interruptible) - ($0.00299/therm).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-4

These findings of fact are jurisdictional and/or informational in nature and are not contested by any party. They are supported by the petition, the testimony and exhibits of the various witnesses, the records of the Commission in other proceedings and the affidavits of publication filed with the Commission in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

The review period for this proceeding is established by Commission Rule R1-17. The review period designated for NUI North Carolina Gas is the 12-month period ending April 30, 2000.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6-7

The Company's fixed gas costs of $2,134,507, commodity gas costs of $6,885,464 and other gas costs of $903,293, as adjusted by the Public Staff, were presented in the prefiled testimony of Public Staff witness Hoard. Company witnesses Mach and Smith accepted the Public Staff's adjustment to the Company's review period commodity gas costs in their prefiled rebuttal testimony. As set forth in Public Staff witness Hoard's prefiled direct testimony, this adjustment to the Company's commodity gas costs did not impact the Company's deferred account balances. No other party presented evidence on this issue.

The Company's end of period deferred account balances, which consisted of a debit of $51,124 in the Sales Customers Only account and a credit of $233,358 in the All Customers account, were presented in the prefiled direct testimony of Company witness Mach. Public Staff witness Larsen agreed with these balances in his prefiled direct testimony. No other party presented evidence on this issue.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 8-9

Company witness Mach testified that NUI North Carolina Gas had properly accounted for its gas costs during the review period. Public Staff witness Hoard noted one correction to the Company's commodity gas costs but agreed that, as adjusted, the Company had properly accounted for its gas costs. Notwithstanding his conclusion that the Company had properly accounted for its gas costs during the review period, Public Staff witness Hoard expressed concern over the difficulties the Company has experienced over the last several years in submitting accurate and timely deferred account reports. In this regard, Public Staff witness Hoard recommended that the Commission inform the Company that future gas cost adjustments may not be approved if accurate and timely deferred account reports are not filed. In his prefiled rebuttal testimony, Company witness Mach confirmed the Company's acceptance of the Public Staff's adjustment to review period commodity gas costs. Company witness Mach further acknowledged the difficulties the Company had experienced in the past in submitting timely and accurate deferred account reports and indicated that the Company had taken a number of affirmative steps to address that situation which he believed would correct the problem. Company witness Mach also acknowledged that it was the Company's responsibility to maintain accurate deferred account records and to report the status of those accounts to the Commission on a timely basis and that the accuracy of these reports was part of the evidence the Commission should properly consider in proceedings to change the Company's Benchmark Cost of Gas. At this time, the Commission finds good cause to monitor the issue of timely deferred account reports and to address the matter in subsequent proceedings if deemed necessary. No other party presented evidence on these issues.

Company witness Smith testified that NUI North Carolina Gas' gas purchasing policy was designed to meet four primary objectives: (1) maintain secure supplies for firm customers; (2) diversify supply sources to ensure reliability; (3) obtain lowest reasonable cost; and (4) enhance flexibility. Company witness Smith also testified that NUI North Carolina Gas' gas costs during the review period were consistent with this policy and were prudent. During the period of review, NUI North Carolina Gas' gas supplies were provided primarily through long-term firm supply contracts whose pricing was tied to a spot market index. Public Staff witness Larsen testified that he conducted a review of NUI North Carolina Gas' gas purchases during the period of review, including NUI North Carolina Gas' gas purchasing philosophies, customer requirements, and gas portfolio mixes, and concluded that the Company's gas costs were prudently incurred. Witness Larsen also testified that he considered design day estimates, forecasted load duration curves, historical and forecasted gas supply needs, and projected capacity additions and supply changes in evaluating how the Company will meet its future needs. No other party presented evidence on these issues.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 10-11

Company witness Smith testified that the existing deferred account temporary decrements established by the Commission in Docket No. G-3, Sub 218 were: (1) a decrement of ($0.00138/therm) relating to the Sales Customer Only deferred account and (2) decrements of: Rate Schedule 101 (Residential) - ($0.0171/therm); Rate Schedule 102 (Small General) - ($0.00167/therm); Rate Schedule 104 (Large General) - ($0.00093/therm); and Rate Schedule 105 (Interruptible) - ($0.00049/therm) relating to the All Customers deferred account. This testimony is undisputed and is consistent with the Commission's November 5, 1999 Order on Annual Review of Gas Costs in Docket No. G-3, Sub 218.

Company witness Smith testified that based on the Company's deferred account balances at April 30, 2000, the existing temporary decrements should be discontinued and a temporary increment of $0.00137/therm for sales only customers should be instituted and new temporary decrements for all customers should be implemented as follows: Rate Schedule 101 (Residential) - ($0.01039/therm); Rate Schedule 102 (Small General) - ($0.01016/therm); Rate Schedule 104 (Large General) - ($0.00565/therm); Rate Schedule 105 (Interruptible) - ($0.00299/dt). Public Staff witness Larsen agreed with the Company's proposed increment and decrements in his prefiled direct testimony. No other party presented evidence on this issue.

IT IS, THEREFORE, ORDERED as follows:

1. That the $2,134,507 in fixed gas costs, $6,885,464 in commodity gas costs and $903,293 in other gas costs incurred by NUI North Carolina Gas during the period of review be, and they hereby are, determined to be prudently incurred;

2. That NUI North Carolina Gas' accounting for all such gas costs, as adjusted by the Public Staff and reflected in this Order be, and the same hereby is approved;

3. That NUI North Carolina Gas be, and it hereby is, authorized to recover 100 percent of its prudently incurred gas costs during the period of review;

4. That NUI North Carolina Gas shall implement in its next billing cycle after the date of this Order a temporary increment of $0.00137/therm relating to sales only customers and temporary decrements relating to all customers of ($0.01039/therm) for Rate Schedule 101 (Residential) customers; ($0.01016/therm) for Rate Schedule 102 (Small General) customers; ($0.00565/therm) for Rate Schedule 104 (Large General) customers; and ($0.00299/dt) for Rate Schedule 105 (Interruptible) customers simultaneously with the removal of the existing temporary decrements from its Docket No. G-3, Sub 218 filing; and

5. That NUI North Carolina Gas shall give notice to all of its customers of the change in rates approved in this Order by appropriate bill inserts in the first billing cycle following the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the 6th day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg110600.19

DOCKET NO. G-3, SUB 230

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application of NUI Corporation d/b/a NUI)
North Carolina Gas, for Approval of Gas) ERRATA ORDER
Costs and Gas Purchasing Policies for the)
Period May 1, 1999 through April 30, 2000)

BY THE COMMISSION: On November 6, 2000, the Commission issued its Order on Annual Review of Gas Costs in this docket. It has come to the attention of the Commission that an error exists in that order. The temporary decrement relating to all customers for Rate Schedule 101 cited as $0.0171/therm in Finding of Fact No. 10 on page 3 and in the related discussion of evidence and conclusions on page 5 should be cited as $0.00171/therm, and the present Errata Order is being issued to make this correction.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 22nd day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg112100.05

DOCKET NO. G-9, SUB 428

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Piedmont Natural Gas Company,	)	
Inc., for a General Increase in Its Rates and	)	ORDER APPROVING
Charges, for Approval of Certain Changes to Its	)	PARTIAL RATE
Rate Schedules, Classifications and Practices,	)	INCREASE
and for Approval of Certain Negotiated Contracts	)	

HEARING IN: Charlotte-Mecklenburg Governmental Center, Charlotte, North Carolina, on August 8, 2000; Guilford County Courthouse, Greensboro, North Carolina, on August 10, 2000; and Commission Hearing Room, Dobbs Building, Raleigh, North Carolina, on September 5, 2000

BEFORE: Commissioner William R. Pittman, Presiding; Chair Jo Anne Sanford; and Commissioners Ralph A. Hunt, Judy Hunt, Robert V. Owens, and Sam J. Ervin, IV

APPEARANCES:

For the Applicant:

Jerry W. Amos and James H. Jeffries, Amos, Jeffries & Robinson, LLP, P. O. Box 787, Greensboro, North Carolina 27402

For the Public Staff:

Paul L. Lassiter and Vickie L. Moir, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For the North Carolina Department of Justice:

Leonard E. Green, Assistant Attorney General, North Carolina Department of Justice, P. O. Box 629, Raleigh, North Carolina 27602

For Carolina Utility Customers Association, Inc.:

James P. West, West Law Offices, P.O. Box 1568, Raleigh, North Carolina 27602

BY THE COMMISSION. On March 1, 2000, Piedmont Natural Gas Company, Inc. (Piedmont or the Company) gave notice pursuant to Commission Rule R1-17(a) of its intent to file for a general increase in its rates and charges. On March 31, 2000, Piedmont filed a petition requesting a general increase in its rates and charges for natural gas service, approval of certain changes to its rate schedules, classifications, and practices, and approval of certain negotiated contracts.

On May 3, 2000, the Commission declared Piedmont's application to be a general rate case pursuant to G.S. 62-137 and suspended the proposed rates for a period of 270 days from the requested implementation date of May 1, 2000. In that order, the Commission also set the matter for hearing, required Piedmont to give notice of the hearing, and established dates for the prefiling of direct testimony by the intervenors and for the prefiling of rebuttal testimony by Piedmont.

On March 21, 2000, the Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene and on March 28, 2000, the Commission issued an order granting the petition. On April 25, 2000, the Attorney General filed notice of intervention.

On August 8, 2000, the matter came on for hearing as scheduled. At the hearing in Charlotte, Mr. Jack Copeland testified as a public witness. On August 10, 2000, the hearing was continued in Greensboro, at which time no one appeared to testify as a public witness.

On August 24, 2000, the Company filed (1) a stipulation (Stipulation) resolving all of the issues in this proceeding as between the Company, the Public Staff and CUCA (collectively, the Stipulating Parties) and (2) testimony in support of the Stipulation.

On September 5, 2000, the case came on for hearing as scheduled in Raleigh. The Stipulation was offered into evidence and explained to the Commission. At the hearing, the prefiled testimony and exhibits of the following witnesses were offered and accepted into evidence: (1) Ware F. Schiefer, President and Chief Executive Officer of Piedmont; (2) Barry L. Guy, Vice President and Controller of Piedmont; (3) Chuck W. Fleenor, Vice President of Gas Services of Piedmont; and (4) Dr. Donald A. Murry, Economist with C. H. Guernsey & Company and Professor Emeritus at the University of Oklahoma. The prefiled testimony of Ray B. Killough, Senior Vice President of Operations of Piedmont, was withdrawn.

Based upon the verified application, the testimony and exhibits received into evidence at the hearings, the Stipulation, and the record as a whole, the Commission makes the following:

FINDINGS AND CONCLUSIONS

1. The Company is engaged in the business of transporting, distributing and selling natural gas in North Carolina, South Carolina and Tennessee.

2. In its application in this docket, the Company is seeking an increase in its rates and charges for natural gas service to its North Carolina customers, approval of certain changes to its rate schedules, classifications and practices, and approval of certain negotiated contracts.

3. The Company is a public utility within the meaning of G.S. 62-3(23).

4. The Commission has jurisdiction over, among other things, the rates and charges, rate schedules, classifications and practices and certain contracts of public utilities, including the Company.

5. The Commission concludes that the Company is properly before the Commission for a determination of the justness and reasonableness of its rates and charges, rate schedules, classifications and practices and the special contracts as regulated by the Commission under Chapter 62 of the General Statutes of North Carolina.

6. The only parties submitting evidence in this case with respect to revenue, expenses and rate base used a test period of the twelve months ended December 31, 1999, updated for the most part through July 31, 2000, and the Stipulation was based upon the same test period.

7. The Commission concludes that the appropriate test period for use in this proceeding is the twelve months ended December 31, 1999, updated primarily through July 31, 2000.

8. The Stipulation executed by Piedmont, the Public Staff and CUCA is unopposed by any party. The Stipulation settles all matters in this docket.

9. The Stipulation provides for an increase in annual revenues of $6,000,542.

10. As required by G.S. 62-133(b)(1), the Commission has ascertained the reasonable original cost of the Company's property used and useful, or to be used and useful within a reasonable time after the test period, in providing natural gas utility service to the public within North Carolina, less that portion of the cost which has been consumed by depreciation expense, all as set forth in Exhibit A attached to this Order. The Commission concludes that these amounts are appropriate for use in this docket.

11. As required by G.S. 62-133(b)(2), the Commission has determined the Company's end-of-period pro forma revenues under the present and proposed rates. The Commission concludes that these amounts, as set forth in Exhibit A attached to this Order, are reasonable for use in this docket.

12. As required by G.S. 62-133(b)(3), the Commission has ascertained the Company's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation. The Commission concludes that these amounts, as set forth in Exhibit A attached to this Order, are reasonable for use in this docket.

13. As required by G.S. 62-133(b)(4), the Commission has fixed the rate of return on the cost of the property ascertained pursuant to paragraph 10 above as will enable the Company by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they now exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors. This overall rate of return of 9.70% is set forth on Exhibit A attached to this Order. In fixing this rate of return, the Commission has used the capital structure, and cost of short-

term debt, long-term debt, and common equity agreed to in paragraph 8(c) of the Stipulation. Such capital structure consists of 52.71% common equity, 3.17% short-term debt, and 44.12% long-term debt. The cost of short-term debt is set at 6.91%. The cost of long-term debt is set at 7.98%. The appropriate return on common equity is 11.30%. The Commission concludes that such capital structure and costs of short-term debt, long-term debt, and common equity are appropriate and that the rate of return is fair and reasonable and will enable the Company by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

14. The Commission concludes that for the purpose of this proceeding the appropriate level of adjusted sales and transportation volumes is 74,409,893 dekatherms (dts), which is composed of 57,205,985 dts of sales quantities and 17,203,908 dts of transportation quantities. The Commission further concludes that the appropriate level for lost and unaccounted for gas is 755,436 dts, that the appropriate level of company use gas is 86,830 dts, and that the appropriate level of purchased gas supply is 58,048,251 dts, consisting of sales volumes, company use gas and lost and unaccounted for gas.

15. The Commission concludes that the rate schedules reflecting new volumetric rates, facilities charges and demand charges as shown in the column entitled Proposed Rate Benchmark $4.50 on Exhibit C to the Stipulation (as the same may be adjusted for any changes in the benchmark cost of gas prior to the effective date of the revised rates) should be established by the Commission as just and reasonable in this case; however, it is understood that the Company will actually charge the rates listed under the column entitled Adjusted for Temporary Increments/Decrements until such rates are changed by order of the Commission. The Commission further concludes that the proposed rates are just and reasonable to all customer classes.

16. The Commission concludes that the fixed gas costs that should be embedded in the proposed rates and used in true-ups of fixed gas costs for periods subsequent to October 31, 2000, in proceedings under Rule R1-17(k) are those fixed gas costs set forth in Exhibit B attached to this Order which are based on a fixed gas cost allocation to North Carolina of 78.00%.

17. The Commission concludes that the "R" values and heat factors that should be used in the Company's Weather Normalization Adjustment (WNA) for periods subsequent to October 31, 2000, are those "R" values and heat factors set forth in Exhibit C attached to this Order.

18. The Commission concludes that the two special contracts filed with the Company's application are fair and reasonable and should be approved.

19. The Commission finds and concludes that the proposed treatment of margin from certain electric generation facilities in the manner set forth in paragraph 9 of the Stipulation is fair and reasonable and should be approved.

20. The Commission finds and concludes that the amortization of deferred Y2K costs and environmental remediation costs in the manner set forth in paragraph 10 of the Stipulation is fair and reasonable and should be approved.

21. The Commission finds and concludes that the tariffs attached to the Stipulation as Exhibit F and the service regulations attached to the Stipulation as Exhibit G are fair and reasonable and should be approved.

22. The Commission finds and concludes that all of the provisions of the Stipulation are fair and reasonable under the circumstances of this proceeding and should be approved.

EVIDENCE IN SUPPORT OF FINDINGS AND CONCLUSIONS 1-5

The findings of fact and conclusions set forth in Findings and Conclusions 1-5 are jurisdictional and were not contested by any party. They are supported by the Company's verified application and the testimony and exhibits of the various witnesses and the N.C.U.C. Form G-1 that was filed with the application.

EVIDENCE IN SUPPORT OF FINDINGS AND CONCLUSIONS 6-7

The Company filed its application and exhibits using a test period of the twelve months ended December 31, 1999. In its order of May 3, 2000, the Commission ordered the parties to use a test period of the twelve months ended December 31, 1999, with appropriate adjustments. The Stipulation is based upon the test period ordered by the Commission, and this test period was not contested by any party.

EVIDENCE IN SUPPORT OF FINDINGS AND CONCLUSIONS 8-9

These findings and conclusions are supported by the Stipulation are not contested by any party.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 10

The reasonable original cost of the Company's property used and useful, or to be used and useful within a reasonable time after the test period, in providing natural gas utility service to the public within North Carolina, less that portion of the cost that has been consumed by depreciation expense, is set forth in Exhibit A attached to this Order. The amounts shown on Exhibit A attached to this Order are the result of negotiations among the parties and are not opposed by any party. The Commission has carefully reviewed these amounts and concludes that they are appropriate for use in this docket.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 11

The probable revenues under the Company's present and proposed rates are set forth in Exhibit A attached to this Order. The amounts shown on Exhibit A attached to this Order are the result of negotiations among the parties and are not opposed by any party. The Commission has carefully reviewed these amounts and concludes that they are reasonable and appropriate for use in this docket.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 12

The Company's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation, is set forth in Exhibit A attached to this Order. The amounts shown on Exhibit A attached to this Order are the result of negotiations among the parties and are not opposed by any party. The Commission has carefully reviewed these amounts and concludes that they are appropriate for use in this docket.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 13

The rate of return on the cost of the Company's used and useful property is set forth on Exhibit A attached to this Order. The rate of return, capital structure and costs of short-term debt, long-term debt and common equity are the result of negotiations among the parties and are not opposed by any party. The Commission has carefully reviewed the return, the capital structure and costs of short-term debt, long-term debt and common equity and concludes that they are fair and reasonable and will allow the Company by sound management the opportunity to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they now exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 14

The level of adjusted sales and transportation volumes used in the Stipulation is 74,409,893 dts and the level of purchased gas supply is 58,048,251. The throughput volume level is derived as follows:

Sales	57,205,985
Transportation Supply	17,203,908
Total Throughput	74,409,893

The level of purchased gas supply is 58,048,251 dts derived as follows:

Sales	57,205,985
Lost & Unaccounted for	755,436
Company Use	86,830
Purchased Gas Supply	58,048,251

This throughput level and level of purchased gas supply is the result of negotiations among the parties and is not opposed by any party. The Commission has carefully reviewed this throughput level and concludes that it is a fair and reasonable approximation of the Company's pro forma adjusted sales and transportation volumes. The Commission has also carefully reviewed the purchased gas supply level and concludes that it is a fair and reasonable approximation of the Company's pro forma purchased gas supply level.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 15

The computation of revenues under the proposed rates (based on the $3.05 wholesale commodity cost of gas that was in effect at the time of the filing of the Application) is set forth on Exhibit B of the Stipulation. These computations show that the proposed rates will produce the revenues used by the Commission in its determination of the revenue increase granted in this order. The rates approved herein provide an overall increase to the Company of 1.2%. Based on the $4.50 wholesale commodity cost of gas in effect at the time of the hearings, the rates approved herein result in an increase for residential customers of 4.3%, no change for commercial customers, a decrease for firm industrial customers of 5.3% and a decrease for interruptible customers of 7.9%. These rates are the result of negotiations among the parties and are not opposed by any party. The Commission has carefully reviewed these rates and concludes that they are just and reasonable to all customer classes.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 16

Under the Commission's procedures for truing-up fixed gas costs in proceedings under Rule R1-17(k), it is necessary and appropriate to determine the amount of fixed gas costs that are embedded in the rates approved herein. In the Stipulation, the parties agree that for the purpose of this proceeding and future proceedings under Rule R1-17(k) the appropriate amount of fixed costs for each rate schedule is the amount set forth in Exhibit B attached to this Order, which gas costs are based on a fixed gas cost allocation to North Carolina of 78.00%. The Commission has carefully examined these amounts and concludes that they are just and reasonable.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 17

Under the Company's WNA, it is necessary and appropriate to determine the "R" values and heat factors that will be used in the Company's WNA. In the Stipulation, the parties agree that the "R" values and heat factors that should be used in the Company's WNA are those "R" values and heat factors set forth in Exhibit C attached to this Order. The Commission has carefully reviewed the "R" values and heat factors and concludes that they are appropriate and in compliance with the rates approved herein and with the other provisions of this order.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 18

Piedmont witness Fleenor testified that the two special contracts filed with the Company's application were entered into to avoid the loss of the two customers to an alternate competitive energy source. He further testified that had the Company not entered into those two contracts, the Company would have lost the two customers and would have had to further increase rates to the other customers. The Stipulating Parties agreed that the two contracts should be approved as filed, and no party opposed the approval of the two contracts. The Commission has carefully reviewed the contracts and concludes that they are fair and reasonable under the circumstances and that they should be approved.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 19

In paragraph 9 of the Stipulation, the Stipulating Parties agreed that from the effective date of the rates approved in this docket to the effective date of the rates approved in Piedmont's next general rate case, any "net compensation" from the commodity sale of gas to Duke Power Company's power generation facilities in Lincoln County, Carolina Power & Light Company's power generation facilities in Rowan County, or any other special contract with an electric utility company for the generation of electric power in Piedmont's North Carolina certificated service area, shall be subject to the 75%/25% secondary market sharing mechanism as approved by the Commission in Docket No. G-100, Sub 67. Piedmont witness Schiefer testified that this mechanism accomplishes several objectives. First, it eliminates the need to estimate volumes for these highly volatile sales and undue risk to either the Company or its customers. Second, it provides the Company with an incentive to maximize commodity sales during the summer to these gas-fired electric generation facilities and the margin they generate for the benefit of other customers and shareholders. Third, with respect to any additional commodity sales to power generation load added subsequent to and during the term of this rate case, customers will receive 75% of any net compensation, which in the absence of this provision would all go to shareholders. The Commission concludes that these objectives are fair and reasonable under the circumstances of this case and that the sharing mechanism should be approved.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 20

The Stipulating Parties have agreed that as of November 1, 2000, the Company will have $586,409 of deferred Y2K costs recorded as a regulatory asset in its deferred account and that the Company should be permitted to recover these deferred Y2K costs by amortizing this regulatory asset over a period of three years beginning with the effective date of the rates approved herein. Witness Schiefer testified that this method of recovery is consistent with a previous order of the Commission in a Public Service Company of North Carolina, Inc. case. The Stipulating Parties have also agreed that as of November 1, 2000, the Company will have $3,808,398 of deferred environmental remediation costs recorded as a regulatory asset in a deferred account and that the Company should be permitted to recover these deferred environmental remediation costs by amortizing this regulatory asset over a period of three years beginning with the effective date of the rates approved herein. No party opposed the recovery of the deferred Y2K and environmental remediation costs in the manner agreed. The Commission concludes that the recovery of these deferred Y2K costs and environmental remediation costs in the manner set forth in the Stipulation is fair and reasonable and should be approved.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 21

Witnesses Schiefer and Fleenor testified to the various changes in the Company's tariffs and service regulations. In general, they testified that these changes were necessary and appropriate to reflect the new rates and rate design approved in this Order and to reflect changes in market and regulatory conditions. The parties agreed in the Stipulation that such changes are appropriate, and no party objected to these changes. The Commission has carefully reviewed these changes and concludes that they are fair and reasonable and should be approved.

EVIDENCE IN SUPPORT OF FINDING AND CONCLUSION 22

For the reasons set forth in the foregoing paragraphs, the Commission concludes that the Stipulation provides a just and reasonable resolution of all the issues in this case, will allow the Company a reasonable opportunity to earn a fair return, and provides just and reasonable rates to all customer classes. The Commission finds and concludes that all of the provisions of the Stipulation, taken together, are fair and reasonable under the circumstances of this proceeding and should be approved.

IT IS, THEREFORE, ORDERED as follows:

1. That Piedmont is hereby authorized to adjust its rates and charges in accordance with the Stipulation (as such rates may be adjusted for any changes in the benchmark cost of gas prior to the effective date of the revised rates) effective for service rendered on and after November 1, 2000, and the Stipulation is approved. The Stipulation provides for an increase in annual revenues of $6,000,542.

2. That Piedmont is authorized to implement the tariffs attached to the Stipulation as Exhibit F effective November 1, 2000; provided, however, that any future changes in such tariffs shall be consistent with the provisions of paragraph 14 of the Stipulation.

3. That Piedmont is authorized to implement the service regulations attached to the Stipulation as Exhibit G effective November 1, 2000.

4. That the two contracts filed with the Company's application are approved effective November 1, 2000.

5. That Piedmont shall file tariffs and service regulations to comply with paragraph 1 through 3 of this order within five (5) days from the date of this order.

6. That in the true-up of fixed gas costs for periods subsequent to October 31, 2000, in proceedings under Rule R1-17(k), Piedmont shall use the fixed gas costs set forth in Exhibit B attached to this Order.

7. That for periods subsequent to October 31, 2000, Piedmont shall use the "R" values and heat factors set forth in Exhibit C attached to this Order.

8. That from November 1, 2000, to the effective date of the rates approved in Piedmont's next general rate case, any "net compensation" from the commodity sale of gas to Duke Power Company's power generation facilities in Lincoln County, Carolina Power & Light Company's power generation facilities in Rowan County, or from any other special contract with an electric utility company for the generation of electric power in Piedmont's North Carolina certificated service area, shall be subject to the 75%/25% secondary market sharing mechanism as approved by the Commission in Docket No. G-100, Sub 67.

9. That the Company be permitted to recover its deferred Y2K costs and environmental remediation costs in the manner set for in this Order.

10. That Piedmont shall send the notice attached hereto as Exhibit D (which reflects the benchmark commodity gas cost approved on October 3, 2000, in Docket G-9, Sub 437) to its customers as a bill insert beginning with the billing cycle that includes the rate changes approved herein.

ISSUED BY ORDER OF THE COMMISSION
This the 5th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg100500.06
(For Exhibits A, B & C, please contact the Chief Clerk's Office.)

EXHIBIT D

State of North Carolina
Utilities Commission
Raleigh

Docket No. G-9, Sub 428

Before the North Carolina Utilities Commission

In the Matter of Application of Piedmont Natural Gas Company, Inc., for a General Increase in its Rates and Charges, for Approval of Certain Changes and to Its Rate Schedules, Classifications and Practices and for Approval of Certain Negotiated Contracts	)	**Public Notice**

The North Carolina Utilities Commission issued an Order allowing Piedmont Natural Gas Company, Inc. (Piedmont), to increase its rates and charges by approximately $6 million annually, or 1.1% overall, effective November 1, 2000.

Piedmont's application for a rate increase was filed with the Commission on March 31, 2000. In its application, Piedmont requested an increase of approximately $14.5 million annually. The increase approved by the Commission was the result of a stipulation entered into between Piedmont and other parties to the proceeding, including the Public Staff of the North Carolina Utilities Commission.

In its application, Piedmont stated that the rate increase was needed because it has been adding customers, making capital improvements in its utility properties and obtaining new long-term capital from the sales of securities at unprecedented levels. The reasons cited by Piedmont in support of its request for a rate increase were to allow it to maintain its facilities and services in accordance with the reasonable requirements of its customers, to compete in the market for capital funds on fair and reasonable terms and to produce a fair profit for its stockholders.

The Commission notes that the increase to specific classes of customers will vary in order to have each customer class pay its fair share of the cost of providing service.

A typical year-round residential customer's annual bill will increase approximately 3.8% based on 804 therms of gas usage.

ISSUED BY ORDER OF THE COMMISSION.
This the 5th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

DOCKET NO. G-9, SUB 436

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Piedmont Natural Gas Company, Inc., for Annual Review of Gas Costs Pursuant to G.S. 62-133.4(c) and Commission Rule R1-17(k)(6)	))))	ORDER ON ANNUAL REVIEW OF GAS COSTS

HEARD: October 3, 2000, at 10:00 a.m., Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Commissioner Judy Hunt; and Commissioner J. Richard Conder

APPEARANCES:

For Piedmont Natural Gas Company, Inc.:

James H. Jeffries, Amos, Jeffries & Robinson, L.L.P., Post Office Box 787, Greensboro, North Carolina 27402

For the Public Staff:

Kendrick C. Fentress, Staff Attorney, Public Staff - North Carolina Utilities Commission, Post Office Box 29520, Raleigh, North Carolina 27626-0520

BY THE COMMISSION: On August 1, 2000, Piedmont Natural Gas Company, Inc. (Piedmont), filed the direct testimony and exhibits of Thomas E. Skains, Senior Vice President – Marketing & Supply Services; the direct testimony and exhibits of Chuck W. Fleenor, Vice President – Gas Services; the direct testimony of Keith P. Maust, Director of Gas Supply and Market Sales; and the direct testimony and exhibits of Ann H. Boggs, Director of Gas Accounting, all relating to the annual review of Piedmont's gas costs pursuant to G.S. 62-133.4(c) and Commission Rule R1-17(k)(6).

On August 7, 2000, the Commission issued an Order scheduling a public hearing for October 3, 2000, setting dates for pre-filed testimony and intervention, and requiring public notice.

On August 10, 2000, the Attorney General gave notice of intervention.

On September 5, 2000, the Carolina Utility Customers Association, Inc. (CUCA), filed a Petition to Intervene, and on September 19, 2000, the Commission issued an order granting the petition.

On September 18, 2000, the Public Staff filed the testimony of Julie G. Perry, Staff Accountant, Accounting Division of the Public Staff, and Jeffrey L. Davis, Utilities Engineer, Natural Gas Division of the Public Staff.

On October 3, 2000, the matter came on for hearing as scheduled. Presiding Commissioner Ervin was present at the hearing, and the parties agreed that Commissioners Hunt and Conder could participate in the decision in this matter based upon the record and without attending the hearing. Pursuant to agreement of all parties of record, the prefiled testimonies of the witnesses for Piedmont and for the Public Staff were introduced into evidence and the parties waived cross-examination.

Based upon the evidence adduced at the hearing and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Piedmont is a public utility as defined in Chapter 62 of the North Carolina General Statutes.

2. Piedmont is engaged primarily in the business of transporting, distributing and selling natural gas to customers in North Carolina, South Carolina, and Tennessee.

3. Piedmont has filed with the Commission and submitted to the Public Staff all of the information required by G.S. 62-133.4(c) and Commission Rule R1-17(k) and has complied with the procedural requirements of such statute and Rule.

4. The review period in this proceeding is the twelve months ended May 31, 2000.

5. During the review period, Piedmont incurred gas costs of $228,169,257, received $244,616,223 of this amount through rates, and credited the difference to the appropriate deferred accounts.

6. At May 31, 2000, Piedmont had a credit balance of $9,474,763 in its deferred accounts consisting of a credit balance of $6,607,679 in the commodity, or Sales Only Deferred Account and a credit balance of $2,867,084 in the demand or All Customers Deferred Account.

7. During the review period, Piedmont realized net compensation of $9,316,878 from secondary market transactions. In accordance with the Commission's orders in Docket Nos. G-100, Subs 63 and 67 and Docket No. G-9, Sub 317, $6,987,659 of the net compensation was treated as a reduction in gas costs for the benefit of Piedmont's customers.

8. Piedmont properly accounted for its gas costs during the review period.

9. Piedmont has transportation and storage contracts with interstate pipelines which provide for the transportation of gas to Piedmont's system and long term supply contracts with producers, marketers and other suppliers.

10. Piedmont has adopted a "best cost" gas purchasing policy consisting of five main components - the price of gas, the security of the gas supply, the flexibility of the gas supply, gas deliverability, and supplier relations.

11. Piedmont's gas purchasing policies and practices during the review period were prudent and, as a result, its gas costs during the review period were prudently incurred.

12. Piedmont should be permitted to recover 100% of its prudently incurred gas costs.

13. Piedmont's service agreement with Pine Needle LNG Company, LLC (Pine Needle) is prudent.

14. Piedmont proposed to refund the net credit balance in its All Customers Deferred Accounts based on the fixed gas costs apportionment percentages for each rate schedule as set forth in the Commission's order in Docket No. G-9, Sub 382.

15. Piedmont proposed to refund the May 31, 2000 balance in its All Customers Deferred Account by implementing the decrements for each rate schedule as shown on Company witness Boggs' Schedule 11 to Exhibit AHB-1 beginning with the first billing cycle of the month that follows the date of this order.

16. Piedmont proposed to refund the May 31, 2000 balance in its Sales Customers Only Deferred Account by implementing an across-the-board decrement of $0.1180 per dekatherm (dt) to its sales rates effective with the first billing cycle of the month that immediately follows the date of this order.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-2

The evidence supporting these findings is contained in the official files and records of the Commission and the testimony of Piedmont witness Maust. These findings are essentially informational, procedural or jurisdictional in nature and are based on evidence uncontested by any of the parties.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3-4

The evidence supporting these findings is contained in the testimony of Piedmont witness Boggs and Public Staff witness Perry.

G.S. 62-133.4 requires that each natural gas utility submit to the Commission information and data for an historical twelve-month test period concerning its actual cost of gas, volumes of purchased gas, sales volumes, negotiated sales volumes, and transportation volumes. In addition, Commission Rule R1-17(k)(6)(c) requires the filing of information and data showing weather-normalized sales volumes, workpapers, and direct testimony and exhibits supporting the information.

Witness Boggs testified that Piedmont filed with the Commission and submitted to the Public Staff throughout the review period complete monthly accounting of the computations required by Commission Rule R1-17(k)(6)(c). Witness Perry confirmed that the Public Staff had reviewed the filings and that they complied with the Rules.

The Commission therefore concludes that Piedmont has complied with all of the procedural requirements of G.S. 62-133.4(c) and Commission Rule R1-17(k) for the review period.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 5 - 8

The evidence supporting these findings is contained in the testimony of Piedmont witnesses Maust and Boggs and Public Staff witnesses Perry and Davis.

In her prefiled testimony witness Boggs testified that, as of May 31, 2000, Piedmont had a credit balance of $9,474,763 in its deferred account. The credit balance consisted of a credit balance of $6,607,679 in the Sales Only Deferred Account and a credit balance of $2,867,084 in the All Customers Deferred Account. Public Staff witness Perry testified that Piedmont had properly accounted for its gas costs during the review period.

Witness Maust testified that Piedmont achieved net compensation of $9,316,878 from secondary market transactions and that $6,987,659 of this net compensation was treated as a reduction in gas costs for the benefit of Piedmont's customers in accordance with procedures established in Docket No. G-100, Sub 63 and Docket No. G-100, Sub 67. No party offered any evidence to show that Piedmont did not record its gas costs in compliance with the previously approved procedures and, therefore, the Commission finds and concludes that Piedmont has properly accounted for these transactions.

Based on the foregoing, the monthly filings by Piedmont pursuant to Commission Rule R1-17(k)(5)(c), and the findings of fact set forth above, the Commission concludes that Piedmont properly accounted for its gas costs during the review period and that the deferred account balances as reported are correct.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 9 - 12

The evidence supporting these findings is contained in the testimony of Piedmont witness Maust and Public Staff witness Davis.

Witness Maust testified that Piedmont's gas purchasing policy is best described as a "best cost" policy. This policy consists of five main components: price of gas; security of gas supply; flexibility of gas supply; gas deliverability; and supplier relations. Witness Maust stated that all of these components are interrelated and that Piedmont considers and weighs each of these five factors in establishing its entire supply portfolio.

Witness Maust further testified that Piedmont purchases gas supplies under a diverse portfolio of contractual arrangements through the spot market and through long-term contracts. Spot gas is purchased under a contract with a term of one month or less while long-term gas is purchased under a contract ranging in term from one year (or less) to terms extending through October, 2004. Spot gas contracts provide for little or no supply security because they are interruptible and short-term in nature. Long term firm supplies are usually more expensive; however, firm supplies are the most reliable and secure source of gas. Some of these firm contracts are for winter service only and some provide for 365 day service.

Witness Maust described how the interrelationship of the five factors affects Piedmont's construction of its gas supply portfolio under its "best cost" policy. The long term contracts, supplemented by long-term peaking services and storage, generally are aligned with the firm market; the short term spot gas generally serves the interruptible market. In order to weigh and consider the five factors, Piedmont must be kept informed about all aspects of the natural gas industry. Piedmont therefore stays abreast of current issues by intervening in all major proceedings affecting pipeline suppliers, attending conferences, and subscribing to industry literature.

Witness Maust stated that Piedmont's greatest obstacle in applying its "best cost" policy is in dealing with future uncertainties in a dynamic national and regional energy market. Future demand for gas is affected by economic conditions, weather patterns, regulatory policies, and industry restructuring in the energy markets. Future availability and pricing of gas supplies is affected by overall demand, domestic oil and gas exploration and development, pipeline expansion projects, and regulatory policies and approvals. Witness Maust further stated that Piedmont did not make any changes in its "best cost" gas purchasing policies or practices during the year.

Finally, witness Maust testified that Piedmont had taken a number of steps to manage its gas costs, consistent with its "best cost" policy. Piedmont has participated in matters before the Federal Energy Regulatory Commission (FERC) and other regulatory agencies, actively renegotiated and restructured eligible supply and capacity contracts in order to take advantage of market opportunities, utilized the flexibility available within its supply and capacity contracts to purchase and dispatch gas and to release capacity in the most cost effective manner, "locked in" gas prices for periods of time to maintain its competitive position in specific markets and provided transportation services to large volume customers in order to maintain system throughput and reduce average unit costs, actively promoted growth from "year around" markets in order to improve Piedmont's load factor and reduce average unit costs, and continued an internal review committee to receive input and direction on its gas supply performance and planning activities.

Witness Davis testified that he had reviewed Piedmont's gas supply contracts to determine how the commodity and variable costs were determined. He then reviewed the fixed gas cost fees that were charged during the review period. In addition, witness Davis stated that he reviewed information related to (1) design day estimates and requirements, (2) forecasted load duration curves, (3) forecasted gas supply needs, (4) projections of capacity additions and supply changes, (5) customer load profile changes, and (6) potential capacity and storage opportunities. Witness Davis stated that, in the Public Staff's opinion, Piedmont's gas costs were prudently incurred.

Piedmont used a "reserve margin" of 43,221 dt per day in estimating its capacity needs. Witness Davis testified that other gas utilities do not use a reserve margin, but use a design day criterion of 55 Heating Degree Days (HDD). Witness Davis stated that Piedmont uses a "relatively low" design day of 53 HDD. He added that that design day criterion, along with the 43,221 dt per day reserve margin, is ". . . the approximate equivalent of using 55 HDD for planning purposes" and that basing design day calculations on 55 HDD is ". . . well within design tolerances and is an acceptable approach." Furthermore, witness Davis testified that the Public Staff will continue to review the use of a reserve margin to supplement the Company's design day criteria in subsequent annual gas cost review proceedings.

Based on the foregoing, the Commission concludes that Piedmont's gas purchasing policies and practices during the review period were prudent and that its gas costs during the review period were reasonably and prudently incurred and should be recovered.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

The evidence supporting this finding is contained in the testimony of Piedmont witnesses Skains and Fleenor.

By Order dated December 21, 1999, in Docket No. G-9, Sub 427, the Commission required Piedmont's filing in this proceeding to include information addressing why Piedmont's service agreement with Pine Needle is prudent. In response to the requirement, Piedmont filed the testimony and exhibits of witnesses Skains and Fleenor.

Witness Fleenor testified that Piedmont's growth in firm requirements necessitates that it increase design day deliverability by approximately 40,000 dt per day per year. He testified that Piedmont contracted for 200,000 dt per day of 10 day Pine Needle LNG withdrawal deliverability to meet the long term peaking requirements of Piedmont's customers and to best match Piedmont's load profile with complementary supply services.

Witness Skains testified that Piedmont considered numerous alternative interstate pipeline capacity projects prior to making the decision to subscribe to Pine Needle service. He sponsored an exhibit showing Piedmont's analysis of the various alternatives and testified that the estimated annual savings to Piedmont from selecting Pine Needle service over the alternatives ranged from $2 million to $47 million. Mr. Skains also testified as to various operational and supply security factors that caused Piedmont to select Pine Needle service.

No evidence was introduced by any party to suggest that Piedmont's decision to purchase Pine Needle service was not prudent.

Based on the foregoing, the Commission concludes that Piedmont's service agreement with Pine Needle is prudent.

Piedmont decided to participate in Pine Needle, an interstate project regulated by the FERC, as both a customer and an equity owner. The Commission notes that Piedmont witness Maust testified that, in order to manage its gas costs consistent with its "best cost" policy, "Piedmont has actively participated in proceedings before the FERC . . . that could reasonably be expected to affect Piedmont's rates and services." The Commission encourages Piedmont to continue to act in accordance with this policy and intends to scrutinize Piedmont's performance in such matters carefully in Piedmont's next annual gas cost review.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 14-16

The evidence supporting these findings is contained in the testimony of Piedmont witness Boggs and Public Staff witness Davis.

Witness Boggs testified that Piedmont proposes to change its rates as shown on Schedule 11 to Exhibit AHB-1. Witness Boggs computed rate decrements for all of its rate schedules to refund the $2,867,084 credit balance in the All Customers Deferred Account. Witness Boggs computed a rate decrement of $0.1180/dt for its sales rates to refund the $6,607,679 credit balance in the Sales Only Deferred Account. Public Staff witness Davis testified that he agreed with Piedmont's proposed rate changes.

The Commission finds that the rates proposed by Piedmont are appropriate and should be implemented on the first billing cycle of the month following the date of this order.

IT IS, THEREFORE, ORDERED as follows:

1. That Piedmont's accounting for gas costs during the twelve months ended May 31, 2000, is approved;

2. That Piedmont is authorized to recover 100% of its gas costs incurred during the twelve months ended May 31, 2000;

3. That Piedmont shall implement the temporary decrements, as shown on Schedule 11 to Exhibit AHB-1, to refund the credit balance related to the All Customers Deferred Account beginning with the first billing cycle of the month immediately following the date of this order;

4. That Piedmont shall implement a temporary decrement of $0.1180/dt to refund the credit balance related to the Sales Only Deferred Account beginning with the first billing cycle of the month immediately following the date of this order;

5. That the existing increments to all customers approved in the last annual review proceeding shall be discontinued; and

6. That Piedmont shall give notice to all of its customers of the changes in rates approved in this order by appropriate bill inserts beginning with the first billing cycle that includes the changes in rates approved herein.

ISSUED BY ORDER OF THE COMMISSION
This the 22nd day of November, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg110700.02

DOCKET NO. G-5, SUB 379

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application for Permanent Approval of Revisions to Rider D and Rate Schedule Nos. 145 and 150, and for Partial Waiver of Rule R1-17(k), if Necessary	))))))	ORDER APPROVING TARIFFS

HEARD: Wednesday, March 1, 2000, at 9:30 a.m., Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner William R. Pittman, Presiding, Chairman Jo Anne Sanford, Commissioners Ralph Hunt, J. Richard Conder, and Robert V. Owens, Jr.

APPEARANCES:

For Public Service Company of North Carolina, Inc.:

J. Paul Douglas, Public Service Company of North Carolina, Inc., Post Office Box 1398, Gastonia, North Carolina 28053

Mary Lynne Grigg, Kilpatrick Stockton, Suite 400, 3737 Glenwood Avenue, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Antoinette R. Wike, Chief Counsel, Public Staff – North Carolina Utilities Commission, Post Office Box 29520, Raleigh, North Carolina 27626-0520

Margaret A. Force, Assistant Attorney General, North Carolina Department of Justice, P. O. Box 629, Raleigh, North Carolina 27602

BY THE COMMISSION: On September 30, 1997, Public Service Company of North Carolina, Inc. (PSNC), filed an application seeking (i) to revise its Rider D to bifurcate the determination of its commodity cost of gas with separate commodity costs to be determined for residential and small commercial customers and for large-volume customers, (ii) to convert its Rate Schedule Nos. 145 and 150 from sales rate schedules to large-volume rate schedules under which sales will be made at the prices calculated under revised Rider D, and (iii) to conform other tariffs (Sheet Nos. 100 and 101) to the foregoing amendments. PSNC also requested a waiver of Rule R1-17(k), if necessary, to implement these changes. The proposed revisions bifurcate the determination of PSNC's commodity cost of gas so that the commodity cost for PSNC's residential and small general service customers are based on a benchmark derived from long-term projections of gas prices, with undercollections and overcollections being recorded in a deferred account, and the commodity cost for PSNC's large-volume customers, which have access to competitively priced natural gas supplies and related services through the use of PSNC's transportation services under its Rate Schedules 175 and 180, are calculated monthly on the basis of reported market prices with no increments or decrements for undercollections or overcollections. The Commission approved the application on a two-year trial basis by its Order Approving Rider D and Rate Schedules 145 and 150 issued on November 6, 1997.

In PSNC's 1998 general rate case, Docket No. G-5, Sub 386, the Commission rejected arguments that this mechanism should be changed, stating in its October 30, 1998 Order Granting Partial Rate Increase as follows:

> Furthermore, the Commission notes that in November 1997, in Docket No. G-5, Sub 379, the Commission approved the mechanism for calculating the commodity cost of gas for these rate schedules on an experimental basis for two years. The mechanism has been in effect for less than a year, and PSNC has not yet submitted its first report under that program. The Commission is reluctant to change an experimental program that has been in effect only a short time and has not been shown to have an adverse impact on the competitive market.

88 N.C.U.C. 339, 389. On February 4, 2000, the North Carolina Supreme Court affirmed that order in *State ex rel. Utilities Commission v. Carolina Utility Customers Association, Inc.*, No. 170A99. The Supreme Court quoted with approval the Commission's finding that "PSNC's bifurcated benchmark, by which large commercial and industrial customers receive monthly market based rates, does not affect the use of the full-margin concept for transportation in this case." *Slip opinion*, at 36-38. The Court held:

> Although the Commission did not specifically address CUCA's argument that PSNC's rates double-charge sales customers for interstate transportation, the Commission did thoroughly review the record evidence supporting PSNC's bifurcated full-margin pricing method. The order reveals that the Commission relied upon the testimony of PSNC witness Barkley,
>
> Public Staff witness Davis, and CUCA witness Schoenbeck for its findings of fact and conclusions of law.
>
> ....
>
> The Commission ultimately concluded that "the Public Staff's proposed transportation rates based on the full-margin concept are just and reasonable." We hold that the record evidence, combined with the Commission's analysis of prior cases addressing the lawfulness of full-margin transportation rates, is more than adequate to support the Commission's approval of PSNC's bifurcated full-margin pricing mechanism.

Id.

In the interim, on October 12, 1999, PSNC requested that the revisions to Rider D and Rate Schedules 145 and 150 be made permanent. On October 26, 1999, the Carolina Utility Customers Association, Inc. (CUCA), filed a complaint and a request for an evidentiary hearing. On November 3, 1999, the Commission issued its Order Scheduling Hearing, setting PSNC's request to make the revisions permanent for hearing and extending the trial period on an interim basis pending the issuance of a final order.

The Attorney General filed a notice of intervention, and Southeastern Gas & Power, Inc. (Southeastern), filed a motion to intervene, which was granted. By Order Granting Motion For Extension Of Time issued on January 20, 2000, the Chair extended the time for the filing of intervenor and rebuttal testimony and rescheduled the date of the hearing to March 1, 2000. CUCA subsequently pre-filed testimony of Kevin W. O'Donnell.

The Chair issued an Order On Motions on February 10, 2000, ruling that "the Commission will not revisit the interrelationship between full-margin transportation rates and PSNC's bifurcated Rider D at the March 1 hearing in this docket." The Order also struck portions of the prepared testimony of CUCA's witness Kevin W. O'Donnell and prohibited further discovery on full-margin transportation rates. The Commission, either by the Chair or Presiding Commissioner, issued other orders addressing the scope of the hearing and resolving discovery disputes; it is not necessary to summarize all of these.

On February 28, 2000, Southeastern filed a petition of withdrawal, and on February 29, 2000, CUCA filed a withdrawal, both of which were granted at the hearing. The hearing was held as scheduled on March 1, 2000. Counsel for PSNC moved to strike the pre-filed direct testimony of CUCA witness O'Donnell and the rebuttal testimony of Mr. Barkley. The Presiding Commissioner granted this motion. The Commission received the prefiled direct testimony and exhibit of PSNC witness Barkley.

Finally, at the March 1, 2000 hearing, the Public Staff moved that PSNC revise its deferred cost of gas accounting procedures to record any difference between the amount that PSNC collects in the commodity portion of its rates for sales under Rate Schedules 145 and 150 and the cost of acquiring gas for those sales to the all-customers deferred account rather than the sales-only deferred account. PSNC stated that it did not oppose this motion and did not object to the proposed change. The motion was granted.

Following the hearing, PSNC filed a proposed order, to which the Public Staff states it has no objection. The Attorney General filed a statement taking no position.

Upon a review of the entire record in this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. By its application herein, PSNC seeks (i) to revise its Rider D to bifurcate the determination of its commodity cost of gas with separate commodity costs to be determined for residential and small commercial customers and large-volume customers (ii) to convert its Rate Schedule Nos. 145 and 150 from sales rate schedules to large-volume rate schedules under which sales will be made at the prices calculated under revised Rider D, and (iii) to conform other tariff sheets (Sheet Nos. 100 and 101) to the foregoing amendments.

2. The Commission approved this application on a two-year trial basis by its Order Approving Rider D and Rate Schedules 145 and 150 issued on November 6, 1997.

3. The bifurcated commodity rate mechanism prevents an unfair shifting of costs to heat-sensitive customers and should be approved on a permanent basis.

4. The proposed tariffs should be modified to record any difference between the amount that PSNC collects in the commodity portion of its rates for sales under Rate Schedules 145 and 150 and the cost of acquiring gas for those sales to the all-customers deferred account rather than the sales-only deferred account.

DISCUSSION OF EVIDENCE AND CONCLUSIONS OF LAW

Witness Barkley testified that PSNC's bifurcated commodity rate mechanism prevents an unfair shifting of costs to PSNC's heat-sensitive customers (mostly, residential and small commercial customers) and promotes further development of a competitive market for its large-volume customers who can purchase sales service under Rate Schedules 145 and 150 or negotiate sales rates under Rate Schedule 160. He provided three reasons for PSNC's position. First, large-volume customers can purchase gas supplies at market prices from suppliers other than PSNC and have PSNC transport the gas to their facilities. Second, PSNC's heat-sensitive customers, who do not have the same options for obtaining gas supplies as PSNC's large-volume customers, are disadvantaged when the large-volume customers switch to sales service when PSNC's benchmark cost of gas is lower than the prevailing market price for gas and then switch back to transportation service when PSNC increases its benchmark cost of gas to attempt to match market prices or implements an increment to recover any unrecovered gas costs. Barkley testified that the undercollection during the winter heating season immediately preceding the implementation of the bifurcated commodity rate mechanism (1996-1997) was approximately $4.2 million. During the March to July, 1999 period, if PSNC's bifurcated commodity rate mechanism had not been in effect, the undercollection would have been approximately $7.1 million. Third, marketers that currently provide gas supplies and transportation services to PSNC's large-volume customers are unable to operate on PSNC's system when PSNC sells gas to large-volume customers at rates that are lower than the prices at which these marketers can deliver gas to PSNC's large-volume customers.

Witness Barkley described the operation of the bifurcated commodity rate mechanism as follows:

> The bifurcated commodity rate mechanism affects the manner in which PSNC determines the monthly price for the commodity portion of the rate for natural gas sales made to large-quantity customers under Rate Schedule Numbers 145 and 150. As shown in PSNC's approved Rider D, the "Monthly Commodity Gas Cost" charged to these customers is the sum of the Monthly Index Price, the 100% load factor equivalent of the maximum firm transportation (FT) rate for a Zone 3 to Zone 5 movement on Transcontinental Gas Pipe Line Corporation (Transco), fuel, and Other Gas Supply Charges.
>
> The "Monthly Index Price" for a particular month is the sum of the NYMEX closing price for natural gas contracts for that month established on the third business day prior to the end of the prior month and $0.03 per dekatherm. The Zone 3 to Zone 5 rate is obtainable from Transco's tariff and reflects the cost of transporting gas from Transco's natural gas pooling points located in Louisiana to North Carolina. Fuel is calculated in a manner consistent with Transco's tariff. The "Other Gas Supply Costs" are determined by dividing PSNC's total estimated reservation fees to be paid under the firm supply contracts by the total estimated quantities to be purchased under these contracts.

The Commission concludes that the bifurcated commodity rate mechanism prevents an unfair shifting of costs to heat-sensitive customers and that it should be approved on a permanent basis. Prior to the trial approval of the bifurcated commodity rate mechanism, PSNC's large-volume customers frequently switched from transportation service to sales service when the monthly market price of natural gas escalated above PSNC's benchmark. When PSNC's benchmark increased above the monthly market price of natural gas, these customers then switched from sales service to transportation service. This switch generated a shortfall in PSNC's collections of the costs of purchasing gas for all of its customers because PSNC was required to purchase additional quantities of gas at prices greater than its benchmark price to ensure service to its large-volume customers as well as its residential and small commercial customers. Then, when market prices moderated and fell below PSNC's benchmark, the large-volume customers switched back to PSNC's transportation service, forcing PSNC to recover the resulting shortage from its residential and small general service customers. The impact of this switching was significant. For example, during the winter of 1996-1997, the winter prior to the approval of the revised mechanism, large-volume customers switched from transportation service to sales service when market prices climbed above PSNC's benchmark and increased PSNC's under-recovery of its gas costs by approximately $4 million. This amount was added to the balance owed PSNC in its deferred cost of gas account for sales-only customers and was later recovered primarily from PSNC's residential and small general service customers, not its large-volume customers.

The bifurcated commodity rate mechanism has been effective in reducing the balances in the sales only deferred account owed to PSNC. For PSNC's annual gas cost prudence reviews held during in 1998 and 1999, which cover portions of the two-year experimental period, PSNC's balances in its deferred cost of gas account for sales customers at March 31 of each year were less than $2 million. The March 31 balances in this deferred account in the two gas cost reviews prior to the approval of this experimental mechanism, those held in 1996 and 1997, respectively, were $12,205,483 and $15,713,980 owed to PSNC by its sales rate customers.

This mechanism, however, will be modified as requested by the Public Staff to record any difference between the amount that PSNC collects in the commodity portion of its rates for sales under Rate Schedules 145 and 150 and the cost of acquiring gas for those sales to the all-customers deferred account rather than the sales-only deferred account.

IT IS, THEREFORE, ORDERED as follows:

1. That PSNC's September 30, 1997 application to amend its Rider D and Rate Schedules 145 and 150, and other related tariffs to conform to those amendments, as amended by its October 12, 1999 request that these amendments and conforming changes be made effective on a permanent basis, is hereby approved, and these amendments and conforming changes are made permanent, subject to modification to credit any difference to the all-customers deferred account rather than the sales-only deferred account;

2. That the requirements of Rule R1-17(k) are waived to the extent necessary to implement these amendments and conforming changes; and

3. That PSNC shall file revised tariff sheets to implement this Order within fifteen (15) days of this date.

ISSUED BY ORDER OF THE COMMISSION,
This the 6th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg040500.06

DOCKET NO. G-5, SUB 414

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Public Service Company of North	)	
Carolina, Inc., for Annual Review of Gas Costs	)	ORDER ON ANNUAL
Pursuant to G.S. 62-133.4(c) and Commission	)	REVIEW OF GAS COSTS
Rule R1-17(k)(6)	)	

HEARD: Tuesday, August 9, 2000, at 10:00 a.m., in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner William R. Pittman, Presiding, and Commissioners Ralph A. Hunt and J. Richard Conder

APPEARANCES:

For Public Service Company of North Carolina, Inc.:

Allyson K. Duncan, Kilpatrick Stockton LLP, 3737 Glenwood Avenue, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Gisele L. Rankin, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For the Attorney General:

Margaret A. Force, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, NC 27602

For Carolina Utility Customers Association, Inc.:

James P. West, West Law Offices, P.C., Post Office Box 1568, Raleigh, North Carolina 27602

BY THE COMMISSION: On June 1, 2000, Public Service Company of North Carolina, Inc. (PSNC or Company), filed the direct testimony and exhibits of William C. Williams, General Manager - Interstate Gas Supply & Capacity, and Bruce P. Barkley, Director - Rates and Regulatory Administration, in connection with the annual review of PSNC's gas costs pursuant to G.S. 62-133.4(c) and Commission Rule R1-17(k)(6).

On June 12, 2000, the North Carolina Utilities Commission (the Commission) issued an Order scheduling a hearing on August 9, setting other procedural deadlines, establishing discovery guidelines, and requiring public notice.

On June 6, 2000, the Attorney General filed Notice of Intervention. On July 12, 2000, the Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene, which the Commission granted on July 14.

On July 27, 2000, the Public Staff filed the direct testimony of James G. Hoard, Supervisor of the Natural Gas Section in the Accounting Division, and Eugene H. Curtis, Jr., Director of the Natural Gas Division.

PSNC witnesses Williams and Barkley and Public Staff witnesses Hoard and Curtis were the only witnesses to present testimony at the public hearing on August 9, 2000.

Based on the testimony, schedules and exhibits, and the entire record in this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. PSNC is a corporation duly organized and existing under the laws of the State of South Carolina, having its principal office and place of business in Gastonia, North Carolina. PSNC operates a natural gas pipeline system for the transportation, distribution, and sale of natural gas to approximately 360,000 winter-peak customers within a certificated service area consisting of all or parts of twenty-eight (28) counties in central and western North Carolina as designated in PSNC's certificates of public convenience and necessity issued by this Commission.

2. PSNC is engaged in providing natural gas utility service to the public and is a public utility, as defined in G.S. 62-3(23), subject to the jurisdiction of this Commission.

3. PSNC has filed with the Commission, and submitted to the Public Staff, all of the information required by G.S. 62-133.4(c) and Commission Rule R1-17(k), and has complied with the procedural requirements of such statute and rule.

4. The review period for this proceeding is the twelve months ending March 31, 2000.

5. As of March 31, 2000, PSNC had a balance of $2,198,378 owed to its customers in its Sales-Only Deferred Account and a $2,337,856 balance recoverable from its customers in its All-Customers Deferred Account.

6. The Public Staff took no exceptions to PSNC's accounting for gas costs and recoveries during the review period.

7. PSNC has properly accounted for its gas costs and collections from customers during the review period.

8. PSNC's contract with Pine Needle LNG was reasonable and prudent in light of the circumstances that existed when the contract was entered, and the costs associated with the contract during the review period were prudently incurred.

9. PSNC has adopted a gas supply policy which it refers to as a "best cost supply strategy." This gas supply policy is based upon three primary criteria: supply security, operational flexibility, and cost of gas.

10. PSNC has a portfolio of gas supply contracts which include long-term supply contracts with major producers, marketing companies, and interstate pipeline marketing affiliates. All of these contracts have provisions which ensure that the pricing remains market sensitive.

11. PSNC has made prudent gas purchasing decisions, and all of the gas costs incurred during this review period were prudently incurred.

12. PSNC should be permitted to recover 100 percent of its prudently incurred gas costs.

13. Pursuant to PSNC's request, a rate decrement of $.00614 per therm will be established to refund the March 31, 2000 balance in the Sales-Only Deferred Account to PSNC's customers taking service under Rate Schedules 105, 110, 125, and 126. The amount owed to PSNC in the All-Customers Deferred Account will remain in that deferred account and will be considered part of the activity for PSNC's next review period.

14. In the future, PSNC shall file with the Commission, within 30 days of execution, a redacted copy of all negotiated sales contracts of more than one month but less than or equal to one year. Parties will then have an opportunity to challenge the contract in the next annual prudency review. Contracts of more than one year will be subject to Commission review prior to becoming effective.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 AND 2

These findings are essentially informational, procedural, or jurisdictional in nature, and were not contested by any party. They are supported by information in the Commission's public files and records and the testimony, schedules and exhibits filed by the witnesses for PSNC and the Public Staff.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3 AND 4

The evidence for these findings of fact is contained in the testimony of PSNC witnesses Williams and Barkley and Public Staff witnesses Curtis and Hoard, and the findings are based on G.S. 62-133.4(c) and Commission Rule R1-17(k)(6).

The relevant statute, G.S. 62-133.4(c), requires PSNC to submit to the Commission specified information and data for a historical 12-month test period, including its actual cost of gas, volumes of purchased gas, sales volumes, negotiated sales volumes, and transportation volumes. In addition, Commission Rule R1-17(k)(6)(c) requires the filing of weather-normalized sales volume data, work papers, and direct testimony and exhibits supporting the information filed.

Commission Rule R1-17(k)(6) requires PSNC to submit to the Commission the required information based on a 12-month test period ending March 31. An examination of witness Barkley's testimony confirms that PSNC has complied with the filing requirements of G.S. 62-133.4(c) and Commission Rule R1-17(k)(6). Witness Barkley further testified that PSNC filed with the Commission, and submitted to the Public Staff, throughout the review period, complete monthly accounting of the computations required by Commission Rule R1-17(k)(5)(c). Public Staff witness Hoard stated that PSNC has properly accounted for its gas costs during the review period. The Public Staff has not taken issue with any of these filings, and they are found to be in conformity with the Rules.

The Commission concludes that PSNC has complied with all of the procedural requirements of G.S. 62-133.4(c) and Commission Rule R1-17(k) for the 12-month review period ending March 31, 2000.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 5 THROUGH 7

The evidence supporting these findings of fact is found in the testimony of PSNC witness Barkley and Public Staff witness Hoard.

PSNC witness Barkley testified that the balance in PSNC's Sales-Only Deferred Account as of March 31, 2000, was $2,198,378 owed to PSNC's customers taking service under Rate Schedules 105, 110, 125, and 126. He summarized the activity in the Sales-Only Deferred Account during the twelve months ending March 31, 2000, as follows:

Beginning balance, April 1, 1999	$(1,862,331)
Commodity cost overcollections	(4,421,653)
Negotiated margin losses	2,793,893
G-5, Sub 402 decrement	1,269,789
Accrued interest	21,924
Ending balance, March 31, 2000	$(2,198,378)

The balance in the All-Customers Deferred Account as of March 31, 2000, was $2,337,856 owed from customers to PSNC. Mr. Barkley summarized the activity in the All-Customers Deferred Account for the twelve months ending March 31, 2000, as follows:

Beginning balance, April 1, 1999	$ 4,667,210
Demand cost undercollections	330,862
True-up of unaccounted-for and company-use gas	(372,078)
Buy/sell credits	(901,042)
Capacity release credits	(1,422,677)
Other secondary market transaction credits	(2,642,067)
Rider F activity	68,984
Cardinal pipeline treatment per G-5, Sub 386	1,533,420
Accrued interest	1,075,244
Ending balance, March 31, 2000	$ 2,337,856

Witness Hoard testified that the Public Staff had examined PSNC's accounting for gas costs during the review period ending March 31, 2000, and concluded that PSNC had properly accounted for its gas costs during this review period.

Based upon the testimony, exhibits, and schedules of the witnesses, the monthly filings by PSNC as required by Commission Rule R1-1 7(k)(5)(c), and the findings of fact set forth above, the Commission concludes that PSNC has properly accounted for its gas costs during the review period.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence for this finding is contained in the testimony and exhibits of PSNC witness Williams.

In the Commission's Order on Affiliated Contracts dated December 21, 1999, in Docket No. G-5, Sub 408, the Commission concluded that PSNC's June 1, 2000 filing in its next annual gas cost prudency review should include testimony addressing why the contract with Pine Needle is prudent and should include a discussion of the following issues:

1. The need for the amount and type of capacity in the Pine Needle contract, including detailed forecasts of load growth and an explanation of why new capacity, from Pine Needle or another source, was not phased in;

2. Why needed capacity was obtained from only one source;

3. What non-affiliate options were considered and why they were rejected, including comparisons of all costs of delivering gas to customers and comparisons of impacts on expansion of gas service to unserved areas, and an explanation of why Transco was chosen as a partner in Pine Needle;

4. Whether existing non-affiliate sources of capacity were eliminated or allowed to expire to make room for the Pine Needle contract and, if so, a description and justification of the decision to cease using these other sources of capacity; and

5. The effects of the Pine Needle contract on revenues from capacity release, including anticipated revenues from the resale of Pine Needle capacity and the criteria for release of Pine Needle capacity.

One of the stated purposes of witness Williams' testimony was to address issues concerning the Pine Needle LNG facility as requested by the Commission. With respect to the need for the amount and type of capacity in the Pine Needle contract and an explanation of why it was not phased in, Williams testified that PSNC has experienced 5% to 6% growth per year in its core heat sensitive markets since the early 1990s. In response to the Commission's request for "detailed forecasts of load growth," Williams Exhibit 1 reflected a design day throughput forecast prepared in 1995 showing the anticipated growth in peak day requirements, at that time, through the winter of 2004-2005. Williams testified that in 1995, PSNC had a peak day capacity of 455,308 dt per day. Beginning in 1996, North Carolina Natural Gas Corporation (NCNG) informed PSNC that it would no longer be able to provide 15,000 dt per day to PSNC as it had previously, because of the growth behind NCNG's system. Williams testified that this situation led PSNC to seek peaking capacity because the 440,308 dt of capacity that remained after NCNG terminated its contract fell far short of the projected 497,211 dt required for the 1999-2000 winter heating season.

The Pine Needle capacity was not phased in, first, because it is not economically feasible to build an LNG peaking facility in small increments. As Williams elaborated in response to a question from Commissioner Pittman, there is not a sufficiently significant amount of savings to be derived to justify building a tank with a capacity of one billion cubic feet (BCF) instead of a two BCF tank. Second, according to Williams Exhibit II, if PSNC had elected to purchase a smaller portion of Pine Needle, PSNC would have put itself in the position of potentially needing to consider a significantly higher priced alternative for the remaining capacity it would ultimately need. That option would not be prudent on behalf of PSNC's customers.

In response to the Commission's inquiry as to why the needed capacity was obtained from only one source, Williams testified that the Pine Needle capacity was the most cost-effective source of peaking capacity available. Exhibit II to Williams testimony reflects the cost per dt advantage of the Pine Needle Project over its alternatives. Williams Exhibit II details the various options that PSNC considered, including Transco, CNG, Columbia, Cove Point, and Tennessee. All of the options shown on Exhibit II were rejected because they were more expensive than the Pine Needle facility. Mr. Williams testified that in addition to the cost-related factors, the alternatives did not offer superior security or flexibility.

Williams went on to explain that due to its rapid growth, PSNC is continually evaluating and adding to its supply and capacity portfolio. Pine Needle is just one service in a diverse portfolio of services that ensures that PSNC acquires the most cost effective supplies available for its customers while maintaining the necessary supply security and flexibility to serve their needs.

With respect to the Commission's questions regarding non-affiliate options and why Transco was chosen as a partner in Pine Needle, Williams explained that no non-affiliated sources of capacity were eliminated or allowed to expire solely to "make room" for Pine Needle. However, services were eliminated or allowed to expire. Specifically, the peaking service provided by NCNG was discontinued and the incremental 25,000 dt per day service with Cove Point LNG was eliminated because it was more expensive than Pine Needle. Transco was chosen as PSNC's partner in the Pine Needle project for several reasons, including the location of its interstate pipeline and its ability and willingness to construct and operate the facility and contribute capital. In response to questions from Commissioner Pittman regarding Transco's role, Williams noted that Transco and Piedmont were the first parties involved in Pine Needle and that PSNC's participation came later.

Williams testified that the selection of Pine Needle versus other options would not affect PSNC's ability to expand service to previously unserved areas. PSNC would have proceeded to complete expansion projects to McDowell, Haywood, and Alexander Counties and to propose an additional project to provide service to Madison, Jackson, and Swain Counties regardless of the source of additional peaking capacity. To date, these expansions have not significantly affected PSNC's gas supply and capacity plans because of the relatively small volumes of gas consumed in these areas.

With respect to the Commission's question regarding the effect of the Pine Needle contract on revenues from capacity release, witness Williams testified that PSNC's latest projections show that the capacity PSNC has under contract with Pine Needle will not be fully required for peak day until the 2002-2003 winter period. Williams Exhibit II showed the currently available capacity and the anticipated needs for the next five winter heating seasons. For the next two heating seasons the amount of capacity from the Pine Needle facility that will be available for the secondary market, system balancing, and/or curtailment mitigation will decline annually. At this time, it is difficult to predict, with any accuracy, the impact of the Pine Needle contract on capacity release revenues during that period. The determination of an ideal capacity position is dynamic, subject to uncertainties associated with market demand, supply availability and other regulatory forces. PSNC continually monitors its peak day position to ensure that neither a shortage nor an unreasonable surplus exists. Williams testified that a nominal long position is prudent as it provides a fall back in the event of a mechanical failure or disruption of any other firm supply source.

In response to questions from the Attorney General, Williams testified that PSNC is active in the secondary market in recovering any costs associated with carrying surplus capacity as a result of the Pine Needle contract. In that regard, PSNC takes both a monthly and a seasonal approach based on historical usage. Williams testified that going into the winter, PSNC would have looked at what would be available for the winter given historical patterns. PSNC would also be vigilant with respect to taking advantage of monthly opportunities as well. Williams further testified that one of PSNC's strategies is to bundle its assets and outsource the management of the capacity to a non-affiliated marketer subject to PSNC's right to recall those assets or capacity if needed for its customers.

The Commission finds no evidence in this docket that PSNC acted imprudently in becoming a customer of Pine Needle, an interstate project in which a PSNC affiliate holds an equity interest. Nevertheless, PSNC's involvement in this and the related Cardinal project raises concerns. The Commission notes that witness Williams testified, "PSNC has actively participated in matters before regulatory and governmental agencies whose actions could reasonably impact PSNC's rates and services to its customers." The Commission intends to scrutinize PSNC's performance in such matters carefully in PSNC's next annual prudency review.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 9 - 12

The evidence supporting these findings of fact is found in the testimony of PSNC witnesses Williams and Barkley and Public Staff witness Curtis.

Williams testified that approximately 50% of PSNC's market is comprised of deliveries to industrial or large commercial customers which either purchase gas from PSNC or transport gas on PSNC's system. The majority of these customers have the capability to use fuels other than natural gas (e.g., distillate fuel oil, residual fuel oil, or propane) and will use their respective alternate fuels when they are priced below natural gas. The remainder of PSNC's sales are primarily to residential and small commercial customers, and electricity represents the primary competition for this market segment.

NATURAL GAS - RATES

Williams testified that the most appropriate description of PSNC's gas supply policy would be a "best cost" supply strategy, which is based on three primary criteria: supply security, operational flexibility, and the cost of gas. The first and foremost criterion is security of gas supply. To maintain the necessary supply security for PSNC's firm customers, PSNC has supply contracts with delivery guarantees and storage service contracts with deliverability rights that provide total gas deliveries to PSNC to facilitate full use of PSNC's firm interstate pipeline and construction capacity.

Williams testified that PSNC has executed long-term supply agreements and supplemental short-term supply agreements with a variety of suppliers including producers, interstate pipeline marketing affiliates, and independent marketers. By developing a diversified portfolio of capable long-term and short-term suppliers, PSNC believes it has increased the security of its gas supply. Potential suppliers are evaluated on a variety of factors including past performance and gas delivery capability.

Williams testified that the second primary criterion is maintaining the necessary operational flexibility in PSNC's gas supply portfolio. Operational flexibility is required because of the daily changes in PSNC's market requirements related to the unpredictable nature of the weather, the operating schedules of PSNC's industrial customers, and their capacity to switch to an alternate fuel. While each of its gas supply agreements has different purchase commitments and swing capabilities, PSNC's gas supply portfolio as a whole must be capable of handling the monthly, daily, and hourly changes in PSNC's market requirements.

The third primary criterion is the cost of gas. Williams testified that PSNC is committed to acquiring the most cost effective supplies of natural gas available for its customers while maintaining the necessary security and flexibility to serve their needs.

Williams further testified that the greatest challenges confronting PSNC involve making decisions today which will affect PSNC and its customers for many years in light of future uncertainty associated with critical planning factors such as market demand and dynamics, supply availability, regulation, deregulation and legislation. These factors directly affect PSNC's business, and future changes are almost impossible to predict. PSNC expressed concern about making decisions regarding long-term gas purchases and pipeline and storage capacity acquisitions when future changes caused by the market, state and federal regulators, and legislators could alter what is required of an LDC.

Transco remains PSNC's primary interstate pipeline transporter. Additionally, PSNC has a backhaul arrangement with Transco to redeliver gas from firm transportation and storage agreements with CNG Transmission Corporation (CNG) and Columbia Gas Transmission Corporation (Columbia Gas). PSNC also has upstream firm transportation agreements with Texas Eastern Transmission Corporation, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, and Transco, which deliver gas into CNG for delivery to Transco for redelivery to PSNC via this backhaul transportation arrangement. In addition, PSNC has a transportation agreement with Washington Gas Light Company to move gas that PSNC will receive from the Cove Point LNG facility in Maryland.

With respect to the gas supplies used to support its firm transportation contracts, Williams testified that PSNC has developed a portfolio gas strategy which includes the execution of long-term supply contracts that conform to PSNC's best cost supply strategy. PSNC currently has approximately 235,000 dt per day under long-term contracts with six major producers and three interstate pipeline marketing affiliates. He also testified that all of these contracts have provisions which ensure that the price stays market sensitive. Williams further stated that PSNC's gas supply and capacity portfolio has the flexibility necessary to meet its market requirements in a secure and cost-effective manner.

In addition, Williams testified that PSNC has undertaken the following activities to keep its gas costs as low as reasonably possible, while accomplishing its stated policies and maintaining security of supply and operational flexibility:

a. PSNC is actively participating in all matters before regulatory and governmental agencies whose actions could reasonably be expected to impact PSNC's rates and services to its customers;

b. PSNC has pursued and captured significant opportunities for capacity release and other secondary market transactions;

c. PSNC continues to work with its industrial customers to transport customer-owned gas; these transportation services permit PSNC to compete with alternate fuels without having to negotiate the rates under its regular rate schedules;

d. PSNC routinely communicates directly with customers, numerous supply sources and other industry participants, and actively researches and monitors the industry using a variety of sources, including industry trade periodicals;

e. PSNC has frequent internal discussions among various senior level officers regarding gas supply policies and major purchasing decisions;

f. PSNC renegotiated certain pricing terms in six of its long-term supply contracts to ensure that the prices accurately reflect market conditions; and

g. PSNC continually evaluates various capacity and supply options to ensure that future peak day requirements will be met.

Williams described PSNC's acquisition of additional interstate capacity and storage services during the test period. During the test period, PSNC's 90-day firm storage service agreement with Columbia Gas increased to 35,335 dt per day in November 1999. Pine Needle LNG, which provides PSNC with a 10-day firm peaking service of approximately 100,000 dt per day, began in May 1999. PSNC's 10-day peaking service with NCNG that provided 12,000 dt per day was discontinued, and PSNC reduced the 10-day peaking service provided by Cove Point LNG from 50,000 dt per day to 25,000 dt per day. PSNC also added a 60-day general storage service with CNG, providing 23,000 dt per day, in April 1999. In October 2000 PSNC will terminate its 365-day service with Tennessee Gas Pipeline. PSNC's 365-day service with Texas Eastern Transmission Corporation expires in October 2002.

Witness Curtis, testifying for the Public Staff, stated that he had reviewed PSNC's gas supply contracts to determine how the commodity or variable costs were determined and then reviewed any fixed gas cost fees that might apply. Curtis also reviewed PSNC's responses to the Public Staff's data requests regarding PSNC's gas purchasing philosophies, customer requirements, and gas portfolio mixes. Curtis further testified that he considered other information received in response to the Public Staff data requests concerning PSNC's future needs, including (i) design day estimates, (ii) forecasted load duration curves, (iii) forecasted gas supply needs, (iv) projection of capacity additions and supply changes, and (v) customer load profile changes. Curtis stated that, based upon his review of this information, PSNC's gas costs were prudently incurred during the review period.

Based upon the foregoing, the Commission concludes that the gas costs incurred by PSNC during the twelve-month review period ending March 31, 2000, were reasonable and prudently incurred.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

The evidence for this finding of fact is contained in the testimony of PSNC witness Barkley and Public Staff witness Curtis.

Barkley testified that PSNC's balance in the Sales-Only Deferred Account as of March 31, 2000, was $2,198,378 owed by PSNC, and the All-Customers Deferred Account balance was $2,337,856 owed to PSNC. Barkley requested that the March 31, 2000, balance owed by PSNC in the Sales-Only Deferred Account be refunded by a decrement of $.00614 per therm for customers taking service under Rate Schedules 105, 110, 125, and 126. He stated that the amount owed to PSNC in the All-Customers Deferred Account should remain in that deferred account and be treated as activity during the next review period.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

The evidence for this finding is found in the testimony of PSNC witness Barkley and the Public Staff witnesses and in the post hearing briefs of the parties.

Counsel for CUCA cross-examined witness Barkley about agreements negotiated under PSNC's Purchased Gas Adjustment Procedures - Rider D (Rider D) to avoid the loss of customers to alternative fuels. Rider D states that "PSNC may negotiate with commercial and industrial Customers on its sales and transportation rates to avoid loss of deliveries to these customers." PSNC negotiates under Rider D with industrial and commercial customers that have lower cost alternate fuels and the margin losses resulting from these negotiations are recovered by PSNC through its deferred account. Such negotiations are reviewed by the Public Staff in the context of the annual gas cost prudence reviews. CUCA's counsel specifically asked whether such agreements lasting more than one month had been filed with the Commission. Witness Barkley testified that PSNC had entered into agreements longer than one month with two customers during the test period for its 1999 annual review. Pursuant to CUCA's request and the Commission's ruling, three such contracts were filed as a late-filed exhibit following the close of the hearing. These three contracts were entered into during the test period for PSNC's prior annual review (although one had a later effective date). All three were designed to compete with alternative fuel prices that are below PSNC's tariff rates. The effective dates of the negotiated rates in these contracts are as follows: (1) October 1, 1999, through April 30, 2000 (six months of which were in the test period for the current annual review and one month in the next review period); (2) August 1, 1998, through July 31, 1999 (eight months of which were in the test period for the previous annual review and four months in the current review period); and (3) May 1, 1998, through April 30, 1999 (eleven months of which were in the test period for the previous annual review and one month in the current review period). With respect to such contracts, witness Barkley testified that PSNC first determines whether it can purchase natural gas for less than the customer's price quote on its alternate fuel and then confirms whether the alternative fuel can be bought at the quoted price. If the customer's claim meets those two criteria, PSNC agrees to sell gas at a negotiated price. Barkley testified that negotiated sales to meet alternative fuel prices typically occur for a one-month term and are not memorialized in writing. On rare occasions, a customer requests a longer commitment, based on a longer term alternative fuel price commitment. That was the situation that gave rise to the three contracts filed as PSNC's late-filed exhibit.

Public Staff witnesses testified that they had reviewed PSNC's negotiated rates, that the negotiated prices for each customer were reviewed to ensure that PSNC did not sell gas to any customer at a price below PSNC's cost of gas or below the customer's alternative fuel price, and that the negotiated losses resulting from negotiated contracts were accounted for properly.

In its post hearing brief, the Public Staff recognized that contracts for longer than one month produce a greater amount of negotiated losses for which recovery is likely to be sought and that greater regulatory oversight and scrutiny may be appropriate. PSNC and the Public Staff both note that it is important for the utility to respond to lower cost alternate fuels quickly and that a pre-approval requirement might not allow the utility to act quickly enough. They agree that, in the future, PSNC will file with the Commission, within 30 days of execution, a redacted copy of all negotiated sales contracts of more than one month but less than or equal to one year. Parties will then have an opportunity to challenge the contract in the next annual prudency review. Contracts of more than one year will be subject to Commission review prior to becoming effective. In its brief, CUCA asked that, in addition to filing the contracts, PSNC be required to file an analysis of each such contract demonstrating how the benefits to ratepayers exceed the negotiated loss.

The Commission concludes that the procedures agreed to by PSNC and the Public Staff shall be followed. The Commission will not require an analysis as proposed by CUCA; parties can use discovery to get more information.

IT IS, THEREFORE, ORDERED

1. That PSNC's accounting for gas costs and recoveries during the twelve-month review period ending March 31, 2000, be, and the same hereby is, approved;

2. That the gas costs incurred by PSNC during the twelve-month review period ending March 31, 2000, were reasonable and prudently incurred, and PSNC be, and hereby is, authorized to recover its gas costs as provided herein;

3. That PSNC refund the $2,198,378 balance owed to customers in PSNC's Sales-Only Deferred Account through a decrement of $.00614 per therm for customers taking service under Rate Schedules 105, 110, 125, and 126, as set forth above; and

4. That PSNC give notice to all of its customers of the change in rates approved in this Order by appropriate bill messages in the first billing cycle following the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the 18th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

rg101700.01

NATURAL GAS - PIPELINE

DOCKET NO. PL-1, SUB 3

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Exxon Pipeline Company	))	ORDER ON PETITION TO ABANDON SERVICE

BY THE COMMISSION: On April 10, 2000, ExxonMobil Pipeline Company (EMPCo) filed a petition to abandon service as a common carrier with respect to certain pipelines in New Hanover and Brunswick Counties.

On August 29, 1972, the Commission granted EMPCo's predecessor Humble Pipe Line Company (Humble) a certificate of public convenience and necessity to construct and operate two pipelines transporting petroleum products as a common carrier from a site near Wilmington, North Carolina, to a plant owned by E.I. DuPont de Nemours and Company (DuPont) approximately 14 miles away. One of the pipelines is a six-inch pipeline transporting heavy fuel oil; the other is a four-inch pipeline carrying paraxylene, a petroleum derivative. The certificate was sought and granted because Humble anticipated leasing capacity on both pipelines to other industries in the area.

That expectation never materialized. The six-inch pipeline was taken out of service at some point prior to 1992. In October of 1992, the Federal Energy Regulatory Commission (FERC) canceled the tariff on the pipeline. In February of 1997, Exxon Chemical Company (Exxon Chemical), to whom the pipeline had been transferred, leased it to North Carolina Natural Gas Corporation (NCNG). NCNG uses the pipeline to transport natural gas as a part of its distribution system and pursuant to its regulatory authority.

The four-inch pipeline, which was also transferred to Exxon Chemical, was leased to DuPont in January of 1994. The lease applies to the full capacity of the pipelines, and reflects DuPont's intent to use that leased capacity "as a private pipeline."

EMPCo urges the Commission to find that, on these facts, it is authorized to abandon service as of October 1, 1992, with respect to the six-inch pipeline, and as of January 1, 1994, with respect to the four-inch pipeline. EMPCo argues that in neither instance is it providing service to the public as a common carrier as of those dates.

G.S. 62-118(a) provides that "[u]pon finding that public convenience and necessity are no longer served . . . the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service." There are no absolute or abstract rules governing the principle of public convenience and necessity. State ex rel. Utilities Commission v. Southern Ry., 254 N.C. 73, 118 S.E. 2d 21 (1961). The Commission must determine on the basis of the specific facts of each case whether the standard is met. Ultimately, the Commission must decide whether the utility has shown that the public no longer needs the service which the facilities were created to render. State ex rel. Utilities Commission v. Haywood Electric Membership Corporation, 260 N.C. 59, 131 S.E.2d 865 (1963).

The factual basis for the Commission's decision in this case is as follows:

1. The utility obtained a certificate of public convenience and necessity to construct a six-inch pipeline to transport heavy fuel oil and a four-inch pipeline to transport paraxylene with the

expectation of serving as a common carrier for industry in the Wilmington area. It does not appear that the pipeline ever served as such.

2. The six-inch pipeline was abandoned no later than 1992, when the Federal Energy Regulatory Commission (FERC) canceled its tariff. There is, therefore, no current possibility that the public can transport heavy fuel oil through the pipeline, and the utility asserts that it does not intend to do so in the future.

3. Although the six-inch pipeline is now in service, it transports natural gas for a regulated local distribution company, North Carolina Natural Gas Corporation (NCNG), pursuant to that company's franchise. The Commission exercises its authority over the rates charged and services provided to the public by NCNG.

4. The full capacity of the four-inch pipeline transporting paraxylene has been leased to DuPont. The parties have demonstrated their expectation that the relationship between them be governed by the terms of the contract rather than by Chapter 62 of the General Statutes.

5. Further, with respect to the four-inch pipeline, paraxylene, like steam, is not a common utility function and traditionally has not been regulated to the same degree as other services listed in G.S. 62-3(23).

6. The utility commits not to hold itself out to offer the specified utility services to anyone else and to refuse to serve anyone else who might seek those services.

Based on the foregoing, and limited to the facts as stated, the Commission concludes that EMPCo has carried its burden with respect to showing that it should be allowed to abandon service as common carrier as of October 1, 1992, with respect to the six-inch pipeline, and as of January 1, 1994, with respect to the four-inch pipeline. There was no continuing public need for the service with respect to either pipeline as of those dates.

IT IS, THEREFORE, ORDERED as follows:

1. That EMPCo is allowed to abandon service with respect to the six-inch pipeline as of October 1, 1992, and the four-inch pipeline as of January 1, 1994, pursuant to G.S. 62-118(a); and

2. That the Commission's decision in this docket establishes no precedent and that any future activities with respect to these pipelines will be analyzed on a case-by-case basis.

ISSUED BY ORDER OF THE COMMISSION.
This the 9th day of May, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz050800.02

Commissioner Sam J. Ervin, IV abstained from voting on this matter, and did not participate in this decision.

DOCKET NO. P-55, SUB 1178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of BellSouth Telecommunications, Inc. For	)	
Arbitration of Interconnection Agreement with Intermedia	)	RECOMMENDED
Communications, Inc. Pursuant to Section 252(b)	)	ARBITRATION
of the Telecommunications Act of 1996	)	ORDER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on February 23, 2000.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding, and Commissioners William R. Pittman and Robert V. Owens, Jr.

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Edward L. Rankin, III, General Counsel - North Carolina, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

A. Langley Kitchings, General Attorney, BellSouth Telecommunications, Inc., 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375-0001

FOR INTERMEDIA COMMUNICATIONS, INC.:

Henry C. Campen, Jr. and Layth S. Elhassani, Parker, Poe, Adams & Bernstein, L.L.P., First Union Capitol Center, Suite 1400, 150 Fayetteville Street Mall, Raleigh, North Carolina 27602-0389

Jonathan E. Canis and Ronald J. Jarvis, Kelley, Drye & Warren, L.L.P., 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036

FOR THE USING AND CONSUMING PUBLIC:

Lucy E. Edmondson and Kendrick C. Fentress, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission pursuant to Section 252(b) of the Telecommunications Act of 1996 (TA96 or the Act) and Section 62-110(f1) of the North Carolina General Statutes. On December 7, 1999, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition for Arbitration of Interconnection

Agreement with Intermedia Communications, Inc. (Intermedia) in this docket which initiated this proceeding. By its Petition, BellSouth requested that the Commission arbitrate certain terms and conditions with respect to interconnection between itself as the petitioning party and Intermedia.

The purpose of this arbitration proceeding is for the Commission to resolve the issues set forth in the Petition and Responses. 47 U.S.C.A. Section 252(b)(4)(C). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission (FCC) regulations pursuant to Section 252. Additionally, the Commission shall establish rates according to the provisions in 47 U.S.C.A. Section 252(d) for interconnection, services or network elements, and shall provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C.A. Section 252(c).

Pursuant to Section 252 of TA96, the FCC issued its First Report and Order in CC Docket Numbers 96-98 and 95-185 on August 8, 1996 (Interconnection Order). The Interconnection Order adopted a forward-looking incremental costing methodology for pricing unbundled network elements (UNEs) which an incumbent local exchange company (ILEC) must sell new entrants, adopted certain pricing methodologies for calculating wholesale rates on resold telephone service, and provided proxy rates for State Commissions that did not have appropriate costing studies for UNEs or wholesale service. Several parties, including this Commission, appealed the Interconnection Order and on October 15, 1996, the United States Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing provisions and its "pick and choose" rule pending the outcome of the appeals.

The July 18, 1997 ruling of the Eighth Circuit, as amended on rehearing October 14, 1997, was largely in favor of state regulatory commissions and local phone companies and adverse to the FCC and potential competitors, primarily long distance carriers. The Eight Circuit held that 47 U.S.C.A. Sections 251 and 252 "authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." The Court of Appeals also vacated the FCC's "pick and choose rule." Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

On January 25, 1999, the United States Supreme Court entered its Opinion in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999). The Supreme Court held, in pertinent part, that (1) the FCC has jurisdiction under Sections 251 and 252 of the Act to design a pricing methodology and adopt pricing rules; (2) the FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the Act; (3) it was proper for the FCC in Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided by competitors; (4) the FCC did not adequately consider the Section 251(d)(2) "necessary and impair" standards when it gave requesting carriers blanket access to network elements in Rule 319; (5) the FCC reasonably omitted a facilities-ownership requirement on requesting carriers; (6) FCC Rule 315(b), which forbids ILECs to separate already-combined network elements before leasing them to competitors, reasonably interprets Section 251(c)(3) of the Act, which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements; and (7) FCC Rule 809 (the "pick and choose" rule), which tracks the pertinent language in Section 252(i) of the Act almost exactly, is not only a reasonable interpretation of the Act, it is the most readily apparent. The Supreme Court remanded the cases back to the Eighth Circuit Court of Appeals for proceedings consistent with its opinion.

On June 10, 1999, the Eighth Circuit Court of Appeals entered an Order on remand in response to the Supreme Court's decision which, in pertinent part, reinstated FCC Rules 501-515, 601-611, and 701-717 (the pricing rules), Rule 809 (the "pick and choose" rule), and Rule 315(b) (ILECs shall not separate requested network elements which are currently combined). The Eighth Circuit also vacated FCC Rule 319 (specific unbundling requirements). The Court set a schedule for briefing and oral argument of those issues which it did not address in its initial opinion because of its ruling on the jurisdictional issues. The Court also requested the parties to address whether it should take any further action with respect to FCC Rules 315(c) - (f) regarding unbundling requirements. Iowa Utilities Board v. FCC, ___ F.3d ___ (Order Filed June 10, 1999).

On December 7, 1999, concurrent with filing its Petition for Arbitration, BellSouth filed the testimony of Alphonso J. Varner and W. Keith Milner.

On January 3, 2000, Intermedia filed an Answer and New Matter along with an Issues Matrix in response to BellSouth's Petition for Arbitration. Intermedia also filed the affidavit and testimony of J. Carl Jackson, Jr.

On January 7, 2000, BellSouth filed a Motion for Extension of Time to file its rebuttal testimony. Intermedia filed in opposition of BellSouth's Motion for Extension of Time in part on January 11, 2000, on the ground that BellSouth had prior notice of the new matters raised in Intermedia's Answer and New Matter. On January 12, 2000, the Commission issued an Order Allowing Extension of Time to File Rebuttal Testimony.

On January 12, 2000, the Commission issued an Order Setting Hearing in the matter for Wednesday, February 23, 2000.

On January 13, 2000, BellSouth filed a Motion seeking to resolve certain issues in the arbitration by addressing them in generic proceedings already pending before the Commission. Specifically, BellSouth sought to resolve issues concerning the definition of and/or rates for collocation and certain network capabilities that Intermedia wanted BellSouth to unbundle. On January 20, 2000, Intermedia filed a Motion in Opposition to BellSouth's Motion to Resolve Issues. On February 1, 2000, the Commission issued an Order Granting Motion to Resolve Issues which provided that the issues identified by BellSouth as pertaining to generic dockets on the issues of UNE rates, collocation, and performance measures should be considered in Docket Nos. P-100, Sub 133d, P-100, Sub 133j, and P-100, Sub 133k, respectively.

Also, on January 13, 2000, BellSouth filed the affidavit of Patrick C. Finlen.

On January 31, 2000, BellSouth filed the rebuttal testimony and exhibits of David A. Coon, D. Daonne Caldwell, W. Keith Milner, and Alphonso J. Varner. BellSouth also filed under seal Exhibit AJV-3, Exhibit DDC-1, and three CD-ROMs.

On February 9, 2000, BellSouth filed revised Caldwell Exhibit DDC-2 and revised Varner Exhibit AJV-1.

On February 9, 2000, the Public Staff filed its Notice of Intervention in the docket.

On February 17, 2000, Intermedia and BellSouth filed their Witness Lists and Estimated Cross-Examination Times.

On February 17, 2000, BellSouth filed revised Caldwell Exhibit DDC-1 and Varner Exhibit AJV-1.

On February 17, 2000, Intermedia filed a Motion for Acceptance of Late Filed Exhibits concerning the issue of reciprocal compensation for Intermedia's switch as a tandem switch.

On February 18, 2000, BellSouth filed a Supplemental Motion to Resolve Issues. With this Motion, BellSouth sought to supplement BellSouth's prior Motion to Resolve Issues. Specifically, BellSouth omitted an issue, Issue 18, from its previous Motion to have certain issues considered in the generic UNE docket. Intermedia did not oppose this Motion as long as the Commission would consider the issue in Docket No. P-100, Sub 133d.

Also, on February 18, 2000, Intermedia filed a Motion for Acceptance of Supplemental Testimony of J. Carl Jackson, Jr., his Supplemental Testimony and Exhibits.

On February 21, 2000, the Public Staff filed its Estimated Cross-Examination Times. Also on that day, BellSouth and Intermedia filed a revised Joint Issues Matrix.

On February 22, 2000, BellSouth filed its proprietary CD ROMs.

On February 22, 2000, BellSouth filed the rebuttal testimony and exhibits of Alphonso J. Varner.

This matter came on for hearing on February 23, 2000. Pursuant to a request from the Parties, the hearing was continued until 2:30 p.m. At the commencement of the hearing, all the issues had been deferred, withdrawn, or settled, except Issues 2(a), 3, 18, 22, 31, 32, 33, 37, 38, and 45. The Commission then heard the Parties' Motion to decide Issue 2(a), which pertains to the definition of local traffic for purposes of the Parties' reciprocal compensation obligations under Section 251 (b)(5) of the Act on the record without further testimony. The Parties requested that the Commission take administrative notice of the records of the ICG Telecom Group, Inc./BellSouth, ITC^DeltaCom/BellSouth and Time Warner Telecom of North Carolina, L.P./ BellSouth arbitrations in Docket Nos. P-582, Sub 6, P-500, Sub 10, and P-472, Sub 15, respectively. That Motion also asked that the Parties be allowed to brief the issue further. The Commission allowed the Motion.
The Commission also allowed BellSouth's February 18, 2000, Motion to Defer an Additional Issue, Issue 18, to a generic proceeding.

BellSouth presented the testimony of Alphonso J. Varner, (Direct, Rebuttal, and Supplemental Rebuttal). Intermedia presented the testimony of J. Carl Jackson, Jr. (Direct and Supplemental Direct). The rebuttal testimony of D. Daonne Caldwell was entered into the record by stipulation.

On February 25, 2000, BellSouth and Intermedia filed a Corrected Motion Regarding Inter-Carrier Compensation.

On February 29, 2000, the Commission issued an Order Seeking Late-Filed Exhibits pertaining to Issue 3, whether Intermedia should be compensated for end office, tandem and transport elements for purposes of reciprocal compensation. This Order requested that Intermedia submit on or before March 6, 2000: (1) a description of the relevant switches and associated technology necessary to provide service; (2) the number and location of customers, if available; and (3) any other information relevant to the Company's capability and intent to serve. In response, Intermedia submitted supplemental exhibits on March 6, 2000. On March 10, 2000, BellSouth filed a Reply to Intermedia's exhibits.

On March 1, 2000, BellSouth filed the redacted direct and rebuttal testimony of Alphonso J. Varner. BellSouth also withdrew Exhibit AJV-4, the direct and rebuttal testimony of W. Keith Milner, and the rebuttal testimony and exhibits of David A. Coon.

On March 3, 2000, Intermedia filed the redacted and revised testimony of J. Carl Jackson, Jr.

On March 6, 2000, Intermedia filed its confidential Supplemental Exhibits concerning issue 3.

On March 10, 2000, BellSouth filed its Reply to Intermedia's March 6, 2000 Supplemental Exhibits.

On May 2, 2000, BellSouth filed a Notice that Matrix Issue No. 45 had been resolved by the Parties.

A glossary of the acronyms referenced in this Order is attached hereto as Appendix A.

WHEREUPON, based upon a careful consideration of the entire record in this arbitration proceeding, the Commission now makes the following

FINDINGS OF FACT

1. Dial-up Internet Service Provider (ISP) traffic is subject to an interim intercarrier compensation mechanism at the same rate and in the same manner as reciprocal compensation for local traffic. Such rate should be subject to true-up at such time as the Commission has ruled pursuant to the FCC's subsequent Order on the subject.

2. For reciprocal compensation purposes, Intermedia should be compensated at BellSouth's tandem interconnection rate.

3. It is appropriate to adopt BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allow for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d.

4. The Commission declines to adopt the definitions for IntraLATA Toll Traffic proposed by either BellSouth or by Intermedia. The Parties are encouraged to continue to negotiate

an appropriate definition that would be consistent with the Commission's conclusions set forth in Finding of Fact No. 7.

5. The definition of "switched access traffic" as proposed by Intermedia should be included in the Agreement. The Commission declines to require a definition of switched access traffic that specifically includes Internet Protocol (IP) telephony at this time.

6. The Commission finds it appropriate to adopt Intermedia's proposed language concerning lost switched access revenues due to lost or damaged billing data, but declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data. Therefore, the last three sentences of Intermedia's proposed language which reference lost revenues or a liability cap of $10,000, should be excluded from the Agreement.

7. Reciprocal compensation should be paid for the local portion of framed packet data transported within a Virtual Circuit (VC) that originates and terminates within a Local Access and Transport Area (LATA). BellSouth and Intermedia are directed to propose a mechanism to provide for such compensation. Such proposal should be a joint proposal, if possible, and should include a description of and basis for the proposal. The proposal(s) should take into consideration that, while intraLATA frame relay circuits can be considered local for the purposes of physical installation and interconnection, the traffic occurring over the facilities can and probably will be local and intraLATA toll.

8. When there are no VCs on a frame relay interconnection facility when it is billed, the Parties should deem the Percent Local Circuit Use (PLCU) to be zero.

9. Matrix Issue No. 45 ("Should the Interconnection Agreement specifically state that the Agreement does not address or alter either Party's provision of Exchange Access Frame Relay Service or InterLATA Frame Relay Service?") has been resolved by the Parties and it has been withdrawn from this arbitration.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

MATRIX ISSUE NO. 2(a): Should the definition of "Local Traffic" for the purposes of the Parties' reciprocal compensation obligations under Section 251(b)(5) of TA96 include ISP traffic?

POSITIONS OF PARTIES

BELLSOUTH: No. The FCC's Declaratory Ruling, confirmed unequivocally that the FCC has, will retain, and will exercise jurisdiction over ISP traffic. In short, the FCC determined that ISP traffic is interstate traffic, not local traffic. Under the provisions of the Act and FCC Rules, only local traffic is subject to reciprocal compensation obligations. Thus, reciprocal compensation is not applicable to ISP-bound traffic. However, BellSouth recognizes that the Commission has established an intercarrier compensation mechanism by its decisions in Docket Nos. P-582, Sub 6 and P-472, Sub 15 and has agreed to incorporate that mechanism into the Parties' Interconnection Agreement in this docket.

INTERMEDIA: Yes. The definition of local traffic should include traffic that originates from or is carried to an Enhanced Service Provider (ESP) or ISP. This issue was arbitrated in the ICG Telecom Group, Inc. (ICG) Arbitration, and the FCC has not made any changes which should alter the Commission's conclusion there. In addition, the FCC's Declaratory Ruling was recently (March 24, 2000) vacated by the United States Court of Appeals for the District of Columbia Circuit (D. C. Circuit), and therefore BellSouth may no longer rely upon the Declaratory Ruling to support its position that ISP traffic is jurisdictionally interstate. Until the FCC adopts a rule of prospective application, reciprocal compensation is appropriate for calls originated by BellSouth's end users to ISPs served by Intermedia. Without payment of reciprocal compensation, Intermedia will not receive compensation at all until the FCC adopts a prospective compensation rule at some indefinite point in the future.

PUBLIC STAFF: Yes. The law and rules governing this hotly disputed issue are confusing and often contradictory. Section 251(b)(5) of TA96 requires that interconnecting parties "establish telecommunications." 47 CFR § 51.701(a) restricts reciprocal compensation to "local telecommunications traffic." The FCC determined that the calls were nonlocal, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 14, FCC Rcd 3689, 3690 (¶ 1) (1999). Despite this determination, the FCC stated that parties may voluntarily negotiate reciprocal compensation in their interconnection agreements, and that state commissions may find that reciprocal compensation for calls to ISPs is appropriate. Id. at 3703-05 (¶¶ 24-25).

On March 24, 2000, the D.C. Circuit vacated this ruling and remanded it to the FCC in Bell Atlantic Companies v. FCC, ____F.3d_____, 2000 WL 273383 (D.C. Cir. March 24, 2000). If the FCC determines calls to ISPs are intrastate, then the Commission's jurisdiction over this issue should not be affected. However, even if the FCC deems such calls to be interstate, it is not a foregone conclusion that such a ruling would supersede a state commission's authority over arbitration of interconnection agreements. See also, Southwester Bell Telephone Co. v. Public Utility Commission of Texas, ________F.3d_____, 2000 WL 332062, n. 2 (5th Cir. March 30, 2000).

This Commission first considered the issue of whether calls to ISPs were subject to reciprocal compensation in Docket No. P-55, Sub 1027. The Commission determined that the Interconnection Agreement between US LEC of North Carolina, Inc. (US LEC) and BellSouth did not distinguish calls to ISPs from other local traffic. The Commission also determined that a call terminates when delivered to the local exchange number of the ISP.

Since that ruling, BellSouth has been a party to arbitration in three Interconnection Agreements and has asked the Commission in each proceeding to determine that calls to ISPs are not local traffic subject to reciprocal compensation. The Commission has issued Orders in each docket determining that calls to ISPs, for the purpose of reciprocal compensation, are local traffic. BellSouth has not presented adequate justification in this case for the Commission to depart from its previous rulings on this issue. As such, the Parties are due reciprocal compensation for calls to ISP customers.

DISCUSSION

Students of the reciprocal compensation issue will recall that the Commission first considered the issue of whether calls to ISPs were subject to such compensation in Docket No. P-55, Sub 1027, where the Commission determined that such traffic was local. Subsequently, the FCC on February 26, 1999, issued its Declaratory Ruling finding such traffic to be interstate. However, the FCC stated that the parties could voluntarily negotiate reciprocal compensation for such calls in their interconnection agreements and state commissions could find reciprocal compensation for calls to ISPs to be appropriate. The FCC also stated that it would issue a subsequent Order to provide guidance as to the implementation of its Declaratory Ruling.

This Commission in subsequent arbitrations has provided for reciprocal compensation for ISP traffic at the same rate as that for local traffic generally -- i.e., at the sum of certain UNE rates. However, out of deference to the FCC's ruling, the Commission has characterized this as an "interim intercarrier compensation mechanism," rather than categorizing the traffic as "local" (or as "nonlocal," for that matter). Moreover, the Commission has also provided that the rate applicable to ISP traffic will be subject to true-up at such time as the Commission has implemented the FCC's premised subsequent ruling. This true-up does not apply to local traffic subject to reciprocal compensation, generally.

Into this rather complicated mix has come the ruling by the D.C. Circuit on March 24, 2000, where the Court found the reasoning applicable to the "one-call theory" in the FCC's Declaratory Ruling inadequate, vacated the Order, and sent the matter back to the FCC for further consideration.

In the short term, it would certainly appear that the D.C. Circuit ruling undercuts those who maintain that ISP traffic is not local. In the longer term, however, the matter is less clear. Should the FCC be able to fortify and explicate its Declaratory Ruling better, it may very well ultimately prevail -- and things will be on the same track they were before the March 24, 2000, D.C. Circuit ruling.

So, in view of these considerations, how should the Commission proceed? There are really only two practical alternatives. One would be to stay the course in line with its previous decision -- that is, an ISP rate for intercarrier compensation that is identical to the general reciprocal compensation rate but subject to eventual true-up. The other would be to consider ISP traffic to be explicitly local and have it subject to the general reciprocal compensation rate, but not subject to eventual true-up but, at most, to prospective adjustment depending on how the issue sorts itself out on the federal level.

The Commission concludes that this first alternative, an ISP rate for intercarrier compensation that is identical to the general reciprocal compensation rate but subject to eventual true-up, is preferable for several reasons. First, in this docket, BellSouth has already agreed to incorporate the original mechanism decided upon in previous arbitrations into this one. These filings were received after the March 24, 2000, D.C. Circuit decision, but BellSouth has chosen not to make an issue of it. Second, to change the ruling would probably require revisiting previous cases. Third, there is no pressing practical reason to revisit the issue in light of the March 24, 2000, D.C. Circuit decision. The implementation of a true-up is a contingent event. It will only happen at such time as the FCC has issued its follow-up ruling and this Commission has acted upon it. If the FCC is unable to have its Declaratory Ruling sustained, then obviously there will be no follow-up ruling and, hence, no true-up. If, on the other hand, the FCC prevails, there will be a mechanism already in place to provide for the true-up.

CONCLUSIONS

The Commission concludes that dial-up ISP traffic is subject to an interim intercarrier compensation mechanism at the same rate and in the same manner as reciprocal compensation for local traffic. Such rate should be subject to true-up at such time as the Commission has ruled pursuant to the FCC's subsequent Order on the subject.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

MATRIX ISSUE NO. 3: Should Intermedia be compensated for end office, tandem, and transport elements, for purposes of reciprocal compensation?

POSITIONS OF PARTIES

BELLSOUTH: No. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if Intermedia's switches are actually performing the local tandem switching functions and providing the same geographic coverage. Intermedia is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. Therefore, Intermedia's request for tandem switching compensation when tandem switching is not performed should be denied.

INTERMEDIA: Yes. FCC Rule 51.711(a)(3) requires that where the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the interconnecting carrier is entitled to receive compensation at the tandem interconnection rate. Consequently, BellSouth should be required to pay reciprocal compensation to Intermedia for end office, tandem, and transport elements. Intermedia's switches in the Charlotte and Raleigh metropolitan areas serve areas geographically comparable to those served by BellSouth's tandem switches in those areas.

PUBLIC STAFF: No. Intermedia has failed to show that its switches provide tandem switching functions when terminating calls from BellSouth's end users and has failed to show that its switches provide service to areas comparable to those served by BellSouth's local tandem switches.

DISCUSSION

BellSouth explained that a tandem switch connects one trunk to another trunk and is an intermediate switch or connection between the switch where a telephone call originates and the switch which terminates the call. BellSouth maintained that an end-office switch is connected to a telephone subscriber and allows the call to be originated or terminated. BellSouth stated that if Intermedia's switch is an end-office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus Intermedia's switch is not providing a tandem function.

BellSouth argued that although this Commission has considered this issue before in the BellSouth/ICG arbitration, and concluded that ICG was entitled to the tandem switching rate, that case involved different facts than those produced here. BellSouth contended that in this proceeding Intermedia could not tell this Commission where its customers are located. As such, BellSouth believes that there is no showing that Intermedia's switches serve geographic areas comparable to BellSouth's. In BellSouth's opinion, the evidence in the record does not support Intermedia's contention that its switches provide the transport element. Further, it is BellSouth's position that the Act does not contemplate that compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation. Thus, BellSouth opined that Intermedia is not entitled to tandem switching compensation when tandem switching is not performed.

Intermedia witness Jackson stated that Intermedia's switches in the Charlotte and Raleigh metropolitan areas serve geographic areas comparable to those served by BellSouth's tandem switches in those areas. Intermedia asserted that its network design is entirely different than BellSouth's. Intermedia explained that instead of using a multiplicity of switches to cover an area, Intermedia uses a single switch to cover the same area. With respect to the Raleigh LATA, witness Jackson testified that Intermedia serves areas of both GTE South Incorporated's (GTE's) and Sprint Communications Company, L.P.'s (Sprint's) territory which are not served by BellSouth. Witness Jackson testified that while Intermedia does not have a ubiquitous network like that of BellSouth, Intermedia could purchase, lease, or build facilities to serve its customers.

In response to the Commission's February 29, 2000 Order, Intermedia submitted additional information on March 6, 2000, concerning its service area and the functionality of its switches. With respect to the issue of geographic comparability, Intermedia submitted a list of its customers by location and type of service; a listing of the Company's collocations, including collocations in GTE offices; a snapshot of incoming traffic from Raleigh and Charlotte exchange areas; county maps depicting current and future rate centers in and around Raleigh and Charlotte; and Company promotional materials. Intermedia contended that the customer information it submitted shows a sizeable number of customers in a widely dispersed area in and around both Charlotte and Raleigh. Further, Intermedia contended that the snapshot of incoming traffic it submitted shows incoming calls from a large number of exchanges in and around both cities, and that the rate center maps and promotional materials also demonstrate a capability and intent to serve a large geographical area.

With respect to the functionality issue, Intermedia submitted information from the manufacturer of its two North Carolina switches which describes the technology inherent in the switches used by Intermedia. Intermedia also included diagrams and narratives describing the trunk topology of its two North Carolina switches and call diagrams depicting the functions performed by its switches. Intermedia witness Jackson testified that "The [Intermedia] switches perform the functions of a tandem, such as remote traffic aggregation, and the functions of end offices switches, such as providing dial tone. Due to this different network design concept, Intermedia's single switches have to perform all of the relevant functions, including the function BellSouth assigns to its tandem switches." Intermedia contended that the materials from the manufacturer of Intermedia's switches demonstrate that the Nortel DMS 500 switch employed by Intermedia performs both end office and tandem switching functions. Intermedia asserted that the diagrams submitted by Intermedia support witness Jackson's testimony that the Intermedia switch performs the traffic aggregation function of a BellSouth tandem switch.

BellSouth did not file objections to Intermedia's Exhibits filed March 6, 2000, nor did BellSouth seek an evidentiary hearing. On March 10, 2000, BellSouth filed a reply to Intermedia's exhibits filed on March 6, 2000. BellSouth stated that Intermedia had failed to demonstrate that it incurs any functional costs that would justify BellSouth paying Intermedia the tandem interconnection rate. BellSouth refuted Intermedia's Exhibits, point by point, and argued that nothing in the submitted material indicates that Intermedia's local switches perform tandem functions in terminating local traffic. BellSouth also contended that Intermedia does not provide tandem switching of local traffic between BellSouth and GTE switches, that Intermedia has inappropriately labeled Intermedia's collocation sites as Intermedia end-office switches, that Intermedia inflated its number of end users by repeating the same customer numerous times by listing each individual service to which the customer subscribes, and that Intermedia has only three collocation sites for the Raleigh LATA and two collocation sites for all of the Charlotte LATA, indicating a very limited number of customers for a very small geographic area.

The additional information filed by Intermedia on March 6, 2000, in response to the Commission's February 29, 2000 Order seeking late-filed exhibits, and BellSouth's response of March 10, 2000, to Intermedia's exhibits are hereby allowed in evidence in this proceeding as late-filed exhibits.

The Public Staff contended that although Intermedia provided information in its March 6, 2000 filing which demonstrates that Intermedia's switches have the capability of functioning as tandem switches, the issue before the Commission is whether Intermedia's switches, in terminating traffic from BellSouth's customers to Intermedia's end users, not merely have the capability of performing, but actually perform, tandem switching functions.

The Public Staff further contended that based upon the information provided by Intermedia in its March 6, 2000 filing, Intermedia does not have switches in the ILEC's end offices where it collocates. Since traffic can be switched only through the use of a switch, the Public Staff questioned how Intermedia can claim that it performs switching functions at its collocation facilities. The Public Staff stated that there is insufficient evidence in the record to support a finding that Intermedia may be providing tandem switching functions.

The Public Staff stated that Intermedia has not shown, for the calls in question, that either its switch in Charlotte or its switch in Raleigh performs the basic switch trunk function of connecting trunks to trunks. The Public Staff believes that since the record fails to support Intermedia's claim that its switches perform a trunk-to-trunk switching function for these calls, the Commission should conclude that they do not operate as local tandem switches and Intermedia is not entitled to receive tandem switching compensation for those calls. It is the Public Staff's opinion that performance of the tandem switching function in terminating calls is a necessary, but not sufficient, condition alone to qualify those calls for tandem switching compensation.

The Public Staff argued that, contrary to Intermedia's contentions, whether the switches are capable of serving an area comparable to those served by BellSouth's local tandems is not determinative of this issue. The Public Staff conceded that any end office with sufficient line capacity is capable of serving a huge area, certainly as large as the areas served by BellSouth's tandems, although perhaps inefficiently. The Public Staff stated that the capacity to serve a large area clearly does not make each large capacity end-office switch a tandem switch and that this view comports with the language of the FCC's Rule 51.711(a)(3) and the explanatory language of Paragraph 1090.

The Public Staff argued that it is necessary that the areas served by Intermedia's switches be comparable to the areas served by BellSouth's tandems, in order for traffic delivered to Intermedia for termination to be eligible for tandem switching compensation. The Public Staff remarked that each Intermedia switch could actually serve a third of the geographic area of North Carolina. However, the Public Staff argued that if the tandem switching function is not actually performed by those switches in terminating traffic from BellSouth to Intermedia's customers, Intermedia should not be compensated for tandem switching.

The Public Staff claimed that there is ample evidence in the record to discern whether Intermedia's switches serve comparable areas to BellSouth's local tandem switches. The Public Staff stated that according to the maps filed with BellSouth witness Varner's Supplemental Rebuttal testimony, BellSouth's local tandem switches in the Raleigh LATA serve numerous wire centers. According to the Public Staff, Intermedia's March 6, 2000 filing, made on a confidential basis, indicates that its switch in Raleigh serves only a few of the areas that are served by either of the BellSouth local tandem switches in the Raleigh LATA. Additionally, the Public Staff noted that Intermedia's Charlotte switch serves only a few of the areas that are served by either of BellSouth's local tandem switches in the Charlotte LATA.

Further, the Public Staff contended that Intermedia did not present any evidence regarding new technologies analogous to those suggested by the FCC which would qualify the traffic terminated to those switches as being eligible for tandem compensation.

All Parties appear to agree that Intermedia should receive reciprocal compensation for end-office switching, tandem switching, and common transport if it provides such functions. The Parties also concur that Intermedia provides end-office switching and common transport. The Parties, however, disagree on whether Intermedia should receive reciprocal compensation for tandem switching.

The pertinent authority governing the issue of reciprocal compensation for tandem switching is found in FCC Rule 51.711(a)(3) and Paragraph 1090 of the FCC's First Report and Order.

Rule 51.711(a)(3) states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Paragraph 1090 of the First Report and Order states:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

The Commission concluded, in *Petition of ICG Telecom Group, Inc. for Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-582, Sub 6, that ICG had met its burden of proof in regard to both geographic coverage and similar functionality.

The Commission concluded in *Petition by ITC^DeltaCom Communications, Inc. (DeltaCom) for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-500, Sub 10, that DeltaCom had met its burden of proof that its switches cover comparable areas to that covered by BellSouth's switches and that, for reciprocal compensation purposes, DeltaCom is entitled to compensation at BellSouth's tandem interconnection rate. In the DeltaCom Order, the Commission discussed more extensively its belief that the language in the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090 clearly contemplate that exact duplication of the ILEC's network architecture is not necessary in order for the competing local provider (CLP) to be eligible to receive reciprocal compensation at the tandem switching rate. The Commission also indicated that it believes that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both Parties covers the same basic geographic area.

Based on the exhibits filed by Intermedia on March 6, 2000, including the maps, the description of Intermedia's Nortel DMS 500 switches and associated technology, and the current listing of Intermedia's customers in North Carolina by location and type of service, the Commission believes that Intermedia has met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth's switches, and that, for reciprocal compensation purposes, Intermedia is entitled to compensation at BellSouth's tandem interconnection rate.

CONCLUSIONS

The Commission concludes that, for reciprocal compensation purposes, Intermedia should be compensated at BellSouth's tandem interconnection rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

MATRIX ISSUE NO. 22: Should BellSouth be required to provide nondiscriminatory access to interoffice transmission facilities, including dark fiber, DS1, DS3 and OCn levels, and shared transport, in accordance with, and as defined in, the FCC's UNE Remand Order and should BellSouth's proposed rates be subject to true-up?

POSITIONS OF PARTIES

BELLSOUTH: No. BellSouth agreed that it is required to provide nondiscriminatory access to interoffice transmission facilities and has proposed language which it believes is consistent with Section 51.319(d) of the FCC's Rules promulgated by its UNE Remand Order and with Intermedia's proposed language. BellSouth further believes that the rates it proposed for interoffice transmission facilities are Total Element Long Run Incremental Cost (TELRIC)-based and should not be subject to true-up if later modified by the Commission.

INTERMEDIA: Yes. Intermedia believes that under the FCC's UNE Remand Order, interoffice transport must be provided to CLPs at TELRIC rates. Intermedia argued that the rates proposed by BellSouth should be adopted as interim rates subject to true-up when the Commission establishes permanent rates in Docket No. P-100, Sub 133d.

PUBLIC STAFF: Yes. The Public Staff recommended that the Commission adopt BellSouth's proposed language regarding this issue. The Public Staff further recommended that the Commission approve BellSouth's proposed rates for inclusion in this Agreement, but that the rates be subject to true-up after the Commission establishes rates in the Docket No. P-100, Sub 133d proceeding.

DISCUSSION

The Parties do not dispute that BellSouth must provide unbundled access to interoffice transport at TELRIC-based rates. The Parties do dispute whether the BellSouth-proposed TELRIC rates should be subject to true-up after the Commission sets permanent prices in Docket No. P-100, Sub 133d for interoffice transport.

BellSouth argued in its Proposed Order that it has agreed to provide nondiscriminatory access to interoffice facilities in accordance with the FCC's UNE Remand Order and that BellSouth has, in fact, proposed the following language to Intermedia, which BellSouth believes is consistent with Section 51.319(d) of the FCC's Rules promulgated by its UNE Remand Order:

> "BellSouth shall provide nondiscriminatory access, in accordance with FCC Rule 51.311 and Section 251(c)(3) of the Act, to interoffice transmission facilities on an unbundled basis to Intermedia for the

provision of a telecommunications service at the rates set forth in this Attachment.

Interoffice transmission facility network elements include:

A) Dedicated transport, defined as BellSouth's transmission facilities, including all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers or switches owned by BellSouth, or between wire centers and switches owned by BellSouth and Intermedia;
B) Dark Fiber transport, defined as BellSouth's optical transmission facilities without attached multiplexing, aggregation, or other electronics; and
C) Shared transport, defined as transmission facilities shared by more than one carrier, including BellSouth, between end office switches, between end office switches and tandem switches, and between tandem switches, in BellSouth's network.

BellSouth shall:

A) Provide Intermedia exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or shared use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;
B) Provide all technically feasible transmission facilities, features, functions, and capabilities that Intermedia could use to provide telecommunications services;
C) Permit, to the extent technically feasible, Intermedia to connect such interoffice facilities to equipment designated by Intermedia, including but not limited to, Intermedia's collocated facilities; and
D) Permit, to the extent technically feasible, Intermedia to obtain the functionality provided by BellSouth's digital cross-connect systems in the same manner that BellSouth provides such functionality to interexchange carriers."

BellSouth argued in its Proposed Order that Intermedia does not oppose BellSouth's proposed rates and that Intermedia witness Jackson on cross-examination admitted that Intermedia is not contesting that BellSouth's proposed rates are, in fact, TELRIC-based. BellSouth stated in its Proposed Order that the only issue Intermedia now contests is whether those rates should be subject to a true-up. As BellSouth witness Varner stated on cross-examination, "The basic point of contention is whether or not these rates, once the Commission approves rates in this arbitration, whether those rates will be subject to true-up or not. We don't agree that those rates would be subject to true-up. That's the issue that's before the Commission." BellSouth argued in its Proposed Order that since its proposed rates are TELRIC-based and are not interim rates, the Commission should not true-up the rates.

Intermedia witness Jackson stated in cross-examination that, "It's my understanding that obviously we believe those ought to be on a TELRIC-based rate schedule or cost basis. I think our point on that is that in the interim until those rates are approved that we're looking for -- if we use those rates, that we would like to have a true-up at the end of that period of time, if should this Commission decide that those rates are well over priced or to your advantage if they were way underpriced. So I think the true-up was the issue from our standpoint at this time." Intermedia commented in its Proposed Order that the Commission has consistently held that interim rates are subject to true-up upon adoption of permanent rates. Intermedia noted that as recently as March 30, 2000, in the Order Setting Procedural Schedules in Docket No. P-100, Sub 133d, the Commission announced that it would adopt interim line sharing rates, subject to true-up upon adoption of permanent rates. Intermedia also stated in its Proposed Order that the Commission's March 13, 2000 Order Adopting Permanent UNE Rates in Docket No. P-100, Sub 133d is another example of the Commission ordering the true-up of interim rates once permanent rates are established. Intermedia recommended in its Proposed Order that the Commission adopt the rates proposed by BellSouth for interoffice transmission, subject to true-up once the Commission adopts permanent rates in Docket No. P-100, Sub 133d.

The Public Staff stated in its Proposed Order that BellSouth's proposed language on this issue is substantially similar to Intermedia's proposed language in the Agreement. However, the Public Staff stated that BellSouth's proposed language refers to rates for interoffice facilities that are to be included in the Agreement while Intermedia's proposed language does not. The Public Staff stated that in this arbitration, BellSouth has proposed rates for dedicated transport, dark fiber, and shared transport for inclusion in the Agreement for interoffice facilities as shown in BellSouth witness Varner's Exhibit AJV-1. According to the Public Staff, the Parties agree that BellSouth has an obligation under the law to provide Intermedia access to interoffice transmission facilities at TELRIC-based prices, but Intermedia objects to BellSouth's proposed inclusion of rates in the Agreement if those rates are not subject to true-up. The Public Staff stated that BellSouth is seeking the Commission's approval of its proposed rates for interoffice facilities on a permanent basis in this arbitration. The Public Staff stated that BellSouth witness Varner testified that if the Commission approved different rates in its Docket No. P-100, Sub 133d proceeding, then BellSouth and Intermedia could amend their Interconnection Agreement to reflect the rate changes from that time forward. The Public Staff recommended that the Commission adopt BellSouth's proposed language and proposed rates for inclusion in the Agreement, but allow for a true-up of the rates after the Commission establishes rates in the Docket No. P-100, Sub 133d proceeding.

The Commission notes that in its March 30, 2000 Order Setting Procedural Schedules in the UNE docket, the Commission concluded that interoffice transmission facilities including dedicated transport, dark fiber, and shared transport would be considered in Phase I of the Commission's generic UNE proceeding. The Commission also notes that in said Order, the Commission concluded that there was not enough evidence at that point in time for the Commission to know which, if any, of the proposed new UNEs would ultimately be determined to be, in fact, UNEs. Therefore, the Commission found it appropriate to deny requests for the Commission to establish interim rates for any new UNEs, with the exception of line sharing.

In this arbitration docket, the Parties agree that BellSouth must provide unbundled access to interoffice transport at TELRIC-based rates. Therefore, the Commission believes that it is reasonable and appropriate for the interoffice transport rates agreed to by the Parties in this arbitration proceeding to be considered interim and subject to true-up if the Commission adopts different permanent prices for interoffice transport in its generic UNE proceeding. The Commission finds it appropriate to accept the recommendation of Intermedia and the Public Staff by adopting BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allowing for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d.

CONCLUSIONS

The Commission concludes that it is appropriate to adopt BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allow for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d.

<u>EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4</u>

<u>MATRIX ISSUE NO. 31</u>: For purposes of compensation, how should IntraLATA Toll Traffic be defined?

POSITIONS OF PARTIES

BELLSOUTH: IntraLATA Toll Traffic should be defined as any telephone call that is not local or switched access per the Parties' Agreement.

INTERMEDIA: IntraLATA Toll Traffic should be defined broadly, to include not merely the use of one type of equipment, such as analog circuit switches, but should also encompass nonlocal traffic that is carried over facilities that employ new technologies, such as data or frame relay traffic over packet switching equipment. The Act makes no distinction between voice and data traffic. In the FCC's Advanced Services Order in CC Docket No. 98-147, the FCC clearly states that "for purposes of determining the interconnection obligation of carriers, the Act does not draw a regulatory distinction between voice and data services." (Paragraph 47). ILECs have the same obligations to competing carriers with respect to data traffic, including frame relay traffic, as they do for voice traffic.

PUBLIC STAFF: The definitions propounded by both BellSouth and Intermedia are insufficient in themselves in determining whether they include or exclude frame relay traffic. Both definitions lack specificity and clarity. Due to an insufficient record, the Public Staff recommends that the Commission not adopt either Party's proposal.

DISCUSSION

BellSouth's proposed language for inclusion in the Interconnection Agreement is as follows:

> **IntraLATA Toll Traffic is defined as any telephone call that is not local or switched access per this Agreement.** (Proposed Interconnection Agreement, Attachment 3, §6.7.1).

In the Proposed Interconnection Agreement, Attachment 3, Section 6 deals with interconnection compensation. On cross-examination, witness Varner testified that a "telephone call" is defined as "a basic voice connection between two customers". Therefore, under BellSouth's definition, only voice traffic would be considered as intraLATA toll traffic. Witness Varner testified that BellSouth defines intraLATA toll traffic in this manner to exclude data services, such as frame relay, from this definition. Further, witness Varner stated that what is considered as local and toll for frame relay is stated in the part of the Agreement that deals with frame relay.

In the Proposed Interconnection Agreement, Attachment 3, Section 6.7.2, the Parties have agreed that they will compensate each other for intraLATA toll traffic originated by one Party and terminated on the other Party's network. Consequently, as stated in BellSouth's Proposed Order, the effect of adopting BellSouth's proposed language would be to exclude nonvoice intraLATA traffic from reciprocal compensation obligations. Further discussion on BellSouth's proposal that frame relay traffic be excluded from the requirements of reciprocal compensation is, subsequently, provided in the Evidence and Conclusions for Finding of Fact No. 7 — Matrix Issue No. 37.

Intermedia's proposed language for inclusion in the Interconnection Agreement is as follows:

> **IntraLATA Toll Traffic is defined as all basic intraLATA message services calls other than Local Traffic.** (Proposed Interconnection Agreement, Attachment 3, §6.7.1).

In its Post-Hearing Brief, Intermedia stated that BellSouth seeks to define intraLATA toll traffic in a manner that specifically excludes messaging or data, and only includes voice traffic. Intermedia argued that the law makes no distinction between voice and data for interconnection purposes. Intermedia witness Jackson testified that Intermedia's definition would ensure that toll traffic cannot be limited to traffic that uses one type of equipment, such as analog circuit switches, but will include nonlocal traffic carried over facilities that employ new technologies, such as packet switching. In support of its position, Intermedia relies upon the FCC's August 7, 1998, Advanced Services Order in Docket No. 98-147, which states in pertinent part:

> We agree with ALTS that the interconnection obligations of section 251 of the Act apply equally to facilities and equipment used to provide data transport functionality and voice functionality. . . . For purposes of determining the interconnection obligation of carriers, the Act does not draw a regulatory distinction between voice

> and data services. In particular, the Commission drew no such distinction in the *Local Competition Order*, when it required incumbent LECs to offer interconnection with competitors for the transmission and routing of telephone exchange and exchange access traffic. Thus, the interconnection obligations of incumbent LECs apply to packet-switched as well as circuit-switched services. . . . We therefore grant the ALTS request that we declare that the interconnection obligations of sections 251(a) and 251(c)(2) apply to incumbents' packet-switched telecommunications networks and the telecommunications services offered over them. (Paragraphs 46, 47, and 48).

During cross-examination, BellSouth witness Varner acknowledged that BellSouth had previously made the argument to the FCC that Congress did not intend for Section 251 to apply to new technology that was deployed after 1996. The FCC rejected BellSouth's argument in the Advanced Services Order. Specifically, in the Advanced Services Order, the FCC states:

> We reject BellSouth's argument that Congress intended that section 251(c) not apply to new technology not yet deployed in 1996. Nothing in the statute or legislative history indicates that it was intended to apply only to existing technology. Moreover, Congress was well aware of the Internet and packet-switched services in 1996, and the statutory terms do not include any exemption for those services. (Paragraph 49).

Nevertheless, witness Varner contended that while the parts of Section 251 dealing with interconnection do apply to voice and data services, other parts of Section 251 do not apply to advanced services, such as the unbundling requirements of Section 251. Witness Varner further opined that reciprocal compensation is different than interconnection.

Intermedia believes that the FCC made it clear that intraLATA toll traffic includes both voice and data traffic, and that no legal distinction can be made between them. In its Proposed Order, Intermedia stated that the Act and the FCC's Advanced Services Order provide no basis for a distinction between voice and data traffic. Thus, Intermedia contended that Intermedia's proposed definition is appropriate as it includes data messaging in the category of intraLATA toll traffic, and does not distinguish between voice and data traffic.

The Public Staff stated that it is unclear from the evidence what the importance is of including or excluding frame relay traffic in the definition of intraLATA toll traffic. The Public Staff asserted that BellSouth has not explained the need for excluding frame relay traffic from the definition, nor has Intermedia attempted to explain why frame relay traffic should be included. The Public Staff concluded that the definitions propounded by both BellSouth and Intermedia are insufficient in themselves to determine whether they include or exclude frame relay traffic. Due to an insufficient record, the Public Staff recommended that the Commission not adopt either Party's proposed definition.

The basic difference between the positions of BellSouth and Intermedia on this issue appears to center on whether frame relay traffic is included or excluded in the definition of intraLATA toll traffic for purposes of compensation. The Commission agrees with the Public Staff that neither Party has adequately explained why their respective proposed definition for intraLATA toll traffic is appropriate. Furthermore, neither Party's proposed definition is sufficiently clear in its composition to determine whether it includes or excludes frame relay traffic. Consequently, neither Party's proposed definition should be adopted.

CONCLUSIONS

The Commission declines to adopt either the definition proposed by BellSouth or by Intermedia. Furthermore, due to an insufficient record, the Commission declines to develop an alternative definition. Instead, the Commission encourages the Parties to continue to negotiate an appropriate definition that would be consistent with the Commission's conclusions set forth in the Evidence and Conclusions for Finding of Fact No. 7.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

MATRIX ISSUE NO. 32: How should "Switched Access Traffic" be defined?

POSITIONS OF PARTIES

BELLSOUTH: Switched Access Traffic should be defined in accordance with BellSouth's access tariff and should include IP telephony.

INTERMEDIA: Switched Access Traffic should be defined as telephone calls requiring local transmission or switching services for the purpose of the origination or termination of Telephone Toll Service, including Feature Groups A, B, and D, 800/888 access, and 900 access (and their successors or similar Switched Exchange Access Services).

PUBLIC STAFF: The Commission should not object to an agreement by BellSouth and Intermedia to specifically define switched access traffic in the Agreement as it has been specified in BellSouth's Access Tariff. Further, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony.

DISCUSSION

BellSouth witness Varner stated that because switched access traffic is already defined in BellSouth's Access Tariff, there is no need for an additional definition in the Interconnection Agreement. Because Intermedia insisted upon such a definition, however, BellSouth proposed the following language:

> Switched Access Traffic is as defined in the BellSouth Access Tariff. Additionally, IP Telephony traffic will be considered switched access traffic.

Witness Varner, under cross-examination, stated that there is nothing in this local Interconnection Agreement that discusses, determines, or affects the way in which BellSouth engages in a joint provision of access service so it is really a definition without a purpose. However, he stated that BellSouth would be willing to put the same definition of switched access traffic that is in the tariff into the Agreement.

Witness Varner explained that it is important to include IP telephony in the definition to avoid confusion. Due to the increasing use of IP technology mixed with traditional analog and digital technology to transport long distance telephone calls, BellSouth believes that it is important to specify that such traffic is switched access traffic rather than local traffic.

Intermedia witness Jackson testified that the essential difference between the Parties is that Intermedia believes that "switched access traffic" should be defined in the Parties' agreement. Intermedia argued that BellSouth's tariff language changes from time to time, and referring to its tariff allows BellSouth to define this crucial term any way it wishes, perhaps in ways that Intermedia may consider adverse.

In addition, Intermedia stated that it does not believe that it is appropriate for BellSouth to attempt unilaterally to assign a regulatory status to "IP Telephony." In its Post-Hearing Brief, Intermedia stated that the treatment of IP telephony should not be determined on a piecemeal basis, from state to state, agreement to agreement, but should await a determination from the FCC.

The Public Staff stated that it does not think the Commission should object to an arrangement by BellSouth and Intermedia to specifically define switched access traffic in the Agreement as it has been specified in BellSouth's Access Tariff. The Public Staff stated that even though it does not necessarily disagree with BellSouth's position that toll calls completed using the technology embodied in IP telephony should be treated similarly to other toll traffic with respect to switched access, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony. The Public Staff maintained that this issue is best addressed in a setting in which all interexchange carriers (IXCs) and other affected carriers have notice and in which the procedures for determining billable minutes are fully explored.

On April 27, 2000, upon the request of the Commission Staff, BellSouth filed a letter with attached tariff pages which provided a description of Switched Access Service and associated Feature Groups as defined in BellSouth's intrastate Access Services Tariff. This letter with attached tariff pages is hereby allowed in evidence in this proceeding as a late-filed exhibit.

Also, on April 27, 2000, Intermedia filed a letter in response to BellSouth's filing which stated that the Access Services Tariff which BellSouth cited did not include a definition of switched access traffic, and, therefore, the only clear option is Intermedia's suggested language for the definition of switched access traffic. This letter is hereby allowed in evidence in this proceeding as a late-filed exhibit.

There is only a fine distinction between switched access *traffic* and switched access *service*. Generally, switched access service is ordered from the tariff and switched access traffic is what one sends over the switched access service. The tariff pages submitted by BellSouth are clearly to provide "switched access service." Even though it is unclear from the record what the importance is of having a definition of switched access traffic contained in the Parties' local Interconnection Agreement, the definition offered by Intermedia would seem to be more appropriate since it appears to list the same services as those listed in BellSouth's intrastate Access Tariff under its Switched Access Service Section.

Both Intermedia and the Public Staff expressed reservations about whether IP telephony should be included in a definition of switched access traffic in this proceeding. Intermedia was of the opinion that such a definition should await a determination from the FCC; the Public Staff believes that the Commission should decline to require such a definition until the issue is more fully addressed in a setting involving all affected parties. The Commission believes that due to the considerable uncertainty as to how this type of telephony should be defined, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony at this time.

CONCLUSIONS

The Commission concludes that the definition of "switched access traffic" as proposed by Intermedia should be included in the Agreement. Further, the Commission declines to require a definition of switched access traffic that specifically includes IP telephony at this time.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

MATRIX ISSUE NO. 33: Should BellSouth and Intermedia be liable to each other for lost switched access revenues due to lost or damaged billing data?

POSITIONS OF PARTIES

BELLSOUTH: No and if yes, then no cap. BellSouth argued that since this issue deals with switched access revenues, it is not appropriate for arbitration under Section 252 of TA96. BellSouth stated that Interconnection Agreements arbitrated under Section 252 should govern local interconnection terms and conditions, not switched access issues. However, BellSouth is willing to accept Intermedia's proposed language with one exception: BellSouth does not wish to place a cap on the liabilities of the Parties.

INTERMEDIA: Yes. Intermedia maintained that the Parties' Interconnection Agreement should provide that each Party is liable to the other for lost or damaged billing data. Intermedia argued that the Parties' liability should be capped at $10,000 per episode.

PUBLIC STAFF: No. The Public Staff argued that because the Parties must negotiate and settle this issue should it arise, there is already a mechanism in place to resolve disputes. The Public Staff stated that there is not a need for a liability cap as proposed by Intermedia.

DISCUSSION

The only area of contention between the Parties concerning this issue is whether there should or should not be a cap on the liabilities of the Parties. As Intermedia described in its Brief, BellSouth and Intermedia provide services jointly to third parties, and as a result, each Party must be responsible for the maintenance of billing records that will allow the other Party to obtain any revenues due to it for providing that service. Intermedia further explained that occasionally, mistakes in compiling this billing information occur and that Intermedia originally proposed that the Parties be mutually liable for lost or damaged billing data, however, that liability should be limited by a cap. Intermedia stated in its Brief that BellSouth has refused to limit liability. Intermedia concluded in its Brief that this issue is an area ripe for disagreement that could escalate into an issue before the Commission and that putting a liability cap of $10,000 per episode on lost or damaged billing data is prudent in these circumstances.

BellSouth witness Varner stated in his rebuttal testimony that BellSouth has advised Intermedia that it is agreeable to Intermedia's proposed language, except that BellSouth does not wish to place a cap on the liabilities of the Parties. BellSouth argued in its Proposed Order that its switched access revenues are substantial and that it must rely on accurate information from CLPs such as Intermedia in order to accurately bill the appropriate IXCs and vice-versa. BellSouth witness Varner stated on cross-examination that a Party would lose switched access revenues due to lost or damaged billing records when the data, for whatever reason, was not available for the Party to properly bill the customer. BellSouth stated in its Proposed Order that Intermedia's proposed cap of $10,000 is unreasonable since BellSouth's switched access revenues in North Carolina amount to millions of dollars annually. Therefore, BellSouth recommended that the Commission reject Intermedia's proposed cap of $10,000, as unreasonable.

Intermedia argued in its Proposed Order that this issue involves the general terms and conditions of the Parties' Interconnection Agreement. Intermedia stated that the losses at issue here would occur when one Party causes the other Party's billing data either to be lost or damaged, and the other Party is unaware of its customers having incurred the corresponding charges. Intermedia maintained in its Proposed Order that once the billing period has passed, the billing party generally cannot recover the lost charges from its customers. Intermedia stated that in this proceeding it has proposed a means for recovering at least a part of the estimated damages lost from the negligent party. Intermedia recommended that the Commission conclude that each Party should be liable to the other for losses it causes the other Party to incur by losing or damaging billing data but that liability for such losses under the Parties' Interconnection Agreement shall be capped at $10,000 per episode. Intermedia argued in its Proposed Order that although its choice for a cap of $10,000 per episode is somewhat arbitrary, BellSouth has not suggested a better one. Intermedia argued that its proposal would minimize both Parties' exposure to unlimited and unquantifiable losses. Intermedia witness Jackson stated on cross-examination that Intermedia has not been as wedded to the actual dollar amount of the cap as it was to coming up with a reasonable cap based on good business practice to ensure that no Party is overly damaged for issues that may be beyond the Party's control. Intermedia witness Jackson also clarified on cross-examination that the situation that is described in this issue is limited to situations where cooperative efforts between the Parties to reconstruct the billing data have failed for whatever reason.

The Public Staff argued in its Proposed Order that there is no need for a liability cap. The Public Staff argued that since the Parties must negotiate and settle the issue should it arise, there is already a mechanism in place to resolve disputes. The Public Staff maintained that it is equitable to require the liable party to provide adequate compensation for damages it has caused. The Public Staff recommended that the Commission decline to require the inclusion of a liability cap for lost or damaged switched access revenues.

The Commission notes that Intermedia witness Jackson testified that the situation that is described in this issue is limited to situations where cooperative efforts between the Parties to reconstruct the billing data have failed for whatever reason. Intermedia's proposed language as reflected in Exhibit 1 of BellSouth's Petition for Arbitration filed on December 7, 1999 reads:

> "In the event of a loss of data, both Parties shall cooperate to reconstruct the lost data and shall make best efforts to do so within 48 hours. If such reconstruction is not possible, the Parties shall use a reasonable estimate of the lost data, based on twelve (12) months of prior usage data; provided that if twelve (12) months of prior usage data is not available, the Parties shall base the estimate on as much prior usage data that is available; and further provided, however, that if reconstruction is required prior to the availability of at least three (3) months of prior usage data, the Parties shall defer such reconstruction until three (3) months of prior usage data is available. If the estimated billing is not accepted for payment by the affected Access Services Customer(s), the responsible Party shall be liable to the other Party for any resulting lost revenue up to a maximum of $10,000 in the aggregate in any one (1) month period. Lost revenue may be a combination of revenues that could not be billed to the End Users and associated Access Service revenues. Lost revenue will be calculated by subtracting the amount actually paid by the affected Access Services Customer(s) from the estimated billing derived pursuant to the process set forth in this section." (Proposed Interconnection Agreement, Attachment 3, Section 6.8.6, pages 18-19).

Also, the Commission notes that BellSouth's proposed Interconnection Agreement with Intermedia filed as Exhibit I to its December 7, 1999 Petition for Arbitration has a Liability and Indemnification section [See pages 5-6 of the General Terms and Conditions - Part A].

The Commission believes that it would be more appropriate to adopt Intermedia's proposed language outlined above, but removing the last three sentences referencing lost revenues or the liability cap of $10,000. The language to be included in the Agreement would require the Parties to make cooperative efforts to reconstruct billing data using their best efforts. Thus, the Commission declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data.

CONCLUSIONS

The Commission finds it appropriate to adopt Intermedia's proposed language concerning lost switched access revenues due to lost or damaged billing data, but declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data. Therefore, the Commission finds it appropriate to require the Parties to delete the last three sentences of Intermedia's proposed language which reference lost revenues or a liability cap of $10,000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

MATRIX ISSUE NO. 37: Should all framed packet data transported within a VC that originates and terminates within a LATA be classified as local traffic?

POSITIONS OF PARTIES

BELLSOUTH: While BellSouth agrees that all framed packet data transported within a VC that originates and terminates within a LATA should be classified as local traffic for the purposes of establishing interconnection between the Parties, BellSouth contends that frame relay traffic originated and terminated in the LATA should not be subject to reciprocal compensation. BellSouth's rationale is that there is a need to distinguish between voice traffic and frame relay traffic. Voice traffic travels in a connection between at least two points and can be measured in minutes of use, while frame relay utilizes packet switching, where packets or "bursts" of information are sent in groups. Since there is no continuous connection, a minutes of use measurement is inappropriate.

INTERMEDIA: Frame relay and other data traffic originated and terminated within the same LATA should be considered local traffic. Thus, such traffic should be subject to reciprocal compensation. However, the underlying issue of the measurement of such traffic has not been addressed. Thus, the Parties should submit late-filed exhibits outlining their proposals for measurement and compensation of frame relay and other data traffic for reciprocal compensation purposes.

PUBLIC STAFF: The record indicates that both Parties recognize that reciprocal compensation would apply to this traffic. The FCC had clearly recognized that packet switching differs from traditional local circuit switching. See Third Report and Order and Fourth Further Notice of Proposed Rulemaking CC Docket No. 96-98, November 5, 1999, fn. 592. However, there is insufficient information in this record to establish an appropriate mechanism for reciprocal compensation. The Parties (preferably jointly) should be directed to prepare such a mechanism. The proposal(s) should include a description of and basis for the proposal and should reflect that, while intraLATA frame relay circuits can be considered local for the purpose of physical installation and interconnection, the traffic occurring over the facilities can and probably will be both local and intraLATA toll.

DISCUSSION

The Commission notes that Section 251(c) of TA96, which requires reciprocal compensation, does not differentiate between voice and data services. Indeed, the FCC in its August 7, 1998, Advanced Services Order rejected a BellSouth contention that Section 251(c) does not apply to technology which was not deployed at the time of the enactment of TA96.

BellSouth had conceded that intraLATA traffic transported by frame relay should be classified as local for the purposes of establishing interconnections. BellSouth witness Varner appeared to recognize that local traffic transported via frame relay is subject to reciprocal compensation.

Nevertheless, BellSouth is surely right in its contention that not all such intraLATA traffic is in fact local and that the nature of packet switching is such that application of a straight minutes-of-use arrangement is questionable.

The Commission believes that it is clear that reciprocal compensation should be paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA. However, there is a dearth of evidence as to what the appropriate design and level for such compensation should be. BellSouth witness Varner speculated as to a "bill and keep" arrangement, but Intermedia made no firm proposal.

CONCLUSIONS

The Commission concludes that reciprocal compensation should be paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA. BellSouth and Intermedia are directed to propose a mechanism to provide for such compensation. Such proposal should be a joint proposal, if possible, and should include a description of and basis for the proposal. The proposal(s) should take into consideration that, while intraLATA frame relay circuits can be considered local for the purposes of physical installation and interconnection, the traffic occurring over the facilities can and probably will be local and intraLATA toll. Such proposal(s) is/are required to be filed with the Commission no later than July 13, 2000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

MATRIX ISSUE NO. 38: If there are no VCs on a frame relay interconnection facility when it is billed, should the Parties deem the PLCU to be zero?

POSITIONS OF PARTIES

BELLSOUTH: Yes. BellSouth proposes a PLCU of zero if there are no VCs on a frame relay interconnection facility when it is billed.

INTERMEDIA: No. Intermedia argued that the PLCU on newly installed frame relay interconnection trunks should be 100% until such time as traffic begins to flow over those trunks (the point at which VCs are turned up on the trunks). Intermedia stated that after the trunks are turned up, the Parties' established cost allocation formula should apply.

PUBLIC STAFF: Yes. The Public Staff recommended that until Intermedia begins to use the frame relay trunks, the PLCU should be deemed to be 0%.

DISCUSSION

BellSouth stated in its Proposed Order that this issue concerns the cost of frame relay interconnection facilities after the facilities are ordered, but before a customer begins to utilize them. BellSouth stated that ordinarily, Intermedia would order facilities, BellSouth would then install the facilities, and then BellSouth would bill Intermedia for the facilities. BellSouth stated that at some future point, Intermedia would begin to use the facilities that it ordered. BellSouth maintained that after traffic begins to flow over the interconnection facilities, Intermedia then advises BellSouth what percentage of the traffic is expected to be local, and BellSouth reimburses Intermedia for a portion of the trunk charges based on the PLCU. BellSouth stated, however, that prior to traffic flowing over these trunks, there are two compelling reasons why the PLCU should be zero: (1) BellSouth's experience indicates that the predominant use of these types of facilities is for interLATA traffic since frame relay is generally used for high speed exchange of large amounts of data; and (2) Intermedia controls when traffic begins to flow over the facilities and BellSouth should not be forced to incur charges until Intermedia begins to flow traffic over the facilities. BellSouth argued in its Proposed Order that it is clear that the appropriate PLCU for frame relay interconnection facilities, where there are no VCs (i.e. there is no traffic flowing over the facilities), should be zero.

BellSouth witness Varner stated in his rebuttal testimony that BellSouth's position is that, if there are no VCs on a frame relay interconnection facility when it is billed, then the PLCU should be zero (and therefore BellSouth would not reimburse Intermedia for any trunk charges) and that Intermedia's position is that the PLCU should be 100% in this situation (and therefore BellSouth would have to reimburse Intermedia for half of the trunk charges). BellSouth witness Varner explained in his rebuttal testimony that once frame relay traffic is flowing over the trunks, Intermedia advises BellSouth of the PLCU (i.e., what percentage of that traffic is local) and BellSouth reimburses Intermedia for a portion of the interconnection trunk charges based on the PLCU. Witness Varner provided an example in his rebuttal testimony wherein if the PLCU is 10%, then BellSouth reimburses Intermedia for 5% of the charges (PLCU ÷ 2).

Intermedia stated in its Proposed Order that this issue involves the cost of interconnection trunks between the Parties' frame relay networks. Intermedia maintained that when it orders frame relay interconnection trunks from BellSouth, Intermedia pays a nonrecurring charge and a recurring charge. Intermedia stated that when traffic begins to flow over these trunks, Intermedia advises BellSouth of the percentage of the traffic which is local (the PLCU). Intermedia stated that the Parties evenly split the recurring cost associated with local traffic over these trunks and if the PLCU is 100%, each Party is responsible for half the cost; BellSouth would reimburse Intermedia for half the recurring charge for these trunks. Intermedia maintained that there is no cost sharing for interLATA frame relay traffic over these trunks, and Intermedia bears all of this cost. Intermedia stated in its Proposed Order that BellSouth witness Varner's own testimony is that this issue arises under very limited circumstances. Intermedia argued that once traffic begins to flow over these trunks, there is an established formula for cost allocation that is not in dispute. Intermedia maintained that there is no evidence in the record about what percentage of frame relay traffic is local versus interLATA. Intermedia recommended in its Proposed Order that the Commission find that its proposal is the most reasonable resolution of the issues since presumably the period after the trunks are installed but before they are turned up is short and it is reasonable that during this period of time the equal cost sharing arrangement proposed by Intermedia is appropriate.

Intermedia argued in its Brief that it is asking this Commission to find that the Parties should equally share the cost of establishing and maintaining frame relay interconnection arrangements when there is no objective measure of how these expenses should be resolved. Intermedia stated that the frame relay interconnection arrangement benefits BellSouth's customers and Intermedia's customers that want to exchange data traffic. Intermedia maintained that this type of arrangement is made for the exchange of data traffic, and as BellSouth witness Varner conceded during cross-examination, there must be a BellSouth customer on the other end of the connection to make it sensible; therefore, Intermedia asserted that BellSouth, Intermedia, and both Parties' customers benefit from the service. Further, in its Brief, Intermedia argued that in the event an existing arrangement does not have any traffic for a given billing cycle, why should BellSouth be able to nearly double the charge to Intermedia when BellSouth's cost of providing the service to Intermedia remains constant. Intermedia stated that finding that the PLCU should be zero during this time of no traffic would be a windfall to BellSouth solely for maintaining a mutually beneficial interconnection arrangement.

Intermedia witness Jackson stated in his direct testimony that any other conclusion where the PLCU is not 100% could unreasonably impose higher rates on Intermedia, even though BellSouth was not incurring higher costs in providing the facility. During cross-examination, witness Jackson stated that he did not know what the percentages would be between local and interLATA traffic over frame relay but that he would assume that there would be both types of traffic. Further, witness Jackson admitted on cross-examination that it is up to Intermedia and its customer when the circuit is turned up.

The Public Staff argued in its Proposed Order that the uncontested evidence in this case is that most of the traffic carried over frame relay trunks is not local. The Public Staff maintained that it would, therefore, be unrealistic for the Commission to adopt the position advocated by Intermedia.. The Public Staff stated that, in effect, Intermedia appears to be seeking more favorable terms when no traffic is being carried over the trunks than when traffic does flow. The Public Staff argued that Intermedia controls the use of the trunks and can alleviate the situation. Therefore, the Public Staff recommended that the Commission conclude that until Intermedia begins to use the frame relay trunks, the PLCU should be deemed to be 0%.

Although there is no specific evidence in the record of the percentage of local traffic which typically flows over frame relay interconnection facilities, the Commission believes that the record of evidence generally supports BellSouth's contention that the predominant use of these types of facilities is for interLATA traffic since frame relay is generally used for high speed exchange of large amounts of data. Additionally, the Commission agrees with BellSouth that it is up to Intermedia when traffic begins to flow over these facilities. Based on this, the Commission believes that it is not reasonable for BellSouth to be expected to reimburse Intermedia during this time when no traffic is flowing over the facilities. Adopting Intermedia's position that the PLCU should be 100% during this time would obligate BellSouth to reimburse Intermedia for 50% of the facilities although there is no traffic flowing over the facilities. Therefore, the Commission finds that it is appropriate for the PLCU for frame relay interconnection facilities, where there are no VCs (i.e. there is no traffic flowing over the facilities), to be zero.

CONCLUSIONS

The Commission concludes that when there are no VCs on a frame relay interconnection facility when it is billed, the Parties should deem the PLCU to be zero.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

MATRIX ISSUE NO. 45: Should the Interconnection Agreement specifically state that the Agreement does not address or alter either Party's provision of Exchange Access Frame Relay Service or InterLATA Frame Relay Service?

DISCUSSION

Since the filing of Proposed Orders by BellSouth and Intermedia, BellSouth filed a letter with the Commission on May 2, 2000, stating that the Parties have resolved this issue. The Parties agreed that the language that had been suggested by BellSouth in the Proposed Interconnection Agreement, Attachment 3, Section 7.9.6, should be stricken. The Parties have requested that this issue be withdrawn from this arbitration.

CONCLUSIONS

The Commission acknowledges that this issue has been resolved by the Parties. Consequently, the Commission finds it appropriate to allow the Parties' request that the matter be withdrawn from arbitration.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth and Intermedia shall prepare and file a Composite Agreement in conformity with the conclusions of this Order not later than July 28, 2000. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 Order in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order).

2. That BellSouth and Intermedia shall file a proposed mechanism to provide that reciprocal compensation is paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA no later than July 13, 2000.

3. That, not later than July 13, 2000, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the Arbitration Procedure Order.

4. That, not later than July 13, 2000, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the Arbitration Procedure Order.

5. That, with respect to objections or comments filed pursuant to decretal paragraphs 3 or 4 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages, single-spaced or three pages, double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

6. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or comments, including the executive summary required in decretal paragraph 5 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in WordPerfect format.

7. That the exhibits filed by Intermedia on March 6, 2000, in response to the Commission's February 29, 2000 Order, and BellSouth's reply of March 10, 2000, to Intermedia's exhibits be, and the same are hereby, admitted in evidence as late-filed exhibits.

8. That the description of Switched Access Service and associated Feature Groups as defined in BellSouth's intrastate Access Services Tariff filed in a letter from BellSouth on April 27, 2000, and the response of Intermedia to this letter, be, and the same are hereby, admitted in evidence in this proceeding as late-filed exhibits.

ISSUED BY ORDER OF THE COMMISSION.
This the _13th_ day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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Appendix A

GLOSSARY OF ACRONYMS
Docket No. P-55, Sub 1178

Act	Telecommunications Act of 1996
ALTS	Association for Local Telecommunications Services
BellSouth	BellSouth Telecommunications, Inc.
CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
DeltaCom	ITC^DeltaCom Communications, Inc
ESP	Enhanced Service Provider
FCC	Federal Communications Commission
GTE	GTE South Incorporated
ICG	ICG Telecom Group, Inc.
ILEC	Incumbent Local Exchange Company (Carrier)
Intermedia	Intermedia Communications, Inc.
IP	Internet Protocol
ISP	Internet Service Provider
IXC	Interexchange Carrier

LATA	Local Access and Transport Area
LEC	Local Exchange Company (Carrier)
PLCU	Percent Local Circuit Use
Public Staff	Public Staff-North Carolina Utilities Commission
Sprint	Sprint Communications Company, L.P.
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long Run Incremental Cost
UNE	Unbundled Network Element
US LEC	US LEC of North Carolina Inc.
VC	Virtual Circuit

DOCKET NO. P-55, SUB 1178

In the Matter of

Petition of BellSouth Telecommunications, Inc. for Arbitration of Interconnection Agreement with Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)))))	ORDER RULING ON OBJECTIONS, REQUEST FOR RECONSIDERATION, AND COMPOSITE AGREEMENT

BEFORE: Commissioner Sam J. Ervin, IV, Presiding, and Commissioners William R. Pittman and Robert V. Owens, Jr.

BY THE COMMISSION: On June 13, 2000, the Commission issued a Recommended Arbitration Order (RAO) in this docket. Finding of Fact No. 2 of that Order states: "For reciprocal compensation purposes, [Intermedia Communications Inc.] Intermedia should be compensated at [BellSouth Telecommunications, Inc.'s] BellSouth's tandem interconnection rate.

On July 13, 2000, BellSouth filed its Objection and Request for Reconsideration concerning the Commission's decision regarding the application of the tandem rate to reciprocal compensation. BellSouth stated that reconsideration is warranted because the Commission's determination is legally, and factually flawed.

On July 21, 2000, Intermedia filed its Response in Opposition to BellSouth's Objection and Request for Reconsideration. Intermedia pointed out that BellSouth's arguments as to the tandem switch rate have previously been rejected by the Commission and that BellSouth has not presented a single reason that the Commission's determinations in the RAO as to the tandem switch rate should be revisited. Intermedia requested that the Commission reject BellSouth's Objection and Request for Reconsideration.

Discussion and Commission conclusions regarding the issue raised by BellSouth's in its Objections and Request for Reconsideration follow:

FINDING OF FACT NO. 2 - (MATRIX ISSUE NO. 3): Should Intermedia be compensated for end office, tandem, and transport elements, for purposes of reciprocal compensation?

INITIAL COMMISSION DECISION

The Commission concluded that, for reciprocal compensation purposes, Intermedia should be compensated at BellSouth's tandem interconnection rate.

COMMENTS/OBJECTIONS

BELLSOUTH: On July 13, 2000, BellSouth filed Objection and Request for Reconsideration of the Commission's Recommended Arbitration Order (RAO) dated June 13, 2000. Specifically, BellSouth objected to the Commission's determination that Intermedia should be compensated at BellSouth's tandem interconnection rate. BellSouth stated that reconsideration is warranted because the Commission's determination is legally and factually flawed, and that the evidence in the record does not support the award of the tandem interconnection rate to Intermedia.

In its argument that the Commission's decision is legally flawed, BellSouth stated that Intermedia's evidence supports only the notion that its switches may be capable of performing tandem switching functions. BellSouth argued that no serious argument can be made that Intermedia's two switches in Charlotte and Raleigh actually perform functions similar to those performed by BellSouth's tandem switch. While Intermedia's switches may be capable of performing tandem switching functions when connected to end office switches, capability is not the test. BellSouth stated that Intermedia did not present any credible evidence to support a conclusion that the Intermedia switches actually perform functions similar to BellSouth's tandem switch. BellSouth further stated that the information submitted by Intermedia regarding the manufacturer's specifications of the switches only spoke to the capability of the switch, not its actual performance.

BellSouth argued that the Commission's analysis that "the concept of equivalent functionality is included within the requirement that the equipment utilized by both Parties covers the same basic geographic area," cannot be squared with the plain language of the FCC's discussion of Rule 51.711. The courts have expressly held that equivalent functionality and geographic comparability are two separate requirements that must be satisfied.

In support of its arguments, BellSouth cited three Court cases: *U.S. West Communications, Inc. v. Minnesota Public Utilities Commission (U.S. West v. Minnesota PUC)*,, 55 F. S.p. d. 968, 977 (D. Minn. 1999); *MCI Telecommunications Corp. v. Michigan Bell Telephone Co. (MCI v. Michigan Bell)*, 79 F. Spp.. d. 768, 790 (E.D. Mich. 1999); and, *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc. (MCI v. Ameritech)*, No. 97c2225, 1999 U.S. dist. Lexis 111488 (N.D. Ill.), June 22, 1999.

BellSouth also referred to and quoted extensively from portions of the Proposed Order of the Public Staff which supported BellSouth's position as to the issue of actually performing tandem switching functions as opposed to having the capability of performing these functions.

In its argument that the Commission's determination is factually flawed, BellSouth stated that there is no credible evidence in the record that Intermedia's switches serve a geographic area comparable to BellSouth's tandem switch.

BellSouth stated that, as it had previously pointed out, Intermedia inappropriately labeled its collocation sites as end-office switches, and artificially inflated the number of end users. BellSouth noted that Intermedia only has three collocation sites for the Raleigh LATA and two for the Charlotte LATA, which clearly indicates only the capability to serve a limited number of customers in a very small geographic service area. Moreover, depicting rate centers to be served in the future does nothing to support the requirement that customers are currently being served by Intermedia. BellSouth submitted that the information relied upon by the Commission in making its determination was flawed and insufficient.

BellSouth noted that the Public Staff and the Florida Public Service Commission Staff (in the same BellSouth-Intermedia arbitration in Florida) concurred with BellSouth as to this issue.

INTERMEDIA: On July 21, 2000, Intermedia filed its Response in Opposition to BellSouth's Objection and Request for Reconsideration. Intermedia pointed out that BellSouth's arguments as to the tandem switch rate have previously been rejected by the Commission and BellSouth has not presented a single reason that the Commission's determinations in the RAO as to the tandem switch rate should be revisited. Intermedia requested that the Commission reject BellSouth's Objection and Request for Reconsideration.

Intermedia stated that FCC Rule 51.711(a)(3) and Paragraph 1090 of the FCC's First Report and Order demonstrate that a competing local provider must establish that the facilities are geographically comparable to the incumbent's facilities in order to receive the tandem interconnection rate for purposes of reciprocal compensation. Paragraph 1090 also shows that new technology such as Intermedia's Nortel DMS 500 switches, while not constituting an identical network to the incumbent LEC's network, can achieve such comparability by showing "geographic coverage" and "similar functionality."

Intermedia pointed out that the Commission followed this same approach to geographic comparability in both the ICG and DeltaCom arbitrations. (*ICG Telecom Group, Inc. For Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc.*(ICG), Docket No. P-582, Sub 6; *Petition by ITC^DeltaCom Communications, Inc.* (DeltaCom), *For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-500, Sub 10.)

Intermedia contended that BellSouth's reliance on a recommendation from another jurisdiction is not persuasive. Intermedia stated that the opinion of the Commission Staff in Florida, where an arbitration between Intermedia and BellSouth is pending, has not yet been ruled on by the Florida Public Service Commission, and BellSouth's emphasis on a non-binding opinion demonstrates the futility it faces with regard to objecting to the panel's conclusion on the tandem switching issue.

Furthermore, Intermedia pointed out that resolution of the tandem switching issue requires factual determinations which may be specific to a particular state, and the recommendation of Florida's Commission Staff may not apply as well in North Carolina.

Intermedia noted the July 5, 2000 decision in the corresponding Georgia Intermedia/BellSouth arbitration, in which the Georgia Public Service Commission issued a ruling adopting its staff's recommendation that Intermedia is entitled to the tandem interconnection rate in Georgia. Intermedia pointed out that Intermedia utilizes the same switch (Nortel DMS-500 Switch) in Georgia as it does in North Carolina. Intermedia submitted that the Georgia Public Service Commission made the factual determination that Intermedia's network was geographically comparable to BellSouth's network, and that the Georgia Commission's decision is more persuasive than an opinion from the Florida staff.

DISCUSSION

In the RAO in this proceeding, the Commission stated that the pertinent authority governing the issue of reciprocal compensation for tandem switching is found in FCC Rule 51.711(a)(3) and Paragraph 1090 of the FCC's First Report and Order.

Rule 51.711(a)(3):

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Paragraph 1090 of the First report and Order:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

Based on its understanding and interpretation of the FCC's Rule 711.11 and Paragraph 1090, the Commission found, based on the evidence submitted by Intermedia, that Intermedia had met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth's switches, and that, for reciprocal compensation purposes, Intermedia was entitled to compensation at BellSouth's tandem interconnection rate.

In addition to its decision in the RAO in this docket, the Commission has concluded in two previous arbitrations, ICG/BellSouth (Docket P-582, Sub 6) and DeltaCom/BellSouth (Docket P-590, Sub 10), that both companies had met their burden of proof in regard to this issue, and were entitled to BellSouth's tandem switching rate for reciprocal compensation purposes.

In the DeltaCom RAO, the Commission discussed more extensively its belief that the language in the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090 clearly contemplate that exact duplication of the ILEC's network architecture is not necessary in order for the competing local provider (CLP) to be eligible to receive reciprocal compensation at the tandem switching rate. The Commission also indicated that it believes that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both parties covers the same basic geographic area.

The Commission expanded this reasoning further in its Order Ruling on Objections, Request for Reconsideration, and Composite Agreement in the DeltaCom arbitration decision by stating: "The literal language of FCC Rule 51.711 states that the Commission should rely on geographic coverage as the sole basis for determining this issue. The only way to reconcile the language of FCC Rule 51.711 with Paragraph 1090 of the First Report and Order is to adopt the approach taken by the Commission in the RAO in the DeltaCom case, which treats comparable geographic coverage as a proxy for equivalent functionality. This approach reconciles FCC Rule 51.711 and Paragraph 1090 in a manner which rests upon a reasonable construction of both. Any other approach necessarily assumes that there is an inconsistency between FCC Rule 51.711 and Paragraph 1090, a result which the Commission is loath to reach. Furthermore, the adoption of the argument advanced by BellSouth and the Public Staff would, of necessity, require a CLP to duplicate the network architecture utilized by the incumbent, an outcome which is expressly rejected in Paragraph 1090. Finally, adoption of the argument that the CLP's switch must actually be serving customers in the relevant geographic area instead of being capable of serving them makes the availability of the tandem switching rate contingent upon the level of market penetration achieved by the CLP, an outcome which finds no support in either Rule 51.711 or Paragraph 1090."

The Commission concluded in the RAO that Intermedia had met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth's switches, and that, for reciprocal compensation purposes, Intermedia is entitled to compensation at BellSouth's tandem interconnection rate. Further, as the Commission pointed out in the DeltaCom Order Ruling on Objections, Request for Reconsideration, and Composite Agreement, it does not agree that FCC Rule 51.711(a) in its entirety can be interpreted as creating a two-pronged test involving both equivalent functionality and geographical serving area as separate prerequisites for obtaining the tandem switching rate.

In any event, the Commission believes that, regardless of the proper interpretation of the FCC's Rule and Paragraph 1090 of the First Report and Order, Intermedia has met both the functionality and geographic coverage tests claimed by BellSouth. As pointed out in the RAO, with respect to the issue of geographic comparability, Intermedia submitted information which included a list of its customers by location; a listing of the company's collocations; and county maps depicting current and future rate centers in and around the two cities. With respect to the functionality issue, Intermedia submitted information from the manufacturer of its two North Carolina switches concerning the technology inherent in the switches used by Intermedia. Intermedia also included diagrams and narratives describing the trunk topology of its two North Carolina switches and call diagrams depicting the functions performed by its switches. In addition, Intermedia witness Jackson testified that "The [Intermedia switches perform the functions of a tandem, such as remote traffic aggregation, and the functions of end office switches, such as providing dial tone. Due to this different network design concept, Intermedia's single switches have to perform all of the relevant functions, including the function BellSouth assigns to its tandem switches."

The three court cases cited by BellSouth in support of its views are the same three court cases cited by BellSouth in the DeltaCom proceeding. In the DeltaCom Order, the Commission expressed doubts about the generic value of these cases as they involved specific fact situations peculiar to those cases. The Commission remains unconvinced that the court cases cited by BellSouth are particularly persuasive of its arguments in the Intermedia case. The Commission has serious doubts about the generic applicability of these decisions for the same reasons set forth in the ITC^DeltaCom Order.

As stated in the DeltaCom Order, the Commission reiterates its advice to any party in this docket wishing to pursue this issue to seek a Declaratory Ruling from the FCC.

CONCLUSIONS

The Commission concludes that Intermedia has clearly met its burden of proof that its switches provide equivalent functionality through their geographic coverage and that, by doing so, Intermedia is entitled to compensation at BellSouth's's tandem interconnection rate.

In addition, the Commission concludes that, if there is a two-part test for both geographic coverage and functional equivalence, Intermedia meets both prongs of such a test. Thus, the Commission finds it appropriate to deny BellSouth's Objection and Request for Reconsideration and affirms its RAO in this regard.

IT IS, THEREFORE, ORDERED as follows:

1. That the Commission hereby denies BellSouth's Objection and Request for Reconsideration and affirms Finding of Fact No. 2 of its RAO in this docket.

2. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

ISSUED BY ORDER OF THE COMMISSION.
This the 7th day of September, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

je090600.01

DOCKET NO. P-55, SUB 1178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996	))))	ERRATA ORDER

BY THE PRESIDING COMMISSIONER: On July 28, 2000, an Order Extending Time for Filing Composite Agreement was issued in this docket providing the parties an extension of time in which to file the Composite Agreement until 10 days after the Commission has issued its Order on the frame relay proposal. On September 7, 2000, an Order Ruling on Objections, Request for Reconsideration, and Composite Agreement was issued in this docket. However, the Order did not address the Composite Agreement nor did it amend the Order Extending Time for Filing Composite Agreement and no such Composite Agreement has been filed. Therefore, the inclusion of the words "and Composite Agreement" in the caption of the September 7, 2000, Order was incorrect, and those words should be deleted.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the __12th__ day of September, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz091100.13

DOCKET NO. P-55, SUB 1178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996	))))	ORDER CONCERNING FRAME RELAY ISSUE

BY THE COMMISSION: On June 13, 2000, the Commission issued a Recommended Arbitration Order in the above docket. Matrix Issue No. 37 read: "Should all framed packet data transported within a VC that originates and terminates within a LATA be classified as local traffic?"

The Commission in its Discussion stated that it was clear that reciprocal compensation should be paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA but that there was a dearth of evidence as to the appropriate design and level for such compensation. BellSouth Telecommunications, Inc. (BellSouth) had proposed a "bill and keep" arrangement but Intermedia Communications, Inc. (Intermedia) had made no firm proposal. Accordingly, the Commission solicited from the parties further proposals for such mechanism--jointly, if possible, but individually, if necessary.

BellSouth Proposal

On July 13, 2000, BellSouth filed its proposal regarding frame relay reciprocal compensation. BellSouth noted that the parties agree that it is possible for data traffic transported over Virtual Circuit (VC) to be local in nature, and BellSouth concedes that data packets transported within a VC which originate and terminate within the same LATA should be considered local for certain purposes. There is also no dispute between the parties regarding compensation to each other for Frame Relay interconnection facilities, inasmuch as the parties have agreed to a method for calculating a Percent Local Circuit Use (PLCU) factor to determine each parties' proportionate charge for the Frame Relay interconnection. Thus, if Intermedia reports a PLCU of 10% to BellSouth then BellSouth will reimburse Intermedia 5% of the applicable Frame Relay interconnection facility charges. However, unlike circuit switched voice and data traffic, BellSouth is unaware of any existing capability to measure packet data transmitted over Frame Relay facilities.

BellSouth noted that it had forwarded to Intermedia a proposal to implement a bill and keep reciprocal compensation mechanism for Frame Relay packet switched data traffic but that Intermedia had rejected BellSouth's proposal without offering any counter proposal.

Below is BellSouth proposed contract language relating to this matter. The parties have agreed on the language except as otherwise marked:

7.5 The Parties agree to assess each other reciprocal charges for the facilities that each provides to the other according to the Percent Local Circuit Use Factor (PLCU), determined as follows:

7.5.1 Frame Relay framed packet data is transported within Virtual Circuits (VC). ~~For the purposes of this Agreement, i~~If all the data packets transported with a VC originate and terminate within the LATA, the traffic on that VC is local ("Local VC") for purposes of calculating the PLCU and for purposes of reciprocal compensation for Frame Relay packet data.

7.5.2 If the originating and terminating locations of the two way packet data traffic are not in the same LATA, the traffic on that VC is interLATA ("interLATA VC").

7.5.3 The PLCU is determined by dividing the total number of Local VCs, by the total number of VCs on each Frame Relay facility. To facilitate implementation, Intermedia may determine its PLCU in aggregate, by dividing the total number of Local VCs in a given LATA by the total number VCs in that LATA. The Parties agree to renegotiate the method for determining PLCU, at BellSouth's request, and within 90 days, if BellSouth notifies Intermedia that it has found that this method does not adequately represent the PLCU. The Parties shall implement a bill and keep reciprocal compensation mechanism for data packets transported over Local VCs.

7.5.4 If there are no VCs on a particular facility when it is initially billed, the Parties will establish the PLCU based upon the average number of Local VCs and total VCs on other Frame Relay facilities between the Parties in the same LATA. If there are no other Frame Relay facilities between the Parties in the same LATA, the Parties will establish the PLCU based upon the average number of Local VCs and total VCs on other Frame Relay facilities between the Parties in the same state. If there are no other Frame Relay facilities between the Parties in the same state, the Parties will establish the PLCU based upon the average number of Local VCs and total VCs on other Frame Relay facilities between the Parties in BellSouth's nine-state region. The PLCU established pursuant to this paragraph shall remain in effect for a period of ninety (90) days or until such time as one or more VCs are activated on the particular facility in question, whichever occurs first. Thereafter, the PLCU will be determined in accordance with Section 7.5.3 above.

Intermedia Proposal

On September 1, 2000, Intermedia filed its proposal for local frame relay reciprocal compensation. Intermedia proposed an interim bill and keep compensation mechanism for such traffic and conceded that it had not been able to arrive at any suitable, cost-effective mechanism other than bill and keep. Intermedia's proposed language is set out below:

7.5 The Parties agree to assess each other reciprocal charges for the facilities that each provides to the other according to the Percent Local Circuit Use Factor (PLCU), determined as follows:

7.5.1 Frame Relay framed packet data is transported within Virtual Circuits (VC). ~~For the purposes of this Agreement, i~~If all the data packets transported with a VC originate and terminate within the LATA, the traffic on that VC is local ("Local VC") for purposes of calculating the PLCU and for purposes of reciprocal compensation for Frame Relay packet data.

7.5.2 If the originating and terminating locations of the two way packet data traffic are not in the same LATA, the traffic on that VC is interLATA ("interLATA VC").

7.5.3 The PLCU is determined by dividing the total number of Local VCs, by the total number of VCs on each Frame Relay facility. To facilitate implementation, Intermedia may determine its PLCU in aggregate, by dividing the total number of Local VCs in a given LATA by the total number VCs in that LATA. The Parties agree to renegotiate the method for determining PLCU, at BellSouth's request, and within 90 days, if BellSouth notifies Intermedia that it has found that this method does not adequately represent the PLCU. Pending the development of a suitable mechanism for measuring packet data traffic, and assessment of reciprocal compensation for Local VC traffic, the Parties agree that, on an interim basis, the reciprocal compensation mechanism for Local VC traffic shall be bill and keep

BellSouth's Response

On September 8, 2000, BellSouth filed its comments on Intermedia's proposal. BellSouth stated that it agrees with Intermedia's proposal with the exception of one clause in the last sentence of Intermedia's proposed Section 7.5.3. BellSouth requested that the clause "on an interim basis" be deleted to ensure that neither party can request a "true-up" of past reciprocal compensation payments in the event a suitable mechanism for measuring and billing packet data traffic is developed in the future. Such mechanism should only be applied on a prospective basis.

Public Staff Comments

On September 18, 2000, the Public Staff filed its comments on this matter. It was the Public Staff's opinion that, until a means is developed to measure the traffic carried over frame relay circuits,the language proposed by either party could be inserted into the Agreement with the same practical effect. While the Public Staff did not oppose Intermedia's proposed language, it did concur with BellSouth's concerns about the possibility of true-up and recommended that any change in the mechanism for paying reciprocal compensation as a result of finding a suitable means to measure frame relay traffic should only be adopted on a prospective basis.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that Intermedia's language on this matter should be adopted. Although the Commission has left in the words "on an interim basis," the Commission wishes to make clear its agreement with BellSouth that there will be no true-up mechanism introduced into this Agreement during its term should a more suitable mechanism be developed. Thus, the nature of the bill-and-keep provision is interim but not subject to true-up.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 5th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz092900.03

DOCKET NO. P-55, SUB 1178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Petition by BellSouth Telecommunications, Inc., for	)
Arbitration of Interconnection Agreement with	) ORDER APPROVING
Intermedia Communications, Inc. Pursuant to the	) COMPOSITE AGREEMENT
Telecommunications Act of 1996	)

BY THE COMMISSION: On October 16, 2999, Intermedia Communications, Inc. and BellSouth Telecommunications, Inc., filed a composite agreement concerning local interconnection with the Commission. The Commission has reviewed the composite agreements and concludes that good cause exists to approve such agreement.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the _8th_ day of _November_, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg110600.23

DOCKET NO. P-582, SUB 6

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition by ICG Telecom Group, Inc. For Arbitration	)	ORDER RULING ON
of Interconnection Agreement with BellSouth	)	OBJECTIONS,
Telecommunications, Inc. Pursuant to Section 252(b)	)	REQUEST FOR
of the Telecommunications Act of 1996	)	CLARIFICATION,
	)	RECONSIDERATION,
	)	AND COMPOSITE
	)	AGREEMENT

BEFORE: Jo Anne Sanford, Chair; and Commissioners Robert V. Owens, Jr. and Sam J. Ervin, IV

BY THE COMMISSION: On November 4, 1999, the Commission entered its Recommended Arbitration Order (RAO) in this docket. As part of that Order, the Commission made the following

FINDINGS OF FACT

1. The parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to Internet Service Providers (ISPs) at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by this Order, subject to true-up at such time as the Commission has ruled pursuant to future Federal Communications Commission (FCC) consideration of this matter.

2. ICG Telecom Group, Inc.'s (ICG's) Charlotte switch serves an area comparable to that served by BellSouth Telecommunications, Inc.'s (BellSouth's) Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

3. The Commission declines to decide at this time whether BellSouth should be required to commit to provisioning the requisite network buildout and necessary support. The Commission encourages BellSouth and ICG to continue to negotiate on this issue. Further, the Commission notes that since a similar provision is found in BellSouth's Revised Statement of Generally Available Terms (SGAT) and at least one interconnection agreement, it would appear reasonable for a similar provision to be voluntarily included in the BellSouth/ICG interconnection agreement.

4. The issue of performance measurements and liquidated damages has been, in essence, withdrawn from the arbitration and accordingly is not in need of resolution in this docket. Further, the Commission will create a new docket, Docket No. P-100, Sub 133k, and issue an Order in that docket establishing the generic docket and requesting that the industry, the Public Staff, the Attorney General, and any other interested parties form a Task Force to attempt to agree on all potential issues concerning performance measurements and enforcement mechanisms. Further, the Commission will issue an Order in Docket No. P-100, Sub 133i (AT&T's Petition for Third-Party Testing) stating that the Commission is investigating performance measurements in a generic docket as a first step, but will keep the third-party testing docket open for future consideration.

On December 6, 1999, BellSouth filed its Objections and Request for Clarification and Reconsideration with an additional letter filed on December 14, 1999, correcting the citations referenced in its Objections and Request for Clarification and Reconsideration. BellSouth stated in its Objections and Request for Clarification and Reconsideration that it seeks clarification and reconsideration concerning: (1) the interim inter-carrier compensation plan adopted by the Commission for ISP traffic; and (2) the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's tandem interconnection rate. BellSouth stated that it seeks clarification of the RAO on two points. First, BellSouth stated that it desires confirmation that any compensation paid pursuant to the interim inter-carrier compensation plan will be trued-up retroactively to the effective date of the Interconnection Agreement resulting from this Arbitration in accordance with the mechanism established by the FCC and the Notice of Proposed Rulemaking (CC Docket 99-68). Second, BellSouth stated that it seeks clarification that the true-up will be triggered, and based on, an effective order by the FCC in CC Docket 99-68 which ensures the most expeditious resolution of this issue for all competing local providers (CLPs) and incumbent local exchange companies (ILECs) operating under the Commission's interim inter-carrier compensation plan. Finally, BellSouth requested the Commission to reconsider its position on the interim inter-carrier compensation rates for ISP-bound traffic and consider an alternative for the payment of those rates and to reconsider its conclusion that ICG is entitled to reciprocal compensation at the tandem interconnection rate.

On December 14, 1999, ICG filed a letter confirming its intentions to file on or before December 21, 1999, a response to BellSouth's Objections and Request for Clarification and Reconsideration.

On December 22, 1999, ICG filed its Opposition to BellSouth's Objections and Request for Clarification and Reconsideration. ICG maintained that BellSouth's filing is nothing more than a rehash of arguments already considered and rejected by the Commission. ICG further maintained that BellSouth's request for clarification is unclear. ICG concluded that neither of the requested clarifications is in any way necessary.

On January 3, 2000, the Public Staff filed its Response to Request for Reconsideration. The Public Staff stated that the single issue it wished to address concerned whether ICG should be compensated for tandem switching. The Public Staff stated that it did not address this issue in its Proposed Order in this docket, however, it now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by the LEC.

On January 10, 2000, ICG filed its Reply to the Public Staff's Response. ICG maintained that the Commission correctly concluded that FCC Rule 51.117 provides a single criterion for tandem rate eligibility and that though not required, the record demonstrates that ICG's switch functions as a tandem. ICG recommended that the Commission deny BellSouth's Request for Reconsideration.

On January 20, 2000, the Commission issued an Order Regarding Maps. The Commission required ICG and BellSouth to submit as late-filed exhibits a map showing ICG's network with relevant switches in North Carolina overlaid against the geographic area which BellSouth's tandem switch serves and the number of BellSouth central offices ICG is presently collocated in within North Carolina by no later than January 23, 2000.

On January 20, 2000, BellSouth filed the Final Order of the Florida Public Service Commission in its ICG/BellSouth arbitration docket.

On February 7, 2000, BellSouth filed its maps in response to the Commission's January 10, 2000 Order. ICG also filed its maps in response to the Order on February 7, 2000.

On February 14, 2000, ICG filed a Notice of Supplemental Authority which included decisions of the Alabama and Georgia Public Service Commissions.

On February 14, 2000, ICG filed a letter to protest the letter filed by BellSouth with its maps stating that BellSouth used its transmittal letter as an opportunity to present its arguments on the tandem rate eligibility issue.

Discussions and Commission conclusions regarding the issues raised by BellSouth in its Objections and Request for Clarification and Reconsideration follow. These matters are addressed below by reference to the specific Findings of Fact which coincide with those findings set forth in the Commission Order entered in this docket on November 4, 1999, which are the subject of said Objections and Request for Clarification and Reconsideration.

<u>FINDING OF FACT NO. 1</u>: Until the FCC adopts a rule with prospective application, should dial-up calls to ISPs be treated as if they were local calls for the purposes of reciprocal compensation?

INITIAL COMMISSION DECISION

The Commission concluded that the parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by the Commission's Order in this docket, subject to true-up at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

COMMENTS/OBJECTIONS

BELLSOUTH: BellSouth has asked the Commission for clarification or reconsideration of the following:

1. Confirmation that any compensation paid pursuant to the interim inter-carrier compensation mechanism will be trued-up retroactively to the effective date of the Interconnection Agreement resulting from this Arbitration. BellSouth requested clarification on this point because of the dual true-up referenced by the Commission in its RAO — (1) an interim true-up based on the establishment of final unbundled network element (UNE) rates and (2) a final true-up based on the upcoming FCC decision. BellSouth believes that the reciprocal compensation rates should be trued-up once the Commission establishes rates in the UNE docket without regard to any action from the FCC.

2. Clarification regarding the procedure that the parties are to utilize to effectuate the true-up. BellSouth argued that the true-up should be triggered and based upon an effective Order by the FCC. Theoretical alternative dates would be when the FCC decision is released, or as the Commission has implied, after Commission action pursuant to that Order.

3. Reconsideration of the interim-carrier compensation rates for ISP-bound traffic and consideration of an alternative for payment of those rates. BellSouth noted that the Commission had established interim inter-carrier compensation rates at the same level as reciprocal compensation rates for local traffic but, in light of the fact that the interim inter-carrier compensation plan adopted here will be the template for other agreements, BellSouth argued that the rates paid for ISP-bound traffic should reflect the longer holding times associated with ISP-bound traffic. Specifically, BellSouth stated it is willing to accept the 20-minute call duration originally proposed by ICG in this Arbitration. This would yield a minute of use (MOU) total rate of $0.0022806.

BellSouth also requested that the Commission reconsider its ruling regarding payment and allow BellSouth to make payments pursuant to the plan in an interest-bearing escrow account. BellSouth cited substantial risk that it would be unable to recover those funds at final true-up, especially from smaller CLPs.

ICG: ICG urged the Commission to reject BellSouth's request that it modify the inter-carrier compensation rates for ISP-bound traffic based on an average call length (ACL) factor of 20 minutes. ICG argued that the costs it incurs for delivering calls to BellSouth customers are the same regardless of whether the called party is an ISP and thus there is no basis for a different compensation rate. ICG also chided BellSouth for attempting to insert new data in this proceeding purporting to show that the flow of compensation would be one-sided on a statewide basis by citing evidence in another proceeding (BellSouth/Time Warner, Docket No. P-472, Sub 15). Finally, ICG also maintained that BellSouth had not presented the Commission with a workable, alternative compensation mechanism.

ICG further noted that the 20-minute ACL proposal had been originally submitted by ICG itself in response to the Commission's Order seeking alternative approaches to compensation, but that the ICG proposal assumed that the proposed rate would be applied to all calls, not just ISP-bound calls. Moreover, ICG had noted that it had not done a study of actual call lengths and that the 20-minute figure was an "overly conservative" estimate of actual call lengths. In any event, the Commission rejected the ACL proposal. BellSouth is also using the new costs/rates which it proposed in the UNE docket, but these are final rates and not in effect yet. ICG further stated that ISP-bound calls are indistinguishable from other calls; thus there is not a reliable way to identify them.

With respect to BellSouth's requests for clarification, ICG expressed puzzlement. To the extent that BellSouth is asking whether the true-up will be to the final UNE rates and will occur when the FCC issues its final ruling, this would appear consistent with the Order. The true-up, however, should not occur upon the effective date of the FCC Order, since the Commission has made it plain that subsequent proceedings to implement the FCC ruling will be needed.

ICG emphatically rejected BellSouth's proposal that the payments be held in escrow as the Commission did in its original ruling.

PUBLIC STAFF: The Public Staff did not address this issue in its Response to Request for Reconsideration.

DISCUSSION

There are two major issues for consideration. The first is BellSouth's request for an alternative inter-carrier compensation mechanism based on a 20-minute ACL rather than one based on the sum of certain UNE rates. The other is BellSouth's request for clarification.

With respect to the first item, the Commission sees no reason to depart from the decision that it has already made on this matter. It is, to say the least, ironic for BellSouth to propose what in essence was a tentative proposal, later withdrawn, originally made by ICG in response to the Commission's request for "creative thinking" on inter-carrier compensation. Apparently, the merits of this proposal became obvious to BellSouth only after its own proposal was rejected. Meanwhile, the merits have become less persuasive to ICG, since it extensively critiqued the deficiencies of the ACL proposal in its reply to BellSouth. This only fortifies the Commission's belief that it would be on the right track to stand by an interim mechanism that is relatively simple and straight forward and tracks the reciprocal compensation rates applicable to other calls.

With respect to BellSouth's request for clarification regarding the inter-carrier compensation rates for ISP-bound traffic, the Commission makes the following clarification:

1. There is to be a first true-up applicable to all traffic subject to reciprocal compensation when the interim UNE rates become final UNE rates. However, if the final UNE rates are effective before the Interconnection Agreement becomes effective, then the final UNE rates will apply, and no such true-up will be necessary. The true-up will be retroactive to the effective date of the Interconnection Agreement resulting from this Arbitration.

2. There is to be a second true-up applicable to ISP-bound traffic at such time as the Commission has issued an Order setting up a permanent inter-carrier compensation mechanism for ISP-bound traffic. The true-up will be retroactive to the effective date of the Interconnection Agreement resulting from this Arbitration.

Finally, with respect to BellSouth's request that BellSouth be allowed to make payments into an interest-bearing escrow account rather than to the CLPs, the Commission finds it appropriate to reject this proposal for the reasons originally set out in the RAO.

CONCLUSIONS

The Commission upholds and reaffirms its original decision in this regard. Further, the Commission finds it appropriate to clarify the true-up process as outlined above.

FINDING OF FACT NO. 2: For purposes of reciprocal compensation, should ICG be compensated for end office, tandem, and transport elements of termination where ICG's switch services a geographic area comparable to the area served by BellSouth's tandem switch?

INITIAL COMMISSION DECISION

The Commission concluded that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, the Commission found that ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

COMMENTS/OBJECTIONS

BELLSOUTH: BellSouth contended that in its RAO, the Commission relied heavily on FCC *Rule* 51.711(a)(3), and failed to consider the FCC's *discussion* of Rule 51.711, which sets forth a two-prong test that must be satisfied prior to a CLP being entitled to reciprocal compensation at the

ILEC's tandem interconnection rate. BellSouth noted that, in its discussion, the FCC identified two requirements that ICG, or any CLP, must satisfy in order to be compensated at the tandem interconnection rate: (1) the CLP's network must perform functions similar to those performed by the ILEC's tandem switch; and (2) the CLP's switch must serve a geographic area comparable to the geographic area served by the ILEC.

BellSouth stated that ICG failed to satisfy the first prong of the FCC's two-prong test because ICG's network does not actually perform functions similar to those performed by BellSouth's tandem switch. While ICG's switch may be capable of performing tandem switching functions when connected to end office switches, capability is not the test. Throughout the testimony, ICG repeatedly concluded that ICG's switch "performs the same functionality as the BellSouth tandem switch and end office switch combined." ICG, however, did not offer any evidence to support a conclusion that the ICG switch actually performs functions similar to BellSouth's tandem switch.

BellSouth contended that the only evidence presented by ICG concerning switch functionality revolved around a network diagram attached to witness Starkey's direct testimony. (Starkey direct, at page 22 - diagram 3.) Based on ICG's network diagram, it is clear that: (1) ICG does not interconnect end offices or perform trunk-to-trunk switching, but rather performs line-to-trunk or trunk-to-line switching; (2) to the extent ICG has a switch in North Carolina, it performs only end-office switching functions and does not switch BellSouth's traffic to another ICG switch; and (3) based on the information provided, ICG's switch does not provide other centralization functions, namely call recording, routing of calls to operator services, and signaling conversion for other switches, as BellSouth's tandems do and as required by the FCC's rules.

BellSouth argued that while ICG witness Starkey insists that ICG's switch performs the same functions as a BellSouth tandem switch, the network design included in witness Starkey's testimony shows that each of ICG's collocation arrangements serve only as an intermediate point in ICG's loop plant. Without specific information from ICG to the contrary, the "piece of equipment" in ICG's collocation cage appears to be nothing more than a Subscriber Loop Carrier, which is part of loop technology and provides no "switching" functionality. ICG's switch is not providing a transport or tandem function, but is switching traffic through its end office for delivery of traffic from that switch to the called party's premises. No switching is performed in these collocation arrangements. These lines are simply long loops transported to ICG's switch; they are not trunks. Long loop facilities do not quality as facilities over which local calls are transported and terminated as described by the Telecommunications Act of 1996 (TA96) and therefore are not eligible for reciprocal compensation.

BellSouth stated that other state commissions have rejected arguments that a CLP's switch performs the same functions as a tandem switch. BellSouth specifically referenced orders by the Florida Public Service Commission which concluded that "...MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function." Order No. PSC-97-0294-FOF-TP, Docket 962121-TP, at 1011 (March 14, 1997), and also Order No. PSC-96-1532-FOF-TP, Docket No. 960838-TP, at 4 (December 16, 1996) which concluded that "...evidence in the record does not support MFS' position that its switch provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation."

BellSouth argued that even assuming ICG's switch performs the same functions as BellSouth's tandem switch, there is no evidence in the record that ICG's switch serves a geographic area comparable to BellSouth's tandem switch. BellSouth pointed out there is a distinction between actually serving and being capable of serving. BellSouth stated that, in fact, other than generally referencing ICG switches, there is no record evidence that ICG has a switch in North Carolina.

BellSouth contended that when it attempted to determine the number of customers ICG has in North Carolina, ICG conveniently refused, claiming that such information was proprietary. BellSouth stated that ICG also failed to identify where the unknown number of customers are located — information that is essential to support a finding that ICG's switch serves a comparable geographic area. BellSouth contended that under no set of circumstances could ICG seriously argue in such a case that its switch services a comparable geographic area to BellSouth. See Decision 99-09-069, In Re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom, Application 99-03-047, at 15-16 (September 16, 1999) California Public Service Commission (finding "unpersuasive" MFS's showing that its switch served a comparable geographic area when many of MFS's ISP-bound customers were actually collocated with MFS's switch.)

BellSouth contended that ICG failed to make a showing that its network performs functions similar to those performed by BellSouth's tandem switch and that its switch serves a geographic area comparable to BellSouth's. For these reasons, BellSouth argued that the Commission should reconsider its decision and deny ICG's request for reciprocal compensation at the tandem interconnection rate.

ICG: ICG contended that the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's tandem interconnection rate is supported by the evidence of record. In response to BellSouth's claim that the Commission failed to consider the FCC's discussion of Rule 51.711, specifically, that the Commission failed to address both parts of the FCC's two-prong test, ICG contended that the Commission did consider BellSouth's contention that Rule 51.711 contains a two criterion test — and squarely rejected it. The Commission expressly held that the FCC "requires only that a CLP's switch serve a geographic area comparable to that served by an ILEC's tandem to qualify for the tandem termination rates." The Commission should summarily reject BellSouth's attempt to re-argue a point on which the Commission has clearly, and correctly, ruled.

ICG further argued that the only relevant criterion is whether ICG's switch serves a geographic area comparable to that served by BellSouth's tandem. BellSouth simply refuses to recognize that the evidence it claims to be nonexistent is amply spread throughout the record and that it is totally consistent with the Commission's findings and conclusions on this issue. ICG witnesses Starkey and Schonhaut presented evidence demonstrating that ICG's switch serves a comparable geographic area to that served by BellSouth's tandem switch.

ICG contended that the record evidence is uncontroverted. BellSouth has not so much as suggested, much less proven, that the geographic area served by its tandem switch is not comparable to the area served by ICG's switch. Nor did BellSouth introduce any evidence whatsoever and did not cross-examine ICG's witnesses on this point.

ICG further contended that the record in this proceeding clearly demonstrates that ICG's switch also provides the same functionality as BellSouth's tandem. As ICG witness Starkey testified: "ICG's switching platform transfers traffic amongst discrete network nodes that exist in the ICG network for purposes of serving groups of its customers in exactly the same fashion that [BellSouth's] tandem switch distributes traffic."

ICG argued that BellSouth misses the point of Rule 51.711. BellSouth essentially argues that ICG's switch cannot meet the tandem switching definition because ICG's switch does not route traffic between other ICG switches. Rule 51.711 contemplates that a single CLP switch will serve the same function in the CLP's network that a tandem and multiple serving central office switches serve in the ILEC's network. The rule would be rendered meaningless if CLPs were required to duplicate the ILEC's network architecture in order to qualify for the tandem rate. The FCC made clear that in constructing their networks CLPs may opt to use new technologies that were unavailable when the ILEC's networks were designed: "... states shall ... consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and, thus, whether some or all calls terminating on the new entrant's network should qualify for the tandem rate." ICG contended that its fiber ring is precisely the sort of new technology the FCC had in mind when it adopted Rule 51.711.

In its Reply to the Public Staff's Response to Request for Reconsideration, ICG restated that Rule 51.711 of the FCC rules provides a single criterion for tandem rate eligibility — whether the competing carrier's switch serves an area comparable to that of the ILEC's tandem switch. ICG maintained that the Commission thus correctly rejected the Public Staff's argument that, in order to qualify for the tandem rate, Rule 51.711 requires a competing carrier to also demonstrate that its switch provides functionality similar to that provided by the incumbent's tandem switch.

ICG maintained that Rule 51.711 speaks for itself and is unambiguous. If a competing carrier is able to make the geographic showing, it is entitled to the tandem rate, regardless of whether it is able to make the functionality showing.

ICG suggested that the Public Staff's Response should be disregarded and that BellSouth's Request should be denied. As noted in ICG's Opposition to BellSouth's Request, ICG's evidence that the ICG switch serves an area comparable to that served by the BellSouth tandem is uncontroverted in the record.

ICG also contended that even though it is not required, the record demonstrates that ICG's switch functions as a tandem. ICG explained that its witness Starkey offered detailed testimony explaining the configuration of ICG's network and specifically addressed the switch functionality issue. Witness Starkey testified that ICG's network consists of a Lucent 5ESS switch which performs both Class 4 and Class 5 functions, SONET nodes collocated at BellSouth end offices and in ICG on-network buildings, and a fiber optic ring.

ICG contended that the fact that ICG's network incorporates collocated SONET nodes instead of Class 5 central office switches, as BellSouth witness Varner pointed out in his direct testimony, is irrelevant. This difference in architecture between the two networks is a result of the technology each carrier has chosen in an effort to best serve its particular customer base. Witness Starkey testified:

> At the time the majority of the ILEC network was built, switches were very limited in the number of individual lines they could service and copper plant was the most expensive portion of the network to deploy. Therefore, ILECs chose to trade switching costs for copper plant costs by deploying greater numbers of switches and shorter copper loops. However, with the advent of relatively inexpensive fiber optic transport facilities and the enormous switching capacity available in today's switching platforms, the economics of the switch/transport tradeoff have changed.

As witness Starkey further explained in his testimony, ICG's network consists of a centrally-located host switch (defined in the Local Exchange Routing Guide (LERG) as a combination Class 4/Class 5 switch) that supports other, individual switching nodes that are collocated either in BellSouth central offices or in customer locations. ICG's fiber optic ring connects these discrete switching nodes within its network and transfers traffic amongst those nodes. This is exactly the function that BellSouth's tandem switch serves in the BellSouth network. The fact that ICG is not required to place fully-featured Class 5 switches in each collocation does not detract from the fact that the ICG network performs exactly the same function as the BellSouth network; it simply uses a different architecture to accomplish the same tasks. This is exactly what the FCC envisioned in paragraph 1090 of the Local Competition First Report and Order when it directed state commissions to "...consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem...."

ICG stated that the arguments of the Public Staff and BellSouth are premised on the faulty assumption that competing carriers must mimic the incumbents' network to qualify for the tandem interconnection rate. ICG believes that tandem rate eligibility depends solely on geographic service area comparability as expressly provided in Rule 51.711. However, even if the Commission were to conclude that functionality is a second requirement, the Commission could not conclude that identical functionality is the standard. The often quoted paragraph 1090 from the Local Competition First Report and Order expressly contemplates that competing carriers will employ different network architectures than those used by incumbents. In that Order, the FCC notes that new technologies may "perform functions similar - not identical - to those performed by incumbents' tandem switches."

ICG contended that the Public Staff is mistaken in its belief that ICG relies on the fact that its switch serves as a point of interconnection for interexchange carriers (IXCs) and an access point for operator services to establish the tandem status of ICG's switch. These two functions are included in a general description of tandem functionality. Witness Starkey testified that the ICG switch performs nearly all of the functions included in the tandem definition included in the LERG. Indeed, the LERG definition provides that a switch is defined as a tandem if it performs one or more of a list of functions. Witness Starkey testified that the ICG switch performed "nearly all" of the functions enumerated in the LERG. ICG reiterated, however, that no FCC rule or order makes inclusion of a switch in the LERG a requirement for tandem rate eligibility.

In conclusion, ICG stated it has met its burden of proving that its Charlotte switch serves an area comparable to that of BellSouth's tandem. ICG asserted that the record evidence on this issue is uncontroverted, and there is no basis to disturb the Commission's conclusion.

PUBLIC STAFF: The Public Staff did not address this issue in its Proposed Order. However, in its Response to Request for Reconsideration, the Public Staff stated that it now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by a LEC.

The Public Staff indicated that by reading Paragraph 1090 of the FCC's First Report and Order in CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, as a whole, and as an indication of the FCC's intent in promulgating Rule 51.711, it is clear that the functionality of the interconnecting carrier's network must be considered for the purpose of determining whether the carrier should be compensated for tandem switching. The FCC specifically directs the states to consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch. If the only requirement were that the interconnecting carrier's switch serve an area comparable to the LEC's tandem switch, any consideration of the new technologies would be completely irrelevant.

The Public Staff contended that ICG's fiber ring is apparently a means of connecting its switch to its customers. Fiber rings can also be used to interconnect end office switches and to reroute traffic in the event that an interoffice circuit is cut. Such is the case with BellSouth. ICG's ring, on the other hand, does not extend between switches, but between ICG customers, and between ICG customers and the ICG switch from which dial tone is provided. Under normal circumstances, in the termination of a call delivered to ICG by BellSouth, the ICG ring does not perform a function even remotely similar to that of a tandem switch. It actually serves as the loop between the ICG switch, where end office switching is done, and the ICG customer. Tandem switching, if it was involved, would occur at the other end of the circuit, even before the call reached the end office from which dial tone is provided.

The Public Staff stated that ICG's assertions that its switch qualifies as a tandem because it serves as a point of interconnection for traffic to and from IXCs, and as ICG's access point for operator services for its customers are not persuasive. Even if these are considered tandem functions for some purposes, they have no bearing on the issue at hand unless they are actually employed in the process of terminating calls delivered to ICG by BellSouth. Since they are not so employed, they do not qualify ICG for tandem switching and transport compensation.

The Public Staff recommended that the Commission reconsider and reverse Finding of Fact No. 2 and Ordering Paragraph No. 2 of the RAO dated November 4, 1999.

The Public Staff also suggested that the Commission consider this issue in conjunction with its deliberations in the pending arbitration between BellSouth and ITC^DeltaCom in Docket No. P-500, Sub 10.

DISCUSSION

The difference in the positions of the parties appears to be due to ambiguity between the language in the FCC's discussion of this issue, Paragraph 1090, and the language in the FCC's Rule 51.711.

ICG's position is that the only relevant criterion is whether ICG's switch serves a geographic area comparable to that served by BellSouth's tandem as stated in Rule 51.711(a)(3). However, even if that is the only requirement, ICG believes that its switch performs the same functionality as BellSouth's tandem switch as discussed in Paragraph 1090 of the FCC's First Report and Order.

BellSouth's position is that the discussion of Rule 51.711 which addresses functionality must be considered as well as Rule 51.711(a)(3) and that ICG does not meet either requirement.

The Public Staff's position supports that of BellSouth.

Paragraph 1090 of the First Report and Order states:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. *In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch.* (Emphasis added) Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. (First Report and Order, CC Docket 96-98, Paragraph 1090) (August 6, 1996).

Rule 51.711(a)(3) states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

On February 7, 2000, ICG and BellSouth filed maps in response to a Commission Order. BellSouth filed a map depicting the geographic coverage of BellSouth's local access and transport area (LATA) tandem switch and a map depicting BellSouth's local tandem switch in the Charlotte area. ICG filed a map showing ICG's Charlotte serving area. These maps are hereby allowed in evidence in this proceeding as late-filed exhibits.

The Commission is unpersuaded by the arguments of BellSouth and the Public Staff in this matter. The Commission believes, based on the evidence in the record, including the maps filed by the parties on February 7, 2000, that ICG has met its burden of proof that its switch serves a comparable geographic area to that served by BellSouth's tandem switch for the Charlotte serving area. Although such information may be both useful and relevant, the Commission can find no basis for BellSouth's argument that the location of actual customers is essential to support a finding that ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch in either Paragraph 1090 or Rule 51.711 of the FCC's First Report and Order. The Commission believes that the testimony of ICG witness Starkey was more cogent and convincing than that of BellSouth witness Varner and that witness Starkey clearly demonstrated that the technologies employed by ICG's network provide functions that are the same as or similar to the functions performed by BellSouth's tandem switch and, in fact, meet both the criteria discussed in the parties' filings.

Since we are persuaded that ICG has demonstrated both geographic and functional capability in this case, we believe that it is unnecessary at this time to decide the question of whether both criteria must be satisfied in order for a CLP such as ICG to receive compensation at the tandem interconnection rate for reciprocal compensation purposes.

CONCLUSIONS

The Commission upholds and reaffirms its original decision and concludes that for reciprocal compensation purposes, based on the fact that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and provides functionality the same as or similar to that provided by BellSouth's tandem switch, ICG is entitled to compensation at the tandem interconnection rate.

The Commission strongly advises parties involved in future arbitrations where inclusion of the tandem switch element for reciprocal compensation purposes is an issue to file maps showing their serving areas as compared to that of the ILEC serving area, along with substantial testimony including a description of the switch(es) and associated technology necessary to provide service; the number and location of customers, if available; and any other information relevant to capability or intent to serve.

IT IS, THEREFORE, ORDERED as follows:

1. That the Composite Agreement submitted by BellSouth and ICG is hereby approved, subject to such modifications as may be required by this Order.

2. That BellSouth and ICG shall revise the Composite Agreement in conformity with the provisions of this Order and shall file the revised Composite Agreement for review and approval by the Commission not later than 15 days from the date of this Order. Should no revisions be necessary to the Composite Agreement, the parties shall so advise the Commission not later than 15 days from the date of this Order.

3. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

4. That the maps filed in this docket by BellSouth and ICG on February 7, 2000, be, and the same are hereby, admitted in evidence as late-filed exhibits.

ISSUED BY ORDER OF THE COMMISSION.
This the _1st_ day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

bc030100.01

DOCKET NO. P-582, SUB 6

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition by ICG Telecom Group, Inc., for Arbitration of the Interconnection Agreement with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996	)	ORDER APPROVING COMPOSITE AGREEMENT

BY THE COMMISSION: On November 4, 1999, the Commission issued a Recommended Arbitration Order (RAO) in this docket directing the parties, among other points, to prepare and file a Composite Agreement in conformity with the conclusions of the RAO. On March 1, 2000, the Commission issued an Order Ruling on Objections, Request for Clarification, Reconsideration, and Composite Agreement. On May 4, 2000, the parties submitted a Composite Agreement to replace an unexecuted agreement filed March 17, 2000. The Commission has examined the modified Composite Agreement and concludes that it should be approved.

ISSUED BY ORDER OF THE COMMISSION.
This the _31st_ day of _May_, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz053000.14

TELECOMMUNICATIONS - ARBITRATION

DOCKET NO. P-500, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Petition by ITC^DeltaCom Communications, Inc. For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996) RECOMMENDED ARBITRATION ORDER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on October 18-20, 1999

BEFORE: Commissioner Sam J. Ervin, IV, Presiding, and Commissioners Judy Hunt and William R. Pittman

APPEARANCES:

FOR ITC^DELTACOM COMMUNICATIONS, INC.:

Charles C. Meeker and Henry C. Campen, Jr., Parker, Poe, Adams & Bernstein, L.L.P., First Union Capitol Center, Suite 1400, 150 Fayetteville Street Mall, Raleigh, North Carolina 27602-0389

Nanette S. Edwards - Senior Manager and Regulatory Attorney, 700 Boulevard South, Suite 101, Huntsville, Alabama 35802

David I. Adelman, Sutherland, Asbill & Brennan, L.L.P., 999 Peachtree Street, NE, Atlanta, Georgia 30309-3996

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Edward L. Rankin, III, General Counsel - North Carolina, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

Thomas B. Alexander, General Attorney and Bennett L. Ross, General Attorney, BellSouth Telecommunications, Inc., 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375-0001

FOR THE USING AND CONSUMING PUBLIC:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission pursuant to Section 252(b) of the Telecommunications Act of 1996 (TA96 or the Act) and Section 62-110(fl) of the North Carolina General Statutes. On June 14, 1999, ITC^DeltaCom Communications, Inc. (DeltaCom) filed a Petition for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. (BellSouth) in this docket which initiated this proceeding. By its Petition, DeltaCom requested that the Commission arbitrate certain terms and conditions with respect to interconnection between itself as the petitioning party and BellSouth.

The purpose of this arbitration proceeding is for the Commission to resolve the issues set forth in the Petition and Responses. 47 U.S.C.A. Section 252(b)(4)(C). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission (FCC) regulations pursuant to Section 252. Additionally, the Commission shall establish rates according to the provisions in 47 U.S.C.A. Section 252(d) for interconnection, services or network elements, and shall provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C.A. Section 252(c).

Pursuant to Section 252 of TA96, the FCC issued its First Report and Order in CC Docket Numbers 96-98 and 95-185 on August 8, 1996 (Interconnection Order). The Interconnection Order adopted a forward-looking incremental costing methodology for pricing unbundled network elements (UNEs) which an incumbent local exchange company (ILEC) must sell new entrants, adopted certain pricing methodologies for calculating wholesale rates on resold telephone service, and provided proxy rates for State Commissions that did not have appropriate costing studies for UNEs or wholesale service. Several parties, including this Commission, appealed the Interconnection Order and on October 15, 1996, the United States Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing provisions and its "pick and choose" rule pending the outcome of the appeals.

The July 18, 1997 ruling of the Eighth Circuit, as amended on rehearing October 14, 1997, was largely in favor of state regulatory commissions and local phone companies and adverse to the FCC and potential competitors, primarily long distance carriers. The Eight Circuit held that 47 U.S.C.A. Sections 251 and 252 "authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." The Court of Appeals also vacated the FCC's "pick and choose rule." Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

On January 25, 1999, the United States Supreme Court entered its Opinion in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999). The Supreme Court held, in pertinent part, that (1) the FCC has jurisdiction under Sections 251 and 252 of the Act to design a pricing methodology and adopt pricing rules; (2) the FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the Act; (3) it was proper for the FCC in Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided by competitors; (4) the FCC did not adequately consider the Section 251(d)(2) "necessary and impair" standards when it gave requesting carriers blanket access to network elements in Rule 319; (5) the FCC reasonably omitted a facilities-ownership requirement on requesting carriers; (6) FCC Rule 315(b), which forbids ILECs to separate already-combined network elements before leasing them to competitors, reasonably interprets Section 251(c)(3) of the Act, which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements; and (7) FCC Rule 809 (the "pick and choose" rule), which tracks the pertinent language in Section 252(i) of the Act almost exactly, is not only a reasonable interpretation of the Act, it is the most readily apparent. The Supreme Court remanded the cases back to the Eighth Circuit Court of Appeals for proceedings consistent with its opinion.

On June 10, 1999, the Eighth Circuit Court of Appeals entered an Order on remand in response to the Supreme Court's decision which, in pertinent part, reinstated FCC Rules 501-515, 601-611, and 701-717 (the pricing rules), Rule 809 (the "pick and choose" rule), and Rule 315(b) (ILECs shall not separate requested network elements which are currently combined). The Eighth Circuit also vacated FCC Rule 319 (specific unbundling requirements). The Court set a schedule for briefing and oral argument of those issues which it did not address in its initial opinion because of its ruling on the jurisdictional issues. The Court also requested the parties to address whether it should take any further action with respect to FCC Rules 315(c) - (f) regarding unbundling requirements. Iowa Utilities Board v. FCC, ___ F.3d ___ (Order Filed June 10, 1999).

By Order dated June 29, 1999, the Commission set this matter for hearing on October 18, 1999.

On July 9, 1999, BellSouth filed its prefiled direct testimony as well as its Response to DeltaCom's Petition for Arbitration.

On July 26, 1999, DeltaCom prefiled its rebuttal testimony.

On September 27, 1999, the Public Staff of the North Carolina Utilities Commission filed a Notice of Intervention in this proceeding.

On October 1, 1999, BellSouth filed a Motion to Resolve Issues. In its Motion, BellSouth requested that certain arbitration issues concerning UNEs and collocation be transferred to Docket No. P-100, Sub 133d, the Commission's generic UNE docket, and Docket No. P-100, Sub 133j, the Commission's generic collocation docket. On October 8, 1999, DeltaCom filed its Opposition to BellSouth's Motion to Resolve Issues.

On October 11, 1999, the Commission issued its Order Concerning UNEs and Collocation Issues. The Commission deferred nine issues from the arbitration proceeding which concerned UNEs or collocation.

On October 13, 1999, DeltaCom filed a Motion for Clarification and to Defer Issues in which DeltaCom asked the Commission: (1) to clarify that its existing Interconnection Agreement with BellSouth will remain in effect until all issues deferred to the generic dockets have been decided and (2) to defer consideration of the issues relating to the reciprocal compensation associated with Internet Service Providers (ISPs) pending the Commission's decision in the ICG Telecom Group, Inc. (ICG) arbitration docket, Docket No. P-582, Sub 6. Specifically, DeltaCom was concerned with the 449 extended loops in service serving current customers in North Carolina and the status of the extended loops regarding additional customers.

On October 14, 1999, BellSouth prefiled redacted testimony.

On October 15, 1999, the Public Staff filed its Reply to DeltaCom's Motion for Clarification and to Defer Issues. With respect to the deferral of issues, the Public Staff supported the request of

DeltaCom, saying that it is clearly in the public interest that there is no service disruption for DeltaCom customers receiving service via extended loops during the pendency of these issues. With respect to the deferral of a hearing concerning reciprocal compensation issues until a decision is issued in the pending arbitration between BellSouth and ICG, the Public Staff supported deferral of the reciprocal compensation issues to a generic proceeding.

On October 15, 1999, BellSouth filed its Response to DeltaCom's Motion. BellSouth argued that DeltaCom's Motion regarding continued operation under the existing Interconnection Agreement should be denied as unnecessary, and it stated that it did not oppose DeltaCom's Motion to defer consideration of issues related to inter-carrier reciprocal compensation as long as such consideration occurs within the context of a general proceeding as requested by BellSouth, and not within the pending ICG arbitration.

By Order dated October 15, 1999, the Commission concluded that good cause existed to defer consideration of issues in this docket relating to reciprocal compensation. The Commission reserved the question of deferring the reciprocal compensation issue pending the issuance of an Order in the ICG/BellSouth arbitration docket or pending the conclusion of a generic docket such as that proposed by BellSouth. The Commission further concluded that a decision regarding DeltaCom's Motion concerning continued operation under the existing Interconnection Agreement should be deferred pending further argument and clarification from the Parties at the beginning of the hearing scheduled for October 18, 1999.

This matter came on for hearing as scheduled on October 18, 1999. At the beginning of the hearing, the Commission Panel heard oral arguments for reconsideration of its decision to defer consideration of the reciprocal compensation issues. The Commission concluded that it would hear evidence on the issue of reciprocal compensation in the hearing. The Commission Panel also heard arguments from BellSouth and DeltaCom concerning DeltaCom's Motion to hold its existing Interconnection Agreement in effect pending implementation of a further agreement. The arguments concerned BellSouth's provision of extended loops to existing and prospective customers.

Following the preliminary oral argument, the hearing commenced. DeltaCom offered the direct and rebuttal testimony of Christopher J. Rozycki, Director of Regulatory Affairs for DeltaCom; the direct and rebuttal testimony of Michael Thomas, Director - Information Services for DeltaCom; and the direct and rebuttal testimony of Thomas Hyde, Senior Manager - Industry Relations for DeltaCom. The direct testimony of Don J. Wood was entered into the record by stipulation. BellSouth offered the direct testimony of Dr. William E. Taylor, Senior Vice President of National Economic Research Associates, Inc.; the direct testimony of Alphonso J. Varner, Senior Director - Regulatory Policy and Planning for BellSouth; the direct testimony of Ronald M. Pate, Director - Interconnection Services for BellSouth; the direct testimony of David P. Scollard, Manager - Wholesale Billing for BellSouth Billing, Inc., a subsidiary of BellSouth; and the direct testimony of W. Keith Milner, Senior Director - Interconnection Services for BellSouth.

In response to the oral argument held on October 18, 1999, the Commission entered an Order on October 19, 1999, requesting that BellSouth and DeltaCom each make a filing by October 22, 1999, setting forth: (1) a concise restatement of their arguments, (2) citations and text of relevant sections of the existing Interconnection Agreement, (3) the substance of the terms of the oral agreement between the Parties concerning continuation of service referred to at the October 18, 1999 oral argument, (4) the rates applicable to the extended loops and collocation service and authority therefor, and (5) each party's "bottom line" concerning the terms and conditions under which a continuation of service as to extended loops to new and existing customers would be effected.

On October 21, 1999, the Commission issued its Post-Hearing Order wherein the Commission instructed the Parties to consult with each other to arrive at a common list of remaining disputed issues consistently numbered and identified. The Commission further requested the Parties to prepare a post-hearing matrix to be submitted at the same time as Proposed Orders and Briefs.

DeltaCom and BellSouth both submitted their filings on October 22, 1999 in compliance with the Commission's October 19, 1999 Order. DeltaCom's "bottom line" position was that the Interconnection Agreement provided for continuation of extended loop service for new customers in North Carolina until the Commission ruled on this issue in the generic docket. BellSouth's "bottom line" position was that it is under no obligation under either the Agreement or the FCC rules to combine unbundled elements with BellSouth's retail services. BellSouth argued that the extended loops were provided to DeltaCom in error by BellSouth employees unfamiliar with the terms of the Agreement. To avoid a complete disruption of DeltaCom's service, however, BellSouth reached an oral agreement with DeltaCom by which BellSouth would continue to provision these extended loops until such time as DeltaCom could establish collocation arrangements in the affected central offices. Until these collocation arrangements are completed, BellSouth also agreed to accept orders from DeltaCom for extended loops to serve new customers, but only for those central offices with existing extended loops and for which collocation requests had been submitted. Further, under the oral agreement, BellSouth will not process any requests for DeltaCom for extended loops involving other central offices.

On November 2, 1999, the Commission entered an Order Concerning Continuation of Service. Through this Order, the Commission provided an interim solution to the dispute of the status of new and existing DeltaCom customers with regard to extended loops. Pursuant to the Order, existing DeltaCom customers who are receiving or have received extended loop service shall be able to receive extended loop service out of central offices already providing service by extended loops. New customers shall be able to receive extended loop service out of central offices already providing service by extended loops. DeltaCom has no obligation to initiate or continue the collocation process at this time in those central offices already providing service to DeltaCom customers by extended loops. BellSouth is under no obligation to provide extended loop service to new customers out of central offices which provide no extended loops service to DeltaCom customers. DeltaCom has the option of converting any extended loop arrangement at central offices where some service is provided to DeltaCom customers via extended loops to a collocation arrangement. The interim solution, which applies only to extended loop arrangements, is subject to prospective revision and change based upon the Commission's generic consideration of issues related to extended loops in Docket No. P-100, Sub 133d.

On December 1, 1999, BellSouth and DeltaCom provided their Notification of Resolved and Unresolved Issues for Purposes for Arbitration.

On December 2, 1999, BellSouth filed a Motion for Reconsideration of the Commission's November 2, 1999 Order concerning continuation of service.

On December 6, 1999, BellSouth and DeltaCom filed their Proposed Orders and Briefs. On that same day, the Public Staff filed its Proposed Order.

On December 13, 1999, DeltaCom filed its Response to BellSouth's Motion for Reconsideration concerning continuation of service.

On December 16, 1999, the Commission issued its Order Denying Motion for Reconsideration.

On December 20, 1999, DeltaCom filed its Motion for Leave to File a Supplemental Brief. DeltaCom stated in its Motion that the Public Staff, in its Proposed Order, raised two issues concerning the tandem switch rate which DeltaCom had not anticipated would be raised. DeltaCom argued that it had not previously briefed the issues and needed to brief the issues now.

On December 21, 1999, BellSouth filed its Response to DeltaCom's Motion. On December 23, 1999, the Public Staff filed its Response to DeltaCom's Motion.

By Order dated December 29, 1999, the Commission allowed Supplemental Briefs.

On December 29, 1999, DeltaCom filed its Supplemental Brief. On January 5, 2000, BellSouth filed its Supplemental Brief.

On January 5, 2000, the Public Staff filed its Response to DeltaCom's Supplemental Brief.

By Order dated January 20, 2000, the Commission required DeltaCom and BellSouth to submit as late-filed exhibits certain information concerning the issue of whether DeltaCom's switches serve a comparable geographic area to BellSouth's tandem switches.

On February 21, 2000, DeltaCom and BellSouth made separate filings in compliance with the Commission's January 20, 2000 Order.

By Order dated February 29, 2000, the Commission sought additional information as late-filed exhibits concerning the tandem switching issue in addition to the maps already provided.

On March 7, 2000, DeltaCom filed its late-filed exhibits in response to the Commission's February 29, 2000 Order. On March 14, 2000, BellSouth filed its Response to DeltaCom's March 7, 2000 late-filed exhibits.

A glossary of the acronyms referenced in this Order is attached hereto as Appendix A.

WHEREUPON, based upon a careful consideration of the entire record in this arbitration proceeding, the Commission now makes the following

FINDINGS OF FACT

1. It is more appropriate to consider DeltaCom's proposed performance measurements and performance guarantees in the generic docket (Docket No. P-100, Sub 133k) established to address such issues. Further, the Commission concludes that it is appropriate for the Parties to include BellSouth's most recent Service Quality Measures (SQMs) in their Interconnection Agreement on an interim basis until a Final Order is issued by the Commission in the generic Docket No. P-100, Sub 133k, concerning performance measurements and enforcement mechanisms.

2. BellSouth is not required at this time to map Electronic Data Interchange (EDI) to the Direct Order Entry (DOE) system for all commonly ordered services requested by DeltaCom on behalf of its retail customers. However, the Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. Finally, it is not appropriate to include any additional language in the Interconnection Agreement setting out BellSouth's obligation for providing UNEs and Operations Support Systems (OSS).

3. The appropriate reciprocal compensation rate for local traffic is the sum of the permanent rates for the individual network elements actually used to handle the call as established in Docket No. P-100, Sub 133d. The overall rate, including tandem switching, is approximately $.003 per minute. Further, dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and the relevant rates should mirror those used for reciprocal compensation for local traffic. Such rates shall be subject to true-up at such time as the Commission has ruled pursuant to the FCC's anticipated order on the subject.

4. For reciprocal compensation purposes, DeltaCom should be compensated at BellSouth's tandem interconnection rate.

5. The Parties should incorporate into their new Interconnection Agreement the existing local interconnection arrangements pertaining to the following matters until or unless the Parties reach agreement otherwise: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, and (8) the delivery of traffic between DeltaCom, BellSouth, and a third party. The Commission declines to include any proposed provisions, in this regard, that are not contained in the current local interconnection arrangements. However, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

6. It is reasonable and appropriate to adopt BellSouth's proposed language providing that the party requesting an audit should be responsible for paying for the audit; however, a party overstating Percent Local Usage (PLU) or Percent Interstate Usage (PIU) by 20% or more shall pay for the cost of the audit.

7. The Commission declines to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

8. The Commission declines to require the insertion of a tax liability provision in the Interconnection Agreement but encourages the Parties to continue negotiations on this issue.

9. The Commission declines to require the inclusion of a provision establishing compensation for a material breach of contract in the Interconnection Agreement.

<u>EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1</u>

<u>MATRIX ISSUE NO. 1(a)</u>: Should BellSouth be required to comply with the performance measures and guarantees for pre-ordering/ordering, resale and UNEs, provisioning, maintenance, interim number portability and local number portability, collocation, coordinated conversions, and the bona fide request process as set forth fully in Attachment 10 of Exhibit A to DeltaCom's Petition?

POSITIONS OF PARTIES

DELTACOM: Yes. DeltaCom argued that although the Commission has recently established a generic docket concerning performance measures and guarantees, DeltaCom believes that interim measures should be adopted in this arbitration because it may be some time before a final order is issued in the generic docket. DeltaCom argued that nothing in TA96 gives the Commission authority to preclude certain issues from arbitration simply because those issues affect more than one carrier or because those issues may be considered at a later date. DeltaCom maintained that TA96 specifically mandates that all issues be resolved. DeltaCom argued that this Federal mandate is particularly important in this instance where inadequate service by BellSouth will cause DeltaCom to lose customers and likely damage DeltaCom's reputation. DeltaCom posited that performance measures and guarantees are essential for three primary reasons: (1) BellSouth has competitive and financial incentives to block entry of DeltaCom into the North Carolina market; (2) as the owner of the local loop, BellSouth has the means to limit DeltaCom's ability to provide quality service; and (3) seeking redress through the regulatory complaint procedure or through the courts would be wasteful and ineffective in a competitive environment. DeltaCom stated that performance measures and guarantees are necessary and in the public interest because such provisions would create meaningful incentives for BellSouth to perform. DeltaCom stated that it proposes a three-tier set of performance measures and guarantees. The first tier calls for the waiver of nonrecurring charges when BellSouth fails to provide the ordered service in a timely fashion. The second tier of guarantees is triggered when BellSouth fails to meet a measurement in two out of three months during a quarter. Where such a "Specified Performance Breach" occurs, BellSouth is required to provide compensation of $25,000. The third level of DeltaCom's proposed performance guarantees is triggered only in the cases of extreme and extraordinary nonperformance, where BellSouth fails to meet a single measure five times during a six-month period. For those extreme cases, BellSouth must pay $100,000 for each default, for each day the default continues. Also, DeltaCom is recommending that the second- and third-tier guarantees, if assessed, be paid to a public interest fund. DeltaCom concluded that although the generic docket will provide consistent guidance in this area on a state-wide basis, the Commission should be concerned that several months may elapse before a final order is issued in the generic docket. Therefore, DeltaCom recommended that the Commission find that the performance measures and guarantees contained in Exhibit A at Attachment 10 be in place until the Commission issues a final and nonappealable order in the generic proceeding.

BELLSOUTH: No. BellSouth maintained that despite having made numerous requests early during the negotiations, BellSouth did not receive a copy of Attachment 10 from DeltaCom until the day after the negotiations ended. BellSouth stated that it does not believe that the so-called performance measures and performance guarantees in Attachment 10 to the Petition are appropriate. BellSouth stated that the Parties do not dispute the importance of or need for performance measurements in their Interconnection Agreement, only which performance measures should be included. BellSouth argued that it has offered in its negotiations with DeltaCom comprehensive performance measures that will ensure that BellSouth provides DeltaCom with nondiscriminatory access consistent with the requirements of TA96 and FCC orders and rules known as BellSouth's SQMs. BellSouth further noted that the Commission issued a November 4, 1999 Order establishing a generic docket to address performance measurements and enforcement mechanisms and that docket may be the more appropriate place for a decision regarding this issue. BellSouth recommended that the Commission require the Parties to incorporate BellSouth's SQMs into their Interconnection Agreement as may be subsequently modified consistent with future decisions by the Commission in its recently established generic docket to address performance measurements and enforcement mechanisms. With respect to performance guarantees, BellSouth argued that DeltaCom's proposed performance guarantees constitute financial penalties, which the Commission lacks the statutory or jurisdictional authority under state law to unilaterally award without a hearing and absent BellSouth's prior consent. BellSouth recommended that the Commission specifically decline to adopt any of the performance guarantees offered by DeltaCom, but note that the subject of appropriate enforcement mechanisms will be taken up in Docket No. P-100, Sub 133k.

PUBLIC STAFF: No. The Public Staff stated that on November 4, 1999, the Commission established a generic docket, Docket No. P-100, Sub 133k, for the consideration of performance measures and enforcement mechanisms. The Public Staff maintained that the issues of performance measures and an enforcement mechanism are more appropriate for consideration in that docket. The Public Staff argued that consideration in a generic docket would lead to a uniform decision which would apply to all competing local providers (CLPs) and ILECs operating in North Carolina. The Public Staff recommended that the Commission deny any request by DeltaCom that it establish performance measures and an enforcement mechanism in this case on an interim basis and defer the issue to the generic proceeding since it would be of greater benefit to decide this issue on an industry-wide basis rather than to consider individual cases and make decisions in a piecemeal fashion.

DISCUSSION

The Commission notes that by Order dated November 4, 1999, the Commission established a generic docket to consider performance measurements and enforcement mechanisms which stemmed from the BellSouth/ICG arbitration proceeding (Docket No. P-582, Sub 6). In its Order, the Commission requested the industry, the Public Staff, the Attorney General, and other interested parties to form a Task Force. The Commission notes that, after being granted extensions of time, the Task Force is to file a report with the Commission by not later than May 3, 2000, which outlines specific issues agreed to by the Task Force as well as any issues on which the Task Force is unable to reach agreement. The Commission believes that it would be more appropriate for DeltaCom to actively participate on the Task Force established to address these issues on a statewide level rather than adopting DeltaCom's proposed set of performance measurements in this docket. Further, the Commission believes that BellSouth's proposal to include BellSouth's SQMs on an interim basis until an Order is issued in the generic proceeding in the Interconnection Agreement is a reasonable and appropriate recommendation. However, the Commission's decision is not intended to preclude the Parties from negotiating guarantees as referenced by BellSouth witness Varner during cross-examination by DeltaCom (See Transcript Volume 3, Page 117).

CONCLUSIONS

The Commission concludes that it is more appropriate to consider DeltaCom's proposed performance measurements and performance guarantees in the generic docket established to address such issues. Further, the Commission concludes that it is appropriate for the Parties to include BellSouth's most recent SQMs in their Interconnection Agreement on an interim basis until a Final Order is issued by the Commission in the generic Docket No. P-100, Sub 133k, concerning performance measurements and enforcement mechanisms.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

MATRIX ISSUE NO. 2: Is BellSouth providing services including OSS and UNEs to DeltaCom at parity with that which it provides to itself?

POSITIONS OF PARTIES

DELTACOM: No. DeltaCom argued that its access to OSS must be at parity with BellSouth's access. DeltaCom maintained that its evidence showed that for a customer desiring to switch from BellSouth to DeltaCom and add several commonly ordered services, DeltaCom submits the order for the customer to BellSouth electronically through EDI. DeltaCom stated that by design, such order falls out when it reaches BellSouth and that when the same order is placed by BellSouth to provide the same services with BellSouth as the retail service provider, the order is processed electronically. DeltaCom argued that this example reflects the underlying problem of BellSouth's failure to map EDI to the DOE system. DeltaCom maintained that BellSouth's systems must provide access to OSS for DeltaCom at least equal to that enjoyed by BellSouth. DeltaCom stated that both companies initially enter orders manually - DeltaCom through EDI and BellSouth through DOE - but it is only DeltaCom's orders that must be re-entered by BellSouth personnel. DeltaCom stated that its orders fall out while BellSouth's orders do not. DeltaCom maintained that it is technically feasible for BellSouth to map EDI to DOE and avoid this problem and that the Commission should require BellSouth to do so. DeltaCom recommended that the Commission find that the intent of the parity requirement is that the service really be equal and, therefore, BellSouth should map fully between the EDI and DOE systems for all commonly ordered services requested by DeltaCom on behalf of its retail customers.

BELLSOUTH: Yes. BellSouth stated that it denies that it does not offer OSS and UNEs to DeltaCom at parity. BellSouth stated that it has offered to include language in the Interconnection Agreement consistent with TA96 and the FCC's rules regarding parity of services. BellSouth maintained that TA96 does not require BellSouth to provide DeltaCom with service at levels greater than BellSouth provides to its own end users. BellSouth argued that it is not clear what relief DeltaCom is seeking under this issue that is not already subsumed under other issues. BellSouth stated that FCC Rule 51.311 specifically provides: "The quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an ILEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the ILEC provides to itself." Therefore, BellSouth stated that it is already obligated, by TA96 and the FCC's rules, to provide DeltaCom and any other CLP nondiscriminatory access to telecommunications services, UNEs, and interconnection. BellSouth noted that it currently provides CLPs with nondiscriminatory electronic interfaces to access BellSouth's OSS including: the Local Exchange Navigation System (LENS) and the Telecommunications Access Gateway (TAG) for pre-ordering, ordering, and provisioning; EDI for ordering and provisioning; Trouble Analysis and Facilities Interface (TAFI) for maintenance and repair; Electronic Communications Trouble Administration (ECTA) for maintenance and repair; and Optional Daily Usage File (ODUF), Enhanced Optional Daily Usage File, and Access Optional Daily Usage File for billing. BellSouth asserted that it also offers CLPs manual interfaces to its OSS. BellSouth maintained that these interfaces allow CLPs to perform pre-ordering, ordering, provisioning, maintenance and repair, and billing functions for resale service in substantially the same time and manner as BellSouth does for itself, and, in the case of UNEs, provide a reasonable competitor with a meaningful opportunity to compete, which is all that is required. Further, BellSouth stated that although DeltaCom complains that more than 50% of its orders submitted electronically "fall out" for manual handling, that complaint must be put in proper perspective. BellSouth stated that it would be unfair to attribute every "fall out" to BellSouth and that obviously DeltaCom is having difficulty submitting complete and accurate orders. Also, BellSouth maintained that DeltaCom markets complex business services to its customers and such orders are designed to fall out for manual handling using the same processes that BellSouth uses to handle the same orders for its retail customers. BellSouth noted that its witness Pate testified that "[t]his 'fall out' has nothing to do with any supposed inadequacies in BellSouth's systems, but results from the fact that the requested services are complex." BellSouth also pointed out that witness Pate testified that the manual processes are in compliance with TA96 and the FCC's Rules. In conclusion, BellSouth recommended that the Commission conclude that from the record evidence BellSouth is providing parity of service, as required by TA96 and the FCC's rules, to DeltaCom with respect to access to BellSouth's OSS and to the provision of UNEs. BellSouth recommended that the Commission decline to grant DeltaCom any relief with respect to this issue.

PUBLIC STAFF: Yes. The Public Staff argued that the FCC and the Act effectively set out BellSouth's obligations for providing UNEs and OSS and that, therefore, no further language on this issue is necessary for inclusion in an arbitrated Interconnection Agreement. The Public Staff maintained that BellSouth is not required to give CLPs the same access it has to its OSS, but functionally equivalent access. The Public Staff further stated that it is not satisfied that the language suggested by either party, DeltaCom's "parity equal to or greater in quality" or BellSouth's "meaningful opportunity to compete," completely captures the essence of the Act or the FCC Rules. The Public Staff opined that DeltaCom's requested language could be seen as an invitation to further muddy the waters and that the language appears to raise the standard above that required by the FCC. The Public Staff recommended that the Commission not include additional language in the Interconnection Agreement setting out BellSouth's obligations for providing UNEs and OSS.

DISCUSSION

The Commission agrees with BellSouth that it is not clear from the record what relief DeltaCom is seeking under this issue that is not already subsumed under other issues. First, based on the Proposed Orders and Briefs of BellSouth and the Public Staff, it appears that DeltaCom is requesting that the language "parity equal to or greater in quality" be included in the Interconnection Agreement while BellSouth has suggested the language "meaningful opportunity to compete." DeltaCom requested in its Proposed Order that the Commission require BellSouth to map EDI to the DOE system for all commonly ordered services requested by DeltaCom on behalf of its retail customers.

The Commission notes that BellSouth has stated that it has offered to include language in the Interconnection Agreement consistent with TA96 and the FCC's Rules regarding parity of services. The Commission further notes that it agrees with BellSouth that TA96 does not require BellSouth to provide DeltaCom with service at levels greater than BellSouth provides to its own end users and that the FCC's language refers to service "at least equal in quality to" that which BellSouth provides to itself. Therefore, the Commission does not find it appropriate to include any additional language in the Interconnection Agreement setting out BellSouth's obligations for providing UNEs and OSS.

Additionally, the Commission notes that DeltaCom has requested that the Commission require BellSouth to map EDI to the DOE system for all commonly ordered services requested by DeltaCom on behalf of its retail customers. DeltaCom uses EDI to enter orders while BellSouth uses DOE to enter orders. DeltaCom maintained that by design, orders entered into EDI fall out when they reach BellSouth and that when the same order is placed by BellSouth to provide the same services with BellSouth as the retail service provider, the order is processed electronically. Therefore, DeltaCom maintained, BellSouth's systems are not providing access at least equal to that enjoyed by BellSouth in compliance with TA96 and the FCC. BellSouth asserted that it would be unfair to attribute every "fall out" to BellSouth and that obviously DeltaCom is having difficulty submitting complete and accurate orders. Also, BellSouth maintained that DeltaCom markets complex business services to its customers and such orders are designed to fall out for manual handling using the same processes that BellSouth uses to handle the same orders for its retail customers.

The Commission does not believe parity is obtained through BellSouth's OSS when DeltaCom's orders submitted through EDI fall out when they reach BellSouth for manual handling as evidenced in this record. Nevertheless, the Commission does not find it appropriate at this time to require BellSouth to map EDI to DOE as requested by DeltaCom. The Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. However, the Commission is not inclined at this time to dictate specifically what action BellSouth should take to correct this lack of parity.

CONCLUSIONS

The Commission concludes that BellSouth should not be required to map EDI to the DOE system at this time for all commonly ordered services requested by DeltaCom on behalf of its retail customers. However, the Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. Finally, the Commission concludes that it is not appropriate to include any additional language in the Interconnection Agreement setting out BellSouth's obligation for providing UNEs and OSS.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

MATRIX ISSUE NO. 3: What should be the rate for reciprocal compensation? Should BellSouth be required to pay reciprocal compensation to DeltaCom for all calls that are properly routed over local trunks, including calls to ISPs?

POSITIONS OF PARTIES

DELTACOM: Yes, reciprocal compensation should be paid. Calls to ISPs are the same as calls to local customers and cause the same costs. As a result, reciprocal compensation should be paid for these calls. DeltaCom has proposed a compromise reciprocal compensation rate of $.0045 per minute pending final ruling by the FCC. This rate is approximately one-half the rate in the Parties' current Interconnection Agreement.

BELLSOUTH: With respect to the first issue, the appropriate rate for reciprocal compensation is the sum of the individual network elements that are actually used to handle the call such as transport or switching. The rates for each of these network elements have previously been established by the Commission in its generic UNE cost proceeding.

With respect to the second issue, calls to ISPs, even if routed over local interconnection trunks, are not subject to TA96's requirement of reciprocal compensation. The FCC's recent Declaratory Ruling in CC Docket Nos. 96-98 and 99-68, released on February 26, 1999, confirmed unequivocally that the FCC had, will retain, and will exercise jurisdiction over ISP traffic because it is interstate in nature, not local. Under the provisions of TA96 and the FCC's Orders and Rules, only local traffic is subject to the reciprocal compensation requirements. Thus, reciprocal compensation is clearly not applicable to ISP-bound traffic. In addition to being contrary to the law, treating ISP-bound traffic as local for reciprocal compensation purposes is contrary to sound public policy.

PUBLIC STAFF: The appropriate rates for reciprocal compensation are the interim UNE rates, subject to true-up upon issuance of final rates in Docket No. P-100, Sub 133d. The same rates should apply to ISP-bound traffic as an interim inter-carrier compensation mechanism.

DISCUSSION

This issue includes two parts. The first is the appropriate reciprocal compensation rate for local traffic generally. The second is whether there should be an interim inter-carrier compensation mechanism rate applied to dial-up ISP calls and, if so, at what rate.

With respect to the first part, the Commission agrees with BellSouth and the Public Staff that the appropriate reciprocal compensation rate for local traffic is the sum of the individual network elements actually used to handle the call.[1] These rates were set by Order dated March 13, 2000, in Docket No. P-100, Sub 133d.

With respect to the second part, the Commission concurs with the Public Staff that dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and that the relevant rates should mirror those used for reciprocal compensation for local traffic. This matter has been exhaustively treated in the Commission's Recommended Arbitration Order in Docket No. P-582, Sub 6 (ICG/BellSouth Arbitration), and subsequent rulings related to that docket. There is no need to repeat that discussion here since no new evidence has been introduced for the Commission to reconsider its prior ruling. The Commission believes that the decision in that docket, on this matter, should apply to subsequent arbitrations, including a true-up once the Commission has ruled pursuant to the FCC's anticipated order on the subject.

CONCLUSIONS

The Commission concludes that the appropriate reciprocal compensation rate for local traffic is the sum of the permanent rates for the individual network elements actually used to handle the call as established in Docket No. P-100, Sub 133d. The overall rate, including tandem switching, is approximately $.003[2] per minute.

It is further concluded that dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and that the relevant rates should mirror those used for reciprocal compensation for local traffic. Such rates shall be subject to true-up at such time as the Commission has ruled pursuant to the FCC's anticipated Order on the subject.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

MATRIX ISSUE NO. 3: Should reciprocal compensation include the tandem switching function?

POSITIONS OF PARTIES

DELTACOM: Yes. As in the ICG arbitration, DeltaCom's compensation should include end-office, tandem, and transport elements of termination where its switches serve a geographic area similar to the area served by BellSouth's tandem switches.

BELLSOUTH: No. It is BellSouth's position that, consistent with FCC Rules and industry standards, DeltaCom does not qualify for tandem switching and common transport because its network design does not perform these functions. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function.

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[1] The issue of whether tandem switching should be included is addressed in Finding of Fact No. 4.

[2] The actual rates are: End Office Switching, $.0017 per minute of use (mou); Tandem Switching, $.0009 per mou; Common Transport, $.00001 per mile per mou; and Common Transport Facilities Termination, $.00034 per mou.

PUBLIC STAFF: No. DeltaCom is not entitled to compensation for tandem switching because it has failed to prove that its switches provide the same functions as BellSouth's tandem switches and serve the same geographic areas.

DISCUSSION

DeltaCom witness Rozycki testified that if BellSouth wishes to charge DeltaCom for transport, end-office switching, and tandem switching on its terms, then DeltaCom should be able to charge BellSouth for the same elements. Witness Rozycki further testified that DeltaCom has designed a network where its switches perform the same functions as the BellSouth end-office and tandem switches. DeltaCom uses multifunction switches which serve large geographic areas in a manner similar to BellSouth's tandem switches, and represent precisely the situation contemplated in Section 51.711(a)(3).

In its Proposed Order, DeltaCom again contended that its compensation should include end-office, tandem, and transport elements of termination where such switches serve a geographic area similar to the area served by BellSouth's tandem switch. DeltaCom stated that, in view of the interim rate proposed by DeltaCom, detailed discussion of this issue is not required in the Commission Order, and that the rationale of the ICG/BellSouth Recommended Arbitration Order applies here as well.

BellSouth witness Varner testified that if a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if DeltaCom's switch is identified in the Local Exchange Routing Guide (LERG) as a tandem. Witness Varner explained that a tandem switch connects one trunk to another trunk and is an intermediate switch or connection between an originating call location and the final destination of the call. An end-office switch connects a line to a trunk enabling the subscriber to originate or terminate a call. If DeltaCom's switch is an end-office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus BellSouth argued that DeltaCom's switch is not providing the tandem function. It is BellSouth's opinion that DeltaCom is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide.

In its Proposed Order, BellSouth argued that the FCC has identified two requirements that a CLP such as DeltaCom must meet in order to be compensated at the tandem interconnection rate: (1) DeltaCom's network must perform functions similar to those performed by BellSouth's tandem switch; and (2) DeltaCom's switch must serve a geographic area comparable to BellSouth's. BellSouth argued that DeltaCom cannot meet either of these requirements. BellSouth maintained that while DeltaCom's switch may be capable of performing tandem switching functions when connected to end-office switches, DeltaCom has presented no evidence in this record that proves that DeltaCom's switches perform such functions. BellSouth argued that, for example, there is not any evidence in this record that: (1) DeltaCom interconnects end-offices or performs trunk-to-trunk switching; (2) DeltaCom switches BellSouth's traffic to another DeltaCom switch; or (3) DeltaCom's switch provides other centralization functions, namely call recording, routing of calls to operator services, and signaling conversion for other switches, as BellSouth's tandem switches do and as is required by the FCC's Rules.

BellSouth further argued in its Proposed Order that even assuming DeltaCom's switch performs the same functions as BellSouth's tandem switch (which is not the case), there is no evidence in the record that DeltaCom's switch serves a geographic area comparable to BellSouth's. DeltaCom did not identify where the customers it serves in North Carolina are located -- information that would be essential to support a finding that DeltaCom's switch serves a comparable geographic area.

The Public Staff stated in its Proposed Order that under FCC Rule 51.711, DeltaCom failed to meet its burden of proof by showing that its switches performed similar functions to and served a comparable geographic area as BellSouth's tandem switches. The Public Staff contended that DeltaCom presented a "paucity of evidence" on this issue in this case. Other than DeltaCom witness Rozycki's testimony that DeltaCom's switches performed similar functions to and served a comparable geographic area as BellSouth's tandem switches, in the Public Staff's opinion there appears to be no further showing from DeltaCom as to details of these switches which DeltaCom contends should be treated as tandem switches.

The Public Staff cautioned in its Proposed Order that the FCC has set a high standard of proof on this issue and that it is infeasible, impracticable, and subjective for the Commission to determine whether one geographic area is comparable to another and whether one switch performs similar functions as another. Given the large number of wire centers in the state, there are innumerable permutations and combinations with which the Commission could be presented. The Public Staff opined that rendering a judgment on such issues would demand a substantial amount of Commission time, resources, and technical expertise.

On December 20, 1999, DeltaCom filed a Motion for Leave to File a Supplemental Brief regarding issues concerning the tandem switch rate. An Order Allowing Supplemental Briefs was issued on December 29, 1999.

In its Supplemental Brief, filed December 29, 1999, DeltaCom stated that the Public Staff has misinterpreted Rule 51.711 in a manner which, if adopted by this Commission, would impose a burden of proof on DeltaCom which has no legal basis, and which could result in an improper finding on a crucial issue in this docket. DeltaCom argued that the plain language of FCC Rule 51.711(a)(3) controls this issue. DeltaCom maintained that the Rule does not discuss functional equivalency, nor does it limit the type of switches used by non-ILECs that are entitled to the ILEC's tandem interconnection rate. DeltaCom stated that the Commission is required to adhere to the language of Rule 51.711.

DeltaCom further stated in its Supplemental Brief that the Public Staff erred when it asserted that DeltaCom had the burden of demonstrating that its switches performed similar functions to BellSouth's switches. DeltaCom stated that FCC Rule 51.711(a)(3) makes no mention of tandem functionality, nor does it imply that CLP switches must be functionally equivalent to ILEC tandem switches. If anything, the FCC's language implies an understanding that CLP network design and switch placement could vastly differ from traditional ILEC network design. DeltaCom argued that Rule 51.711 was crafted to ensure that CLPs were not financially penalized or discouraged from designing networks differently than that designed by the incumbent.

DeltaCom also argued in its Supplemental Brief that its testimony reflects that its local switch in North Carolina – located in Greensboro – serves the entire state of North Carolina, a geographic area "comparable" to the area served by BellSouth's tandem switches. DeltaCom stated that it has on file with this Commission a price list which states the geographic area by exchange available to its facilities-based customers served by its North Carolina switch, and the price list shows that DeltaCom serves 73 exchanges located throughout North Carolina from its switch in Greensboro. DeltaCom argued that this arrangement is an example of the types of radically different network designs envisioned in FCC Rule 51.711(a)(3), and also demonstrates why the FCC made no reference to the switches performing "similar functions." DeltaCom argued that its network is fundamentally different from that of BellSouth. Rule 51.711(a)(3) requires only that the Commission consider whether a "comparable" geographic area is served – there simply is no functionality comparison to be made.

DeltaCom contended in its Supplemental Brief that BellSouth did not meet the burden of demonstrating that DeltaCom's switch does not serve such a geographical area, indeed, it is undisputed that DeltaCom's switch in Greensboro serves the entire State of North Carolina. DeltaCom maintained that BellSouth's argument that DeltaCom does not identify its switch in the LERG specifically as a tandem switch is of no legal consequence, because identification of a switch as a tandem in the LERG is not a requirement of FCC Rule 51.711(a)(3). (In a footnote, DeltaCom indicated the tandem function performed by DeltaCom's switch is a local tandem function with the access tandem function performed by a different switch. DeltaCom indicated that it is in the process of listing its North Carolina switch as a local tandem switch in the LERG.)

DeltaCom further contended that the language of Rule 51.711(a)(3) demonstrates that DeltaCom's switch does not have to serve as a tandem. DeltaCom argued that the Rule refers to "the switch of a carrier other than an ILEC" serving a comparable geographic area to the area served by "the ILEC's tandem switch." If the FCC intended to require non-ILECs to have tandem switches in order to be entitled to an ILEC's tandem interconnection rate, it would have said so. DeltaCom stated its argument is validated by the fact that the FCC specifies the ILEC switch as a "tandem," but uses the broad, unqualified word "switch" when referring to non-ILECs' equipment.

BellSouth stated in its Supplemental Brief that it agrees that Rule 51.711(a)(3) controls this issue. However, BellSouth maintained that the Rule cannot be read in a vacuum, but must be read in the broader context of TA96 and the FCC's Order adopting the Rule, both of which fully support the Public Staff's analysis of DeltaCom's burden of proof on the tandem switching issue.

BellSouth further contended in its Supplemental Brief that the FCC directed state commissions to consider two factors in determining whether a CLP should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch. First, the FCC directed state commissions to "consider whether new technologies (e.g., fiber ring or wireless network) performed functions similar to those performed by an ILEC's tandem switch and thus whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the ILEC's tandem switch." Second, in addition to the functionality comparison, the FCC instructed state commissions to consider whether the new entrant's switch serves a geographic area comparable to that served by the ILEC's tandem switch, in which case the appropriate proxy for the new carrier's costs is the incumbent's tandem interconnection rate.

BellSouth stated in its Supplemental Brief that the Public Staff's conclusion that DeltaCom failed to satisfy its burden of proof on the tandem switching issue is abundantly correct, particularly given that the record evidence from DeltaCom on the tandem switching issue consisted of slightly more than one page of prefiled testimony in addition to witness Rozycki's responses to four questions from the Public Staff on the issue at the hearing. BellSouth argued that DeltaCom's latest filing should not obscure the inescapable truth that it failed to produce any evidence upon which this Commission could find in DeltaCom's favor on the tandem switching issue.

BellSouth contended in its Supplemental Brief that if the Commission were to conclude that DeltaCom was only required to prove that its switch serves a comparable geographic area to BellSouth's tandem switch (which BellSouth does not believe is the appropriate test), DeltaCom utterly failed to satisfy this burden of proof as well. BellSouth further contended that DeltaCom does not and cannot point to a single shred of evidence in this record that establishes what geographic area its Greensboro switch currently serves and whether that area is comparable to the geographic area served by BellSouth's tandem switch. BellSouth stated that neither DeltaCom's tariffs nor its network map were entered into evidence. Furthermore, BellSouth asserted that even if considered by the Commission, neither DeltaCom's tariffs nor its network map demonstrate what geographic area DeltaCom's switch actually serves in North Carolina. BellSouth maintained that the issue is whether DeltaCom's Greensboro switch "serves" a comparable geographic area, not whether its switch is technically capable of serving a particular geographic area. *See* 47 C.F.R. Paragraph 51.711(a)(3); *see also MCI Telecommunications Corp. (MCI) v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.*, 1999 U.S. Dist. LEXIS 11418 (N.D. Ill. June 22, 1999).

BellSouth stated that the evidence in this record (or lack thereof) on the question of whether DeltaCom's switch serves a comparable geographic area is similar to the record evidence confronted by the federal district court in *MCI v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.* In that case, MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission (ICC) rejected MCI's argument, finding that MCI had failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate.

The Public Staff, in its Response to DeltaCom's Supplemental Brief, stated that DeltaCom failed to demonstrate that its switch performs tandem functions in terminating a call delivered to it by a local exchange company (LEC). The Public Staff argued that the determination of whether DeltaCom's switch performs the tandem functionality on calls delivered to it by BellSouth is central to the Commission's decision as to whether DeltaCom should be compensated for the tandem switching and transport elements. The Public Staff argued that even if it could be construed that DeltaCom's switch serves an area comparable to that served by BellSouth's tandem switch, that determination, standing alone, is insufficient to qualify DeltaCom to receive compensation for the tandem switching and transport elements.

The Public Staff further stated in its Response to DeltaCom's Supplemental Brief that it is clear in reading Paragraph 1090 of the FCC's First Report and Order as a whole, and as an indication of the FCC's intent in promulgating Section 51.711 of its Rules, that the functionality of the interconnecting carrier's network must be considered for the purpose of determining whether the carrier should be compensated for tandem switching. The Public Staff maintained that in Paragraph

1090, the FCC makes it clear that states may establish transport and termination rates which vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. However, the Public Staff opined that the FCC specifically directs the states to consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch. The Public Staff stated that if the only requirement were that the interconnecting carrier's switch serve an area comparable to the LEC's tandem switch, any consideration of the new technologies would be completely irrelevant.

The Public Staff stated that if the Commission were to adopt DeltaCom's position that the rule should be read in isolation without any consideration of Paragraph 1090, then a CLP with a switch serving a geographic area comparable to that served by the LEC's tandem would be entitled only to reciprocal compensation for tandem switching and for no other functions such as end-office switching or transport. The Public Staff stated that it did not believe this is the result that was intended by the FCC or desired by DeltaCom. The Public Staff stated that a major theme of TA96 is that rates should be cost-based, and this is the principle underlying the FCC Rule. The Public Staff maintained that it is unreasonable to conclude that a switch that performs no tandem functions should be compensated as if it did, merely because it serves a comparable geographic area. According to the Public Staff, the functionality of the switch is a key element which cannot be overlooked.

The Public Staff submitted that a diagram handed out by DeltaCom as an exhibit to its counsel's opening statement to show the geographic coverage of DeltaCom's network, and the unsupported assertions of its witness Rozycki as to geographic coverage and functionality, do not rise to the level necessary to support DeltaCom's position on this issue.

In conclusion, in its Response to DeltaCom's Supplemental Brief, the Public Staff submitted that to qualify for reciprocal compensation for tandem switching and transport, the CLP must show that its network performs the same functions as the incumbent LEC's tandem switch in terminating calls directed to it by the interconnecting LEC and that the CLP's switch serves a comparable geographic area. The Public Staff further submitted that DeltaCom has not met its burden of proof on either of these two elements.

On February 21, 2000, in response to Commission Order, DeltaCom filed a map of its switch coverage in North Carolina vs. BellSouth's local tandems which depicted that DeltaCom's Greensboro switch covers the Greensboro, Raleigh, and Asheville Local Access and Transport Areas (LATAs), and its Columbia, South Carolina switch covers the Charlotte LATA. DeltaCom also filed a list of DeltaCom's collocations in BellSouth central offices in North Carolina, and a list of Common Language Location Identifier (CLLI) Codes for BellSouth central offices served by BellSouth local tandems. BellSouth filed LATA tandem serving area maps for its Asheville LATA Tandem, Asheville LATA Local Tandem, Charlotte LATA Tandem, Charlotte LATA Local Tandem, Greensboro LATA Tandem, Greensboro LATA Local Tandem, Raleigh LATA Tandem, Raleigh LATA Local Tandem, Wilmington LATA Tandem, and Wilmington LATA Local Tandem.

On March 7, 2000, in response to Commission Order dated February 29, 2000, DeltaCom filed a description of its switches and network architecture in North Carolina. DeltaCom described its network architecture as "super switches," and stated that these super switches perform many functions similar to the BellSouth end office and local tandem switches as well as also performing long distance or interexchange switching and access tandem switching functions. DeltaCom further stated that its "super switches" switch originating and terminating local traffic, sending the traffic to or receiving it from Traffic Concentration Nodes (TCNs) in the DeltaCom network. For local calls, the TCN gathers or concentrates originating local traffic in an area, and sends that traffic to the DeltaCom switch, thus performing a function similar to a BellSouth end office subtending a BellSouth tandem.

DeltaCom also filed four Exhibits as support. Exhibit 1 illustrated DeltaCom's North Carolina network, showing 17 Points of Presence (POPs). Exhibit 2 illustrated examples of North Carolina local calls that DeltaCom's Greensboro, North Carolina and Columbia, South Carolina switches handle today. DeltaCom contended that together, Exhibits 1 and 2 demonstrated that with the advent of fiber optic transport facilities and the enormous switching capacity available in today's switching platforms, the economics of the switch/transport tradeoff have changed. DeltaCom argued that competing local exchange companies (CLECs) today are able to perform many of the same functions with a single switch that may be performed by at least two switches in the BellSouth network.

In Exhibit 3, DeltaCom provided their number of customers and location. In Exhibit 4, DeltaCom illustrated a small sample of the calling to DeltaCom customers in Charlotte, originated by customers of BellSouth and other North Carolina LECs.

In its Response to DeltaCom's Exhibits filed on March 7, 2000, BellSouth contended that DeltaCom has failed to demonstrate that it incurs any "additional costs" beyond its end office switching function that would justify BellSouth paying DeltaCom the tandem interconnection rate. BellSouth further contended that the technology and concentration nodes referred to by DeltaCom as TCNs are used to multiplex traffic, not to switch traffic. Therefore, BellSouth stated that contrary to DeltaCom's claim, TCNs are simply multiplexing nodes on DeltaCom's transport facilities, not traffic switching points. According to BellSouth, DeltaCom's equipment provides long (or extended) loops, but does not perform a switching function.

BellSouth summarized its opposition as follows:

1. SONET loop concentration nodes are not switches, nor do they perform functions even similar to an end office switch.
2. While DeltaCom attempts to define the loops between the DeltaCom end user and the DeltaCom switch as trunks on "common transport" facilities, these facilities are nothing more than long loops.
3. To the extent that DeltaCom utilizes SONET technology and loop concentration nodes for its loops, either short or long, such costs are prohibited by the FCC from being recovered in reciprocal compensation for local traffic.
4. Contrary to DeltaCom's claims, the DeltaCom switch performs only end office loop-to-trunk port switching and does not perform local tandem switching functions.

The Commission concluded, in *Petition of ICG Telecom Group, Inc. for Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-582, Sub 6, that ICG had met its burden of proof in regard to both geographic coverage and similar functionality.

That decision, based primarily on the testimony of ICG witness Starkey, was upheld and reaffirmed in the Commission's Order Ruling on Objections, Request for Clarification, Reconsideration, and Composite Agreement issued March 1, 2000. In the same Order, the Commission concluded that although it chose not to make a decision in the ICG case on the principal difference in the positions of the parties - whether FCC Rule 51.711 prevails or if the attendant discussion in Paragraph 1090 of the FCC Order should also be considered - parties arbitrating this issue in future proceedings should file maps and provide substantial testimony in the record including information as to location of actual customers[1], description of equipment and associated technology, and other relevant information.

After careful and extensive review of the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090, the Commission believes that the language in the FCC's Order clearly contemplates that exact duplication of the ILEC's network architecture is not necessary in order for the CLP to be eligible to receive reciprocal compensation at the tandem switching rate. Further, we believe that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both parties covers the same basic geographic area. We further believe that the Rule and the Order language are not, for this reason, in conflict in the manner described by BellSouth and the Public Staff.

Based on the information filed by DeltaCom including the map and the description of its network, the Commission believes that DeltaCom has met its burden of proof that its switches cover a comparable area to that covered by BellSouth's switches and that, for reciprocal compensation purposes, DeltaCom is entitled to compensation at BellSouth's tandem interconnection rate.

CONCLUSIONS

The Commission concludes that, for reciprocal compensation purposes, DeltaCom should be compensated at BellSouth's tandem interconnection rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

MATRIX ISSUE NO. 5: Should the Parties continue operating under existing local interconnection arrangements?

POSITIONS OF PARTIES

DELTACOM: Yes. The Parties' existing Interconnection Agreement addresses each of the following topics, and the existing language in this regard should remain in place. Specifically, the

[1] The Commission concluded in the ICG Order that although it could find no basis in the FCC Rule or discussion that location of actual customers *is essential*, the Commission did not rule out such information as being relevant or useful.

current Interconnection Agreement language concerning cross-connect fees, reconfiguration charges, network redesign, NXX translation, the definitions of the terms "local traffic" and "trunking options", and the parameters establishing routing of originating traffic and each party's exchange of transit traffic should remain.

BELLSOUTH: BellSouth does not understand this issue and needs clarification from DeltaCom. The fact that DeltaCom has filed for arbitration with BellSouth and listed some 73 issues, many of which contain multiple questions, belies DeltaCom's request to maintain its existing arrangements with BellSouth. Additionally, DeltaCom proposed a new Interconnection Agreement attached as Exhibit A to the Petition rather than relying upon the existing Agreement. BellSouth has negotiated with DeltaCom in good faith and will continue to do so in an effort to reach a new Interconnection Agreement. This issue is not appropriate for arbitration.

PUBLIC STAFF: Yes. The Parties should continue to operate under the existing local interconnection arrangements until or unless the Parties reach agreement otherwise. The Commission should decline to include any proposed provisions not contained in the current local interconnection arrangements.

DISCUSSION

In addressing this issue, DeltaCom witness Hyde testified that at the time of the filing of DeltaCom's Petition, BellSouth was reviewing DeltaCom's proposed language. Thus, in order to preserve these issues, witness Hyde generically requested the same interconnection language that is in the current Interconnection Agreement as part of Issue 5. Witness Hyde testified that DeltaCom listed each section of the proposed language that it provided to BellSouth that it understood as open and under review as an unresolved issue in DeltaCom's Exhibit B matrix attached to its Petition.

In its Post-Hearing Brief, DeltaCom addressed this issue by dividing it into four subtopics which were included in DeltaCom's Exhibit B matrix, among others. DeltaCom stated that the existing Interconnection Agreement addresses, at least in part, each of the subtopics with the exception of binding forecasts. DeltaCom noted that the Parties have been able to negotiate all the other provisions concerning local interconnection with the exception of the following four subtopics: **(a)** "Should the current Interconnection Agreement language continue regarding cross-connect fees, reconfiguration charges, or network redesigns and NXX translations?"; **(b)** "What should be the definition of the terms 'local traffic' and 'trunking options'?"; **(c)** "What parameters should be established to govern routing DeltaCom's originating traffic and each party's exchange of transit traffic?"; and **(d)** "Should the Parties implement a procedure for binding forecasts?"

In regard to DeltaCom's subtopics a, b, and c, DeltaCom noted that the Parties had been unable to negotiate any alternative arrangements. Thus, DeltaCom proposed that the language which is in the existing Interconnection Agreement relating to these subtopics should remain in place. DeltaCom noted that BellSouth agreed to the language that is in the existing Agreement and that this Commission approved that Agreement approximately two years ago as compliant with the Act and consistent with the public interest as required by Section 252(e)(2)(A) of the Act. DeltaCom stated that the terms and conditions in the previously approved Interconnection Agreement have enabled DeltaCom to enter the North Carolina local exchange market and have encouraged DeltaCom to make significant investments in facilities in North Carolina. DeltaCom believes that the current language related to DeltaCom's subtopics a, b, and c should be renewed and incorporated into the Interconnection Agreement resulting from this proceeding. DeltaCom argued that BellSouth has not provided any evidence that these requirements are no longer appropriate for the Interconnection Agreement between the Parties and the Parties have been unable to negotiate any alternative arrangements. Thus, absent a compelling reason to remove the existing language related to these subtopics a, b, and c, DeltaCom argued that the existing related language should remain in the Agreement.

BellSouth witness Varner testified that BellSouth's position on this issue is that negotiations take place in order to incorporate new language and terms into an Interconnection Agreement based upon new situations, governing law, processes, and technologies. Furthermore, witness Varner stated that this is not an arbitrable issue due to the fact that there is no contract language attached to this issue. Witness Varner noted that as stated in DeltaCom's position on this issue, the current arrangement has worked well for the past two years. However, DeltaCom's supporting testimony and petition seem to infer otherwise. Further, witness Varner testified that in order to ensure that DeltaCom and BellSouth have the most beneficial agreement for both Parties, new negotiations need to take place.

In its Proposed Order, BellSouth stated that for reasons that are not readily apparent, DeltaCom is asking this Commission to decide that DeltaCom should be permitted to operate under certain terms of its expired local Interconnection Agreement, while at the same time asking this Commission to arbitrate numerous disputes concerning proposed terms for a new Interconnection Agreement. Furthermore, BellSouth argued that DeltaCom attempted to expand the scope of this issue after the Petition for Arbitration was filed, by seeking to add an issue concerning binding forecasts and other newly raised matters. BellSouth objects to DeltaCom being permitted to do so. BellSouth noted that under the Act, DeltaCom is required to state the unresolved issues in its Petition. It is BellSouth's position that DeltaCom is attempting to expand those issues and it should not be allowed to do so.

In its Proposed Order, the Public Staff noted that Exhibit B to the Petition for Arbitration contains 19 particular references to DeltaCom's proposed Interconnection Agreement which pertain to this issue. The Public Staff noted that the record contains little substantive information on this issue. However, the Public Staff pointed out that if the current local interconnection arrangements cease and no substitute exists, service disruptions may well occur. Thus, the Public Staff stated that it is necessary to continue the current arrangements unless the Parties have reached agreement otherwise. Further, the Public Staff also stated that if the provision is not included in the current local interconnection arrangements, then the Commission should decline to order the inclusion of the proposed language.

The Commission disagrees with BellSouth's assertion that this is not an arbitrable issue because no contract language was attached. DeltaCom filed its Petition for Arbitration on June 14, 1999, and attached three exhibits to its Petition as follows: Exhibit A—Proposed Interconnection Agreement, Exhibit B—Matrix of Unresolved Issues, and Exhibit C—Verification. In its Exhibit B attached to the Petition, DeltaCom raised 19 items under this issue and specifically cited where the proposed related language was set forth in its proposed Interconnection Agreement. Based on

DeltaCom's Proposed Order, it now appears that 10 of these items have been negotiated and that nine items remain unresolved. These nine items relate to the following matters: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, (8) the delivery of traffic between DeltaCom, BellSouth, and a third party, and (9) binding forecasts with liquidated damages. Of these nine items, all but one which relates to binding forecasts, have existing provisions that are in the current local interconnection arrangements.

The Commission agrees with the Public Staff that if the current local interconnection arrangements cease and no substitute exists, service disruptions may well occur. That, of course, is an undesired outcome. The local interconnection arrangements outline how the Parties exchange and account for different traffic. Accordingly, the Commission believes that in order to avoid service disruptions, it is appropriate to require the Parties to incorporate into their new Interconnection Agreement their current local interconnection arrangements as they relate to the foregoing items, excluding binding forecasts, unless they negotiate other mutually acceptable provisions.

In regard to the implementation of a procedure for binding forecasts, DeltaCom urged the Commission to direct BellSouth to form a binding forecast capability that gives DeltaCom the assurance of having available facilities when needed and as forecasted. DeltaCom noted that with binding forecasts, BellSouth can build out its network without fearing that it will not be able to recoup its investments. DeltaCom stated its willingness to be bound by its forecasts. DeltaCom is willing to pay an underutilization charge for any trunks that are constructed by BellSouth for DeltaCom as a result of a binding forecast. Furthermore, DeltaCom stated that binding forecasts and the requirement that suppliers be made whole where purchasers over-forecast needs are procedures that have worked and continue to work well in the interexchange industry, and should be applied to the local exchange industry.

DeltaCom stated that it has been negotiating this matter of binding forecasts with BellSouth for almost a year. DeltaCom stated that it was approached by the BellSouth account team to implement binding forecasts on the assumption by at least some at BellSouth that binding forecasts had been agreed to and were needed to efficiently govern the relationship between the companies. DeltaCom stated that it is perplexed by BellSouth's refusal to agree to binding forecasts because of the benefits such a program will provide to BellSouth. Further, DeltaCom noted that BellSouth has not clearly opposed binding forecasts and still seems to be analyzing the issue. DeltaCom believes that binding forecasts should be implemented as one means to facilitate orderly and efficient local competition. It is DeltaCom's position that through the forecasts, BellSouth will be assisted in knowing what facilities need to be constructed and will not be harmed since DeltaCom will be required to pay an underutilization fee on any trunks that are not put into service.

BellSouth witness Varner testified that although not required under the Act or by FCC Rules, BellSouth is currently analyzing the possibility of providing a service whereby BellSouth commits to provisioning the necessary network buildout and support when a CLP agrees to enter into a binding forecast of its traffic requirements. Further, witness Varner testified that while BellSouth has not yet completed the analysis needed to determine if this is a feasible offering, BellSouth is willing to discuss the specifics of such an arrangement with DeltaCom.

In its Proposed Order, BellSouth argued that the Commission should deny DeltaCom's request for binding forecasts. BellSouth stated that Section 251 of the Act does not impose a duty nor an obligation on the part of an incumbent to enter into binding forecasts, which makes this issue inappropriate for arbitration. Further, BellSouth argued that DeltaCom's proposal for binding forecasts is ill-defined and administratively unworkable. Although DeltaCom would be willing to compensate BellSouth if DeltaCom fails to meet its forecast, the specifics of how this compensation would work are not spelled out in DeltaCom's proposal. Additionally, DeltaCom's proposal may make it difficult for BellSouth to serve other carriers that may require trunking capacity that has been reserved for DeltaCom pursuant to a binding forecast. For example, under DeltaCom's proposal, BellSouth would be prohibited from allowing other carriers to take advantage of these existing trunks, even though DeltaCom is not using, and may never use the trunks.

The Commission believes that it should decline to decide at this time whether the Act mandates a binding forecast requirement of the sort requested by DeltaCom, consistent with the Commission Recommended Arbitration Order in Docket No. P-582, Sub 6, involving ICG and BellSouth. However, the Commission does note that DeltaCom's request for this type of requirement does not appear to be inappropriate. In fact, such a provision can be found in BellSouth's Revised Statement of Generally Available Terms (SGAT). The Commission also agrees with the Public Staff that since this provision for binding forecasts is not included in the current local interconnection arrangements, then the Commission should decline to order the inclusion of the proposed language. However, BellSouth witness Varner testified that BellSouth was still analyzing this proposal and that BellSouth was willing to discuss the specifics of such an arrangement with DeltaCom. Accordingly, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

CONCLUSIONS

The Commission concludes that the Parties should incorporate into their new Interconnection Agreement the existing local interconnection arrangements pertaining to the following matters until or unless the Parties reach agreement otherwise: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, and (8) the delivery of traffic between DeltaCom, BellSouth, and a third party. The Commission declines to include any proposed provisions, in this regard, that are not contained in the current local interconnection arrangements. However, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

MATRIX ISSUE NO. 7(b)(iv): Who pays for the audit?

POSITIONS OF PARTIES

DELTACOM: DeltaCom argued that the party requesting the audit should pay for it. DeltaCom stated that this approach is simple and avoids any dispute as to who ultimately is responsible for the expense of the audit.

BELLSOUTH: BellSouth maintained that the issue is relatively straightforward: should one carrier that inaccurately reports information to a significant extent to another carrier be required to pay for the costs of the audit that uncovers the inaccurate information. BellSouth stated that it agrees that the party requesting an audit should be responsible for the costs of the audit, except that BellSouth would add that if the audit reveals that either party is found to have overstated the PLU or PIU by 20% or more, then that party should be required to reimburse the other party for the costs of the audit. Therefore, if a BellSouth-requested audit reveals that DeltaCom has overstated PLU/PIU percentages by 20% or more, DeltaCom should pay for the audit; otherwise, BellSouth would be required to do so. BellSouth maintained that this is a fair and reasonable provision for the protection of both Parties. BellSouth maintained that DeltaCom's argument that "each Party should pay for their own audits regardless of the outcome otherwise it would constitute a 'penalty'" is inconsistent with basic principles of cost causation. BellSouth further stated that paying the costs of an audit is not akin to a "penalty" as DeltaCom argued, since BellSouth would only be entitled to recover its actual costs incurred in conducting the audit, not fines or punitive damages. BellSouth argued that including such a provision in the Interconnection Agreement is reasonable and would create an incentive for DeltaCom to report accurately PLU/PIU information in the first place. Therefore, BellSouth recommended that the Commission conclude that it is reasonable to require the inclusion of a provision for audit rights in the Interconnection Agreement such that if one party is found to have overstated the PLU/PIU percentages by 20% or more, then that party should be required to pay for the entire audit.

PUBLIC STAFF: The Public Staff maintained that both Parties agree that, generally, the party requesting an audit should pay for it. The Public Staff further stated that one reason a party would request an audit is if it believed that reports provided by the other party were inaccurate or overstated. The Public Staff argued that should this belief be borne out by the audit, it is equitable that the party in error should pay the costs of the audit. The Public Staff maintained that including such language in the Interconnection Agreement encourages the Parties to deal with each other honestly and to ensure that information provided to each other is accurate. The Public Staff, therefore, recommended that the Commission accept BellSouth's proposed language providing that each party bears the cost of an audit; however, a party overstating PLU/PIU by 20% or more will bear the other party's audit costs.

DISCUSSION

The Commission notes that the Parties agree that the party requesting an audit should be responsible for paying for the audit. In addition, the Commission believes that it is reasonable and appropriate to adopt the additional language proposed by BellSouth that if an audit reveals that a party reported PLU/PIU in error and overstated such percentages by 20% or more, the party in error should pay for the cost of the audit. The Commission agrees with BellSouth and the Public Staff that inclusion of such language would encourage the Parties to deal with each other honestly and provide accurate information to each other.

CONCLUSIONS

The Commission concludes that it is reasonable and appropriate to adopt BellSouth's proposed language providing that the party requesting an audit should be responsible for paying for the audit; however, a party overstating PLU/PIU by 20% or more shall pay for the cost of the audit.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

MATRIX ISSUE NO. 8(b): Should the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement be required to pay the costs of such litigation?

POSITIONS OF PARTIES

DELTACOM: Yes. The losing party should pay the costs of such proceeding and litigation. Such a provision will deter frivolous claims, and encourage both Parties to resolve disputes informally. The Parties' present Interconnection Agreement contains this provision.

BELLSOUTH: No. BellSouth believes that the inclusion of a "loser pays" provision would have a chilling effect on both Parties to the extent that even meritorious claims may not be filed. TA96 is barely three years old and clearly represents an evolving area of rules and regulation. It is inevitable that complaints will be brought by various parties seeking clarification as issues emerge. Often times there is no clear "winner" or "loser," thus further complicating the use of a "loser pays" clause. A negative provision like "loser pays" should not be included in the agreement.

PUBLIC STAFF: No. It is not within the Commission's province to order the payment of attorney's fees and other costs by one party to another. While such a provision might indeed reduce litigation and encourage settlement and fair play, there is a real danger of even more controversy erupting as to whether a party can unequivocally be denominated as a winner.

DISCUSSION

DeltaCom witness Rozycki testified that a provision in the contract as to whether the losing party to an enforcement proceeding or a proceeding for breach of the Interconnection Agreement should be required to pay the costs of litigation would not encourage "forum shopping." First, DeltaCom stated that the proposed language is in the Parties' existing Interconnection Agreement so BellSouth has agreed to this language previously. Second, according to DeltaCom, the purpose of this provision is to encourage Parties to meet their commitments under this Agreement. Witness Rozycki further testified that he believed this provision actually encourages Parties to settle rather than face a negative decision. The Interconnection Agreement between DeltaCom and BellSouth which was previously approved contains a "loser pays" provision. DeltaCom simply seeks to continue that provision for two more years.

BellSouth witness Varner testified that it is inevitable that complaints will be brought by various parties seeking clarification as issues emerge. Often times there is no clear "winner" or "loser," thus further complicating the use of a "loser pays" clause. BellSouth stated that a negative provision like "loser pays" should not be included in the Agreement. Witness Varner further testified that BellSouth will agree to appropriate language regarding jurisdictional issues that would allow the Parties to seek damages under the Agreement from the courts since that would be a matter outside the Commission's jurisdiction. It is BellSouth's position that the Parties should determine at the time they enter the Interconnection Agreement where disputes will be resolved. BellSouth asserted that this is standard contract language and for good reason. It gives certainty as to how and where disputes will be resolved and it helps prevent the potential for "forum shopping" as well as the potential for inconsistent decisions under the Agreement.

The Public Staff recommended that the Commission encourage the Parties to continue negotiation of this issue and to consider seeking redress in another forum.

The Commission concurs with the Public Staff that it is not appropriate to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

CONCLUSIONS

The Commission declines to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

MATRIX ISSUE NO. 8(e): Whether language covering tax liability should be included in the Interconnection Agreement and, if so, whether that language should simply state that each party is responsible for its tax liability?

POSITIONS OF PARTIES

DELTACOM: No. A statement concerning tax liability need not be included. DeltaCom has proposed a compromise, supplying tax language acceptable to it to BellSouth which was less verbose and more understandable. BellSouth has not responded. In any event, the Agreement needs no provision relating to tax liability, which is an issue between the respective Parties and the relevant taxing authorities. DeltaCom noted that BellSouth had not put forward its suggested language into the record.

BELLSOUTH: Yes. BellSouth has proposed language for the Interconnection Agreement based upon BellSouth's experiences with tax matters and liability issues in connection with the Parties' obligations under interconnection agreements. A variety of taxes are imposed upon telecommunications carriers, both directly and indirectly (collected from end-users and other carriers). As would be expected, problems and disputes over the application and validity of these taxes will and do occur. The Interconnection Agreement should clearly define the respective rights and duties for each party in the handling of such tax issues so that they can be resolved fairly and quickly.

PUBLIC STAFF: No. Each party should be responsible for its own tax liability outside the Interconnection Agreement. However, if the Parties desire a provision on tax liability in the Agreement, such a provision should simply state that each party shall be responsible for its own tax liability.

DISCUSSION

The Commission believes that, while it may be desirable as a business practice to have provisions in a contractual agreement which spell out tax liability, the Commission should not itself impose such a provision, absent mutual agreement by the Parties. In his rebuttal testimony, DeltaCom witness Rozycki agreed with BellSouth that the Interconnection Agreement should clearly define the Parties' rights and duties in handling tax issues. The Parties did not agree, however, on the specific language to be included in the Agreement. While DeltaCom in negotiations proposed no language on taxes, witness Rozycki, in his direct testimony, did suggest language. The Commission believes that the Parties should continue their negotiations on this issue and arrive at a mutually agreeable provision, even if it is one that simply states that each party shall be responsible for its own tax liability.

CONCLUSIONS

The Commission declines to require the insertion of a tax liability provision in the Interconnection Agreement but encourages the Parties to continue negotiations on this issue.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

MATRIX ISSUE NO. 8(f): Should BellSouth be required to compensate DeltaCom for breach of material terms of the contract?

POSITIONS OF PARTIES

DELTACOM: Yes. There should be a provision establishing liability for a material breach of contract.

BELLSOUTH: The issue of penalties or liquidated damages is not an appropriate subject of arbitration. The Commission lacks the statutory or jurisdictional authority to award or order monetary damages or financial penalties. Even if a penalty or liquidated damage award could be arbitrated, it is completely unnecessary. State law and Commission complaint procedures are available, and are more than sufficient, to address or remedy any breach of contract situation should it occur. Furthermore, nothing in TA96 nor in any order of the FCC requires the inclusion of a liquidated damages provision in an Interconnection Agreement.

PUBLIC STAFF: The Commission should decline to include a provision in the Interconnection Agreement that requires either party to compensate the other party for the breach of material terms of the contract.

DISCUSSION

The Commission concurs with the Public Staff that the Commission should decline to include a provision establishing compensation for a material breach of contract. Further, the Commission notes that the Parties presented Section 11 - Resolution of Disputes in Part A of Exhibit A - Interconnection Agreement Between DeltaCom and BellSouth filed with DeltaCom's June 14, 1999 Petition for Arbitration.

CONCLUSIONS

The Commission declines to require the inclusion of a provision establishing compensation for a material breach of contract in the Interconnection Agreement. The Parties are referred to Section 11 of the Parties' Interconnection Agreement.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth and DeltaCom shall prepare and file a Composite Agreement in conformity with the conclusions of this Order not later than June 5, 2000. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 Order in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order).

2. That, not later than May 22, 2000, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the Arbitration Procedure Order.

3. That, not later than May 22, 2000, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the Arbitration Procedure Order.

4. That, with respect to objections or comments filed pursuant to decretal paragraphs 2 or 3 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages single-spaced or three pages double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

5. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or comments, including the executive summary required in decretal paragraph 4 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in WordPerfect format.

ISSUED BY ORDER OF THE COMMISSION.
This the 20th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

APPENDIX A

GLOSSARY OF ACRONYMS
Docket No. P-500, Sub 10

Act	Telecommunications Act of 1996
BellSouth	BellSouth Telecommunications, Inc.
CLLI	Common Language Location Identifier
CLP	Competing Local Provider
CLEC	Competing Local Exchange Company (Carrier)
Commission	North Carolina Utilities Commission
DeltaCom	ITC^DeltaCom Communications, Inc
DOE	Direct Order Entry
ECTA	Electronic Communications Trouble Administration
EDI	Electronic Data Interchange
FCC	Federal Communications Commission
ICC	Illinois Commerce Commission
ICG	ICG Telecom Group, Inc.
ILEC	Incumbent Local Exchange Company (Carrier)
ISP	Internet Service Provider
LATA	Local Access and Transport Area
LEC	Local Exchange Company (Carrier)
LENS	Local Exchange Navigation System
LERG	Local Exchange Routing Guide
MCI	MCI Telecommunications Corp.
MOU	Minute of Use
NXX	Used to symbolize telephone numbers not yet determined
ODUF	Optional Daily Usage File
OSS	Operations Support Systems
PIU	Percent Interstate Usage

PLU	Percent Local Usage
POP	Point of Presence
Public Staff	Public Staff-North Carolina Utilities Commission
SGAT	Statement of Generally Available Terms
SQMs	Service Quality Measures
TA96	Telecommunications Act of 1996
TAFI	Trouble Analysis and Facilities Interface
TAG	Telecommunications Access Gateway
TCN	Traffic Concentration Node
UNE	Unbundled Network Element

DOCKET NO. P-500, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition by ITC^DeltaCom Communications, Inc. For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	))))))	ORDER RULING ON OBJECTIONS, REQUEST FOR RECONSIDERATION, AND COMPOSITE AGREEMENT

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; and Commissioners Judy Hunt and William R. Pittman

BY THE COMMISSION: On April 20, 2000, the Commission entered its Recommended Arbitration Order (RAO) in this docket. Finding of Fact No. 4 of that Order states: "For reciprocal compensation purposes, [ITC^DeltaCom Communications, Inc.] DeltaCom should be compensated at [BellSouth Telecommunications, Inc.'s] BellSouth's tandem interconnection rate."

On May 23, 2000, BellSouth filed its Objections and Request for Reconsideration. BellSouth stated in its Objections and Request for Reconsideration that it seeks reconsideration concerning the Commission's determination that DeltaCom is entitled to reciprocal compensation at BellSouth's tandem interconnection rate. BellSouth stated that reconsideration is warranted because the Commission's determination is legally, factually, and procedurally flawed.

On May 30, 2000, the Public Staff filed its Response in Support of BellSouth's Objections and Request for Reconsideration. The Public Staff stated that it believes that a fundamental error in the Commission's decision is its conclusion that the Federal Communications Commission's (FCC's) Interconnection Order treats geographical coverage as a proxy for equivalent functionality.

On June 2, 2000, DeltaCom filed its response to BellSouth's Objections and Request for Reconsideration. DeltaCom contended that BellSouth's Motion does not present an adequate basis on which to reconsider or modify the RAO.

On June 5, 2000, the Parties filed a copy of the executed Composite Interconnection Agreement between BellSouth and DeltaCom.

Discussion and Commission conclusions regarding the issue raised by BellSouth in its Objections and Request for Reconsideration follow.

<u>FINDING OF FACT NO. 4 - (MATRIX ISSUE NO. 3)</u>: Should reciprocal compensation include the tandem switching function?

INITIAL COMMISSION DECISION

The Commission concluded that for reciprocal compensation purposes, DeltaCom should be compensated at BellSouth's tandem interconnection rate.

COMMENTS/OBJECTIONS

BELLSOUTH: On May 23, 2000, BellSouth filed Objections and Request for Reconsideration of this issue which was addressed by the Commission in its RAO dated April 20, 2000. Specifically, BellSouth objected to the Commission's determination that DeltaCom is entitled to reciprocal compensation at BellSouth's tandem interconnection rate. BellSouth stated that reconsideration is warranted because the Commission's determination is legally, factually, and procedurally flawed.

In its argument that the Commission's determination is legally flawed, BellSouth argued that DeltaCom, or any competing local provider (CLP), must satisfy two distinct requirements in order to be compensated at the tandem interconnection rate: (1) DeltaCom's network must perform functions similar to those performed by BellSouth's tandem switch; and (2) DeltaCom's switch must serve a geographic area comparable to the geographic area served by BellSouth. BellSouth stated that the Commission's analysis that "the concept of equivalent functionality is included within the requirement that the equipment utilized by both parties covers the same basic geographic area," cannot be squared with the plain language of the FCC's discussion of Rule 51.711.

BellSouth contended that the courts have expressly held that equivalent functionality and geographic comparability are two separate requirements that must be satisfied. BellSouth cited *U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d 968, 977 (D. Minn. 1999), (*U.S. West v. MPUC*), in which the Court (in evaluating whether a CLP should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch) stated, "it is appropriate to look at both the function and geographic scope of the switch at issue." BellSouth claimed that the Commission erred in merging these two separate requirements together.

BellSouth argued that no serious argument can be made that DeltaCom's single switch in Greensboro actually performs functions similar to those performed by BellSouth's tandem switch. BellSouth asserted that while DeltaCom's switch may be capable of performing tandem switching functions when connected to end-office switches, capability is not the test. BellSouth asserted that DeltaCom did not present one shred of evidence to support a conclusion that the DeltaCom switch actually performs functions similar to BellSouth's tandem switch, and that the Commission's RAO completely ignored the issue.

In its claim that the Commission's determination is factually flawed, BellSouth stated that there is no evidence in the record that DeltaCom's switch serves a geographic area comparable to BellSouth's tandem switch. BellSouth contended that there is a distinction between actually serving and being capable of serving and cited *MCI Telecommunications Corp. v. Michigan Bell Telephone Co.*, 79 F. Supp. 2d 768, 790 (E.D. Mich. 1999) (*MCI v. Michigan Bell*) which stated that the rule [FCC Rule 51.711(a)(3)] focuses on the area currently being served by the competing carrier, not the area the competing carrier may in the future serve.

BellSouth contended in its Request for Reconsideration that even taking the two maps filed by DeltaCom at face value, the geographic area served by BellSouth's tandems is much larger than the area DeltaCom claims it currently serves. BellSouth further pointed out that one of DeltaCom's maps consisted merely of a shading of the counties in which a DeltaCom customer is allegedly located, without any details of who the customer is, the services DeltaCom is actually providing that customer, or the customer's actual location. BellSouth indicated that such information is critical to resolving the tandem interconnection issue, as confirmed by the Federal District Court in *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc. (MCI v. Ameritech)*. BellSouth stated that in that case, MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission (ICC) rejected MCI's argument, finding that MCI had failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate. BellSouth contended that in affirming the ICC on the tandem switching issue, the Federal District Court found that MCI's "intentions for its switch" were "irrelevant."

In a footnote, BellSouth noted that according to the District Court, "[t]he issue of comparable functionality apparently was not in serious dispute" as MCI presented evidence that its switch performed similar functions as Ameritech's tandem switches -- evidence that Ameritech did not dispute. Indeed, Ameritech did not even raise the comparable functionality issue on appeal, which led the District Court to conclude that "only at issue is the geographical areas served by the respective switches."

BellSouth contended that the District Court's reasoning applies equally here. BellSouth argued that DeltaCom has offered nothing but "bare, unsupported conclusions" that its Greensboro switch currently serves an area comparable to BellSouth's tandem switch. Further, BellSouth stated that DeltaCom did not provide any details about the location of its customers in North Carolina, which would be essential for the Commission to determine the geographic area that DeltaCom's

Greensboro switch actually serves and whether that area is comparable to the area served by BellSouth's tandem switch. BellSouth argued that, absent such evidence, DeltaCom has clearly failed to satisfy its burden of proof on this issue, even if that burden were couched as narrowly as the RAO proposes.

BellSouth further stated that the Commission's determination is procedurally flawed. BellSouth pointed out that the record evidence from DeltaCom on the tandem switching issue consisted of slightly more than one page of prefiled testimony in addition to DeltaCom witness Rozckyi's responses to four questions from the Public Staff on the issue at the hearing. BellSouth complained that the Commission allowed DeltaCom to attempt to overcome this shortcoming by permitting the filing of maps, a description of its network, and other information after the hearing had concluded. The Commission relied upon this information in finding that DeltaCom's switch serves a comparable geographic area to BellSouth's tandem, even though BellSouth had no opportunity to cross-examine DeltaCom's witnesses about such "facts."

BellSouth stated that it understands the need for, and has no objection to, the submission of late-filed exhibits after the conclusion of a hearing in order to allow a party to respond adequately to a question from the Commission, the Public Staff, or another party. However, BellSouth considers that it is altogether a different matter to allow a party to attempt to cure deficiencies in its case by filing "evidence" that has not been subject to cross-examination. BellSouth pointed out that DeltaCom submitted one map in response to the Commission's February 18, 2000 Order that purported to show the geographic area DeltaCom's Greensboro switch serves. Further, BellSouth noted that DeltaCom submitted a different map several weeks later in response to the Commission's February 29, 2000 Order. BellSouth claimed that had DeltaCom presented these maps at the hearing, it would have had the opportunity to explore on cross-examination the differences between the two and thereby challenge the credibility of the information DeltaCom presented. As a matter of fundamental fairness, BellSouth asserted that the Commission's decision should rest squarely on the evidence put forth by DeltaCom in its testimony, not through unverified filings submitted after the fact.

DELTACOM: DeltaCom requested the Commission to reject BellSouth's Objections and Motion to Reconsider and adopt the Commission's April 20, 2000 RAO. DeltaCom contended that BellSouth's Motion does not present an adequate basis on which to reconsider or modify the RAO. First, DeltaCom stated that the Commission has already rejected BellSouth's contention that the RAO is legally flawed. DeltaCom asserted that BellSouth previously raised the same arguments in this docket, and the Commission rejected those arguments in the RAO. Further, DeltaCom noted that the Commission also has consistently rejected the same arguments by BellSouth in other interconnection agreement arbitration proceedings. *See, e.g., In the Matter of Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Docket No. P-582, Sub 6 (*ICG Arbitration*), Order Ruling on Objections, Request for Clarification, Reconsideration, and Composite Agreement, pages 7-14, (May 1, 2000). DeltaCom stated that the conclusion by the Commission that the geographic coverage of a switch is a proxy for equivalent functionality is sound and need not be disturbed on the basis of the fragmentary authority cited by BellSouth.

Second, DeltaCom stated that BellSouth is incorrect in contending that the RAO is factually flawed. As the Commission correctly noted in the RAO, DeltaCom argued that it submitted ample evidence demonstrating that its two local switches serve the entire State of North Carolina, which is a geographic area comparable to the area served by BellSouth's tandem switches within the meaning of that word under FCC Rule 51.711(a)(3). Moreover, as correctly noted in the RAO, DeltaCom's evidence is equivalent to the evidence submitted by ICG Telecom Group, Inc. (ICG) in the *ICG Arbitration*, where the full Commission concluded that ICG had demonstrated that its local switches served a geographic area comparable to the area served by BellSouth's tandem switches.

Finally, DeltaCom argued that BellSouth cannot belatedly contend that the Commission should reconsider the RAO simply because the Commission requested the parties to file post-hearing materials. DeltaCom stated that as BellSouth admits in its motion, this is common practice with the Commission, and the Commission is entitled to follow the procedures it deems fit in such matters. It is the same procedure the Commission followed in the *ICG Arbitration*, and BellSouth did not object in that matter. Moreover, BellSouth did not object to this procedure when the Commission issued Orders on January 20, 2000, and again on February 29, 2000, inviting the parties to submit post-hearing materials. Rather, DeltaCom noted that BellSouth took advantage of the opportunity afforded by those Orders and submitted its own post-hearing materials. Finally, DeltaCom stated that BellSouth did not request a further evidentiary hearing on these materials but rather submitted extended argument in opposition to DeltaCom's post-hearing submissions. As a result, DeltaCom asserted that BellSouth did have an opportunity to respond to DeltaCom's post-hearing materials and should not now be heard to object to this procedure.

PUBLIC STAFF: In its Response in Support of Request for Reconsideration filed on May 30, 2000, the Public Staff stated that it concurs with BellSouth's arguments concerning reciprocal compensation at the tandem switching rate. The Public Staff stated that it believes that a fundamental error in the Commission's decision is its conclusion that the FCC's Interconnection Order treats geographical coverage as a proxy for equivalent functionality.

The Public Staff stated that the distinction between equivalent functionality and geographical serving area is clear from a reading of FCC Rule 51.711(a) in its entirety. Rule 51.711(a)(1) states that "...symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services."

The Public Staff contended that the issue of whether DeltaCom's switches serve a comparable geographical area as that served by BellSouth's tandem switches arises only if the Commission has first determined that DeltaCom's switches perform functions similar to BellSouth's tandem switches on some or all of the calls terminating on DeltaCom's network. The Public Staff argued that FCC Rule 51.711(a)(3) simply sets a proxy rate if the Commission has first concluded that DeltaCom's switches serve comparable geographical areas as that served by BellSouth's tandem switches. If the Commission concludes that DeltaCom's switches perform functions similar to those of BellSouth's tandem switches, but that DeltaCom's switches do not serve a comparable geographical area, then the Public Staff believes that the Commission must establish a different rate.

The Public Staff pointed out that the Commission's RAO is silent as to which local calls terminated on DeltaCom's network should be subject to the tandem switching rate. According to the Public Staff, this is not surprising since the record does not include any evidence concerning which calls terminating on DeltaCom's network are completed using functions similar to those of a tandem switch. The Public Staff stated that a local call does not require tandem switching, and, in fact, BellSouth's tandem switching rate only applies when a local call is switched though the local tandem switch.

The Public Staff further stated that it concurs with BellSouth that DeltaCom has failed to show that its switches serve a geographical area comparable to that served by BellSouth's tandem switches. The Public Staff stated that it believes that there is considerable confusion as to the geographical areas served by DeltaCom's switches. The Public Staff stated that the RAO at one point refers to DeltaCom's contention that its Greensboro switch serves the entire state of North Carolina and then later references filings by DeltaCom indicating that its Greensboro switch covers only part of North Carolina while its Columbia, South Carolina switch covers other parts of the state. Thus, the Public Staff asserted that even DeltaCom appears unclear as to how its network is configured. Furthermore, the Public Staff argued that Exhibit 3 of DeltaCom's March 7, 2000 filing indicates that DeltaCom has customers located in a part of North Carolina which is not served by either its Greensboro switch or its Columbia, South Carolina switch.

The Public Staff requested that the Commission reconsider its decision concerning reciprocal compensation and conclude that DeltaCom has shown neither that its switches perform functions similar to BellSouth's tandem switches in terminating local calls directed to it by the interconnecting LEC, nor that its switches serve a comparable geographical area as that served by BellSouth's tandem switches.

DISCUSSION

The Commission, in the RAO in this docket stated: "After careful and extensive review of the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090, the Commission believes that the language in the FCC's Order clearly contemplates that exact duplication of the ILEC's network architecture is not necessary in order for the CLP to be eligible to receive reciprocal compensation at the tandem switching rate. Further, we believe that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both parties covers the same basic geographic area."

The Commission followed this same line of reasoning in its June 13, 2000 RAO issued in the *Petition of BellSouth Telecommunications, Inc. for Arbitration of Interconnection Agreement with Intermedia Communications, Inc.*, Docket No. P-55, Sub 1178, and concluded that Intermedia had met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth's switches, and that for reciprocal compensation purposes, Intermedia is entitled to compensation at BellSouth's tandem interconnection rate.

The core of the Public Staff's and BellSouth's arguments appears to be that the Commission must find that the CLP's switch is performing the same functionality and serving the same geographic area as that of the ILEC, and that the CLP's switch must *actually* be serving customers, as opposed to having the ability to serve customers, in order for the CLP to qualify for the tandem switching rate.

BellSouth cited three cases in support of its views: *U.S. West v. MPUC*, *MCI v. Michigan Bell*, and *MCI v. Ameritech*. Each of these cases involved specific fact situations peculiar to these cases, and the Commission has doubts about their generic value. Interestingly, in one of the cases, *U.S West v. MPUC*, which involved an interconnection agreement between U.S. West and a wireless company, the Court stated in a section not cited by BellSouth: "The evidence also indicates that the MSC [mobile switching center] covers a geographic area comparable to that covered by a tandem switch. Pursuant to the FCC rules, *this alone* (emphasis added) provides sufficient grounds for a finding that the appropriate rate for the MSC is the tandem switch rate." Thus, the Commission does not find the cases cited by BellSouth to be particularly persuasive of its arguments in the instant case.

In addition, the Commission is unpersuaded by these arguments for the reasons given previously in the RAO in this proceeding and in our ICG and Intermedia orders. The literal language of FCC Rule 51.711 states that the Commission should rely on geographic coverage as the sole basis for determining this issue. The only way to reconcile the language of FCC Rule 51.711 with Paragraph 1090 of the Local Competition Order is to adopt the approach taken by the Commission in the RAO in this case, which treats comparable geographic coverage as a proxy for equivalent functionality. This approach reconciles FCC Rule 51.711 and Paragraph 1090 in a manner which rests upon a reasonable construction of both. Any other approach necessarily assumes that there is an inconsistency between FCC Rule 51.711 and Paragraph 1090 of the Local Competition Order, a result which the Commission is loath to reach. Furthermore, the adoption of the argument advanced by BellSouth and the Public Staff would, of necessity, require a CLP to duplicate the network architecture utilized by the incumbent, an outcome which is expressly rejected in Paragraph 1090. Finally, adoption of the argument that the CLP's switch must actually be serving customers in the relevant geographic area instead of being capable of serving them makes the availability of the tandem switching rate contingent upon the level of market penetration achieved by the CLP, an outcome which finds no support in either Rule 51.711 or Paragraph 1090. As a result, the Commission remains unpersuaded by the substantive arguments advanced by BellSouth and the Public Staff.

The record establishes that different commissions appear to have reached different results with respect to this issue and that a clear resolution of this dispute will come more rapidly from the FCC than from piecemeal review by the courts. Therefore, we strongly advise any party aggrieved by the Commission's decision, if it wishes to further pursue this issue, to seek a Declaratory Ruling from the FCC clarifying this matter. It strikes the Commission that it may be preferable to "go to the source" – that is, the FCC – to obtain a more definitive ruling as to generic principles that should be applied in this matter, rather than engaging solely in prolonged litigation in federal courts with a high probability of arriving at divergent or equivocal results.

Further, the Commission would like to point out that it does not agree that FCC Rule 51.711(a) in its entirety can be interpreted as a clear distinction between equivalent functionality and geographical serving area. However, even if that were the case, the Commission believes that based on DeltaCom's response to the Commission's Order dated February 29, 2000, in which DeltaCom described its network architecture as "super switches," and further stated that "these super switches perform many functions similar to the BellSouth end office and local tandem switches," DeltaCom *has* demonstrated similar functionality of its switches. The Commission finds it appropriate to allow DeltaCom's response to the Commission's Order dated February 29, 2000, into evidence in this proceeding as a late-filed exhibit.

BellSouth argued that the Commission's determination is factually flawed because there is no evidence in the record that DeltaCom's switches serve a geographic area comparable to BellSouth's tandem switches. The Public Staff argued that it is unclear from the RAO as to the geographical areas served by DeltaCom's switches. The Commission notes that as stated in the RAO on February 21, 2000, in response to Commission Order, DeltaCom filed a map of its switch coverage in North Carolina versus BellSouth's local tandems which depicted that DeltaCom's Greensboro switch covers the Greensboro, Raleigh, and Asheville local access and transport areas (LATAs), and its Columbia, South Carolina switch covers the Charlotte LATA. Based on this map, the Commission believes that DeltaCom has provided sufficient and convincing evidence that its switches serve a geographic area comparable to BellSouth's tandem switches. The Commission finds it was appropriate to have allowed this map into evidence in this proceeding as a late-filed exhibit.

Further, BellSouth argued that the Commission's determination is procedurally flawed because the Commission requested the parties to file post-hearing materials and relied upon this information in finding that DeltaCom's switch serves a comparable geographic area to BellSouth's tandem, even though BellSouth had no opportunity to cross-examine DeltaCom's witness about this information. This objection is inapposite. The Commission may clearly rely on late-filed exhibits where the adverse party has had adequate notice of the filing, whereupon it may demand a hearing on the matter. <u>State ex. rel. Utilities Commission v. Carolina Telephone and Telegraph Company</u>, 267 N.C. 257, 148 S.E. 2d 100 (1966). In the instant case, the Commission notes that BellSouth also responded to the Commission Order of February 21, 2000, by filing LATA tandem serving areas and maps for its LATA tandems and LATA local tandems for Asheville, Charlotte, Greensboro, Raleigh, and Wilmington. We further note that BellSouth did not file any objections or state any opposition to this Order at the time, nor did it request a hearing on the matter. The Commission finds it appropriate to have allowed the maps filed by BellSouth into evidence in this proceeding as late-filed exhibits.

Moreover, the Telecommunications Act grants extensive authority to state commissions to obtain needful information. 47 U.S.C. 252 (b)(4)(B) states in relevant part: "The state commission may require the petitioning party and the responding party to provide such information as may be necessary for the state commission to reach a decision on the unresolved issues."

Finally, the Public Staff raised the issue that the RAO is silent as to which local calls terminated on DeltaCom's network should be subject to the tandem switching rate. The Commission notes that this issue was not addressed in the original hearing nor in the comments filed by either BellSouth or DeltaCom. Therefore, we believe there is insufficient evidence in the record on which to make such a determination at this time. However, if the Parties believe that this is a matter which must be addressed, the Commission requests the Parties to negotiate a solution and present it to the Commission for approval.

CONCLUSIONS

The Commission concludes that DeltaCom has clearly met its burden of proof that its switches provide equivalent functionality through their geographic coverage and that, by doing so, DeltaCom is entitled to compensation at BellSouth's tandem interconnection rate. Thus, the Commission finds it appropriate to deny BellSouth's Objections and Request for Reconsideration and affirm its RAO in this regard.

Further, the Commission finds that there is insufficient evidence in the record on which to make a determination as to which local calls terminated on DeltaCom's network should be subject to the tandem switching rate. The Commission believes that if this is a matter which must be addressed, the Parties should negotiate a solution and present it to the Commission for approval.

Finally, Attachment 3, pages 17-18, Section 6.1.2 of the June 5, 2000 Composite Interconnection Agreement filed by the Parties states: ". . . Based upon the Commission evaluation of ITC^DeltaCom's network and in accordance with the order of the Commission in Docket No. P-500, Sub 10, for reciprocal compensation purposes, ITC^DeltaCom shall be compensated at BellSouth's tandem interconnection rate." The Commission finds this language to be consistent with the conclusions set forth in the RAO.

IT IS, THEREFORE, ORDERED as follows:

1. That the Commission hereby denies BellSouth's Objections and Request for Reconsideration and affirms Finding of Fact No. 4 of its RAO in this docket.

2. That the Composite Interconnection Agreement submitted by BellSouth and DeltaCom on June 5, 2000, is hereby approved.

3. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

ISSUED BY ORDER OF THE COMMISSION.
This the 25th day of July, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

jc072400.01

DOCKET NO. P-472, SUB 15

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc., and Time Warner Telecom of North Carolina, L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996	))))	RECOMMENDED ARBITRATION ORDER

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; and Chairman Jo Anne Sanford and Commissioners Ralph A. Hunt, Judy Hunt, William R. Pittman, J. Richard Conder, and Robert V. Owens, Jr.

APPEARANCES:

For BellSouth Telecommunications, Inc.

Edward L. Rankin, III, General Counsel - North Carolina, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

R. Douglas Lackey and Bennett L. Ross, General Attorneys, BellSouth Telecommunications, Inc., 675 West Peachtree Street, N.E., Atlanta, Georgia 30375

For Time Warner Telecom of North Carolina, L.P.

Wade H. Hargrove, Marcus W. Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Attorneys at Law, Post Office Box 1800, Raleigh, North Carolina 27602

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission (Commission) pursuant to Section 252(b) of the Telecommunications Act of 1996 (1996 Act) and G.S. 62-110(f1) of the North Carolina General Statutes. This proceeding was initiated by a Petition filed in this docket by BellSouth Telecommunications, Inc. (BellSouth). By its Petition, BellSouth requested that the Commission arbitrate a single issue in dispute between BellSouth and Time Warner Telecom of North Carolina, L.P. (Time Warner). The issue as originally stated is: "What should be the appropriate definition of 'local traffic' for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act?" The parties agree that the issue in dispute is, in essence, whether reciprocal compensation should be paid for traffic to Internet service providers (ISPs).

The Commission had set this matter for hearing on January 25, 2000. In lieu of a hearing, BellSouth and Time Warner jointly filed a motion on January 10, 2000, which requested that: (1) the Commission take administrative notice of the records developed in Docket No. P-582, Sub 6 (ICG

Proceeding) and Docket No. P-500, Sub 10 (DeltaCom Proceeding); (2) the record from those proceedings as well as the parties' prefiled testimony in this case be used as the evidentiary record for the Commission's decision; and (3) the parties' briefs be permitted to reference the prefiled testimony in this case and the record developed in the ICG Proceeding and DeltaCom Proceeding. By Order entered on January 19, 2000, the Commission granted BellSouth's and Time Warner's Motion, and the January 25, 2000 hearing was canceled.

The purpose of this arbitration proceeding is for the Commission to resolve the single issue set forth in the Petition and Response. 47 U.S.C. § 252(b)(4)(C). Under the 1996 Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission (FCC) regulations pursuant to Section 252, shall establish rates according to the provisions of Section 252(d) for interconnection, services or network elements, and shall provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252.

WHEREUPON, based upon a careful consideration of the entire record in this arbitration proceeding, the Commission now makes the following

FINDING OF FACT

The parties should, as an interim inter-carrier compensation mechanism, pay compensation to each other for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic, subject to true-up retroactive to the effective date of the interconnection agreement resulting from this arbitration at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT

POSITIONS OF PARTIES

BELLSOUTH: "Local traffic" should be defined to apply only to traffic that originates and terminates within a local area. The definition should expressly exclude traffic to ISPs, which the FCC's Declaratory Ruling states is interstate in nature. However, inasmuch as the Commission has previously determined in an earlier arbitration what it believes to be an "appropriate template for an interim inter-carrier compensation mechanism" for ISP-bound traffic, BellSouth conceded that the parties should incorporate the rulings on this issue made in Docket No. P-582, Sub 6 (ICG/BellSouth Arbitration).

TIME WARNER: The Commission has already resolved this issue, on an interim basis, in the context of the ICG/BellSouth Arbitration. The Commission's Order in that docket should be applied in this proceeding.

The FCC's Declaratory Ruling clearly contemplates that state commissions may adopt interim reciprocal compensation arrangements. Time Warner incurs costs on behalf of BellSouth whenever it terminates calls originated by BellSouth's end users to ISPs served by Time Warner. Without payment of reciprocal compensation, Time Warner will not receive compensation at all until the FCC adopts a prospective compensation rule at some indefinite point in the future, which will harm competition.

DISCUSSION

Testimony regarding this issue was presented by BellSouth witness Varner and Time Warner witness Wood. In addition, considerable testimony on this issue was presented by the parties in Docket No. P-582, Sub 6 (ICG/BellSouth Arbitration) and Docket No. P-500, Sub 10 (DeltaCom/BellSouth Arbitration), the records of which have been considered in this proceeding.

The Commission notes that BellSouth's recommendation in its proposed order filed on February 15, 2000, is that the parties incorporate the Commission's ruling on this issue in Docket No. P-582, Sub 6. This is essentially the same as Time Warner's recommendation. Accordingly, the Commission concludes that good cause exists to apply the decision in Docket No. P-582, Sub 6, to this proceeding. In the Commission's November 4, 1999 Recommended Arbitration Order in Docket No. P-582, Sub 6, the Commission ordered that "the parties shall, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic...subject to true-up at such time as the Commission has ruled pursuant to FCC consideration of this matter."[1]

IT IS, THEREFORE, ORDERED as follows:

1. That the parties shall, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic, subject to true-up retroactive to the effective date of the interconnection agreement resulting from this arbitration at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

2. That BellSouth and Time Warner shall prepare and file a Composite Agreement in conformity with the conclusions of this Order not later than 45 days after the date of issuance of this Order. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 Order in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order).

3. That, not later than 30 days from the date of issuance of this Order, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the Arbitration Procedure Order.

4. That, not later than 30 days from the date of issuance of this Order, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the Arbitration Procedure Order.

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[1] The Commission reaffirmed its position on this matter in its March 1, 2000, Order Ruling on Objections, Request for Clarification, Reconsideration and Composite Agreement. This Order is subject to any rulings or clarifications stemming from the March 1, 2000, Order.

5. That, with respect to objections or comments filed pursuant to decretal paragraph 1, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages single-spaced or three pages double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

6. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or comments, including the executive summary required in decretal paragraph 5 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in WordPerfect format.

ISSUED BY ORDER OF THE COMMISSION.
This the 13th day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz031300.14

DOCKET NO. P-472, SUB 15

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Petition for Arbitration of the Interconnection Agreement	)	ORDER
Between BellSouth Telecommunications, Inc., and Time Warner	)	APPROVING
Telecom of North Carolina, L.P., Pursuant to Section 252(b) of	)	COMPOSITE
the Telecommunications Act of 1996	)	AGREEMENT

BY THE COMMISSION: On March 13, 2000, the Commission issued a Recommended Arbitration Order (RAO) in this docket directing the parties, among other points, to prepare and file a Composite Agreement in conformity with the conclusions of the RAO. On April 27, 2000, the parties submitted the Composite Agreement. The Commission has examined the Composite Agreement and concludes that it should be approved.

ISSUED BY ORDER OF THE COMMISSION.
This the 16th day of May, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz051200.03

TELECOMMUNICATIONS - COMPLAINT

DOCKET NO. P-561, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
BellSouth Telecommunications, Inc.,	)	
Complainant,	)	ORDER DENYING
v.	)	RECIPROCAL
	)	COMPENSATION
US LEC of North Carolina Inc.,	)	
Respondent	)	

HEARD: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, August 16, 1999 - August 24, 1999

BEFORE: Chairman Jo Anne Sanford, Presiding; and Commissioners Ralph A. Hunt, Judy Hunt, William R. Pittman, J. Richard Conder, Robert V. Owens, Jr., and Sam J. Ervin, IV

APPEARANCES:

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III, General Counsel – North Carolina, and Andrew D. Shore, BellSouth Telecommunications, Inc., 1521 BellSouth Plaza, Post Office Box 30188, Charlotte, North Carolina 28230

R. Douglas Lackey, Bennett L. Ross, and J. Phillip Carver, BellSouth Telecommunications, Inc., 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375

Edward S. Finley, Jr., Hunton & Williams, Suite 1600, One Hannover Square, Fayetteville Street Mall, Post Office Box 109, Raleigh, North Carolina 27602

For US LEC of North Carolina, Inc.:

Joseph W. Eason and Christopher J. Blake, Moore & Van Allen, PLLC, Post Office Box 26507, Raleigh, North Carolina 27611

James P. McLoughlin, Jr., Moore & Van Allen, PLLC, 100 North Tryon Street, Charlotte, North Carolina 28202-4003

Ky E. Kirby, Swidler, Berlin, Shereff and Friedman, 3000 K Street, N.W., Washington, D.C. 20007

For Metacomm, LLC:

Jim W. Phillips, Jr. and Marcus W. Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Post Office Box 1800, Raleigh, North Carolina 27602

BY THE COMMISSION: BellSouth Telecommunications, Inc. (BellSouth) initiated this proceeding on September 14, 1998, by filing a Complaint and Request for Declaratory Ruling. BellSouth alleged that US LEC of North Carolina Inc. (formerly US LEC of North Carolina, LLC) (US LEC) was improperly invoicing BellSouth for millions of dollars of reciprocal compensation for minutes of use resulting from telephone connections established between the BellSouth and US LEC networks for the purpose of generating reciprocal compensation. BellSouth stated that no reciprocal compensation was due under the parties' Commission-approved Interconnection Agreements, the Telecommunications Act of 1996 (Act, 1996 Act, or TA96), or the public policy of this State for minutes of use attributable to such connections. Also, on September 14, 1998, US LEC filed a Complaint against BellSouth in Docket No. P-55, Sub 1107 (the US LEC Complaint case). The thrust of US LEC's Complaint was that BellSouth had breached the parties' then current Interconnection Agreement by failing to pay amounts due US LEC. The money sought by US LEC consists mostly of the reciprocal compensation at issue in this proceeding.

BellSouth and US LEC each filed an Answer to the other's Complaint on October 26, 1998. On November 20, 1998, the Commission issued an Order Concerning Procedure and Scheduling Hearings. In its Order, the Commission consolidated the two cases for discovery, but not for hearing, set forth procedures and a timetable for serving, responding to, and objecting to data requests, and established deadlines for discovery and prefiling testimony. On November 25, 1998, Metacomm, LLC (Metacomm) filed a Petition to Intervene in this docket. By Order dated December 17, 1998, the Commission allowed Metacomm to intervene. It also ordered that any prefiled testimony of Metacomm be filed on the same day as that of US LEC.

On January 13, 1999, the Commission issued an Order Concerning Protective Order which directed the parties to adopt the Protective Order proposed by BellSouth, with one noted exception. By Order dated March 23, 1999, the Commission issued a revised schedule in this matter. It established a discovery deadline of June 16, 1999, and set the hearing in this docket to begin on August 16, 1999, and the hearing in the US LEC Complaint case to begin on August 23, 1999.

On July 7, 1999, the Commission issued an Order directing the Public Staff to provide direct technical and other assistance to the Commission in these proceedings, rather than participating as a party. On July 16, 1999, the Public Staff filed a letter indicating its willingness to provide direct assistance to the Commission.

On August 3, 1999, the Commission issued an Order, *sua sponte*, directing that the hearing in the US LEC Complaint case would begin on October 25, 1999, and stating that the Commission would allow up to two weeks for the evidentiary hearing in this matter. By Order dated October 12, 1999, the Commission continued the hearing in the US LEC Complaint case until at least 30 days following its decision in this proceeding.

The Commission issued a Prehearing Order on August 11, 1999. On that same date, US LEC and Metacomm filed a Joint Motion asking the Commission to order BellSouth to identify its "causes of action." By Order dated August 13, 1999, the Commission denied the Motion.

Discovery in this proceeding was prodigious. The parties deposed more than 90 witnesses, and they each propounded and answered several sets of data requests and produced a voluminous amount of documents. The Commission ruled on numerous objections to data requests, as well as several motions concerning discovery matters.

The parties prefiled the testimony of several witnesses. During the evidentiary hearing, on August 20, 1999, US LEC and Metacomm filed a Revised Joint List of Witnesses. By that filing, US LEC and Metacomm notified BellSouth and the Commission that they were withdrawing the prefiled testimony of nine of their seventeen witnesses.

In order to streamline the presentation of proof at the evidentiary hearing, the Commission allowed the parties to designate as part of the record deposition testimony and exhibits. On September 3, 1999, the parties filed a Statement Regarding Depositions in the Record. The Statement included the lists of the full depositions, and the deposition excerpts, which the parties had designated as part of the record. By Order dated September 17, 1999, the Commission admitted into evidence and made part of the official record in this proceeding all depositions and deposition excerpts designated by the parties.

Numerous other motions and pleadings have been filed in this docket, and various Orders have been issued by the Commission addressing those motions and pleadings. All of those motions, pleadings, and Commission Orders, with the exception of some pleadings and data request responses US LEC and Metacomm filed under seal, are matters of public record and are contained in the official files maintained by the Chief Clerk of the Commission.

At the evidentiary hearing, which began as scheduled on August 16, 1999, BellSouth offered the testimony of the following fact witnesses: W. Keith Milner (Senior Director – Interconnection Services); JoAnn Ward (Systems Designer – BellSouth Business Systems, Inc.); Max Boykin (MIS Director – Meineke Discount Mufflers, Inc.); John McMahon (General Manager and VP Sales – BellSouth Business Systems, Inc.); and Jerry Hendrix (Senior Director – Interconnection Services Revenue Management, Network and Carrier Services). BellSouth also offered the expert testimony of Albert Halprin and William E. Taylor, Ph.D. In addition, Mr. Milner offered a portion of his testimony as an expert on network issues. Metacomm offered the fact testimony of the following witnesses: Mitchell Self (Shelby City Schools); Michael Crovi (Mecklenburg Area Catholic Schools); and Andrew McIntosh (Metacomm). Metacomm also offered the expert testimony of Don Wood. US LEC offered the fact testimony of employees Gary Grefrath and Michael Robinson. It also offered the expert testimony of Kathleen Wallman and William H. Lehr, Ph.D.

THE REGULATORY FRAMEWORK AND RECIPROCAL COMPENSATION

Until this decade, a single regulated company such as BellSouth was ordinarily the sole provider in any given area of local telephone exchange service (completing calls within a local calling area) and exchange access service (connecting customers to long distance companies such as AT&T).

Congress adopted the 1996 Act in part to replace that plan with a competitive market for local telecommunications services.

To spur competition, the 1996 Act imposes a series of new federal obligations on incumbent carriers. See 47 U.S.C. § 251(b), (c). Of particular relevance here, the statute establishes rules to ensure that competing telephone companies may "interconnect" their networks so that callers who subscribe, for example, to US LEC's local telephone service can receive calls from, and place calls to, individuals who subscribe to BellSouth's service. See id. § 251(c)(2).

Under the 1996 Act's interconnection rules, all local exchange carriers must "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Id. § 251(b)(5). In basic terms, "reciprocal compensation" works as follows. When a customer of Carrier A places a call to a customer of Carrier B in the same local area, Carrier A pays Carrier B for "terminating," or completing, that local call. Similarly, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A. Reciprocal compensation is generally computed on a minutes-of-use basis.

The 1996 Act requires a local carrier to pay reciprocal compensation only for local calls. The FCC accordingly ruled in its 1996 Local Competition Order[1] that "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area." 11 FCC Rcd at 16013, ¶ 1034. A completely different set of rules governs non-local, long-distance traffic.

Acting pursuant to Section 252(a), BellSouth and US LEC entered into negotiations in 1996 in an effort to reach a "binding agreement" that would implement the duties imposed by the new 1996 Act. Those negotiations were successful, and the parties executed an Interconnection Agreement. The Commission approved that Agreement in January 1997. The Commission approved two subsequent Agreements which contained language identical to the first Agreement regarding the parties' reciprocal compensation obligations. The third and current Agreement between the parties expired on December 31, 1999.

The initial BellSouth-US LEC Agreement contained several provisions dealing with reciprocal compensation. Consistent with Section 251(b)(5) — which, as noted above, requires carriers to pay reciprocal compensation only for local traffic — the Agreement (Section IV.B.) states that "[e]ach party will pay the other for terminating its local traffic on the other's network the local interconnection rates" set forth in the Agreement. The Agreement (Section I.C.), in turn, defines "local traffic as "any telephone call that originates in one exchange and terminates in...the same exchange."

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[1] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996), modified on recon., 11 FCC Rcd 13042 (1996) ("Local Competition Order"), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

Dispute resolution provisions in each of the Agreements give either party the right to petition the Commission when a dispute arises as to the interpretation of "[a]ny provision of this Agreement or as to the proper implementation of this Agreement." Moreover, federal law gives the Commission the authority to "enforce the substantive terms of the agreements made pursuant to Sections 251 and 252." Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999).

BellSouth's Complaint asked the Commission to enforce the substantive terms of the Agreements by finding that the minutes of use at issue in this proceeding do not qualify for payment of reciprocal compensation under the terms of the Agreements. Moreover, BellSouth's Complaint asked the Commission to find that the minutes of use do not qualify for reciprocal compensation as a matter of public policy. We review this Complaint under the authority given the Commission pursuant to the Agreements and the 1996 Act and also pursuant to our general supervisory powers granted by the North Carolina General Assembly in Chapter 62 of the General Statutes, the Public Utilities Act.

FINDINGS OF FACT

Parties and Jurisdiction

1. BellSouth is an incumbent local exchange carrier (ILEC) operating in portions of nine southeast states. Its service territory in North Carolina includes Raleigh, Greensboro, and Charlotte. US LEC is a competitive local exchange carrier (CLEC) that operates in selected southeast and mid-Atlantic markets. US LEC is certified by the Commission as a competing local provider (CLP). US LEC owns and operates switches in only three North Carolina cities — Raleigh, Greensboro, and Charlotte. Richard Aab is the controlling shareholder and Chairman of the Board of US LEC. Metacomm was formed in September 1997, to attempt to generate reciprocal compensation for US LEC, which US LEC agreed to share with Metacomm. Richard Aab also owns a controlling interest in Metacomm through RTA Associates, LLC, of which he is the sole owner. MCNC is a quasi-governmental agency created by the North Carolina General Assembly in 1981. This Commission has jurisdiction to hear and rule upon the complaint in this docket.

Interconnection Agreements

2. In accordance with their obligations under the 1996 Act, BellSouth and US LEC have been parties to three Interconnection Agreements since 1996. Their current agreement expired on December 31, 1999. US LEC and BellSouth negotiated their first Interconnection Agreement filed with the Commission pursuant to Sections 251 and 252 of the 1996 Act, and the Commission approved the Interconnection Agreement by Order dated January 29, 1997 (1997 Agreement), under authority granted by Section 252(e) of TA96. Following the expiration of the first US LEC/BellSouth Interconnection Agreement on October 31, 1998, US LEC opted into the terms of a voluntarily-negotiated and Commission-approved Interconnection Agreement between BellSouth and ALEC, Inc. (1998 Agreement). Following the expiration of that Interconnection Agreement in June 1999, US LEC opted into the terms of a voluntarily-negotiated and Commission-approved Interconnection Agreement between BellSouth and Intermedia Communications, Inc. (1999 Agreement). However, it is the Commission's understanding that the parties are continuing to operate

under this agreement. The opted-into Interconnection Agreements are substantially similar in all material respects to the first US LEC/BellSouth Interconnection Agreement. The Commission approved all three Agreements pursuant to its duties under the 1996 Act. All three Agreements require the parties, among other things, to pay each other reciprocal compensation for terminating local traffic originated by an end user on its network and terminated by an end user on the other party's network. The first Interconnection Agreement between the parties, under which they were operating at the time US LEC entered into relationships with Metacomm and MCNC to induce them to originate minutes of use for which US LEC would bill BellSouth reciprocal compensation, stated: "US LEC and BellSouth enter into this Agreement with the understanding that the carriers would be interconnecting with each other for comparable types of calls and that the usage would likely be reasonably balanced, i.e., US LEC would be terminating to BellSouth approximately the same level of usage that BellSouth would be terminating to US LEC." Pertinent parts of the three Interconnection Agreements are set out or cited in Appendix A.

Establishment of Networks

3. US LEC deliberately created a usage imbalance between itself and BellSouth by terminating a greater amount of traffic originating on BellSouth's network than it would be terminating to BellSouth. In furtherance of its plan to create a traffic imbalance and thus large reciprocal compensation revenues for itself, US LEC, among other things, induced MCNC and Metacomm to originate connections on BellSouth's network and terminate them to US LEC telephone numbers by agreeing to pay them 40% of all reciprocal compensation BellSouth paid US LEC for minutes of use for which they were responsible.

4. In the fall of 1997, Metacomm and MCNC established networks to generate reciprocal compensation for US LEC and commissions for themselves. They established connections by having routers connected to circuits purchased from BellSouth call routers connected to circuits provided by US LEC. They leased transmission facilities from BellSouth capable of originating up to 672 connections simultaneously. Pursuant to US LEC's instructions, Metacomm and MCNC programmed their routers to disconnect and immediately reconnect each connection every 23 hours and 59 minutes, so that US LEC's switches could create the records US LEC which needed to bill BellSouth for reciprocal compensation.

Withdrawal of MCNC

5. MCNC withdrew its participation in the reciprocal compensation arrangement after its management learned that the "unusual configuration and mix of equipment" making up the network was intended to generate revenue from connections without regard to actual traffic or content traversing the connections. MCNC withdrew its participation even though it stood to gain millions of dollars in commissions from the minutes of use generated on its reciprocal compensation network before the time it terminated its relationship with US LEC. The MCNC executive who investigated the network configured by MCNC's former consultants testified in this proceeding that he did not think it was appropriate for BellSouth to have to pay reciprocal compensation for connections established for the purpose of generating reciprocal compensation.

Further Evolution of Metacomm Network

6. To ensure that its reciprocal compensation plan succeeded, US LEC provided the financial, technical, and other support Metacomm needed to maximize the number and duration of connections it established originating out of BellSouth's network and terminating to US LEC's network. Other than US LEC, Richard Aab has been the sole source of the funds needed by Metacomm to establish the connections to generate the minutes of use for which US LEC has billed BellSouth over $100 million in reciprocal compensation.

7. It is unclear whether Metacomm's initial plan included serving end-user customers. At some point after US LEC and Metacomm implemented their reciprocal compensation plan, US LEC demanded that Metacomm "develop real originating traffic for its network." In response to US LEC's "demand," and to "provide Metacomm a hedge against any unforeseen actions yet-to-be taken by BellSouth, the PUC, MCNC, et al.," Metacomm provided customers with what it described as "dedicated access." Metacomm offered potential customers free access to the Internet via its network through at least the date the then-current Interconnection Agreement between BellSouth and US LEC expired. Metacomm's offers for free service were dependent upon the customer accepting an amount of capacity predetermined by Metacomm which in no way depended upon the customer's needs. Metacomm paid sales agents more than $400,000 ($25,000 per customer) to persuade customers to sign up for free access to Metacomm's network. It cost Metacomm $685,000 a year to serve each customer. At the time of the evidentiary hearing, Metacomm had approximately 25 customers. This number had remained stable since September of 1998. At the time of the evidentiary hearing, virtually no customers had paid Metacomm to access Metacomm's network. There is evidence in the record regarding only seven of Metacomm's customers. One customer, Charlie Horse Farm, never accessed or attempted to access Metacomm's network. Metacomm nevertheless originated connections from a router located at the horse barn to a terminating router for approximately one year, and US LEC has billed BellSouth reciprocal compensation for all of the minutes of use attributable to the connections established by the router at the horse barn. Another customer, Meineke Discount Mufflers, Inc. (Meineke), did not access Metacomm's network for an overwhelming majority of the time Metacomm's router at Meineke's premises was opening connections to US LEC's network. Like the connections originated by Metacomm at Charlie Horse Farm, US LEC has billed BellSouth for every minute connections were established by the router at Meineke's premises.

Plan Not Revealed

8. US LEC and Metacomm took active steps to not reveal their reciprocal compensation plan to BellSouth.

BellSouth's Knowledge of the Network and the Flow of Reciprocal Compensation

9. BellSouth's knowledge of the US LEC/Metacomm network configuration, and its understanding of the resulting flow of reciprocal compensation, evolved over time. Employees of some subsidiaries of BellSouth, such as BellSouth Business Systems (BBS), appear to have had some suspicion of the situation earlier than other employees of other subsidiaries. It took a certain amount of time before the entire picture became clear to the parties who would be responsible for the

payment or non-payment of reciprocal compensation, or for raising objections with US LEC regarding whether payment of reciprocal compensation for the traffic was appropriate. BellSouth brought its complaint to the Commission within a reasonable time after those persons became aware of the nature of the traffic traversing the US LEC/Metacomm network.

Amounts of Minutes Generated

10. Metacomm generates more than 650 million minutes of connections between its routers per month, resulting in monthly reciprocal compensation billing by US LEC to BellSouth of more than $8.5 million. By the end of 1999, if historical billings continued, US LEC's reciprocal compensation billings to BellSouth attributable to minutes of use generated by Metacomm would be approximately $150 million. As of May 1999, US LEC had billed BellSouth 78 times the amount of reciprocal compensation that BellSouth had billed US LEC.

11. There is no basis upon which to rule that reciprocal compensation is due for some minutes of use by Metacomm's customers. The configuration deployed by Metacomm to generate reciprocal compensation is the same when a customer accesses the network as when Metacomm is simply using routers located adjacent to one another to establish connections for the purpose of generating reciprocal compensation. Metacomm did not measure actual customer minutes of use. There is no way to estimate actual customer minutes of use in a reasonably accurate way which would not be arbitrary.

EVIDENCE TO SUPPORT FINDINGS OF FACT

This section of this Order is not intended to list all of the record evidence which supports each finding of fact. As noted above, the record includes numerous volumes of deposition testimony and exhibits in addition to the transcript from the hearing and is, therefore, quite voluminous. This section is, rather, intended to reference the most salient evidence which supports our findings of fact.

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 1

BellSouth is a "local exchange company" within the meaning of G.S. 62-3(16a) and an "incumbent local exchange carrier" within the meaning of Section 251 of the 1996 Act. Its service territory in North Carolina includes Raleigh, Greensboro, and Charlotte.

US LEC is a competitive local exchange carrier that operates in selected southeast and mid-Atlantic markets. US LEC is certified by the North Carolina Utilities Commission (Commission or NCUC) as a CLP. It owns and operates switches in three North Carolina cities — Raleigh, Greensboro, and Charlotte.

Richard T. Aab owns stock representing 94% of US LEC's total voting power. (Tr. Vol. 1, p. 97.) Consequently, he is "able to control the board and all stockholder decisions and, in general, to determine (without the consent of the Company's other stockholders) the outcome of any corporate transaction or other matter submitted to the stockholders for approval." (US LEC Form 10-K, filed March 23, 1999, at 15.) US LEC's President is Tansukh Ganatra. US LEC executive Mike Simmons had responsibility initially for the "projects" which underlie this dispute. Wilbur

Williams assumed that duty from Mr. Simmons at the end of 1997. Both men reported to Mr. Ganatra, who oversaw and directed their efforts.

Tom Finn and Steve McNeill formed Metacomm in September 1997 to take advantage of US LEC's offer to share reciprocal compensation it received from BellSouth. In June 1998, Richard Aab acquired a controlling interest in Metacomm. (Tr. Vol. 1, p. 97; Ex. WKM-23.) Mr. Aab's "long time business partner and personal friend," Andy McIntosh, replaced Mr. Finn as the CEO of Metacomm in January 1999. (Tr. Vol. 7, pp. 100, 120.) Metacomm intervened in this proceeding to protect its interests in receiving a commission from the reciprocal compensation payments billed by US LEC to BellSouth and to assist US LEC in defending the network they both designed and developed for the express purpose of generating reciprocal compensation.

MCNC was created by the North Carolina General Assembly in 1981. (Tr. Vol. 1, p. 81.) Among other things, MCNC operates the NC-REN network, which provides Internet connectivity via dedicated facilities to colleges and universities located in North Carolina. (Blatecky Dep. 413.) Alan Blatecky is MCNC's Vice President of Information Technologies and a member of MCNC's Executive Management Committee (EMC). He has worked at MCNC since 1982. (Tr. Vol. 1, p. 82; Blatecky Dep. 8-9.) Frank Hart was the President of MCNC until early 1998. It was BellSouth witness Milner's understanding that he was forced to resign as a result of entangling MCNC in the "US LEC project." (Tr. Vol 1, p. 128.)

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 2

In accordance with their obligations under the 1996 Act, BellSouth and US LEC executed their first Interconnection Agreement on November 1, 1996 (1997 Agreement). (Tr. Vol. 6, p. 209; Ex. JDH-1.) Section I.D. of the 1997 Agreement defines "local interconnection," in relevant part, as "the delivery of local traffic to be terminated on each party's local network so that end users of either party have the ability to reach end users of the other party." Section IV is titled "Local Interconnection." Paragraph B of that section states that "[e]ach party will pay the other [reciprocal compensation] for terminating its local traffic on the other's network at the rate set forth in the agreement." "Local traffic" is defined as "any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange." (Section I.C.) These same provisions appear in most of the approximately 700 interconnection agreements BellSouth has entered into with various CLPs. (Tr. Vol. 6, pp. 209-216.)

The 1997 Agreement contains an additional provision which was added to address and allay US LEC's concern that traffic, and thus reciprocal compensation payments, might be imbalanced in favor of BellSouth. Section IV.C. states:

> <u>US LEC and BellSouth enter into this Agreement with the understanding that the carriers would be interconnecting with each other for comparable types of calls and that the usage would likely be reasonably balanced, i.e., US LEC would be terminating to BellSouth approximately the same level of usage that BellSouth would be terminating to US LEC.</u> If at any time during the term of this Agreement traffic is imbalanced to the degree that US LEC feels a cap on amounts owing under this Agreement is required, US LEC has the option to adopt the comparable billing

> provisions contained in any agreement BellSouth negotiates or has entered into with another ALEC which contains cap provisions, after August 8, 1996 provided that US LEC adopt the billing provisions of such other agreement that are comparable to those contained in this Section IV.

(emphasis added).

The 1997 Agreement expired by its terms on October 31, 1998. On June 26, 1998, US LEC exercised its right under Section 252(i) of the Act to adopt another CLP's interconnection agreement by adopting BellSouth's agreement with ALEC, Inc. (1998 Agreement). The 1998 Agreement expired on June 15, 1999. (Ex. JDH-2.) In August 1999, after US LEC's reciprocal compensation plan came to light, US LEC avoided arbitration with BellSouth over the definition of "local traffic" by again exercising its right to adopt the interconnection agreement between BellSouth and a different CLP, Intermedia Communications, Inc. (1999 Agreement). The 1999 Agreement expired on December 31, 1999.

The 1998 and 1999 Agreements also require the parties to pay one another reciprocal compensation for the termination of "local traffic." All three Agreements contain provisions for reciprocal compensation to be paid at a rate of approximately 1.33 cents per minute. (Tr. Vol. 8, pp. 156-57.)

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 3

After executing the 1997 Agreement, US LEC sought to imbalance traffic in its favor. First, US LEC's president, Mr. Ganatra, required his management employees to install and maintain BellSouth Basic Rate ISDN (BRI) service at their homes to connect to US LEC's network during nonbusiness hours, and he encouraged them to keep the lines connected or "nailed up" 24 hours a day for the express purpose of generating minutes of use for which US LEC would bill BellSouth reciprocal compensation. (Tr. Vol. 1, p. 82; Vail Dep. 246-49.) For every US LEC employee who participated in the "Employee BRI Program," US LEC could generate more than $1,000 per month. (Tr. Vol. 1, pp. 134-35.)

In addition, Mr. Ganatra negotiated an agreement executed on June 1, 1997, to pay sales agents 50-65% of the reciprocal compensation US LEC received from BellSouth for terminating calls to information providers and others whom the sales agent recruited as US LEC customers. (See US LEC's response to Interrogatory No. 37 of BellSouth's Fourth Set of Data Requests to US LEC.) In addition to the commissions paid under the agreement, US LEC rewarded the sales agent's principal in December 1997, with a warrant to purchase 99,000 shares of US LEC stock. (Vail Dep. 57-59.)

In 1997, in response to funding cuts by the General Assembly, MCNC began to investigate opportunities to commercialize MCNC assets and/or to create new, profit-generating businesses. In the summer of 1997, MCNC hired Tom Finn and Steve McNeill as consultants to assist MCNC in identifying and implementing business development opportunities. (Tr. Vol. 1, p. 81; see also Blatecky Dep. 17-80.)

In August 1997, US LEC Executive Mike Simmons approached his former co-workers Steve McNeill and Tom Finn, and "suggest[ed] an arrangement in which MCNC could share in revenues owed to US LEC by BellSouth...." (Ex. WKM-3, at 1.) The arrangement was intended to exploit the reciprocal compensation provision in US LEC's Interconnection Agreement with BellSouth. At a meeting arranged by Messrs. Finn and McNeill, Mr. Simmons and his colleagues at US LEC described to Mr. Blatecky and others at MCNC how the reciprocal compensation provision in the US LEC/BellSouth Interconnection Agreement could be a tremendous moneymaker for US LEC if traffic was imbalanced in favor of US LEC, and how MCNC could share in the wealth if it assisted in generating the traffic to create the imbalance. During this meeting, Mr. McNeill, in the presence of Mr. Simmons and others from US LEC, told MCNC's representatives that imbalancing traffic in order to bill BellSouth enormous amounts of reciprocal compensation would benefit BellSouth, because it would help BellSouth demonstrate that sufficient competition existed in BellSouth's local market and thereby allow BellSouth to offer long distance services. [1] The consultants then sold MCNC management on the idea of establishing the network suggested by Mr. Simmons and using it to provide Internet connectivity to schools. (Tr. Vol. 1, pp. 81-82; Blatecky Dep. 81-88, 355-358; Ex. WKM-3, at 1.)

In order to take personal advantage of the reciprocal compensation sharing offered by US LEC, Messrs. Finn and McNeill formed a separate company, Metacomm, to set up a second reciprocal compensation network identical to, but independent from, the one it planned to establish for MCNC. They recruited two partners to provide financial backing based on promises of quick profits in the "10s of millions of dollars." (Ex. WKM-18.) Messrs. Finn and McNeill also solicited the assistance of the other MCNC consultants and employees who would work in setting up the MCNC network to simultaneously set up a network to generate reciprocal compensation for Metacomm's benefit. This group consisted of Andy Carwile, Dave Sinnott, Jason Brown, Larry Densmore, and Michael Fox. They all made great efforts to ensure that MCNC did not find out about their activities on behalf of Metacomm.[2] (Tr. Vol. 1, p. 96; Exs. WKM-17, 19, 20, 21, 22.)

On September 3, 1997, US LEC entered into identical agreements with MCNC and Metacomm to pay them 40% of all reciprocal compensation BellSouth paid US LEC for traffic created by the two companies. (Exs. WKM-4 and WKM-16.)

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 4

The record shows that immediately after signing the commission agreements on the sharing of reciprocal compensation, MCNC and Metacomm began setting up the networks suggested by US LEC. The networks they configured were identical in design and remarkably simple. MCNC and Metacomm each located routers (computers) in leased "POP sites." They leased from BellSouth

[1] This same statement was later repeated to others, including one of the vendors who provided equipment for the MCNC reciprocal compensation network. (Tr. Vol. 1, p. 130)

[2] Mr. Blatecky stated at his deposition that had he been aware of his consultants' and employee's activities on behalf of Metacomm, "[i]t would have concerned [him] a great deal [b]ecause these folks are on our [MCNC's] payroll and should be working for us." (Blatecky Dep. 392.)

ISDN lines and DS3 high-transmission facilities capable of originating up to 672 connections and connected them to their originating routers. They programmed the routers to dial telephone numbers supplied to them by US LEC. Connections originated by the routers were transported to BellSouth's switch, then to US LEC's switch in the same city in which the connection originated, and then transported by leased facilities to terminating routers.

Metacomm set up originating routers in POP sites located in Raleigh, Greensboro and Charlotte. MCNC planned to do the same, but withdrew its participation after setting up only the Raleigh and Charlotte POP sites. In each city, the two companies' POP sites were located in contiguous, leased spaces. All of MCNC's connections terminated in Raleigh or RTP, and most of Metacomm's terminated in Raleigh, regardless of their originating location. Metacomm's Raleigh originating routers called terminating routers located next to them in the same building. The stated objective of US LEC and its partners was for Metacomm and MCNC to keep as many of the available connections "nailed up" on a continuous basis so that US LEC could bill BellSouth the maximum amount of reciprocal compensation for the open connections. (Tr. Vol. 1, pp. 84-87; 97-99; Exs. WKM-8, 9, 24; see also US LEC's responses to Interrogatory Nos. 2-5 of BellSouth's Fifth Set of Data Requests.)

US LEC directed MCNC and Metacomm to disconnect and immediately reconnect each connection every 23 hours and 59 minutes, because US LEC's switches could not create billing records needed to bill BellSouth reciprocal compensation if the connections were left up continuously. Pursuant to US LEC's instructions, MCNC and Metacomm programmed their routers to recycle each circuit once per 24-hour period. (Tr. Vol. 1, pp. 88-89; 99; Finn Dep. Ex. 3.)

The plan US LEC proposed to MCNC is set forth in a memorandum produced by MCNC. It states:

> MCNC/US LEC ISDN Remuneration Application
>
> One provision of the Telecom Reform Act of 1996 requires that Incumbent Local Exchange Carriers (ILECs) provide a termination fee to new Competitive Local Exchange Carriers (CLECs) for any switched call that originates from an ILEC and terminates at the CLEC....
>
> This provision of the Telecom reform act provides a unique opportunity for CLECs (in this case, US LEC) to pass along a portion of those termination fees (paid per minute) to customers who are willing to purchase services from US LEC. MCNC has entered into an agreement with US LEC where they will provide ISDN connectivity from remote MCNC locations serviced by BellSouth to MCNC, which is served by US LEC. There are remote locations being serviced by BellSouth in Raleigh, Charlotte, and Greensboro and all of these sites dial back to MCNC via ISDN.
>
> Each remote site will have one or more DS3s (BellSouth) feeding an M13 channel bank which delivers 28 PRIs to the access equipment (currently Cisco 3640s). The [routers] then initiate 23 calls per PRI which terminate at MCNC (US LEC) on a similar set of access equipment. Given that each DS3 has 28 PRIs and each PRI can

> initiate 23 calls (644 calls per DS3), there is a major opportunity for revenue to grow significantly with each pair of DS3s (one remote and one central) that are activated.
>
> The technical requirements for this application are fairly simple. The equipment must primarily be able to originate and answer 644 calls per DS3 as well as take these calls down and bring them back up once per 24 hour period. <u>Circuit availability is the primary factor in this application. There is no major requirement for accommodation of heavy traffic today as the current implementation requires simply enough traffic (i.e. Routing updates) to keep the circuits alive</u>. The other major requirements entail monitoring and management capabilities as well as uptime reporting...with BellSouth and US LEC availability reports.

(Ex. WKM-5.) (emphasis added).

The Commission notes that the above-quoted memorandum makes no reference to the need for any actual use of the circuits for the reciprocal compensation to be generated. According to the memorandum, all that was needed to flow across the lines from BellSouth's network to US LEC's network were "routing updates."

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 5

In October 1997, MCNC terminated Tom Finn, Dave Sinnott and Jason Brown (who later became Metacomm employees) because it discovered that they had noncompete agreements with their former employer that prohibited them from working for MCNC. (Tr. Vol. 1, p. 90; Blatecky Dep. 382-83.) The following month, MCNC fired Mr. McNeill and Mr. Densmore because Messrs. McNeill and Densmore sent US LEC a letter misrepresenting that Mr. Densmore was the acting chief executive officer of MCNC to have US LEC write an $85,000 advance commission check to Mr. McNeill. Mr. McNeill shared the money with Mr. Densmore and MCNC employee/Metacomm consultant Michael Fox. (Tr. Vol. 1, p. 90.)

After terminating its consultants, MCNC President Frank Hart assigned Alan Blatecky to investigate the network configured by MCNC's former consultants in cooperation with US LEC. Mr. Blatecky discovered that the network was not currently designed to serve schools or any end users, but was designed and being operated at that time simply to keep open connections between routers for the sole purpose of generating reciprocal compensation. Mr. Blatecky documented his findings in two memoranda he prepared for MCNC's EMC in early January 1998. (Tr. Vol. 1, pp. 90-91; Exs. WKM-6 and WKM-7.) He concluded: "Essentially the project is based on having circuits operational with no data or content. That is, the circuits are being turned up and no traffic traverses the circuits." (Ex. WKM-6.) He further stated:

> The US LEC project was established haphazardly and was predicated solely on the potential revenue stream from BellSouth to US LEC for termination charges. The result is that the network that is being brought up is optimized to generate revenue from these termination charges without regard to actual traffic or content.

(Ex. WKM-7.) Mr. Blatecky testified at his deposition in June 1999, that he stood behind these statements and saw no need to amend them in any way based on information he learned in the intervening year and a half. (Tr. Vol. 1, p. 129; Blatecky Dep. 417-24.)

Other evidence confirms Mr. Blatecky's conclusions. The Cisco equipment representative who installed the routers for MCNC stated that Michael Fox told him that the network was being configured solely to establish empty connections, and not to serve end-user customers:

> A. What I said Michael Fox repeatedly told me was performance was not a requirement, because there was no data, period. He didn't say that there was a test phase. 'Cause if it was a test phase, then performance eventually would be a requirement. Do you see what I'm saying?
>
> Q. Uh-huh (yes).
>
> A. I didn't say anything about test requirements. I just said there was no requirements for data going across this network, period.
>
> Q. So, in other words, what you were told by Mr. Fox is, "We want to set this network up, but it's never going to be used"?
>
> A. Just a – I was told by Mr. Fox, back again to my record, that it was to help US LEC and BellSouth – US LEC as a CLEC, competitive local exchange carrier, and BellSouth in an FCC ruling for long distance. That was the purpose I was told.
>
> Q. So was it your understanding this network was never going to be used?
>
> A. It was my understanding that the network was not to be – was not going to be passing data. There was no requirement for data on that line. That was my understanding. I wouldn't say it wasn't being used. It's being – I mean, its running. It's used.
>
> Q. So it's just a network that's going to get set up, and nobody was ever going to pass data or do anything with it?
>
> A. That was my knowledge.

(Tr. Vol. 1, p. 130 (quoting Whelan Dep. 53-54).) Metacomm's Mr. Finn likewise conceded that, at least after his ouster, MCNC sought only to execute the "simple plan" to generate reciprocal compensation solely through open connections, and did not intend to make its reciprocal compensation network available to end users. (Ex. WKM-3, at 2.)

After discovering the true nature of the network configured by its former consultants and US LEC, MCNC withdrew its participation in the "US LEC project." MCNC did not think it appropriate to set up a network and maintain empty connections over it solely to generate reciprocal compensation. (Blatecky Dep. 421-22; Hart Dep. 245-47.) By terminating its agreements to purchase DS3s and other facilities from BellSouth, MCNC incurred substantial termination liabilities to BellSouth. (Tr. Vol. 1, p. 91.) These liabilities, together with the millions in commissions it stood to receive from US LEC for establishing empty connections, were not enough to persuade MCNC to participate in a business which it concluded "did not have integrity." (Blatecky Dep. 421, 429.)

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 6

Through the winter of 1997 and into the spring of 1998, Metacomm continued to expand its network by increasing the number of connections nailed up through BellSouth's and US LEC's switches. The goal of both US LEC and Metacomm was to create as much reciprocal compensation revenue as possible via this type of traffic. In December 1997, when US LEC's Executive Vice President reported to US LEC's President, Tansukh Ganatra, that Metacomm had activated new circuits at its Greensboro originating router location and planned to turn up additional circuits the next day as well, Ganatra responded: "Great!!! Show me the money!!!!!" (Ex. WKM-27.)

By mid-December 1997, Metacomm had five DS3s terminating in excess of 640 empty circuits each to US LEC numbers. Its plan was to employ the "full utilization of 18 DS3s (six in each of the three cities) by April 1998. (Finn Dep. Ex. 20.) After discussions with Mr. Ganatra at US LEC, Metacomm quickly expanded its plan to include 12 DS3s at each of its three originating router locations, for a total of 36 DS3s by July 1, 1998. In a letter to Mr. Ganatra confirming Metacomm's growth plans, Tom Finn stated that Metacomm's "goal is to expand its network at a rate that remains consistent with US LEC's expectations and is cognizant of BellSouth's constraints. The Company will rely on its close working relationship with US LEC to ensure that the incremental profitability afforded through its network expansion does not reach a point of diminished returns." (Finn Dep. Ex. 21.)

US LEC was extremely excited about the revenue Metacomm's empty connections were creating for it. In early-March 1998, Wilbur Williams reported to Mike Simmons on the "success" of the Metacomm project: "We will have nine Metacomm DS3s pumping $250,000 per month each, net installed by Friday. That is the total installed to date. With the BellSouth 25% PIU, that number could be as high as $400K per DS3. Pretty bad, huh?" (Ex. WKM 57.) Mr. Williams calculated that nine DS3s "running full time" would result in monthly revenue of $3,173,148, with $1,903,887 (60%) going to US LEC and $1,269,261 (40%) to Metacomm." (Ex. WKM-40.) By March 1999, Metacomm was originating connections through more than twenty DS3s, and US LEC was billing BellSouth over $9 million per month for Metacomm's traffic. (See US LEC's response to Interrogatory No. 25 of BellSouth's Fourth Set of Data Requests.)

Mr. Ganatra exhorted his employees to ensure that the Metacomm "network" created as much revenue for US LEC as possible. For example, in May 1998, when Mr. Ganatra discovered that Metacomm traffic appeared to be decreasing, he sent an e-mail memorandum to his senior managers noting the decrease, and stated: "Folks something is not right and this is serious stuff!!!!! **Remember that our lifeline is in the billings to BellSouth.** . . .please assure me that whatever is wrong will be fixed on a retroactive basis! (WKM-25.) (emphasis in original). In June 1998, when Wilbur Williams reported to Ganatra that the Metacomm routers were performing "poorly" – that is, they were not "pumping minutes" to US LEC at full capacity – and that he had told Metacomm to get the routers turned up "immediately," Ganatra responded: "Keep the 'pressure' on! We need the minutes!"[1] (WKM-26.) (emphasis in original).

In January 1998, US LEC began providing the money needed by Metacomm to keep its network up and generating the empty minutes for which US LEC billed BellSouth. On January 19, 1998, US LEC provided Metacomm with a \$500,000 unsecured "advance" on reciprocal compensation commissions payable to Metacomm. The following month, it provided an additional \$700,000 unsecured advance. US LEC placed one condition on its cash advances – that "Metacomm grows rapidly to 36 DS3s." (WKM-42, at 2.) Indeed, US LEC made its initial advance contingent upon Metacomm converting its forecast for 36 DS3s into a firm sales order by the end of January 1998.[2] (Ex. WKM-79; Finn Dep. Ex. 24; Vail Dep. 148-51.) These were, of course, the 36 DS3s Metacomm planned to connect to routers at its POP sites.

US LEC has continued to make monthly advances to Metacomm. Each month, Metacomm sends US LEC a memorandum setting forth its network expenses, and US LEC responds with a check for about \$1 million so that Metacomm can continue leaving connections nailed up to US LEC telephone numbers. (Tr. Vol. 1, p. 110; US LEC's responses to Interrogatory No. 5 of BellSouth's Second Set of Data Requests and Interrogatory No. 26 of BellSouth's Fourth Set of Data Requests.)

US LEC's ongoing support of Metacomm has not been limited to money. US LEC provided Metacomm with human capital as well. For example, when Metacomm expressed concern about not having sufficient "bodies" to accomplish their mutual goal of installing 36 DS3s by the summer of 1998, US LEC responded by offering to provide technical and administrative personnel and to assign an employee to assist Metacomm full-time. (Tr. Vol. 1, p. 110; Exs. WKM-49, 50, 51, 52, 53.) Similarly, when Metacomm's Tom Finn wrote to Wilbur Williams of US LEC: "Please assure me that US LEC's current intentions (to "reward us handsomely, etc.") haven't changed and remain consistent with our numerous discussions..." (Finn Dep. Ex. 38), US LEC responded:

> I know of no reason why anyone there should feel the least bit different about US LEC's intentions and satisfaction with the way things are going. As I have stated numerous times, you guys are a critical block in our company and you must be

[1] US LEC claims that Mr. Ganatra's numerous e-mails which state clearly his demands that the plan generate as much money for US LEC as possible merely reflect his "excitement" about helping Metacomm provide a valuable service to end-user customers. The Commission observes that none of Mr. Ganatra's e-mails expressing this "excitement" mention or even refer indirectly to Metacomm serving customers. (Tr. Vol. 1, pp. 136-137; Vol. 4, pp. 65-71.)

[2] On June 30, 1998, in connection with Richard Aab's purchase of a controlling interest in Metacomm, and after Mr. Aab paid more than \$3 million to Metacomm's existing creditors, Metacomm and US LEC entered into a Security Agreement with respect to these advances. (US LEC Cross-Exam Ex. 2.) At that point, as a result of Mr. Aab's ownership and control of both companies, Metacomm and US LEC became "affiliated companies" for Securities and Exchange Commission reporting purposes, and US LEC had an obligation to enter into the security agreement with its sister company.

> successful, and we will make sure you are....Again, we must have you being successful, and nothing about that has changed.

(Finn Dep. Ex. 41.)

With its support, US LEC bought control over Metacomm. US LEC even made hiring decisions for Metacomm. In the spring of 1998, Mr. Finn asked Mr. Ganatra, "May I have your approval to hire/contract (@5K per month to get started) both Dave Sinnott and Jason Brown?" Ganatra directed: "The answer is NO at this time and it will have to wait until 6/18/98." (Tr. Vol. 1, p. 138; Ex. WKM-52; US LEC Ex. 18.)

US LEC did not purchase Metacomm directly. Instead, in June 1998, RTA Associates (RTA) bought 69% of Metacomm by buying out Mr. McNeill and the two silent partners for $1 million each. Mr. Aab also paid Larry Densmore, Michael Fox, and Andy Carwile over $90,000 for their interests in Metacomm, and paid over $3 million of Metacomm's outstanding debts. (Tr. Vol. 1, p. 97; WKM-23.) Mr. Aab insisted as a condition of his buyout that the former Metacomm partners enter into side agreements with Metacomm. The side agreements contained, among other things: a release by the individuals of Metacomm, RTA, and US LEC from all liabilities of any kind (¶ 1); a release of the individual by Metacomm only (¶ 2); a promise by the individuals not to participate in any way in a suit or other proceeding in a position adverse to Metacomm, RTA, or US LEC (¶ 1); a confidentiality clause which each individual acknowledged would be breached if he "discusses any contract to which Metacomm, RTA, or US LEC or any of their affiliates or subsidiaries is a party, or discusses the business of Metacomm, RTA or US LEC...with any persons," unless Metacomm provided written authorization (¶ 9); and a recital that Metacomm, RTA, and US LEC were each intended beneficiaries of and could each enforce the agreement (¶ 13). (See, e.g., Finn Dep. Ex. 70.)

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 7

US LEC was concerned that BellSouth would object to paying reciprocal compensation for the empty connections nailed up by Metacomm and MCNC to generate reciprocal compensation. In a February 27, 1998 memorandum to Tansukh Ganatra, Wilbur Williams wrote: "The key question is whether or not [Metacomm's network] would stand up to scrutiny if BellSouth cried foul for any type of router-to-router configuration and would we be taking an unnecessary risk?" (WKM-41.) In an effort to shield Metacomm's network from unwanted scrutiny, US LEC demanded that Metacomm find a way to originate "real originating traffic" on its network. In response to US LEC's demand, Metacomm began for the first time to investigate allowing customers to access its network. In a March 13, 1998 memorandum to his Metacomm partners, Tom Finn wrote:

> In direct support of US LEC's demand (and to again differentiate Metacomm from MCNC), Capital Holdings introduced and negotiated with several other firms to establish 1) a bankable business plan which would survive scrutiny; 2) develop real originating traffic for the network. In addition of this effort meeting US LEC's demand, it also provides Metacomm a hedge against any unforeseen actions yet-to-be taken by BellSouth, the PUC, MCNC, et al.

(Ex. WKM-42, at 2.) (emphasis in original).

Thereafter, on March 20, 1998, Metacomm entered into a written agreement with Learningstation.com to allow Learningstation to host its educational applications on Metacomm's network. (Finn Dep. Ex. 33.) Metacomm agreed to pay Learningstation to bring customers onto Metacomm's network, by promising to pay Learningstation more than $50,000 for each DS3 connected to the network in order to allow access to Learningstation's applications. (Id. ¶ 1.) The record evidence is that only one customer ever used the Metacomm network to access Learningstation's applications.

US LEC allowed Metacomm to sign up only those customers located in BellSouth's service territory. US LEC apparently recognized that originating Metacomm traffic through the switch of a smaller ILEC could cause the ILEC serious financial harm. When Metacomm inquired about a potential customer served by Concord Telephone Company, with whom US LEC has an interconnection agreement, US LEC instructed: "Back away from Concord for the moment. A DS3 would break their bank." (Ex. WKM-80; see also Finn Dep. Ex. 54.)

All of the Metacomm partners did not agree with the need to add customers to Metacomm's network. Wilbur Williams reported to Mr. Ganatra: "Steve McNeill is only interested in setting up router-to-router configurations (Metacomm) and the rest of those guys are trying to build a business that would be sustainable even if reciprocal compensation went away....Their internal struggles seem to continue, which is the business building idea versus the greedy pigs who only want to create dollars (Steve)." (Ex. WKM-56.) Moreover, in a late-1997 memorandum to Metacomm investors Terry Phillips and Phil Miller, Metacomm's Tom Finn addressed their "disappointment and frustration" regarding the MCNC and Metacomm business plan. (Finn Dep. Ex. 13.) He said he "share[d] many of the same 'strange feelings' concerning the ethics of this business" as they did, but continued to justify the plan as an acceptable "arbitrage" of BellSouth. He stated that "US LEC writes huge checks to BellSouth on the first of each month for traffic generated by US LEC that terminates on BellSouth switches." Thus, he told his investors that BellSouth should reciprocate by paying US LEC for Metacomm traffic. He said if BellSouth was required to pay, "everyone" would win: "BellSouth gets long distance approval and the CLECs get what they were already promised. All that Metacomm does is share in the revenues it creates for US LEC - that's it." (Id.)

In response to its partners' internal debate concerning whether to allow customers to access its network, Metacomm proposed selling its network to US LEC. In an April 29, 1998 letter to Messrs. Ganatra and Aab setting forth his proposal, Mr. Finn wrote:

> [W]e understand the value of 18 nailed-up DS3s switched through US LEC facilities over the next year. We know of US LEC's ability to take advantage of "ride" a similar third party Interconnect Agreement through July of 1999. We appreciate that US LEC has greatly and recently benefited from the revenue and earnings that we have mutually generated. We recognize that US LEC will accrue additional benefits through an acquisition of Metacomm. We feel compelled to remind you that we have done everything you have asked of us (and more) and have clearly operated with nothing but US LEC's best interest in mind.

* * *

> It would be our intention to work closely with you to ensure the surviving entity would be integrated into US LEC's business plan, or into a separate plan with the goal of a data services arm which could achieve a significant valuation of its own. This entity has been described to you before. We feel we could build a valuable company which supports the education goals of Learningstation.com and exploit the emerging "net PC" concept through BusinessStation.com. These entities each have growth plans which extend past the November time frame (when the interconnection agreement expired) and are more suited to meeting the goals of the surviving entity without the encumbrance of not matching the goals of the current Metacomm owners.

(Finn Dep. Ex. 37.) (emphasis in original). In a subsequent letter, Mr. Finn stated that his proposal to sell Metacomm to US LEC "should accomplish three objectives:"

> 1. To replace the current ownership of Metacomm with a team that has a longer-term view of the business opportunity, is willing to share the risks, and would re-engineer the current network to support end user traffic: Metacomm's current members want "out", its investors have lost confidence. US LEC's agenda and that of Metacomm's seems to have diverged, causing a strain on continued relations that do not serve anyone's interest.
>
> 2. During this period of uncertainty, the "new team" will...enable the network re-engineering effort....
>
> 3. Learningstation.com needs to be funded so that it could reasonably expand its sales, marketing and implementation force to create the demand which supports the network re-engineering effort...

(Ex. WKM-48.)

In response to Mr. Finn's inquiry about a buyout, Mr. Ganatra gathered and sent to Mr. Aab the "raw data" Mr. Ganatra believed US LEC needed to make a decision about acquiring Metacomm. (Ex. WKM-47.) The "raw data" consisted solely of a spreadsheet setting forth the money US LEC stood to earn based on 15 Metacomm DS3s generating traffic at a rate of 98% of capacity.

In response to US LEC's demand, Metacomm began soliciting end-user customers for its network in March of 1998. According to Andy McIntosh's sworn testimony, "[t]he first customers were placed on the network in May of 1998."[1] (Tr. Vol. 7, p. 149.)

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[1] Mr. Carwile testified at his deposition that at the time he stopped working for Metacomm in June 1998, there were no customers accessing the Metacomm network. In addition, dates Mr. McIntosh represented in Exhibit 3 to his testimony that Metacomm first signed up customers and the date those customers were in fact given access to the Metacomm network differ significantly. For example, Mr. McIntosh's Exhibit AM-3 shows some of the Mecklenburg Area Catholic Schools as coming onto the Metacomm network in March 1998. Mr. Crovi, the technology director for the Catholic Schools testified, however, that the schools did not even decide to use Metacomm's network (continued...)

Metacomm offered potential customers free Internet access via its "test network" if the customer agreed to allow Metacomm to install at least four PRIs (92 circuits) and a router on the customer's premises. (Tr. Vol. 1, p. 101.) Metacomm made its offers for free access on a "take it or leave it basis," such that the customer was faced with accepting far more capacity than it needed or refusing Metacomm's free offer. Mr. Self from the Shelby City Schools testified at the hearing, for example, that the sole reason that he accepted Metacomm's offer was because it was free, and that he understood the offer for four PRIs per school to be a take it or leave it offer. (Tr. Vol. 7, pp. 37-41.) Mr. Boykin from Meineke Muffler testified that his understanding and reason for accepting Metacomm's offer was the same. (Tr. Vol. 5, pp. 91-92.)

In addition, in order to induce customers to sign on for free access to its network, Metacomm implied to potential customers that BellSouth had knowingly "joined forces" with Metacomm to provide this free service. (Tr. Vol. 5, p. 94; Ex. WKM-34.) Metacomm promised that free access to its "test network" would continue through at least June 15, 1999, the date the BellSouth-US LEC 1998 Agreement was set to expire. (Tr. Vol. 1, p. 101.) Since adopting the 1999 Agreement this past summer, Metacomm has continued to allow virtually all of its customers to access the network at no cost. (Tr. Vol. 7, pp. 222-224.) Metacomm paid sales agents more than $400,000 ($25,000 per customer) to persuade customers to sign up for this free access to Metacomm's network. (Tr. Vol. 7, pp. 224-226; McIntosh Cross-Exam Ex. 4; Metacomm's response to Interrogatory No. 3 of BellSouth's Second Set of Data Requests.)

In order to provide end-user customers access to its network, Metacomm placed a router on the customer's property. It connected the router to clusters of primary rate ISDN lines (PRIs) or, in some cases, to a DS3, which Metacomm leased from BellSouth and had installed at its customer's premises. The ISDN lines Metacomm placed at customer locations connected Metacomm's router on the customer's premise to the BellSouth central office serving the customer. Metacomm programmed the routers to dial US LEC telephone numbers so that the connections were transported through BellSouth's switch to US LEC's switch in the same city, and then from US LEC's switch over dedicated facilities to another Metacomm router, usually in Raleigh. (Tr. Vol. 1, p. 102.) It costs Metacomm $685,000 a year to serve each customer. (Tr. Vol. 7, pp. 233-234.)

As with all of the connections it established, Metacomm programmed its routers located at customer premises to nail up all available circuits and to recycle each connection once every 24 hours so that US LEC could create a billing record. Metacomm's customers could not use these connections for any purpose other than to access the Metacomm network. Accordingly, Metacomm's CEO, Andy McIntosh, testified that Metacomm's customers "would describe it as a dedicated service." (Tr. Vol. 7, p. 167; see also Tr. Vol. 7, p. 163, quoting McIntosh Dep. p. 40.)

(...continued)
until April 1, 1998, and that no facilities were installed until the Summer of 1998, after the end of the school year. (Tr. Vol. 7, pp. 57, 66-67.) He also testified that the schools did not begin to use the network to its full potential until January of 1999. (Tr. Vol. 7, pp. 67-68.)

Mr. Self from the Shelby School District testified that the Shelby Schools did not access the Metacomm network until Christmas of 1998, and that all schools in his district were not connected to the network until February of 1999. This is in stark contrast to Mr. McIntosh's exhibit showing the Shelby Schools as coming on line in August of 1998.

Metacomm's former CEO, Tom Finn, testified similarly that "Metacomm's customers enjoy dedicated access." (Finn Dep. 37.) According to Metacomm, its network did not become "stable" until December 1998. (Tr. Vol. 7, p. 121.)

Metacomm claims to have 35 end-user customers for its "dedicated service."[1] (Tr. Vol. 7, p. 210.) Its customer base has not increased since September 1998. (Tr. Vol. 7, pp. 214-215.) There is evidence in the record regarding only seven of these customers: Charlie Horse Farm; Meineke Discount Muffler, Inc.; Alexander Children's Center; EDS; Aerial Images; Mecklenburg Area Catholic Schools; and the Shelby City Schools. The evidence shows the following with respect to each of these customers:

Charlie Horse Farm. This Metacomm customer is in the business of boarding horses. Metacomm installed a router and four PRIs at the horse barn so that it could establish 92 connections at one time, and originated connections from the horse barn to a terminating router for approximately one year. The owner of the horse barn testified that he never accessed or attempted to access Metacomm's network. He further testified that Dave Sinnott from Metacomm knew that he was not using Metacomm's network.[2] (Tr. Vol. 1, pp. 104-106; Pharr Dep. 15-17.)

Meineke. Meineke's director of MIS, Max Boykin, testified at the hearing that he allowed Metacomm to install a router and a DS3 at Meineke's location solely because it was free. Mr. Boykin testified that Meineke's sole use of the network consisted of connecting two personal computers to Metacomm's router and using them to access the Internet during working hours for only a couple of months. He said that in October 1998, when Meineke entered into an arrangement for another company to provide all of Meineke's approximately 80 employees with Internet access using only a fraction of the capacity installed free of charge by Metacomm, he disconnected the link between Meineke's computers and the Metacomm router, and Meineke did not use the network for any purpose thereafter. Mr. Boykin told Metacomm's sales agent at the time he accepted the equipment that he may not use the Metacomm network, and later told the sales agent that he was in fact not using it.[3] (Tr. Vol. 5, pp. 105 and 107.)

Shelby City Schools. Metacomm presented the testimony of Mitchell Self from the Shelby City Schools. Mr. Self testified that the Shelby schools signed on to become a Metacomm customer

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[1] Metacomm counts each school in the Mecklenburg Area Catholic Schools and Shelby City School District as a separate customer, even though the school system is in reality the only customer. When each school system is counted as a single customer, Metacomm has about 25 customers.

[2] US LEC suggested that the owner of the horse barn ordered facilities to establish an ISP, but the horse barn owner's own testimony contradicts US LEC's claim. The horse barn owner, Mr. Pharr, who is also employed by Metacomm's principal sales agent Computer Network Power, testified that he would not have accepted the facilities if there was any cost to him, and that he "just don't care to play with computers" when he gets home from his job as a computer consultant. (Pharr Dep. 16, 21.)

[3] Metacomm likewise knew that its customer UNCC was not using its network. (See Sinnott Dep. Ex. 27.)

in the fall of 1998. The schools did not begin accessing the Metacomm network until Christmas of 1998, and all schools were not connected until February of 1999. The Shelby schools do not use the Metacomm network to access Learningstation's applications. Mr. Self testified that the sole reason he chose Metacomm over a competing proposal from BellSouth was that Metacomm was offering access to its network free of charge. He did not have any choice with respect to the amount of capacity to accept from Metacomm. Mr. Self also testified that actual use of the Metacomm network was confined to school hours. (Tr. Vol. 7, pp. 9-49.)

Mecklenburg Area Catholic Schools (MACS). Michael Crovi from MACS testified that his schools have been using the Metacomm network at full capacity to access the Internet and Learningstation since January of 1999. MACS is the sole customer using the Metacomm network to access Learningstation's applications. Metacomm provides MACs with four PRIs at each school location. Mr. Crovi testified that if MACS has to pay for Metacomm's service, it will cut back to one-half of a PRI at its high school and middle school, and to one-quarter of a PRI at each of its elementary schools, and that this reduced bandwidth would meet the schools' needs. (Tr. Vol. 7, pp. 75-86.)

Alexander Children's Center, Aerial Images, and EDS. All three of these customers testified that they accepted Metacomm's equipment because it was free. All three further testified that they do not use all of the capacity provided by Metacomm, nor do they access the network 24 hours a day. For example, Catherine Brooks from Alexander Children's Center, a group home and learning center for troubled youths, testified that the Center did not give its students access to the Metacomm network. It used the network only to give its approximately 40-50 administrative employees access to the Internet. These employees used the network mostly during business hours. Mr. Anderson for EDS testified that his company uses the Metacomm network to transfer information between its two facilities. He testified that if he had to pay for access to Metacomm's network, he would reduce his capacity from its current level of two DS3s to one DS3. (Anderson Dep. 7-8.)

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 8

The record conclusively shows that US LEC attempted to avoid revealing its reciprocal compensation imbalance plan to BellSouth. (See, e.g., Tr. Vol. 9, pp. 6-7.) The record is replete with evidence of US LEC and its associates' preference that BellSouth not discover the truth behind the Metacomm network. For example:

- At the outset, US LEC directed the Metacomm principals/MCNC consultants to conceal from BellSouth the true use of BellSouth's facilities. US LEC executive Mike Simmons instructed:

> Be careful we do not spill all the beans here. You should approach this as if MCNC will dial into our [US LEC's] facilities, but will not be online all of the time. In other words they may have all trunks connected to us [US LEC] at the same time, but not all of the time. MCNC will be telling BELLSOUTH that they will be dialing "others" not just us.

(Tr. Vol. 1, p. 134; see also Ex. WKM-81.) (emphasis added).

- After MCNC's initial turn-up of massive numbers of empty circuits in Raleigh created problems in BellSouth's end offices and BellSouth asked who the connections were being established with, Andy Carwile told BellSouth network personnel that they were "mostly going through a CLEC" and "did not provide the CLEC name." All connections were, in fact, being directed to US LEC. (Tr. Vol. 9, pp. 8-9; Grefrath Cross-Exam Ex. 1.)

- When BBS representatives asked Metacomm about their applications in an effort to better serve their customer, Metacomm refused to disclose its plans, citing confidentiality concerns. They remained steadfast in this position even when BBS offered to enter into confidentiality agreements, as it commonly does with its customers. (Tr. Vol. 5, pp. 10-12, 26-27.)

- US LEC had Metacomm and MCNC each confirm in a "side letter," rather than as part of their reciprocal compensation commission agreements with US LEC, that the traffic generated on their networks was local and not subject to the ISP dispute between BellSouth and US LEC, so that in the event US LEC had to prove the Metacomm and MCNC traffic was not subject to its separate dispute with BellSouth concerning ISP traffic, US LEC would "not need to show the [reciprocal compensation sharing] contract." (Tr. Vol. 9, pp. 15-19; Grefrath Cross-Exam Ex. 3.)

- When MCNC, after learning the truth about what its consultants intended to accomplish in conjunction with US LEC, told US LEC that it planned to tell BellSouth's North Carolina president, Billie Ray, of its contractual arrangement with US LEC, and that it had been duped by its former consultants and US LEC into establishing its reciprocal compensation network, US LEC threatened to sue MCNC for breach of the nondisclosure provision in the commission agreement. Dr. Hart responded with his "solemn oath...that [MCNC's] discussions with BellSouth would not mention US LEC in any fashion whatsoever."[1] (Tr. Vol. 1, p. 135; Ex. WKM-82; see also Williams Dep. Ex. 317)

- US LEC insisted that its name not be connected in any way with the Metacomm or MCNC reciprocal compensation networks. US LEC's name is not listed with all of Metacomm's other vendors in Metacomm's contract offering "free service," even though there would have been no offers of free service but for US LEC. US LEC likewise instructed that it not be mentioned in connection with MCNC's "Education Initiative," even though it would have

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[1] Dr. Hart apparently kept his oath. Alan Blatecky accompanied Dr. Hart to Hart's one meeting with Mr. Ray. Blatecky testified that they discussed in general MCNC's termination liabilities to BellSouth as a result of canceling the contracts pursuant to which MCNC was purchasing facilities from BellSouth and that Mr. Ray referred MCNC to a BBS manager. Mr. Blatecky testified that the discussion with Mr. Ray did not include any mention of MCNC's reciprocal compensation commission arrangement with US LEC. Mr. Ray was deposed in this matter and his recollection was the same. BellSouth stated in response to data requests that it first learned of US LEC's reciprocal compensation sharing agreement with MCNC in July 1998. (See BellSouth's response to Interrogatory Nos. 18 and 19 of US LEC's 2nd Set of Data Requests.) BellSouth did not confirm the existence of US LEC's identical agreement with Metacomm until it was able to conduct discovery in this proceeding.

provided one-half of the telecommunications facilities if the initiative was to become a reality and receive free publicity for its participation in a seemingly worthwhile endeavor.

- US LEC demanded that Metacomm take US LEC's name out of a memorandum which Metacomm planned to send to a potential customer. (Finn Dep. Exs. 67, 68.)

- Metacomm told BellSouth that it had competing proposals from US LEC to provide originating facilities in order to obtain better pricing from BellSouth. It later admitted that this was not true. (Tr. Vol. 5, p. 23; Metacomm's response to Interrogatory No. 25 of BellSouth's Second Set of Data Requests.)

- Mr. Aab required that Metacomm's partners agree not to disclose anything about Metacomm's or US LEC's businesses or the two parties' contracts as a condition of Mr. Aab's acquisition of Metacomm.

- When BellSouth refused for many months to pay US LEC's invoices for reciprocal compensation for Metacomm and MCNC traffic pursuant to its mistaken belief that the billed minutes were attributable to ISP traffic, US LEC did nothing to correct BellSouth's misperception. US LEC was apparently willing to wait for an expected favorable decision in the ISP dispute and then take BellSouth's money, paid under the mistaken belief that it was for ISP traffic.

US LEC and Metacomm were successful in not revealing their reciprocal compensation plan to BellSouth for many months. Indeed, BellSouth was constrained to make the substantive allegations in its Complaint upon information and belief.

BellSouth first became suspicious about the use to which Metacomm was putting the circuits it was ordering from BellSouth following a blockage of BellSouth's interoffice trunks between its Greensboro Eugene Street end office switch and the Greensboro local tandem switch in early-1998. BellSouth discovered that the blockage was caused by a translation error which was directing hundreds of circuits opened by Metacomm to a toll trunk group. In investigating the blockage problem, BellSouth observed that Metacomm's circuits maintained their connections through all of the night and into the next day. BellSouth then "force released" the trunks that Metacomm was using and that were blocking the entire trunk group. The released lines stayed idle for about five minutes and then reconnected all at one time. (Tr. Vol. 1, pp. 75-76.)

As a result of this extraordinary event, BellSouth sought to determine whether traffic was actually being carried over the nailed up connections or if a problem condition existed that would preclude the trunks being used by other end-user customers. BellSouth performed tests on a sample of Metacomm circuits and discovered that although most of those circuits were connected for over 20 hours per day, no telecommunications were flowing over those trunks. (Tr. Vol. 1, p. 76.)

BellSouth conducted an extensive internal investigation to attempt to determine why Metacomm was keeping lines open continuously with no information flowing over those lines. At about the same time BellSouth concluded its investigation in late-June/early-July 1998, BellSouth obtained a copy of the reciprocal compensation commission agreement between US LEC and MCNC.

The existence of this agreement together with information gathered by BellSouth that Metacomm would not disclose its use of the BellSouth lines, caused BellSouth to suspect that US LEC had a similar reciprocal compensation commission arrangement with Metacomm. BellSouth wrote to US LEC, cited the results of its investigation, and stated its position that it did not believe reciprocal compensation was due for continuously open, empty circuits. The parties met on July 31, 1998, but did not reach a resolution. Consequently, BellSouth filed its Complaint and Request for a Declaratory Ruling initiating this proceeding. (Tr. Vol. 1, pp. 76-77.)

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 9

BBS and BellSouth Telecommunications, Inc. are separate corporate entities, but both are subsidiaries of BellSouth Corporation. BBS sells and implements installation of telecommunications facilities and services to business customers. BBS employees have an obligation to keep information pertaining to its customers confidential, and not share the information with other entities within BellSouth. (Tr. Vol. 5, p. 10.) BBS has no responsibility for regulatory issues or interconnection agreements with CLPs. (Tr. Vol. 5, p. 12.)

Metacomm, as a customer of BBS, never told BBS that it planned to nail up connections to US LEC regardless of whether any traffic was actually flowing over those connections. (Tr. Vol. 5, p. 14.)

Metacomm's secrecy with BBS regarding its applications and its network was unusual. Some BBS representatives speculated as to what Metacomm might be doing. (Tr. Vol. 5, p. 14.) One BBS employee speculated that Metacomm traffic "might" be terminating at a CLP to permit the CLP to bill BellSouth for reciprocal compensation, but that employee believed that BellSouth had gone on record taking the position that it would not pay reciprocal compensation for traffic terminating to an Internet service provider and therefore dismissed the idea. The employee also could not understand how Metacomm would benefit from payments to a CLP. (Tr. Vol. 5, p. 16.)

No one from BBS took action to bring suspicions regarding the configuration of the Metacomm network to the attention of someone within BellSouth's organization that might have led to an investigation. Early on, BBS employees did not see it as their jobs to "police" Metacomm's activities. (Tr. Vol. 5, p. 17.)

In early 1998, some employees of BBS apparently had some understanding of the general concept of reciprocal compensation and possibly the potential for calls being routed to a CLP generating high levels of reciprocal compensation. (Tr. Vol. 5, pp. 43-44.) Around January 8, 1998, a meeting took place between BBS personnel and Metacomm personnel. Notes from that meeting reflect that there were statements to the effect that the network would be a "closed environment" and that computers would "only call each other." (Tr. Vol. 5, pp. 48-49.) Around January 18, 1998, 33 people within either BBS or BellSouth Telecommunications, Inc. had notice of a conference call regarding implementation of Metacomm's equipment. Those persons had notice of what the equipment was, and that Metacomm was going to be connecting to CLPs. (Tr. Vol. 5, p. 80.) Around the early summer of 1998, BBS was told that Metacomm's connections were going to a CLP or to CLPs. (Tr. Vol. 5, pp. 51-52.)

By September 1998, BellSouth had filed a complaint against US LEC with the Commission. BBS understood that Metacomm played a role in the US LEC practices upon which the complaint was based. When BBS learned of the complaint, it asked for instructions as to how to deal with Metacomm. It received instructions to continue treating Metacomm like any other customer. (Tr. Vol. 5, p. 18.)

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 10

US LEC does not dispute the fact that it has billed BellSouth for every minute of every connection established between routers on the MCNC and Metacomm networks. It does not dispute the fact, due to the enormous billings of Metacomm and MCNC traffic, it had billed BellSouth 78 times the amount of reciprocal compensation that BellSouth had billed it through May 1999. At the time of the hearing in this case in August 1999, Metacomm had stabilized its network to the point that it was able to generate more than 650 million minutes of essentially empty connections between its routers per month, resulting in monthly reciprocal compensation billing by US LEC to BellSouth of more than $8.5 million for Metacomm traffic alone. Metacomm traffic accounts for nine out of every 10 minutes of use for which US LEC bills BellSouth reciprocal compensation. By the end of 1999, if monthly billings continued on the same level, US LEC's reciprocal compensation billings for Metacomm traffic would be approximately $150 million.

EVIDENCE IN SUPPORT OF FINDING OF FACT NO. 11

The Metacomm network configuration – routers nailing up connections to other routers — creates effectively dedicated circuits. The location of the "originating router" at a customer's premises rather than at a Metacomm POP site does not change the analysis. Metacomm programmed its routers at customer locations to nail up every available circuit on a virtually 24-hour basis, regardless of customer need or usage, thereby providing what Metacomm's CEO himself described as a "dedicated service."

All parties agree that actual usage, if any, is irrelevant to the question of whether every minute of use generated by the Metacomm network is compensable. US LEC and Metacomm contend that reciprocal compensation is due for every minute that a router held a circuit open to another router. According to US LEC and Metacomm expert witness, Ms. Wallman, the customer "is not a factor." (Tr. Vol. 9, p. 113.) Her testimony is clear on this point:

> Q. So for purposes of your analysis basically it doesn't matter whether Metacomm has customers or whether it doesn't have customers. And if they do have customers it doesn't matter whether they use the network or not?
>
> A. True.

(Id.) Consistent with its "customers are irrelevant" position, US LEC maintains, for example, that reciprocal compensation is due for the millions of minutes of use attributable to connections established by the Metacomm router at Charlie Horse Farm, even though the horse barn owner never used the Metacomm network for any purpose. Consequently, according to US LEC, Metacomm's failure to measure any actual customer usage does not render otherwise compensable minutes of use noncompensable.

Even if the Commission had concluded that there is some basis upon which minutes of actual usage by Metacomm's end-user customers might be compensable, which it has not, there is no competent, material, and substantial evidence in the record upon which to estimate actual customer minutes of use in a reasonably accurate way. First, there is direct record evidence that only six customers – MACS, Meineke, Shelby City Schools, EDS, Aerial Images, and Alexander Children's Center – used the network in any way. The evidence is that Metacomm customer Charlie Horse Farm never used the routers Metacomm placed at its facilities and that Meineke used it in a limited way for only a short period after the Metacomm router at its premises began "pumping minutes" to US LEC. Other than these six customers, there is no specific basis in the record to conclude that any other Metacomm customer used the network at all. To reach such a conclusion would be purely speculative. Given the tenacity with which US LEC and Metacomm conducted discovery and advocated their case, the Commission notes that US LEC and Metacomm did not present any evidence of actual usage by the 20 or so other Metacomm customers.

For the six customers who appear to have used Metacomm's network, there is no competent, material, and substantial evidence upon which to estimate their usage. Metacomm supplied each of them, on a take-it-or-leave-it basis, with capacity which exceeded their needs. Thus, even if a customer estimated that it used the Metacomm network for 50% of a school day (as opposed to the 24 hours a day that the routers on his premises were connected to Metacomm's terminating routers), there is no way to know whether the customer's usage would have been supported by a fraction of the capacity installed by Metacomm. The fact that no customer said that it would pay for the capacity provided by Metacomm free of charge, and at least MACS and EDS testified that they would use far less capacity to meet their needs if they had to pay for it — is strong evidence that actual usage (number of circuits x minutes) would have been far less. Thus, there is no defensible way to estimate actual usage for those customers who did use the network. Any estimate of actual Metacomm customer minutes of use would be arbitrary.

CONCLUSIONS OF LAW

Introduction

This docket has presented many challenges to the Commission. It is not simply the sheer volume of the filings and discovery, running into the thousands of pages, nor is it simply the amount of money involved, a conservative estimate of which at this time is well over a hundred million dollars. It is rather the application of the facts — which in a broad sense are largely undisputed or undisputable — to the contract and the law.

Both parties, for reasons of their own, have attributed a degree of clarity to the contracts that they do not possess, coming in the process to directly opposite conclusions. The contracts, it is true, are somewhat deceptive in their simplicity. They are in many ways "garden-variety," first-generation interconnection agreements that on their face appear unexceptionable. They are therefore not the sort of contracts one would find void on their face. For that reason, the Commission must necessarily examine the language of the contracts themselves. The ultimate difficulty which the Commission must confront comes from the interpretation that US LEC seeks to put on the contracts. It is simply not credible to believe that a network such as that which US LEC and Metacomm constructed was within the parties' contemplation when they entered into the contracts. The contracts are ambiguous as here applied to the Metacomm network and require interpretation through extrinsic evidence, especially as to the public interest.

There were, of course, numerous issues that the parties argued forcefully and at great length. These included questions that outwardly appeared simple but, upon closer examination, were extremely complex — issues such as what is a "telephone call" and what constitutes "telecommunications." However, it is the Commission's view that, before even reaching such questions, we must examine whether, in light of what US LEC and Metacomm actually did in constructing their network, the interpretation that they wish to put on the contract is reasonable and in the public interest. Our answer is a resounding "no." Accordingly, the Commission will follow the prudent principle followed by the courts and we will only decide those questions that absolutely need to be decided to reach the appropriate result. Thus, we believe that it is sufficient that we have found, among other things, that the contract is such that its terms must be interpreted in light of the public interest and that the network is an effectively dedicated one. For these reasons, and the others set out below, we have found that US LEC is not entitled to reciprocal compensation.

<u>CONCLUSION NO. 1</u>

The Commission should consider extrinsic evidence in interpreting the Interconnection Agreements.

POSITIONS OF PARTIES

BELLSOUTH: BellSouth believes that the Interconnection Agreements are clear that reciprocal compensation is not due for the traffic at issue, but noted that US LEC argued that they are just as clear that reciprocal compensation is due, regardless of whether any telecommunications traverse the nailed up circuits or whether any customer of Metacomm used them. BellSouth stated that, if the Commission concludes that the Interconnection Agreements are ambiguous on this issue, it may properly consider extrinsic evidence as to the meaning of the contracts. In BellSouth's view, this evidence demonstrates that the parties did not intend for such traffic to be subject to the reciprocal compensation provisions of the Interconnection Agreements.

US LEC: US LEC maintained that BellSouth has not established that there is any ambiguity in the definition of "local traffic" contained in the Interconnection Agreements that would permit the Commission to look beyond the plain language of those Agreements. Only if such ambiguity is found, and is not resolved through application of the statutory rules of construction, is extrinsic evidence admissible to explain the intent of the parties and resolve ambiguity, US LEC argued.

METACOMM: Metacomm also argued that the contractual terms in this case are unambiguous and that therefore, as a matter of law, the Commission cannot consider extrinsic evidence. The definition of local traffic is straightforward and apparent by reference to everyday experience and the Commission's Order in Docket No. P-55, Sub 1027. Metacomm stated that BellSouth is attempting to interject new terms and qualifications on otherwise unambiguous language rather than attempting to ascertain a correct interpretation of a term that is fairly susceptible to more than one meaning. If ambiguity is found, parol evidence is admissible to explain the intent of the parties and resolve the ambiguity. Metacomm stated that, assuming for the sake of argument that the Commission considers extrinsic evidence, the evidence supports finding that the traffic is local traffic.

DISCUSSION

BellSouth stated that, under Georgia law, which applies to the interpretation of these contracts, the meaning of ambiguous contract terms may be resolved by reference to the conduct of the parties that evidences such intent. Further, it is appropriate to consider industry usage or custom in determining the meaning of a contract provision. BellSouth argued that US LEC knew when it first began operations that the traffic at issue in this case is not the type of traffic for which the parties agreed to pay each other reciprocal compensation. BellSouth contended that, if the traffic was clearly compensable, US LEC would not have done everything possible to conceal its scheme from BellSouth. BellSouth also stated that US LEC allowed BellSouth to labor for months under the misimpression that US LEC's reciprocal compensation invoices to BellSouth were attributable to ISP traffic when it could have told BellSouth and the Commission the truth and demanded payment immediately. Instead, US LEC insisted that Metacomm allow customers access to its network in order to provide a "hedge." US LEC demanded customers even though the Metacomm network supposedly provided compensable local calls without customers.

BellSouth insisted that US LEC knew that BellSouth did not intend at the time it entered into the Interconnection Agreements to pay for minutes of use generated by "nailed up" empty connections originated and terminated by the same party. BellSouth stated that it has hundreds of Interconnection Agreements with language identical to that in the Interconnection Agreements upon which US LEC relied to make its argument, but no other CLP has argued that reciprocal compensation is due for the type of traffic at issue in this proceeding.

US LEC stated that, assuming there is any ambiguity in the Interconnection Agreements, BellSouth's Access Services Tariff is persuasive evidence of BellSouth's understanding of the terms in the Interconnection Agreements. The tariff contains the words "traffic," "call," and "end user" and, US LEC argued, each of the definitions supports US LEC's reading of those terms. The tariff states that traffic simply "denotes a volume of IC [interexchange carrier] access **minutes of use or calls.**" (Emphasis supplied). BellSouth cited to no statement of intent by the parties in the contract, no industry practice, no industry definition, and no case that defines "local traffic" or "traffic" according to anything other than minutes of use.

Further, US LEC stated that the definition of a "call" in the Access Services Tariff contains none of the limitations which BellSouth is seeking to impose. The tariff states that a call denotes a customer communications attempt in which the complete address code is provided to the serving dial tone office. It begins with an off-hook signal initiated by an interexchange carrier or end user (calling party) and concludes with an on-hook signal after attempted or completed communication to an end user (called party) or to an interexchange carrier terminal location. US LEC stated that BellSouth's definition is consistent with the industry definition, and that a "telephone call" is generally understood in the industry as "any demand to set up a connection...[t]he actions performed by a call originator...[t]he operations required to establish, maintain, and release a connection...[t]o use a connection between two stations." US LEC asserted that Metacomm and MCNC meet these definitions.

BellSouth defines the term "end user" in the Access Services Tariff as follows: "any individual, partnership, association, corporation, governmental agency, or any other entity which (A) **obtains a common line, uses a pay telephone or obtains intrastate service arrangements in the operating territory of the Company or** (B) subscribes to intrastate service(s) provided by an interexchange carrier or uses the services of the interexchange carrier when the interexchange carrier provides intrastate service(s) for its own use." (Emphasis supplied). US LEC stated that Metacomm and MCNC obtained local services from BellSouth in its operating territory, and were plainly BellSouth's subscribers and end users.

In US LEC's view, BellSouth's performance of its contracts is also persuasive. BellSouth has treated Metacomm and MCNC as end users, customers, and subscribers. The offerings made by BellSouth to Metacomm and MCNC were standard switched local services offered through special assemblies and the sums billed to Metacomm and MCNC were retail, not wholesale, prices.

US LEC contended that if its claim for reciprocal compensation is denied, the Commission will be disregarding the "clear language" of the Interconnection Agreements between the parties, and will in essence be rewriting the contracts in order to provide BellSouth with retroactive protection against an unforeseen risk. As evidenced by the preceding discussion, however, the terms of the contracts are by no means as clear as US LEC asserts. The evidence shows that when the Interconnection Agreement was originally negotiated by the parties and approved by the Commission in 1997, US LEC and BellSouth believed that the flow of reciprocal compensation between them would be roughly balanced, or possibly favorable to BellSouth. At that time, the idea of setting up a network of routers and high-volume lines, in order to generate the greatest possible number of calls and the largest possible claim for reciprocal compensation, had not come to the mind of either party. The evidence at the hearing showed that the first discussions that ultimately led to the development of the Metacomm network took place in 1997. When US LEC and BellSouth negotiated the Interconnection Agreement in 1996, the circumstances which have now developed were completely unforeseen. This is not a case in which the language of the parties' contract is clear and unambiguous and leaves no room for interpretation. Rather, the terms of the agreement, as applied to this unanticipated situation, are ambiguous and actually require interpretation by the Commission.

In summary, common sense dictates that extrinsic evidence should be considered in this proceeding. BellSouth and US LEC/Metacomm argued that the Interconnection Agreements are clear on their faces, but each party claims that the Agreements support its position. Thus, there appears to be ambiguity, and extrinsic evidence may lawfully be considered. Further, consideration of extrinsic evidence is not only lawful, but is necessary in order to reach conclusions with regard to certain important issues in this proceeding. Consideration of the intent of the various parties, and the parties' conduct that evidences such intent, will be useful in reaching conclusions on these questions. Further, consideration of industry usage or custom in determining the meaning of particular contract provisions will be useful.

CONCLUSION NO. 2

The public interest requires that the Interconnection Agreements be construed in such a way as to disallow the payment of reciprocal compensation for the networks at issue.

POSITIONS OF PARTIES

BELLSOUTH: BellSouth argued that the Commission must consider public policy in rendering a decision in this matter. BellSouth believes that since Metacomm and MCNC originated traffic for the purpose of generating reciprocal compensation, the Commission should find the traffic noncompensable for public policy reasons.

US LEC: US LEC stated that public policy may be considered in determining whether the minutes of use in this proceeding are compensable under the terms of the Interconnection Agreements. US LEC argued that in order to foster the growth of competition and innovation in North Carolina, public policy requires enforcement of the Interconnection Agreements according to their terms. Further, US LEC believes that the public policy in North Carolina does not permit retroactive elimination of valid reciprocal compensation obligations once they have accrued. However, US LEC maintained that public policy should not be invoked in this proceeding to relieve BellSouth from its obligations to pay reciprocal compensation for minutes of use on the MCNC and Metacomm networks.

METACOMM: Same as that of US LEC.

DISCUSSION

BellSouth maintained in its Brief that the General Assembly has charged the Commission with the responsibility to protect the public interest by supervising and controlling public utilities operating in North Carolina. BellSouth pointed out that US LEC witness Wallman candidly acknowledged that the Commission's first and foremost responsibility is to protect the public interest and that the Commission could and should consider its public interest responsibility in determining the compensability of the traffic in question. BellSouth argued that under the public interest analysis of the record in this case, the Commission can make only one conclusion and that is that US LEC is not due reciprocal compensation for Metacomm traffic. Further, BellSouth concluded in its Brief that Section 62-2 of the North Carolina General Statutes declares it to be the public policy of the State to "protect fair regulation of public utilities in the interest of the public," to "prevent unfair or destructive competitive practices," "to assure that facilities necessary to meet future growth can be financed by utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities," and to "encourage and promote harmony between public utilities." BellSouth pointed out that numerous provisions in Chapter 62 give the Commission authority to protect the public interest through its regulation of public utilities. BellSouth also stated in its Brief that the Metacomm network unnecessarily utilizes an enormous amount of capacity in BellSouth's switches which would be available for use by legitimate customers in actual need of the switching functions for which the switches were designed and installed, and BellSouth network personnel could devote their time to serving legitimate customers rather than installing and maintaining facilities over which Metacomm generates meaningless traffic 24 hours a day. Finally, BellSouth also stated in its Brief that since the filing of its Complaint until the present, BellSouth has consistently stressed the propriety and importance of a public interest analysis of the US LEC/Metacomm reciprocal compensation scheme while US LEC and Metacomm have attempted to persuade the Commission that consideration of public policy is irrelevant and unnecessary, and that the Commission's analysis should begin and end with a determination of what the Interconnection Agreements mean.

BellSouth maintained in its Brief that the traffic in question violates public policy for the following reasons:

(1) The traffic was originated for the sole purpose of generating reciprocal compensation;
(2) Determining the traffic to be compensable would harm competition in the State;
(3) Other regulatory bodies and courts have ruled that analogous schemes violate public policy; and
(4) The Commission should pierce the corporate veil between US LEC and Metacomm.

BellSouth argued in its Proposed Order that Metacomm and MCNC originated the traffic at issue for the purpose of generating reciprocal compensation. BellSouth maintained that the Commission should conclude that traffic generated for the purpose of generating reciprocal compensation is not subject to the payment of reciprocal compensation.

Further, BellSouth stated in its Brief that local telephone competition in this State would be harmed severely by granting US LEC, or any other provider that is interested in performing the same scam, what amounts to a license to print money. Additionally, BellSouth argued in its Proposed Order that if the Commission adopts the interpretation of "local traffic" recommended by US LEC and concludes that reciprocal compensation is due for the minutes of use at issue here, the Commission's decision would seriously damage the development of local telephone competition in North Carolina. BellSouth argued that such a decision would be contrary to public policy and would be a disincentive for carriers to compete for and serve genuine customers.

BellSouth also stated in its Proposed Order that finding the traffic noncompensable is sound public policy and consistent with rulings of other regulatory bodies and courts. BellSouth argued in its Brief that the Federal Communications Commission (FCC) addressed in rulemaking proceedings a similar get-rich-scheme. BellSouth stated that the FCC ruled that calls placed for the purpose of generating compensation are noncompensable.

Finally, BellSouth maintained that Metacomm did not operate independently from US LEC, but rather, as US LEC's agent in carrying out its reciprocal compensation plan and that the connections established by Metacomm were the equivalent of US LEC keeping lines open to itself. BellSouth argued that allowing the payment of reciprocal compensation for such connections would be contrary to the public interest. BellSouth stated in its Brief that the case breaks down to a Richard Aab-owned company (Metacomm) calling numbers furnished by another Richard Aab-owned company (US LEC) in order to create revenue for two companies he owns and controls. BellSouth concluded that in its role of protecting the public interest from destructive competitive practices, the Commission should pierce the corporate veil and conclude that no reciprocal compensation is due.

US LEC and Metacomm stated in their Joint Proposed Order that the law is clear that the liberty to contract carries with it the right to exercise poor judgment in business transactions and that the Commission should not rescue BellSouth, on public policy grounds, from strategic decisions that later turn out to have unintended consequences. US LEC and Metacomm maintained that the evidence demonstrates that BellSouth's senior management was involved in, and aware of, the terms of the Interconnection Agreements with US LEC, as well as interconnection agreements with other CLPs. Further, US LEC and Metacomm stated that BellSouth failed to prove that Metacomm was transmitting sham traffic for the sole purpose of generating reciprocal compensation, that US LEC's agreement to share reciprocal compensation with Metacomm was an unlawful kickback, and that Metacomm's traffic interfered with the public switched network. Therefore, US LEC and Metacomm argued, BellSouth failed to demonstrate a sufficient public policy justification to abrogate the terms of the Interconnection Agreements. Further, US LEC and Metacomm argued that there is nothing wrong with US LEC and Metacomm availing themselves of the opportunity that the excessive reciprocal compensation rate presented and that such a response should be expected from new entrants in a competitive marketplace. US LEC and Metacomm recommended that the Commission agree with witness Wallman that, in future cases, the Commission will be able to use objective criteria to protect the public interest from allegedly sham traffic.

US LEC, in its Brief, outlined the following issues for the Commission to consider when evaluating public policy in this case:

(1) North Carolina and Federal telecommunications policies require the unyielding enforcement of the Interconnection Agreements to foster the paramount telecommunications policies of local competition and innovation and BellSouth's hostility to competition and innovation motivates its strategy here;
(2) Enforcing contracts as written is a paramount public policy that controls this case;
(3) Retroactive modification of the Interconnection Agreements is beyond the Commission's authority;
(4) Having failed to prove its allegations of "sham traffic" and "kickbacks", BellSouth has utterly failed to offer a public policy justification for rewriting or abrogating the Interconnection Agreements;
(5) BellSouth created an attractive revenue opportunity by insisting that the Interconnection Agreements contain a reciprocal compensation rate substantially above cost; therefore, if the Commission wants to address the root cause of this proceeding and any concerns it might have about the amount of reciprocal compensation at issue, it must address one and only one issue: BellSouth's above-cost interconnection rates; and
(6) BellSouth's arguments and the Commission's finding in the Fresh Look proceeding should apply here.

US LEC asserted in its Brief that the Commission must give priority to the policies given priority by the General Assembly, which has emphasized the desirability of competitors to the ILECs and price and service competition in the marketplace. Likewise, US LEC pointed out that TA96 is intended to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans, and to do so by opening all telecommunications markets to competition.

US LEC further stated in its Brief that the paramount public policy to be guarded and nurtured by the Commission requires the enforcement of the contracts exactly as BellSouth wrote them. Further, US LEC argued that if the Commission found that as a matter of public policy the minutes of use are not compensable, it will do so after US LEC has performed all of the services necessary to be paid for the minutes of use. US LEC maintained that this would be a retroactive modification of the Interconnection Agreements that would amount to a refund to BellSouth and would be anticompetitive. US LEC stated in its Brief that the fundamental policy the Commission is bound to implement in this case is the protection of the sanctity of contract.

US LEC further argued in its Brief that in North Carolina, the law of contracts and the public policy doctrines encompassing that body of law are a bona fide public policy of this State. US LEC maintained that there can be no doubt that BellSouth was competent to contract and that BellSouth failed to prove that US LEC did anything but negotiate fairly and honorably. Further, US LEC argued that for the marketplace to work, there must be certainty in the terms, whether wise or not, that govern the relationship between the contracting parties. US LEC stated that if BellSouth's senior executives who formulated BellSouth's policy with respect to interconnection with CLPs across its territory erred, it should not be a public policy goal of the Commission to protect the multi-billion dollar behemoth from its own greed.

US LEC also maintained in its Brief that if the Commission were to rewrite the Interconnection Agreements to relieve BellSouth of any part of its obligation to pay reciprocal compensation for Metacomm or MCNC traffic, it would be retroactively rewriting the Interconnection Agreements to deny US LEC its contractual benefit after US LEC's right to payment had accrued, in violation of North Carolina law. US LEC argued that BellSouth seeks excuse from its payment of reciprocal compensation based on its value judgments that there is no public policy benefit flowing from the telephone calls at issue. US LEC stated that the Commission must think long and hard before it follows BellSouth down the path of allowing retroactive challenges to reciprocal compensation obligations based on criteria invented after the fact since this path would lead to administrative gridlock.

Additionally, US LEC argued in its Brief that not just any public policy is grounds to abrogate the Interconnection Agreements. US LEC maintained that BellSouth has attempted to argue that public policy should not allow that reciprocal compensation be paid in order to prevent the generation of "sham traffic", the payment of kickbacks or the growth of "reciprocal compensation machines" which US LEC argued BellSouth was unable to prove. US LEC stated that in its opinion BellSouth's public policy justification for abrogating and rewriting the Interconnection Agreements boils down to nothing more than BellSouth does not want to pay. US LEC also noted in its Brief that BellSouth has no less than admitted that the only "public policy" at issue for BellSouth is to save money since BellSouth has admitted that but for the money BellSouth must pay US LEC in reciprocal compensation, BellSouth is indifferent to how US LEC or Metacomm build or design their networks. US LEC also maintained that in the absence of threat to a well-defined and dominant public policy that proves the illegality of the Interconnection Agreements is clear and certain, BellSouth has no grounds to seek modification or abrogation of its contractual obligations to US LEC. US LEC quoted Wallihan v. Hughes, 82 S.E.2d 553, 558 (Va. 1954) which states "...and courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain."

Further, US LEC maintained in its Brief that it is beyond question that BellSouth insisted on the above-cost rate to create the revenue opportunity that it claims should not now be enforced. US LEC asserted that it had no choice but to respond to the risk by soliciting, when it could, businesses that it hoped would have high volumes of terminating traffic. US LEC maintained that it not only had a legal right, but an obligation to avail itself of the revenue opportunity that the reciprocal compensation rate presented. US LEC stated that had it not done so, its viability as a competitor was threatened. US LEC stated that technological innovations like the one Metacomm created are generally the product of the revenue opportunities that are created by above-cost prices or rates. US LEC maintained that whether called arbitrage or good business sense, the result is public benefit from the innovation itself and from correction of price anomalies. US LEC mentioned that international call-back was a technological innovation that developed to take advantage of revenue opportunities but was attacked as fraudulent. US LEC stated that in the end, it was found that call-back services could place a significant downward pressure on foreign rates to the ultimate benefit of United States' ratepayers and that the service promoted the public interest by providing increased competition. US LEC further maintained in its Brief that if there is a public policy issue to be addressed, and if the Commission believes that it would have been preferable for MCNC and Metacomm to configure their networks without factoring in revenue from reciprocal compensation, the only way to ensure the lowest-cost network design and operation is to attack the root cause of the problem -- BellSouth's imposition of above-cost interconnection rates. US LEC stated that today to its knowledge only one contract exists that still contains such a high reciprocal compensation rate (that contract expired on December 31, 1999). US LEC argued that market forces are correcting the root cause of the problem, just as market forces corrected the root cause of the international call-back controversy.

Finally, US LEC argued in its Brief that historically BellSouth has been one of the loudest opponents of efforts by others to persuade the Commission to abrogate contracts on public policy grounds. US LEC stated that in the Fresh Look proceeding, BellSouth argued that the Commission had no authority to abrogate the contracts CLPs made with BellSouth pursuant to N.C. General Statue Sections 62-134(j) and 62-133.5(f) which contain pre-competition provisions in BellSouth's favor. US LEC stated that BellSouth stated in its reply comments in that proceeding that, "[i]t strains credulity to assert now that the General Assembly, in light of this *explicit* move *away* from regulation, had somehow *implicitly* granted the Commission authority also to eviscerate the very contracts it had made available to telecommunications public utilities." The Commission agreed with BellSouth, holding that the statutes and case law cited by the Fresh Look proponents "did not constitute the clear grant of authority necessary to justify and support Commission intervention in statutorily-authorized, valid and binding contracts between ILECs and their customers."

In its Brief, Metacomm outlined the testimony of US LEC witness Wallman where witness Wallman stated, "Yes, I believe that the Commission could decide that at some -- that if a business were not real, if a business were a sham, a contention that I believe is not seriously raised in this record based on what I've heard and read, that the Commission could decide that in the public interest that compensation should not be paid. But I say again I'm confident, based on what I've seen, that the Commission need not have any doubt here that this is a real business, with a real business plan, with real financing, with real talented people who are working on it, that aims to deliver a vision and services like scalable broadband. And I think they're comfortably on the right side of the line here." Metacomm argued that none of BellSouth's "public policy" arguments justify a departure from the contract. Metacomm further maintained that if the Commission concludes that the configuration used by Metacomm was contrary to public policy, there was no basis upon which Metacomm, or any other entity for that matter, could have known that such a configuration was "unacceptable." Metacomm concluded that the contract must not be abrogated on the basis of such an irrelevant, wrong "policy" goal in a potentially unconstitutional manner. Metacomm also maintained that to the extent that public policy concerns are considered, they favor enforcing the contract since CLPs must be confident that their agreements with ILECs will be honored and enforced.

Based on the evidence in the record and the North Carolina General Statutes, the Commission believes that it should undoubtedly consider matters of public policy in determining whether the minutes of use at issue are compensable. The parties, of course, differ on exactly which public policy considerations should affect the outcome of this case. Foremost, BellSouth argued that a network that is set up primarily for the purpose of generating reciprocal compensation should not be found to constitute compensable traffic as a matter of public policy. US LEC and Metacomm, on the other hand, argued that the foremost public policy is to require the enforcement of the Interconnection Agreements according to their terms.

* * * *

As noted in the introduction to the Conclusions of Law, the case before us involves the construction of a contract, the terms of which on their face do not appear to be particularly obnoxious. It is in many ways a somewhat ordinary, first-generation interconnection agreement. The concern arises regarding the manner in which US LEC has construed the contract to justify how it has behaved with reference to the contract. The Commission has concluded above that "[t]his is not a case in which the language of the parties' contract is clear and unambiguous and leaves no room for interpretation. Rather the terms of the agreement, as applied to this unanticipated situation, are ambiguous and actually require interpretation by the Commission....Thus, there appears to be ambiguity, and extrinsic evidence may lawfully be considered."

This being the case, the Commission is free to consider whether enforcing the agreement in accordance with the interpretation propounded by US LEC is in the public interest.[1] That the public interest can be considered in construing a contract is well-settled. See, generally 17A AmJur 2d, Contracts, §257-264 (1991); Restatement of Contracts Second §207 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred"); 3 A.L. Corbin on Contracts §550 (1960); 11 R.A. Lord, Williston on Contracts, §32.18 - 32.19 (4th ed. 1999) ("[C]ontracts affecting the public interest are to be liberally construed in favor of the public interest"). There are also numerous cases in Georgia supporting the proposition that contracts should be construed fairly and reasonably. See Whitney v. Hagan, 65 Ga. App. 849, 16 S.E. 2d 779 (1941); C.V. Hill & Co. v. Winberg, 67 Ga. App. ex, 19 S.E. 2d 430 (1942); Talerica v. Grove Park

[1]The Commission also believes that enforcing the contract as US LEC would have it would produce an unreasonable result, allowing US LEC to benefit from its own hyper-aggressive practices and doing nothing to further the beneficial purposes of the contract — viz., to facilitate the exchange of substantive traffic across relevant networks in a seamless and effective manner consistent with the requirements of the Telecommunications Act.

Plumbing Service, 103 Ga. App. 591, 120 S.E. 2d 36 (1961); Bemco Mattress Company v. Southeast Bedding Co., 196 Ga. App. 509, 396 S.E. 2d 238 (1990). Indeed with respect to public interest consideration in Clear-Vu Cable, Inc. v. Town of Trion, 244 Ga. 790, 262 SE2d 73 (1979), the Georgia Supreme Court wrote:

> [W]e approve the Restatement position insofar as public contracts are concerned that "In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." Again insofar as public franchises are concerned, we adopt the Restatement view that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

Moreover, with respect to the regulated industries, the Commission is specifically charged at numerous places in Chapter 62 with protecting the public interest. See e.g., G.S. 62-2(1) ("To provide for fair regulation of public utilities in the interest of the public"); 62-2(3) (prevention of "unfair or destructive competitive practices"); 62-30 (general powers "necessary or incident to the proper discharge of its duties."); 62-31 (power to make and enforce rules which are "reasonable and necessary"); 62-32 (supervisory powers); 62-34 (investigation of companies); 62-37 (investigations); 62-43 (fixing standards, classifications, etc.); and 62-110(f1) (to adopt rules pertaining to telecommunications interconnection and universal service "in a manner consistent with the public interest").

While ordinarily contracts are reasonably clear and do not require extrinsic construction, this is not an ordinary case. Indeed, it is a most extraordinary case, both in the nature of the network constructed and in the immense sums of reciprocal compensation said to be owed. In considering this matter in light of the public interest, one cannot simply look at the facts in isolation but must look at them in their totality. Such facts include:

1. That US LEC and Metacomm are not totally separate and independent companies but are rather owned by the same man, Richard Aab. These companies have entered into a 40% commission agreement to share reciprocal compensation revenues.

2. That US LEC and Metacomm put together their network with the generation of reciprocal compensation being its "driving force." However, the BellSouth switch was not as a technical matter necessary to provide the service which they sought to provide.

3. That, to that end, US LEC and Metacomm kept the routers "nailed up" on a 23 hour, 59 minutes per day, 7-day per week basis, taking them down for one minute per day only for billing purposes.

4. That, for a significant period of the life of this network, there were no customer end-users on this network. Nevertheless, US LEC is claiming compensation for a period of time in which only signaling data was exchanged over the network.

5. That the number of customer end-users is relatively insignificant and many have been provided with capacity far exceeding their needs. Such customers were initially provided this service for "free."

6. That, as of August 1999, US LEC has invoiced BellSouth for approximately $100 million. The average level of invoicing is approximately $9 million per month.

7. That, to the extent that BellSouth and other companies have the same pertinent language in their interconnection agreements, US LEC and other CLPs can exploit such agreements to generate massive amounts of reciprocal compensation, were such an interpretation to be validated.

It is to be expected that some facts, viewed in isolation, may be construed to be innocent enough, even praiseworthy. Of course, telecommunications companies enter into commission agreements all the time. Of course, telecommunications companies seek to make a profit, and one of their sources of revenue may be reciprocal compensation. Of course, it is a good thing that customer end-users should have access to advanced telecommunications services. All of these things are true. But, when the facts of this case are viewed in their totality, it is apparent that what we have here is not an example of the invisible hand in search of economic efficiency but rather the attempted exploitation of a perceived loophole to generate massive transfer payments from one entity and its shareholders to another entity and its shareholders. It is the Commission's responsibility to protect the public interest as a whole, not to condone the individual interest seeking profit at the expense of others, as is so manifestly the case here.

The Commission further observes that validating this network arrangement for the purposes of reciprocal compensation would be ultimately destructive to competition and represents a severe misallocation of resources. Competition in telecommunications is in the public interest because competition promotes the efficient allocation of scarce resources and tends to drive prices to their marginal levels–direct benefits for consumers. The destructiveness arises not only from the draining of resources from existing ILECs but from the incentive to prospective recipients of reciprocal compensation to construct artificial and inefficient networks resulting ultimately in endangerment to the public switched network.[1] In other words, the ultimate effect of validating the practice here

[1] It should be noted that Metacomm's network is not designed uniquely for the BellSouth system; it can be replicated on the system of any LEC whose interconnection agreements provide for the payment of reciprocal compensation at a uniform per-minute rate. It is not designed solely for use with US LEC as the terminating carrier; on the contrary, any CLP or LEC can set up a similar system of routers and high-volume lines designed to generate the largest possible number of calls terminating on its own system. The Metacomm network can be greatly expanded -- indeed, there is no technological reason why it could not be expanded many times over, so as to generate even more prodigious compensation claims. Thus, the profits that can be realized from reciprocal compensation will vastly exceed those that a carrier can earn by providing a variety of useful services. The successful competitor would not be the one providing the best overall service but rather the one that could most rapidly link together the largest chains of routers and high-volume lines in order to realize reciprocal compensation. The threat to ILECs, especially the smaller ones, would be real. Consider that US LEC backed away from Concord Telephone Company because "[a] DS3 would break their bank."

would be to discourage the sort of innovation which could be of real benefit to the society at large as well as individual customers.

The Commission finds it curious indeed that US LEC and Metacomm have been at pains to assure the Commission that the effects of their undertakings are limited in time and scope to existing agreements and that future agreements will surely be changed to prevent them from doing what they are doing now. This amounts to an implicit admission that what they are doing now is destructive and in the long run insupportable--if it were not, what would be the harm in allowing this network and others similarly constructed to continue to produce reciprocal compensation into the indefinite future? In any event, the Commission finds US LEC's and Metacomm's representations of no future harm to be less than completely reassuring.

Although the potential risks associated with the Metacomm network are extremely serious, they are not counterbalanced by significant public benefits. The Metacomm customers who use the network are relatively few in number. Most of them have been provided much greater capacity than they are able to use. The Internet access, software access, and other services provided to Metacomm's customers could just as easily be made available through dedicated lines. Witness MacIntosh testified that if Metacomm no longer had access to reciprocal compensation revenues, it could "drop a switch," i.e., disconnect itself from BellSouth's system, and continue providing the very same services to its customers. (Indeed, if Metacomm were to use dedicated lines for its services, this would eliminate the risk that a heavy volume of traffic on the US LEC network might tie up BellSouth's switches and block or delay telephone service to the general public. So far this risk has not materialized, but it could materialize if the US LEC network is expanded, or if other carriers set up similar networks.) This acknowledgment by witness MacIntosh clearly demonstrates that from a practical economic standpoint, there is nothing new and improved that Metacomm is bringing to the marketplace. If its network were a "better mousetrap," offering competitive advantages to its customers, Metacomm should have no problem offering the same service without linking itself to BellSouth's switches. But in fact, if it were not for the lure of reciprocal compensation, the network would never have been installed in this manner; and witness MacIntosh testified that if the Commission ultimately denies US LEC's claim for reciprocal compensation in this case, he will recommend that Metacomm cease operation. In the last analysis, none of the witnesses for Metacomm or US LEC were ever able to show that as a result of tapping into the public switched telephone network and generating a claim for reciprocal compensation, Metacomm and US LEC were able to provide any useful service to Metacomm's customers that they could not otherwise have provided.

The courts have often held that the heart of a contract is the intention of the parties, and the parties' intention can best be determined by examining the purpose of the agreement, the language used, and the surrounding circumstances. E.g., Beavers v. LeSeur, 188 Ga. 393, 3 S.E. 2d 667 (1939); Brigadier Industries Corp. v. Pippin, 146 Ga. App. 705, 247 S.E. 2d 170 (1978); Whitney v. Hagan, 65 Ga. App. 849, 16 S.E. 2d 779 (1941); Adder v. Holman & Moody, Inc., 288 N.C. 484, 219 S.E.2d 190 (1975); McDonald v. Medford, 111 N.C. App. 643, 433 S.E.2d 231 (1993). When a customer served by one telephone carrier makes a local call to a customer served by another carrier, the originating carrier receives compensation through its customer's regular charges for local service, but the terminating carrier does not. Clearly the purpose of the reciprocal compensation provision in Sections IV.A. and IV.B. of the 1997 Interconnection Agreement, and of the corresponding provisions in the 1998 and 1999 Agreements, was to provide fair compensation to each party for its services in terminating calls originating on the other party's system. The parties did not intend to encourage, or provide incentives for, each other to reap enormous profits through reciprocal compensation by installing equipment that would artificially generate huge numbers of calls; at that time, they did not foresee the installation of this type of network. As discussed above, the widespread use of networks such as US LEC and Metacomm have developed has the potential to wreak havoc on the public switched telephone network, destroy established telephone companies that have served the public adequately for years, and stifle the development of beneficial innovations in telephone service. It is unreasonable to suggest that the parties intended to bring about, or create the risk of, such harmful consequences. If Sections IV.A. and IV.B. of the Interconnection Agreements are to be interpreted in accordance with their purpose and the parties' intent, the connections generated by US LEC's network of routers and high-volume lines must be held not to qualify for reciprocal compensation.

US LEC and Metacomm have suggested that the Commission should forbear from becoming what they call "network police." To do so, they urge, would hinder innovation. The Commission certainly agrees that innovation should be encouraged, but this is not real innovation. As explained above, the "innovation" that US LEC and Metacomm have created here is primarily an innovative way to transfer money from BellSouth's pocket to their own. The service they provide, which appears relatively unremarkable by modern standards, could have been provided without the BellSouth switch; and, although the customer end-users have certainly received a bargain, it has been at the expense of others. The Commission (and BellSouth for that matter) has no particular objection to US LEC and Metacomm constructing their network in any way they see fit so long as they do not expect someone else to pay for it.

A further consideration in our analysis relates to Section IV.C. where US LEC and BellSouth stated their understanding that they would be interconnecting with each other for comparable types of calls and the "usage would likely be reasonably balanced." While the Commission believes that this provision is not legally enforceable to the extent that, of itself, its violation would be a basis for withholding reciprocal compensation, the Commission believes that US LEC's and Metacomm's behavior in deliberately unbalancing traffic through such an artificial means can certainly be taken into consideration as an additional factor relating to the public interest. US LEC has attempted to defend its behavior as a defensive reaction to what it viewed as an excessively high reciprocal compensation rate which it felt BellSouth had imposed upon it.[1] While it can certainly be conceded that BellSouth hoped and perhaps even expected to profit from this rate, it is also the case that BellSouth hoped to do this from the natural flow of traffic. By contrast, US LEC and Metacomm sought to create and did in fact create a massive imbalance of traffic in a manner inconsistent with this understanding. The

[1] US LEC has actually gone further and portrayed itself in positive terms as conferring public benefits by creating pressure to correct price anomalies — in this case, the rate for reciprocal compensation. US LEC's argument is rather like that of the thief who argues that he is conferring a public benefit by encouraging the creation of better locks. The fact is that the downward pressure on reciprocal compensation rates has arisen quite independently of US LEC's actions. In any event, any tangential benefit US LEC may have conferred by highlighting the issue of reciprocal compensation rates is more than canceled out by negative public interest implications of what it has done.

Commission would be remiss if it did not consider this as bearing on the public interest. Such practices should not be encouraged.

Finally, US LEC has made much of the "sanctity of contracts." This assumes that the contract at issue is straightforward and unambiguous to begin with — something which is decidedly not the case in this docket. In the instant case, the more "sacred" principle is not to give the contract an unreasonable construction which plainly conflicts with the public interest, properly understood.

In conclusion, the Commission believes that it is not sound public policy to interpret the contract to allow US LEC to be compensated for reciprocal compensation generated on a network specifically designed to exploit the terms of the parties' Interconnection Agreements. Therefore, the Commission concludes that public policy requires that US LEC not be compensated for the minutes of use at issue in this docket.

CONCLUSION NO. 3

The physical configuration of the Metacomm/MCNC network is that of an effectively dedicated network and is ineligible for reciprocal compensation.

POSITIONS OF PARTIES

BELLSOUTH: BellSouth argued that the Metacomm/MCNC traffic is the product of a closed, dedicated network configuration that does not allow the termination of calls to ubiquitous locations within the local exchange and that there is no dispute that reciprocal compensation applies only to calls that are switched in nature, as opposed to dedicated.

Specifically, BellSouth pointed out that the network is configured to have Metacomm routers in continuous connection ("nailed up") with other Metacomm routers. Connections go to points that the end-user customer cannot control. Metacomm and US LEC inserted the BellSouth switches into the configuration solely to attempt to generate reciprocal compensation. The relevant question, however, is whether, through these switched facilities, it has provided its customers with the ability to terminate calls ubiquitously. The answer, according to BellSouth, to this question is "no."

Metacomm has admitted that, at least from the customer's view point, the network is a dedicated service. Metacomm CEO, Andy MacIntosh, testified that Metacomm's customers "would describe it as a dedicated service" (Tr. Vol. 7, p. 167). Metacomm's former CEO, Tom Finn, testified similarly that "Metacomm's customers enjoy dedicated access" (Finn Dep 37). Metacomm, in its petition to intervene, stated that it was "developing a virtual private network" and in its reply in support of its petition, it has "developed a unique private wide area network...."

US LEC: US LEC argued that since BellSouth and US LEC switches were used in the network, the network was not dedicated. There is no precedent for characterizing a network with a switched component like this one as dedicated. Thus, the calls are switched and terminate to a number in the same exchange.

METACOMM: To characterize the Metacomm network as "quasi" or "effectively" dedicated is to invent a new regulatory category. BellSouth has not cited to any state commission or FCC decision concluding that a service was an "effectively" or "quasi" dedicated service. The calls placed on the Metacomm network do in fact use BellSouth and US LEC switches and the public switched telecommunications network (PSTN). The fact that a customer's perspective is dedicated does not transform physical connections and the underlying telecommunications service into a dedicated (i.e., nonswitched) service. Indeed, Metacomm could call anywhere in the local exchange and did in fact reprogram its routers to call new numbers from time to time. The important factor in the analysis is the service that the carrier provides, not the service the carrier's customer provides.

DISCUSSION

The network configuration at issue in this docket and the legal consequences that flow from it are very significant to this controversy. While the network configuration can be described more or less straight forwardly, a description of the legal consequences flowing from that configuration is perforce more convoluted. For the reasons set out below, the Commission concludes that the network at issue is an effectively dedicated network and is not entitled to reciprocal compensation.

BellSouth contends that the network configuration is essentially that of a dedicated network and the traffic on it is, therefore, not entitled to reciprocal compensation. BellSouth points especially to the inability of end-user customers of Metacomm to have ubiquitous access to numbers other than those prescribed by Metacomm. BellSouth also noted that the Metacomm routers are in continuous connection -- in BellSouth's phrase, "nailed up" virtually at all times (23 hours, 59 minutes a day, every day, taken down for one minute per day only for billing purposes). Metacomm and US LEC argued that the network is not dedicated because it includes the BellSouth switches. They charged that BellSouth is trying to make up a new regulatory category of "quasi-dedicated" networks. While admitting that it may appear dedicated from an end-user customer's perspective, Metacomm argued that this is irrelevant because the important thing is the network's objective structure -- which includes a BellSouth switch. Metacomm added that, while end-user customers may not be able to dial other numbers than Metacomm prescribes, Metacomm can and has reprogrammed its routers to call new numbers from time to time.

None of the parties disputed that reciprocal compensation is not due from a dedicated network. Metacomm and US LEC simply denied that it <u>is</u> a dedicated network.

This case appears to be one of first impression. Such cases frequently require the extension of old concepts to new situations by the process of analogy and functional comparison. (This is also, in a broad sense, how the common law operates.) So it is with the definition of "dedicated" in the context of telecommunications. It is of no particular significance -- given the fast-moving nature of telecommunications at the present time -- that there has been no specific regulatory category into which this network configuration neatly falls.

Before arriving at a legal conclusion as to the nature of the network here, the Commission believes that the important thing is to examine how the network actually works rather than focusing exclusively on the ownership interests in its constituent parts. Certainly, it must be conceded that Metacomm inserted a BellSouth switch into the network configuration; but the pertinent question in the Commission's view is whether the Metacomm network amounts to an effectively dedicated network. We should not elevate form over substance.

Accordingly, the first issue to examine is: What are the essential characteristics of a dedicated network as the term is commonly understood? Telecommunications dictionaries provide a clue as to the industry understanding. A dedicated network is one which functions to provide constant, always-on transmission capability from one discrete point to another discrete point.

Thus, Newton's Telecom Dictionary (11th ed., 1996) defines a "dedicated channel or circuit" as "[a] channel leased from a common carrier by an end user used exclusively by that end user. The channel is available for use 24 hours a day, seven days a week, 52 weeks a year, assuming it works that efficiently." Similarly, Newton's defines a "dedicated line" as "[a]nother name for a private leased line or dedicated channel. A dedicated line provides the ability to have a constant transmission path from point A to point B...It may be part of a network with the ability for many to dial into it." The McGraw-Hill Illustrated Telecom Dictionary (McGraw-Hill, 1998) sets out a similar definition for a "dedicated circuit." It is defined as follows: "Also called a private line. A private line is a pair of wires..that runs from your location to a location that you want to be connected to with a dedicated high-speed data connection. Once a private line is installed, it is there all day, every day...."[1]

From these definitions, it is clear that a dedicated network is one that provides constant, always-on transmission and goes from one specific point to another. As it happens, this is an accurate description of how the Metacomm network works. The network is always on and goes from one point (a Metacomm router) to another (a Metacomm router). The end-user customers have no choice as to what these points are. Thus, BellSouth's emphasis that the end users had no choice on the numbers they could call, coupled with the network's always-on nature, was well-placed.

If this is the case, why is the BellSouth switch even in the configuration? Metacomm witness MacIntosh answered that "[t]he driving reason for this configuration is that it results in the generation of reciprocal compensation when calls are placed over the network." He further asserted that there are "collateral benefits such as access to BellSouth's ubiquitous switched network."[2] (Tr. Vol. 7, p. 129) Witness MacIntosh conceded that Metacomm could "drop a switch" -- i.e., not use BellSouth facilities -- and provide the same connectivity and service to its customers. (Tr. Vol. 7, p. 230) The Commission does not believe that the mere presence of a BellSouth switch converts a network that otherwise has the essential characteristics of a dedicated one where the "driving reason" for its insertion is to generate reciprocal compensation.

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[1] Note also Metacomm witness MacIntosh stating, "there is a longstanding usage in the telecommunications industry with reference to the term 'dedicated' and that typically means purchasing facilities that one links from one point to another point...[F]rom our customer's point of view they see a service that is always on..." (Tr. Vol. 7, p. 165; see also Tr. Vol. 7, p. 166-167)

[2] Accord Tr. Vol. 7, p. 141. "[T]he configuration allowed Metacomm to share in the reciprocal compensation proceeds that the network generated." Witness MacIntosh also cited overcoming the "local access bottleneck" and greater bandwidth.

Metacomm does in fact concede that from the end-user customer's point of view, its network appears as a dedicated network (Tr. Vol. 7, pp. 166-167), but it denies the relevance of this fact. The Commission believes, on the contrary, that this fact is highly relevant in evaluating whether the network is on balance an effectively dedicated one. This is especially true in light of Metacomm's contention that this configuration conferred additional benefits such as access to BellSouth's "ubiquitous switched network." There was no substantial "ubiquitous switched network" benefit to the end-user customers because they could not call anyone else on the network aside from Metacomm.[1]

Indeed, the inability of Metacomm end-user customers to call outside numbers is highly significant. A network which is "nailed up" and in continuous operation from one point to another is by definition a dedicated network. By necessity, it excludes choice by the end-user customer of the numbers that can be called.

Finally, as noted above, none of the parties disputed that reciprocal compensation is not due from a dedicated network. Metacomm and US LEC simply deny that it is a dedicated network, and their main rationale for this is the presence of a BellSouth switch. However, as analyzed by the Commission, the presence of the BellSouth switch does not change the essential nature of the Metacomm network as a dedicated network.

There are additional reasons why reciprocal compensation should not be paid for traffic generated over a dedicated network. First, dedicated networks are traditionally provided over private lines, and private lines are flat-rated and are thus insensitive to the type or quantity of traffic called. Economically, this makes a great deal of sense. The private line is always on and ready for use from one point to another. For any significant quantity of such traffic, a switched line charged on a usage basis would be far too expensive to sustain and would be economically impracticable. Accordingly, in such situations, the private line represents the most economically efficient way by which such traffic is transported.

Of course, what Metacomm and US LEC have done in this case is to stand matters on their head and to construct a network whereby they contend that BellSouth owes them far more money than the other way around through the device of inserting the BellSouth switch. This leads to the second reason for finding that such a network does not generate reciprocal compensation: it would be contrary to the public interest to do so. The public interest issues are discussed in more detail elsewhere, but the cardinal point here is that the Commission cannot on the one hand discharge its responsibility to protect the public interest and on the other hand give sanction to a network it has found to be effectively dedicated, where the "driving force" for the insertion of the BellSouth switch was to generate vast quantities of reciprocal compensation for US LEC and Metacomm and their shareholders. Allowing reciprocal compensation in such circumstances promotes neither economic efficiency nor true competition. Rather, it would institute an opportunity to "make a killing" through the exploitation of a perceived loophole. The Commission's responsibility is to promote the common

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[1] Metacomm argues that it could change the numbers and in fact has. However, numbers can be changed on a "classic" dedicated line configuration if one takes the trouble to reprogram the switch. In neither case can anyone freely and casually call any number other than those which are programmed.

good, not simply the opportunity of one company to profit at the expense of others — and, ultimately, of the public at large.

The mischief does not necessarily end with US LEC and Metacomm. Although US LEC and Metacomm took pains to assure the Commission that the danger was strictly limited in time frame, BellSouth disagreed, and it is impossible to know for sure. What is known is that the initial Interconnection Agreement here is a rather common, first-generation interconnection agreement whose life was in the instant case effectively extended to December 31, 1999. Like provisions in other Agreements may continue to exist through the agency of pick-and-choose into an indeterminate future both for BellSouth and other LECs. To countenance this practice by US LEC and Metacomm would be to declare open season on the LECs who have such contracts. Some companies, like Concord Telephone Company, may be too small to provide much sustenance to US LEC or its imitators; but larger companies could provide for a more extended meal.[1] The Commission believes that it is in the public interest that this practice be stopped from spreading. Accordingly, the Commission concludes that the physical configuration of the Metacomm/MCNC network renders the traffic ineligible for reciprocal compensation.

CONCLUSION NO. 4

There is no basis upon which to conclude that some minutes of use by Metacomm's customers are compensable.

POSITIONS OF PARTIES

BELLSOUTH: There is no basis upon which to rule that reciprocal compensation is due for some minutes of use by Metacomm's customers. Further, there is no way to estimate actual customer minutes of use in a reasonably accurate way which would not be arbitrary and capricious.

US LEC: It is not possible to estimate or approximate the times in which data was either being transmitted or received by Metacomm's customers. Actual transmission and reception of data by each customer varies by individual customer needs and personal habits. No evidence was introduced during the hearing to estimate times in which data was either being transmitted or received by Metacomm's customers.

METACOMM: The quality or quantity of the underlying data transmissions associated with particular minutes of use is not relevant to BellSouth's payment obligation under the terms of the Interconnection Agreements.

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[1] The essentially predatory nature of US LEC's network plan is nowhere clearer than in the case of Concord Telephone Company. US LEC recognized that originating Metacomm traffic through the switch of a smaller ILEC could cause the ILEC serious financial harm. When Metacomm inquired about a potential customer served by Concord Telephone Company, with whom US LEC has an Interconnection Agreement, US LEC instructed: "Back away from Concord for the moment. A DS3 would break their bank." (Ex WKM-80; <u>see also</u> Finn Dep. Ex 54). At least in this instance, US LEC was a discerning predator when it came to its choice of prey.

DISCUSSION

The parties were specifically requested by the Commission to address whether there is a basis upon which some minutes of use by Metacomm customers might be compensable. The parties were unanimous that there was not.

In its response, BellSouth stated the configuration deployed by Metacomm to generate reciprocal compensation is the same when a customer accesses the network as when Metacomm is simply using routers located adjacent to one another to establish connections for the purpose of generating reciprocal compensation. Metacomm did not measure actual customer minutes of use.

BellSouth contended that even if the Commission concluded that there is some basis upon which minutes of actual usage by Metacomm's end-user customers might be compensable, there is no competent, material, and substantial evidence in the record upon which to estimate actual customer minutes of use in a reasonably accurate way. First, there is record evidence that only six customers - MACS, Meineke, Shelby City Schools, EDS, Aerial Images, and Alexander Children's Center - used the network. The evidence is that purported Metacomm customer Charlie Horse Farm never used the routers Metacomm placed at its facilities and that Meineke used them in a limited way for only a short period. Other than these six customers, there is no basis in the record to conclude that any other Metacomm customer used the network to any significant degree. To reach such a conclusion would be purely speculative.

BellSouth further contended that for the six customers who appear to have used Metacomm's network, there is no competent, material, and substantial evidence upon which to estimate their usage. Metacomm supplied each of them, on a take it or leave it basis, with capacity which exceeded their needs. Thus, even if a customer estimated that it used the Metacomm network for 50% of a school day (as opposed to the 24 hours a day that the routers on their premises were connected to Metacomm's terminating routers), there is no way to know whether the customer's usage would have been supported by a fraction of the capacity installed by Metacomm. The fact that no customer said that it would pay for the capacity provided by Metacomm free of charge, and at least MACS and EDS testified that they would use far less capacity to meet their needs if they had to pay for it -- is strong evidence that actual usage (number of circuits x minutes) would have been far less. Thus, there is no defensible way to estimate actual usage for those few customers who did use the network. Any estimate of actual Metacomm customer minutes of use would be arbitrary and capricious.

US LEC in its response, stated that no difference exists between the usage that Metacomm's customers make and the duration of the Metacomm network calls that US LEC terminated - durations that both BellSouth and US LEC have recorded. The service that Metacomm extends to its customers is an *always on* service. As a consequence, the usage of Metacomm's customers is effectively 24 hours a day, seven days a week. Their usage is no different from the hypothetical computer users whom BellSouth witness Halprin agreed legitimately would create a reciprocal compensation obligation if they maintained an open phone line between them for a month but actually passed messages for only a few minutes each day.

US LEC stated that BellSouth does not dispute that no carrier must or can measure the duration of data transmission during a call, as opposed to the duration of the call itself. Periods of data transmission by Metacomm's customers have not been measured by BellSouth, Metacomm, or US LEC because that type of measurement is not required by law, industry practice, or the terms of the Interconnection Agreements, and not capable of being measured under today's switching technology. Indeed, the only means of measuring those transmissions is by invasive line testing and monitoring of each call which cannot be conducted on a wide scale, and likely would be an unlawful interception if done. The minutes that US LEC terminated, and that US LEC and BellSouth were required under the Interconnection Agreements to record, were the minutes of Metacomm's usage, not that of Metacomm's customer's data transmission.

US LEC further contended that imposition of a voice or data transmission measurement in lieu of actual call duration would create a standard for reciprocal compensation that is completely different than the parties provided in the Interconnection Agreements. Further, it would impose a standard on US LEC that is different than BellSouth has applied in the context of its reciprocal compensation billings to US LEC -- which have been based strictly on the duration of the call, with no "discounts" for periods of silence. And finally, since no other carrier in the industry can or does measure when voice or data is crossing a phone line, this "new standard" would impose extraordinary burdens on US LEC which no other carrier in the industry must or can bear.

US LEC believed that just as BellSouth charged Metacomm for the facilities and services it provided to Metacomm, so too is US LEC entitled to compensation for terminating the Metacomm network traffic that was produced as a result and that was passed by BellSouth to US LEC. Neither US LEC's state-of-the-art Lucent switch nor any of BellSouth's switches has the ability to distinguish between different types of traffic (whether voice, data, or connections with silent periods) being sent for termination.

Metacomm contended in its response that all minutes of use associated with the Metacomm network are entitled to compensation under the Interconnection Agreements. The Agreements clearly require compensation to be paid for all local "telephone calls"; the calls by the Metacomm network are unquestionably "telephone calls" within the meaning of the Interconnection Agreements; and the Agreements contain no exclusion for any particular type of traffic, whether it be "Enhanced Service Provider," "Information service Provider," or "Internet Service Provider" traffic.

Metacomm stated that read in the context of the definition of "minutes of use" (mou) provided by the Interconnection Agreements, all of the minutes at issue are "customer" minutes of use as they were generated in connection with Metacomm's always-on product offering. There is no need to estimate "customer" minutes of use, because these are the actual MOU at issue.

Metacomm contended that it is simply not possible to arrive at approximations of the times in which data was either being transmitted or received by Metacomm's customers. In the end, the actual transmission and reception of data by each customer would vary depending on the individual customer's needs, personal habits (i.e., some customers use their computer more than others), and applications accessed over the network. It is possible to generally categorize Metacomm's customers by schools and businesses, but the precise minutes of use associated with each customer's transmission or reception of data would vary among individual schools and businesses.

Metacomm stated that BellSouth's arguments that the Commission should exclude compensation for testing and development traffic prior to May 1998 on the grounds that traffic for the purpose of testing is not appropriate for compensation should be rejected. The Agreements simply do not contain an exclusion for any particular category of traffic, including traffic associated with testing and development.

The Commission cannot consider these connections "telephone calls" in the traditional sense, particularly for the periods of time when the connections were open and there was no transmission of any data or actual content, or even potential for such transmission. It is doubtful that these sorts of connections, where, for the most part, only "network holding signals" would actually traverse the network, were contemplated by the parties when they executed the Interconnection Agreements. Otherwise, the result would be that BellSouth would have to pay reciprocal compensation for empty connections between two routers, established in order to generate reciprocal compensation. Furthermore, even when actual Metacomm customers use the network and actual data content, as opposed to network holding signals, traverses the network, the parties have stated that the minutes during which this data content has flowed over the network cannot be measured. Not only did the parties rule out that the minutes are measurable, no party offered any basis for estimating or approximating some minutes as a basis for compensation. Accordingly, the Commission concludes that there is no basis for measurement of some of the minutes for compensation purposes. More importantly, however, there is no reason for the particular physical configuration of this network except for the generation of reciprocal compensation and traffic generated on such a network does not appear to have been contemplated by the parties when they executed the Interconnection Agreements. Finally, customer traffic on a dedicated network is not eligible for reciprocal compensation. All of these considerations support a determination by the Commission that it is not appropriate to require the payment of any reciprocal compensation for traffic generated by the network in question in this case and upon this record.

CONCLUSION NO. 5

The doctrines of estoppel, waiver, and laches do not act to limit the relief requested by BellSouth.

POSITIONS OF PARTIES

BELLSOUTH: BellSouth argued that none of the affirmative defenses raised by US LEC (estoppel, waiver, and laches) bar the relief requested by BellSouth, because US LEC and Metacomm have unclean hands and because the equitable defenses are not applicable under the facts of this case.

US LEC: US LEC argued that BellSouth's conduct precludes the equitable remedy of contract reformation under the doctrines of equitable estoppel and quasi-estoppel.

METACOMM: Metacomm contended that BellSouth's representation and conduct bar it from now claiming that Metacomm's network is a sham or that it otherwise is violative of public policy. The equitable defenses preclude such action by BellSouth.

DISCUSSION

BellSouth stated that US LEC and Metacomm do not dispute that they never told BellSouth of their arrangement regarding reciprocal compensation or of the intended uses of Metacomm's or MCNC's networks. BellSouth stated that US LEC and Metacomm also claim that after BellSouth learned of the arrangement, it acquiesced so that it could profit by selling facilities and services to Metacomm. BellSouth stated that it would have had to decide to accept $12 million for facilities so that it could be billed approximately $100 million in reciprocal compensation.

In BellSouth's view, the equitable defenses asserted by US LEC are inapplicable because US LEC and Metacomm have unclean hands. They failed to tell BellSouth that the majority of minutes of use for which BellSouth initially refused to pay reciprocal compensation, based on the mistaken belief that they were being terminated to ISP customers of US LEC, were in fact not due to ISP traffic, but rather "traffic" consisting of empty connections by Metacomm routers being nailed up through BellSouth and US LEC's switches. US LEC and Metacomm knew that BellSouth would object to paying reciprocal compensation for such traffic.

BellSouth further argued that the equitable defenses do not apply in any event because the facts do not support them. US LEC and Metacomm based their estoppel, waiver, and laches claims on facts allegedly demonstrating that BellSouth knew or should have known what US LEC and Metacomm were doing. BellSouth stated that its knowledge was incomplete and that Metacomm and US LEC perpetuated the misunderstanding. BellSouth did not know that the networks would be "always on" and connected only to US LEC. BellSouth acknowledged that it had to add trunks between BellSouth's switching offices and US LEC's, but stated that these additions were not made by BellSouth Business Systems, the retail entity that met Metacomm's needs, but by employees in the networking department of BellSouth who were responsible for meeting the needs of CLPs and IXCs. Moreover, BellSouth Business Systems employees had a duty of confidentiality with regard to information about Metacomm.

Waiver. BellSouth argued that waiver requires an intentional relinquishment of a known right. If US LEC's version of the facts is true, waiver would still not apply, because there is no right or benefit that BellSouth could have relinquished. Further, if there was such a right or benefit, there is no evidence of an intentional election by BellSouth to give up its right to dispute the propriety of reciprocal compensation for the "traffic" at issue.

Laches. BellSouth stated that laches operates to bar a claim where a party waits too long to assert it to the material detriment of its adversary. For the defense to succeed, US LEC must show that BellSouth knew about the sham traffic and delayed in asserting its claim to the material prejudice of US LEC. BellSouth stated that it started investigating Metacomm's network as soon as it suspected any wrongdoing. Once it gathered some basic facts, it put US LEC on notice of its position not to pay for what it suspected was sham traffic and invited negotiations with US LEC, which US LEC refused. BellSouth had no choice but to file its complaint, which it did less than a year after Metacomm began constructing its network and within months after blockages caused by its traffic first raised BellSouth's suspicions. There was no change in the relations of the parties which would make it unjust to permit the prosecution of the claim, so laches does not apply.

Equitable Estoppel. BellSouth noted that, under the law, the essential elements of equitable estoppel are: (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have: (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the part sought to be estopped to his prejudice. BellSouth argued that these elements are not present. There are no allegations or evidence that US LEC lacked knowledge of the network it was configuring and the reciprocal compensation issues the network would spawn. There is no evidence of any conduct on BellSouth's part amounting to a false representation or concealment of material facts. BellSouth did not know all of the true facts until discovery in this action.

Quasi-Estoppel. BellSouth contended that quasi-estoppel likewise does not apply. It is grounded upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts. BellSouth acknowledged that it accepted the benefits of its Interconnection Agreements with US LEC, but stated that it is not now attempting to avoid certain terms of the agreements. Instead, BellSouth contested US LEC's interpretation of the reciprocal compensation provision of the Agreements. Further, BellSouth lacked knowledge of the capabilities and intended use of the network at issue at the time it began "accepting benefits" under the Interconnection Agreements and pursuant to the sale of the network facilities and services. BellSouth initiated this action as soon as it learned of and investigated the situation. Thus, BellSouth argued that quasi-estoppel does not apply.

US LEC argued that BellSouth's conduct precludes the equitable remedy of contract reformation under the doctrines of equitable estoppel and quasi-estoppel.

Equitable Estoppel. Equitable estoppel arises when: (1) an individual by his acts, representations, admissions, or silence when he has a duty to speak; (2) intentionally or through culpable negligence; (3) induces another to believe that certain facts exist; and (4) such other person rightfully relies and acts upon that belief to his detriment. In US LEC's view, BellSouth is estopped by its participation in the development of the Metacomm network from claiming that Metacomm traffic was a sham or is otherwise not compensable. No later than January 1998, BellSouth kept silent about its objections to paying reciprocal compensation for Metacomm and MCNC traffic when it had a contractual and equitable duty to speak. BellSouth induced Metacomm to order more services and facilities. BellSouth led US LEC to believe it could continue to accept BellSouth's local traffic for termination and be paid for providing that service pursuant to the Interconnection Agreements. Metacomm and US LEC relied on BellSouth's failure to object and its marketing to Metacomm to their detriment. US LEC advanced to Metacomm portions of the reciprocal compensation to be shared with Metacomm primarily so that Metacomm could pay BellSouth. Metacomm kept paying BellSouth and adding customers. US LEC also used its switch resources to terminate this traffic.

US LEC argued that the Interconnection Agreements and the law of equity obligated BellSouth to notify US LEC promptly of any billing dispute or lose its right to do so. US LEC stated that, not later that January 1998, BellSouth was aware of the operation and key elements of the Metacomm and MCNC networks. BellSouth knew the imbalance of reciprocal compensation generated by the Metacomm and MCNC networks. Thereafter, every DS3 and PRI on the Metacomm network was provisioned by BellSouth. Local calls were placed over these DS3s and PRIs to US LEC numbers, so BellSouth ordered and installed one-way trunks outbound from the BellSouth network to the US LEC network to allow calls traversing the Metacomm network to be completed. For every trunk BellSouth provisioned to MCNC or Metacomm, it provisioned a corresponding trunk into a US LEC switch to transmit the traffic. The trunks were only outbound from BellSouth to US LEC, so there was no mystery that calls being made by MCNC and Metacomm were being terminated to US LEC switches and that there was no call flow from US LEC to BellSouth on these facilities. More than one BellSouth employee knew of the volume and direction of the traffic, including BellSouth's traffic planner for Raleigh and BellSouth's project manager for Metacomm. Metacomm's connectivity to a CLEC was confirmed to over 30 people, employed by either BellSouth Telecommunications or BellSouth Business Systems.

US LEC further argued that BellSouth knew and understood the reciprocal compensation liability arising from the Metacomm and MCNC networks. US LEC asserted that BellSouth employees discussed the reciprocal compensation resulting from the MCNC and Metacomm terminating traffic directed to the US LEC network. Nevertheless, BellSouth continued to sell facilities and services to Metacomm without objection and to accept the payments Metacomm's growth provided it. BellSouth also knew about US LEC's arrangement to share reciprocal compensation with MCNC and Metacomm. BellSouth's North Carolina President and BellSouth's Assistant Vice President of Sales were told in January 1998 that MCNC had agreed to share reciprocal compensation with US LEC. BellSouth cannot argue that it did not have notice of a similar agreement between US LEC and Metacomm. It knew of the similarities in the design and configuration of the networks. US LEC stated that the fact that MCNC had a sharing arrangement with US LEC put BellSouth on notice in January 1998 of the existence of a similar agreement between US LEC and Metacomm. Further, as a competitor, US LEC was under no obligation to inform BellSouth of its decision to share reciprocal compensation.

US LEC asserted that BellSouth was also aware of how MCNC and Metacomm intended to configure and market their networks. BellSouth learned from Metacomm in January 1998 and thereafter the configuration of the Metacomm network and how Metacomm intended to use its DS3s. BellSouth knew about every Metacomm customer as each was added, because BellSouth was given their identities by Metacomm so BellSouth could install the DS3s and PRIs. BellSouth never refused to provide service and actively sought Metacomm's business before and after this proceeding was filed. From January 1998 through July 15, 1998, BellSouth never complained to Metacomm or US LEC. On July 15, 1998, BellSouth stated that it would not pay reciprocal compensation for circuits that remained open between a BellSouth customer and US LEC's network but over which no information is transmitted, or for other arrangements entered into solely for the purpose of generating reciprocal compensation.

US LEC argued that the Commission must conclude that Metacomm and US LEC reasonably relied, to their detriment, on BellSouth's silence and its expressions of a desire to do business with Metacomm. US LEC and Metacomm could have avoided the substantial financial and manpower commitment they made to the Metacomm network after January 1998 if BellSouth had made any of its objections. US LEC could have sought a ruling on enforcement of the contract in advance.

Quasi-Estoppel. US LEC stated that BellSouth is also barred by the related doctrine of "quasi-estoppel" from seeking a rewrite of the Interconnection Agreements. BellSouth's efforts to woo Metacomm in 1998 and well into 1999 have two effects in this proceeding. First, there is a legal obligation on BellSouth which results from its acceptance of the benefits of the Metacomm contract. BellSouth may not seek out and accept all of the benefits of the contract, accept Metacomm's money, and sell Metacomm more services, only to then say that those services were used to perpetrate a sham with BellSouth as the victim in order to avoid the obligations it well understood would result from accepting those benefits.

Second, there are implications regarding the credibility of BellSouth's legal positions in this proceeding. The Commission must determine whether BellSouth's claimed defenses are bona fide arguments with legal merit or artificial stumbling blocks simply to delay the payment obligation. US LEC stated that the defenses are not bona fide. If BellSouth really believed that Metacomm was a carrier or a reseller, BellSouth would have billed Metacomm as a carrier or reseller, but it did not. If BellSouth believed it was the victim of a sham, it would have come to the Commission or a court to be relieved of the obligation of installing those facilities. If BellSouth believed that Metacomm traffic was interfering with its network, it would have produced evidence of that fact and would have asked this Commission for relief to prevent that harm.

Similar to US LEC, Metacomm argued that BellSouth knew from its inception that Metacomm's network was originating a large number of long duration calls over BellSouth's network and terminating those calls on US LEC's network. BellSouth encouraged Metacomm's growth and transformed Metacomm into one of BellSouth's largest and most valued customers. In Metacomm's view, BellSouth intended that Metacomm rely upon its representations of "partnership" building, and Metacomm did so to its detriment. BellSouth continued to accept monthly payments of approximately $1 million from Metacomm and encouraged Metacomm to order additional facilities. Metacomm made contractual commitments with customers and vendors and deployed its limited resources toward building its business. Metacomm committed itself to its business plan of constructing a network capable of providing wide bandwidth services to schools and businesses in North Carolina. Now BellSouth claims that Metacomm's network is a sham, is inefficient, and violates public policy. Metacomm argued that equity does not allow BellSouth to use such tactics.

The Commission concludes that the equitable doctrines of estoppel, waiver, and laches should not be applied to bar the relief sought by BellSouth. There is a great deal of conflicting testimony and evidence in the record regarding what BellSouth knew or did not know, what US LEC and Metacomm did or did not disclose to BellSouth, and the timing of such disclosures and knowledge. There is so much conflicting evidence that it would be inappropriate to conclude that BellSouth had full knowledge of the US LEC plan and, therefore, it would be inappropriate to apply the equitable doctrines of estoppel, waiver, or laches.

Although it appears that employees in some BellSouth subsidiaries knew some pieces of the picture, BellSouth argued convincingly that its knowledge and understanding of the situation was incomplete. US LEC and Metacomm have not proven that BellSouth Business Systems and BellSouth employees pieced together the knowledge of various individuals for several months. Nevertheless, it appears that BellSouth alerted US LEC and brought its complaint to the Commission within a reasonable time of its developing suspicions that the "nailed up connections" were established for the purpose of generating reciprocal compensation. BellSouth noted that it filed its complaint less than a year after Metacomm began constructing its network and within months after BellSouth first began to suspect a problem. The facts certainly do not demonstrate that BellSouth intentionally elected to waive its right to dispute the propriety of reciprocal compensation for the traffic at issue, that BellSouth deliberately delayed in filing its complaint in order to harm US LEC and Metacomm, or that BellSouth in any other fashion relinquished its right to pursue its claim at the Commission.

CONCLUSION NO. 6

The Commission's decision in Docket No. P-55, Sub 1027 (ISP Order) does not control the determination in this case of whether BellSouth should be required to pay reciprocal compensation for Metacomm traffic under the Interconnection Agreements.

POSITIONS OF PARTIES

BELLSOUTH: According to BellSouth, the Commission's decision in Docket No. P-55, Sub 1027, does not require that Metacomm connections which originated in one local exchange and terminated to Metacomm equipment located within a different local exchange be deemed "local" under the Interconnection Agreements between BellSouth and US LEC.

US LEC: Because the ISP Order interprets the same BellSouth/US LEC Interconnection Agreement which is the subject of this complaint proceeding, the interpretation contained in the ISP Order is binding.

METACOMM: According to Metacomm, the arguments made by BellSouth in this case are premised on the same theory that the Commission rejected in its ISP Order. The Commission should decline BellSouth's arguments in favor of a reversal of the ISP Order.

DISCUSSION

On October 24, 1997, US LEC filed a Petition with the Commission In Docket No. P-55, Sub 1027, to enforce its Interconnection Agreement with BellSouth, which was approved by the Commission on January 29, 1997. US LEC contended that BellSouth had breached the contract by failing to pay reciprocal compensation for the transport and termination of local exchange traffic from BellSouth end users that was handed off by BellSouth to US LEC for termination to US LEC local exchange end users who are ISPs.

In the ISP Order which was issued on February 26, 1998, the Commission concluded that the ISP traffic under dispute was local and that US LEC was entitled to reciprocal compensation in accordance with the contract terms. The Commission noted that the Interconnection Agreement spoke of reciprocal compensation for local traffic and that there was no exception for local traffic to an end user who happened to be an ISP. For the purposes of reciprocal compensation, the Commission concluded that the call terminated when it was delivered to the called local exchange telephone number of the end-user ISP. The Commission further noted that BellSouth treats calls from its own end-user customers to ISPs it serves with telephone numbers in the same local calling area as local traffic; that BellSouth charges its own ISP customers local business line rates for local telephone exchange service; that when a BellSouth telephone exchange service customer places a call to an ISP within that caller's local calling area, BellSouth treats this as a local call pursuant to the terms of its local tariffs; and that BellSouth also treats the revenues associated with the local exchange traffic to its ISP customers as local for purposes of separations and ARMIS reporting. The Commission also stated that the FCC had not at that time squarely addressed this issue and that, while both sides presented extensive exegeses on the obscurities of FCC rulings bearing on ISPs, there was nothing dispositive in the FCC rulings at that time. The Commission stated that every state that had ruled on the matter through the date of that Order had ruled that such ISP traffic was local.

BellSouth appealed the Commission's ISP Order to the Federal District Court for the Western District of North Carolina. While the matter was pending before the Federal District Court, the FCC issued its Declaratory Ruling in CC Docket Nos. 96-98 and 99-68 on February 26, 1999, wherein it held that ISP-bound traffic is largely jurisdictionally interstate, but further held that it would decline "to interfere with state commission findings as to whether reciprocal compensation provisions of interconnections agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism." (Paragraph 21). The Federal District Court remanded the case to the Commission by Order dated May 24, 1999, for reconsideration in light of the FCC's Declaratory Ruling of February 26, 1999. The Commission appealed the case on jurisdictional grounds to the United States Court of Appeals for the Fourth Circuit where the matter is now pending.

The parties to this case take contrary positions on the issue of whether the ISP Order controls the determination of whether reciprocal compensation must be paid by BellSouth under the Interconnection Agreements. In the ISP Order, the Commission addressed the applicability of the reciprocal compensation provision in the specific context of typical dial-up Internet traffic; i.e., the situation where a customer of an ISP connects to the ISP by means of a local phone call using telephone exchange service. In that context, the Commission concluded that dial-up calls to the Internet constitute local traffic for purposes of payment of reciprocal compensation when the end-user customer places a local telephone call to his or her ISP delivered to the called telephone number in either the same exchange or a corresponding EAS exchange. The specific factual situation and question which was addressed by the Commission in the ISP Order related solely to dial-up calls placed to ISPs by end-user customers. It did not address the factual situation which has been presented in this complaint proceeding. That being the case, the ISP Order is certainly not controlling or dispositive as to the outcome of the instant dispute, although it can certainly be looked to for guidance where it may have some relevance. The Commission believes that US LEC and Metacomm cannot reasonably rely on the ISP Order to justify their position that BellSouth should be required to pay reciprocal compensation in this case. The factual situations are simply too different considering in particular the physical configuration of the US LEC/Metacomm network architecture. This case involves facts which are far different from those addressed by the Commission in the ISP Order dealing with typical dial-up Internet calls placed by an end-user customer where the customer actually dials a local telephone number and the call to the ISP is delivered in the customer's same local exchange or an EAS exchange serving the called telephone number.

IT IS, THEREFORE, ORDERED as follows:

1. That no reciprocal compensation is due for any minutes of use attributable to Metacomm or MCNC.

2. That US LEC shall, to the extent it has not done so previously, identify the number of minutes on each of its reciprocal compensation invoices to BellSouth which are attributable to Metacomm and MCNC.

3. That US LEC shall cease immediately from billing BellSouth reciprocal compensation for minutes of use attributable to Metacomm.

4. That US LEC shall refrain on a going-forward basis from billing BellSouth reciprocal compensation for traffic of the nature ruled noncompensable herein.

ISSUED BY ORDER OF THE COMMISSION.
This the 31st day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz033100.01

Commissioner Judy Hunt dissents.
Commissioner William R. Pittman concurs.

DOCKET NO. P-561, SUB 10

COMMISSIONER JUDY HUNT, DISSENTING:

In this Order, the majority directs that "no reciprocal compensation is due for any minutes of use attributable to Metacomm or MCNC." In my view, at a minimum, the commission should consider requiring that BellSouth pay reciprocal compensation for certain minutes of use where it is clearly established as fact that "real" customers or users existed. The parties do not instruct the Commission on how to ascertain "real" minutes of use and all parties argue for "all or nothing" compensation. The majority, therefore, says actual customer minutes cannot be estimated. Nevertheless, the record shows that a number of real users or customers did exist and were benefiting from the service. Even without request from the parties, the Commission should have the fortitude to establish remedy for some minutes of use.

Further, in this case, BellSouth bears the burden of proof in its complaint that US LEC was improperly invoicing BellSouth for millions of dollars of reciprocal compensation. A contract existed that perhaps is vague and unclear, but if so, it is BellSouth's responsibility to prove that they (BellSouth) should be relieved of payment responsibility. Rather than "proving" this, Bell South attacks the "intent" of US LEC. US LEC (and every current and former employee) may not all be pure of heart, but BellSouth, in my view, does not meet the burden of proof by showing that the contract in wholly invalid.

This Order also quotes heavily from BellSouth testimony and briefs and fails to acknowledge perhaps counter-balancing comments in US LEC/Metacomm documents (see Executive Summary of Metacomm's post-hearing brief).

BellSouth's complaint also asks the Commission to find that the minutes of use do not qualify for reciprocal compensation as a matter of public policy. The question here is whether the majority decision will fuel or chill future, innovative, technological developments and promote meaningful competition. Failure to enforce this contract may have the effect of preventing new entrants in the high tech community from introducing innovations that require regulatory oversight. Future new entrants may be understandably concerned that regulations tend to protect the regulated.

/s/ Judy Hunt
Judy Hunt, Commissioner

DOCKET NO. P-561, SUB 10

COMMISSIONER WILLIAM R. PITTMAN, CONCURRING:

I concur wholeheartedly with the result reached by the majority on every issue in this case. I write separately, however, to highlight what I believe to be the fraudulent, unfair and deceptive, and perhaps even criminal conduct of US LEC and Metacomm.

Fraud can be defined in a number of ways, including "[a] false representation of a matter of fact, whether by word or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury." Black's Law Dictionary 594 (5th ed. 1979). The evidence in this case suggests the existence of each of those elements in the conduct of US LEC and Metacomm.

North Carolina General Statute §75-1.1, which mirrors federal law, makes unlawful "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. §75-1.1 (1999), 15 U.S.C.A. §45(a)(1) (1997). "A practice is unfair when it offends established public policy as well as when [it] is immoral, unethical, oppressive, [or] unscrupulous...". Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247,263, 266 S.E. 2d 610,621 (1980). "An act...is deceptive...if it has the capacity or tendency to deceive." *Id* at 265, 266 S.E. 2d at 622. The evidence in this case suggests conduct by US LEC and Metacomm that was both unfair and deceptive.

The crime of obtaining property by false pretense is defined as a false representation of a subsisting fact or a future fulfillment or event which is calculated and intended to deceive, which does in fact deceive, and by which one obtains or attempts to obtain property from another. N.C. Gen. Stat. §14-100 (1999); State v. Cronin, 299 N.C. 229, 262 S.E. 2d 277 (1980). The evidence in this case suggests the existence of probable cause to believe a prima facie case of obtaining property by false pretense could lie against US LEC and Metacomm.

The evidence in this case suggests, in fact, that the US LEC/Metacomm alliance was part of a grand scheme by US LEC to squeeze enough money out of BellSouth to finance much of its operation. There is no other reason apparent from this evidence for the existence of Metacomm other than the generation of reciprocal compensation payments to US LEC. The evidence suggests that Metacomm and (because Metacomm is little more than a corporate alter ego of US LEC and its principals) US LEC initially had no plans for Metacomm to serve end users. Probably out of fear of discovery, Metacomm was later told to develop some "real" traffic for its sham network, and it made some attempts to do so. Putting a red dress on a hog does not change its essential nature, although US LEC/Metacomm's misrepresentations and other attempts to conceal their scheme from BellSouth worked for several months.

MCNC and some of Metacomm's "customers", lured by the promise of free high-technology equipment, free Internet access and capacity beyond belief, were duped into becoming accomplices in this scheme for a time. MCNC withdrew as soon as its management discovered the true character of this "network". Even some of Metacomm's investors had "strange feelings" about the way Metacomm did business. Indeed.

US LEC's pious breast beating about the sanctity of contracts would be laughable if it weren't so serious a matter. "Although the law will not generally inquire into men's acts and contracts to determine whether they are wise and prudent, yet it will not suffer them to be entrapped by fraudulent contrivances or cunning or deceitful management of those who purposely mislead them." 17A Am. Jur. 2d Contracts §238 (1991). Contracts against public policy will not be enforced. Gore v. Ball, 279 N.C. 192, 203 182 S.E. 2d 389 (1971).

Some will argue that the US LEC/Metacomm scheme was simply a clever and innovative mechanism resulting from the introduction of competition in public telecommunications. While clever, the scheme is not particularly innovative, deriving from a certain snake which convinced a certain woman that a certain fruit would be good for her. The US LEC/Metacomm attempt to build a facilities-based competing provider with hundreds of millions of reciprocal compensation dollars is certainly the result of competition in public telecommunications, but this remora-like approach was clearly not contemplated by the Congress or the North Carolina General Assembly in the passage of telecommunication competition legislation. Genuine, service-providing, value-adding business, something the US LEC/Metacomm enterprise clearly was not, was contemplated.

Not only is reciprocal compensation not due in this case, perhaps we should take a careful look at whether US LEC's certificate should continue to be valid in North Carolina. The kind of scheme perpetrated upon BellSouth is obviously not in the public interest. Perhaps we should decide whether allowing the perpetrator to continue to do business in this state is in the public interest.

/s/ William R. Pittman
Commissioner William R. Pittman

APPENDIX A

The major relevant provisions of the three Interconnection Agreements are as follows:

- Third whereas clause, 1997 Agreement:

  WHEREAS, the parties wish to interconnect their facilities, purchase unbundled elements, and exchange traffic for the purposes of fulfilling their obligations pursuant to sections 251, 252 and 271 of the Telecommunications Act of 1996 and to replace any and all other prior agreements, both written and oral;

- Section I.C., 1997 Agreement:

  C. **Local Traffic** is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff. (Accord, Section I.D., 1998 Agreement and Section I.D., 1999 Agreement)

- Section IV.A., 1997 Agreement:

  IV. Local Interconnection

  A. The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. The parties agree that the exchange of traffic on BellSouth's EAS routes shall be considered as local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section. EAS routes are those exchanges within an exchange's Basic Local Calling Area, as defined in Section A3 of BellSouth's General Subscriber Services Tariff. (Accord, Section IV.B., 1998 Agreement and Section IV.A., 1999 Agreement)

- Section IV.B., 1997 Agreement:

  B. Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein. The charges for local interconnection are to [be] billed monthly and payable quarterly after appropriate adjustments pursuant to this Agreement are made. Late payment fees, not to exceed 1% per month after the due date may be assessed, if interconnection charges are not paid within thirty (30) days of the due date. (Accord, 1998 Agreement, Section IV. C. and 1999 Agreement, Section IV.B.)

- Section IV.C., 1997 Agreement:

C. US LEC and BellSouth enter into this Agreement with the understanding that the carriers would be interconnecting with each other for comparable types of calls and that usage would likely be reasonably balanced, *i.e.*, US LEC would be terminating to BellSouth approximately the same level of usage that BellSouth would be terminating to US LEC. If at any time during the term of this Agreement traffic is imbalanced to the degree that US LEC feels a cap on amounts owing under this Agreement is required, US LEC has the option to adopt the comparable billing provisions contained in any agreement that BellSouth negotiates or has entered into with another ALEC which contains cap provisions, after August 8, 1996 provided that US LEC adopt the billing provisions of such other agreement that are comparable to those contained in this Section IV. Each party will report to the other a Percentage Local Usage ("PLU") and the application of the PLU will determine the amount of local minutes to be billed to the other party. For purposes of developing the PLU, each party shall consider every local call, including non-intermediary calls, and every long distance call. Effective on the first of January, April, July and October of each year, the parties shall update their PLU.

DOCKET NO. P-55, SUB 1013
DOCKET NO. P-55, SUB 1161
DOCKET NO. P-100, SUB 72

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-55, SUB 1013 In the Matter of Application by BellSouth Telecommunications, Inc., For, and Election of, Price Regulation DOCKET NO. P-55, SUB 1161 In the Matter of Complaint of AT&T Communications of the Southern States, Inc., Requesting that the Commission Reduce BellSouth Telecommunications, Inc.'s Intrastate Switched Access Rate DOCKET NO. P-100, SUB 72 In the Matter of Investigation to Determine Whether Competitive Long Distance Service Should Be Allowed in North Carolina and What Rules and Regulations Should Be Applicable to Such Service if Authorized	ORDER REGARDING JOINT STIPULATION

HEARD IN: Commission Hearing Room 2115, Dobbs Building, Raleigh, North Carolina, on April 27 and May 2, 2000

BEFORE: Chairman Jo Anne Sanford, Presiding, and Commissioners Ralph A. Hunt, Judy Hunt, William R. Pittman, J. Richard Conder, Robert V. Owens, Jr., and Sam J. Ervin, IV

APPEARANCES:

For BellSouth Telecommunications, Inc.:

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For Carolina Utility Customers Association, Inc.:

James West, West Law Offices, Post Office Box 1568, Raleigh, North Carolina 27602

For the Using and Consuming Public:

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Kevin Anderson, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602

BY THE COMMISSION: This matter arose on July 28, 1999, upon the filing of a complaint by AT&T Communications of the Southern States, Inc. (AT&T), seeking a reduction in the rates charged by BellSouth Telecommunications, Inc. (BellSouth), for intrastate switched access service. In its complaint, AT&T alleged that BellSouth's rates for switched access service in North Carolina are the highest in the nine-state BellSouth region and are well above their cost. AT&T further alleged that these rates are discriminatory and anticompetitive. AT&T requested that BellSouth's switched access rates be reduced to $.01 a minute.

By Order issued August 3, 1999, the Commission served the complaint on BellSouth. On September 7, 1999, BellSouth filed an answer and motion to dismiss requesting the Commission to consolidate the issues set forth in the complaint with the universal service docket, No. P-100, Sub 133g. By Order issued September 9, 1999, the Commission, having determined that the issues raised by AT&T warranted immediate investigation, set the matter for hearing on December 6, 1999.

On November 4, 1999, AT&T and BellSouth filed a joint motion requesting the Commission to stay its procedural order and continue the hearing until January 10, 2000. The movants stated that they had agreed to terms and conditions satisfying the complaint and were in the process of creating a joint stipulation regarding proposed changes in BellSouth's Price Regulation Plan. By Order entered November 10, 1999, the motion was granted.

On December 21, 1999, AT&T and BellSouth filed a joint motion requesting a further stay and continuance. By Order issued December 29, 1999, the Commission granted the motion and continued the hearing until March 13, 2000. A third joint motion was filed on February 4, 2000, requesting that the hearing be continued until March 20, 2000.

On February 15, 2000, AT&T, BellSouth, and the Public Staff (the Stipulating Parties) filed a Joint Stipulation settling AT&T's complaint, revising BellSouth's Price Plan, establishing an enhanced infrastructure fund to further deployment of Asymmetric Digital Subscriber Line (ADSL) technology, and adopting service objectives with self-enforcing penalties.

On February 16, 2000, the Public Staff filed a Petition requesting the Commission to require facilities-based interexchange carriers (IXCs) to flow through, on a dollar-for-dollar basis, the intrastate switched access charge reductions made by BellSouth pursuant to the Joint Stipulation.

On February 17, 2000, the Commission issued an Order scheduling a hearing on the Joint Stipulation for March 27, 2000, and requiring the Stipulating Parties to file testimony. On March 10, 2000, Carolina Utility Customers Association, Inc. (CUCA), filed a motion for an extension of time and continuance asking that the hearing be held on or after May 29, 2000. The hearing was rescheduled for April 24, 2000. The hearing was subsequently rescheduled for April 25, 2000, at the request of BellSouth and AT&T, and for April 27, 2000, on the Commission's own motion.

The matter came on for hearing on April 27, 2000, before the Full Commission. BellSouth presented the testimony and exhibits of Linda P. Cheatham, Director of Regulatory for BellSouth in North Carolina. AT&T presented the testimony of Gregory R. Follensbee, a Director in AT&T's Law and Government Affairs organization. The Public Staff presented the testimony of Ben Johnson, Ph.D., a consulting economist and President of Ben Johnson Associates, Inc. Neither the Attorney General nor CUCA presented testimony. One public witness, Catherine Williams Pitts, testified concerning the quality of service provided by BellSouth to Internet service providers.

Summaries of the Briefs and/or Proposed Orders of the Parties

Summary of the
Attorney General's Brief and Proposed Order

The Attorney General's position is that the proposed Stipulation should not be approved. He argued that (a) there is no basis in the record for premature revisions to the Price Regulation Plan; and (b) there is no basis in the record, nor is there any reason to believe, that residential rates (including rates for residential services in the various baskets) should be increased.

Regarding the proposed revisions to the Price Regulation Plan, the Attorney General argued that BellSouth's Price Plan was designed to be a reasonable way of transitioning to a competitive market that would provide tangible benefits to consumers. For instance, BellSouth's witness Dr.

Lewis J. Perl testified in 1996, when the Price Regulation Plan was first considered by the Commission, that ". . . the Plan will not only ensure that rates will continue to be affordable; it will make basic telephone service even more affordable than it is today. The primary issue here is to ensure affordable rates for **residence** basic exchange service." (Emphasis in original). Other BellSouth witnesses assured the Commission in 1996 that quality of service to consumers would not deteriorate if the Price Plan were adopted.

BellSouth's Price Plan itself provides that the Commission shall undertake a review of the operation of the Plan before it expires and is up for renewal. Because the Price Plan expires in approximately one year (June 24, 2001), those proceedings must necessarily begin within the next few months. When conducting a review of the Price Plan, the Commission's evaluation should consider how the Plan's operation has affected citizens of North Carolina and specifically whether the Plan: ". . . (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards that the Commission may adopt; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest." G.S. 62-133.5(a) and/or G.S. 62-133.5(c). Following this review, ". . . the Commission may make modifications to the Plan consistent with the public interest." Section IX of the Price Plan.

G.S. 62-133.5(c) prescribes a specific procedure that the Commission must follow when a local exchange company seeks to modify its price plan prior to expiration. Pursuant to such provision, the local exchange company is required to file an application with the Commission, and in considering the proposed modifications, the Commission, as provided by G.S. 62-133.5(c), must evaluate whether the modified plan comports with the four statutory conditions as set forth above.

The Attorney General stated that when the Commission reviews the Price Plan in the coming months, it will consider a number of factors. Public Staff witness Dr. Ben Johnson testified that when the Commission conducts its full review of a price plan, it should consider the company's return on common equity. He testified that if there is a flaw in the plan that is causing a company to have excessive earnings, then the Commission should fix the flaw in some fashion. Witness Johnson testified that the review needs to be thorough — there needs to be full opportunity for discovery so the Commission can determine if there are improvements that could be made to the plan in order to accomplish public interest goals. He testified that the Commission needs to compare how each of the three major local exchange companies (LECs) have done under their respective price plans in order to determine how best to craft modifications to the plans. Witness Johnson testified that the Commission must have an appropriate evidentiary basis for making decisions regarding modifications to price plans so that such decisions are not arbitrary. He testified that the Commission needs to consider the significant revenue generated by vertical services such as call waiting and caller identification, and not just revenue generated by basic local exchange service, when it is considering modifications to a LEC's price plan. Finally, in this regard, witness Johnson testified that the Commission should examine how management behaved — what rates were increased, what rates were decreased, what happened to costs, and what happened to revenues.

Notwithstanding the foregoing, the proposed Joint Stipulation asks the Commission to significantly modify BellSouth's Price Plan without conducting even a portion of the full review of the Plan required by G.S. 62-133.5(c). Among other things, the proposed Joint Stipulation would directly result in a $1.50 increase in basic local exchange rates for residential consumers, to be imposed in three separate increments. BellSouth's annual revenues from the proposed increases in residential basic local exchange service rates would be increased by a total of $24 million, once fully implemented over a two-year period. In addition, the proposed Joint Stipulation would modify the Price Plan by moving some services (or portions of services) such as Complete Choice and Area Plus from one category of services to another. It would also create a new category of services, Non-Basic 1.5 (NB1.5) Service. Such changes would allow BellSouth to substantially increase other residential rates and charges. BellSouth has, in fact, indicated that, for example, the rates for Complete Choice and Area Plus would increase as a result of the Joint Stipulation.

The law and the public interest require that changes to the Price Plan be based on a fully developed record and the criteria set forth above. The Attorney General does not believe that there is evidence in the record to support any of the proposed modifications to the Plan. For example, there is no evidence in the record to support the notion that BellSouth needs additional authority or flexibility under the Plan to raise residential rates or make substantive changes to its Price Plan. In fact, BellSouth's witness testified that ". . . price regulation is working as it was intended." Moreover, no studies were done by either BellSouth or the Public Staff regarding competition in the market for the services which would be moved from one category to another. Certainly, no studies have been presented to or considered by the Commission. Furthermore, witness Johnson even testified that he would not characterize vertical services — which under the proposed Joint Stipulation would be moved from the Basic to the Non-Basic 1 (NB1) Category — as being competitive. In fact, the evidence indicates that services were moved from one category to another in an arbitrary fashion ". . . as part of a negotiation." It is clear from the record that "negotiation" was substituted for formal examination of market conditions.

Both BellSouth and the Public Staff testified that, at one point and while under the Plan, BellSouth cut costs at the expense of service quality. Such action clearly does not support an increase in residential rates. If anything, it indicates that full review of the Plan should come sooner rather than later as proposed in the Joint Stipulation, that is, under the Joint Stipulation, the Commission's full review of BellSouth's Price Regulation Plan would be deferred for approximately one year so that it would not occur prior to June 24, 2001. The existing Plan currently provides for full review of its provisions by the Commission prior to the expiration of its fifth and final year on June 24, 2001, which as previously indicated, would imply that proceedings in that regard should be commenced by the Commission in the very near term.

Regarding the proposed $1.50 increase in residential rates for basic local exchange service and the additional residential rate increases that would occur as a result of the changes in services between categories, the Attorney General observed that such increases come at a time when BellSouth is earning record profits and making an estimated 27.75% return on common equity, according to the Commission's most recent *Quarterly Review*. Before the Commission can find that the Price Plan should be modified and the proposed residential rate increases allowed, it must first find that all of the statutory criteria are met, including a finding that the rate increases are in the public interest.

With respect to the argument that it is necessary to increase basic local exchange service rates to foster competition for telecommunications services, both AT&T witness Gregory R. Follensbee and Public Staff witness Johnson testified that local exchange rates do not have to be increased in order to encourage competition in the local exchange market. Further, witness Johnson testified that the telecommunications industry is a declining cost industry and that local service for residential customers is now priced above its direct cost.

At least one other Commission in BellSouth's territory has taken the opposite approach from that advocated by the Joint Stipulation with respect to rates for basic local exchange service. In an Order dated May 2, 2000, the Louisiana Public Service Commission ordered that "BellSouth shall not increase any basic local exchange rates pursuant to any rate rebalancing effort either under its consumer price protection plan or through any other mechanism for a minimum of three years from the effective date of this Order."

In short, there is no evidence whatsoever in the record that residential rates and charges should be increased. Indeed, such rates and charges are still for monopoly services and therefore should be the last to be increased.

BellSouth does have the authority, under its current Plan, to make increases in residential rates provided it makes the appropriate corresponding reductions. Furthermore, once the full review of the Plan occurs, the Commission will have every opportunity, pursuant to Section IX of the Plan, to evaluate whether the Plan is "consistent with the public interest" and whether rates are set at appropriate levels under the circumstances.

In concluding, the Attorney General asserted that the Commission should not approve the proposed Joint Stipulation as it has been presented. He reiterated that the evidence of record does not support allowing BellSouth to prematurely change its Price Plan, for example, by moving certain services from one service category to another and by creating a new price plan service category, both of which provide BellSouth with increased flexibility for imposing higher levels of increase in local service rates than presently exists under its current Price Plan.

The Attorney General further stated that the Joint Stipulation does contain a number of potentially beneficial provisions, including reduced access charges, self-enforcing service penalties, and increased deployment of ADSL. However, he observed that modifications to the Price Plan and increased residential rates need not be part of this package. The Commission can consider those matters separately without involving the Price Plan.

Finally, the Attorney General stated that he had carefully considered recommending specific modifications to the Joint Stipulation to preserve the benefits of the Plan without requiring residential consumers to accept unwarranted rate increases. For example, he considered a proposal which would include the service penalties, ADSL enhancements, no modifications to the Price Plan, and a somewhat smaller reduction in access charges, so that the net revenue to BellSouth would be the same as under the Joint Stipulation. However, in light of the fact that this was a three-party stipulation, that the Attorney General was not a party to the negotiations, and that modifications to BellSouth's Price Plan require BellSouth's approval, it was concluded that unilateral recommendations by any one party were not desirable.

Summary of
BellSouth's and AT&T's Brief and Proposed Order

In a Joint Proposed Order, BellSouth and AT&T (collectively BellSouth) argued that the Joint Stipulation should be approved for the following reasons:

1. ***Consumers of local exchange and intrastate long distance services in North Carolina will benefit more from its approval than its disapproval.***

BellSouth cited to the testimony of witness Johnson in support of its proposal that the Commission should decide whether to approve the Joint Stipulation on the basis of whether ratepayers were "better off implementing this stipulation or not implementing it," and that the Commission should weigh the Joint Stipulation against "broad public interest standards," and that "what matters is what would next year be with or without the stipulation?" Further, BellSouth cited to the testimony of witness Johnson in support of its proposal that while the Joint Stipulation touched on issues that the Commission will consider in more depth during its full review of the Plan, the current proceeding was not the appropriate forum in which to deal with those issues.

2. ***BellSouth's access charge reductions and AT&T's commitment to flow those reductions through to its customers on a dollar-for-dollar basis, as proposed by the Joint Stipulation, will translate into real savings on most consumers' monthly toll bills.***

BellSouth explained that a major feature of the Joint Stipulation is a substantial, phased-in reduction of BellSouth's intrastate switched access charges and AT&T's commitment to flow through those reductions to its North Carolina long distance customers on a dollar-for-dollar basis. In its prefiled testimony and again at the hearing, AT&T confirmed its commitment to flow through its share of the access reductions if the Joint Stipulation is approved. This $83 million reduction, and related flow-through to AT&T's customers, will only occur if the Joint Stipulation is approved.

BellSouth explained that its current composite per minute rate of $.062658, including both originating and terminating charges, will be reduced to a composite rate of $.02 per minute over a two-year period. The total amount of the access charge reduction is $83 million and will be phased in as follows:

Upon Effective Date of Revised Plan	$.04 per minute
First Anniversary of the Revised Plan	$.03 per minute
Second Anniversary of the Revised Plan	$.02 per minute

If the Joint Stipulation is approved, the access reductions will make North Carolina's access rate among the lowest in the BellSouth region rather than among the highest. Moreover, based on the current average monthly bills for AT&T's residential customers in North Carolina, the access charge reductions will allow AT&T to lower residential customer bills on average by $.85 per month, or a reduction of more than 14%. The actual reduction experienced by each customer will depend upon what long distance services he or she purchases from AT&T. BellSouth explained that because federal law precludes AT&T from reducing its toll rates to only BellSouth customers who subscribe to AT&T's long distance service, the average reductions for each customer are not as great as the reductions could have been if they had been confined only to BellSouth customers. However, if the Commission were to order similar reductions in access rates of other local carriers, AT&T could pass through those savings to its statewide customers as well.

BellSouth further cited to witness Johnson's testimony that another benefit to consumers from the access charge reductions will be a lessening in the disparity between intrastate and interstate toll rates. Because the per minute interstate access rates have declined sharply in recent years, many interstate calling plans have lower per minute rates than the lowest analogous intrastate rates. Reducing the intrastate access rates will lessen this discrepancy, thereby reducing consumer confusion and irritation over disparate toll rates. Further, witness Johnson testified that lower prices for toll service will serve to stimulate toll calling. Consumers will benefit when they respond to price reductions by increasing the frequency or duration of their toll calls.

BellSouth pointed out that approval of the Joint Stipulation will result in the dismissal of AT&T's access charge complaint in Docket No. P-55, Sub 1161, thus saving the parties and the Commission the time and expense of litigating this complaint case and any appeals or other proceedings resulting from it. BellSouth pointed out that this will allow the Commission to deliver the benefits of reduced access charges immediately to North Carolina consumers, rather than months later if it rejected the Joint Stipulation and then decided to reduce access charges after hearing AT&T's complaint case.

3. *The self-enforcing service quality penalty mechanism proposed by the Joint Stipulation will provide immediate, monetary incentives for BellSouth to improve and maintain service quality standards.*

A second major feature of the Joint Stipulation is the creation of a self-enforcing penalty mechanism wherein BellSouth must meet eight service quality objectives to avoid the imposition of significant monetary penalties. Under the Joint Stipulation, BellSouth will change its Plan to provide for the payment of penalties if the objectives for the following service measurements are not met:

a. Operator "0" answer time.
b. Directory assistance answer time.
c. Initial customer trouble reports per 100 access lines.
d. Repeat customer trouble reports per 100 access lines.
e. Out-of-service trouble cleared within 24 hours.
f. Regular service orders completed within five working days.
g. New service installation appointments not met for company reasons.
h. New service held orders not completed within 30 days.

The objective for each of these measurements will be those currently specified by Commission Rule R9-8, except for out-of-service troubles cleared within 24 hours. Penalties for that service objective will be assessed only if BellSouth fails to achieve a 90% objective.

Under the proposal, if BellSouth's yearly average statewide service result for a given service measurement falls below the established objective, the amount of the penalty is calculated by applying the monthly penalty amount ($10,000) to each unit missed. For example, assuming the yearly average statewide result for regular service orders completed within five working days is below 90%, if BellSouth completed 84% of regular service orders within five working days in June, but the objective is 90%, then the penalty for June would be $60,000.

In addition to the per-unit penalties, additional penalties would apply depending on the number of months the objective is missed. Such penalties would exceed $1 million for a specific measure if the monthly performance objective is missed for nine or more months in the year. For example, if BellSouth were to miss three of the eight objectives by 25% for the year, the penalty would be over $11 million. After the total penalties for the year are calculated, they will be issued as a credit on the bill of all residence and business customers of record within 60 days after the end of the applicable period. If this had been in place in 1999, BellSouth would have paid over $3 million in penalties.

BellSouth argued that, in addition to providing an incentive for BellSouth to meet its service quality standards, the self-enforcing mechanism is administratively superior to the usual penalty process, where the maximum amount is $1,000 per day, per violation, but may have to be collected through actions instituted in Superior Court. Amounts remitted under the traditional process go to the State, not the consumers. BellSouth's proposed mechanism may also furnish useful precedent for other companies in the future.

4. ***BellSouth's commitment to substantially enhance its investment in ADSL technology, as proposed by the Joint Stipulation, will bring high-speed Internet access to rural and urban areas of North Carolina much faster than originally planned.***

BellSouth explained that a third major feature of the Joint Stipulation is the commitment by BellSouth to establish a $97.8 million ADSL enhanced infrastructure fund. This represents an increase of $60 million over BellSouth's current budget for ADSL deployment in North Carolina and guarantees almost ubiquitous deployment of the fast-access Internet technology years earlier than planned. The enhanced fund will be used to equip 95 central offices and more than 2,100 remote terminal sites for ADSL by year-end 2002. Eleven of those central offices have been identified as being in economically disadvantaged areas.

BellSouth contended that reporting requirements associated with the deployment will allow the Commission and Public Staff to monitor BellSouth's adherence to its deployment schedule. Beginning January 31, 2001, BellSouth will file the first of three reports with the Commission detailing BellSouth's progress in deploying ADSL capability. The second and third reports will be filed on January 31, 2002, and January 31, 2003, respectively.

BellSouth further cited to witness Johnson's testimony that the enhanced ADSL investment "is clearly a win" for consumers because "we're spreading that investment much more rapidly and much more broadly across the state than what BellSouth would do on its own." According to witness Johnson, "rapid deployment of ADSL will help meet the ever-growing demand for bandwidth by both business and residential customers." Witness Johnson further testified that merely the increased awareness of the availability of the new technology will benefit rural customers as well.

5. Creation of a NB1.5 basket and movement of services from the Basic basket to NB1 basket provides BellSouth with necessary pricing flexibility in the emerging competitive local exchange environment.

BellSouth's rationale for this proposal is that, in the context of increasing competition, a new Plan basket known as NB1.5 should be created which contains services that are more discretionary and/or more competitive than NB1. Thus, sixteen services currently categorized as NB1 will be moved to NB1.5. The Joint Stipulation also calls for moving a sub-subgroup of services from the Basic to the NB1 category--specifically, the nonaccess line portion of optional residential packages (vertical features) would be shifted to the NB1 Category to reflect their more discretionary nature.

For individual rate elements, the NB1.5 Category of services will have the same pricing rules as the NB1 Category, with the maximum increase in any given rate element in a single year limited to the change in the GDP-PI plus 17%; but there will be a revenue cap on the NB1.5 Category equal to the change in the GDP-PI plus 3%, as opposed to the GDP-PI minus 3% cap that exists for the NB1 Category.

BellSouth cited especially to the testimony of witness Johnson in support of its proposal where he spoke of increasing competition and the desirability of giving BellSouth additional pricing flexibility without giving it complete pricing freedom. For example, while MTS and WATS services are not fully competitive, they are becoming more so. Similarly, data transport services are definitely becoming more competitive.

6. Allowing BellSouth to offset basic rate increases against access charge reductions as proposed in the Joint Stipulation is reasonable and in the public interest.

The Joint Stipulation would allow BellSouth to offset approximately $32.5 million of the $83 million access charge reduction through increases in Basic Services. Of the $32.5 million, approximately $24 million is in residence basic local exchange service, equating to a per line increase of approximately $1.50 per month, by the end of the phase-in period. Moreover, NB1 Services will be increased by $15 million, and the remaining $35.5 million will either be funded by productivity offsets in other categories or by BellSouth absorbing the decreases with no offset.

BellSouth argued that it was reasonable to allow it to offset the access reductions in this manner for several reasons. First, the existing Plan already allows BellSouth to increase rates for the same service proposed to be increased under the Joint Stipulation, since the three-year cap on residential rates expired in June 1999. In fact, BellSouth has already notified the Commission that, should the Joint Stipulation be rejected, it would propose to increase the basic residence local exchange rate in an amount greater than that proposed in the first step of the phase-in period of the Joint Stipulation. Second, BellSouth noted that the existing GTE and Sprint Price Regulation Plans already allow them to offset basic rate increases against access charge reductions. Third, as witness Johnson pointed out, allowing the residential increases to offset the access reductions is "a clear win [for consumers]." The lower access charges will lower the consumers' toll bills. Fourth, although the proposed offset may cause some business customers not to see reductions they otherwise would have seen in the absence of the Joint Stipulation, competitive pressures will exercise a downward pressure on business rates in any case. Fifth, the proposed changes to local rates are quite moderate and spread over two years. The resulting monthly charge will be slightly below the price that was charged in 1984 for the most expensive local calling service then available. Sixth, the increase in local rates will tend to decrease the rate shock that may occur as the Commission, in response to the universal service mandates, moves to more cost-based rates. Finally, a collateral benefit to the higher rates is that they will create more incentives for competition in the local service market.

7. ***Granting BellSouth a one-year extension of the Commission's full Price Regulation Plan review provides the Commission and the Public Staff with additional time to study the effects of the changes caused by the Joint Stipulation and prepare for a full review of the Plan.***

BellSouth argued that delaying the review for one year will, as witness Johnson testified, give the Public Staff and the Commission "an opportunity to review the effects of the various provisions which have been added or amended by virtue of the Joint Stipulation." Conducting the review any sooner would not give adequate time to observe the effects of any changes.

Summary of CUCA's Brief

Note: CUCA filed a confidential version of its Brief Opposing the Joint Stipulation, along with a redacted public form of the Brief. This summary is a synopsis of the redacted version.

In its Brief, CUCA requested that the Commission reject the Joint Stipulation on the bases that it is (i) unreasonably prejudicial to the residential and business customers of BellSouth; and (ii) inconsistent with the public interest. CUCA maintained that G.S. 62-133.5(c) permits BellSouth to modify the form of its price regulation, subject to four requirements. The two requirements which CUCA believes are relevant to this proceeding are that the Plan as proposed "will not unreasonably prejudice any class of telephone customers, including telecommunications companies" and "is otherwise consistent with the public interest". CUCA supported its position that the Joint Stipulation is unreasonably prejudicial and inconsistent with the public interest by providing (a) an evaluation of the direct costs and benefits of the Joint Stipulation for each relevant group; (b) an evaluation of the "equities" relevant to this proceeding because fairness should be a part of the public interest determination; and (c) an evaluation of other miscellaneous factors relating to the Joint Stipulation.

I - Unreasonably Prejudicial to Residential and Business Customers

CUCA stated that prior to an evidentiary hearing in the Complaint Docket (Docket No. P-55, Sub 1161), AT&T and BellSouth engaged in settlement negotiations that were expanded to include the Public Staff. CUCA remarked that both BellSouth and the Public Staff characterize the Joint Stipulation as beneficial to customers because a rate increase of approximately $47.5 million would be offset by the flow-through of $83 million in access charge reductions, leaving BellSouth to absorb the differential to the extent it was not funded by productivity offsets. However, CUCA asserted that the testimony elicited through cross-examination and the exhibits in the record demonstrate that BellSouth's and the Public Staff's characterization is not accurate because if the Joint Stipulation is adopted, BellSouth's customers will actually incur $66 million to $84 million in increased telecommunications charges and forsaken productivity-related cost reductions and will receive only approximately $41.5 million in access charge related reductions. CUCA stated that this is even assuming that AT&T and other carriers flow-through 100% of the access charge reductions to customers. CUCA argued that the approximate $41.5 million in remaining access charge reductions will reduce the telecommunications charges paid by customers of other LECs, such as GTE and Carolina, and competing local providers (CLPs). CUCA stated that the reason for the disparity between costs and benefits is that for each additional dollar paid by BellSouth's customers in higher rates under the Joint Stipulation, BellSouth's customers will receive only $.50 in benefits from each dollar reduction in switched access charges. CUCA argued that the remaining $.50 for every dollar in access charge reductions will go to other LEC and CLP customers.

In its Brief, CUCA stated that on cross-examination, witness Johnson acknowledged that a point his analysis failed to recognize was that under the Joint Stipulation, if BellSouth were to offset revenue increases with revenue decreases in one of its own categories (such as Basic rates), the impact on ratepayers would be dollar-for-dollar, whereas when the offset is allocated to switched access, the offset is only $.50 on the dollar because the reduction is allocated to the entire state, not just BellSouth's customers. CUCA asserted that on an overall basis, adoption of the Joint Stipulation would be unreasonably prejudicial to BellSouth's residential and business customers because it would require those customers to fund a windfall of more than $40 million to the customers of other LECs and CLPs without any offsetting benefit. CUCA maintained that BellSouth's customers are already funding BellSouth's annual return on equity which is in excess of 27% and that those customers should not be asked to bear an additional financial burden to pay for a windfall to other LEC and CLP customers.

II - Inconsistent with the Public Interest

(A) Direct Costs and Benefits of the Joint Stipulation

CUCA maintained that the Joint Stipulation will modify the structure of BellSouth's Price Regulation Plan primarily by allowing intercategory offsets and the movement of rate elements into other categories.

CUCA stated that witness Cheatham verified on cross-examination that the Public Staff's analysis of the Joint Stipulation, identified as CUCA Cheatham Cross-Examination (Exhibit 12), was reasonable. CUCA noted that witness Cheatham acknowledged that Exhibit 12 presents the revenue increases to be implemented by BellSouth in the following areas during the years 2000-2002:

Basic Exchange Rates	$ 29.65 million
DA Allowance	$ 2.86 million
NB1 Rebalance	$ 15.10 million
Productivity Offsets (B+NB1)	$ 17.61 million
Total	$65.22 million

CUCA stated that witness Cheatham also agreed that Exhibit 12 presents the cost of the Joint Stipulation to BellSouth during the years 2000-2002 as follows:

Productivity Offsets (SwAcc)	$ 1.56 million
Give Up	$ 16.34 million
Total	$17.90 million

Consequently, CUCA maintained, the Joint Stipulation will actually increase the cost to BellSouth's customers by at least $65 million, reduce BellSouth's revenues by less than $18 million, and produce switched access charge reductions of approximately $83 million. CUCA asserted that the $83 million in access charge reductions are to be shared by BellSouth and other LEC and CLP customers, assuming a 100% flow-through by AT&T and other IXCs.

However, CUCA stated that Exhibit 12 neglects to reflect an important element of the Joint Stipulation that will allow BellSouth to move certain services totaling $125 million from the existing Non-Basic 1 Category to a new Non-Basic 1.5 Category. CUCA argued that revenues in the Non-Basic 1.5 Category can be increased 6% per year more than revenues can be increased in the Non-Basic 1 Category. CUCA maintained that as a result, the Joint Stipulation will allow BellSouth to *increase its revenues* from the Non-Basic 1.5 Category by $18.8 million during the years 2000-2002. CUCA asserted that according to witness Cheatham, the only factor that will preclude the exercise of BellSouth's discretion to increase revenues in the Non-Basic 1.5 Category is competition. CUCA stated that the only information offered by BellSouth about the competition that witness Cheatham claimed would preclude BellSouth from exercising the discretion to increase Non-Basic 1.5 rates was derived from anecdotal sources of information such as websites without the benefit of any formal study.

Nevertheless, CUCA noted that witness Cheatham acknowledged that if BellSouth had *no intention* of raising the revenues associated with the Non-Basic 1.5 Category, BellSouth could have set the revenue cap increase at zero rather than at inflation plus 3%. CUCA further stated that if BellSouth chooses to exercise the discretion afforded by the Joint Stipulation to increase Non-Basic 1.5 Category revenues, the burden on BellSouth's customers may be as much as $84.02 million ($18.8 million plus $65.22 million from Exhibit 12), and BellSouth will enjoy a revenue increase of almost $1 million more than the revenue reduction associated with switched access charges ($83 million). CUCA maintained that witness Cheatham admitted on cross-examination that the Joint Stipulation actually allows BellSouth to achieve *a net increase in revenues if* BellSouth exercised the discretion to increase Non-Basic 1.5 revenues in the absence of competition.

CUCA also stated in its Brief that the testimony of witness Johnson supports CUCA's assertion that an evaluation of the direct costs and benefits of the Joint Stipulation confirms that the Joint Stipulation is inconsistent with the public interest. CUCA stated that witness Johnson testified that the Joint Stipulation provides BellSouth "with roughly $47.6 million of additional revenues, substantially less than the $83 million reduction in access revenues." CUCA maintained that witness Johnson indisputably relied upon a comparison of the results under the Joint Stipulation with BellSouth's 1999 Price Plan costs when he identified a $47 million revenue increase and an $83 million revenue decrease as a material basis for concluding that the Joint Stipulation was beneficial to consumers.

CUCA presented the following table, of amounts in millions, showing the impact of the Joint Stipulation during the years 2000-2002, on relevant Groups [known as CUCA Johnson Cross-Examination Exhibit 12]:

Group	BellSouth Revenue Increase	BellSouth Revenue Decrease	Net Effect (Savings - Cost)
BST Residential	$39	$18	($21)
BST Business	$27 - $45	$23.5	($3.5 - $21.5)
NonBST Customers	$0	$41.5	$41.5
BellSouth	$66 - $84	$83	($17) - $1
AT&T	$41	$41	$0
Other IXCs	$42	$42	$0

CUCA commented that witness Johnson stated that CUCA's Exhibit 2 as shown above "only shows the effects of the stipulation relative to 1999." CUCA noted that witness Johnson testified that Exhibit 2 "doesn't tell us what either 1999 or 2000 would look like without the stipulation or more importantly 2000 because it takes effect in 2000." CUCA referenced a quote by witness Johnson wherein witness Johnson, in response to a question from Commissioner Ervin, recommended that the Commission look at two scenarios, one with the Stipulation and one without the Stipulation. Witness Johnson asserted that last year's results are largely irrelevant.

CUCA quoted witness Johnson's testimony that, "[I]t's not possible until we see the [late-filed] exhibit [regarding what the May, 2000 Price Plan filing would have been in the absence of the Joint Stipulation] that the Commissioners have asked for. What you're really asking me is, can I read BellSouth's mind. And the answer is no, I can't." CUCA argued that the record is simply devoid of the evidence that witness Johnson claimed is crucial to the Commission's decision of whether to adopt the Joint Stipulation. CUCA stated that the Commission's May 3, 2000 Order Rescinding Requests for Late-Filed Exhibits and Denying Joint Motion to Hold Price Regulation Annual Filing in Abeyance, rescinded a request from a Commissioner for BellSouth to provide a study of what would have occurred under the Price Plan in the absence of the Joint Stipulation, thereby closing the record. CUCA argued that witness Johnson's assertion that the necessary comparison is between the Joint Stipulation and what would happen in the absence of the Joint Stipulation, if correct, conclusively demonstrates that the Joint Stipulation is not adequately supported by the record evidence. CUCA maintained that if witness Johnson is not correct in his assertion about the crucial comparison, then the Joint Stipulation produces the results identified in the table above and is unreasonably prejudicial to BellSouth's residential and business customers and inconsistent with the public interest.

CUCA pointed out that the Commission ordered BellSouth to file its annual price plan filing prior to the issuance of an order in this proceeding. CUCA noted that the Commission obviously cannot rely upon information that is not in the record without revealing such reliance. CUCA asserted its rights under G.S. 62-65(b) to request a rehearing, after the opportunity for discovery, in order to contest the evidence outside of the record if the Commission ultimately reviews and relies upon BellSouth's year 2000 price plan filing in this proceeding.

CUCA maintained that since the Joint Stipulation allows intercategory offsets, and specifically switched access reductions, in place of intracategory offsets, BellSouth's customers will be unreasonably prejudiced by the Joint Stipulation. CUCA concluded that a final analysis of direct costs and benefits shows that BellSouth's customers who are already financing BellSouth's 27.75% return on equity will be materially harmed by the Joint Stipulation.

Further, CUCA asserted that the other direct cost and benefit issue the Commission must address, which CUCA maintained witness Johnson neglected to investigate, is whether AT&T will flow-through 100% of the switched access charge reductions and how the flow-through will be identified and confirmed. CUCA argued that the risks associated with the flow-through make the decision to reject the Joint Stipulation even easier. CUCA maintained that the limited benefits to be derived from the Joint Stipulation by BellSouth customers are indisputably heavily dependent upon how AT&T accomplishes the flow-through of those access charge reductions. CUCA argued that the record evidence should create concerns for the Commission as to the adequacy of AT&T's flow-through proposal.

(B) Equitable Considerations

CUCA maintained that an evaluation of the "equitable" considerations relevant to the Joint Stipulation include:

(1) BellSouth's return on equity;
(2) Competition in the provision of telecommunications services;
(3) The amount paid by BellSouth's business customers to subsidize basic residential service;
(4) The ability of AT&T to pursue allegations of anticompetitive pricing without raising BellSouth's residential and business rates; and
(5) Political consequences.

CUCA argued that a review of these "equitable" considerations confirms that the Joint Stipulation is unreasonably prejudicial to BellSouth's customers generally, and to its business customers specifically, and inconsistent with the public interest.

(1) BellSouth's Return on Equity

CUCA stated that BellSouth's return on equity was more than 25% in calendar year 1998 and more than 27% in calendar year 1999. CUCA maintained that allowing BellSouth to continue to earn such profits in the context of a stipulated settlement is particularly distressing because a material share of BellSouth's excessive profitability has been borne on the backs of BellSouth's customers through poorer service quality from BellSouth. CUCA argued that witness Johnson acknowledged a correlation between BellSouth's reduced service quality and higher profitability. CUCA maintained that BellSouth's current return on equity is so excessive that the Commission could actually reduce BellSouth's revenues by the aggregate amount of switched access charge reductions ($83 million), and BellSouth would still be able to earn in excess of a 20% return on equity. CUCA stated that this fact raises the fundamental question as to why price plan modifications of the magnitude proposed in the Joint Stipulation are being proposed in the same year the Commission is scheduled to undertake a comprehensive review of BellSouth's Price Plan.

(2&3) Competition in the Provision of Telecommunications Services and the Amount Paid by BellSouth's Business Customers to Subsidize Basic Residential Service

CUCA argued that one area that was largely glossed over by the Stipulating Parties rather than studied sufficiently was the absence of effective competition within BellSouth's North Carolina territory. CUCA maintained that if effective competition existed in the provisioning of business telecommunications services, it is self-evident that BellSouth would not be able to maintain profit margins on business service rates sufficient to subsidize residential services. CUCA argued that both BellSouth and the Public Staff acknowledged that business service rates are set at a level that subsidizes residential rates but that neither could identify the amount of the subsidy because they both neglected to address the issue. CUCA asserted that the fact that BellSouth's business-derived subsidies remain in place confirms the existence of little or limited competition in BellSouth's service territory.

CUCA also made further arguments concerning market penetration and competition in various facets of BellSouth's services by referencing matters addressed in CUCA Cheatham Cross-Examination Exhibit 8 (Exhibit 8). However, the information in Exhibit 8 was provided by BellSouth to CUCA on a proprietary and confidential basis, consequently, the assertions by CUCA in this regard are not provided herein.

(4) The Ability of AT&T to Pursue Allegations of Anticompetitive Pricing Without Raising BellSouth's Residential and Business Rates

CUCA stated that AT&T's complaint concerning switched access charges can stand alone without the Joint Stipulation. CUCA pointed out that G.S. 62-133.5(e) provides that "[a]ny allegation of anticompetitive activity by a competing local provider or a local exchange company shall be raised in a complaint proceeding pursuant to G.S. 62-73." CUCA concluded that AT&T's ability to address switched access charges through a complaint allows BellSouth's rates to be reduced without commensurate increases in residential and business rates for the purpose of preserving BellSouth's 27.75% return on equity.

(5) Political Consequences

CUCA stated that another consideration for the Commission to evaluate is that telecommunications rate increases in an era of declining costs will undoubtedly confuse and upset some customer groups. CUCA asserted that adoption of the Joint Stipulation will give BellSouth a political shield to deflect criticism for rate increases by asserting that BellSouth is just following the orders of the Commission. CUCA stressed that if BellSouth has the discretion to raise customer rates even without the Joint Stipulation, as BellSouth claims, then BellSouth rather than the Commission ought to suffer the consequences of rate increases in an era of declining telecommunications costs. CUCA asserted that the record does not reveal any clear reason for the Commission to bear the brunt of the political consequences of increasing customer rates for BellSouth's benefit, especially since the result of the rate increases under the Joint Stipulation would be to preserve a 27.75% return on equity that most customers would find difficult to swallow or even comprehend.

(C) Other Miscellaneous Factors

CUCA maintained that three other miscellaneous factors should be evaluated by the Commission in considering whether to adopt the Joint Stipulation.

First, CUCA maintained that the failure of the parties supporting the Joint Stipulation to undertake adequate supporting studies necessary to evaluate the impact of the Joint Stipulation clearly warrants rejection of the Joint Stipulation. CUCA asserted that the parties' failure to conduct studies to support the Joint Stipulation raises concerns about the propriety of the substantial basket switching proposed in the Joint Stipulation, the reduction of switched access charges, and the customer rate increases. CUCA stated that through the Joint Stipulation, BellSouth is proposing to move more than $200 million in telecommunications products and services from existing baskets to other existing or new baskets, which will provide BellSouth with greater pricing discretion. CUCA argued that witnesses Cheatham and Johnson both admitted that the parties' respective decisions to include this basket shifting was the product of "eyeballing", general knowledge, and compromise, rather than formal study.

Second, CUCA argued that the benefits supposedly offered by the performance guarantees are largely illusory. CUCA argued that before customers are subject to the onerous cost increases associated with the Joint Stipulation, it would seem more reasonable to attempt to enforce existing rules, particularly given the fact that BellSouth has admitted that it has been out of compliance with the applicable service standards set out in Rule R9-8. CUCA asserted that with a 27.75% return on equity, it is not as if BellSouth is suffering a cash shortage that would limit its ability to achieve compliance. CUCA further maintained that it would appear to be a shrewd trade-off on BellSouth's part to forestall Commission review of BellSouth's Price Regulation Plan for an additional year while earning another $250 million to $300 million in exchange for possibly paying a few million dollars in penalties through the Joint Stipulation.

Third, CUCA stated that witness Johnson acknowledged that the entire additional $60 million, BellSouth ADSL investment is not a net win for consumers. CUCA maintained that none of the Stipulating Parties identified any quantifiable benefit to customers associated with the ADSL investment, and that BellSouth's unsubstantiated estimate that it will incur net additional costs of $15 million annually over ten years as a result of its ADSL investment suggests that customers will enjoy little, if any, benefit because apparently few, if any, customers will be using it. CUCA argued that even if the ADSL service is entirely unused, it is difficult to conceive of how BellSouth could lose $150 million by spending $60 million, even with the inclusion of accrued interest. CUCA concluded that the costs associated with BellSouth's ADSL investment are effectively unsubstantiated and that the benefits are unquantified. CUCA asserted that hypothetically, "BellSouth could agree in the Joint Stipulation to burn $15 million per year in a barrel -- it would cost BellSouth a lot of money but would not benefit customers." Further, CUCA remarked that an added long-term benefit to BellSouth of early ADSL deployment will also likely be the limitation of competition from other DSL providers as BellSouth fills its central offices with its own equipment, increasing its opportunity to tell competitors that "the inn is full" and secure a collocation waiver from the Commission. Consequently, CUCA asserted that early deployment may have a negative impact on some groups of customers because it will ultimately limit competition.

Overall, CUCA requested that the Commission reject the Joint Stipulation and proceed with a comprehensive review of BellSouth's Price Regulation Plan. Additionally, CUCA recommended that the Commission also either coordinate switched access charge reductions through the price plan reviews to which the other LECs will be subject or initiate a generic proceeding for the same purpose.

Summary of the
Public Staff's Proposed Order

In its Proposed Order, the Public Staff asserts that there are compelling reasons for approving the Joint Stipulation. It offers the Commission a unique opportunity to deal with a number of pressing issues: access charge reform, service quality improvement, and infrastructure enhancement. The access reductions will take BellSouth's access rates in North Carolina to $.02 per minute in 2002 and place it in the middle of the range for BellSouth's nine-state region instead of at the top. These reductions will total $83 million and will be flowed through dollar for dollar to IXC customers. The cost of these reductions to BellSouth is expected to be at least $16.3 million. The remainder will come from three sources: rate increases that are already permitted and would otherwise be made under the Price Plan, rate increases that are made possible from reclassifications as permitted under the Plan, and productivity offsets that would otherwise be used to reduce the most competitive rates in the respective baskets under the Plan. The quality of customer service should improve under the system of self-enforcing penalties proposed in the Joint Stipulation. The proposed penalty structure should bring most of BellSouth's performance measurements to the levels established by the Commission. BellSouth will have to invest in service personnel to meet these objectives. If it does not, it will have to credit customer bills by predetermined amounts. The infrastructure enhancement fund will take BellSouth closer toward the goal of bridging the digital divide. BellSouth will have to make an unprofitable investment to deploy ADSL technology at this rate and scope.

The Public Staff further asserted that, given AT&T's persistent desire for access charge reductions, there is good reason to expect it to go forward with its complaint if the Joint Stipulation is rejected and access charges are not reduced. There is also good reason to expect BellSouth to assert a governmental action claim if the Joint Stipulation is rejected and access charges are reduced. Either way, absent the Joint Stipulation, the Commission almost certainly will be faced with the prospect of protracted litigation without any assurance of a better result than the one that is already presented in the Joint Stipulation. Thus, it is clear that rejecting the Joint Stipulation is not a viable option if the benefits of access charge reductions are to be realized. That fact alone would tend to justify approval. When the added benefits of self-enforcing penalties and ADSL deployment are taken into account, the case for approval becomes almost overwhelming.

While the Public Staff recognizes that it is doubtful that the Commission, on its own, would have crafted a proposal identical to the Joint Stipulation in every respect, the Public Staff stated that it considers each component to be reasonable, lawful, and in accordance with the public interest. The Public Staff stated that the Joint Stipulation is in the public interest and should be approved in its entirety. More specifically, the Public Staff sets forth the following reasons and justification in support of its recommendation that the Joint Stipulation be approved:

1. ***AT&T, BellSouth, and the Public Staff are properly before the Commission seeking approval of the Joint Stipulation pursuant to G.S. 62-133.5(a), G.S. 62-80, and the provisions of BellSouth's Price Plan.***

G.S. 62-133.5(a) provides that "[a]ny local exchange company subject to G.S. 62-110(f1), that is subject to rate of return regulation pursuant to G.S. 62-133 or a form of alternative regulation authorized by subsection (b) of this section, may elect to have the rates, terms, and conditions of its services determined pursuant to a form of price regulation, rather than rate of return regulation." Pursuant to this provision, BellSouth elected in 1995 to have its rates regulated under a price regulation plan. G.S. 62-133.5(a) requires the Commission to approve price regulation upon finding that a proposed plan "(i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards that the Commission may adopt; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest." By Order issued May 2, 1996, the Commission found that BellSouth's proposed Price Regulation Plan, as modified by agreement between BellSouth and the Public Staff and as further modified by the Commission, satisfied the four statutory criteria. Order Authorizing Price Regulation, 86 N.C.U.C. 570 (1996) (the 1996 Order). BellSouth submitted a Plan with the Commission's modifications on June 3, 1996, and began operation under the Plan effective June 24, 1996. Since then, BellSouth's rates have been regulated pursuant to its Price Plan rather than on the basis of its earnings and an authorized rate of return.

The Commission now has before it a Joint Stipulation that includes certain proposed revisions to BellSouth's Price Plan. A question was raised earlier concerning whether this proceeding is pursuant to G.S. 62-133.5(c), which provides in part: "Any local exchange company subject to price regulation under the provisions of subsection (a) of this section may file an application with the Commission to modify such form of price regulation or for other forms of regulation." The Public Staff takes the position that the Joint Stipulation does not constitute an application to modify the form of price regulation for BellSouth and therefore subsection (c) is inapposite to this proceeding.

In the 1996 Order, the Commission concluded, among other things, that it retained sufficient authority to protect the public interest. The Commission noted that BellSouth had agreed to a review of the Plan within five years and to file earnings surveillance reports annually. The Commission further noted that it retained authority to monitor and maintain service quality, authority to review rate structures and terms and conditions of tariffs against a public interest standard, and oversight over classification and reclassification of services. Finally, the Commission noted that it has the power to modify the Plan during its term pursuant to G.S. 62-80 and other relevant provisions. 86 N.C.U.C. at 607-608.

The Price Plan revisions proposed by the Joint Stipulation include the reclassification of services, a waiver of the implicit prohibition against intercategory revenue offsets, the addition of self-enforcing penalties for failure to meet service objectives, and a one-year extension of the term of the Plan. Except for the additional constraints imposed on the Switched Access basket, none of the basket or revenue constraints is affected by the Joint Stipulation. Although this is the first time BellSouth has proposed to reclassify services, reclassification is clearly permitted under the Plan. The creation of a new category is a type of reclassification, as is the waiver of restrictions on intercategory revenue offsets. This is not the first time BellSouth has proposed to reduce rates in one category to offset revenues in another category. Last summer, when the Commission ordered BellSouth to reflect the amount of the reductions required by the net inflation-productivity adjustment of approximately $3.1 million as a result of removing the cap on certain services in the Basic Category, BellSouth was allowed to make those reductions in the Switched Access Category. The one-year extension affects the term of the Plan, not its form. Self-enforcing penalties are an addition to the Plan to insure service quality rather than a modification of the form of price regulation itself.

According to the Public Staff, instead of looking to G.S. 62-133.5(c) for authority to consider and approve the proposed Price Plan revisions, the Commission has ample authority under G.S. 62-133.5(a) and the terms of the Plan itself. The Public Staff noted, however, that the criteria for approval of another form of regulation under G.S. 62-133.5(c) are the same as the criteria for approval of price regulation under G.S. 62-133.5(a). Since those are the criteria that were applied to the Price Plan when it was initially approved, the Public Staff believes they should also be applied to the revisions proposed in the Joint Stipulation.

The Public Staff stated that the practical difference between proceeding under G.S. 62-133.5(a) and proceeding under G.S. 62-133.5(c) lies in the interpretation of the following language in subsection (a): "Upon approval [of a price plan], <u>and except as provided in subsection (c) of this section</u>, price regulation shall thereafter be the sole form of regulation imposed on the electing local exchange company, and the Commission shall thenceforth regulate the electing local exchange company's prices, <u>rather than its earnings</u>." (Emphasis added.) It has been suggested that this language confers upon the Commission the authority to regulate the electing company's earnings in a proceeding under subsection (c). The Public Staff does not believe that such a reading was intended by the Legislature. It is the view of the Public Staff that subsection (c) was intended to allow a company that has received price plan approval the option of seeking approval of another kind of price plan or another form of regulation under subsection (b) or even for rate of return regulation. If the company chose the subsection (b) option, it <u>could</u> thenceforth be subject to earnings regulation; if it chose G.S. 62-133, it <u>would</u> be subject to earnings regulation. Thus, the need for the language "except as provided in subsection (c)." Otherwise, the company's earnings would not be regulated. The Public Staff asserted support for this view in G.S. 62-133.5(g), which contains a list of statutes that do not apply to a local exchange company that has elected price regulation under subsection (a). This list includes G.S. 62-81, 62-130, 62-131, 62-132, 62-133, and 62-137, all of which relate to the Commission's general ratemaking authority under traditional rate of return regulation.

2. ***BellSouth's aggregate intrastate switched access rates in North Carolina are currently \$.063 per minute, the highest in the Company's nine-state region. The proposed reduction in BellSouth's switched access rates to \$.02 per minute will make significant benefits available to long distance customers in North Carolina.***

BellSouth's Price Plan provided for scheduled rate and revenue reductions of approximately $15 million each, a total of $60 million, on the effective date of the Plan and on the next three anniversaries of the Plan. As a result of these reductions, and other revisions in the access rates, BellSouth's switched access rates went from $.1016 per minute at the inception of the Plan to $.0648 per minute on the third anniversary of the Plan. A further reduction to $.063 per minute was accomplished through the $3.1 million revenue offset from the Basic Category discussed above. The Commission required AT&T and the other facilities-based long distance carriers to flow-through these access charge reductions to their customers on a dollar-for-dollar basis.

AT&T argued in its complaint that BellSouth's access rates should be reduced to $.01 per minute. The total annual revenue impact of such a reduction is approximately $99 million. Under the Joint Stipulation, these charges will be reduced to $.04 per minute at the inception of the revised Price Plan, $.03 on the first anniversary, and $.02 on the second anniversary. The total annual revenue impact of these reductions is approximately $83 million. The record shows that $47 million of this impact will occur during the year immediately following the initiation of the revised Price Plan, $19 million during the year immediately following the first anniversary, and $17 million during the year immediately following the second anniversary.

Witness Cheatham testified that, in addition to the scheduled rate reductions, under the revised Price Plan the revenue in the Toll Switched Access category will become subject to a constraint equal to the change in the GDP-PI minus 2.5%. She explained that the anticipated results of this constraint were incorporated into the scheduled reductions. She further noted that rates in the Toll Switched Access Category will be capped at the aggregate rate in effect upon initiation of the revised Plan and on each subsequent anniversary. If the rates for switched access should reach $.01 per minute, the aggregate rate cap will be removed and the aggregate rate element constraint will become inflation plus 17%, the same constraint that applies to NB1 Services.

AT&T witness Follensbee testified that BellSouth's current access rates range from a high of $.063 per minute in North Carolina to a low of $.025 per minute in Alabama. Witness Follensbee stated that effective January 1, 2001, BellSouth's intrastate access rates in Tennessee will fall to $.015 per minute. He further stated that the scheduled reduction to $.02 per minute under the Joint Stipulation would place BellSouth's access rates in North Carolina in the middle of the nine BellSouth states, which are expected to range from $.01 per minute in Mississippi to $.061 per minute in Florida.

Witness Follensbee cited several benefits to customers that will result from the proposed reduction. The first is lower rates and better pricing plans for long distance customers. AT&T has agreed to flow-through on an aggregate dollar-for-dollar basis the access savings resulting from approval of the Joint Stipulation. Based on current average monthly bills for residential customers, the access reductions contained in the Joint Stipulation will allow AT&T to lower residential customers' bills by an average of $.85 per month. Because AT&T is prohibited from passing along these reductions solely to BellSouth's local customers, these reductions in toll bills will apply statewide. Moreover, even customers who do not make long distance calls will benefit because calls will now be more affordable. Finally, witness Follensbee testified that lower long distance rates will enable North Carolina to compete with surrounding states for businesses that depend on long distance service.

Witness Follensbee stated on cross-examination that flow-through is in AT&T's interest for one main reason: unless access is priced as close to cost as it can be, when BellSouth is granted interLATA long distance relief, AT&T will be unable to compete with BellSouth using its own facilities unless AT&T installs its own facilities as well. Witness Follensbee agreed that prices charged by IXCs are determined by a number of factors, but he stated that for a residential customer, access is half the cost and the predominant driver of what is offered.

Regarding the flow-through to business customers who are served by AT&T pursuant to contract, witness Follensbee explained on cross-examination that the amount of the flow-through depends on the specific contract. If it involves service that is dedicated at one or both ends, the customer would see very little reduction because the customer is already receiving reduced prices. However, the full access charge reductions would be passed on to other customers. In response to questions from the Commission, witness Follensbee offered no flow-through proposal but said that AT&T might leave rates at $.07 under its $.07-Plan and instead lower MTS rates that are distance and time-of-day sensitive.

Witness Johnson testified that the flow-through provisions of the Joint Stipulation will translate into real savings on most customers' bills, including those living outside BellSouth's service area. He stated that another benefit will be a reduction in the disparity and confusion between intrastate and interstate toll rates. In addition, lower prices will stimulate toll calling, and, because the telecommunications business is a declining cost industry, when traffic is stimulated prices can be expected to decline even further under competitive conditions.

On cross-examination, witness Johnson explained that the access reduction in the first year of approximately $.023 converts to a $.025 change for minutes that take place in BellSouth's territory, but the number is adjusted downward to $.012 when looking at an average for all minutes across the state. Thus, a customer making 40 minutes of toll calls would see a $.50 per month reduction the first year, which is consistent with AT&T's estimate of $.85 per month after the second year. He estimated, however, that the cumulative reduction, based on usage of 45 to 50 minutes a month, would be between $.90 and $1.00 at the end of three years.

According to the Public Staff, the uncontroverted evidence in this proceeding supports a reduction in BellSouth's switched access charges. Although the Commission concluded in the 1996 Order that there is no language in the General Statutes requiring it to reduce access charges to cost, the Commission indicated an expectation that competition would drive BellSouth's rates gradually toward cost. 86 N.C.U.C. at 587. In the case of switched access, that has not happened. Moreover, the record indicates that in recent years switched access charges have declined more rapidly in other states than they have in North Carolina. As a result, the Public Staff takes the position that long distance customers in this State have failed to enjoy the benefits of toll competition to the same extent as their neighbors. AT&T has committed to flow through the entire access charge reduction to its long distance customers on a dollar-for-dollar basis in accordance with procedures authorized by the Commission. The Public Staff has asked that other facilities-based long distance carriers be required to do likewise.

Because the access charge reductions proposed in the Joint Stipulation are contingent upon approval of the proposed revisions to BellSouth's Price Plan, the Public Staff stated that the question then is whether the Price Plan, with those revisions, including the reclassification of certain services, continues to meet the criteria set forth in G.S. 62-133.5(a).

3. BellSouth's Price Plan with the proposed revisions will protect the affordability of basic local exchange service.

In the 1996 Order, the Commission defined "basic local exchange service" to mean "basic residence and business local exchange service." 86 N.C.U.C. at 577. The Commission concluded that BellSouth's rates for basic local exchange service were and would remain affordable under the approved Price Plan. To support this conclusion, the Commission cited several factors: the elimination of Touchtone charges, the three-year cap on residence basic local exchange rates, the availability of Lifeline and Link-up assistance, the gradual rebalancing of rates, the constraint of competition in addition to the pricing rules, and the rising per capita income in North Carolina. 86 N.C.U.C. at 578-79.

The record shows that the current rate for a basic residence line in BellSouth's highest rate group is $12.51 per month. Witness Cheatham testified that, under the Joint Stipulation, BellSouth proposes to offset $24 million of the $83 million in access charge reductions with increases in basic monthly residence rates of approximately $.50 each year or $1.50 by the end of the sixth year of the Price Plan. She emphasized that these increases are in accordance with the pricing rules in the Price Plan that was approved in 1996. Witness Johnson described these increases as moderate, noting that for most customers they will be ameliorated or completely offset by the toll rate reductions. He added that the resulting monthly charge will still be below the $14.77 price charged in 1984 for the highest rate group. To place the proposed increases in further perspective, the Public Staff noted that, in its annual Price Plan filing, BellSouth proposes to increase its basic monthly residence rates by amounts ranging from $.45 to $.57, depending on rate group.

The Public Staff asserted that the decision to give BellSouth the flexibility to raise rates for basic residence and business services was made in the first instance by the General Assembly when it opened BellSouth's franchised areas to competition under G.S. 62-110(f1) and allowed BellSouth to elect price regulation under G.S. 62-133.5. One of the statutory requirements of any price regulation plan is that the carrier must be allowed to adjust its prices in the aggregate or for various aggregated categories of services based on changes in price indices. Another requirement is that the carrier be allowed to rebalance its rates. While BellSouth's Price Plan reflects both of these requirements, it also protects the affordability of basic local exchange service by capping residence rates for the first three years and permitting gradual rebalancing with moderate rate increases that are offset by decreases in rates for other services. The Plan includes both rate element and revenue constraints for the Basic Service Category. The Joint Stipulation does not affect these constraints.

According to the Public Staff, it has been implied during the course of this proceeding that the Joint Stipulation constitutes a proposal to increase basic local rates solely for the purpose of offsetting access charge reductions. However, it is clear from a reading of BellSouth's Price Plan and from the testimony in the record that this is not the case. It is true that the Joint Stipulation contemplates and makes use of increases in rates for basic local exchange service, but those increases are already permitted under the Price Plan as part of the gradual rebalancing anticipated in the 1996 Order. Absent the Joint Stipulation, basic local exchange rates could and would increase by even greater amounts. In other words, the access charges reductions under the Joint Stipulation are not necessary to justify the price changes proposed by BellSouth.

For the foregoing reasons, as well as the reasons stated in the 1996 Order, the Public Staff asserted that BellSouth's Price Plan, with the proposed revisions, will protect the affordability of basic local exchange service.

4. BellSouth's Price Plan with the proposed revisions will reasonably assure the continuation of basic local exchange service that meets reasonable service standards.

The Commission noted in the 1996 Order that its Rule R9-8 prescribes service objectives for all local exchange companies in North Carolina. The Commission further noted that it retains the statutory authority under G.S. 62-42 to compel efficient service and can investigate service problems either on its own motion or upon complaint. The Commission said the record was clear that BellSouth was providing excellent service in North Carolina. 86 N.C.U.C. at 579. The Public Staff asserted that the record today, however, indicates that BellSouth's service has deteriorated and that BellSouth is not meeting all of the Commission's service objectives. To remedy this problem, BellSouth has agreed in the Joint Stipulation to a system of self-enforcing penalties for failure to meet certain service objectives on an annual basis.

Under the Joint Stipulation, Section XI. SERVICE MEASUREMENTS will be added to BellSouth's Price Plan. Penalties will be assessed if objectives are not met for eight service measurements based on yearly statewide service results. The objectives are a subset of those currently specified in Commission Rule R9-8 except for one, out-of-service troubles cleared within 24 hours. If the yearly statewide average service result for a given measurement satisfies the objective, no penalty will be assessed even though one or more monthly measurements may have been missed. If the yearly statewide average falls below the objective, a $10,000 monthly penalty will accrue for every unit by which the objective is missed. Additional penalties will apply depending on the number of months in which the objective is missed: $250,000 if there are 3 – 5 monthly performance misses for a service measurement, $500,000 if there are 6 – 8 monthly performance misses, and $1,000,000 if there are 9 – 12 monthly performance misses. BellSouth may ask the Commission to waive the penalty for any objective for any month it believes a special circumstance beyond its control has prevented it from meeting one or more objectives. Penalty amounts at the end of the year will be credited to bills of all residence and business customers.

All service results provided by BellSouth will be considered proprietary except those currently provided on a nonproprietary basis. BellSouth will begin providing the number of Commission complaints monthly on an exchange basis. BellSouth will also begin providing on a proprietary basis for Commission and Public Staff inspection the results of regular service orders completed within five working days and new service orders held over 30 days on an exchange basis. BellSouth will continue to provide initial trouble reports per 100 access lines on an exchange basis.

Witness Cheatham testified that at one point BellSouth probably cut too many people and service suffered. She added, however, that she thinks BellSouth has learned from this and it is not going to happen again. In her opinion, the self-enforcing penalties are a little insurance policy that it does not happen. Although witness Cheatham was unable to give the results of service quality measurements that are proprietary, she did state that if the self-enforcing penalty provision had been in effect in 1999, BellSouth would have been subject to over $3 million in penalties. Witness Cheatham acknowledged that these self-enforcing penalties for failure to meet certain objectives are in addition to any penalties the Commission might impose for failure to meet the objectives in its rules.

Witness Johnson testified that the majority of the service complaints involve price plan companies, which no longer have to fear rate of return penalties and have every incentive to cut costs. He stated that since the implementation of price regulation, BellSouth's service measurements have deteriorated while complaints have escalated. He noted that, while theoretically customers could turn to a competitor if they are not satisfied with BellSouth's service, we are still at an early stage in the transition toward a more competitive market. Furthermore, competitors may resell BellSouth service or depend on BellSouth for various network elements, so the quality of service they offer may be limited to that of BellSouth.

Witness Johnson explained that the remedies for compelling adequate service are few. The Commission can impose rate of return penalties for service inadequacies due to mismanagement in general rate cases for LECs that are not under price regulation. The Commission can also order a LEC to show cause why it should not be subject to fines and penalties for failure to meet the standards in Rule R9-8. However, actions to collect penalties must be instituted in Superior Court and monies forfeited are remitted to the State. The only other remedy would be to specify penalties in the Rule itself, but that would be time consuming and likely to be contested.

Witness Johnson stated that the self-enforcing mechanism should be preferable to the normal penalty process, since it will allow BellSouth, the Commission, and the Public Staff to direct their resources where they will do the most good for consumers. It gives BellSouth both the incentive and the opportunity to meet the Commission's objectives and lower the incidence of service complaints.

The Public Staff asserted that the Commission should be seriously concerned about the deterioration of service quality since BellSouth elected price regulation. It is all too apparent, as witness Johnson noted, that BellSouth has had every incentive under its Price Plan to cut costs at the expense of service. It is the opinion of the Public Staff that the system of self-enforcing penalties proposed in the Joint Stipulation provides a much needed remedy and improves the Plan significantly. It will be both an incentive to BellSouth and an assurance to customers that service quality will improve. The Public Staff emphasizes, however, that it considers the objectives in Rule R9-8 to be the minimum standards for all LECs and that all LECs should be expected to meet or exceed those standards. According to the Public Staff, the Commission should continue to monitor service measurements and take whatever additional action is necessary within its powers to ensure that BellSouth's customers receive the quality of service to which they are entitled.

For the foregoing reasons, the Public Staff asserted that BellSouth's Price Plan with the proposed revisions will reasonably assure the continuation of basic local exchange service that meets reasonable service standards.

5. BellSouth's Price Plan with the proposed revisions will not unreasonably prejudice any class of telephone customers, including telecommunications companies.

BellSouth's Price Plan provides for services to be reclassified to less restrictive categories as competition develops. Under the Joint Stipulation, the nonline portion of certain package services (Frequent Caller, Complete Choice, Area Plus, and Area Plus with Complete Choice) will be reclassified from the Basic Category to the NB1 Category. In addition, certain services will be reclassified from the Non-Basic 1 Category to a new category, Non-Basic 1.5, where they will be subject to a rate element constraint of inflation plus 17%, the same as Non-Basic 1, and a revenue constraint of inflation plus 3%.

Witness Cheatham stated in response to questions from the Commission that the services to be moved into the Non-Basic 1.5 Category were selected using degree of competitiveness as the criterion. She further stated that the list was developed as part of a negotiation with the Public Staff. She offered no formal studies to support this selection but referred to various competitors' websites as evidence of competition. As for the nonline portion of certain packages of vertical services that are to be moved from Basic to Non-Basic 1, also the product of negotiation, witness Cheatham explained that vertical services individually are already in the Non-Basic 1 Category. She further stated that, in her opinion, packages are where competition is going to go.

Witness Johnson agreed that the services being transferred into the new category are becoming more competitive, MTS and WATS, for example. He stated that by moving these services to Non-Basic 1.5, the Public Staff has given BellSouth some increased pricing flexibility but not without constraints and only for a relatively brief period until the full plan is reviewed. He stated that data transport services are also increasingly competitive because of the unbundled network environment and that competitors are well positioned to offer the value added functions. As for packages of vertical services, witness Johnson said they are not necessarily competitive but are discretionary. He noted that as a result of the move of the nonline portion to Non-Basic 1, the rate element constraint will be much broader but the productivity offset will increase from 2% to 3%.

The Public Staff takes the position, as witness Cheatham noted, that reclassification is more of an art than a science. However, the Public Staff stated that it has agreed to support only those reclassifications which it believes are justified under current market conditions. Based on the testimony of the witnesses, and on an examination of the services that will be reclassified, the Public Staff is of the opinion that the proposed reclassifications, including the creation of the new basket, are consistent with the principles of price regulation embodied in the Price Plan from the outset.

According to the Public Staff, in the 1996 proceeding, three customer groups challenged various aspects of the proposed plan under this criterion. Two of those groups, interexchange carriers and business customers, are represented in this proceeding. The interexchange carriers, of course, have largely achieved their objective of access charge reductions under the Joint Stipulation. The IXCs also argued in the earlier proceeding that switched access charges should be capped on a rate element basis rather than in the aggregate. Under the Joint Stipulation, a rate element constraint of inflation plus 17% will take effect in the Switched Access Category if the aggregate rate for switched access reaches $.01.

According to the Public Staff, CUCA argued that business customers are prejudiced because many rates for business services are priced above cost and because both competitive and noncompetitive services are in the same basket. The Commission agreed, however, with BellSouth's witness that competition makes further increases in rates for business services unlikely. 86 N.C.U.C. at 582. CUCA has raised essentially the same arguments in this proceeding, and the Public Staff urges the Commission to reach the same conclusion. The Public Staff asserts that nothing in the record in this case indicates that rate increases for complex business services are any more likely today.

CUCA has also suggested that BellSouth's customers will be prejudiced by experiencing rate increases under the Price Plan while customers of other LECs receive reductions in their toll rates. Similarly, BellSouth's business customers will experience rate increases but will not receive the benefit of toll rate reductions. The Public Staff finds no unreasonable prejudice or disadvantage in either instance. The witnesses accurately cited both state and federal law that requires AT&T and other interexchange carriers to charge uniform toll rates. To do otherwise would indeed be to subject one group of customers to unreasonable prejudice. Moreover, the Public Staff notes that GTE and Sprint already have the ability to offset local rate increases with access charge reductions in the Basic basket under their Price Plans, and these reductions would be flowed through to toll rates paid by BellSouth's customers. As for businesses who may not receive the benefits of the flow-through, because they already receive discounted toll service under contract, the Public Staff notes that their local rates are unlikely to increase for the same reason -- competition. Finally, the Public Staff asserts that while the Joint Stipulation proposes price plan revisions to enable BellSouth to offset a portion of the access charge reductions, BellSouth could have implemented many of the increases anyway and could have requested reclassifications that would have permitted the remaining ones regardless of whether access charges were reduced.

For the foregoing reasons, the Public Staff asserted that BellSouth's Price Plan with the proposed revisions will not unreasonably prejudice any class of telephone customers, including telecommunications companies.

6. ***BellSouth's Price Plan with the proposed revisions will be otherwise consistent with the public interest.***

Witness Cheatham testified that, under the Joint Stipulation, BellSouth will be allowed to offset $12.2 million of the $47 million first year access revenue reduction with revenues from rate increases in the Basic Category. In response to questions from the Commission, she explained that revenues include $6.9 million from residence rate increases, $4,000 from increases in NARS associated with Thrifty Caller Service, $1.7 million from increases in the line portion of optional packages, $1.4 million from the reduction in the number of free DA allowance from five to four, and

$2.2 million from increases in rates for single line business services in the lower rate groups. By contrast, BellSouth's most recent annual filing includes rate increases totaling $17.8 million and revenue decreases totaling $20.8 million in the Basic Category. Under the Joint Stipulation, BellSouth will be allowed to offset an additional $15.1 million of the access reduction with revenues from rate increases in NB1. These include $7.7 million from increases in the nonline portion of Complete Choice and Area Plus, $7.1 million from increases in vertical features, $200,000 from Frequent Caller Service, and $19,000 from Toll Terminals and Residential ISDN. By contrast, the annual filing shows total revenue increases in NB1 of $3.9 million and revenue decreases totaling $7.9 million.

According to the Public Staff, information provided by the Public Staff and entered by CUCA on cross-examination shows that in addition to the $27.3 million from rate increases under the Plan, BellSouth will also be allowed to use $8.3 million in required productivity offsets in these two categories to reduce switched access charges. Another $855,000 will come from productivity offsets in the Toll Switched Access Category itself. The remaining $10.7 million will be "give up" by BellSouth. In the second year, the revenue increase offsets will total $10.8 million, the productivity offsets total $5.5 million, and the "give up" is $1.7 million. In the third year, the increases will total $8.5 million, the offsets $4.5 million, and the "give up" $4 million. These numbers, however, are only estimates. The record shows that the productivity offset calculation assumes a revenue growth rate of 4% per year. The rate of inflation is estimated at 1.3% for 2000, 1.7% for 2001, and 1.9% for 2002. Witness Cheatham testified that the 2000 rate is actually 1.6%, which means a smaller productivity offset and a correspondingly larger "give up" by BellSouth under the Joint Stipulation.

All three witnesses were questioned about the relevance of BellSouth's earnings in this proceeding. Witness Follensbee was asked about the allegation in AT&T's complaint that "BellSouth's earnings are so overwhelmingly healthy that its switched access rate could be reduced with no need to offset the reductions with higher rates for other services" and the statement in his testimony in support of the complaint to the effect that access rates could be reduced without affecting local residential rates. He emphasized that AT&T's concern was to achieve access reductions, which the Joint Stipulation does.

Witness Cheatham testified on cross-examination that BellSouth's current earnings level indicates that price regulation is working as intended. BellSouth is doing a good job of introducing new services and keeping expenses under control. She conceded that at one point BellSouth probably cut too many jobs, which affected service quality, but said that BellSouth is not cutting costs at the expense of quality today.

In response to questions from the Commission, witness Cheatham agreed that a 1% change in BellSouth's jurisdictional return on common equity equates to a change of $15.1 million in gross revenues. She also agreed that if BellSouth absorbed the entire $83 million reduction in access revenues, its return on equity would be reduced by about 5½%, bringing it down to about 22¼%. When asked why, in view of its earnings, BellSouth should be allowed to recover the lost revenues proposed in the Joint Stipulation, witness Cheatham responded that BellSouth is not recovering all of those revenues under the Stipulation. She stated that there is a $35 million buy-in, plus the ADSL infrastructure fund. In addition, she stated that BellSouth's earnings were primarily achieved through increased revenues, the bulk of which came from the sale of competitive services, such as MegaLink and ISDN, and less-competitive but discretionary vertical services.

According to the Public Staff, witness Johnson testified on cross-examination that earnings are something the Commission can and should consider when it reviews BellSouth's Price Plan. He stated that the proper way to look at earnings is to look at all of the price plan companies and try to understand why some are making higher returns than others. Witness Johnson noted that price regulation is supposed to break the linkage between prices and earnings. He stated that if management does a good job of cutting costs or generating revenues and increases profitability, taking away those profits removes the incentive to cut costs or grow revenues. Witness Johnson also questioned whether the Commission has the clear-cut legal right to demand that BellSouth lower particular rates without giving any compensating relief. He further stated that if a company has excessive earnings because of a flaw in the plan, that flaw should be fixed. For example, the productivity offsets might not have been deep enough or the rate element constraints might not have been set properly. In witness Johnson's view, however, if a company's earnings are high, that does not automatically mean its rates need to be reduced to bring the return to a particular level. He stated that the process is more sophisticated and recommended that the Commission identify what is causing the high returns and what is the appropriate response to them.

Witness Johnson testified that the upcoming price plan reviews for GTE and Sprint give the Commission the opportunity to begin this process, and he recommended that these reviews be very thorough. As to the relationship between this proceeding and the end of plan review, witness Johnson stated that the Commission could in good conscience approve the Joint Stipulation and, if it is troubled by some aspects, give the parties fair warning of what it will study more deeply in a full review. But this is not the forum to deal with issues like rate of return.

He stated that a one-year delay in the review for BellSouth gives the Commission in effect two years in which to review BellSouth's data. Then, after focusing generically on GTE's and Sprint's plans, the Commission can focus more intensely on BellSouth and any necessary improvements in its Plan.

According to the Public Staff, undisputed data indicate that BellSouth's earnings are much higher today than they were four years ago. The Public Staff recognized that the Commission might well be troubled, to say the least, by the prospect of rate increases in face of such earnings. Nevertheless, the Public Staff asserted that earnings have a different relevance in cases involving price regulation than they do in cases involving rate of return regulation. For example, if BellSouth's rates were still regulated pursuant to G.S. 62-133, the Commission would clearly have the authority to order rate reductions if, after investigation and hearing, it found BellSouth's current level of earnings to be in excess of a reasonable rate of return. The Commission's authority to order reductions in the context of this case is more problematic.

Although AT&T has alleged that BellSouth's access charges are unlawfully high, the Public Staff stated that BellSouth had denied those allegations and presumably would contest them in a hearing on the merits of the complaint. Furthermore, BellSouth has indicated that if the Commission ordered it to reduce access charges, it would seek to recover the associated revenues under the governmental action provision of its Price Plan. As an alternative, BellSouth has agreed to access charge reductions as part of the Joint Stipulation.

The Public Staff asserted that it would be inappropriate to decide whether to accept or reject the proposed Price Plan revisions based on BellSouth's earnings. Both AT&T and CUCA argued that the Commission should conduct a general rate case for BellSouth going into the Price Plan, but the Commission rejected those arguments in its 1996 Order, citing G.S. 62-133.5(a) and (g). 86 N.C.U.C. at 594. While the Commission did say that BellSouth's earnings were relevant to the proceeding and had been considered in developing the Price Plan, it also found and concluded that there was no justification for revenue or rate reductions in addition to the $60 million agreed to by BellSouth as a buy-in.

In this proceeding, the Public Staff noted that BellSouth has also agreed to a buy-in. The record shows that there is $16.3 million in pure "give up" and, as witness Cheatham testified, if the productivity offsets decrease because inflation is higher than expected, that give up increases. The carrying charges on accelerated ADSL deployment are also "give up", as witness Cheatham explained. The Public Staff asserts that to determine that BellSouth's earnings are sufficient to fund an additional buy-in and still leave BellSouth the opportunity to earn a reasonable rate of return would come close to having a general rate case which is beyond the Commission's authority under price regulation.

However, even without authority to regulate earnings *per se*, the Public Staff stated that the Commission is not required to ignore earnings, particularly when reviewing the Price Plan as a whole. The Public Staff cites witness Johnson's testimony that a full review of the Plan is the context in which to evaluate the effect of the Plan on earnings and to make modifications to the Plan. According to the Public Staff, a detailed understanding of how and why BellSouth's earnings have increased since price regulation was implemented will serve as an indication of whether certain service classifications and pricing constraints are appropriate under current market conditions.

The Joint Stipulation calls for the term of BellSouth's Price Plan to be extended by one year, until June 24, 2002. The Public Staff stated that this will allow time to gain experience with the self-enforcing penalties and other revisions and to conduct the kind of earnings analysis that is relevant in a price regulation environment and to take appropriate action within the scope of our authority. According to the Public Staff, with the case that is before the Commission today, the Commission has little choice but to accept BellSouth's earnings as a consequence of the decisions which were made in 1996. BellSouth has clearly taken advantage of price regulation to the benefit of its stockholders. The Public Staff took the position that it does not necessarily follow that this has been detrimental to the interests of ratepayers, particularly those whose rates have been capped and proposed to go up for the first time this year and that the only indication that earnings have grown at ratepayer expense is in the area of service quality, where BellSouth concedes it cut costs and service suffered. BellSouth has agreed to a system of self-enforcing penalties to insure that the proper incentives are in the Price Plan.

Based on the foregoing, the Public Staff asserted that BellSouth's Price Plan with the proposed revisions will be otherwise consistent with the public interest.

7. ***The proposed infrastructure enhancement fund for deployment of ADSL technology will make ADSL available to over 50% of BellSouth's access lines and will further the goal of bridging the "digital divide" between rural and urban areas of the State.***

Under the Joint Stipulation, BellSouth will deploy approximately $97.8 million in ADSL in North Carolina by the end of 2002, an increase of $60 million over its previous investment plans. This added investment will result in 95 central offices and 2,100 remote terminal sites being equipped with ADSL technology. BellSouth will file annual reports beginning January 1, 2001, detailing its progress in deploying ADSL. Witness Cheatham testified that this deployment will make ADSL accessible to over 50% of BellSouth's lines in North Carolina.

Witness Cheatham explained on cross-examination that BellSouth's planning for ADSL is done on a regional basis with very little of it being state specific. She stated that during the negotiations BellSouth went back to the regional budget and looked at how it could be allocated to North Carolina and what central offices and remote sites would be equipped through that allocation. She stated that the $60 million represents completely new investment. She further stated that BellSouth had planned to deploy $37.5 million over five years, which is now included in the $97.8 million BellSouth has agreed to deploy by the end of 2002. As for the profitability of this investment, she stated that an analysis of revenues versus expenses versus investment and carrying charges over a ten-year period did not show a positive contribution but instead showed that the Joint Stipulation requires an additional "give up" by BellSouth.

In response to questions from the Commission, witness Cheatham stated that the net carrying charges associated with the additional investment in ADSL will be $15 million annually, which includes an offset for revenues that would be derived from the sale of these services. She also explained that the proposal includes all but four of BellSouth's central offices -- the Raleigh and Charlotte Airport central offices, which are exclusively business customers, and the Milton and Gatewood central offices, which are in the Virginia LATA.

Witness Johnson testified that the addition of $60 million to BellSouth's previous investment plans represents a net additional cost to BellSouth of $15 million annually over ten years. He also stated that customers will benefit from more rapid deployment of ADSL in three ways. First, infrastructure improvements will be more widely spread across the state, including areas where the potential revenues alone would not necessarily be sufficient to encourage BellSouth to invest in this technology. He noted that 11 of the central offices listed in the Joint Stipulation are in areas that have been identified as economically disadvantaged. Second, rapid deployment of ADSL will help meet the growing demand for bandwidth by business and residence customers. And third, this investment may lead to additional investment in DSL-type technology by other carriers as well as by BellSouth as experience is gained with this technology.

The Public Staff argued that the establishment of an infrastructure enhancement fund for the accelerated deployment of ADSL is a significant commitment on the part of BellSouth. The Public Staff stated that it is satisfied that the scheduled installation of ADSL equipment under this Plan is well beyond what would have occurred in the ordinary course of business. It will clearly take the company and its customers much closer to the public policy goal of making Internet access equally available in both rural and urban areas.

8. The Joint Stipulation is in the public interest and should be approved in its entirety.

According to the Public Staff, it is clear from the all of the testimony that the Joint Stipulation is the product of give and take negotiation among the parties. Witness Cheatham described it as an integrated package. She also described it as a "win-win-win" proposition. On cross-examination, she explained that BellSouth benefits by being able to reduce access charges as well as from the creation of a new basket that recognizes the transition of services from slightly less competitive to increasingly competitive. AT&T receives lower access charges, which it has agreed to flow through, so customers receive the benefit of lower toll rates. The Public Staff benefits in that BellSouth has agreed to self-enforcing penalties. Finally, the public benefits from an almost $100 million ADSL infrastructure fund.

Witness Johnson also described the benefits to consumers. The first thing is the self-enforcing penalty provision, which is accomplished immediately. He noted that it would probably take a year or more to get such a plan in effect through the normal course of the regulatory process. The second is the movement downward in switched access rates at a moderate pace, a sort of controlled decline towards greater parity with the interstate jurisdiction as well as neighboring state jurisdictions. This is accomplished without a lengthy argument before the Commission and a likely appeal. In addition, instead of raising residence rates and offsetting them with business reductions, lowering access will flow through directly to residence customers, while BellSouth will still be under pressure to lower business rates in the long run. Another benefit, witness Johnson said, is the ADSL deployment, because it spreads that investment more rapidly and more broadly than BellSouth would do on its own. He added that once this technology is available, it will create pressure on BellSouth to deploy it to the rest of the people in the area.

CUCA sought, on cross-examination of witness Johnson, to compare the proposed effects of the Joint Stipulation, including the proposed revisions to the Price Plan, with experience during 1999. Witness Johnson, however, insisted that the proper comparison is between the effect of the Joint Stipulation and the operation of the Price Plan today without the proposed revisions. Witness Johnson further stated, in response to questions from the Commission, that the question is whether the public is better off implementing the Joint Stipulation or not implementing it. The Public Staff further asserted that many of the rate changes that will occur under the Joint Stipulation will also occur if the Joint Stipulation is rejected, that access rates will remain at current levels, as will intrastate toll rates, that service quality will remain unaddressed in the Price Plan, and that ADSL deployment will remain a laudable but significantly underfunded goal.

For all of the reasons set forth above, the Public Staff asserted that the Joint Stipulation is in the public interest and should be approved in its entirety.

Based on the foregoing, the evidence adduced at the hearing, and the entire record in these dockets, the Commission now makes the following

FINDINGS OF FACT

1. BellSouth is an incumbent local exchange company serving approximately 2.3 million customers, including 1.6 million residential customers, in North Carolina. BellSouth's rates are regulated under a Price Regulation Plan approved by the Commission pursuant to G.S. 62-133.5.

2. AT&T is a facilities-based interexchange carrier serving customers of BellSouth and other local exchange companies in North Carolina. AT&T's rates are regulated under a ceiling rate plan pursuant to Commission Orders.

3. AT&T, BellSouth, and the Public Staff are properly before the Commission seeking approval of the Joint Stipulation pursuant to G.S. 62-133.5(c), G.S. 62-80, and the provisions of BellSouth's Price Plan.

4. BellSouth's aggregate intrastate switched access rate in North Carolina is currently \$.063 per minute, the highest in the Company's nine-state region. The proposed reduction in BellSouth's aggregate switched access rate to \$.02 per minute will make significant benefits available to intrastate long distance customers in North Carolina.

5. BellSouth's Price Plan with the proposed revisions set forth in this Order will, in accordance with G.S. 62-133.5(c):

(a) Protect the affordability of basic local exchange service.

(b) Reasonably assure the continuation of basic local exchange service that meets reasonable service standards.

(c) Not unreasonably prejudice any class of telephone customers, including telecommunications companies.

(d) Be otherwise consistent with the public interest.

6. The proposed infrastructure enhancement fund for deployment of ADSL technology will make ADSL available to over 50% of BellSouth's access lines and will further the goal of bridging the "digital divide" between rural and urban areas of North Carolina.

7. The Joint Stipulation as modified by the provisions of this Order is in the public interest and should be approved.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission commends all of the parties to this proceeding for the manner in which they have addressed some of the most difficult and complex issues the Commission has ever been called upon to decide. This case offers the Commission and the parties a unique opportunity to address and constructively resolve, in particular, the very important and difficult issues of access charge reform, service quality improvement, and infrastructure enhancement. The Joint Stipulation, as proposed by BellSouth, AT&T, and the Public Staff, has many aspects and features which are very beneficial to consumers and which are therefore very attractive to the Commission, including the following:

I. The Joint Stipulation settles AT&T's complaint concerning the current level of BellSouth's intrastate switched access charges:

(1) BellSouth agrees to reduce its aggregate intrastate switched access rate from $.063 to $.02 per minute over a two-year period.

(2) AT&T agrees to flow through to North Carolina consumers on an aggregate dollar-for-dollar basis the resultant intrastate access charge savings:

(a) AT&T's North Carolina residential customer intrastate long distance bills on average will be reduced by $.85 per month or more than 14%.[1]

(b) AT&T's North Carolina intrastate long distance rate reductions should increase the number of customers who can afford to make such calls and enhance the competitiveness of the state in attracting industry.

(3) The total annual revenue impact of the access charge reductions, once fully implemented, will be approximately $83 million. These intrastate reductions will be flowed through dollar-for-dollar to customers of IXCs who pay access charges to BellSouth.

(4) The disparity between intrastate and interstate long distance rates will be lessened and lower prices for intrastate long distance services should stimulate toll calling.

II. The Joint Stipulation establishes service objectives with associated self-enforcing penalties[2] if such objectives are not met:

BellSouth will change its Price Regulation Plan to provide for the payment of penalties if objectives established for the measurement of certain quality of service standards are not met.

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[1]The actual reduction experienced by each customer will depend upon what intrastate long distance services are purchased from AT&T or any other IXCs who flow through intrastate access charge reductions.

[2]As an aside, the Commission notes that the "penalty" proposed here, as the record clearly demonstrates, is a voluntary measure not derived from or in derogation to the Commission's authority to impose penalties under G.S. 62-310 or any other provision of Chapter 62. As such, it is entirely appropriate that any monies derived from this process should go to ratepayers -- who may be said to have been directly or indirectly harmed by poor service -- rather than to the Commission's coffers for ultimate distribution elsewhere.

(1) The provisions for penalties will be applicable to eight service quality measures. The objectives for each of these eight measurements will be those currently specified by Commission Rule R9-8, except for out-of-service trouble reports cleared within 24 hours. Penalties for that service objective will be assessed only if BellSouth fails to achieve a 90% objective.[1]

(2) Penalties, if any, arising in this regard will be self-enforcing (i.e., BellSouth will calculate and determine penalty) and will be credited to the bills of all retail residential and business customers receiving retail services from BellSouth.

The Commission certainly anticipates and expects that the quality of service currently being provided by BellSouth to its customers in North Carolina will improve under the system of self-enforcing penalties proposed in the Joint Stipulation. The Commission will carefully monitor BellSouth's ongoing compliance with the quality of service measures set forth in the Joint Stipulation and Rule R9-8 to ensure that the Company does in fact meet the specified service objectives and also takes all appropriate actions, including investing in additional personnel as necessary, to provide good and reliable service to its customers which meets reasonable service standards on a consistent and continuing basis.

III. The Joint Stipulation establishes an enhanced infrastructure fund to further ADSL deployment throughout North Carolina:

BellSouth agrees to deploy approximately $97.8 million in investment in ADSL in North Carolina by year-end 2002. This represents an investment plan that exceeds BellSouth's previous plans for North Carolina by $60 million. Because of this added incremental investment, 95 central offices will be equipped for ADSL in advance of BellSouth's preexisting baseline schedule.

The Commission applauds and strongly endorses this aspect of the Joint Stipulation based upon a belief that BellSouth's stated commitment to this investment in enhanced telecommunications infrastructure is vitally important to the rural areas of North Carolina in particular. This is an important step which will bring North Carolina closer to meeting the goal of bridging the digital divide for all citizens of the State. The Commission will carefully monitor BellSouth's deployment of ADSL through the reports on deployment which will be submitted under the Joint Stipulation to ensure that the benefits of such investment are in fact made available to consumers according to the schedule committed to by the Company.

IV. The Joint Stipulation postpones the Commission's comprehensive review of BellSouth's Price Regulation Plan such that the review would be deferred for approximately one year so that it would not occur prior to June 24, 2001:

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[1]However, BellSouth will be provided a ramp-up time for the out-of-service standard with interim objectives. At the end of the initial year's penalty period, BellSouth will not be assessed any penalties for the out-of-service objective if it achieves an average statewide annual result of 86% or better.

(1) Postponement for a year would allow the Commission an opportunity to evaluate the impact of the revised Plan over a longer period of time.

(2) Postponement will allow additional time to prepare for a comprehensive review of the revised Plan, the purpose of which is to ensure that the operation of the Plan comports with the General Statutes, particularly from the standpoint of ensuring that it continues to meet the following conditions:

a. protects the affordability of basic local exchange service, as such is defined by the Commission,

b. reasonably assures the continuation of basic local exchange service that meets reasonable service standards that the Commission may adopt,

c. will not unreasonably prejudice any class of telephone customers, including telecommunications companies, and

d. is otherwise consistent with the public interest.

Notwithstanding the obvious benefits contained in the Joint Stipulation, there are nevertheless certain aspects and features of the Stipulation which are troubling to the Commission and which the Commission is unable to endorse at this time.

First, in consideration of BellSouth's current level of earnings, the Commission can find no compelling justification to allow the Company to increase any revenues, in either the Basic or NB1 Categories, effective on the date of initiation of a revised Plan.[1] The Commission recognizes that changing this part of the Joint Stipulation will require BellSouth to forego the revenue increase in the total amount of $27.3 million which the Company proposed to immediately implement for services

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[1]Operation of the Price Plan will, however, be waived to the extent necessary to permit revenue decreases otherwise required by productivity offsets in the Basic, NB1, and Toll Switched Access Categories to be satisfied by reductions in access prices. Moreover, revenue increases in the Basic Category will be permitted on the first and second anniversaries of the revised Plan, if accepted by BellSouth, to offset the scheduled access rate reductions to the extent that such revenue increases are specified in the Joint Stipulation. Endorsement by the Commission of these provisions of the Joint Stipulation is necessary to ensure equitable treatment to BellSouth. BellSouth obviously made many significant concessions during negotiations which were incorporated as part of the Joint Stipulation which will materially affect the Company's earnings over the next few years; e.g., a total revenue "give up" of approximately $16.3 million, a commitment to increase its investment in ADSL by $60 million by year-end 2002, and potential financial liabilities associated with self-enforcing penalties. That being the case, the Commission can find no reasonable and fair basis upon which to disfavor the first and second anniversary revenue increases proposed in the Joint Stipulation. Further, the aforementioned increases in the Basic Category and corresponding decreases in the Toll Switched Access Category will be treated as exogenous price changes for purposes of calculating their impact on the Service Price Indices (SPIs). Any additional waivers of intercategory offsets must be requested on a case-by-case basis.

in the Basic and NB1 Categories. Such action will clearly serve to further protect the affordability of basic local exchange service while promoting the public interest. Nevertheless, as a matter of fundamental fairness to BellSouth and in order to ameliorate the immediate financial impact of this decision on the Company, the Commission finds good cause to allow BellSouth to initially reduce its aggregate intrastate switched access rate from $.063 to $.045 per minute on the day a revised Plan will, hopefully, be initiated in response to this Order.[1] More specifically, if the modifications set forth in this Order are accepted by BellSouth, the Company's total potential "give up" under the Joint Stipulation, as so revised, will more than double, increasing from approximately $16.3 million to $43.6 million.[2] This provides further benefit to consumers, who would see no rate increases upon initiation of the revised Plan, in addition to the significant benefits already contained in the Joint Stipulation, without unreasonably impacting BellSouth in an unfair, prejudicial, or unlawful manner.

Second, the Commission can find no compelling justification to authorize creation of the new NB1.5 Service Category at this time.[3] Creation of this new service category is a matter which BellSouth will be free to pursue during the comprehensive review of the Company's Price Regulation Plan. Deferral of a decision on the merits of whether to allow BellSouth to implement the new NB1.5 Service Category at this time will serve to further ensure that there will be no unreasonable prejudice against any class of telephone customers as a result of these proceedings. The Commission is unable, on the basis of the record in this case, to conclude that the services proposed for inclusion in the new NB1.5 Service Category are sufficiently competitive at this time to justify their transfer from the NB1 Category. Such action, if justifiable, is better considered and allowed in the context of the upcoming comprehensive review of BellSouth's Price Regulation Plan. The Commission must ensure that customers who will be affected by this very significant change do not experience unreasonable disadvantage or prejudice.

Accordingly, the Commission is hopeful that BellSouth will accept the revisions to the Joint Stipulation as set forth in this Order and that the Company will file a statement notifying the Commission that it accepts and agrees to revise and refile its Commission-approved Price Regulation Plan with an effective date of not later than August 1, 2000. The revisions to the Joint Stipulation and BellSouth's Price Regulation Plan as requested by the Commission in this Order strengthen the final outcome of this case by balancing the interests of all affected parties while not unfairly penalizing BellSouth or its customers. The Commission is also hopeful that all of the other parties to this

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[1]As proposed in the Joint Stipulation the aggregate access rate will drop to $.03 and $.02 per minute on the first and second anniversaries of the revised Plan, respectively.

[2]Of course, the amount of this potential "give up" is before consideration of revenue enhancements which might arise due to increased intrastate toll calling resulting from the price elasticity of demand.

[3]The Joint Stipulation also moves certain services from the Basic Service Category to the NB1 Service Category. The specific services that will be moved from the Basic Service Category to NB1 are "the uncapped portion of Frequent Caller, Area Plus, Area Plus with Complete Choice, and Complete Choice." For the reasons asserted by BellSouth and the Public Staff, this provision of the Joint Stipulation is deemed reasonable and consistent with the public interest.

proceeding will endorse and support the revisions requested by the Commission so that this matter can be successfully resolved without the need for further proceedings, which would likely be both contentious and protracted in nature. The Commission is convinced that a revised Price Regulation Plan filed in conformity with the provisions of this Order will be reasonable, lawful, and consistent with the public interest. Furthermore, such revised Plan will not subject any class of customers to unreasonable prejudice or disadvantage.

Once BellSouth has had an opportunity to respond to this Order, the Commission will rule on the petition filed by the Public Staff on February 16, 2000, in Docket No. P-100, Sub 72, seeking a flow through of access charge reductions.

IT IS, THEREFORE, ORDERED that BellSouth shall file a statement in these dockets not later than August 1, 2000, notifying the Commission whether the Company (a) accepts and agrees to all of the terms, conditions, and provisions of this Order and (b) is willing to revise and refile its Commission-approved Price Regulation Plan, including any necessary tariff revisions, with an effective date of not later than August 1, 2000.

ISSUED BY ORDER OF THE COMMISSION.
This the 24th day of July, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mz072400.03

Commissioner Robert V. Owens, Jr., dissents in part and concurs in part.

DOCKET NOS. P-55, SUB 1013; P-55, SUB 1161; AND P-100, SUB 72
AT&T/BELLSOUTH/PUBLIC STAFF ACCESS CHARGE
AND PRICE PLAN JOINT STIPULATION

COMMISSIONER ROBERT V. OWENS, JR., DISSENTING IN PART AND CONCURRING IN PART: I respectfully dissent in part from the Majority's decision in this case. I would have disapproved the Joint Stipulation in its entirety, and I would have proceeded immediately with comprehensive investigations of AT&T's access charge complaint and BellSouth's Price Regulation Plan. I would have done those things essentially for the very same reasons that disapproval of the Joint Stipulation was recommended by the North Carolina Department of Justice. I firmly believe that to do otherwise is to act in a manner that is contrary and detrimental to the public interest.

Currently, BellSouth's rates are regulated under a Price Regulation Plan. Under that form of regulation, in theory, it is argued that competitive market forces will operate to prevent firms, such as BellSouth, from charging excessive monopolistic prices for their goods and services. Unfortunately, however, there appears to be a major obstacle in place that continues to thwart the effectiveness of price regulation in this instance; the market for basic local exchange service appears to be far less than fully competitive, and it appears to be dominated, particularly in certain instances, by an entrenched BellSouth.[1] While I do not disagree with economic theory regarding the pricing behavior of firms operating in competitive markets, I do strongly disagree with those who would aver that the telecommunications market for basic local exchange service, and closely related services,[2] within BellSouth's franchised territory is effectively competitive, for it clearly is not, most especially with respect to residential services, as the record in this case plainly reveals. Because of the absence of meaningful competition, BellSouth's Price Plan, in its present form, does not appear to be working as intended by the North Carolina Legislature and should, at the very least, be subjected to an immediate, comprehensive review by this Commission.

A major, if not the preeminent, factor to be considered in assessing the need for immediate review of BellSouth's Price Plan, is the level of profitability that the Company has achieved in recent years. For calendar years 1998 and 1999, based on information provided by the Company, BellSouth has earned returns on common equity of 25.24% and 27.75%, respectively, from its North Carolina jurisdictional operations. In responding to questions on cross-examination regarding the common equity returns that BellSouth has enjoyed in recent years, BellSouth witness Linda Cheatham stated that ***"[i]t appears clear to me that price regulation is working as it was intended. . . ."*** (emphasis added). I wholeheartedly agree with witness Cheatham that the degree of a Company's profitability is an integral factor to be considered in evaluating the efficacy of BellSouth's Price Plan and more generally the appropriateness of price regulation. However, from my perspective as a regulator, I am compelled to disagree with witness Cheatham's interpretation of what such earnings reveal.

To me, the 25.24% return on common equity achieved by BellSouth in 1998 and the 27.75% return on common equity achieved in 1999 strongly suggest that the Company's Price Regulation Plan is seriously flawed due to the absence of a competitive market structure and as such is in need of substantive change, but not the kind of change that is contemplated under the Joint Stipulation and/or the Majority decision. Indeed, I consider the Company's excessive returns to constitute a clarion call for prompt and in-depth Commission action — that is, an immediate and comprehensive investigation of BellSouth's Price Plan. I take that view because those returns, which appear to be grossly excessive, are classic symptoms of the absence of an effectively competitive market structure. Without such a market structure, BellSouth's Price Regulation Plan as presently constructed cannot produce a result that is consistent with the public interest requirement of the North Carolina General Statutes.

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[1] BellSouth's prominent place in the market is explained, of course, by its — and its predecessor, Southern Bell Telephone and Telegraph Company — having effectively operated in North Carolina for more than a century, the vast preponderance of that time as a traditional government sanctioned, monopoly service provider. Generally speaking, the legal framework at the State level which provided for the introduction of competition into the local exchange service market — such market having previously been characterized by monopoly service providers with exclusive franchised territories — was put in place in the mid-1990s. BellSouth's Price Regulation Plan became effective in mid-1996.

[2] Services which I consider to be closely related to basic local exchange service are not substitutes for such service but rather are add-on type services, for example, vertical services — call forwarding, call waiting, call return, call trace, etc. The opportunity for providing those services being dependent on the provider also being the supplier of the related basic local exchange service.

In a truly competitive market, prices adjust such that they reflect an economically efficient pricing structure, that is, the pricing of services is based on their economic costs, which by definition include a reasonable level of profit. Stated alternatively, lack of competition translates into lack of economic efficiency, including pricing efficiency, which translates into, and is reflected by, excessive profits. Again, such results imply a flawed BellSouth Price Regulation Plan in need of Commission modification.

To the extent, if any, a flaw exists in BellSouth's Price Plan, the impact of irreparable harm to consumers of telecommunications services that would occur prior to the Commission's taking remedial action will be exacerbated by the Majority's decision to defer review of the Price Plan for one year. That result would occur because such remedial action would apply on a prospective basis only. Thus, I am of the opinion that the Commission should not have agreed to defer its five-year comprehensive review of the Plan.

Dr. Ben Johnson, witness for the Public Staff, testified that the Commission should consider a company's return on common equity when the Commission conducts a full review of a company's price plan. He further testified that if there is a flaw in the plan that is causing a company to have excessive earnings the Commission should fix the flaw. In that regard, the following scenario gives very real perspective to one of the major exceedingly negative consequences of the Commission's having deferred its comprehensive review of the Price Plan: Let us assume that on review of the Plan the Commission finds that BellSouth's prices and consequently its profits are excessive due to flaws in the Plan — which are due to the absence of a competitive market structure. Let us also assume that the Commission finds that those prices and profits should be constrained in such a way as to prevent the Company from inappropriately capitalizing on its dominance of the market for basic local exchange service until such time as that market evolves into a robust, fully competitive market. Further, let us assume that the Commission determines that the Company's profits in addition to its prices should be capped as a transitional mechanism. Finally, let us assume that a 14% return on common equity is initially determined to be a reasonable, market-based, transitional earnings cap for BellSouth. Based on information provided by BellSouth for calendar year 1999, a change of $15.1 million in its operating revenues would produce a change of 1% in its common equity return or vice versa. Thus, under the foregoing scenario, that would mean that BellSouth's existing rates would appear to be excessive by an annual amount in excess of $207 million.[1] It would also mean, all things remaining relatively constant, that until the Commission acts BellSouth would continue to recover and retain that $207 million annually, that is, until such time as the Commission comprehensively investigates its Price Plan and takes whatever remedial action it may then consider appropriate, if any.

In consideration of the above, my concern is that consumers will be irreparably harmed due to the Majority's having agreed to a one-year delay of the Commission's comprehensive review of BellSouth's Price Plan. Should such a review ultimately reveal that the foregoing, or comparable, assumptions were reasonable, valid, and correct, the Commission will nevertheless be unable to

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[1] BellSouth's calendar year 1999 intrastate return on common equity of 27.75% less an assumed, reasonable, market-based, transitional, return on common equity earnings cap of 14% equals 13.75% (27.75% - 14% = 13.75%); And, 13.75% divided by 1% equals 13.75 (13.75% ÷ 1% = 13.75); And finally, $15.1 million multiplied by 13.75 equals $207.6 million ($15.1 million × 13.75 = $207.6 million).

recompense consumers, since it is unlawful for the Commission to engage in retroactive ratemaking. The very real possibility that the foregoing may one day be shown to have been correct, in all material respects, requires me to acknowledge my profound disagreement with the Majority decision in this regard.

The foregoing is by no means my only concern from the standpoint of negative consequences to the public interest that will arise or are arising, if my concerns regarding BellSouth's Price Plan prove to be valid. If the Price Plan is flawed and operating to thwart or delay implementation of full and effective competition in the market for telecommunications services in North Carolina, and I am concerned that it is, consumers of such services will continue to be denied the many benefits that proponents of market restructuring promise that competition will bring. At the very least, the Commission should undertake an immediate and thorough review of BellSouth's Price Plan, particularly in consideration of the fact that the Plan itself provides for the completion of such a review before expiration of its fifth year on June 24, 2001. As previously noted, the Majority's decision postpones comprehensive review of the Plan for one year.

Other major concerns, in addition to the foregoing, that I have with regard to the Majority's decision are summarized below:

- If competitive market forces and BellSouth's Price Regulation Plan, which includes intrastate switched access charges, are effectively operating to "regulate" prices for telecommunications services why have such considerations not operated to lower intrastate switched access charges to cost, or at the very least caused appreciable movement in that direction? And, if competitive market forces are not effectively "regulating" BellSouth's intrastate switched access charges, then how can one ignore the fact that such a result may also be applicable to certain other BellSouth services, particularly in consideration of the fact that BellSouth's overall profitability for 1998 and 1999 realized from its North Carolina jurisdictional operations appears to indicate, as previously explained, the absence of a competitive market structure? I am of the opinion that those questions, along with related questions, need to be thoroughly investigated and explored by this Commission as soon as practicably possible.

- Notwithstanding the fact that BellSouth's 1999 calendar year return on common equity was 27.75%, which is the most recent jurisdictional earnings information available for the Company, the Majority's decision allows the Company to increase its rates for basic local exchange service on the first and second anniversaries of the revised Price Regulation Plan. The approved rate increases for basic local residential service are in the range of $.50 per month on both the first and second anniversaries of the revised Plan, for a total of $1.00 per month. The Majority's decision disapproves the Joint Stipulation's proposed increase in rates at the time of implementation of the revised Price Plan, including a proposed increase in rates for basic local residential service in the range of $.50 per month. I would have allowed no rate increase at all.

- Public Staff witness Johnson and AT&T witness Gregory R. Follensbee testified to the effect that local exchange rates do not have to be increased in order to encourage competition in the local exchange market. And, witness Johnson testified to the effect that the telecommunications industry is a declining cost industry and that local service for residential customers is now priced above its direct cost. The foregoing testimony appears to reflect valid and relevant considerations that should be further investigated and evaluated by the Commission prior to allowing significant modifications to the Price Plan, if any, including those proposed in the Joint Stipulation. I would have proceeded with such an investigation.

- BellSouth's earnings are such that it would appear that an access charge reduction to $.02 per minute, which would reduce the Company's revenues by $83 million annually, could be accommodated, all other things remaining relatively constant, without BellSouth's annual return on common equity declining to a level below 22.25%[1], a result that does not appear to be unreasonable. I would have proceeded with an investigation of this matter.

- Under existing provisions of BellSouth's current Price Plan, absent the Majority's current decision, the Company would have been required to reduce rates for the Basic Service (Basic) Category and the Non-Basic 1 Service (NB1) Category overall by a total net annual amount of $7 million ($3 million in Basic and $4 million in NB1) in this the fifth year of the Price Plan, effective June 24, 2000. Such reductions would have been required, notwithstanding the fact that the Company has the flexibility under the Price Plan — and has notified the Commission of its intentions — to "rebalance" rates for certain services within the Basic Category, that is, the Company has proposed to increase residential rates for basic local exchange service on average in a range of $.60 per month and plans to increase some business basic local service rates on average in a range of $1.35 per month. Business rates for basic local service in several exchanges would be decreased on average in a range of $4.00 per month. Presumably, BellSouth intends to place the foregoing rate changes into effect should the Joint Stipulation, in some form, not win final Commission approval. I would have required the Company to implement the $7 million reduction in rates for the Basic and NB1 Categories.

- BellSouth's earnings have increased at the expense of reduction in its quality of service. BellSouth witness Cheatham conceded that BellSouth has cut costs and eliminated too many jobs and that service has suffered. However, she further stated that BellSouth is not cutting costs at the expense of service quality today. The foregoing implies that the Commission needs to begin an immediate and full review of the operation of BellSouth's Price Plan in conjunction with consideration of the Joint Stipulation's proposed self-enforcing penalties proposal to ensure that adequate safeguards are in place, or will be put in place, which reasonably assure that reasonable quality of service standards will be met. I would have proceeded with such an investigation.

- Public Staff witness Johnson testified that he would not characterize vertical services as being competitive — under the Joint Stipulation and the Majority's decision certain of those services are moved from the Basic to the NB1 Category. In commenting on the Joint Stipulation's proposal to transfer services between categories, the Attorney General, in his pleadings, stated that the evidence indicates that such services were moved from one category

[1] As noted previously, a 1% change in the Company's jurisdictional return on common equity equates to a $15.1 million change in annual revenue. Thus, the $83 million reduction in access charges divided by $15.1 million equates to a 5.50% change in BellSouth's return on common equity. And, 27.75% less 5.50% equals 22.25%.

to another in an arbitrary fashion as part of a negotiation rather than based on formal examination of market conditions. I agree with both the Attorney General and witness Johnson. Thorough analyses are needed in this regard. I therefore disagree with the Majority's decision to allow the transfer of services from the Basic to the NB1 Category.

I concur in the Majority's decision to the extent that it proposes acceptance of BellSouth's commitment, and encourages BellSouth, to increase its planned investment in broadband infrastructure throughout North Carolina by year-end 2002. I also concur in the Majority's proposal to adopt those provisions of the Joint Stipulation which establish service objectives with associated self-enforcing penalties if the objectives are not met. I would note, however, that those matters could and probably should be considered separate and apart from BellSouth's Price Plan. I also concur in the Majority's decision to the extent it proposes nonacceptance of provisions of the Joint Stipulation, for example, the Majority's proposed disallowance of a portion of the total stipulated basic local exchange service rate increase — I would have allowed no rate increase — and the Majority's disapproval of the creation of a new category of services (NB1.5). Finally, I strongly endorse and support the Majority's decision to reduce access charges to $.02 per minute as proposed by the Stipulating Parties. However, I believe that the Joint Stipulation may not have gone far enough in that regard, in consideration of the fact that the cost of providing intrastate switched access is generally acknowledged by industry experts to be in the range of $.005 per minute. Thus, I am of the opinion that the Commission should have proceeded with a comprehensive investigation of AT&T's access charge complaint.

In conclusion and simply stated, there is no basis in the record for premature revisions to BellSouth's Price Regulation Plan, and there is no basis in the record, nor is there any reason to believe, that residential rates should be increased. As indicated hereinabove, I would have disapproved the Joint Stipulation in its entirety, and I would have proceeded immediately with comprehensive investigations of AT&T's access charge complaint and BellSouth's Price Regulation Plan. Further, either in conjunction with the foregoing or in another docket or dockets, I would have initiated an investigation of the reasonableness of BellSouth's capital budgeting practices with respect to facilities expansion, with emphasis in the area of broadband infrastructure, and I would have initiated an investigation of the need for modification of existing Commission rules relating to quality of service to insure that Commission quality of service standards continue to be reasonable and that they will be met. Such review would include an examination and evaluation of the need for penalties, or more stringent penalties, when service standards are not met.

For the foregoing reasons, I am firmly of the opinion that the Joint Stipulation, even after modification by the Majority, is both inconsistent with and detrimental to the public interest.

\s\ Robert V. Owens, Jr.
COMMISSIONER ROBERT V. OWENS, JR.

DOCKET NO. P-55, SUB 1013
DOCKET NO. P-55, SUB 1161
DOCKET NO. P-100, SUB 72

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-55, SUB 1013 In the Matter of Application by BellSouth Telecommunications, Inc., For, and Election of, Price Regulation DOCKET NO. P-55, SUB 1161 In the Matter of Complaint of AT&T Communications of the Southern States, Inc., Requesting that the Commission Reduce BellSouth Telecommunications, Inc.'s Intrastate Switched Access Rate DOCKET NO. P-100, SUB 72 In the Matter of Investigation to Determine Whether Competitive Long Distance Service Should Be Allowed in North Carolina and What Rules and Regulations Should Be Applicable to Such Service if Authorized	FURTHER ORDER REGARDING JOINT STIPULATION

BY THE COMMISSION: On July 24, 2000, the Commission entered an Order Regarding Joint Stipulation in these dockets. BellSouth Telecommunications, Inc. (BellSouth or Company) filed a Statement in response to that Order on August 15, 2000, and served a copy of that Statement on the parties of record. By Order dated August 16, 2000, the Chair found good cause to notify each of the formal parties who initiated or intervened in these proceedings that they could file comments in response to BellSouth's Statement not later than Tuesday, August 22, 2000.

On August 17, 2000, the Public Staff filed Comments in support of BellSouth's Statement and recommended that the Commission enter a further Order approving the proposed modifications as soon as possible.

On August 22, 2000, the Carolina Utility Customers Association, Inc. (CUCA) filed Comments in opposition to BellSouth's Statement and requested the Commission to deny BellSouth's requests to delay the reduction of switched access charges and to postpone the comprehensive review of the Company's price regulation plan.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

By its Statement filed on August 15, 2000, BellSouth notified the Commission of its willingness to accept the terms, conditions, and provisions of the Order Regarding Joint Stipulation contingent upon certain changes in the timing of two events discussed in that Order. BellSouth further stated that it had discussed this matter with AT&T Communications of the Southern States, Inc. (AT&T) and was authorized to state that AT&T concurred with the following proposed changes and requests:

1. Modify the timing of access charge reductions according to the following schedule:

June 24, 2000	5.6 cents per minute
December 31, 2000	4.5 cents per minute
December 31, 2001	3.0 cents per minute
December 31, 2002	2.0 cents per minute

According to BellSouth, delaying the implementation of the access charge reduction to 4.5 cents per minute would also extend the time during which BellSouth is prohibited from increasing Basic rates as specified in the Joint Stipulation. Under the current time line proposed by the Commission, increases in Basic rates described in the Joint Stipulation could not occur until August 1, 2001. Approving BellSouth's proposed delay in the 4.5 cents per minute access charge reduction would delay those Basic rate increases even further, until December 31, 2001.

2. Postpone completion of the Commission's comprehensive review of BellSouth's Revised Price Regulation Plan until no later than December 31, 2002, such that modifications to the Revised Plan would be effective after that date. According to BellSouth, postponing completion of the review until December 31, 2002, will allow several important aspects of the Revised Plan to be fully implemented prior to any further changes made by the Commission through its comprehensive review; i.e., by that date BellSouth will have completed its enhancement of its Asymmetric Digital Subscriber Line (ADSL) infrastructure, will have reduced its access charge rate to 2.0 cents per minute, and will have undergone a meaningful period of service results under the new self-enforcing penalty mechanism.

The Commission has carefully reviewed the further modifications proposed by BellSouth in its Statement of August 15, 2000, and finds good cause to accede in part and disagree in part with respect to such counter-proposal. The proposed timing changes with respect to access charge reductions are, in the opinion of the Commission, reasonable and should be approved. It is imperative that intrastate access charges be reduced as soon as possible and BellSouth's counter-proposal will accomplish that objective within a reasonable period of time. Correspondingly, the revenue increases authorized by the Commission in the Order Regarding Joint Stipulation will also be postponed under BellSouth's counter-proposal, which benefits those consumers who will be affected by such future increases.

The Commission cannot, however, approve BellSouth's further request to delay and postpone completion of the comprehensive review of the Company's Revised Price Regulation Plan for an additional six months beyond the 12-month extension to June 24, 2002, which was previously approved in the Order Regarding Joint Stipulation. Under the circumstances, the Commission is of the opinion that the comprehensive review of BellSouth's Price Plan should be undertaken pursuant to the schedule initially proposed in the Joint Stipulation. The Commission finds no compelling justification to rethink or depart from the initial decision to endorse and allow an extension of 12 months as originally proposed by the parties to the Joint Stipulation. By June 24, 2002, the current Price Plan will have operated over a six-year period of dynamic developments in markets, regulation, and technology, and it will be time for a thorough review in which the Commission can determine the rules under which BellSouth should be regulated, given then-current conditions.

The Commission strongly encourages BellSouth to accept the further revisions to the Joint Stipulation and the Order Regarding Joint Stipulation as set forth in this Order and to file a statement notifying the Commission that it accepts and agrees to revise and refile its Commission-approved Price Regulation Plan. It is time to finally resolve the issues in these cases and begin to realize the benefits to be gained from reducing intrastate access charges, improving the quality of service offered to consumers, and enhancing the ADSL telecommunications infrastructure in North Carolina, particularly in the rural areas of the State. BellSouth will also presumably benefit from the business certainty that flows from the extension of its Price Plan, as modified, for a year beyond its original term. The Commission is hopeful that there will be no additional delay or need for further proceedings regarding these very important matters. The uninviting alternative is to start over again from the ground up, by initiating various proceedings and investigations.

Accordingly, the Commission finds good cause to hereby reaffirm and incorporate by reference the findings of fact and conclusions set forth in the Order Regarding Joint Stipulation entered in these dockets on July 24, 2000, subject to the further modifications allowed herein. The Commission continues to believe that a Revised Price Regulation Plan filed in conformity with the provisions of the Order Regarding Joint Stipulation and this Order will be reasonable, lawful, and consistent with the public interest and will not subject any class of customers to unreasonable prejudice or disadvantage.

IT IS, THEREFORE, ORDERED that BellSouth shall file a statement in these dockets not later than seven calendar days after the date of this Order notifying the Commission whether the Company (a) accepts and agrees to all of the terms, conditions, and provisions of the Order Regarding Joint Stipulation and this Order and (b) is willing to revise and refile its Commission-approved Price Regulation Plan, including any necessary tariff revisions, effective that same date.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of September, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rg090700.09.

Commissioner Judy Hunt dissents in part.
Commissioner Robert V. Owens, Jr., dissenting in part and concurring in part.
Commissioner Sam J. Ervin, IV concurs.

DOCKET NO. P-55 SUB 1013
DOCKET NO. P-55, SUB 1161
DOCKET NO. P-100, SUB 72

COMMISSIONER JUDY HUNT, DISSENTING IN PART: I would also deny BellSouth's counter-proposal to further modify access charge reductions because it will result in an unjustifiable delay in implementing such reductions, while providing additional, unreasonable, and unnecessary net financial benefits to BellSouth of approximately $24.2 million over the phase-in period.

\s\ Judy Hunt
Commissioner Judy Hunt

DOCKET NOS. P-55, SUB 1013; P-55, SUB 1161; AND P-100, SUB 72
AT&T/BELLSOUTH/PUBLIC STAFF ACCESS CHARGE
AND PRICE PLAN JOINT STIPULATION

COMMISSIONER ROBERT V. OWENS, JR., DISSENTING IN PART AND CONCURRING IN PART: I respectfully dissent in part from the Majority's decision in this instance. As explained in my dissenting and concurring opinion[1] entered earlier in these dockets, I would have disapproved the Joint Stipulation in its entirety, and I would have proceeded immediately with comprehensive investigations of AT&T's access charge complaint and BellSouth's Price Regulation Plan. In my separate opinion, I stated my firm conviction that to do otherwise was to act in a manner that was contrary and detrimental to the public interest. I continue to be ever steadfast in that belief.

The Majority in its decision today has exacerbated the exceedingly significant adverse impact that its earlier decision, in my judgment, will have on consumers of local exchange services. Such consequence is due to the Majority's having acquiesced, in part, to a BellSouth condition precedent. Such acquiescence was in response to BellSouth's having advised that it would accept the Majority's July 24, 2000 modifications to the Joint Stipulation provided the Commission would accept certain BellSouth conditions — or stated alternatively, provided the Commission would accept BellSouth's counter-proposal. In its counter-proposal, BellSouth requested that the Commission agree (1) to delay the timing of the proposed access charge reductions and rate increases and (2) to delay completion of its comprehensive review of BellSouth's Price Regulation Plan by an additional six months.[2]

The detriment to consumers which results from the Majority's having agreed to the Company's first condition — to delay the timing of the proposed access charge reductions and rate

[1] The dissenting and concurring opinion referenced herein was entered on July 24, 2000. That opinion, of course, pertained to the Majority decision which was also entered in these dockets on that date by Order captioned *Order Regarding Joint Stipulation.*

[2] Specifically, BellSouth requested that the Commission set a review completion date of December 31, 2002.

increases — is estimated to be in the range of $24 million over the three-year implementation period of the Joint Stipulation. BellSouth's second condition — an additional six-month delay with respect to the Commission's comprehensive review of the Company's Price Regulation Plan — was not agreed to by the Majority. If that condition had been accepted, it would have significantly intensified the adverse consequences to consumers that already will result, in my judgment, from the Majority's earlier decision to delay review of the Price Plan for a period of 12 months.[1] Indeed, BellSouth's counter-proposal, if it had been fully implemented by the Majority, would have been even more detrimental to consumers than either the original Joint Stipulation, the Joint Stipulation as initially modified by the Majority, or the Joint Stipulation as modified and approved by the Majority in its decision today.

In my earlier dissenting and concurring opinion, I expressed concern that BellSouth's Price Regulation Plan appeared to be flawed, due to the absence of competition in the market for basic local exchange service, and consequently does not appear to be working as intended by the North Carolina Legislature, and I made several observations regarding the basis of that judgment. I also discussed the all too real, potentially extreme, adverse consequences to consumers that appear to have arisen and that are continuing to arise under BellSouth's Price Regulation Plan.[2] I further argued that the Commission should undertake an immediate comprehensive review of the Company's Price Regulation Plan so as to provide for the mitigation of such negative consequences, should my concerns prove to be well-grounded. For if they are valid, consumers will continue to be significantly and irreparably disadvantaged until such time as the Commission takes remedial action. Detailed discussion of the reasoning underlying those views and beliefs, which was presented in my earlier dissenting and concurring opinion, does not need to be fully reiterated here. However, after having given further thought and study to these matters, including BellSouth's counter-proposal, the Majority's decision today, and my earlier dissenting and concurring opinion, I have concluded that there are several additional relevant considerations which need to be discussed. To place these matters in perspective, it will be necessary to a limited extent to review certain of my earlier comments.

Briefly, as stated in my earlier dissenting and concurring opinion, it is my judgment that the returns on common equity BellSouth has realized in recent years — 25.24% in 1998 and 27.75% in 1999 — clearly and unequivocally strongly suggest that the Company's Price Regulation Plan is flawed. I take that view because those returns, which appear to be grossly excessive, are classic

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[1] The detrimental consequences of the 12-month delay to consumers were fully discussed in my earlier dissenting and concurring opinion. BellSouth's proposed 18-month delay, if it had been approved by the Majority, would have intensified the aforesaid consequences by a factor of approximately 1.5 times. Under both the Majority's earlier decision and this decision, there are, however, certain limited ameliorating effects. Such effects are discussed subsequently.

[2] The empirical evidence and the inferences based on such evidence on which I rely in support of this position are discussed, in part, in this opinion and, in part, in my earlier dissenting and concurring opinion.

symptoms of the absence of an effectively competitive market structure.[1] Without such a market structure, it would appear that BellSouth's Price Regulation Plan as presently constructed cannot produce a result that is consistent with the public interest requirement of the North Carolina General Statutes.

Further, as discussed in my earlier dissenting and concurring opinion, it appears that it would be entirely appropriate to consider a company's return on common equity when the Commission conducts a full review of the propriety and efficacy of a company's price plan. Moreover, it is my view that if a company's alternative form of regulation — such as regulation under a price plan — is determined to be flawed, for example, due to the absence of effective competition, and consequently is found not in the public interest, then and in that event an appropriate starting point for a revised or new alternative form of regulation — particularly in this instance — would appear to be a level of rates established under rate base, rate of return regulation.[2]

As previously indicated, under both the Majority's earlier decision and its decision today, there are certain limited aspects of the Joint Stipulation that should prove to be beneficial to consumers prospectively. Those future benefits should ameliorate, to a limited extent, the prospective adverse consequences to consumers that will very likely result from the Majority's having delayed the Commission's comprehensive review of BellSouth's Price Regulation Plan for a period of 12 months. That limited beneficial effect is discussed below.

As explained in my earlier dissenting and concurring opinion, to the extent BellSouth's earnings are excessive because of flaws in its Price Regulation Plan, due to the absence of effective competition, it would appear that BellSouth's rates will remain excessive until such time as the Commission takes remedial action. Based on 1999 data provided by BellSouth, if one assumes that 14%[3] is a reasonable, market-based return on common equity for the Company to be given a

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[1] As explained in my earlier dissenting and concurring opinion, in a truly competitive market, prices adjust such that they reflect an economically efficient pricing structure, that is, the pricing of services is based on their economic costs, which by definition include a reasonable level of profit. Stated alternatively, lack of competition translates into lack of economic efficiency, including pricing efficiency, which translates into, and is reflected by, excessive profits, which in this instance imply a flawed BellSouth Price Regulation Plan in need of Commission modification.

[2] Rates established under rate base, rate of return regulation as a starting point for a new or revised alternative form of regulation, in this instance, would appear to be appropriate, since that form of regulation appears to have been the last form of regulation of BellSouth that effectively produced the results mandated by the General Assembly. Additionally, it is the form of regulation that immediately preceded the Company's current Price Regulation Plan, which does not appear to be working as intended.

[3] To provide perspective for evaluating the reasonableness of this assumption, it is noted that the Commission in its Order Adopting Permanent Prices for Unbundled Network Elements, issued on December 10, 1998, in Docket No. P-100, Sub 133d, General Proceeding to Determine Permanent Pricing for Unbundled Network Elements, found that a return on common equity of (continued...)

reasonable opportunity to earn at the present time under existing market conditions, then BellSouth's existing rates would appear to be excessive by $207 million annually.[1] Therefore, before consideration of certain projected ameliorating effects, the potential cost to consumers from the Majority's having delayed comprehensive review of the Company's Price Regulation Plan would

appear to be $207 million. However, as previously indicated, limited amelioration should result from the Joint Stipulation as approved by the Majority in its Order today; it is estimated to be in the range of $31 million.[2] Therefore, after consideration of prospective amelioration, the potential net excessive rate collection for the 12-month period of delay in the comprehensive review of BellSouth's Price Regulation Plan would appear to be $176 million ($207 million - $31 million = $176 million).

The next matter to be discussed concerns the marked decline in BellSouth's quality of service under price regulation, which was acknowledged, at least to some extent, by BellSouth witness Cheatham. Such decline, like the excessive returns the Company has enjoyed in recent years, also strongly suggests that the Company's Price Regulation Plan is seriously flawed, due to the absence of a competitive market structure. Reasons in support of that conclusion are presented below.

The Commission, in its Order Authorizing Price Regulation for BellSouth, in Docket No. P-55, Sub 1013, issued on May 2, 1996, stated as follows:

> *"Finally, in this regard, we believe that competition will work to the continued benefit of BellSouth's North Carolina subscribers. We find compelling Mr. Ray's statement that*
>
> > *'BellSouth is absolutely committed to maintaining its record of outstanding service. Our reputation in this regard, built over the last one hundred-plus years, is not only important to us, it is the most important asset we have going into the competitive marketplace. We will not allow that reputation to suffer.*
>
> *and further*
>
> > *I mean nothing has changed as far as quality of service and the service standards and what we are going to do and in fact with competition coming in, we've got to give better service than ever.'*

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[3](...continued)
11.8%, for purposes of that proceeding, was appropriate for certain local exchange companies, including BellSouth. BellSouth had contended that its common equity return requirement was 13.4%.

[1] BellSouth's calendar year 1999 intrastate return on common equity of 27.75% less an assumed, reasonable, market-based, return on common equity of 14% equals 13.75% (27.75% - 14% = 13.75%). And, 13.75% divided by 1% equals 13.75 (13.75% ÷ 1% = 13.75). And finally, $15.1 million multiplied by 13.75 equals $207.6 million ($15.1 million × 13.75 = $207.6 million).

[2] The ameliorating effects are from access charge reductions that are not offset by rate increases or retention of productivity offsets.

Local competition will, as BellSouth witness Varner also states, require BellSouth to meet customer expectations to remain competitive in the telecommunications marketplace."

In consideration of the degradation in the Company's quality of service that appears to have occurred since BellSouth has been operating under its Price Regulation Plan, it would appear that the "competitive marketplace" has not operated in the manner as envisioned by Messrs. Ray and Varner,[1] and for that matter the Commission. To me, this further suggests that the Company's Price Regulation Plan is flawed and ineffective, due to the absence of effective competition, and is in need of immediate comprehensive review and possible modification by the Commission.

Perceived deterioration in the Company's quality of service, as discussed above, is evidenced by the Commission's own actions earlier this year. Due to heightened and growing consumer discontent regarding quality of service issues, the Commission by letter dated January 12, 2000, invited certain major incumbent local exchange companies (ILECs), including BellSouth, to a meeting for the purpose of exploring its service quality concerns. Specifically, the Commission in its letter stated as follows:

> *"The Commission is concerned about what we perceive to be a general deterioration in the quality of service provided to ILEC customers. This concern is prompted by the increasing number of complaints received by the Commission and the Public Staff, as well as available information concerning compliance with certain of the service objectives specified in Commission Rule R9-8.*
>
> *While we are concerned about these specific issues, our concern is broader and more comprehensive. For example, the Commission is concerned about the relationship between cost-cutting measures and a perceived deterioration in service quality."*

When the Commission met with the ILECs in mid-February of this year, BellSouth was represented by three spokesmen — Mr. Ray, Mr. Jim Becker, and Ms. Gloria Cockerham.[2] Generally speaking and in summary, they commented that over the past five years BellSouth had continued to improve its service for North Carolina customers in significant ways and had made many achievements. It was also acknowledged that there had been problems, particularly in the area of the network, and that the Company could do better. Mr. Becker outlined the plan that the Company would follow in taking corrective action, with the objective of reducing customer frustration and complaints through an overall level of service improvement.

While I continue to be of the opinion that the Company's plan for service improvement is commendable, I also continue to be concerned that its Price Plan, as presently constructed, provides

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[1] The Mr. Ray referred to here and above is Mr. Billy Ray, who until fairly recently was President of BellSouth's North Carolina operations. The Mr. Varner referred to is Mr. Alphonso J. Varner, Senior Director for Regulatory Policy and Planning for BellSouth.

[2] It was noted during the meeting, that Mr. Becker was Vice President for Network Operations in North and South Carolina for BellSouth, and that Ms. Cockerham was Vice President for Consumer Services in North and South Carolina for BellSouth.

too great an incentive and opportunity for cost cutting at the expense of service quality. In reaching that conclusion, I have not been unmindful of

those provisions of the Joint Stipulation which establish service objectives with associated self-enforcing penalties if the objectives are not met. Although such provisions appear to be a step in the right direction and I support them, it would appear that potential penalties to BellSouth that might arise from enforcement of such provisions pale in comparison to the potential benefits to the Company from the Majority's having agreed to delay the Commission's comprehensive review of the Company's Price Regulation Plan. Moreover, I am concerned by the implication suggested by the need for the penalties mechanism itself. To me, acknowledgment of that need, in and of itself, is tacit affirmation that the Company's Price Plan is deficient from the standpoint of providing reasonable assurance that the Commission's quality of service standards will be met, due to the absence of effective competition. Thus, these considerations also lead me to the conclusion that the Commission should proceed immediately with its comprehensive review of the Company's Price Regulation Plan.

The next matter to be discussed concerns certain aspects of BellSouth's capital budgeting process. BellSouth witness Cheatham testified that the Company in evaluating its proposal to deploy an additional $60 million in investment in Asymmetric Digital Subscriber Line (ADSL) technology in North Carolina by year-end 2002, which it has committed to do under the Joint Stipulation, performed a net present value analysis. According to witness Cheatham, such analysis compared the net present value of the Company's previously planned investment of $37.5 million over a five-year period to the Company's enhanced plan to invest $97.5 over a two-year period. It was indicated, based on that analysis, that over the 10-year life of the project the Company could expect to lose $15 million annually, as a result of having undertaken the two-year, $97.5 million project, as compared to the five-year, $37.5 million project. Witness Cheatham indicated that it was her recollection that 11.25% was used as "the cost of money" or the discount rate in the present value analysis. All of that, of course, says nothing about either the overall rate of return or the return on common equity that the Company expects to earn on either the original or the enhanced project. Further, such information does not disclose the minimum expected return the Company may require before it is willing to undertake a given investment. However, the information provided by witness Cheatham does imply that the expected returns from the enhanced project are less than the expected returns from the previously planned investment scenario. Keeping in mind that $15 million in gross revenues equates to about a 1% return on common equity to the Company, based on data for 1999, that could mean, for example, that the enhanced project's average lifetime return on common equity is expected to be in the range of 13%, as compared to 14% for the previously planned project, or that such expected returns are substantively higher or lower.[1] Unfortunately, the studies performed by the Company in these regards were not submitted for the record. However, knowledge of the absolute levels of the foregoing returns is not crucial to the point that I wish to make here. My point is this. Notwithstanding BellSouth's decision in this instance, which is commendable, for-profit companies, generally speaking, typically invest in projects that are expected to yield the highest returns. Clearly, profit maximization is an exceedingly important, if not the controlling, factor in a firm's project

[1] The 13% and 14% returns on common equity presented here are for illustrative purposes only and should not be construed to imply that they are necessarily representative of the returns that BellSouth might expect to realize on the various proposals, neither in terms of magnitude nor difference.

selection, or stated alternatively capital allocation, process. However, public interest considerations are also extremely important factors to be weighed in that process, particularly with respect to regulated public utilities. Regarding regulated public utilities, it is the responsibility of regulators, in my view, to insure that the oftentimes competing interests of shareholders and consumers are appropriately balanced. In this instance, it is not at all clear to me that BellSouth's Price Regulation Plan will produce that result. I am therefore of the opinion that the Company's capital budgeting practices should be fully investigated and evaluated in the context of the Commission's comprehensive review of BellSouth's Price Regulation Plan, particularly from the standpoint of assuring that the interests of shareholders and North Carolina consumers are being appropriately balanced in the area of project selection. For the foregoing reason, as well as for other reasons which I have previously expressed, it is my view that public interest considerations require that the Commission proceed with its comprehensive review of the Company's Price Regulation Plan without delay.

The last matter to be discussed concerns the magnitude of BellSouth's North Carolina intrastate investment in net telecommunications plant facilities maintained in recent years and the growth the Company has experienced in the number of access lines served. During the four-year period beginning January 1, 1996[1] and ending December 31, 1999, the number of access lines served by the Company increased by 419 thousand, from 1.946 million to 2.365 million. During that same time frame, BellSouth's total investment in net telecommunications plant[2] which the Company attributes to its North Carolina intrastate operations decreased by $24 million, from $1.894 billion to $1.870 billion. Thus, it is observed that, even though the number of access lines served by the Company increased by a total of approximately 22% over the subject four-year period, its net investment in telephone plant has remained relatively constant, or slightly declined. Generally speaking, based on the foregoing and comparable data from 1997 and 1998, and no doubt due largely to new and vastly improved technology, it appears that the Company's North Carolina intrastate capital requirements for new plant investment in recent years could have been funded in virtually all material respects by reinvesting capital recovered through depreciation and/or

amortization charges associated with its North Carolina intrastate operations.[3] Such capital requirements would appear to include those associated with plant facilities needed to meet the significantly increased demand for access lines as well as for all other enhancements to the Company's facilities infrastructure, as may have been required to meet other consumer demands and Company objectives. The Company's accomplishments in this regard are commendable. However, the foregoing circumstances also cause me concern, for they seem to clearly reveal that the telecommunications industry is a declining cost industry, as indicated by Public Staff witness Johnson.

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[1] BellSouth's Price Regulation Plan became effective in mid-1996.

[2] Net telecommunications plant represents the Company's original capital investment in such facilities less that portion of such capital that has been recovered through charges for depreciation and/or amortization.

[3] The information presented here concerning investment and access lines is from the Commission's Telephone Surveillance Reports, which are submitted by the Company pursuant to Commission Rule R9-9 and the Company's Price Regulation Plan.

More specifically, my concern is this. In the absence of competition and consequently economic pricing efficiency, there does not appear to be an adequate mechanism in place that would operate to reasonably insure that the significant cost savings to the Company, which appear to be resulting from new and vastly improved technology, will be appropriately shared with consumers. In my judgment, the validity of this concern is evidenced by the excessive returns on common equity that the Company appears to have achieved in recent years. In my view, BellSouth's Price Regulation Plan also appears to be deficient in this regard — notwithstanding provisions of the Price Plan pertaining to productivity offsets — and needs to be subjected to immediate, comprehensive review.

In summary, for reasons stated in this opinion and my earlier dissenting and concurring opinion, it is my judgment that the evidence strongly suggests that BellSouth's Price Regulation Plan is fatally flawed. If the Plan is flawed, as the evidence suggests, consumers have been and will continue to be irreparably harmed until such time as the Commission takes remedial action. It is entirely appropriate that the need, if any, for such action be determined in the context of the Commission's comprehensive review of the Company's Price Plan, which presumably would include full and complete evidentiary hearings. However, the Majority has agreed to delay the Commission's review of the Price Plan for 12 months. Although I continue to strongly disagree with that aspect of the Majority's decision, I continue to support other aspects of the decision, as set forth in my earlier dissenting and concurring opinion, to the extent they will ameliorate potentially irreparable harm to consumers. Thus, I concur in and support the Majority's decision today to disallow the BellSouth condition contained in the Company's counter-proposal which would have, if approved, delayed the Commission's review of the Company's Price Plan for an additional six months. However, I dissent from the Majority's decision to allow the BellSouth condition which delays the timing of the proposed access charge reductions and rate increases. I do so because the amelioration of potentially irreparable harm to consumers is estimated to be $24 million less under the Majority's decision today, as compared to its decision of July 24, 2000.

For the reasons stated above and in my dissenting and concurring opinion entered earlier in these dockets, I would have disapproved the Joint Stipulation in its entirety, and I would have proceeded immediately with comprehensive investigations of AT&T's access charge complaint and BellSouth's Price Regulation Plan. To do otherwise, in my judgment, is contrary to and inconsistent with the public interest.

\s\ Robert V. Owens, Jr.
COMMISSIONER ROBERT V. OWENS, JR.

DOCKET NO. P-55, SUB 1013
DOCKET NO. P-55, SUB 1161
DOCKET NO. P-100, SUB 72

COMMISSIONER ERVIN, CONCURRING:

I reluctantly concur in the Commission's decision to modify the amendment to the existing price regulation plan applicable to BellSouth approved in the Order Concerning Joint Stipulation entered on July 24, 2000, by altering the schedule under which BellSouth will reduce its intrastate access charges. Although I agree that the Commission's decision is reasonable in light of existing circumstances, I have little or no enthusiasm for further "negotiations" with BellSouth about the contents of the Commission's decision in this proceeding and am not inclined to look favorably upon any request for further modifications to the proposal outlined in the Commission's July 24, 2000, order, as amended in the order we enter today.

An argument which could be advanced in opposition to our decision today, like that made by Commissioner Owens in dissenting from the July 24, 2000, order, is that BellSouth's earnings are so excessive that the Commission should speedily and decisively reject any proposed alteration to the result reached in our July 24, 2000, order as overly favorable to the interests of BellSouth's stockholders. I completely agree that BellSouth's earnings are relevant to the result which should be reached here. The relief sought by the proponents of the original joint stipulation included significant modifications to the existing BellSouth price regulation plan. In evaluating that proposal, the Commission was statutorily obligated to consider the extent to which approval of these plan modifications would be in the "public interest." G. S. 62-133.5. The relevant statutory language does not expressly delineate the criteria which the Commission must consider in conducting the required "public interest" analysis. As a result, the literal language of G. S. 62-133.5 gives the Commission substantial discretion in conducting a proper "public interest" inquiry. Thus, the Commission has the right to consider any logically relevant factor in making the "public interest" determination required under G. S. 62-133.5.

At an earlier stage in this proceeding, certain proponents of the joint stipulation seemed to contend that return on equity considerations were essentially irrelevant to the matters in dispute here for a number of different reasons. BellSouth, for example, appeared to be of the opinion that rate of return regulation and price regulation were two distinct and antithetical forms of regulation and that, once a local exchange company became subject to price regulation, its return on equity should never be of interest to regulators again. Similarly, the Public Staff appeared to contend that, while return on equity considerations might be relevant during an end-of-plan review, they should not be considered in evaluating a proposed plan modification. I do not find either line of argument to be persuasive.

The entire purpose of the regulatory process is to ensure that companies engaged in providing certain essential services historically delivered in a monopoly or near monopoly environment are prevented from using their market power to the detriment of customers by charging excessive rates or failing to provide adequate service. Although rate of return regulation and price regulation attempt to protect customers from these ills in different ways, both are intended to achieve the same end result. The fact that price regulation tends to be viewed as a way station on the road from traditional rate of return regulation conducted in a monopoly environment to a deregulated, fully competitive market, In re BellSouth Telecommunications, Inc., Docket No. P-55, Sub 1013, Eighty-Sixth Report of the North Carolina Utilities Commission: Orders and Decisions 570, 598, 608 (1996), should not obscure the fact that price regulation, while "distinctive and different" from traditional rate base/rate of return regulation, In re BellSouth Telecommunications, Inc., Docket No. P-55, Sub 1013, Eighty-Sixth Report of the North Carolina Utilities Commission: Orders and Decisions 570, 594 (1196), remains, at bottom, a form of regulation rather than a legal regime reminiscent of those found in unregulated markets. As a result, one of the ways to meaningfully judge the success or failure of a price regulation plan is the extent, if any, to which the plan allows a covered local exchange company to earn an excessive return. Although I would not normally propose to intervene in the operation of an existing price regulation plan solely because the earnings achieved by the regulated company under the plan exceeded the level that would be deemed appropriate under rate base/rate of return regulation, I do believe that earnings levels should be scrutinized in the event that a local exchange company subject to price regulation requests modification of an existing plan. Approving a modified price regulation plan for a local exchange company in such a way as to facilitate overearning would simply not, at least in my opinion, serve the "public interest." The Commission validated such logic in approving BellSouth's existing price regulation plan by stating that "BellSouth's earnings are relevant to this proceeding and have been considered in developing the Commission-approved Price Regulation Plan for the Company." <u>In re BellSouth Telecommunications, Inc.</u>, Docket No. P-55, Sub 1013, <u>Eighty-Sixth Report of the North Carolina Utilities Commission: Orders and Decisions</u> 570, 594 (1996). The Public Staff's assertion that the Commission can consider earnings issues in a plan review proceeding strikes me as fully consistent with a proper resolution of this issue and fails only in relying upon an artificial and unsustainable distinction between a plan review proceeding and a plan modification proceeding. As a result, I am convinced that the Commission can and should consider BellSouth's earnings in determining whether to approve a modification to its existing price regulation plan in this proceeding.

I am further inclined to believe that the earnings information contained in the present record tends to show that BellSouth is earning a very healthy return on its North Carolina intrastate business and that these earnings suggest that the Commission should not provide BellSouth with overly generous "offsets" against the access charge reductions proposed in the original joint stipulation. Although a high earnings level does not, without more, tend to show that a particular price regulation plan fails to function properly, I am concerned that additional evidence contained in the present record suggests that BellSouth's current level of earnings reflects a flaw in the existing plan. I might agree with BellSouth's assertion that its current level of earnings demonstrates that its existing price regulation plan is working successfully in the event that the Company had achieved its current level of earnings in the face of significant competitive pressures and while maintaining a high level of service quality. The record, however, indicates that BellSouth continues to face only limited competition in its local exchange service markets and that BellSouth's service quality has declined in the period following its decision to elect price regulation. As a result, I am seriously concerned about the adequacy of BellSouth's current price regulation plan and wish to decide this proceeding in a way which avoids exacerbating any existing flaws or creating new ones.

My concerns about BellSouth's earnings, standing alone, do not justify rejecting the result reached by the Commission in this instance. Although the level of BellSouth's earnings under the existing plan has certainly affected my thinking about the proper resolution of this case, this earnings evidence is only one of several factors which ought to be considered in determining whether a decision to approve either of the modifications to the result reached in our July 24, 2000, order suggested by BellSouth would serve the "public interest." The joint stipulation proposed by AT&T, BellSouth, and the Public Staff contained a number of features which would definitely serve the "public interest," including significant reductions in BellSouth's intrastate access charges, the implementation of a service quality enforcement plan, and a significant infrastructure investment commitment. A reduction in BellSouth's access charges to a level more reflective of cost is clearly consistent with sound telecommunications policy. The fact that these access charge reductions will benefit customers outside BellSouth's territory is not, at least in my opinion, a valid reason for questioning the appropriateness of this component of the joint stipulation in light of the requirements of existing law. Similarly, the record clearly establishes that BellSouth's service quality has declined in recent years. Although I remain unconvinced that the self-enforcing penalty provisions included in the joint stipulation constitute the last word on the subject, they represent an appropriate first step in the process of minimizing BellSouth's incentive to cut corners in the area of service quality for the purpose of improving the bottom line. Finally, the infrastructure investment program which BellSouth has agreed to implement as part of the joint stipulation will provide an important impetus toward the statewide availability of xDSL service. As a result, the joint stipulation included many features which would, if implemented, clearly benefit the citizens of North Carolina.

An additional factor which must, in all candor, be considered in the ultimate balancing process is the fact that certain of the benefits promised under the joint stipulation and incorporated into the modified plan approved in the July 24, 2000, order will not become available to BellSouth's customers in the near future unless the Commission makes a decision which BellSouth is willing to accept. Although one could argue that the Commission should simply order BellSouth to reduce access charges on the basis of the existing record, I have some reservations about the fairness of taking such action given the procedural situation in which the Commission currently finds itself. Assuming that the Commission ultimately decided to mandate access charge reductions without BellSouth's consent, either on the basis of the existing record or following additional proceedings held in response to AT&T's complaint, the entry of such an order would, in all probability, lead to further litigation under the governmental action provisions of BellSouth's price regulation plan, an appeal to the appellate courts, or both. For this reason, I do not believe that the Commission is likely to be able to achieve near term reductions in BellSouth's intrastate access charges without BellSouth's acquiescence. The same logic applies to the proposed performance enforcement mechanism and infrastructure investment commitment, which might well be the subject of protracted proceedings before both the Commission and the appellate courts in the event that the Commission implemented these aspects of the joint stipulation over BellSouth's objection. As a result, the only sure way to achieve the undoubted benefits available from these portions of the joint stipulation and incorporated into the July 24, 2000, order in the near term is for the Commission to make a decision which, while acceptable to BellSouth, minimizes or reduces the extent to which BellSouth will be able earn an excessive return on equity on its North Carolina intrastate business.

One could respond that the Commission can best obtain the benefits available under the joint stipulation without allowing BellSouth to overearn by rejecting the proposed modifications to the amended plan approved in the July 24, 2000, order and proceeding immediately to investigate BellSouth's access charges and review BellSouth's price regulation plan. Although this argument has undoubted surface appeal, it overlooks the fact that any revised price regulation plan which emerged from such a review proceeding could only be implemented with BellSouth's consent and the fact that, for the reasons outlined above, mandating reductions in BellSouth's access charges is not likely to be a quick and simple process. As a result, it is not clear that proceeding in this manner would adequately address the earnings issue. Furthermore, this approach might not produce all of the benefits available to customers under the joint stipulation as modified in the July 24, 2000, order and would, at a minimum, postpone the date upon which those benefits became a reality. Finally, assuming that BellSouth refused to accept a revised price regulation plan at the conclusion of the plan review process and reverted to rate base/rate of return regulation, further proceedings and even more time would be required to remedy any overearning problem given the necessity to convene and litigate a general rate case. As a result, I am simply not persuaded that adoption of this approach would truly serve the "public interest."

The availability of the benefits offered to customers under the original joint stipulation was, however, made contingent on Commission approval for various price increases and revisions to the terms and conditions of BellSouth's existing price regulation plan. Had these proposals been implemented in full, the record suggests that BellSouth would have been given the ability to essentially insulate itself from the adverse impact of the required access charge reductions. I agreed with the conclusion adopted by the Commission in the July 24, 2000, order that allowing such a result in light of BellSouth's existing level of earnings would simply not be in the "public interest." At bottom, I believed then and believe now that the ultimate problem that the Commission must resolve in this proceeding is the development of a modified plan which properly balances the benefits and burdens arising from the joint stipulation in light of BellSouth's current level of earnings. As a result, I supported the result reached in the July 24, 2000, order, which allowed BellSouth to forgo certain price reductions otherwise required under the existing price regulation plan, extended the life of the existing price regulation plan for one year, transferred certain services from the Basic category to the Non-Basic 1 category, and modified the required access charge reduction schedule in return for BellSouth's agreement to significantly reduce access charges, to implement a self-enforcing performance enforcement mechanism, and to make a substantial infrastructure investment. I thought then and continue to believe now that the result reached in the July 24, 2000, order fairly balanced the competing interests and am disappointed that BellSouth did not accept the plan proposed in that document.

As the Commission's present order acknowledges, the Company has expressed a willingness to accept the result reached in the July 24, 2000, order in the event that the Commission approves a further slowing of the schedule for reducing its intrastate access charges and extends its existing price regulation plan for an additional six months. I must confess that I was initially inclined to vote to reject both of BellSouth's proposals on the grounds that the result reached in the July 24, 2000, order was a reasonable one from the perspective of all concerned. Upon further reflection, however, I have concluded that some modification of the access charge reduction timetable is not unreasonable given the limited nature of the proposed schedule modification proposed by the Company and the desirability of near term reductions in BellSouth's intrastate access charges. I cannot, on the other hand, agree to any further extension of BellSouth's existing price regulation plan given BellSouth's earnings in recent years, my perception that local competition has not developed as rapidly as originally expected, my concerns about BellSouth's service quality, and other, similar factors. Agreeing to a further extension of BellSouth's price plan might well prolong the duration of the existing problems confronting BellSouth's subscribers without adequate justification. As a result, I agree with the majority's decision to accept one, but not both, of BellSouth's two proposed modifications and concur in the entry of the present order for that reason.

I am not, however, inclined to support any further modifications to the result reached in the Commission's July 24, 2000, order. I join the majority in believing that the result which the Commission has reached in this proceeding is a reasonable one and trust that BellSouth will come to a similar conclusion. In the event that I am guilty of excessive optimism in this regard, then I hope that the Company will promptly notify the Commission of its decision to reject the result reached in our orders so that we can begin the process of scrutinizing BellSouth's intrastate access charges and reviewing BellSouth's price regulation plan. As part of that process, I, at least, will be particularly interested in determining the actual level of competition that BellSouth currently faces, ascertaining whether any additional steps need to be taken to improve the quality of the service which BellSouth provides to its customers, and examining the categories and pricing rules contained in BellSouth's existing price regulation plan to determine whether they need to be revised in light of all relevant factors, including the Company's earnings. Although this proceeding has been worth the time and attention which the parties and the Commission have committed to it, it is time for this process to come to a conclusion.

\s\ Sam J. Ervin, IV
COMMISSIONER SAM J. ERVIN, IV

DOCKET NO. P-55, SUB 1013
DOCKET NO. P-55, SUB 1161
DOCKET NO. P-100, SUB 72

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-55, SUB 1013 In the Matter of Application by BellSouth Telecommunications, Inc., For, and Election of, Price Regulation DOCKET NO. P-55, SUB 1161 In the Matter of Complaint of AT&T Communications of the Southern States, Inc., Requesting that the Commission Reduce BellSouth Telecommunications, Inc.'s Intrastate Switched Access Rate DOCKET NO. P-100, SUB 72 In the Matter of Investigation to Determine Whether Competitive Long Distance Service Should Be Allowed in North Carolina and What Rules and Regulations Should Be Applicable to Such Service if Authorized	ORDER CONCERNING ACCEPTANCE OF STIPULATION AND REQUIRING FLOW-THROUGH

BY THE COMMISSION: On September 15, 2000, in compliance with the provisions of the Commission's September 8, 2000, Further Order Regarding Joint Stipulation, BellSouth Telecommunications, Inc. (BellSouth), stated that it accepted and agreed to all of the terms, conditions, and provisions of the Order Regarding Joint Stipulation and the Further Order Regarding

Joint Stipulation. BellSouth also filed the necessary revisions to its Price Regulation Plan, including any necessary initial tariff revisions required by the Orders above.

On February 16, 2000, in Docket No. P-100, Sub 72, the Public Staff filed a Petition to Require Flow-Through of BellSouth Access Charge Reductions. This Motion is hereby granted.

The Commission has examined the filings and finds them to be in compliance with the above Order. The tariffs filed are allowed to become effective. The Commission further concludes that good cause exists to require that all facilities-based long distance carriers be required to flow-through the access charge reductions authorized in these dockets on a dollar-for-dollar basis by:

(a) requiring BellSouth to file tariffs and supporting workpapers forty-five days prior to the effective dates of each of the three remaining switched access reductions, which are shown below:

December 31, 2000
December 31, 2001
December 31, 2002

(b) requiring the facilities-based long distance carriers to submit tariff filings by October 15, 2000, with an effective date of June 24, 2000, for the June 24, 2000 reduction, and fourteen days prior to the respective effective dates of each of the three remaining switched access charge reductions to flow-through the reductions to end users on a dollar-for-dollar basis; the effective dates of the three remaining flow-through filings must be the same as the respective effective dates of the switch access reductions, as shown above; and

(c) requiring AT&T Communications of the Southern States, Inc. MCI WorldCom Network Services, Inc. and Sprint Communications Company, L.P. to submit workpapers with each of their tariff filings demonstrating that reduction have been made to offset the intrastate switched access reductions on a dollar-for-dollar basis consistent with the methodology adopted by the Commission for the June 24, 1999, reduction in Docket No. P-55, Sub 1013.

With respect to reporting requirements regarding the self-enforcing penalties provision, the Commission concludes that the reporting period shall begin on October 1, 2000, with the report for the month of October 2000 due on November 20, 2000. Subsequent reports shall be due on a monthly basis for a given month on the 20th of the following month.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of September, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

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Commissioner Robert V. Owens, Jr. dissents.

DOCKET NO. P-504, SUB 8

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Enforcement of Interconnection Agreement) Between Intermedia Communications, Inc.) and Verizon South Inc., f/k/a GTE South) Incorporated)	ORDER CONCERNING RECIPROCAL COMPENSATION FOR ISP TRAFFIC

HEARD: Monday, March 29, 1999, at 2:00 p.m., in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Chairman Jo Anne Sanford, Presiding, and Commissioners Ralph A. Hunt, Judy Hunt, William R. Pittman, J. Richard Conder, Robert V. Owens, Jr., and Dr. Robert K. Koger

APPEARANCES:

For Verizon South Inc.:

Robert W. Kaylor, Attorney at Law, 225 Hillsborough Street, Suite 480, Raleigh, North Carolina 27603

For Intermedia Communications, Inc.:

Henry Campen and Charles Meeker, Parker, Poe, Adams & Bernstein, Attorneys at Law, 150 Fayetteville Street Mall, Suite 1400, Raleigh, North Carolina 27601

Scott Sapperstein, Intermedia Communications, Inc., 3625 Queen Palm Drive, Tampa, Florida 33619

BY THE COMMISSION: On December 23, 1998, Intermedia Communications, Inc. (Intermedia) filed a Petition with the Commission to enforce its Interconnection Agreement with GTE South Incorporated (GTE)[1] which was approved by the Commission on October 15, 1997. Intermedia contends that Verizon has breached the Agreement by failing to pay reciprocal compensation for the transport and termination of local exchange traffic from Verizon end users that is handed off by Verizon to Intermedia for termination to Intermedia's local exchange end users who are Internet service providers (ISPs).

The Commission held an oral argument to consider this dispute on March 29, 1999. Thereafter on April 1, 1999, the Commission issued an Order concerning post-argument filings and

[1]Effective August 1, 2000, GTE changed its name to Verizon South Inc. (Verizon) as a result of a corporate merger. Accordingly, where appropriate, GTE will be referred to as Verizon throughout this Order.

requested that Verizon answer certain specific questions concerning the treatment of ISP-bound traffic at the time the parties' Interconnection Agreement was negotiated and signed. Verizon filed responses to those questions on April 16, 1999.

The parties subsequently filed proposed orders and/or briefs and certain supplemental filings for consideration by the Commission. Most recently, Intermedia renewed its request for a ruling in its favor by a pleading filed August 4, 2000, Verizon filed a response on August 25, 2000, and Intermedia filed a reply on September 13, 2000.

I. Relevant Provisions of Interconnection Agreement.

Section 1.20 of the Interconnection Agreement, as amended and approved by this Commission, defines "Local Traffic" as follows:

> "Local Traffic" means traffic that is originated by an end user of one Party and terminates to the end user of the other Party within GTE's then current local serving area, including mandatory local calling scope arrangements. A mandatory local calling scope arrangement is an arrangement that requires end users to subscribe to a local calling scope beyond their basic exchange serving area. Local Traffic does not include optional local calling scopes (i.e., optional rate packages that permit the end user to choose a local calling scope beyond their basic exchange serving area for an additional fee), referred to hereafter as "optional EAS."

The Agreement provides the following as to transport, termination and compensation of Local Traffic in Sections 3.1 and 3.3.1, respectively:

> Types of Traffic. The Parties shall reciprocally terminate Local Traffic originating on each other's network utilizing either direct or indirect network interconnections as provided in this Article. Neither Party is to send cellular traffic or traffic of any third party unless an agreement has been made between the originating Party and both the tandem company and the terminating company.
>
> Mutual Compensation. The Parties shall compensate each other for the exchange of Local Traffic in accordance with Appendix C attached to this Agreement and made a part hereof. Charges for the transport and termination of intraLATA toll, optional EAS arrangements and interexchange traffic shall be in accordance with the Parties' respective intrastate or interstate access tariffs, as appropriate.

II. Arguments of Intermedia.

Through its Petition filed December 23, 1998, Intermedia seeks to enforce the reciprocal compensation requirement of its Interconnection Agreement with Verizon as to the termination of ISP traffic. Intermedia contends that the Commission has jurisdiction over disputes concerning the interpretation and enforcement of interconnection agreements and has attempted to resolve its dispute informally with Verizon, but has been unable to do so. Further, Intermedia contends that the Interconnection Agreement's definition of "Local Traffic" includes traffic that is transported and terminated to ISPs. The definition of "Local Traffic" does not have an exclusion for calls terminated to ISPs.

Intermedia has billed Verizon for reciprocal compensation, including compensation for the termination of traffic to ISPs, but Verizon has refused to pay such compensation.

Finally, Intermedia notes that this Commission in Docket P-55, Sub 1027 ordered BellSouth Telecommunications, Inc. on February 26, 1998, to pay reciprocal compensation to US LEC of North Carolina, LLC. A similar Order was also entered against BellSouth in a docket involving Intermedia. See Order dated November 4, 1998, in Docket No. P-55, Sub 1096. Intermedia contends that these Commission Orders constitute binding precedent for Verizon's obligation to pay reciprocal compensation to Intermedia for the termination of ISP traffic.

By its pleading of August 4, 2000, Intermedia renewed its request for a ruling on the merits of its complaint, citing a recent ISP reciprocal compensation decision entered by the Commission in Docket No. P-55, Sub 1197, on July 12, 2000. On September 13, 2000, Intermedia filed a further reply in support of its position and in opposition to the arguments set forth by Verizon.

III. Arguments of Verizon.

Verizon first contends that the decisions requiring BellSouth to pay reciprocal compensation for ISP-bound traffic are not binding on Verizon. Verizon believes that the language of its Interconnection Agreement is different and asserts that Verizon was not a party to the BellSouth proceedings.

Verizon next argues that Intermedia's Petition should be dismissed because ISP traffic is jurisdictionally interstate. Specifically, Verizon argues that these calls do not terminate at the ISP server and that the ISP is not an end user. Moreover, Verizon relies on the decision by the Federal Communications Commission as to its ADSL tariff to argue that interstate service is properly tariffed at the federal level. See GTE Tel Operating Cos. Tariff No. 1, GTOC Transmittal No. 1148, FCC 98-292, Memorandum Opinion and Order, October 30, 1998. Verizon argues that the FCC has unequivocally determined that ISP-bound traffic is thus interstate and not subject to this Commission's jurisdiction. Verizon suggests that the FCC's decision on the ADSL tariff should clarify any lack of uncertainty as to the FCC's previous position.

Finally, Verizon contends that if Intermedia's Petition is not dismissed, a hearing must be set on this matter so that Verizon may present evidence as to its intent that ISP traffic not be subject to the obligation of reciprocal compensation. Verizon maintains that it has consistently taken the position that ISP traffic is not local traffic. Thus, Verizon contends that there are disputes of facts which require a hearing in this docket.

On August 25, 2000, Verizon filed a response to Intermedia's request for ruling dated August 4, 2000, wherein it restated its position that Intermedia's petition should be dismissed or, alternatively, that the matter should be set for evidentiary hearing. Verizon reinforced its arguments that ISP-bound traffic is jurisdictionally and substantively interstate and that prior rulings entered by the Commission in other reciprocal compensation dockets are not binding or controlling in this case.

IV. The FCC Declaratory Ruling.

By Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, the FCC ruled on ISP traffic on February 26, 1999. Paragraphs 21-27 of this Declaratory Ruling set out the FCC's position on inter-carrier compensation for delivery of ISP-Bound Traffic. The Declaratory Ruling plainly held that ISP-bound traffic is largely jurisdictionally interstate. The Declaratory Ruling also plainly held that the FCC will decline "to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism." (Paragraph 21). The FCC further stated at Paragraph 25, that "[e]ven where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic." The Declaratory Ruling is both a statement of principle — that ISP traffic is interstate — and a concession to practicality — that previous state decisions and interim period decisions not necessarily consistent with this principle will not be disturbed. This Commission, according to the FCC, has the authority to determine how the parties have treated ISP-bound traffic and whether other legal and equitable considerations make reciprocal compensation for ISP-bound traffic appropriate.

Both Verizon and Intermedia argue that the FCC's Declaratory Ruling supports their respective positions.

FINDINGS OF FACT

1. Verizon is a "public utility" within the meaning of the North Carolina Public Utilities Act. Verizon is engaged in the provision of interstate and intrastate telecommunications service, including local exchange service, under the laws of the State of North Carolina and the United States, and as such is subject to the jurisdiction of this Commission.

2. Intermedia is a competing local provider (CLP), as defined in G.S. 62-3(7a), of local exchange and exchange access services in the State of North Carolina pursuant to a certificate issued by this Commission, and as such is subject to the jurisdiction of this Commission.

3. Intermedia and Verizon negotiated the Interconnection Agreement which was filed with the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the Act). The Commission approved the Interconnection Agreement by Order dated October 15, 1997, under authority granted by Section 252(e) of the Act.

4. The Commission has jurisdiction to interpret and enforce the provisions of interconnection agreements between telecommunications carriers and authority to hear and determine controversies concerning the interpretation and performance of such interconnection agreements under state and federal law and the terms thereof.

5. Section 251 of the Act obligates all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . ." and "to establish reciprocal compensation arrangements for the transport and termination of

telecommunications." Pursuant to the Act and Section 3 of their Interconnection Agreement, Intermedia and Verizon have interconnected their networks to enable an end user subscribing to Intermedia's local exchange service to place calls to end users subscribing to Verizon's local exchange service, and vice versa.

6. Pursuant to Section 3 of the Interconnection Agreement, Intermedia and Verizon agreed to pay reciprocal compensation to each other for the exchange of local traffic in accordance with Appendix C attached to the Agreement.

7. "Local Traffic" is defined in Section 1.20 of the Agreement as "traffic that is originated by an end user of one Party and terminates to the end user of the other Party within GTE's then current local serving area, including mandatory local calling scope arrangements." The only exception is a clarifying exception for "optional EAS." There is no exception for ISP-bound traffic.

8. The FCC has a long-standing policy which exempts ESPs/ISPs from interstate access charges and allows providers to be treated as end users and to buy access to the public switched network through intrastate business tariffs at local exchange rates.

9. Typically, a customer of an ISP connects to an ISP by means of a seven-digit local phone call, using telephone exchange service. When a Verizon telephone exchange service customer places a call to an ISP within the caller's local calling area, Verizon treats this as a local call pursuant to the terms of its local tariffs. These same conditions existed at the time the parties entered into the Interconnection Agreement.

10. Other than reciprocal compensation for local traffic, there is no provision in the parties' Interconnection Agreement for compensation for transport and termination of ISP-bound local traffic. Further, there is no provision in the Agreement for bill and keep arrangements for ISP-bound local traffic.

11. Although Verizon states that it attempted to separate ISP traffic, other Verizon responses show that Verizon has not effectively separated or segregated ISP-bound traffic from other traffic served under its tariffs. Rather, revenues from services provided to ISPs are reported according to the tariff from which they are purchased, which for local traffic is primarily intrastate. Verizon did not effectively separate or segregate such traffic at the time the Interconnection Agreement was negotiated and signed and, therefore, would not have been able to exclude ISP-bound local calls from other compensable local traffic.

12. Verizon's refusal to pay reciprocal compensation for calls made by Verizon customers to ISPs served by Intermedia is inconsistent with the reciprocal compensation terms of the Interconnection Agreement and Verizon's obligation to provide reciprocal compensation under Section 251 of the Act.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

This docket is the second instance that the Commission has had to rule on the issue of reciprocal compensation in an "old" agreement -- i.e., one entered into prior to the FCC's Declaratory Ruling – since the Declaratory Ruling was issued in February 1999.[1] For the reasons set out below, the Commission finds good cause to find for Intermedia on the pleadings and direct Verizon to pay reciprocal compensation for ISP-bound traffic.

There are essentially two main issues. The first is whether Verizon is entitled to an evidentiary hearing. The second is whether the FCC's Declaratory Ruling mandates that the Commission change, or at least consider changing, its original view with respect to "old" agreements that ISP-bound traffic is local and entitled to reciprocal compensation.

Evidentiary Hearing. In its essentials, this matter involves the construction of certain language in the Interconnection Agreement between Verizon and Intermedia -- more specifically, whether ISP-bound traffic falls under the definition of "local traffic" and is thus entitled to reciprocal compensation. The Agreement addresses the exchange and termination of local traffic and conditions for mutual compensation between Verizon and Intermedia.

As Intermedia has pointed out, the provisions in its Agreement with Verizon are substantially similar to the counterpart provisions in the interconnection agreements in a long line of other dockets where the Commission has found ISP traffic to be local. See, Docket Nos. P-55, Subs 1027, 1096, and 1197. In none of those cases did the Commission feel constrained to hold an evidentiary hearing, even when requested.[2] Generally, parol evidence regarding intention or understanding only becomes relevant when the language is ambiguous. The Commission believes that the Agreement is not ambiguous with respect to the parties' obligations to pay reciprocal compensations for terminating ISP traffic. Therefore, the unambiguous plain language of the Agreement controls and the parties' purported intent is irrelevant as a matter of law. See, e.g., Hinkle v. Bowers, 88 N.C. App. 387, 363 S.E.2d 206 (1988).

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[1]See Docket No. P-55, Sub 1197, Order Concerning Reciprocal Compensation (July 12, 2000). This case involved a complaint filed against BellSouth Telecommunications, Inc., by ITC^DeltaCom Communications, Inc. (DeltaCom), seeking reciprocal compensations payments for ISP-bound traffic under an "old" interconnection agreement. The Commission held in favor of DeltaCom.

[2]The only exception to not having evidentiary hearings was Docket No. P-55, Sub 1094, involving a complaint of MCImetro Transmission Services, Inc., against BellSouth concerning their interconnection agreement. However, the reciprocal compensation issue was just one issue among many, and BellSouth presented little evidence on this issue. In any event, the result was identical to that in the other cases.

In any event, the Commission notes that Verizon has not established an effective mechanism to separate ISP traffic from local calls or otherwise provided for differential treatment for such traffic – including its own traffic.

Declaratory Ruling. In its Proposed Order, Verizon argued that the FCC's Declaratory Ruling mandates the Commission to, in effect, reverse its prior rulings on ISP traffic. The Commission, of course, recognizes that the FCC has rendered an opinion that ISP-bound traffic is essentially non-local interstate traffic. The Commission has been careful to defer to this ruling in any arbitration concerning "new" interconnection agreements – i.e., agreements entered into subsequent to the FCC's Declaratory Ruling – by requiring an interim inter-carrier compensation mechanism subject to true-up based on the FCC's ultimate decision regarding methodology. The Commission has continued to do this even in spite of the fact that the D.C. Circuit Court of Appeals vacated and remanded the FCC's Declaratory Ruling and so cast it into limbo, at least for the time being. See, Bell Atlantic Tel. Co. v. FCC, No. 99-1094 (D.C. Cir., March 24, 2000).

But this matter involves an "old" agreement and, despite Verizon's arguments that the Declaratory Ruling does not permit the Commission to apply its previous theories, this is exactly what the Declaratory Ruling does permit. In fact, one would be hard pressed to find a better example in recent regulatory law where a body such as the FCC has gone to such great lengths to reassure state commissions that nothing in its decisions was designed to overturn or call into question previous decisions. See, e.g., Para. 1 ("parties should be bound by their existing interconnection agreements, as interpreted by state commissions"); Para. 21 ("We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions. . .apply to ISP-bound traffic"); Para. 24 ("Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements"). The FCC also pointed out that the rule it intended to adopt would govern prospective compensation. See, e.g., Paras. 28 and 30. Furthermore, Para. 27 of the Declaratory Ruling specifically states that a state commission might conclude, in light of the Declaratory Ruling, "that it is not necessary to re-visit those determinations." It also noted that the Declaratory Ruling "might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server. . ." (emphasis added), but even this was not meant to preclude state commissions from applying appropriate legal or equitable principles and requiring the payment of reciprocal compensation for ISP traffic pursuant to "old" agreements.

As can be seen, the FCC's language is permissive, not mandatory. The Commission finds it inappropriate to revise its conclusions regarding reciprocal compensation for ISP traffic pursuant to "old" agreements, such as the Agreement at issue in this docket, for the following reasons.

1. The FCC's Declaratory Ruling has confirmed that this Commission has the authority to determine how parties to interconnection agreements have treated ISP-bound traffic and whether other legal and equitable considerations make reciprocal compensation for such traffic appropriate. In substance, the FCC found that while ISP traffic is jurisdictionally interstate, parties to interconnection agreements are bound by existing agreements as interpreted by the state commissions.

2. In four prior cases, the Commission has determined that reciprocal compensation must be paid for ISP-bound traffic. We conclude that there is no reason to reach a different result in this case. Moreover, the FCC emphasized that this Commission need not reconsider its position on this issue. The Commission is confident in the soundness of its original decisions; the fact that the FCC has sought to supersede such reasoning on a prospective basis is of no particular significance when it comes to "old" agreements.[1] The Commission has already adopted a common-sense policy that is both legally acceptable and administratively simple -- that is, ISP traffic is local traffic for the purposes of "old" agreements, but for "new" agreements such traffic is to be compensated by an interim inter-carrier compensation mechanism to be trued-up once the FCC has ruled.

3. The Interconnection Agreement speaks of the payment of reciprocal compensation for local traffic. There is no exception for local traffic that is transported and terminated to an ISP. If the parties had intended to exclude such ISP traffic from their straightforward definition of the words "local traffic," they could have done so. We conclude that there is no reason to make an exception where none exists.

4. Verizon's responses to the specific questions set out in our Order dated April 1, 1999, illustrate that the majority of the types of facilities offered to ISPs for switched traffic are indeed offered from Verizon's local intrastate tariffs. Many of the references cited are for special access, DSL or frame relay services which are not relevant to the type of traffic which is the subject of Intermedia's Petition, even though such facilities may be used in some cases to connect ISPs with their customers.

5. Virtually all state commissions and arbitrators which have considered this issue have ruled that reciprocal compensation should be paid for ISP-bound traffic. This result has been reached both before and after the FCC's Declaratory Ruling. This strong precedent provides guidance on what this Commission should do and also reflects the uniformity of treatment of ISP-bound traffic by the state commissions. The weight of authority in other states is that the Declaratory Ruling does not affect the application of reciprocal compensation provisions to ISP calls under "old" agreements. Before the Declaratory Ruling, 27 state commissions issued decisions concluding that reciprocal compensation applies to ISP calls. Since the Declaratory Ruling, at least 18 state commissions have concluded that the decision does not affect their previous findings under "old" interconnection agreements.[2] Only three state commissions have ruled otherwise -- Louisiana, New Jersey, and Massachusetts. There is nothing in the FCC's Declaratory Ruling which requires or causes the

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[1]The FCC implicitly recognized the responsibility of interpretations that the traffic was local when it said: ". . .we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." Declaratory Ruling, Para. 25.

[2]Commissions in the following states either have issued a decision after the ISP order determining -- or reconfirming -- that reciprocal compensation applies to calls to ISPs, or have reconfirmed or denied petitions for reconsideration of similar decisions issued before the ISP Order: Alabama, California, Colorado, Delaware, Florida, Georgia, Hawaii, Indiana, Maryland, Minnesota, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Washington.

Commission to reconsider and depart from its previous decisions requiring reciprocal compensation for ISP traffic under "old" interconnection agreements, including the Agreement at issue in this complaint proceeding.

6. Finally, if ISP-bound traffic is not reciprocally compensated as local traffic, neither Verizon nor Intermedia will receive any compensation for the transport and termination of this traffic. FCC regulation does not permit ISPs to be treated as carriers for the purpose of assessing access charges for the transport and termination of calls. Instead, they are treated as end users. The absence of compensation for ISP-bound traffic would be contrary to the reciprocal compensation structure of the Interconnection Agreement. The fact that there is no mention of a bill and keep arrangement or any other provision for settlement on ISP-bound local traffic further supports our conclusion that ISP-bound local traffic was included in the reciprocal compensation provisions applicable to local traffic in general.

IT IS, THEREFORE, ORDERED as follows:

1. That the reciprocal compensation provision contained in the Interconnection Agreement between Verizon and Intermedia is fully applicable to ISP-bound traffic, and Verizon shall bill and pay reciprocal compensation for all such calls.

2. That Verizon is directed to immediately forward to Intermedia all sums currently due, together with the required late payment charges, pursuant to the terms of the Interconnection Agreement as interpreted herein, and is further directed to pay all sums coming due in the future for such traffic pursuant to the terms of the Interconnection Agreement as interpreted herein.

ISSUED BY ORDER OF THE COMMISSION.
This the 24th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mz102300.03

Commissioners Robert K. Koger and Sam J. Ervin, IV did not participate in deciding this case.

DOCKET NO. W-274, SUB 282

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application by Heater Utilities, Inc., Post Office Drawer 4889, Cary, North Carolina 27519, for Authority to Increase Rates for Water and Sewer Utility Service in All Its Service Areas in North Carolina	))))	ORDER GRANTING PARTIAL RATE INCREASE

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Wednesday, October 18, 2000, at 9:30 a.m.

Public hearings were held at 7:00 p.m. at the following locations and dates:

Hickory, NC	July 12, 2000
Mount Airy, NC	July 13, 2000
Gastonia, NC	August 7, 2000
Concord, NC	August 9, 2000
Raleigh, NC	August 14, 2000
Hendersonville, NC	August 16, 2000

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; and Commissioners Judy Hunt and Robert V. Owens, Jr.

APPEARANCES:

For the Applicant:

Odes L. Stroupe, Jr., Attorney at Law, Bode, Call and Stroupe, LLP, 3101 Glenwood Avenue, Suite 200, Raleigh, North Carolina 27612

For the Public Staff:

James D. Little, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326
For the Using and Consuming Public

BY THE COMMISSION: On May 11, 2000, Heater Utilities, Inc. (Heater or Applicant) filed an application for authority to increase its rates for water and sewer utility service in all of its service areas in North Carolina. On June 5, 2000, the Commission issued an Order declaring the matter to be a general rate case and suspending the proposed rates pursuant to G.S. 62-134, scheduling hearings and requiring customer notice. On June 16, 2000, the Commission issued an order rescheduling the Hendersonville hearing and revising the customer notice.

WATER AND SEWER - RATES

On August 30, 2000, Heater and the Public Staff filed a joint stipulation, subject to Commission approval, regarding the capital structure, cost rates for debt and common equity, and overall cost of capital to be used in determining Heater's revenue requirement in this proceeding.

On September 6, 2000, Heater prefiled its direct testimony. On October 9, 2000, the Public Staff prefiled its testimony. On October 16, 2000, Heater prefiled its rebuttal testimony.

Each of the six public hearings were held as scheduled for the purpose of hearing the testimony of customers. A total of 70 customers residing in 36 of Heater's service areas testified at the hearings with regard to the proposed rates and or service related issues. On September 14, 2000, Heater filed a report on service related customer testimony prepared by Richard J. Durham, Heater's Director of Operations.

On October 18, 2000, the evidentiary hearing was held as scheduled. The Applicant offered the direct and rebuttal testimony of William E. Grantmyre, Heater's President, and the direct testimony of Freda Hilburn, Heater's Director of Accounting, Controller, and Treasurer. The Public Staff offered the testimony of Kenneth E. Rudder, Utilities Engineer with the Water Division, Windley E. Henry, Staff Accountant, and Katherine A. Fernald, Supervisor of the Water Section of the Accounting Division.

At the conclusion of the hearing, Heater moved that it be allowed to put the new rates into effect immediately. The Public Staff did not oppose this Motion, and both parties agreed that neither would appeal this Joint Proposed Order.

WHEREUPON, based upon a careful consideration of the entire record in this proceeding, the Commission makes the following

FINDINGS OF FACT

1. Heater is a corporation authorized to do business under the laws of North Carolina and is a wholly owned subsidiary of MP Water Resources Group, Inc., which is a wholly owned subsidiary of Allete (formerly Minnesota Power).

2. Heater is a public utility as defined by G.S. 62-3(23) and is properly before the Commission seeking an increase in its rates and charges pursuant to G.S. 62-133.

3. The test year appropriate for use in this proceeding is the twelve months ended June 30, 2000, updated for actual and known changes.

4. Heater's present rates and the rates requested in its application are:

WATER AND SEWER - RATES

WATER RATES

	Existing Rates	Applied for Rates
Metered Rates:		
(Former River Dell Service Areas)		
Base charge, zero usage	$ 6.50	$ 13.59
Usage charge, per 1,000 gallons	$ 1.00	$ 3.75
Metered Rates:		
(Riverview North Subdivision)		
Base charge, zero usage	$ 8.50	$ 13.59
Usage charge, per 1,000 gallons	$ 2.48	$ 3.75
Metered Rates:		
(Former Cregg Bess Service Areas)		
Base charge, zero usage	$ 7.80	$ 13.59
Usage charge, per 1,000 gallons	$ 2.45	$ 3.75
Metered Rates:		
(Former Mid South, Huffman, Lincoln, Old South Lane, & Surry Service Areas)		
Base charge, zero usage		
Meter Size		
3/4" x 5/8" meter	$ 10.30	$ 13.59
3/4" meter	$ 15.45	$ 13.59
1" meter	$ 25.75	$ 33.98
1½" meter	$ 51.50	$ 67.95
2" meter	$ 82.40	$108.72
3" meter	$154.50	$203.85
4" meter	$257.50	$339.75
6" meter	$515.00	$679.50
Usage charge, per 1,000 gallons	$ 2.74	$ 3.75

WATER AND SEWER - RATES

	Existing Rates	Applied for Rates
Metered Rates:		
(All Other Residential Service Areas)		
Meter Size		
<1" meter	$ 12.10	$ 13.59
1" meter	$ 30.25	$ 33.98
1½" meter	$ 60.50	$ 67.95
2" meter	$ 96.80	$108.72
3" meter	$181.50	$203.85
4" meter	$302.50	$339.75
6" meter	$605.00	$679.50
Usage charge, per 1,000 gallons	$ 2.95	$ 3.75
Usage charge, per 100 cubic feet	$ 2.21	$ 2.81
Flat Rates:		
(Former Mid South, Huffman, Lincoln, Old South Lane, & Surry Service Areas)		
Skyland Drive Subdivision	$ 18.59	$ 35.00
All other service areas	$ 26.04	$ 35.00
Commercial at motel rate	$117.18	$150.00
Commercial at business rate	$ 39.06	$ 50.00
Commercial at residential rate	$ 26.04	$ 35.00
Flat Rates:		
(Former Cregg Bess Service Areas)	$ 22.25	$ 35.00

WATER AND SEWER - RATES

SEWER RATES – RESIDENTIAL SERVICE

	Existing Rates	Applied for Rates
Windsor Oaks Subdivision:		
(Based on water usage)		
Base charge, zero usage	$ 28.40	$ 35.32
Usage charge, per 1,000 gallons	$ 7.25	$ 8.50
(There will be no sewer charge for monthly usage over 6,000 gallons)		
Former Mid South, Huffman, Lincoln, Old South Lane and Surry Service Areas:		
Flat rate	$ 43.03	$ 53.45
Former River Dell Service Areas:		
Flat rate	$ 40.00	$ 53.45
Crooked Creek Subdivision:		
Flat rate	$ 48.00	$ 53.45
All Other Residential Service Areas:		
Flat rate	$ 41.81	$ 53.45

SEWER RATES – COMMERCIAL SERVICE

	Existing Rates	Applied for Rates
Crooked Creek Subdivision:		
Base charge, zero usage		
<1" meter	N/A	$ 30.00
1" meter	N/A	$ 75.00
1½" meter	N/A	$150.00
2" meter	N/A	$240.00
3" meter	N/A	$450.00
4" meter	N/A	$750.00
Usage charge, per 1,000 gallons	$ 8.00	$ 7.00

WATER AND SEWER - RATES

Former River Dell Service Areas:

	Existing Rates	Applied for Rates
Base charge, zero usage		
<1" meter	N/A	$ 30.00
1" meter	N/A	$ 75.00
1½" meter	N/A	$150.00
2" meter	N/A	$240.00
3" meter	N/A	$450.00
4" meter	N/A	$750.00
Usage charge, per 1,000 gallons	N/A	$ 7.00

Former Mid South, Huffman, Lincoln, Old South Lane, and Surry Service Areas:

	Existing Rates	Applied for Rates
Base charge, zero usage		
<1" meter	$ 58.01	$ 30.00
1" meter	$ 58.01	$ 75.00
1½" meter	$ 58.01	$150.00
2" meter	$ 58.01	$240.00
3" meter	$ 58.01	$450.00
4" meter	$ 58.01	$750.00
Usage charge, per 1,000 gallons	$ 4.34	$ 7.00
Flat Rate (non-residential/commercial)		
Condo @ residential	$ 43.03	$ 53.45
Commercial @ residential	$ 43.03	$ 53.45
Comm'l @ comm'l	$129.08	$160.00

WATER AND SEWER - RATES

	Existing Rates	Applied for Rates
All Other Commercial Service Areas:		
Base charge, zero usage		
<1" meter	$ 28.25	$ 30.00
1" meter	$ 70.63	$ 75.00
1½" meter	$141.25	$150.00
2" meter	$226.00	$240.00
3" meter	$423.75	$450.00
4" meter	$706.25	$750.00
Usage charge, per 1,000 gallons (All over 4,000 gallons)	$ 6.77	N/A
Usage charge, per 1,000 gallons	N/A	$ 7.00

NOTE: Existing base charge includes first 4,000 gallons and usage charge starts at all usage above 4,000 gallons. Proposed base charge is for zero usage and usage charge starts at all usage above zero gallons.

5. At the end of the updated test year period ending June 30, 2000, the Applicant provided water utility service to approximately 29,367 residential and commercial customers.

6. At the end of the updated test year period ending June 30, 2000, the Applicant provided sewer utility service to 3,990 residential and commercial customers. Heater also purchases bulk waste treatment from the Town of Cary for 90 metered residential customers in Windsor Oaks subdivision.

7. Heater is providing adequate water and wastewater service. Heater filed a report with the Commission on September 14, 2000, discussing the problems in each subdivision where complaints were heard.

8. The appropriate level of rate base used and useful in providing water utility service is $26,318,184 consisting of: utility plant in service of $29,047,214, acquisition adjustments of $5,438,893, working capital allowance of $968,545 and meters and supplies inventory of $773,485, reduced by customer deposits of $145,825, accumulated deferred income taxes of $703,126, accumulated depreciation of $8,845,171, accumulated amortization of acquisition adjustments of $167,783 and cost free capital of $48,048.

9. The appropriate level of rate base used and useful in providing sewer utility service is $3,527,892 consisting of: utility plant in service of $3,765,299, acquisition adjustments of $291,147, working capital allowance of $210,963, and meters and supplies inventory of $31,558, reduced by accumulated deferred income taxes of $79,939, accumulated depreciation of $680,120, customer deposits of $2,150, accumulated amortization of acquisition adjustments of $8,743 and cost free capital of $123.

WATER AND SEWER - RATES

10. The appropriate level of rate base used and useful in providing sewer utility service for Windsor Oaks is $66,743 consisting of: utility plant in service of $99,792, working capital allowance of $1,224 and meters and supplies inventory of $192, reduced by accumulated deferred income taxes of $2,089, and accumulated depreciation of $32,376.

11. The appropriate levels of service revenues and miscellaneous revenues under present rates are:

	Service Revenues	Miscellaneous Revenues	Late Payment Fees
Heater Utilities – Water operations	$10,508,180	$282,112	$17,864
Heater Utilities – Sewer operations	$ 2,186,113	$ 6,109	$ 3,716
Windsor Oaks	$ 70,919	$ 153	$ 121

12. The appropriate levels of uncollectibles under present rates are:

	Uncollectibles
Heater Utilities – Water Operations	$25,263
Heater Utilities – Sewer Operations	$ 5,256
Windsor Oaks	$ 170

13. The appropriate levels of operating revenue deductions under present rates are:

	Operating Revenue Deductions
Heater Utilities – Water Operations	$9,362,942
Heater Utilities – Sewer Operations	$2,167,183
Windsor Oaks	$ 64,525

14. The reasonable capital structure in this case consists of 53.56% debt and 46.44% equity.

15. The embedded cost of debt associated with this capital structure is 8.15%.

16. The reasonable cost of equity in this case is 10.65%.

17. The reasonable overall weighted cost of capital is 9.31%.

18. The Commission finds that the Applicant's service rates for Heater Utilities – water operations and Heater Utilities – sewer operations should be increased by amounts, which, after proforma adjustments, will produce the following increases in total revenues:

Heater Utilities – water operations	$1,775,109
Heater Utilities – sewer operations	$ 445,931

These increases will allow the Applicant the opportunity to earn a 9.31% overall rate of return, which the Commission has found to be reasonable upon consideration of the findings in this Order. The Commission finds that the current rates for Windsor Oaks are reasonable and should not be changed.

19. It is appropriate to increase the reconnection charge when water utility service is cut off by the utility for good cause to $35.

20. It is appropriate to increase the returned check charge to $25.

21. It is appropriate to increase the new customer account fee to $20.

22. The Public Staff and Heater have agreed on recommendations concerning accounting procedures for the following items:

a. Allocation of costs from affiliated companies;
b. Keeping system specific time sheets for Windsor Oaks sewer;
c. Accounting treatment of capitalized labor costs associated with acquisition of existing systems from another utility;
d. Capitalization procedures;
e. Construction work in progress;
f. Costs related to sale of systems; and,
g. Contributions in aid of construction.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-3

The evidence supporting these findings of fact is contained in the application and in the Commission's records. These findings are primarily jurisdictional and informational and are not contested.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4-6

The evidence supporting these findings of fact is contained in the application and in the testimony of Public Staff witness Rudder, and is not contested.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence supporting this finding of fact is contained in the testimony of public witnesses, Company Witness Grantmyre, Public Staff witness Rudder and the report on service related customer testimony filed by Heater on September 14, 2000.

Six customer hearings were held across the state and customers testified objecting to the rate increase and/or describing service/quality complaints as follows:

WATER AND SEWER - RATES

Hearing Location	Number of Customers Testifying
Hickory	7
Mount Airy	1
Gastonia	26
Concord	15
Raleigh	15
Hendersonville	6

All of these customers testified in opposition to the proposed rate increase, and 44 customers from 26 service areas testified regarding service related issues.

Most of the water service related issues involved complaints of water outages, low pressure, discolored water, or bad tasting water. Two wastewater service related issues involved noise and/or odor from wastewater treatment plants.

Heater filed a 40-page report describing the systems serving the 26 service areas and the reasons for many of the problems testified to by the customers. In addition, the report details numerous operational and/or capital improvements that have been or will be made to these systems.

Public Staff witness Rudder testified that he is generally in agreement with the courses of action proposed in the report. He recommended that Heater file two follow-up reports, one at six months and the second at one year, after the Order in this docket, specifying the corrections/improvements made to date and giving a schedule of the remaining improvements. Witness Rudder further testified that the Public Staff will contact Heater to conduct a field inspection of the systems after the filing of each of the two reports.

Witness Rudder also testified that several systems are unapproved by the Division of Environmental Health (DEH) and that Heater is in the process of contracting with an engineer to prepare plans and specifications for DEH approval. He recommended that Heater provide, within six months of the date of the order in this proceeding, a report to the Commission as to the systems that are still unapproved, the reasons the systems are unapproved, and a schedule showing the steps that will be taken for approval.

Witness Rudder testified that in his overall opinion, Heater is providing adequate service but needs to address quality problems in several former Mid South systems and continue to correct problems and deficiencies in its field operations particularly in its western area.

Since much of the discussion at the evidentiary hearing in Raleigh and some of the discussion in the other public hearings dealt with the matter of the impact of the purchase of Mid South on the rates proposed to be charged to Heater customers, it is the Commission's opinion that some discussion of the merits with respect to the approval of the transfer of Mid South to Heater is appropriate in this proceeding. At the time that Heater was allowed to purchase the former Mid South systems, the Commission recognized that the former Mid South systems needed improvement and ordered that:

1. Heater would make necessary improvements to meet customer and regulatory needs, to extend the life of the facilities, and to improve efficiency of operations;

2. Immediate action would be taken by Heater to return systems to compliance that were under administrative penalties;

3. Heater would immediately begin the processes to resolve all the formal complaints and other issues pending before the Commission involving the Mid South water and/or wastewater systems;

4. Of the $9 million purchase price, $7 million, consisting of the net plant in service acquired and a portion of the acquisition adjustment, would be allowed in Heater's rate base at closing. Heater would be allowed to include a portion of the remaining $2 million purchase price for each new customer added after the closing of the acquisition of the former Mid South systems;

5. The acquisition adjustment would be reduced on a pro-rata basis for any disposal of whole water and/or wastewater systems as a result of transfers approved by the Commission including sales, transfers, and abandonments (where the abandonment of the system was approved by the Commission after the water and/or wastewater systems had been paralleled by a municipality or county system); and,

6. Heater would pay without any future rate base treatment or inclusion in any future rates, the refunds plus accrued interest ordered by the Commission for Mid South to pay in both the EPA surcharge refund proceedings and the 1995 and 1996 overcollection of gross up for contributions in aid of construction (CIAC) in pending proceedings.

As a result, the Commission believed that Heater would improve the service provided to former Mid South customers. A larger increase has been approved in this Order for sewer service provided to former Mid South customers to reflect the additional cost of providing sewer service to such customers. The Commission notes, however, that the record reflects pre-transfer Heater customers would have received an increase regardless of the Mid South purchase and does not believe that said customers are being unjustly required to bear the burden of needed improvements to the former Mid South systems.

The Commission is concerned about quality of service issues testified to by those customers at the public hearings, as well as improvements yet to be completed in some of the subdivisions discussed in Heater's 40-page report, filed on September 14, 2000. Some of these needed improvements include the following:

<u>Subdivision</u>	<u>Improvement</u>
East Shores	- Taps will be installed for additional blow offs
	- Follow an extensive flushing schedule
	- Take Well 1 and 3 off line at separate times clean/flush
	- Send out notices for flushing of mains, major repairs, and other interruptions

Murray Hills	-	Install blow off valves to remove accumulated sediments
Oxford Glen/Reigate	-	Replace air diffusers in the plant to reduce odor problems
Fox Ridge/Fountain Trace	-	Install additional main valves and blow off valves
	-	Investigate the issue of necessary road patching

The Commission will take appropriate action to ensure that the necessary above-listed quality improvements, as well as those not listed above, are actually made. Heater should be required to file reports stating when these improvements have been completed. The first of such reports, stating the status of improvements, should be filed by Heater on June 30, 2001. A final report, indicating that all improvements have been completed, should be filed by Heater on December 31, 2001. The Public Staff is requested to monitor the progress on improvements made by Heater and file a response with the Commission within 30 days after the filing of each report.

In addition, the Commission concludes that Heater should file service quality reports addressing the status of all former Mid South systems, including those about which no specific complaints were received in this proceeding. The reports should address any operational problems experienced, complaints received, and service improvements made or proposed to be made. These reports should be filed on April 30 and October 30 of each year until it is determined that said reports are no longer needed. The Public Staff is requested to file a response to said status reports within 30 days after the filing of such reports by Heater.

The Commission is also in agreement with Public Staff witness Rudder concerning several systems that remain unapproved by DEH. It is the Commission's understanding that Heater has contracted with the proper sources to assist in rectifying this matter. The Commission still feels that it is necessary to keep abreast of the progress that is being made to resolve this issue. Therefore, the Company is required to file by April 30, 2001, a report to the Commission indicating systems that are still unapproved, the reasons the systems are unapproved, and a schedule showing the steps that will be taken to meet approval. The Public Staff is requested to review such report and file a response within 30 days after the filing of the unapproved systems report.

Based on the foregoing, the Commission concludes that Heater is providing adequate service and should continue its efforts to do so. The Commission agrees with the Public Staff's recommendation, as modified above, to require Heater to provide follow-up reports for quality service issues, remaining improvements to be made, and systems that are unapproved by DEH. These reports are to be filed on dates specified by the Commission in the above discussion.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 8-10

The evidence supporting these findings of fact is found in the testimony and exhibits of Public Staff witnesses Henry and Fernald and Heater witnesses Hilburn and Grantmyre. In its rebuttal testimony, Heater indicated that while it disagreed with a number of the Public Staff positions, Heater accepted the revenue requirement for water and sewer operations filed by the Public Staff for purposes of this proceeding.

Therefore, the Commission concludes that the proper levels of rate base for use in this proceeding are:

HEATER UTILITIES – WATER OPERATIONS

Item	Amount
Plant in service	$29,047,214
Acquisition adjustments	5,438,893
Customer deposits	(145,825)
Accumulated deferred income taxes	(703,126)
Accumulated depreciation	(8,845,171)
Accumulated amortization of acquisition adjustments	(167,783)
Working capital allowance	968,545
Meters and supplies inventory	773,485
Cost free capital	(48,048)
Total Original Cost Rate Base	$26,318,184

HEATER UTILITIES – SEWER OPERATIONS

Item	Amount
Plant in service	$ 3,765,299
Acquisition adjustments	291,147
Customer deposits	(2,150)
Accumulated deferred income taxes	(79,939)
Accumulated depreciation	(680,120)
Accumulated amortization of acquisition adjustments	(8,743)
Working capital allowance	210,963
Meters and supplies inventory	31,558
Cost free capital	(123)
Total Original Cost Rate Base	$ 3,527,892

WINDSOR OAKS

Item	Amount
Plant in service	$ 99,792
Customer deposits	0
Accumulated deferred income taxes	(2,089)
Accumulated depreciation	(32,376)
Working capital allowance	1,224
Meters and supplies inventory	192
Total Original Cost Rate Base	$ 66,743

WATER AND SEWER - RATES

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The evidence supporting this finding of fact is found in the testimony and exhibits of Public Staff witnesses Henry and Rudder and is uncontested in this proceeding.

Therefore, the Commission concludes that the proper levels of revenue under present rates for use in this proceeding are:

	Service Revenues	Miscellaneous Revenues	Late Payment Fees
Heater Utilities – Water Operations	$10,508,180	$282,112	$17,864
Heater Utilities – Sewer operations	$ 2,186,113	$ 6,109	$ 3,716
Windsor Oaks	$ 70,919	$ 153	$ 121

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

The evidence supporting this finding of fact is found in the testimony and exhibits of Public Staff witness Henry and is uncontested in this proceeding.

Therefore, the Commission concludes that the proper levels of uncollectibles under present rates for use in this proceeding are:

	Uncollectibles
Heater Utilities – water operations	$ 25,263
Heater Utilities – sewer operations	$ 5,256
Windsor Oaks	$ 170

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

The evidence supporting this finding of fact is found in the testimony and exhibits of Public Staff witnesses Henry, Fernald, and Rudder and Heater witnesses Hilburn and Grantmyre. In its rebuttal testimony, Heater witness Grantmyre testified that while Heater disagreed with a number of the Public Staff positions, it accepted the revenue requirement for water and sewer operations filed by the Public Staff for purposes of this proceeding. Heater witness Grantmyre testified Heater considered these specific issues non-precedential and plans to litigate some of these issues in future rate proceedings.

Therefore, the Commission concludes that the proper levels of operating revenue deductions under present rates for use in this proceeding are:

WATER AND SEWER - RATES

Item	Water	Sewer	Windsor Oaks
OPERATING & MAINTENANCE EXPENSE			
Salaries and wages – O&M	$1,793,443	$ 568,115	$ 2,805
Employee benefits	308,319	77,665	525
Purchased water	106,631	5,696	0
Purchased power	834,516	191,001	193
Chemicals	478,382	57,579	0
Maintenance and repair	134,466	41,363	184
Testing fees	439,720	104,400	0
Transportation and equipment operation	388,122	117,987	491
Permit fees	70,185	21,110	0
Signal lines	7,702	0	0
Tank painting	24,550	0	0
Purchased sewage treatment	0	618	45,129
Sludge removal	0	175,497	0
Fran amortization	6,662	308	3
Freight and other miscellaneous	237,235	126,750	222
GENERAL EXPENSES			
Salaries and wages – G&A	$ 918,409	$ 109,422	$ 1,904
Employee benefits	142,683	34,949	246
Purchased power – office	22,351	3,225	32
Materials and supplies – office	82,434	10,039	144
Contract services	158,083	24,492	469
Rent	95,740	17,194	9
Transportation – G&A	21,378	2,999	50
Insurance	21,707	4,826	109
Regulatory commission expense	39,978	5,334	248
Telephone, postage and other miscellaneous	339,111	46,170	760
Interest expense – miscellaneous	8,789	130	0
Annualization adjustment	24,962	5,581	0
Depreciation and amortization expense	1,715,905	215,805	3,886
Amortization of abandoned well	1,375	0	0
Taxes other than income taxes	322,179	65,515	452
Regulatory fee	9,705	1,972	64
Gross receipts tax	431,316	131,441	4,261
State income tax	30,914	0	409
Federal income tax	145,990	0	1,930
TOTAL OPERATING REVENUE DEDUCTIONS	$9,362,942	$2,167,183	$64,525

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 14-17

The evidence supporting these findings of fact is contained in the Joint Stipulation filed by the Applicant and the Public Staff on August 30, 2000. The Public Staff and Heater agreed and stated in the Joint Stipulation that it has no precedential value and that it would not be cited by either party in any future proceeding. Inasmuch as the Joint Stipulation is uncontested, the Commission concludes that it is reasonable and should be approved with respect to capital structure of 53.56% debt and 46.44% equity. The appropriate cost of debt is 8.15%. The parties also stipulated to a rate of return on equity of 10.65%. These capitalization ratios and cost rates resulted in an overall weighted cost of capital of 9.31%, which is appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

The following schedules summarize the gross revenue and rate of return that the Company should have a reasonable opportunity to achieve based upon the increase approved in the Order. These schedules, illustrating the Company's gross revenue requirements, incorporate the findings and conclusions found fair and reasonable by the Commission in this Order.

SCHEDULE I
HEATER UTILITIES, INC.
DOCKET NO. W-274, SUB 282
STATEMENT OF OPERATING INCOME AVAILABLE FOR RETURN
HEATER UTILITIES – WATER OPERATIONS

For The Twelve Months Ended June 30, 2000

Item	Present Rates	Increase Approved	After Approved Increase
Operating Revenue:			
Service Revenue	$10,508,180	$1,745,563	$12,253,743
Miscellaneous Revenue and Late Fees	299,976	33,742	333,718
Uncollectibles	(25,263)	(4,196)	(29,459)
Total Operating Revenue	$10,782,893	$1,775,109	$12,558,002
Operating Revenue Deductions:			
Operation Maintenance Expense	$ 4,829,933	$ 0	$ 4,829,933
General Expenses	1,875,625	0	1,875,625
Depreciation and Amortization	1,717,280	0	1,717,280
Taxes other than Income Taxes	322,179	0	322,179
Gross receipts tax and Regulatory Fee	441,021	72,601	513,622
Income Taxes – Federal	145,990	554,763	700,753
Income Taxes – State	30,914	117,473	148,387
Total Operating Revenue Deductions	$ 9,362,942	$ 744,837	$10,107,779
NET OPERATING INCOME FOR RETURN	$ 1,030,272	$2,450,223	$ 1,419,951

SCHEDULE II
HEATER UTILITIES, INC
DOCKET NO. W-274, SUB 282
STATEMENT OF OPERATING INCOME AVAILABLE FOR RETURN
HEATER UTILITIES – SEWER OPERATIONS

For the Twelve Months Ended June 30, 2000

Item	Present Rates	Increase Approved	After Approved Increase
Operating Revenue:			
Service Revenue	$2,186,113	$444,813	$2,630,926
Miscellaneous Revenue and Late Fees	9,825	2,187	12,012
Uncollectibles	(5,256)	(1,069)	(6,325)
Total Operating Revenue	$2,190,682	$445,931	$2,636,613
Operating Revenue Deductions:			
Operation and Maintenance Expense	$1,488,089	$ 0	$1,488,089
General Expenses	264,361	0	264,361
Depreciation and Amortization	215,805	0	215,805
Taxes other than Income Taxes	65,515	0	65,515
Gross Receipts Tax and Regulatory Fee	133,413	27,157	160,570
Income Taxes – Federal	0	93,935	93,935
Income Taxes – State	0	19,891	19,891
Total Operating Revenue Deductions	$2,167,183	$140,983	$2,308,166
Net Operating Income for Return	$ 23,499	$304,948	$ 328,447

SCHEDULE III
HEATER UTILITIES, INC.
DOCKET NO. W-274, SUB 282
STATEMENT OF OPERATING INCOME AVAILABLE FOR RETURN
WINDSOR OAKS

For the Twelve Months Ended June 30, 2000

Item	Present Rates	Increase Approved	After Approved Increase
Operating Revenue:			
Service Revenue	$ 70,919	$(544)	$70,375
Miscellaneous Revenue and late fees	274	44	318
Uncollectibles	(170)	1	(169)
Total Operating Revenue	$71,023	$(499)	$70,524
Operating Revenue Deductions:			
Operation and Maintenance Expense	$49,552	$ 0	$49,552
General Expenses	3,971	0	3,971
Depreciation and Amortization	3,886	0	3,886
Taxes other than Income Taxes	452	0	452
Gross Receipts Tax and Regulatory Fee	4,325	(31)	4,294
Income Taxes – Federal	1,930	(152)	1,778
Income Taxes - State	409	(33)	376
Total Operating Revenue Deductions	$64,525	$(216)	$64,309
Net Operating Income for Return	$ 6,498	$(283)	$ 6,215

SCHEDULE IV
HEATER UTILITIES, INC.
DOCKET NO. W-274, SUB 282

STATEMENT OF RATE BASE AND RATE OF RETURN
HEATER UTILITIES – WATER OPERATIONS
For the Twelve Months Ended June 30, 2000

Item	Amount
Plant in service	$29,047,214
Acquisition adjustments	5,438,893
Customer deposits	(145,825)
Accumulated deferred income taxes	(703,126)
Accumulated depreciation	(8,845,171)
Accumulated amortization - acquisition adjustments	(167,783)
Working capital allowance	968,545
Meter and supplies inventory	773,485
Cost free capital	(48,048)
Total Original Cost Rate Base	$26,318,184

Rates of Return:

Present	5.39%
Approved	9.31%

SCHEDULE V
HEATER UTILITIES, INC.
DOCKET NO. W-274, SUB 282

STATEMENT OF RATE BASE AND RATE OF RETURN
HEATER UTILITIES – SEWER OPERATIONS

For the Twelve Months Ended June 30, 2000

Item	Amount
Plant in service	$3,765,299
Acquisition adjustments	291,147
Customer deposits	(2,150)
Accumulated deferred income taxes	(79,939)
Accumulated depreciation	(680,120)
Accumulated amortization - acquisition adjustments	(8,743)
Working capital allowance	210,963
Meters and supplies inventory	31,558
Cost free capital	(123)
Total Original Cost Rate Base	$3,527,892

Rates of Return:

Present	0.66%
Approved	9.31%

SCHEDULE VI
HEATER UTILITIES, INC.
DOCKET NO. W-274, SUB 282

STATEMENT OF RATE BASE AND RATE OF RETURN
WINDSOR OAKS

For the Twelve Months Ended June 30, 2000

Item	Amount
Plant in service	$ 99,792
Customer deposits	0
Accumulated deferred income taxes	(2,089)
Accumulated depreciation	(32,376)
Accumulated amortization – acquisition adjustments	0
Working capital allowance	1,224
Meters and supplies inventory	192
Cost free capital	0
Total Original Cost Rate Base	$ 66,743

Rates of Return:

Present	9.73%
Approved	9.31%

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 19-21

The evidence supporting these findings of fact is contained in the application and in the testimony of Public Staff witness Rudder. No party contested these increases in charges, and witness Rudder found them all to be justified and reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

The evidence supporting this finding of fact is found in the testimony of Public Staff witness Fernald and Heater witness Grantmyre.

The Public Staff has recommended changes in Heater's accounting procedures as follows:

Allocation of Costs from Affiliated Companies

Public Staff witness Fernald recommended that Heater provide to the Public Staff for review all workpapers, calculations, and supporting documentation for 2001 allocations from MP Water Resources Group by March 31, 2002. Heater agreed to this recommendation.

Windsor Oaks

Public Staff witness Fernald recommended that Heater maintain system specific time spent by operators on Windsor Oaks. Heater agreed with this recommendation.

Acquisition Costs

Public Staff witness Fernald recommended that Heater begin charging capitalized payroll costs related to acquisitions of systems from another utility to Account 114 – Utility Plant Acquisition Adjustments. Heater has agreed to this recommendation.

Capitalization Procedures

Public Staff witness Fernald recommended that Heater begin allocating capitalized labor related costs such as benefits and payroll taxes based on the level of payroll charged to each plant account. Heater has agreed to begin allocating labor related costs based on payroll by the end of 2001 and immediately refine the coding of time by general and administrative personnel.

Witness Fernald testified that the Public Staff will review Heater's revised capitalization procedures in 2002 to determine if all the Public Staff's concerns have been addressed.

Construction Work in Progress (CWIP)

Public Staff witness Fernald recommended and Heater has agreed to more closely evaluate projects to prevent CWIP from being included in rate base in future rate case filings.

Costs Related to Sale of Systems

Public Staff witness Fernald recommended and Heater agreed to record any labor or other costs related to the sale of systems in a non-utility account.

Contributions in Aid of Construction (CIAC)

Public Staff witness Fernald recommended and Heater agreed that the Public Staff and Heater will meet by September 30, 2001, to discuss Heater's accounting for CIAC and that the parties will finalize any recommendations concerning the accounting for CIAC by September 30, 2002.

IT IS, THEREFORE, ORDERED as follows:

1. That Heater shall adjust its utility service rates and charges to produce, based on the adjusted test year level of operations, an increase in total water revenues of $1,775,109 and an increase in total sewer revenues of $445,931.

2. That Heater shall adjust its miscellaneous charges in the following manner: increase the reconnection charge when water utility service is disconnected by the utility for good cause to $35; increase the returned check charge to $25; and increase the new customer account fee to $20.

WATER AND SEWER - RATES

3. That the Schedule of Rates, attached as Appendix A, is approved for water and sewer utility service rendered by Heater. These rates shall become effective for service rendered on and after the date of this Order. The Commission considers this Schedule of Rates to be filed as required by G.S. 62-138.

4. That a copy of the Notice to Customers attached as Appendix B shall be delivered by Heater to all its customers in conjunction with the next billing statement after the date of this order.

5. That Heater shall file the attached Certificate of Service, properly signed and notarized, within ten days of completing the requirement of ordering paragraph No. 4.

6. That Heater shall comply, as Heater has agreed to, with the Public Staff's recommendations concerning accounting procedures described in Evidence and Conclusions for Finding of Fact No. 22.

7. That Heater shall file reports for the quality improvements listed in its September 14, 2000, service report that have not been completed. The first of such reports shall be filed by Heater on June 30, 2001. A final report shall be filed by Heater on December 31, 2001. The Public Staff shall monitor improvements made by Heater and shall file a response with the Commission within 30 days after the filing of each report.

8. That Heater shall file quality of service status reports for all of the former Mid South systems now served by Heater. The Company shall file said reports on April 30 and October 30 of each year until such time that it is determined that these reports are no longer necessary. The reports shall address any operational problems experienced, complaints received, and service improvements made or proposed to be made. The Public Staff shall file a response to said status reports within 30 days after the filing of such reports by Heater.

9. That Heater shall file by April 30, 2001, a report indicating the systems that are still unapproved by DEH, the reasons the systems are unapproved, and the steps that will be taken for approval of such systems. The Public Staff shall review such report and shall file a response within 30 days after the filing of the unapproved systems report.

ISSUED BY ORDER OF THE COMMISSION.
This the 30th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb102700.01

WATER AND SEWER - RATES

APPENDIX A
PAGE 1 OF 6

SCHEDULE OF RATES

for

HEATER UTILITIES, INC.

for providing water and sewer utility service in

ALL ITS SERVICE AREAS IN NORTH CAROLINA

Except - Water and sewer utility service in the former Woodlake service area (see Docket No. W-274, Sub 214)

Water utility service in Riverview Estates Subdivision, Valley Woods Mobile Estates, & Cross Creek Mobile Estates and sewer utility service in Cross Creek Mobile Estates (see Docket No. W-274, Sub 254)

WATER UTILITY SERVICE - Monthly

Metered Rates:

Base Charge, zero usage -

<1" meter	$ 12.11
1" meter	30.29
1 1/2" meter	60.57
2" meter	96.91
3" meter	181.71
4" meter	302.86
6" meter	605.71

Commodity Charge, measured in gallons or cubic feet -

Per 1,000 gallons	$ 3.51
Per 100 cubic feet	$ 2.63

Flat Water Rates - Monthly

Residential	$ 33.86
Commercial at Residential Rate	$ 33.86
Commercial at Business Rate	$ 50.79
Commercial at Motel Rate	$152.36

Reconnection Charges: 2/

If water service cut off by utility for good cause:	$35.00
If water service discontinued at customer's request:	$ 5.00

Connection Charges:

3/4" x 5/8" meters -

For taps made to existing mains installed inside franchised service area: 1/	$800.00
For individual connections outside franchised service area: 2/	Actual cost of installation 3/
Meters exceeding 3/4" x 5/8" -	120% of actual cost

Production and Storage Contribution in Aid of Construction Fee: 2/

For individual connections outside franchised service areas where lot owner has made no contribution in aid of construction toward production and storage facilities	$1,700 per residential equivalent unit (REU)

Meter Installation Fee: 4/ $70.00

Billing Service Charge: 5/ $ 2.00 per month per bill

New Customer Account Fee: $20.00

SEWER UTILITY SERVICE - Monthly

Residential Service:

Windsor Oaks Subdivision: (Based on water usage)

Base Charge, zero usage	$ 28.40, minimum
Usage Charge, per 1,000 gallons	$ 7.25

(No sewer charge for water usage over 6,000 gallons per month)

All Other Residential Service Areas:

	Former Mid-South Service Areas	All Other Service Areas
Flat Rate Per Month	$ 58.35	$ 48.81

Commercial (Non-residential) Service: (Metered rates, based on water usage)

Minimum monthly charge, based on meter size

	Former Mid-South Service Areas	All Other Service Areas
<1" meter	$ 25.74	$ 21.52
1" meter	64.35	53.81
1 1/2" meter	128.70	107.62
2" meter	205.92	172.20
3" meter	386.10	322.87
4" meter	643.50	538.12
6" meter	1,287.00	1,076.24
Commodity charge - Per 1,000 gallons	$ 5.30	$ 4.43

Connection Charges:

None when tap and service line installed by developer.

Actual cost if Heater Utilities, Inc., makes tap or installs service line.

Wastewater Treatment Plant Capacity Charge:
(Applicable to areas feeding into the Hawthorne Wastewater Treatment Plant in Wake County) — $1,080 per residential equivalent unit

Reconnection Charges: [2/]

If sewer service cut off by utility for good cause by disconnecting water:	None
If sewer service cut off by utility for good cause by any method other than noted above:	Actual cost

Grease Traps:

Utility may require installation and/or proper operation of grease traps on grease producing commercial facilities. Failure to properly operate grease traps will result in disconnection of service pursuant to Commission Rule R10-16.

New Customer Account Fee: $20.00

(If customer receives both water and sewer utility service from Heater, then the customer shall only be charged a new account fee for water.)

Reimbursement Charge for Damaged Sewer Lines - Crooked Creek Subdivision:

According to the Sewer Use and Maintenance Statement, which has been presented to all sewer customers for their information, "sewer lines cut by the homeowner shall be repaired at the homeowner's expense."

Reimbursement Charge for Grinder Pump Repair - Crooked Creek Subdivision:

According to the Sewer Use and Maintenance Statement, which has been presented to all sewer customers for their information, "The homeowner shall reimburse Heater Utilities, Inc., for damage to the pump and/or tank caused by willful or negligent discharge of the above items (items listed in the Statement) into the sewer system."

APPENDIX A
PAGE 5 OF 6

OTHER MATTERS

Returned Check Charge:	$25.00
Bills Due:	On billing date
Bills Past Due:	15 days after billing date
Billing Frequency:	Shall be monthly for service in arrears
Finance Charges for Late Payment:	1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date.

1/ In most areas, connection charges do not apply pursuant to contract and only the $70.00 meter installation fee will be charged to the first person requesting service (generally the builder). Where Heater must make a tap to an existing main, the charge will be $800.00, and where main extension is required, the charge will be 120% of the actual cost.

2/ Individual connections outside franchised service areas may be made pursuant to this tariff in the following circumstances: (1) upon request of a "bona fide customer" as that term is defined in Commission Rule R7-16(a)(1); (2) the customer shall be located either within 100 ft. of a Franchised Service Area or located within 100 ft. of an existing Heater main; and (3) the request may come from no more than two customers located in the same area (requests for more than two connections require an application for a new franchise or a request for approval of a contiguous extension). To connect such a customer, Heater shall file a notice with the Commission in Docket No. W-274, Sub 193, at least 30 days before it intends to make the tap. This notice shall include an explanation of the circumstances requiring the tap and an 8.5" X 11" map showing the location of the tap in relation to Heater's existing main. If the Public Staff does not object to the tap within the 30 day period, or upon written notice within that period from the Public Staff that it will not object, Heater may proceed with the connection.

3/ Actual cost for such a connection shall include installation of a 6" or smaller main extension (if necessary), tap of the main, service line, road bore (if necessary), meter box, meter, backflow preventer (if necessary), and Heater's direct labor costs. Heater shall give a written cost quote to the customer(s) applying for connection before actually beginning the installation work.

4/ The fee will be charged only where cost of meter installation is not otherwise recovered through connection charges.

5/ Heater is authorized to include on its monthly water bill the charges resulting from sewer service provided by the Town of Cary, the Town of Fuquay-Varina, Wake County, and various Commission appointed emergency operators where specifically approved by the Commission.. Heater will bill the Town of Cary or emergency operator $2.00 per month per bill for providing this service.

6/ The Utility, at its expense, may install a meter and charge the metered rate.

7/ When service is disconnected and reconnected by the same unit owner within a period of less than nine months, the entire flat rate and/or base charge rate will be due and payable before the service will be reconnected.

APPENDIX B
PAGE 1 OF 3

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-274, SUB 282

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application by Heater Utilities, Inc., Post Office Drawer 4889, Cary, North Carolina 27519, for Authority to Increase Rates for Water and Sewer Utility Service in All Its Service Areas in North Carolina	))))	NOTICE TO CUSTOMERS OF NEW RATES

BY THE COMMISSION: Notice is given that the North Carolina Utilities Commission has granted a rate increase to Heater Utilities, Inc., for water and sewer utility service provided in all its service areas in North Carolina. This decision was based upon evidence presented at the public hearings held on:

July 12, 2000, in Hickory
July 13, 2000, in Mount Airy
August 7, 2000, in Gastonia
August 9, 2000, in Concord
August 14, 2000, in Raleigh
August 16, 2000, in Hendersonville
October 18, 2000, in Raleigh

The new rates are as follows:

<u>Water Utility Service</u>:

<u>Metered Rates</u>

Monthly Base Charge (zero consumption)

<1" meter	$ 12.11
1" meter	30.29
1½" meter	60.57
2" meter	96.91
3" meter	181.71
4" meter	302.86
6" meter	605.71

Usage Charge per 1,000 gallons	$ 3.51
Usage Charge per 1,000 cubic feet	$ 2.63

WATER AND SEWER - RATES

Flat Water Rates – (Monthly):

Residential	$ 33.86
Commercial at Residential Rate	$ 33.86
Commercial at Business Rate	$ 50.79
Commercial at Motel Rate	$152.36

Residential Sewer Utility Service:

	Former Mid South Service Areas	All Other Service Areas
Monthly Flat Rate	$58.35	$48.81

Windsor Oaks Metered Sewer Utility Service:
(No increase granted)

Monthly Base Charge (zero usage)	$28.40
Usage Charge (0-6000 gallons of water usage)	$ 7.25/1,000 gallons

There will be no sewer charge for monthly water usage over 6,000 gallons.

Commercial (Non-residential) Sewer Utility Service:
(Based on water usage)

Base Monthly Charge for Zero Usage

	Former Mid South Service Areas	All Other Service Areas
<1" meter	$ 25.74	$ 21.52
1" meter	$ 64.35	$ 53.81
1½" meter	$ 128.70	$ 107.62
2" meter	$ 205.92	$ 172.20
3" meter	$ 386.10	$ 322.87
4" meter	$ 643.50	$ 538.12
6" meter	$1,287.00	$1,076.24
Commodity Charge Per 1,000 Gallons	$ 5.30	$ 4.43

APPENDIX B
PAGE 3 OF 3

Flat Rates for Non-residential/Commercial (Monthly):

	Former Mid South Service Areas
Condominium residents at residential rate	$ 58.35
Commercial at residential rate	$ 58.35
Commercial at commercial rate	$175.05

ISSUED BY ORDER OF THE COMMISSION.

This the 30th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

DOCKET NO. W-274, SUB 282

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application by Heater Utilities, Inc., Post Office Drawer 4889, Cary, North Carolina 27519, for Authority to Increase Rates for Water and Sewer Utility Service in All Its Service Areas in North Carolina) ERRATA ORDER

BY THE CHAIRMAN: On October 30, 2000, the Commission issued an Order Granting Partial Rate Increase in the above-captioned docket. It has come to the attention of the Commission that column totals (NET OPERATING INCOME FOR RETURN) were transposed on page 18 (Schedule I) of said Order. The tariff sheet (Appendix A) did not include flat rates for nonresidential/commercial sewer customers on Page 3 of 6 and the Notice to Customers (Appendix B) contained a usage charge for 1,000 cubic feet, instead of 100 cubic feet.

The Chairman finds good cause to order the correction of the errors.

IT IS, THEREFORE, ORDERED as follows:

1. That the amended Schedule I (page 18), attached hereto, shall be substituted for Schedule I (page 18) contained in the Order of October 30, 2000, in this docket.

2. That the amended Appendix A, Page 3 of 6, attached hereto, shall be substituted for the Appendix A, Page 3 of 6, attached to the Order issued on October 30, 2000, in this docket.

3. That the amended Appendix B, Page 1 of 3, attached hereto, shall be substituted for the Appendix A, Page 1 of 3, attached to the Order issued on October 30, 2000, in this docket.

4. That, except as amended herein, the Order of October 30, 2000, shall remain in full force and effect.

ISSUED BY ORDER OF THE CHAIRMAN.
This the _1st_ day of _November_, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rb110100.03

SCHEDULE I
HEATER UTILITIES, INC.
DOCKET NO. W-274, SUB 282
STATEMENT OF OPERATING INCOME AVAILABLE FOR RETURN
HEATER UTILITIES – WATER OPERATIONS

For The Twelve Months Ended June 30, 2000

Item	Present Rates	Increase Approved	After Approved Increase
Operating Revenue:			
Service Revenue	$10,508,180	$1,745,563	$12,253,743
Miscellaneous Revenue and Late Fees	299,976	33,742	333,718
Uncollectibles	(25,263)	(4,196)	(29,459)
Total Operating Revenue	$10,782,893	$1,775,109	$12,558,002
Operating Revenue Deductions:			
Operation Maintenance Expense	$ 4,829,933	$ 0	$ 4,829,933
General Expenses	1,875,625	0	1,875,625
Depreciation and Amortization	1,717,280	0	1,717,280
Taxes other than Income Taxes	322,179	0	322,179
Gross receipts tax and Regulatory Fee	441,021	72,601	513,622
Income Taxes – Federal	145,990	554,763	700,753
Income Taxes – State	30,914	117,473	148,387
Total Operating Revenue Deductions	$ 9,362,942	$ 744,837	$10,107,779
NET. OPERATING INCOME FOR RETURN	$ 1,419,951	$1,030,272	$ 2,450,223

WATER AND SEWER - RATES

APPENDIX A
PAGE 3 OF 6

SEWER UTILITY SERVICE - Monthly

Residential Service:

Windsor Oaks Subdivision: (Based on water usage)

Minimum Base Charge, zero usage	$ 28.40
Usage Charge, per 1,000 gallons	$ 7.25

(No sewer charge for water usage over 6,000 gallons per month)

All Other Residential Service Areas:

	Former Mid-South Service Areas	All Other Service Areas
Flat Rate	$ 58.35	$ 48.81

Commercial (Non-residential) Metered Service: (Metered rates, based on water usage)

Minimum Base Charge, based on meter size	Former Mid-South Service Areas	All Other Service Areas
<1" meter	$ 25.74	$ 21.52
1" meter	64.35	53.81
1 1/2" meter	128.70	107.62
2" meter	205.92	172.20
3" meter	386.10	322.87
4" meter	643.50	538.12
6" meter	1,287.00	1,076.24
Usage charge, per 1,000 gallons	$ 5.30	$ 4.43

Commercial (Non-residential) Flat Rate Service:

	Former Mid-South Service Areas
Condominium residents at residential rate	$ 58.35
Commercial at residential rate	$ 58.35
Commercial at commercial rate	$ 175.05

Connection Charges:

None when tap and service line installed by developer.

Actual cost if Heater Utilities, Inc., makes tap or installs service line.

APPENDIX B
PAGE 1 OF 3

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-274, SUB 282

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application by Heater Utilities, Inc., Post Office Drawer 4889, Cary, North Carolina 27519, for Authority to Increase Rates for Water and Sewer Utility Service in All Its Service Areas in North Carolina	)	NOTICE TO CUSTOMERS OF NEW RATES

BY THE COMMISSION: Notice is given that the North Carolina Utilities Commission has granted a rate increase to Heater Utilities, Inc., for water and sewer utility service provided in all its service areas in North Carolina. This decision was based upon evidence presented at the public hearings held on:

July 12, 2000, in Hickory
July 13, 2000, in Mount Airy
August 7, 2000, in Gastonia
August 9, 2000, in Concord
August 14, 2000, in Raleigh
August 16, 2000, in Hendersonville
October 18, 2000, in Raleigh

The new rates are as follows:

Water Utility Service:

Metered Rates

Monthly Base Charge (zero consumption)

<1" meter	$ 12.11
1" meter	30.29
1½" meter	60.57
2" meter	96.91
3" meter	181.71
4" meter	302.86
6" meter	605.71
Usage Charge per 1,000 gallons	$ 3.51
Usage Charge per 100 cubic feet	$ 2.63

DOCKET NO. W-176, SUB 30

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Scientific Water & Sewerage Corporation, 112 Scientific Lane, Jacksonville, North Carolina 28540, for Authority to Increase Rates for Water and Sewer Utility Service in All Its Service Areas in Onslow County, North Carolina	))))))	RECOMMENDED ORDER APPROVING PARTIAL RATE INCREASE

HEARD IN: Council Chambers, City Hall, 211 Johnson Boulevard, Jacksonville, North Carolina, on March 14, 2000, at 7:00 p.m.

Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on April 18, 2000, at 9:30 a.m.

BEFORE: Linda Petrie Haywood, Hearing Examiner

APPEARANCES:

FOR THE APPLICANT

Marcus W. Trathen and Charles E. Coble, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P, Post Office Box 1800, Raleigh, North Carolina 27602

FOR THE PUBLIC STAFF

Robert S. Gillam and Kendrick C. Fentress, Staff Attorneys, Public Staff, North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

HAYWOOD, HEARING EXAMINER: On August 16, 1999, Scientific Water & Sewerage Corporation (Scientific, Applicant, or Company), filed an application for authority to increase its rates for water and sewer utility service in all of its service areas in North Carolina. By Order issued on September 23, 1999, the Commission declared the application to be a general rate case, suspended the applied-for rates, required public notice, and scheduled a hearing for January 6, 2000.

On November 2, 1999, Scientific provided the required public notice announcing the applied-for rates and the hearing date of January 6, 2000, to all its customers, as evidenced by the Certificate of Service filed by Scientific on November 9, 1999.

On November 22, 1999, Scientific filed testimony of Ben Aragona, President of Scientific, and L. Guthrie Brown, accountant for Scientific.

On December 8, 1999, Scientific filed a Motion to Postpone Hearing and to Amend Commission Order in which it requested that the hearing be delayed by approximately two months. The Public Staff concurred in that request.

On December 13, 1999, Scientific filed a Motion to Amend Application for Increased Rates. In its motion, the Applicant noted that the reconnection charge for sewer service, as applied for, was incorrect. Scientific also noted that customers in certain service areas were omitted from the requested rates. The Public Staff concurred in that request.

On December 17, 1999, the Commission issued an Order Rescheduling Hearing and Requiring Customer Notice. The Commission allowed Scientific to amend its application as requested and rescheduled the public hearing for March 14, 2000. On December 20, 1999, the Commission issued an Errata Order clarifying the Notice to Customers.

On December 23, 1999, Scientific provided the required public notice announcing the rescheduled hearing date of March 14, 2000, and the amended items in Scientific's application to all its customers, as evidenced by the Certificate of Service filed by Scientific on December 28, 1999.

On February 9, 2000, the Public Staff filed testimony of Harish L. Rangwani, Staff Accountant, and O. Bruce Vaughan, Utilities Engineer. The affidavit of John R. Hinton, Public Staff Economist, was also filed.

On March 1, 2000, Scientific filed rebuttal testimony of Ben Aragona, President of Scientific, and George Dennis, a consulting certified public accountant.

On March 3, 2000, Scientific filed a Motion to Separately Schedule Evidentiary Hearing. The Public Staff filed its Reply to Motion on March 10, 2000, in which it did not object to limiting the March 14, 2000, hearing to the testimony of public witnesses and to schedule a separate evidentiary hearing for the testimony of expert witnesses.

On March 13, 2000, the Commission issued an Order scheduling a separate evidentiary hearing to be held on April 18, 2000, in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, and requiring public notice.

On March 16, 2000, Scientific provided to all its customers the required public notice announcing the separately scheduled evidentiary hearing, to take place on April 18, 2000, as evidenced by the Certificate of Service filed by Scientific on March 21, 2000.

On March 14, 2000, the customer hearing was held at the City Hall in Jacksonville, North Carolina. At the customer hearing 14 customers voiced their concerns and presented testimony.

On April 4, 2000, Scientific filed supplemental rebuttal testimony of Ben Aragona, President of Scientific.

The evidentiary hearing was held as scheduled on April 18, 2000, and no public witnesses appeared to testify. Scientific's legal counsel provided an opening statement at the hearing summarizing all matters that had been agreed to by Scientific and the Public Staff. Scientific stated that the stipulation it had reached with the Public Staff had been drafted and reviewed, but that minor modifications were going to be made and thereafter a joint stipulation would be submitted with original signatures. The prefiled testimony, including exhibits of the Public Staff and Scientific, were accepted into the record as if given orally from the witness stand.

On April 18, 2000, Scientific and the Public Staff filed the final signed original joint stipulation dated April 18, 2000.

On May 18, 2000, Scientific and the Public Staff filed a jointly prepared proposed order.

Based on the information contained in the Commission files, the verified application with amendment, the testimony of the parties, the joint stipulation, and the entire record in this proceeding, the Commission now makes the following

FINDINGS OF FACT

1. Scientific is a public utility as defined by G.S. 62-3(23) and, as such, is subject to the jurisdiction of and regulation by the North Carolina Utilities Commission. Scientific is lawfully before the Commission seeking an increase in rates and charges pursuant to G.S. 62-133.

2. Scientific's level of wastewater utility service is generally adequate; its level of purchased water service is adequate; and its level of produced water service is marginally to generally adequate.

3. The Public Staff conducted a complete investigation of Scientific's rate base, reasonable operating revenue deductions, operating revenues, and utility service.

4. Scientific's monthly present rates, applied-for rates, and rates stipulated to by Scientific and the Public Staff are as follows:

WATER:

Flat Rate: Lauradale Water System	Present Rates	Applied-For Rates	Stipulated Rates
One-bedroom Apartments, Lee Garden	$ 6.60	$13.00	$ 9.60
Two-bedroom Apartments, Lauradale	$ 7.72	$15.00	$11.20
Metered Rate: Lauradale Water System			
(Water produced from Scientific's wells)			
Base charge per month, zero usage	$ 2.96	$ 5.00	$ 4.55
Usage charge per 1,000 gallons	$ 1.00	$ 3.00	$ 1.45

WATER AND SEWER - RATES

Metered Rate: Cedar Creek, Raintree, Deerfield, and Summersill

(Water purchased from Onslow County)

Base charge per month, zero usage	$ 8.46	$ 9.35	$ 8.40
Usage charge per 1,000 gallons	$ 2.65	$ 3.65	$ 2.81

SEWER:

Flat Rate: Residential

(Sewer-only customers)	$19.33	$36.00	$20.50
(Water and Sewer customers)	$19.33	$34.00	$20.50

Flat Rate: Commercial

(Sewer-only customers with private wells)	$19.33	N/A	$20.50

Metered: Commercial

(Sewer-only customers with water provided by Oslow County

Flat Rate	$19.33	N/A	$20.50
Base charge per month, zero usage	N/A	$25.00	$10.00
Usage charge per 1,000 gallons	N/A	$ 6.25	$ 2.00

(Water and sewer customers with water provided by Scientific)

Flat Rate	$19.33	N/A	$20.50
Base charge per month, zero usage	N/A	N/A	$10.00
Base charge per month, includes first 12,000 gallons	N/A	$34.00	N/A
Usage charge per 1,000 gallons	N/A	N/A	$ 2.00
Usage charge for all usage over 12,000 gallons	N/A	$ 6.25	N/A

5. The test period established for use in this general rate case proceeding is the 12-month period which ended December 31, 1998.

6. Scientific should have the opportunity to generate operating revenues under the rates agreed to by Scientific and the Public Staff as follows:

Purchased Water	Produced Water	Sewer
$272,011	$88,641	$387,144

7. The rates contained in Appendix A, attached hereto, will allow Scientific to generate the operating revenues described above.

8. The rates agreed to by the Public Staff and Scientific are reasonable and should be approved.

9. Scientific and the Public Staff have agreed to certain quality-of-service recommendations contained in Appendix B, attached hereto, which the Commission deems reasonable and hereby approves.

10. Pursuant to the joint stipulation, Scientific agreed to acquire full fee-simple title to the 3.4-acre sewer lot off Aragona Blvd., which it had previously leased from Aragona Enterprises, for $20,000. Scientific has done so.

11. Pursuant to the joint stipulation, the parties have agreed to waive the right to file exceptions to the Recommended Order of the Hearing Examiner and have further agreed that any rate increase approved by the Hearing Examiner may take effect immediately.

12. Approval of the joint stipulation shall have no precedential value in future proceedings for Scientific or any other public utility regulated by the North Carolina Utilities Commission, except with respect to the inclusion of the sewer lot (i.e., the 3.4-acre lot referred to in Finding of Fact No. 10 above) in Scientific's rate base at an original cost of $20,000.

EVIDENCE AND CONCLUSIONS

The Company and the Public Staff have entered into a Joint Stipulation which resolves all contested issues in this proceeding.

With respect to its wastewater collection and treatment operations, the Company has had problems in the past satisfying the Division of Water Quality (DWQ) of the North Carolina Department of Environment and Natural Resources (NCDENR). Recent managerial and operational improvements in this area have allowed DWQ to upgrade the Company's ratings on periodic NPDES Compliance Inspection Reports (for Areas Evaluated During Inspection) to mostly "Satisfactory." As reflected in Appendix B, the Company has agreed to make or investigate the feasibility of certain managerial and operational upgrades which are intended to further improve wastewater treatment compliance status and safety.

At the customer hearing in Jacksonville on March 14, 2000, fourteen of the approximately 1,500 customers testified. Eleven of these customers reside in the Lauradale area, which includes approximately 500 customers, and receive water produced from Scientific's two wells. With possibly one exception, all Lauradale customers complained of quality problems, such as sediment, hard water, high chlorine levels, bad taste, and the smell of rotten eggs. Some of these customers stated that any rate increase was made more unbearable by the knowledge that they were, in effect, not getting the quality product they felt that they deserved. The problems which customers complained of are apparently the result of one or more of the following: (a) the quality of the water produced by the Company's two wells; (b) the operation of the wells; (c) the operation of the distribution system connected to the two wells; (d) the Company's response to customer complaints; and, (e) the Company's response to directives from the NCDENR, Division of Environmental Health. Ben Aragona, President of Scientific, filed supplemental rebuttal testimony with the Commission in which he responded to these complaints. He explained that an unforeseen event contributed to the problems with produced water quality at one well and that major repairs were made at this well and improvements were made to the produced water system generally in an effort to improve produced water quality.

As Appendix B indicates, the Company has agreed to make certain additional managerial and operational improvements which are intended to improve water quality and customer service.

Based upon the entire record of this proceeding, the Hearing Examiner is of the opinion that the rates agreed to by Scientific and the Public Staff are reasonable and should be approved.

Therefore, the Hearing Examiner finds and concludes that the joint stipulation in this docket entered into by Scientific and the Public Staff filed on April 18, 2000, should be adopted, provided that such approval shall have no precedential value in future proceedings for Scientific or any other public utility regulated by the North Carolina Utilities Commission, except with respect to the inclusion of the "sewer lot" in Scientific's rate base at an original cost of $20,000.

IT IS, THEREFORE, ORDERED as follows:

1. That the Schedule of Rates, attached hereto as Appendix A, is hereby approved and deemed to be filed with the Commission pursuant to G.S. 62-138. Said Schedule of Rates is hereby authorized to become effective for services rendered on and after the date of this Order.

2. That a copy of the Notice to Customers, attached hereto as Appendix C, shall be mailed or hand delivered by Scientific to all the affected customers in conjunction with the next regularly scheduled billing process.

3. That Scientific shall file the attached Certificate of Service, properly signed and notarized, within ten days of completing the requirement of Ordering Paragraph No. 2.

4. That Scientific shall undertake the steps relating to quality of service as provided in Appendix B, attached hereto.

5. That Scientific shall complete the items set forth in paragraph 9 of Appendix B and file a report with the Commission on or before October 18, 2000.

6. That the joint stipulation, which has been approved by the Commission, shall have no precedential value in future proceedings for Scientific or any other public utility regulated by the North Carolina Utilities Commission, except with respect to the inclusion of the sewer lot in Scientific's rate base at an original cost of $20,000.

ISSUED BY ORDER OF THE COMMISSION.
This the 12th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb061200.01

APPENDIX A
Page 1 of 3

SCHEDULE OF RATES
for
SCIENTIFIC WATER AND SEWERAGE CORPORATION

for providing water and sewer utility service in

ALL ITS SERVICE AREAS

Onslow County, North Carolina

WATER UTILITY SERVICE:

Flat Rate Water: Lauradale Water System	
(Water produced from Scientific's wells)	
One-bedroom Apartments, Lee Garden	$ 9.60
Two-bedroom Apartments, Lauradale	$11.20
Metered Water: Lauradale Water System	
(Water produced from Scientific's wells)	
Base charge per month, zero usage	$ 4.55
Usage charge, per 1,000 gallons	$ 1.45
Metered Water: Cedar Creek, Raintree, Deerfield, and Summersill Systems	
(Water purchased from Onslow County for resale by Scientific)	
Base charge per month, zero usage	$ 8.40
Usage charge, per 1,000 gallons	$ 2.81

SEWER UTILITY SERVICE:

Flat Rate Residential Sewer	
(Sewer-only customers)	
Tanglewood/Canterbury and Maynard Manor	$20.50
Flat Rate Residential Sewer	
(Water & Sewer customers)	
Lauradale, Cedar Creek, Raintree Deerfield, and Summersill	$20.50
Flat Rate Commercial Sewer	
(Sewer-only customers with private well)	$20.50

SEWER UTILITY SERVICE (continued):

<u>Metered Rate Commercial Sewer</u>
(Sewer-only customers with metered water provided directly by Onslow County; i.e., Summersill Elementary School)

Base charge per month, zero usage	$10.00
Usage charge, per 1,000 gallons	$ 2.00

<u>Metered Rate Commercial Sewer</u>
(Water and Sewer customers with metered water provided by Scientific, i.e., Lauradale and Cedar Creek)

Base charge per month, zero usage	$10.00
Usage charge, per 1,000 gallons	$ 2.00

Connection Charge: (Residential)	Water	Sewer
Cedar Creek	$150	$150
Raintree	$300	$250
Summersill	$300	$965.43 for total of 100 connections after which the fee shall be $450
All Other Service Areas	$250	$450

<u>Connection Charge:</u>
(Commercial) $3.00 per gallon per day of design flow as determined by the Department of Environment and Natural Resources' design flow criteria.

<u>Reconnection Charge:</u> (during normal working hours)

If water service cut off by utility for good cause:	$15.00
If water service discontinued at customer's request:	$15.00

<u>Reconnection Charge:</u> (after normal working hours, and on Saturday, Sunday and holidays)

If water service cut off by utility for good cause:	$30.00
If water service discontinued at customer's request:	$15.00

WATER AND SEWER - RATES

Reconnection Charge: (Sewer-only utility service)

If sewer service is disconnected by the utility for good cause: Actual cost

(The customer must pay all delinquent bills to avoid disconnection, or to initiate a reconnection. Prior to physically disconnecting sewer service, a written statement of the estimated "Actual cost" of disconnection, plus reconnection, of the sewer collection lines will be delivered or mailed to the customer with the Cut-off Notice)

Deposits:

For a customer with no previous usage history:	$50.00
For a customer with previous usage and payment history, either requesting reconnection or a new connection after some absence as a customer:	2/12 of total estimated utility charge for ensuing 12 months, based on previous history

Bills Due:	On billing date
Bills Past Due:	15 days after billing date
Billing Frequency:	Shall be monthly for service in arrears
Finance Charges for Late Payment:	1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date

Issued in Accordance with Authority Granted by the North Carolina Utilities Commission in Docket No. W-176, Sub 30, on this the 12th day of June , 2000.

APPENDIX B
Page 1 of 2

STEPS TO BE TAKEN TO IMPROVE QUALITY OF SERVICE

1. When customers complain about service problems, service personnel or management shall check the problem at the home of the complaining customer, rather than at the home of a Company employee.

2. The Company shall maintain a customer complaint log.

3. Company personnel shall read and follow all instructions in Commission orders and applicable laws and regulations in order to eliminate any further late mailing of Notices to Customers or similar problems.

4. The Company shall maintain easily retrievable records for each year of service, with separate files for expenses related to purchased water and expenses related to produced water.

5. The Company shall keep records of utility-related expenses in such a manner that it can distinguish these expenses from those of affiliated nonregulated companies.

6. The Company shall make a concerted effort to respond to complaints of excessive chlorine in the water and shall check chlorine levels in its Lauradale system in two or more locations in distribution each week, rotating to different locations each weeks, until it is fully established that the problems with the chlorination system have been alleviated.

7. The Company shall initiate a routine and vigorous flushing program, informing customers of the expected dates and times of flushing, and installing blow-off valves in the event that thorough flushing cannot be accomplished using the available hydrants.

8. The Company shall inform the fire department that its Lauradale water system is not designed to support fire protection and that the department should not use distribution lines to fill its tanks.

9. The Company shall complete the following items and file a report on them with the Commission on or before October 18, 2000:

   a. Provide adequate and approved air-water volume controls and tank pressurization at each well site.

   b. Provide adequate and approved emergency power at each well site.

   c. Complete the sandblasting and painting of the hydropneumatic tank at well number 1.

d. Install telemetry of another type of automatic controls at well sites 1 and 2, so that either well can be run as the "primary" with the other well to come on automatically if pressure drops below accepted limits in the system.

e. As soon as possible, repair the leak at the service outlet on the tank at well site 2.

10. The Company agrees to meet with the Public Staff in April 2001 to discuss water quality issues relating to its produced water system.

11. The Company shall report to the Commission on its compliance with the regulations of the Division of Environmental Health and Division of Water Quality (DWQ) on a semiannual basis for a period of two years.

12. The Company shall investigate the financial feasibility of installing a fence around the surge tanks, drying beds, and other portions of its wastewater treatment plant (WWTP) facilities that are not currently fenced, in order to keep people, especially children, from having access to the plant.

13. The Company shall establish a uniform sludge removal program based on maintaining a level of sludge in the plant and ponds that is acceptable to DWQ, avoiding excessive accumulated solids. The Company shall purchase, if necessary, and use a sludge judge to check the sludge levels.

APPENDIX C
Page 1 of 3

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-176, SUB 30

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Scientific Water & Sewerage Corporation, 112 Scientific Lane, Jacksonville, North Carolina 28540, for Authority to Increase Rates for Water and Sewer Utility Service in All Its Service Areas in Onslow County, North Carolina	)	NOTICE TO CUSTOMERS OF NEW RATES

BY THE COMMISSION: Notice is given that the North Carolina Utilities Commission has granted a rate increase to Scientific Water & Sewerage Corporation for water and sewer utility service provided in all its service areas in North Carolina. This decision was based upon evidence presented at the public hearings held on March 14, 2000, in Jacksonville, North Carolina and on April 18, 2000, in Raleigh, North Carolina. The new rates are as follows:

WATER UTILITY SERVICE:

Flat Rate Water: Lauradale Water System
(Water produced from Scientific's wells)

One-bedroom Apartments, Lee Garden	$ 9.60
Two-bedroom Apartments, Lauradale	$11.20

Metered Water: Lauradale Water System
(Water produced from Scientific's wells)

Base charge per month, zero usage	$ 4.55
Usage charge, per 1,000 gallons	$ 1.45

Metered Water: Cedar Creek, Raintree, Deerfield, and Summersill Systems
(Water purchased from Onslow County for resale by Scientific)

Base charge per month, zero usage	$ 8.40
Usage charge, per 1,000 gallons	$ 2.81

WATER AND SEWER - RATES

SEWER UTILITY SERVICE:

<u>Flat Rate Residential Sewer</u> (Sewer-only customers) Tanglewood/Canterbury and Maynard Manor	$20.50
<u>Flat Rate Residential Sewer</u> (Water & Sewer customers) Lauradale, Cedar Creek, Raintree, Deerfield, and Summersill	$20.50
<u>Flat Rate Commercial Sewer</u> (Sewer-only customers with private well)	$20.50
<u>Metered Rate Commercial Sewer</u> (Sewer-only customers with metered water provided directly by Onslow County; i.e., Summersill Elementary School)	
Base charge per month, zero usage	$10.00
Usage charge, per 1,000 gallons	$ 2.00
<u>Metered Rate Commercial Sewer</u> (Water and Sewer customers with metered water provided by Scientific, i.e., Lauradale and Cedar Creek)	
Base charge per month, zero usage	$10.00
Usage charge, per 1,000 gallons	$ 2.00

APPENDIX C
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The Commission directed Scientific to take thirteen specified steps for the purpose of improving the quality of its service. Among these steps are the following: (1) When customers complain about service problems, service personnel or management shall check the problem at the home of the complaining customer, rather than at the home of a Company employee. (2) The Company shall make a concerted effort to respond to complaints of excessive chlorine in the water and shall check chlorine levels in its Lauradale system in two or more locations in distribution each week, rotating to different locations each week, until it is fully established that the problems with the chlorination system have been alleviated. (3) The Company shall initiate a routine and vigorous flushing program, informing customers of the expected dates and times of flushing, and installing blow-off valves in the event that thorough flushing cannot be accomplished using the available hydrants.

ISSUED BY ORDER OF THE COMMISSION.
This the 12th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

DOCKET NO. W-176, SUB 30

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Scientific Water and Sewerage Corporation, 112 Scientific Lane, Jacksonville, North Carolina 28540, for Authority to Increase Rates for Water and Sewer Utility Service in All Its Service Areas in Onslow County, North Carolina	))))))	ORDER ALLOWING RECOMMENDED ORDER TO BECOME EFFECTIVE AND FINAL

BY THE COMMISSION: On June 12, 2000, Hearing Examiner Linda Petrie Haywood issued in the above-captioned docket a Recommended Order Approving Partial Rate Increase. Scientific Water and Sewerage Corporation and the Public Staff have jointly requested that the Commission adopt the Recommended Order as a Final Order.

Based upon the foregoing, the Commission is of the opinion that the request should be granted and, therefore, adopts the Recommended Order as the Final Order of the Commission.

IT IS, THEREFORE, ORDERED that the Recommended Order entered in this docket on June 12, 2000, is hereby adopted as the Final Order of the Commission.

ISSUED BY ORDER OF THE COMMISSION.
This the 13th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb061300.01

DOCKET NO. W-1004, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Whitewood Properties, Inc., d/b/a	)	ORDER APPROVING AGREEMENT
Neuse Crossing Utilities Company -	)	AND STIPULATION, AUTHORIZING
Discontinuance of Water and Sewer	)	CONVEYANCE OF FACILITIES,
Utility Service	)	AMENDING FRANCHISE, REDUCING
	)	BOND, AND REQUIRING NOTICE

BY THE COMMISSION: Pursuant to a franchise granted by this Commission, Whitewood Properties, d/b/a Neuse Crossing Utilities Company (Whitewood or NCU), provides water and sewer utility service to approximately 560 customers in Neuse Crossing Subdivision (Neuse Crossing) and bulk wastewater treatment service to the Wake High Meadows Property Owners Association (WHM), which represents approximately 135 residents. The water utility system operated by NCU is no longer capable of rendering adequate water utility service. Installation of filtering equipment to treat the water for iron, manganese, hardness, and the drilling of new wells are needed to remedy this situation. These improvements would require substantial investment in plant and an increase in rates without the assurance of long term improvements in utility service.

On November 21, 2000, the Public Staff filed a Water and Sewer Agreement and Stipulation, seeking Commission approval for NCU to discontinue service, and transfer the water and sewer utility system serving Neuse Crossing in Wake County to the City of Raleigh (City).

The residents of Neuse Crossing are overwhelmingly in favor of receiving municipal water service from the City, and over 90% of them have signed a petition to that effect. NCU, Neuse Crossing Subdivision Homeowners Association, and the City have entered into a Water and Sewer Agreement whereby the City will build a line to connect the City water system to Neuse Crossing and will provide water and sewer utility service on certain conditions. Those conditions include the conveyance of all Neuse Crossing water distribution lines and all of the Neuse Crossing sewer collection system, except the wastewater treatment plant structures and equipment. Wells, well lots, storage tanks, and water treatment equipment will not be conveyed to the City. Upon conveyance to the City, NCU's water and sewer customers will become customers of the City. Until a sewer line is extended to Neuse Crossing, the City has contracted with NCU to operate the existing sewer utility facilities. NCU will continue to provide bulk wastewater treatment to the WHM, which represents approximately 135 residents. WHM receives its water service from Heater Utilities, Inc., and its water utility service is not affected by this action.

The City is expected to connect its sewer system to Neuse Crossing on or after December 5, 2005, and to terminate Whitewood's obligation to maintain the wastewater collection system, pump station, and wastewater treatment plant. Upon connection of the City sewer system to the Neuse Crossing sewer system, the force main from WHM must be immediately disconnected from the City sewer system and extended or connected directly to the wastewater treatment plant if Whitewood is still obligated to provide sewer utility service to WHM.

The rates currently charged to NCU customers and the City's rates are as follows:

	NCU	City of Raleigh
Water Utility Service:		
Base Charge, zero usage	$ 9.50	$ 3.51
Usage Charge, per 1,000 gals.	$ 2.88	$ 3.05
Sewer Utility Service:		
Flat Rate per month:	$35.97	$44.00
Average Combined Monthly Bill for 6,000 gallons:	$62.75	$65.35

Sewer rates for residents of Neuse Crossing will be fixed at $44 per customer for the first year through December 2001. They may be adjusted in year two based on the City's expenses in operating the system in year one, with subsequent adjustments based on the Consumer Price Index plus major repairs above general operating and maintenance expenses, and any State mandated upgrades.

The combined cost of connecting to the City water and system is $658 per connection. A $300 nutrient reduction fee will be required when the sewer system is connected to the City and the wastewater treatment plant is removed from service to Neuse Crossing.

On November 21, 2000, the Public Staff filed a copy of the Water and Sewer Agreement with the Commission. The Public Staff also filed a Stipulation between it and Whitewood. The Stipulation provides several alternatives for continued sewer utility service to WHM after Neuse Crossing is connected to the City's sewer collection system. These include Whitewood's selling or leasing the wastewater treatment plant to WHM, and continuing to operate the plant for WHM, and terminating operation of the plant if WHM has obtained an alternative source of wastewater treatment. If none of these alternatives occurs, Whitewood will consent to the appointment of an emergency operator as long as the wastewater treatment plant is required to serve WHM.

The parties to the Stipulation requested that the sewer utility rates charged to WHM be determined in the same manner as the rate for sewer service in Neuse Crossing pursuant to the Water and Sewer Agreement, subject to Commission approval. The current rate charged to WHM is $35.97 and will remain at this level through December, 2001.

The parties further requested that NCU's $200,000 bond posted with the Commission be reduced to $30,000. NCU previously filed a bond secured with a $200,000 letter of credit. Since a letter of credit can not be severed into a $30,000 part for retaining and a $170,000 part for refunding, the $200,000 letter of credit must be replaced with a $30,000 letter of credit.

This matter was brought before the Commission at its Regular Staff Conference on November 27, 2000. The Public Staff stated that it has met with members of the board of the WHM, has provided them with copies of the Water and Sewer Agreement and the Stipulation, and believes the provisions affecting WHM are acceptable to the POA.

The Public Staff recommended that the Commission issue an Order approving the Water and Sewer Agreement and the Stipulation; authorizing NCU to convey its water distribution lines and wastewater collection lines to the City; authorizing NCU to discontinue water and sewer utility service in Neuse Crossing Subdivision upon connection to the City; amending NCU's franchise to include only bulk wastewater treatment for WHM; reducing the bond; and requiring customer notice.

Based upon the foregoing and the entire record in this matter, the Commission finds and concludes that the Water and Sewer Agreement and the Stipulation are in the public interest and should be approved and the Public Staff's recommendations should be adopted.

IT IS, THEREFORE, ORDERED as follows:

1. That the Water and Sewer Agreement by and among the City of Raleigh, Whitewood Properties, Inc., d/b/a Neuse Crossing Utilities Company, and the Neuse Crossing Subdivision Homeowners Association, Inc., is hereby approved.

2. That the Stipulation entered into by the Public Staff and Whitewood is hereby approved.

3. That NCU is authorized to convey all of its water distribution lines and wastewater collection lines to the City.

4. That NCU is authorized to discontinue water and sewer utility service in Neuse Crossing, upon connection of the water and sewer utility systems to the City's utility system.

5. That NCU's franchise is hereby amended to include only bulk wastewater treatment to the WHM. An amended Certificate of Public Convenience and Necessity is attached as Appendix B.

6. That NCU's bond requirement is hereby reduced from $200,000 to $30,000. Upon Commission approval of a replacement bond, surety and commitment letter, a further Order shall be issued releasing the $200,000 bond and surety.

7. That NCU shall complete one of the attached bonds (Appendices A-1, A-2, or A-3) and <u>return said bond to the Commission</u>. If the bond selected is Appendix A-1, the Applicant shall deposit the appropriate surety in the amount of $30,000 with Branch Banking & Trust Company, Attention: Julia Percivall, Trust Administrator, 3605 Glenwood Avenue, Raleigh, North Carolina 27612. If the bond selected is Appendix A-2 or Appendix A-3, the Applicant shall file the appropriate surety and commitment letter (see Filing Requirements for Bonding, Appendix A-4) with the Commission.

8. That the rates for bulk wastewater treatment for WHM shall remain the same as those currently approved for WHM until further Order of the Commission. The approved rates are shown on the Schedule of Rates, attached as Appendix C.

9. That NCU shall provide written notification of the transfer to the Commission within ten days after the transfer has been completed.

10. That a copy of the Notice to Customers, attached as Appendix D, shall mailed with sufficient postage or hand delivered by NCU to all customers in Neuse Crossing and to WHM, no later than 15 days after the date of this Order; and that NCU shall submit to the Commission the attached Certificate of Service properly signed and notarized no later than 20 days after the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the __1st__ day of __December__, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rb112700.05

NCUC DOCKET NO. W-1004, SUB 7 APPENDIX A-1

BOND

______________________________ of ______________________,
(Name of Utility) (City)
______________________________, as Principal, is bound to the State of North
(State)
Carolina in the sum of ____
______________________________ Dollars ($______________)
and for which payment to be made, the Principal by this bond binds himself, his, and its successors and assigns.

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water or sewer utility ______________________
____
(describe utility)
____ and,

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in G.S. § 62-110.3, and Commission Rules R7-37 and/or R10-24, and,

WATER AND SEWER - SALE/TRANSFER

WHEREAS, the Principal has delivered to the Commission ____________________

____

(description of security)

with an endorsement as required by the Commission, and,

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. §62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, this bond shall become effective on the date executed by the Principal, and shall continue from year to year unless the obligations of the Principal under this bond are expressly released by the Commission in writing.

NOW THEREFORE, the Principal consents to the conditions of this Bond and agrees to be bound by them.

This the ____________ day of ____________________ 20____.

____

(Name)

NCUC DOCKET NO. W-1004, SUB 7 APPENDIX A-2

BOND

__________________________________ of ____________________________,

(Name of Utility) (City)

________________________________, as Principal, is bound to the State of North

(State)

Carolina in the sum of ____

______________ Dollars ($____________) and for which payment to be made, the Principal by this bond binds ____________ and __________ successors and assigns.

(himself)(itself) (his)(its)

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water and/or sewer utility ________________

____

(describe utility)

____ and,

WATER AND SEWER - SALE/TRANSFER

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water and/or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in G.S. § 62-110.3, and Commission Rules R7-37 and/or R10-24, and

WHEREAS, the Principal has delivered to the Commission an Irrevocable Letter of Credit from

____

(Name of Bank)

with an endorsement as required by the Commission, and,

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. 62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, if for any reason, the Irrevocable Letter of Credit is not to be renewed upon its expiration, the Bank shall, at least 60 days prior to the expiration date of the Irrevocable Letter of Credit, provide written notification by means of certified mail, return receipt requested, to the Chief Clerk of the North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325, that the Irrevocable Letter of Credit will not be renewed beyond the then current maturity date for an additional period, and

WHEREAS, failure to renew the Irrevocable Letter of Credit shall, without the necessity of the Commission being required to hold a hearing or appoint an emergency operator, allow the Commission to convert the Irrevocable Letter of Credit to cash and deposit said cash proceeds with the administrator of the Commission's bonding program, and

WHEREAS, said cash proceeds from the converted Irrevocable Letter of Credit shall be used to post a cash bond on behalf of the Principal pursuant to North Carolina Utilities Commission Rules R7-37(e) and/or R10-24(e), and

WHEREAS, this bond shall become effective on the date executed by the Principal, and shall continue from year to year unless the obligations of the Principal under this bond are expressly released by the Commission in writing.

NOW THEREFORE, the Principal consents to the conditions of this Bond and agrees to be bound by them.

This the ____________ day of ____________________ 20___.

____

(Principal)

BY: ____________________________

WATER AND SEWER - SALE/TRANSFER

NCUC DOCKET NO. W-1004, SUB 7 APPENDIX A-3

BOND

____________________ of ____________________, ____________________,
(Name of Utility) (City) (State)
as Principal, and ____________________, a corporation created and existing under
(Name of Surety)
the laws of ____________________, as Surety (hereinafter called "Surety"), are
(State)
bound to the State of North Carolina in the sum of _______________ Dollars ($__________) and for which payment to be made, the Principal and Surety by this bond bind themselves and their successors and assigns.

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water and/or sewer utility ____________________
____
(Describe utility)
____ and,

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water and/or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in § 62-110.3, and Commission Rules R7-37 and/or R10-24, and

WHEREAS, the Principal and Surety have delivered to the Commission a Surety Bond with an endorsement as required by the Commission, and

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. § 62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, if for any reason, the Surety Bond is not to be renewed upon its expiration, the Surety shall, at least 60 days prior to the expiration date of the Surety Bond, provide written notification by means of certified mail, return receipt requested, to the Chief Clerk of the North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325, that the Surety Bond will not be renewed beyond the then current maturity date for an additional period, and

WHEREAS, failure to renew the Surety Bond shall, without the necessity of the Commission being required to hold a hearing or appoint an emergency operator, allow the Commission to convert the Surety Bond to cash and deposit said cash proceeds with the administrator of the Commission's bonding program, and

WHEREAS, said cash proceeds from the converted Surety Bond shall be used to post a cash bond on behalf of the Principal pursuant to North Carolina Utilities Commission Rules R7-37(e) and/or R10-24(e), and

WHEREAS, this bond shall become effective on the date executed by the Principal, for an initial _________ year term, and shall be automatically renewed for additional ________
(No. of Years) (No. of Years)
year terms, unless the obligations of the principal under this bond are expressly released by the Commission in writing.

NOW, THEREFORE, the Principal and Surety consent to the conditions of this bond and agree to be bound by them.

This the _____________ day of _________________________ 20____.

____
(Principal)

BY: ____________________________

____
(Corporate Surety)

BY: ____________________________

APPENDIX A-4

Filing Requirements for Bonding

Type of Bond

	Cash / Certificate of Deposit Bond	Irrevocable Letter of Credit Bond	Commercial Surety Bond
Bond A-1	X [1/]		
Bond A-2		X [1/]	
Bond A-3			X [1/]
Cash / CD	X [2/]		
Letter of Credit		X [3/]	
Surety Bond			X [4/]
Commitment Letter		X [5/]	X [5/]

WATER AND SEWER - SALE/TRANSFER

(To be filed with the Chief Clerk - where applicable)

1/ Copy of the Original Bond - Preferably on the forms prescribed in the Commission Order dated July 19, 1994, in Docket No. W-100, Sub 5 (Bond forms are usually attached to Order Requiring Bond for each specific franchise).

2/ Notification from Branch Banking & Trust Company (BB&T is the Commission's custodian for bond sureties) that cash or CD surety has been received for a given bond.

3/ Copy of Original Non-Perpetual Irrevocable Letter of Credit [Letter of Credit must comply with Rule R7-37 New Section (e)(4) as adopted by the Commission in its Order dated July 19, 1994, In Docket No. W-100, Sub 5.]

4/ Copy of Original Non-Perpetual Commercial Surety Bond [See No. 3 above]

5/ Copy of <u>Commitment Letter</u>

(a) This letter need only contain a statement indicating whether the utility is required to pledge utility company assets (collateral and type) to secure the bond or irrevocable letter of credit; and

(b) The premium paid by the utility (if any) to the bank and/or lending institution for their accommodation of the borrower.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

APPENDIX B

DOCKET NO. W-1004, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

WHITEWOOD PROPERTIES, INC.,

d/b/a NEUSE CROSSING UTILITIES COMPANY

is granted this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

to provide bulk wastewater treatment service

to

WAKE HIGH MEADOWS PROPERTY OWNERS ASSOCIATION

Wake County, North Carolina

subject to any orders, rules, regulations,
and conditions now or hereafter lawfully made
by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of December, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

APPENDIX C

SCHEDULE OF RATES

for

WHITEWOOD PROPERTIES, INC.,

d/b/a NEUSE CROSSING UTILITIES COMPANY

for providing bulk wastewater treatment service to

WAKE HIGH MEADOWS PROPERTY OWNERS ASSOCIATION

Wake County, North Carolina

Sewer Utility Service:	$35.97 per connection
Bills Due:	On billing date
Bills Past Due:	15 days after billing date
Billing Frequency:	Shall be monthly for service in arrears
Finance Charges for Late Payment:	1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date.

Issued in Accordance with Authority Granted by the North Carolina Utilities Commission in Docket No. W-1004, Sub 7, on this the 1st day of December, 2000.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

APPENDIX D

DOCKET NO. W-1004, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Whitewood Properties, Inc., d/b/a Neuse Crossing	)	
Utilities Company - Discontinuance of Water and	)	NOTICE TO CUSTOMERS
Sewer Utility Service	)	

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission has issued an Order approving a Water and Sewer Agreement by and among the City of Raleigh (City), Whitewood Properties, Inc., d/b/a Neuse Crossing Utilities Company (NCU), and the Neuse Crossing Homeowners Association, whereby the City will connect its water system to Neuse Crossing Subdivision and provide water and sewer service to Neuse Crossing Subdivision. The City will acquire all of the NCU water distribution lines and sewer system except the wastewater treatment plant structures and equipment, and NCU's water and sewer customers will become customers of the City. NCU will continue to maintain the Neuse Crossing Subdivision wastewater collection and treatment system under contract with the City until City sewer service is available to Neuse Crossing Subdivision.

NCU will also continue to provide bulk wastewater treatment service to the Wake High Meadows Property Owners Association under its public utility franchise. Upon connection of the City sewer system to the NCU sewer system, the force main from Wake High Meadows Subdivision must be disconnected from the City sewer system and extended or directly connected to the wastewater treatment plant if NCU is still obligated to provide sewer utility service to the Wake High Meadows Property Owners Association. NCU will have the option of selling or leasing the wastewater treatment plant to the Wake High Meadows Property Owners Association for continued operation or terminating operation of the plant if the Wake High Meadows Property Owners Association has obtained an alternative source of wastewater treatment. If none of these options is feasible, Whitewood will consent to the appointment of an emergency operator by the Commission.

Rates for City water service will be the standard outside City rates, and are as follows:

Water Utility Service:

Base charge, no usage	\$ 3.51
Usage charge, per 1,000 gals.	\$ 3.05

Initial rates for City sewer service will be fixed at \$44 per customer for the first year through December 2001. The rates may be adjusted in year two based on expenses in operating the system in year one, with subsequent adjustments based on the Consumer Price Index plus major repairs above general operating and maintenance expenses, and any State mandated upgrades.

The current rate for sewer utility service to the Wake High Meadows Property Owners Association will remain at $35.97 for the first year through December 2001, subject to adjustment in the same manner as rates for sewer service in Neuse Crossing and as approved by the Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the __1st__ day of _December_, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

DOCKET NO. W-1004, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Whitewood Properties, Inc., d/b/a Neuse Crossing Utilities)
Company - Discontinuance of Water and Sewer Utility) ERRATA ORDER
Service)

BY THE CHAIRMAN: On December 1, 2000, the Commission issued an Order Approving Agreement and Stipulation, Authorizing Conveyance of Facilities, Amending Franchise, Reducing Bond, and Requiring Notice in the above-captioned docket. It has come to the attention of the Commission that the Notice to Customers (Appendix D) does not adequately reflect the language of the stipulation between the parties.

The Chairman finds good cause to order revision of the Notice to Customers.

IT IS, THEREFORE, ORDERED as follows:

1. That the amended Appendix D, attached hereto, shall be substituted for the Appendix D attached to the Order issued on December 1, 2000, in this docket.

2. That, except as amended herein, the Order of December 1, 2000, shall remain if full force and effect.

ISSUED BY ORDER OF THE CHAIRMAN.
This the __15th__ day of _December_, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rb121500.01

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

APPENDIX D

DOCKET NO. W-1004, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Whitewood Properties, Inc., d/b/a Neuse Crossing Utilities Company - Discontinuance of Water and Sewer Utility Service	)))	NOTICE TO CUSTOMERS

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission has issued an Order approving a Water and Sewer Agreement by and among the City of Raleigh (City), Whitewood Properties, Inc., d/b/a Neuse Crossing Utilities Company (NCU), and the Neuse Crossing Homeowners Association, whereby the City will connect its water system to Neuse Crossing Subdivision and provide water and sewer service to Neuse Crossing Subdivision. The City will acquire all of the NCU water distribution lines and sewer system except the wastewater treatment plant structures and equipment, and NCU's water and sewer customers will become customers of the City. NCU will continue to maintain the Neuse Crossing Subdivision wastewater collection and treatment system under contract with the City until City sewer service is available to Neuse Crossing Subdivision.

NCU will also continue to provide bulk wastewater treatment service to the Wake High Meadows Property Owners Association (WHM POA) under its public utility franchise. The Commission has approved the Stipulation entered into by the Public Staff and NCU. The Stipulation reads, in part, as follows:

1. That, upon the conveyance of the Neuse Crossing water and sewer systems to the City, the public convenience and necessity will no longer require the provision of water and sewer utility service by Whitewood in Neuse Crossing;

2. That Whitewood should have the option of (1) conveying the wastewater treatment plant to the WHM POA for continued operation, with the plant being removed from the City's property or operating in its current location subject to subsequent agreement between the City and WHM POA, (2) leasing the wastewater treatment plant to the WHM POA for continued operation, with the plant being removed from the City's property or operating in its current location subject to subsequent agreement between the City and WHM POA, or (3) terminating operation of the wastewater treatment plant and deactivating the wastewater treatment plant if the WHM POA has obtained an alternative source of wastewater treatment;

3. That if the WHM POA does not agree to purchase or to lease the wastewater treatment plant for continued operation and the WHM POA has not obtained an alternative source of wastewater treatment, Whitewood will consent to the appointment of an emergency operator as long as the wastewater treatment plant is required to serve the WHM POA;

4. That, pending connection of the City sewer system to Neuse Crossing, the rate for sewer utility service to the WHM POA should be determined in the same manner as the rate for sewer service in Neuse Crossing;

5. That the current rate for sewer utility service to the WHM POA should remain at $35.97 for the first year through December 2001, subject to adjustment in year two based on Whitewood's expenses in operating the system in year one, with subsequent adjustments based in the CPI plus major repairs above general O & M and any State mandated upgrades as allowed by the City and approved by the Commission.

6. That, upon execution of the foregoing agreement, Whitewood and the Public Staff will request the Commission to enter an order as follows:

a. approving the Water and Sewer Agreement by and among the City, Whitewood, and the Neuse Crossing Subdivision Homeowners Association, Inc.;

b. authorizing Whitewood to convey all of its water distribution lines and wastewater collection lines to the City;

c. authorizing Whitewood to discontinue water and sewer utility service in Neuse Crossing subdivision;

d. amending Whitewood's franchise to include only bulk wastewater treatment to the WHM POA and lowering NCU's bond requirement from $200,000 to $30,000;

e. stating that, within 90 days before the connection of the City sewer system to the Neuse Crossing sewer system, Whitewood will have the option of (a) conveying the wastewater treatment plant to the WHM POA for continued operation, at a price subject to Commission approval, (b) leasing the wastewater treatment plant to the WHM POA for continued operation for $1.00 per year, (c) continuing to operate the wastewater treatment for the WHM POA, or (d) terminating operation of the wastewater treatment plant and deactivating the wastewater treatment plant, in accordance with its contract with the City, provided that WHM POA has obtained an alternative source of wastewater treatment, and, with options (a), (b), and (d), obtaining the cancellation of its franchise to serve the WHM POA;

f. stating that, if Whitewood does not continue to operate the wastewater treatment for the WHM POA and the WHM.POA does not purchase or lease the wastewater treatment plant for continued operation and if the WHM POA cannot obtain an alternative source of wastewater treatment, Whitewood will consent to the appointment of an emergency operator as long as the wastewater treatment plant is required to serve the WHM POA;

g. providing that, pending the cancellation of Whitewood's franchise, the rates for sewer utility service to the WHM POA will be determined as described in paragraph 5, above, until such time as the force main is disconnected from the City's sewer system; and

h. stating that nothing contained in this stipulation or the Order is intended to be or shall be construed as an agreement by Whitewood to amend its contract with WHM POA or its agreement with the City of Raleigh.

Rates for City water service will be the standard outside City rates, and are as follows:

<u>Water Utility Service</u>:

Base charge, no usage	$ 3.51
Usage charge, per 1,000 gallons	$ 3.05

Initial rates for City sewer service will be fixed at $44 per customer for the first year through December 2001. The rates may be adjusted in year two based on expenses in operating the system in year one, with subsequent adjustments based on the Consumer Price Index plus major repairs above general operating and maintenance expenses, and any State mandated upgrades.

The current rate for sewer utility service to the Wake High Meadows Property Owners Association will remain at $35.97 for the first year through December 2001, subject to adjustment in the same manner as rates for sewer service in Neuse Crossing and as approved by the Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 15th day of December, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

DOCKET NO. W-1146

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Total Environmental Solutions, Inc., 2028 Coteau Road, Houma, Louisiana 70364, for Authority to Transfer Assets and Franchise of Riviera Utilities of North Carolina, Inc. in Lake Royale Subdivision in Franklin and Nash Counties, and for Approval of Rates	)	RECOMMENDED ORDER APPROVING TRANSFER

HEARD IN: Lodge at Lake Royale Subdivision, State Road 1611, Bunn, North Carolina on October 16, 2000

BEFORE: Larry S. Height, Hearing Examiner

APPEARANCES:

For the Applicant, Total Environmental Solutions, Inc.:

Edward S. Finley, Jr., Hunton & Williams, Post Office Box 109, Raleigh, North Carolina 27602

For the Using and Consuming Public:

Robert B. Cauthen, Jr. and Lucy E. Edmonson, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY HEIGHT, HEARING EXAMINER: On August 14, 2000, Total Environmental Solutions, Inc. (TESI or Applicant) filed an application with the Commission seeking authority to transfer the franchise for water utility service in Lake Royale Subdivision in Franklin and Nash Counties, North Carolina, from Riviera Utilities of North Carolina, Inc. (Riviera). TESI is seeking to purchase these assets through the United States Bankruptcy Court for the Middle District of Louisiana. In its application, TESI seeks an expedited disposition in order to comply with the timetable and orders of the Bankruptcy Court.

The Applicant also has requested a continuation of the general rate case currently in progress by Riviera in Docket No. W-665, Sub 9. By order issued June 23, 2000, the Commission approved interim rates for Riviera in that docket.

The docket came before the Commission at Agenda Conference on September 25, 2000. The Public Staff indicated that it supports the bifurcation of the rate case and transfer proceeding and requested that the rate case be continued until such time as the transfer proceeding and the resolution of the bankruptcy is completed. The Public Staff also recommended that the rates approved as interim rates on June 23, 2000, continue in effect until the rate case proceeding is completed. TESI has agreed to waive its right to put the proposed rates into effect until the Commission has ruled on the application for the rate increase and to assume any liability for refunds associated with the interim rates.

On October 4, 2000, the Commission issued an order bifurcating the matter, scheduling the transfer proceeding for hearing on an expedited basis, continuing the interim rates until further order, scheduling the matter for hearing and requiring customer notice.

Paul E. Maeder, General Manager and Secretary of TESI, testified for the Applicant at the October 16, 2000 hearing.

Customers of Riviera testifying were Bill Wallace, Bob Winter, Tony Antonelli, Greg Lamm and Garland Shepherd

Based on the testimony and exhibits received into evidence and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. TESI is a Louisiana, for profit utility corporation organized and existing pursuant to the laws of the State of Louisiana that is authorized to do business in North Carolina.

2. TESI is a wholly-owned subsidiary of South Louisiana Electric Cooperative Association (SLECA). SLECA is a rural electric cooperative utility located in Houma, Louisiana and has provided electric services for many years.

3. SLECA has formed TESI to acquire water and sewer assets.

4. TESI is pursuing an attempt to acquire all of the assets and franchises of Johnson Properties, Inc. (Johnson), its subsidiaries and related entities in Louisiana, Mississippi, South Carolina, Pennsylvania, and Tennessee, as well as North Carolina.

5. The systems sought to be acquired by TESI include Riviera Heights Utilities Company and Riviera Utilities of North Carolina, Inc., located in Franklin and Nash Counties, North Carolina. Each of these entities is owned by Eastern Utilities, Inc. (Eastern). Eastern is a sister company of Johnson.

6. On March 12, 1999, Johnson filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Middle District of Louisiana. The Disclosure Statement filed by the Bankruptcy Trustee details many instances of gross financial and operational mismanagement of the

companies. After assuming control, the Bankruptcy Trustee had to establish accounting and financial records of the systems and environmental testing and reporting procedures.

7. While Eastern is technically not in bankruptcy at this time, since Eastern and Johnson were managed by former management as one single entity with corporate forms being ignored, the Bankruptcy Court substantively consolidated or otherwise merged all of the assets and operations of Johnson and Eastern. Therefore, Eastern and its subsidiaries are within the jurisdiction of the Bankruptcy Court, giving the Bankruptcy Court authority over the assets of Eastern and its subsidiaries.

8. TESI has submitted an offer to the Trustee, and the offer has been accepted and incorporated into the proposed Chapter 11 Reorganization Plan. TESI has been confirmed as a qualified purchaser as defined in the Plan of Reorganization. TESI was selected among potential bidders because it presented the most comprehensive plan for operating the assets and was deemed most likely to obtain approval from the state regulatory agencies.

9. Many of the sewage and water systems owned by Johnson and its affiliates, including Eastern and Riviera Systems, are in poor shape and require significant repairs in order to bring the systems into compliance with the Clean Water Act and other EPA and state environmental quality regulations.

10. The Lake Royale water system has a history of inadequate quality and quality and failure to meet regulatory requirements. The system has been largely unmetered. Many of the problems have been reduced due to the purchase of water from Franklin County, a change in operations made possible while the system was under the control of the Bankruptcy Trustee. Replacement of the former owner with a new, well-capitalized one will reduce the risk that such problems will arise in the future. A new, well-capitalized owner can also see that the meter installation program continues.

11. SLECA and TESI have the financing in place to purchase the facilities and to perform any requisite repairs.

12. SLECA and TESI are presently in negotiations with the EPA and many of the state environmental quality agencies in order to negotiate a compliance schedule and time limitations for SLECA and TESI to bring these facilities into compliance.

13. Riviera is a corporation organized under the laws of North Carolina and is authorized to do business in North Carolina. Riviera is the franchise holder of a water service area in Franklin and Nash Counties which it has held since 1978.

14. The Riviera system currently serves a total of approximately 1,346 water and 3,841 availability customers.

15. TESI is financially and operationally fit to provide water service within the service area.

16. TESI has not requested an increase in rates as a result of its transfer but has requested the right to continue the Riviera proceeding now in progress.

17. TESI has agreed to be responsible for any refund if the interim rates now in effect are found to be unreasonable. Such refunds are to be made from the date the rates were first imposed.

18. The parties agree that TESI's rate base after acquisition will be the lesser of the net original cost of the seller or TESI's purchase price, and that TESI will not seek, now or in the future, rate base treatment for a debit plan acquisition adjustment. TESI shall not be precluded from attempting to document and prove the existence of rate base at the time of transfer.

CONCLUSIONS OF LAW

The testimony and evidence presented in this docket indicate that TESI is a suitable purchaser of the Riviera assets. TESI and its affiliate, SLECA, have a history of operating as a professional, competently-operated, well-capitalized utility. TESI has obtained a source of funds to make capital improvements and repairs of the Johnson systems. These systems, including Riviera, have a history of poor performance and service inadequacies. There is a record of consumer dissatisfaction. Johnson presently is in bankruptcy, and, clearly, a transfer to a new owner is in the public interest. The Commission has adopted policies encouraging the transfer of thinly-capitalized utilities to utilities like SLECA/TESI. TESI has not conditioned its request to obtain the franchise for Lake Royale on Commission inclusion of the purchase price in rate base. The Commission concludes that TESI possesses the financial and operational expertise and wherewithal to receive and operate the franchise and assets of the Lake Royale water system. The transfer to TESI is justified by the public convenience and necessity. Therefore, the Commission approves TESI's request to obtain the franchise and assets.

IT IS, THEREFORE, ORDERED as follows:

1. That the transfer of the franchise to provide water utility service in the Lake Royale Subdivision from Riviera Utilities of North Carolina, Inc. to TESI is approved, contingent upon TESI complying with decretal paragraph 2 below.

2. That TESI shall complete one of the attached bonds (Appendices A-1, A-2, or A-3) and <u>return said bond to the Commission</u>. If the bond selected is Appendix A-1, the Applicant shall deposit the appropriate surety in the amount of $20,000.00 with Branch Banking and Trust Company, Attention: Julia Percival, Trust Administrator, 3605 Glenwood Avenue, Raleigh, North Carolina 27612. If the bond selected is Appendix A-2, or Appendix A-3, the Applicant shall file the appropriate surety and commitment letter (see Filing Requirements for Bonding, Appendix A-4) with the Commission.

3. That the transfer will be at the current rates, which will remain the interim rates approved by order dated June 23, 2000, in Docket No. W-665, Sub 9.

4. That TESI shall be responsible for any refund if the interim rates are found to be unreasonable and the refund will be made from the date rates were first implemented.

5. That TESI's rate base after acquisition shall be the lesser of the net original cost of the seller or TESI's purchase price.

6. That Appendix B shall constitute the Certificate of Public Convenience and Necessity.

7. That the Schedule of Rates, attached as Appendix C, is approved and deemed to be filed with the Commission pursuant to N.C. Gen. Stat. § 62-138. Such Schedule of Rates is hereby authorized to become effective on an interim basis on and after the date of this Order.

8. That the Notice to Customers attached as Appendix D be mailed with sufficient postage or hand-delivered by the Applicant to all customers in the Lake Royale service area, not later than 15 days after the date of this Order, and the Applicant submit to the Commission the attached Certificate of Service properly signed and notarized no later than 30 days after the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the 19th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

cz101800.07

NCUC DOCKET NO. W-1146 APPENDIX A-1

BOND

_________________________ of _________________________,
(Name of Utility) (City)
_________________________, as Principal, is bound to the State of North
(State)
Carolina in the sum of _________________________
_________________________ Dollars ($_____________)
and for which payment to be made, the Principal by this bond binds himself, his, and its successors and assigns.

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water or sewer utility _________________________
_________________________.
(describe utility)
_________________________ and,

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in G.S. § 62-110.3, and Commission Rules R7-37 and/or R10-24, and,

WATER AND SEWER - SALE/TRANSFER

WHEREAS, the Principal has delivered to the Commission ______________________

____
(description of security)
with an endorsement as required by the Commission, and,

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. §62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, this bond shall become effective on the date executed by the Principal, and shall continue from year to year unless the obligations of the Principal under this bond are expressly released by the Commission in writing.

NOW THEREFORE, the Principal consents to the conditions of this Bond and agrees to be bound by them.

This the ____________ day of ____________________ 2000.

____
(Name)

NCUC DOCKET NO. W-1146 APPENDIX A-2

BOND

______________________________ of ______________________________,
(Name of Utility) (City)
______________________________, as Principal, is bound to the State of North
(State)
Carolina in the sum of ______________________________
______________ Dollars ($____________) and for which payment to be made, the Principal by this bond binds ____________ and ____________ successors and assigns.
(himself)(itself) (his)(its)

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water and/or sewer utility ______________

____
(describe utility)
____ and,

WATER AND SEWER - SALE/TRANSFER

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water and/or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in G.S. § 62-110.3, and Commission Rules R7-37 and/or R10-24, and

WHEREAS, the Principal has delivered to the Commission an Irrevocable Letter of Credit from

____
(Name of Bank)

with an endorsement as required by the Commission, and,

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. 62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, if for any reason, the Irrevocable Letter of Credit is not to be renewed upon its expiration, the Bank shall, at least 60 days prior to the expiration date of the Irrevocable Letter of Credit, provide written notification by means of certified mail, return receipt requested, to the Chief Clerk of the North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325 that the Irrevocable Letter of Credit will not be renewed beyond the then current maturity date for an additional period, and WHEREAS, failure to renew the Irrevocable Letter of Credit shall, without the necessity of the Commission being required to hold a hearing or appoint an emergency operator, allow the Commission to convert the Irrevocable Letter of Credit to cash and deposit said cash proceeds with the administrator of the Commission's bonding program, and

WHEREAS, said cash proceeds from the converted Irrevocable Letter of Credit shall be used to post a cash bond on behalf of the Principal pursuant to North Carolina Utilities Commission Rules R7-37(e) and/or R10-24(e), and

WHEREAS, this bond shall become effective on the date executed by the Principal, and shall continue from year to year unless the obligations of the Principal under this bond are expressly released by the Commission in writing.

NOW THEREFORE, the Principal consents to the conditions of this Bond and agrees to be bound by them.

This the ____________ day of ____________________ 2000.

____
(Principal)

BY: ______________________________

WATER AND SEWER - SALE/TRANSFER

NCUC DOCKET NO. W-1146 APPENDIX A-3

BOND

_______________ of _______________, _______________,
(Name of Utility) (City) (State)
as Principal, and _______________, a corporation created and existing under
(Name of Surety)
the laws of _______________, as Surety (hereinafter called "Surety"), are
(State)
bound to the State of North Carolina in the sum of _______________ Dollars ($_________) and for which payment to be made, the Principal and Surety by this bond bind themselves and their successors and assigns.

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water and/or sewer utility _______________

____
(Describe utility)
____ and,

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water and/or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in § 62-110.3, and Commission Rules R7-37 and/or R10-24, and

WHEREAS, the Principal and Surety have delivered to the Commission a Surety Bond with an endorsement as required by the Commission, and

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. § 62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, if for any reason, the Surety Bond is not to be renewed upon its expiration, the Surety shall, at least 60 days prior to the expiration date of the Surety Bond, provide written notification by means of certified mail, return receipt requested, to the Chief Clerk of the North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325, that the Surety Bond will not be renewed beyond the then current maturity date for an additional period, and

WHEREAS, failure to renew the Surety Bond shall, without the necessity of the Commission being required to hold a hearing or appoint an emergency operator, allow the Commission to convert the Surety Bond to cash and deposit said cash proceeds with the administrator of the Commission's bonding program, and

WATER AND SEWER - SALE/TRANSFER

WHEREAS, said cash proceeds from the converted Surety Bond shall be used to post a cash bond on behalf of the Principal pursuant to North Carolina Utilities Commission Rules R7-37(e) and/or R10-24(e), and

WHEREAS, this bond shall become effective on the date executed by the Principal, for an initial __________ year term, and shall be automatically renewed for additional ________
(No. of Years) (No. of Years)
year terms, unless the obligations of the principal under this bond are expressly released by the Commission in writing.

NOW, THEREFORE, the Principal and Surety consent to the conditions of this bond and agree to be bound by them.

This the ______________ day of ___________________________ 2000.

____
(Principal)

BY: __________________________________

____
(Corporate Surety)

BY: __________________________________

APPENDIX A-4

Filing Requirements for Bonding

Type of Bond

	Cash / Certificate of Deposit Bond	Irrevocable Letter of Credit Bond	Commercial Surety Bond
Bond A-1	X 1/		
Bond A-2		X 1/	
Bond A-3			X 1/
Cash / CD	X 2/		
Letter of Credit		X 3/	
Surety Bond			X 4/
Commitment Letter		X 5/	X 5/

WATER AND SEWER - SALE/TRANSFER

(To be filed with the Chief Clerk - where applicable)

1/ Copy of the Original Bond - Preferably on the forms prescribed in the Commission Order dated July 19, 1994, in Docket No. W-100, Sub 5 (Bond forms are usually attached to Order Requiring Bond for each specific franchise).

2/ Notification from Branch Banking & Trust Company (BB&T is the Commission's custodian for bond sureties) that cash or CD surety has been received for a given bond.

3/ Copy of Original Non-Perpetual Irrevocable Letter of Credit [Letter of Credit must comply with Rule R7-37 New Section (e)(4) as adopted by the Commission in its Order dated July 19, 1994, In Docket No. W-100, Sub 5.]

4/ Copy of Original Non-Perpetual Commercial Surety Bond [See No. 3 above]

5/ Copy of <u>Commitment Letter</u>

(a) This letter need only contain a statement indicating whether the utility is required to pledge utility company assets (collateral and type) to secure the bond or irrevocable letter of credit; and

(b) The premium paid by the utility (if any) to the bank and/or lending institution for their accommodation of the borrower.

APPENDIX B

DOCKET NO. W-1146

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

TOTAL ENVIRONMENTAL SOLUTIONS, INC.

is granted this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

to provide water utility service

in

LAKE ROYALE SERVICE AREA

Franklin and Nash Counties

subject to any orders, rules, regulations,
and conditions now or hereafter lawfully made
by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 19th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

APPENDIX C

SCHEDULE OF INTERIM RATES

for

TOTAL ENVIRONMENTAL SOLUTIONS, INC.

for providing water utility service in

LAKE ROYALE SUBDIVISION

Franklin and Nash Counties, North Carolina

Flat Rates (Unmetered Water Service):

Residential/Homes & Full-time Campers	\$ 37.40
Recreational/Part-time Campers	\$ 21.40

Metered Rates (Currently Metered Water Service):

Goethermal Customers	
Base Charge, zero usage	\$ 17.40
Usage Charge, per 1,000 gallons	\$ 4.00
POA/Commercial Customers (All meter sizes)	
Base Charge, zero usage	\$ 17.40
Usage Charge, per 1,000 gallons	\$ 4.00

Metered Rates (Newly Metered Water Service):

Residential (Full-time and Part-time)	
Base Charge, zero usage	\$ 17.40
Usage Charge, per 1,000 gallons	\$ 4.00

Connection Charge: \$300.00

Reconnection Charge:

If water service cut off by utility for good cause:	\$ 15.00
If water service discontinued at customer's request:	\$ 15.00

Bills Due:	On billing date
Bills Past Due:	25 days after billing date
Billing Frequency:	Shall be monthly for service in arrears, except Availability Charge will be billed once per year.
Finance Charges for Late Payment:	1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date.
Availability Charge (All non-users):	$ 24.00 per year

Issued in Accordance with Authority Granted by the North Carolina Utilities Commission in Docket No. W-1146, Sub 0, on this the 19th day of October, 2000.

APPENDIX D

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-1146

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Total Environmental Solutions, Inc., 2028 Coteau Road, Houma, Louisiana 70364, for Authority to Transfer Assets and Franchise of Riviera Utilities of North Carolina, Inc. in Lake Royale Subdivision in Franklin and Nash Counties, and for Approval of Rates.	)	NOTICE TO CUSTOMERS

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission has approved the transfer of the Lake Royale Service Area water system in Franklin and Nash Counties, North Carolina, from Riviera Utilities of North Carolina, Inc. to Total Environmental Solutions, Inc. and has approved the following rates for Total Environmental Solutions, Inc. for providing sewer utility service in the Lake Royale Service Area:

		Interim Rates
Flat Rates (Unmetered Water Service):		
Residential/Homes & Full-time Campers	$37.40	
Recreational/Part-time Campers		$21.40
Metered Rates (Currently Metered Water Service):		
Geothermal Customers		
Base Charge, zero usage		$17.40
Usage Charge, per 1,000 gallons	$ 4.00	
POA/Commercial Customers (All meter sizes)		
Base Charge, zero usage		$17.40
Usage Charge, per 1,000 gallons	$ 4.00	
Metered Rates (Newly Metered Water Service):		
Residential (Full-time and Part-time)		
Base Charge, zero usage		$17.40
Usage Charge, per 1,000 gallons	$ 4.00	

The above rates are the same rates approved for Riviera Utilities of North Carolina, Inc.

ISSUED BY ORDER OF THE COMMISSION.
This the 19th day of October, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

DOCKET NO. W-1000, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Petition of Utilities, Inc., for Transfer of the Certificate of Public Convenience and Necessity for Providing Sewer Utility Service on North Topsail Island and Adjacent Mainland Areas in Onslow County from North Topsail Water and Sewer, Inc., and for Temporary Operating Authority) ORDER APPROVING TRANSFER AND DENYING ACQUISITION ADJUSTMENT

WATER AND SEWER - SALE/TRANSFER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on September 30, 1999, at 9:30 a.m.; and North Topsail Beach Town Hall, North Topsail Beach, North Carolina, on October 12, 1999, at 7:00 p.m.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; and Commissioners Ralph A. Hunt, Judy Hunt, William R. Pittman, and J. Richard Conder

APPEARANCES:

For Utilities, Inc.:

Edward S. Finley, Jr., Hunton & Williams, Attorneys at Law, Post Office Box 109, Raleigh, North Carolina 27602

For Onslow County:

M. Gray Styers, Jr., and Benjamin R. Kuhn, Kilpatrick Stockton LLP, Attorneys at Law, 3737 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612

For the Using and Consuming Public:

James D. Little, Staff Attorney, Public Staff - North Carolina Utilities Commission, Post Office Box 29520, Raleigh, North Carolina 27626-0520

BY THE COMMISSION: On June 23, 1999, Utilities, Inc. (UI), filed a Petition pursuant to G.S. 62-111(a) and 62-116 to acquire the certificate of public convenience and necessity to operate the sewage treatment facilities of North Topsail Water and Sewer, Inc. (North Topsail or NTWS), in the North Topsail Beach and Sneads Ferry area in Onslow County, North Carolina. UI stated that it had entered into an asset purchase agreement with Joseph N. Callaway, Trustee in Bankruptcy for Marlow Bostic, owner of one-half of the outstanding corporate stock of NTWS, to transfer the utility franchise and assets subject to Commission approval. UI further stated that the purchase price under the agreement is $2,700,000 and UI requested rate base treatment of the purchase price. UI also requested temporary operating authority pending issuance of a final order on the Petition. On July 2, 1999, UI filed a motion requesting the Commission to establish a hearing at the earliest possible date and require customer notice. On July 8, 1999, UI filed an addendum to its application containing five-year pro forma projections of revenues and expenses.

The matter was brought before the Commission at its Regular Staff Conference on July 26, 1999. The Public Staff stated that it opposed the inclusion of the $2.7 million purchase price in rate base and would oppose the deferral of the acquisition adjustment issue because the Public Staff would oppose the transfer to UI if a purchase acquisition adjustment were allowed. The Public Staff also opposed the granting of temporary operating authority, and UI withdrew that request. The Public Staff requested that the Commission address several issues in this proceeding: a management plan, current employees, a refund plan for overcollection of gross-up on contributions-in-aid-of-construction (CIAC), appropriate tap fees, and system-specific rates.

By Order issued August 3, 1999, the Commission concluded that a hearing should be scheduled as soon as possible to decide the transfer, the purchase acquisition adjustment issue, and the other issues raised by the Public Staff. The matter was scheduled for public hearing on September 23, 1999, in the Town of North Topsail Beach for the sole purpose of receiving customer testimony and for September 30, 1999, in Raleigh for the purpose of taking testimony of UI, the Public Staff, and other parties of record.

The Public Staff also requested the Commission to issue a protective order with respect to unclaimed refunds held by NTWS. By Order issued August 3, 1999, the Commission denied the request for a protective order and stated that it would address the unclaimed refund issue at the same time the transfer petition was heard.

On September 13, 1999, Onslow County filed a Petition to Intervene. This Petition was allowed by Order issued September 17, 1999. The intervention and participation of the Public Staff is recognized pursuant to Commission Rule R1-19(e).

By Order issued September 23, 1999, the hearing in North Topsail Beach was continued until October 12, 1999, because of a recent hurricane.

The matter came on for hearing before the Full Commission in Raleigh as scheduled. UI presented the prefiled direct and rebuttal testimony of Carl J. Wenz, Vice President, Regulatory Affairs; and the rebuttal testimony of Carl Daniel, Vice President of Carolina Water Service, Inc. of North Carolina, a UI subsidiary. The Public Staff presented the prefiled joint testimony of Windley Henry, Staff Accountant; John Robert Hinton, Financial Analyst; Jack Floyd, Utilities Engineer; and Andy Lee, Director, Water Division.

On October 5, 1999, UI filed a Motion requesting the Commission to bifurcate its decision on whether to approve the transfer from other decisions, such as whether the purchase price should be included in rate base. Alternatively, UI requested the Commission to expedite the remaining procedural steps necessary to obtain an order. By Order issued October 12, 1999, the Commission denied the Motion.

The matter came on for hearing in North Topsail Beach on October 12, 1999, before Commissioners Ralph A. Hunt and Sam J. Ervin, IV. The following members of the public testified: Ed Miller, Richard J. Wenzel, Glen Adams, Bob Tate, Ron Lewis, David Clark, Charles Koenig, Richard Twiford, Ginny Hillyer, John B. Henderson, III, and Otis Sizemore. Onslow County attempted to introduce certain testimony from Ronald Lewis, County Manager, and David Clark, Public Works Director. The Hearing Commissioners sustained UI's objections to that testimony; however, Mr. Lewis was allowed to testify as a public witness. On October 15, 1999, Onslow County filed exceptions, a proffer of evidence, and a request for leave to file testimony. By Order issued October 21, 1999, the Commission affirmed its ruling at the October 12, 1999, hearing but allowed Onslow County to proffer the evidence filed with its motion.

On November 10, 1999, the Attorney General filed a Notice of Intervention and Comments in this docket in opposition to the request of UI for a broad policy favoring acquisition adjustments to encourage transfers.

On November 12, 1999, UI filed a Motion to Strike and/or Reject the Notice of Intervention and the Comments of the Attorney General, citing the Attorney General's failure to intervene in a timely fashion or otherwise seek to participate in the evidentiary hearings. UI argued that G.S. 62-20, which authorizes the Attorney General to intervene in Commission proceedings on behalf of the using and consuming public, "does not permit untimely, prejudicial interventions in contravention of the Commission's rules without even so much as a request for leave to intervene."

On November 18, 1999, the Attorney General filed a response to UI's Motion. In his response, the Attorney General acknowledged his late intervention and stated that he did not seek to introduce new evidence, but that he wanted to address one important issue which is central to this case–the acquisition premium sought by UI. The Attorney General also acknowledged that "While there may be circumstances in which the right of intervention could be abused and other parties prejudiced, that case has not presented itself here."

By Order dated November 23, 1999, the Commission denied UI's Motion to Strike and/or Reject the Notice of Intervention and Comments of the Attorney General.

Based on the foregoing, the evidence adduced at the hearing, and the entire record in this matter, the Commission now makes the following

FINDINGS OF FACT

Jurisdictional

1. NTWS is a duly franchised public utility as defined by G.S. 62-3(23). NTWS provides sewer utility service on North Topsail Beach and certain other areas on the mainland of Onslow County pursuant to a certificate of public convenience and necessity granted by the Commission in 1982.

2. UI is a corporation duly organized under the laws of the State of Illinois and is authorized to do business in the State of North Carolina. Through affiliated companies, UI owns and operates water and sewer utility companies in Pender, Craven, and Carteret Counties.

3. NTWS provided sewer utility service to 1,943 residential and commercial customers as of June 30, 1999.

4. The assets of NTWS presently are held in trust by Joseph N. Callaway, Bankruptcy Trustee, under the control of the United States Bankruptcy Court for the Eastern District of North Carolina in the Marlow Bostic bankruptcy proceeding.

5. UI and Mr. Callaway have entered into an Asset Purchase Agreement, dated May 7, 1999, under which UI will purchase the NTWS assets for $2.7 million.

6. The reasonable original cost net investment of NTWS at June 30, 1999, was $976,907, consisting of the following components:

Plant in service	$ 7,452,235
Accumulated tap on fees	(3,308,613)
Contributions in aid of construction	(2,368,689)
Accumulated depreciation	(798,026)
Original cost net investment	$ 976,907

7. UI has requested that the $1,723,093 it is paying in excess of the $976,907 NTWS original cost net investment be placed in UI's rate base as a debit plant acquisition adjustment to be amortized over a 50-year period.

8. UI has requested no increase in NTWS rates, and UI has agreed that it will not seek an adjustment in NTWS rates for three years and has agreed to the withdrawal of NTWS's pending request for a 22% rate increase in Docket No. W-754, Sub 26 if UI's purchase price is included in rate base.

9. UI has expressed its willingness to make NTWS a part of Carolina Water Service, Inc. of North Carolina (CWS) and reduce the rates in NTWS to those currently charged by CWS if the purchase price for NTWS is included in rate base.

Background on Marlow Bostic's Operation of NTWS[1]

10. In 1981, the Commission received information that Marlow Bostic was operating a sewer facility on North Topsail Island without a franchise from the State.

11. In 1982, NTWS applied for and received a franchise to operate the sewer facility for an area being developed on the north end of Topsail Island by North Topsail Shores, a partnership between Marlow Bostic and Roger Page.

12. A deed in the public records shows an initial conveyance of Tracts 1-6 of NTWS from Mr. Bostic and his wife and from Roger Page and his wife to North Topsail Water and Sewer, Inc., on December 30, 1983. At the same time, two deeds of trust were executed, naming Mr. Bostic and Mr. Page as beneficiaries.

13. On May 11, 1993, NTWS moved for a rate increase in Docket No. W-754, Sub 17. On July 13, 1993, the Commission entered an interim order granting a rate increase in that docket. The Commission allowed the interim rate increase based on its finding that NTWS was unable to pay its current operating expenses and that emergency interim rate relief was warranted.

14. The North Carolina Attorney General moved on July 28, 1993, in Docket No. W-754, Sub 17, for reconsideration of the interim rate order and to expand the scope of the pending rate case. The Attorney General objected to the Commission's interim order on the grounds that the Commission allowed a 40% increase in the rate, that the Commission did not require NTWS to post a bond in the event that refunds would be required if the final rate increase was less than 40%, and

---

[1]Evidence supporting findings of fact 10 through 51 is found in UI Wenz Exhibit I, submitted with Mr. Wenz' direct testimony.

that only 18 months had passed since NTWS' prior rate increase. The Attorney General supplemented its objection on August 16, 1993, with a copy of a federal court order in which the court found that Mr. Bostic was responsible for fraudulent transfers of NTWS property, which highlighted, the Attorney General maintained, Mr. Bostic's inability to offer customers reliable service.

15. As a result of these objections, on September 2, 1993, the Commission issued an Order in Docket W-754, Sub 17, granting the Attorney General's motion to expand the rate case proceeding to include an investigation concerning financial solvency, inadequate management and the need to appoint an emergency operator.

16. In connection with a hearing in the docket, the Public Staff submitted the testimony of Gina Casselberry on September 27, 1993. According to Ms. Casselberry's testimony, she conducted a preliminary audit of NTWS, which included a field inspection, review of NTWS's records, review of customer complaints, review of DEM files and an analysis of existing revenues at existing and proposed rates. Among other things, Ms. Casselberry noted that NTWS had leased equipment from Atlantic Enterprises, a company affiliated with Mr. Bostic, but NTWS assumed the expense of repairing all of the leased equipment. Moreover, when she asked for information from NTWS regarding supporting documentation for its lease arrangements with Atlantic Enterprises, the company failed to respond, and its breakdown of cash disbursements to Atlantic Enterprises was incomplete.

17. Subsequent to the hearing, on October 8, 1993, the Commission issued an Order in Docket No. W-754, Sub 17, reducing interim rates effective November 1, 1993. In addition, on November 10, 1993, based on the Public Staff's recommendation, the Commission authorized Mr. Bostic to transfer his 50% interest in NTWS to Thomas Morgan as trustee/escrow agent until such time as NTWS was either sold or returned to Mr. Bostic. The Commission also ordered that Mr. Bostic was to cease having any part in the operation of NTWS, Bennie Tripp was named sole manager and operator of NTWS, Mr. Bostic was barred from interfering in any way with Mr. Tripp's management of NTWS and NTWS was ordered to continue depositing tap fees into escrow.

18. On January 27, 1994, the Commission issued its final Order in Docket No. W-754, Sub 17, finding that Mr. Bostic had agreed that he would not participate further in the operation of NTWS; that as a result of numerous judgments and debts, NTWS was at risk that the utility operations would be interrupted because of execution or other action taken to satisfy these debts and that the Commission needed to investigate the extent of NTWS's outstanding debts, judgments and liens; that NTWS's relationship with Atlantic Enterprises was less than arms' length and that prior approval was required for future transactions.

19. The Commission also stated that although in NTWS's prior rate case in Docket No. W-724, Sub 12, the Commission had ordered reconveyance of the NTWS property that had been transferred to Mr. Page and Mr. Bostic and then leased back to NTWS in 1988, the federal court fraud action had resulted in a court order barring Mr. Bostic from any such conveyance. The title to that land, therefore, remained clouded. The Commission concluded that it was inappropriate at that time to order NTWS to take back the tracts from Mr. Bostic by eminent domain in light of the federal court's order holding that the land could not be transferred until the judgment in the federal case (over $12 million) was satisfied.

20. The Commission further noted that negotiations were ongoing to attract additional capital investors or for the sale of NTWS. With respect to the outstanding liens and judgments against NTWS, the Commission specifically found that the penalties assessed against the company could not be recovered from NTWS's customers through rates, assessments or tap fees and should be paid only from such funds that would prevent draining an adequate capital reserve needed for the operation of the utility.

21. Following the Commission's Order allowing a partial rate increase, the Public Staff also became aware that a federal tax lien had been filed against NTWS on October 1, 1993, and that the utility had been making payments to the IRS in the amount of $2,500/month. The Public Staff moved to require the company to stop making payments to the IRS on the grounds that the lien was appropriately only against Mr. Bostic and not against the utility. Apparently, Mr. Bostic had hired employees for his other real estate development projects, but claimed those people on NTWS' tax returns. The IRS then found that no withholding taxes had been paid and filed the lien against the company. On June 3, 1994, the Commission granted the Public Staff's motion.

22. In the ongoing proceedings, the Commission subsequently ruled on April 7, 1995, that only Bennie Tripp could file state and federal tax returns on behalf of NTWS, and that Mr. Tripp should open new bank accounts for NTWS, with only Mr. Tripp having the ability to write checks for NTWS.

The Refund Proceedings

23. In 1991, the Public Staff and NTWS entered into a stipulation that provided that NTWS would refund to its customers $241,150 it had overcollected related to federal income taxes on contributions-in-aid-of-construction. NTWS agreed to refund this money over a three year period, beginning July 1, 1992.

24. When NTWS failed to file its refund plan as required, the Public Staff moved for a show cause hearing allowing NTWS to show why it should not be held in contempt. Following the show cause hearing, on September 23, 1992, the Commission was told by NTWS that the system might be sold. The Public Staff indicated, however, that the bankruptcy proceedings of one of the partners would hold up any sale.

25. Without a ruling from the Commission, the Public Staff moved on April 7, 1993, for an immediate interim order based on the Public Staff's concern over the financial integrity of the NTWS and NTWS's intentions regarding the refunds due its customers. The Public Staff also became aware that NTWS was about to receive in excess of $100,000 in tap-on fees for a new subdivision. The Public Staff felt that "in order to preserve some degree of control over the finances of this utility, the Commission should immediately order the Company to place any tap-on fees into an escrow account that could only be used to make refunds required in the docket, unless the Company specifically applied to the Commission to use all or part of the funds, specifying how the funds would be used."

26. Following the Public Staff's motion to pay all tap-on fees into an escrow account, the North Carolina Division of Environmental Management (DEM) moved to require that those funds

be expended to satisfy DEM's default judgments as a result of certain civil penalties for the violations arising in relation to other court actions.

27. The North Carolina Attorney General's office also filed a motion in support of the Public Staff's motion to deposit the tap-on fees into escrow. The Attorney General noted that the September 23, 1992 hearing had revealed that: (1) NTWS had not yet planned and carried out refunds because of a lack of financial resources; (2) NTWS had not yet planned and carried out the construction of a gravity sewer line in the Golden Acres subdivision because of a lack of financial resources; (3) NTWS had conveyed land used for spray fields to Mr. Page and Mr. Bostic, but that the shareholders, at the request of the Public Staff, reconveyed the land to NTWS, but a federal court set aside the reconveyance; (4) NTWS used its tap fees to meet operating expenses of the utility; (5) the General Manager of the NTWS was not aware that Mr. Page and Mr. Bostic were the owners; (6) NTWS was faced with numerous outstanding penalties or proceedings for environmental violations. In addition, the Attorney General noted that: (1) a number of complaint proceedings were pending concerning tap fee charges that North Topsail sought to impose; (2) a sale had not occurred of the utility despite NTWS's contentions at the show cause hearing that NTWS needed to garner more time to provide a refund plan; (3) there had been substantial storm damage to the sewer system.

28. NTWS did not file a response to the Attorney General's motion.

29. As a result of such motions, on April 23, 1993, the Commission ordered that NTWS immediately place into escrow all tap-on fees it received and that it could not expend those funds without permission pending a full hearing on May 11, 1993.

30. Following the hearing, the Coastal Resources Commission (CRC) filed a supplemental brief, asserting that the tap fees placed in escrow should be used first to pay for repairs needed to bring one of NTWS's sewer lines into compliance with DEM regulations; second, to pay the outstanding judgments for penalties assessed by CRC and, last, to pay customer refunds. CRC's brief pointed out that "the evidence presented at the hearing reveals that the current management of North Topsail is irresponsible both fiscally and for purposes of compliance with the various environmental and health laws to which North Topsail is subject." CRC also noted that "It is clear from the evidence presented that the management of North Topsail, in particular officers Marlow Bostic and Roger Page, run the company primarily for the benefit of their own separate development interests."

31. The Attorney General also submitted a post-hearing list of recommendations for the use of the escrow funds for the benefit of the using and consuming public. The Attorney General noted that at the May 11, 1993 hearing, NTWS's manager, Bennie Tripp, admitted that the company was delinquent for more than $40,000 in its electric bills and that the company was not performing current maintenance at the sewer plant required under its environmental permit. Further evidence at the hearing established that NTWS, under Mr. Bostic's ownership, required close Commission supervision to ensure compliance with its orders and that penalties did little to force compliance. In addition, the Attorney General noted that "serious questions have been raised as to whether the current owners and operators of the Company (those in charge) would make a good faith effort to serve its customers." For example, the Attorney General pointed to the fact that NTWS had conveyed its land to Mr. Bostic and Mr. Page in June, 1988 without permission from the Commission and that such conveyance was not revealed until a September 23, 1992, hearing before the

Commission. The Attorney General also pointed out that Mr. Page and Mr. Bostic had been involved in a number of improprieties and mismanagement with respect to the relocation of S.R. 1568, including using one of Mr. Page's business entities to serve as the project engineer and gaining ocean front property as part of the relocation deal. Because of these concerns, the Attorney General strongly urged "considerable Commission involvement in and supervision over the utility's operations."

32. NTWS's attorney responded to the need to disburse the escrow funds to pay NTWS's outstanding electric bill or face disconnection on June 7, 1993. NTWS also stated that if the CRC's request was followed to use the escrow funds to pay judgments from environmental penalties, the utility would not have the cash to pay for the repairs needed to bring the utility into compliance.

33. In the years since the escrow account was established, the Commission has issued numerous orders allowing NTWS to borrow or expend money from the escrow account to pay for improvements or for operations:

- On June 2, 1994, the Commission ordered that NTWS could borrow $45,000 from the tap-on fee escrow account to make repairs to its spray irrigation fields and that NTWS would not be required to pay back into the escrow account the $25,000 engineering accounts.

- On October 18, 1994, the Commission authorized NTWS to use up to $188,665 from the escrow account for certain equipment and office building needs, to be paid back at $600/month. The same order also allowed NTWS to borrow $37,300 to pay its past due electric bill, the loan to be paid back at $1000/month.

- On April 23, 1996, the Commission authorized NTWS to use up to $120,000 from the escrow account for additional equipment and office building needs, as long as the escrow funds were not used for a $90,000 request for construction of a pump station. The Commission also authorized NTWS to borrow up to $55,000 from the escrow account to pay for the replacement of the PVC spray field sprinkler head risers.

- On June 21, 1996, the Commission allowed NTWS to use up to $25,200 from escrow to improve and replace a pipe leading from the third lagoon.

- On October 8, 1996, the Commission allowed NTWS to use up to $148,850 from the escrow account to pay for Hurricane Fran repair and to borrow up to $60,000 to cover revenue shortfalls to be paid back when the revenues were eventually collected.

- On May 27, 1997, NTWS was authorized to use up to $368,697 from the escrow account to purchase new property and the construction of a new flow meter.

- On December 17, 1997, NTWS was authorized to use up to $51,250 from the escrow account to cover costs associated with the purchase of a truck and computers, landscaping for the new office and the construction of a driveway, a security gate and a parking lot at the new business office.

- On June 9, 1998, NTWS was ordered to establish a new interest bearing capital account with respect to the existing connection fee escrow account, in which $545,000 would be deposited, to cover the costs associated with the purchase of a service truck, a tractor, a back hoe and a track hoe, the costs of mapping the sewer system, the telemetry for the pump stations, soil testing of new property and a building addition. In addition, NTWS was authorized to borrow up to $36,000 from the escrow account to pay off certain accounts payable, to be paid back at $2000/month.

- On January 13, 1999, NTWS was authorized to use up to $100,000 from the escrow account to cover the costs associated with the purchase of three spray field irrigation pumps and other necessary modifications to the existing facilities.

- On February 9, 1999, NTWS was authorized to use up to $33,000 from the escrow account to cover the costs associated with conducting advanced soil testing of the existing spray irrigation fields under DWQ permit requirements.

- On April 27, 1999, NTWS was authorized to use up to $25,300 from the escrow account to cover costs associated with purchase of fertilizer, lime and gypsum for the irrigation fields, to be reimbursed to the account beginning in June 1999 at $4,216/month.

- On June 18, 1999, NTWS was authorized to use up to $35,700 from the escrow account to cover the costs associated with the purchase of lagoon valves.

Operational Violations

34. In April 1989, DEM issued a notice of violation concerning NTWS's spray field. On September 21, 1990, DEM restricted any additional connections until the problems were solved. In addition, Mr. Bostic entered into a land asset transfer and land lease agreement for the spray fields in 1988 without securing an easement for use as a spray field. Mr. Bostic conveyed the land for the spray fields to himself and Mr. Page, and then Mr. Bostic and Mr. Page entered into a lease agreement with NTWS to use the land in exchange for certain specified rent.

35. In addition, DEM issued a notice of violation in August, 1991, to NTWS after an inspection revealed that wastewater was flowing to an unfinished pump station in the Village of Stump Sound.

Federal Court and Bankruptcy Proceedings

36. Federal court proceedings grew out of Mr. Bostic's plan to develop a tract of land on North Topsail Island to build a residential/resort community with a marina, home sites, a sewer facility and other amenities. Pursuant to his plan, Mr. Bostic distributed promotional literature to homesite purchasers outlining his plan and making many misrepresentations about the development of the site. In fact, Mr. Bostic had not received the necessary permits to go forward with the development of the property.

WATER AND SEWER - SALE/TRANSFER

37. In 1991, a number of Mr. Bostic's purchasers brought individual actions against Mr. Bostic and Mr. Page in federal district court in Wilmington on claims of fraud and unfair and deceptive trade practices. These cases were consolidated and tried before Magistrate Judge Alexander Denson. Mr. Bostic and Mr. Page were held jointly and severally liable for the sum total of $12,483,951.73 on these judgments, which included punitive damages.

38. On the same day that the first judgment was rendered on April 10, 1992, Mr. Bostic conveyed certain of his real property to NTWS. Three days later, on April 13, 1992, Mr. Bostic conveyed additional real property to his son. Soon thereafter, Magistrate Judge Denson conducted a hearing in which Mr. Bostic promised to reconvey the properties and further promised that he would not convey any other property without full consideration until the judgments in the case were satisfied. Plaintiffs then went forward with their post-judgment discovery and served Mr. Bostic with interrogatories and document requests on July 23, 1992. Mr. Bostic ignored the discovery requests.

39. Upon being ordered to file a response, Mr. Bostic served his answer on October 12, 1992. The answers, however, were deficient, and Mr. Bostic was again compelled to answer and was threatened with contempt. At a February, 1993 hearing, Magistrate Judge Denson ordered Mr. Bostic to provide truthful and complete answers to plaintiffs' discovery. More hearings ensued, and Mr. Bostic was given several more opportunities to provide answers and was given notice of plaintiffs' particular allegations on a claim of contempt. Finally, on May 27, 1993, Magistrate Judge Denson held a fact-finding hearing on the motion for contempt and certified the facts for review by the district court.

40. On August 6, 1993, Judge Fox held a show cause hearing for Mr. Bostic to show why he should not be held in contempt for failure to abide by the court's orders to respond fully and truthfully to the discovery requests. Following the hearing, Judge Fox made a number of findings of fact, including the following: Mr. Bostic misrepresented his ownership of Golden Acres, Inc. (the corporate entity selling real estate lots to the plaintiffs) and fraudulently transferred shares to his wife following the entry of the judgment; and Mr. Bostic willfully attempted to conceal ownership of a number of parcels of real property from the plaintiffs. The court then found Mr. Bostic in civil contempt and further found that confinement was necessary to achieve Mr. Bostic's compliance with the court's orders compelling complete and full disclosure to plaintiffs of his assets and further ordered Mr. Bostic to pay plaintiffs $30,000 in attorneys' fees. Finally, the court ordered that Mr. Bostic be tried for criminal contempt predicated on his misrepresentation of his ownership interest in Golden Acres, Inc., and his failure to make full disclosure of his real estate ownership. The trial was to be held in Wilmington during the court's October 12, 1993, session.

41. While serving his jail time for contempt, Mr. Bostic filed for voluntary bankruptcy under Chapter 11 (ostensibly to avoid the federal court judgment). He hired an attorney, Buzzy Stubbs, to represent him in the bankruptcy. Although in a Chapter 11 proceeding the debtor-in-possession is normally responsible for calling a creditors' meeting and filing the appropriate disclosure statement and plan for reorganization, the Bankruptcy Administrator petitioned the court to have a Trustee appointed to oversee the reorganization and to have the assets sold to satisfy Mr. Bostic's debts. The bankruptcy then proceeded under the Trustee (Joseph Callaway), who has sold off virtually all of Mr. Bostic's real estate and has now focused on the remaining issue of selling the North Topsail sewer facility.

42. During the first creditors' meeting called by Mr. Bostic, he again took the stance that he did not own the assets held by his wife. The bankruptcy administrator then delivered a recording of the meeting to the U.S. Attorney's office for possible prosecution or investigation as a misrepresentation during the official bankruptcy proceedings, but the U.S. Attorney did not proceed with the matter.

43. As part of the bankruptcy proceedings, the court approved a Plan of Reorganization, which gave the court continuing jurisdiction to approve sales of Mr. Bostic's assets. Among Mr. Bostic's assets was a one half ownership interest in NTWS. Mr. Bostic's ownership interest in NTWS was transferred to the bankruptcy estate. The other half of the NTWS stock was owned by Roger Page, Mr. Bostic's former real estate development partner. Through an out-of-court agreement, and in lieu of filing for bankruptcy, Mr. Page surrendered control of his shares in NTWS to his two major creditors, Bank of America and Branch Bank and Trust Company (collectively, the Banks).

44. On April 20, 1999, Bankruptcy Trustee, Joseph Callaway, moved the Bankruptcy Court for an order allowing the sale of NTWS, free and clear of all liens and encumbrances. Pursuant to the proposed sale, all liens and claims against Mr. Bostic or NTWS would be satisfied out of the sale proceeds, and the purchaser would obtain NTWS unencumbered.

45. The initial sale agreement accompanying the motion was between NTWS and AquaSource, Inc., a Texas corporation. Under the first proposed sale agreement, AquaSource was to purchase NTWS for $2,250,000. The Banks, as beneficial owners of Mr. Page's stake in NTWS, agreed to reserve objection to the sale limited only to the grounds of the adequacy of the sale price and that any claims of the Banks or Mr. Page to NTWS would be satisfied and extinguished through the sale proceeds. In addition, Mr. Bostic's judgment creditors agreed that their claims would be satisfied out of the sale proceeds and that they too would surrender any rights or claims in NTWS upon its sale.

46. Under the proposed sale, any sale of NTWS requires and is subject to obtaining regulatory consent from the Commission. Any claim of the Commission to the NTWS assets, however, would be transferred to the sale proceeds. This includes claims in paragraph 13 of the Commission's Order of January 27, 1994, regarding gross-up for income taxes on CIAC.

47. The motion to sell NTWS was served on the Commission, giving it the opportunity to review the sale agreement and raise any objections. Under the terms of the sale agreement and order, regulatory pricing and terms remain the province and jurisdiction of the Commission, and the purchaser will remain subject to the Commission's authority for future operation of NTWS assets.

48. UI's May 7, 1999 contract with the Bankruptcy Trustee arose from a subsequent UI upset bid and auction before the Bankruptcy Court in which UI's last bid of $2.7 million exceeded the last bid of AquaSource of $2.65 million.

Other Court Actions Against Mr. Bostic

49. In N.C. Dep't of Environmental Health v. Marlow Bostic, (Superior Court, Onslow County), a number of actions were brought against Mr. Bostic in Superior Court, Onslow County,

to recover civil penalties for various environmental violations. The records show four such actions, all resulting in default judgments against Mr. Bostic. Three default judgments were entered prior to the Public Staff's efforts to have all tap-on fees deposited in escrow. Those defaults totaled $75,955.10. Subsequently, another default judgment was entered against Mr. Bostic in the sum of $16,520 on July 8, 1993. These judgments then created liens on NTWS's property.

50. In United States v. Mr. Bostic, Roger Page and North Topsail Water and Sewer, Inc., 92 CV 101 (U.S. Dist. Ct. E.D.N.C.), a Clean Water Act action for injunctive relief was brought to require defendants to restore environmental damage from discharge of pollutants onto wetlands. Defendants entered into a consent judgment on November 16, 1994, and clean up is complete.

51. In the Matter of Coastal Resources Commission Decision Against North Topsail Water and Sewer, Inc., 96 N.C. App. 468, 386 S.E.2d 92 (1989) in 1982, Mr. Bostic applied to the DEM for a permit to construct a spray irrigation wastewater treatment facility on "estuarine waters" in Onslow County. DEM issued the permit on May 11, 1982. After construction began, Mr. Bostic began excavations on the tract that were not depicted in the development plan submitted to the DEM. The Division of Coastal Management (DCM) then investigated and issued a notice of violation on February 24, 1984, directing Mr. Bostic to install an earthen dam in the tributary that the construction had disrupted. After Mr. Bostic initially ignored the order, he began piecemeal correction, and he did not fully comply until over a month later. As a result, DCM assessed three civil penalties against Mr. Bostic in the amount of $24,000 on a finding that Mr. Bostic had willfully violated the Coastal Area Management Act. On appeal, the Court of Appeals agreed with the DCM that Mr. Bostic had willfully refused to comply with the DCM's directive and had engaged in "a pattern of intentional resistance."

Transfer-Related Issues

52. UI has the technical, managerial, and financial capacity to own and operate the NTWS sewer system.

53. Although NTWS is a financially-troubled public utility, there are no serious operational problems currently affecting the system. The sewer system is currently being operated in a satisfactory manner.

54. All other things remaining equal, inclusion of the proposed acquisition adjustment in rate base would support a $12.00 per month or 38% increase in NTWS's residential rates.

55. The purchase price of $2.7 million that UI agreed to pay for the North Topsail system, which was established through an arms length bidding process, was prudent.

56. UI is obligated to purchase North Topsail whether the proposed acquisition adjustment is included in rate base or not.

57. Approval of the proposed acquisition adjustment is not in the public interest since the benefits to customers resulting from the allowance of rate base treatment of an acquisition adjustment in this case would not outweigh the resulting burden or harm to customers associated therewith.

58. The proper level of connection fees is $1,200 per residential equivalent unit.

59. The appropriate amount of bond to be required of UI is $200,000.

60. The overcollection of gross-up on CIAC should be refunded.

61. The balance in the escrow account should be maintained by UI for purposes of making capital improvements to the NTWS sewer system.

62. UI's management plan is acceptable.

63. The transfer of the franchise and assets of NTWS to UI is in the public interest and should be approved.

CONCLUSIONS

The Public Staff testified that it supports the proposed transfer provided that, among other things, an acquisition adjustment is not allowed. UI contends that there are two pivotal questions for the Commission to address. First, is NTWS a troubled system? Second, if NTWS is troubled, do the benefits of the proposed acquisition outweigh the costs to ratepayers?

In other words, it is UI's position that in order for an acquisition adjustment to be considered, the system must be troubled and the benefits to the customers must outweigh the cost of including the acquisition adjustment in rate base. UI, through its testimony and cross-examination of the Public Staff, sought to demonstrate that NTWS is a troubled system and that there are benefits to the acquisition that would outweigh the costs to ratepayers. The Public Staff, however, takes the position that NTWS is not a troubled system and, therefore, the acquisition adjustment should not be allowed into rate base.

Onslow County, an intervenor in this proceeding, opposes the proposed transfer on the grounds that it is not consistent with the public convenience and necessity, especially considering the fact that UI is requesting to roll the acquisition adjustment into rate base. It is Onslow County's position that the public interest would be best served if the County acquires NTWS because Onslow County is in a better position to provide the best service at the lowest rates and to promote economic development throughout the County. However, no request for such an acquisition is before the Commission at this time.

The Attorney General takes the position that an acquisition premium is not appropriate in this case. According to the Attorney General, the broad policy advocated by UI favoring acquisition adjustments would, if adopted, harm consumers by increasing the transfer price paid for utility systems and would pose an unfair burden on consumers.

No testimony or evidence was presented in this docket calling into question the testimony of UI witness Wenz outlining UI's suitability as a purchaser of NTWS. Indeed, UI and its subsidiaries have long been considered to be professional, competently operated, well-capitalized water and sewer companies. The Commission has adopted policies encouraging the transfer of small, independently-operated, thinly-capitalized utilities to utilities like UI. UI has not conditioned its request to obtain the franchise for NTWS on Commission inclusion of the purchase price in rate base. The Commission concludes that UI possesses the financial and operational expertise and wherewithal to receive and operate the franchise and assets of the sewer facilities serving the North Topsail service area. Therefore, the Commission approves UI's request to obtain the franchise and assets of NTWS. The only substantive contested issue in this docket is whether UI should be permitted to include its $2.7 million purchase price in rate base. The Public Staff, the Attorney General, and Onslow County oppose this UI request. For reasons set forth below, the Commission determines that the transfer should be approved, but that UI may not include its proposed acquisition adjustment in rate base.

The Transfer is in the Public Interest and Should be Approved
NTWS is a Financially-Troubled, but not Operationally-Troubled, Public Utility

Today, NTWS continues to be a financially-troubled, although not an operationally-troubled, public utility. Since 1993, the owner of 50 percent of the NTWS stock, Marlow Bostic, has been in Chapter 11 bankruptcy. In order to liquidate the assets of Mr. Bostic, his 50-percent share of NTWS stock has been transferred to the bankruptcy trustee. Mr. Page owns the other 50 percent of the NTWS stock. Mr. Page's stock, held by bank creditors, also has been transferred to the bankruptcy trustee so that the trustee can sell NTWS through the bankruptcy proceeding free of claims and so that the proceeds of the sale can be used to satisfy creditors' claims. Consequently, since 1993, NTWS has been tied up in the bankruptcy proceedings. NTWS's assets, stock, earnings and good will have been held by the bankruptcy trustee to be sold for the benefit of creditors. The owners have been unable to provide or attract equity capital. NTWS has been unable to attract long-term debt capital because NTWS has been inextricably tied up in the bankruptcy proceeding. NTWS has no sources of traditional capitalization. Since 1993, the bankruptcy trustee has had NTWS on the market for sale, and the Public Staff has discussed the sale with at least sixteen potential purchasers, but until 1999 no purchaser was willing to make an offer of purchase.

Prior to 1993, NTWS was owned and operated by those developing properties in the North Topsail area. The owners conducted their affairs in a fashion that placed the financial well being of NTWS at risk. NTWS refused or was unable to pay its bills, resulting in numerous outstanding claims and judgments. As of May 1993, NTWS had power bills in arrears from Jones-Onslow EMC of $40,000, state environmental penalties from DEM and CRC reduced to judgment of $75,000, bills from McKim and Creed Engineers of $20,000, an outstanding loan from Atlantic Enterprises of $19,848, a loan from Centura Bank of $23,000, a bill from New River Marina for diesel fuel of $8,389 and an unquantified debt to Onslow County. On January 27, 1994, the Commission determined that these outstanding financial obligations placed NTWS at risk that utility operations would be interrupted due to execution or other actions taken to satisfy the amounts owed. As of today, nearly six years later, a number of these obligations and judgments are still outstanding.

Subsequent to the institution of the Mr. Bostic bankruptcy proceeding in 1993 and the Commission's January 1994 Order removing Mr. Bostic from management of NTWS, NTWS has been forced to rely on existing or future customers for its capital needs. Residential connection fees are established at $2,000 per connection, except where a pump station must be installed in which case the connection fee is $3,000. According to the Public Staff, NTWS's actual average cost of making a connection and a pro rata cost of anticipated capital improvements is only $1,200. Because NTWS operates under a DWQ imposed moratorium limiting new connections, NTWS has required those seeking to connect to the system in the future to prepay the connection fee in order for them to reserve the capacity for when it will be needed. To date, 728 customers have prepaid the connection fees to reserve future capacity. NTWS has collected $1,491,000 in connection fees from these future customers. The estimated cost to connect these customers to the system is $398,132. Consequently, NTWS has collected $1,092,828 more from these future customers than NTWS will spend to connect them to the system. NTWS uses this source of customer-supplied capital to make improvements and repairs to the system and as a source of cash working capital.

As of June 30, 1999, NTWS had a balance of $806,000 in the connection fee escrow fund. However, $287,000 of that amount has been earmarked for projects the Commission already has authorized for funding from the escrow fund. Of the uncommitted balance of $519,563, $398,132 must be used to connect the future customers to the system. Thus, as of June 30, 1999, $121,431 is left in the escrow fund as the unencumbered balance free for NTWS to use as a source of capital to meet any outstanding or future needs.

NTWS's reliance on the connection fee escrow fund is no legitimate source of capital for a financially-viable utility that is not dependent upon the Commission for extraordinary ratemaking devices. In the first place, future North Topsail customers should not be required to supply capital to make existing repairs and improvements and provide a source of cash working capital to meet current day-to-day operations. Capital to meet these needs should come from the owner of the system who has the responsibility to meet the utility's capital needs. Even current ratepayers only should be responsible for paying rates that are set to allow pro rata recovery of the prudently employed capital invested to provide current service and a reasonable return on the unrecovered balance.

With respect to the situation at North Topsail, future customers, on the other hand, should not be responsible for supplying any capital. A non-troubled, viable utility should have sufficient capacity to meet reasonably expected growth in its service area without a requirement that future customers pay a connection fee in excess of the costs of connection to reserve a place when and if they need service. North Topsail customers should only be required to pay a connection fee at the time the utility is called upon to incur the cost to connect them to the system.

Under the scenario presently in place for NTWS, the inability to obtain outside capital has resulted in a situation where Peter is being robbed to pay Paul. Future customers are supplying capital to enable current service. When and if these future customers are ready to be connected and need to receive service from the sewer plant and facilities, the services which their capital has been used to finance will already have been used up by someone else. Secondly, the future 728 customers have been required to pay approximately twice as much as the cost to connect them and the cost of the future capital additions they may cause NTWS to incur. Public Staff witness Floyd testified that the $1,200 connection fee average cost is established to recover the labor and materials cost of connection, plus the cost of a fourth lagoon presently required under the DWQ environmental permit.

NTWS is financially-troubled because the connection fee escrow fund is an inadequate and inappropriate source of capital. Even where the connection fees have been established at the historical level well in excess of costs, the amount of capital in excess of costs of connection is too small to meet all of NTWS's capital needs. As of June 30, 1999, NTWS had $121,000 in uncommitted funds in the escrow fund. Public Staff Exhibit No. 2 lists the expenditures from the escrow fund from July 1993 through June 1999. Six times NTWS spent escrow fees in excess of $121,000. In October 1996, NTWS spent $208,850 from the escrow fund for Hurricane Fran related expenses. Public Staff witness Floyd testified that this was an essential expenditure that could not have been deferred or postponed.

NTWS is located geographically where it is extremely vulnerable to hurricanes. In fact, North Topsail is one of the most vulnerable spots for hurricane damage on the East Coast. Hurricane damage has been experienced often and recently in the past. Hurricane damage could occur unexpectedly in the future. Were NTWS to experience $208,850 in hurricane damage today, NTWS would have insufficient capital to make the repairs and would have nowhere to look for outside capital to make up the shortfall. Despite Public Staff claims to the contrary, a VISA card and credit with a few vendors are not adequate sources of capital to meet these very real contingencies.

Additionally, the Public Staff recommends that the connection fees be reduced to $1,200 on average. The $1,200 is established to recover only the costs of connection and the cost of the fourth lagoon.[1] If the connection fees are reduced prospectively to $1,200, there will be no new source of uncommitted capital for any unanticipated future needs or to serve as a source of working capital that can be borrowed for noncapital repairs.

Public Staff testimony and conclusion that NTWS is not a financially-troubled system are without adequate foundation. The Public Staff ignores the pendency of the bankruptcy proceedings and NTWS's inability to obtain outside capital. Not once does the Public Staff in its testimony and conclusions on NTWS's financial viability even mention the Bostic bankruptcy and the fact that the bankruptcy prevents NTWS from obtaining any outside capital.

The support for the Public Staff conclusion is also questionable for other reasons. The Public Staff supports its conclusion that NTWS is financially viable with Public Staff Exhibits 5 and 6. Exhibit 5 relies upon "Viability Policies and Assessment Methods for Small Water Utilities" measurements of financial distress. According to the exhibit, a distressed system has a distress score of 2.78 or below. For 1998, according to the exhibit, NTWS had a score of 2.94, only 1.6 above the distress score. However, the Public Staff included no score for the profit trend. The profit trend is based on the ratio of retained earnings over common stock equity. For 1994, the profit trend was (0.374), determined by comparing retained earnings of (302,005) to common stock equity of 807,042. The profit trend for 1998 was considerably worse -- retained earnings of (1,550,714) and total common equity of (1,450,714). By including no score for profit trend in 1998, the Public Staff overstated the measurement of NTWS's financial health and distorted NTWS's distress score. Even assuming no deterioration from 1994, thus using the (0.374) for profit trend, the total distress score for NTWS becomes 2.57, below the distress score threshold of 2.78.

When he was cross-examined on Public Staff Exhibit 5, Public Staff witness Hinton backtracked on the Public Staff conclusion that NTWS is financially viable. With respect to the 2.94

[1] The $1,200 assumes the cost of the fourth lagoon is $1 million. Mr. Floyd testified that the cost of the fourth lagoon is $1.5 million.

distress score for NTWS for 1998, Mr. Hinton testified that "while it doesn't say it's a viable system, nor does it say it's a distressed system." Witness Hinton also testified that "In sum, the distress score shows that it is not a distressed system but nonetheless it's also showing that it's not a viable system. It is in that gray area."

In Exhibit 6 the Public Staff relies on the Standard and Poor's (S&P) financial benchmarks to conclude that NTWS has an attractive level of cash flow coverage. Of a potential 25 ratios for the five years of financial data the exhibit measures, 12 have "no meaningful figure." The reason that the exhibit has so little ostensibly meaningful data and otherwise shows that there is cash flow coverage is that NTWS cannot borrow and therefore has no meaningful debt or interest expense. Without debt or interest expense, no one should be surprised that net income is sufficient to cover the nominal level of interest expense that exists. Also, the net income from continuing operations cannot legitimately be used to cover any interest expense because net income must be paid into another escrow fund to repay judgments obtained by state agencies for NTWS's failure to pay environmental fines.

NTWS is a financially-troubled sewer utility because its owner/operator has been replaced and regulatory officials have been forced to serve as surrogates to fill many of the traditional roles of management. NTWS has been forced to look to the Commission-established connection fee escrow fund as its source of funding both for operation and maintenance items and improvements. Before NTWS can use the escrow fund, however, NTWS must obtain regulatory approval. Under the procedure established by the Commission, NTWS must consult with and apply to the Public Staff to use any portion of the escrow fund. After the Public Staff completes its analysis, the request is brought to the Commission. The Commission must resolve any differences between the Public Staff and NTWS and otherwise determine whether the requested expenditures should be authorized. All of these steps occur before the expenditures from the escrow fund are made.

UI argues that NTWS is a troubled sewer utility from an operations perspective. Both parties indicated that NTWS is effectively on a sewer permit moratorium. This moratorium was made effective by DWQ, which issues the sewer expansion permits and has jurisdiction over compliance with these permits. DWQ has issued numerous sewer extension permits that provide for a fixed number of connections based upon the design flows anticipated from the users connecting to the system. The capacity of the aggregate sewer extension permits is approximately 629,000 gallons per day, which is the permitted flow of the wastewater treatment facility. This effectively places a moratorium on new sewer extension permits, not new customer connections. NTWS has continued to connect new customers to its collection system. It has done so by reallocating flows and connections from previously issued sewer extension permits, under permission granted to NTWS by DWQ and this Commission. Records of NTWS clearly indicate that its customer base had continued to expand, without threat of punitive action by DWQ. Based on the foregoing, the Commission is of the opinion that the sewer collection system is adequately serving the needs of the customers who are using the collection system.

It is clear that prior to 1994, NTWS was in a state of noncompliance with its environmental permit issued by DWQ. Since 1994, however, NTWS management has operated its facilities in a sound and reasonable manner. Further, customers testifying at the hearing on October 12, 1999, also indicated that service by the current management of NTWS is satisfactory. Only one customer mentioned a problem, which was an occasional odor from the island pumping station at the NC 210 bridge. The rest were complimentary.

The evidence supports the conclusion that NTWS management routinely makes prudent use of its available capital resources to provide an adequate quality of service to its customers. Furthermore, the NTWS system does not suffer from various system deficiencies, ongoing environmental regulatory violations and frequent customer complaints that typify operationally-troubled systems. The Commission finds and concludes that the facilities owned and operated by NTWS are in satisfactory condition and are currently sufficient to provide sewer utility service to the customers. Without some evidence of inadequate service currently or in the recent past, the Commission cannot conclude that NTWS is operationally troubled. The record in this case is devoid of such evidence. Accordingly, the Commission concludes that NTWS is not an operationally-troubled system.

The record clearly establishes that the "public convenience and necessity" would be served by the transfer of North Topsail to an owner other than its current stockholders. At this point, the stock of North Topsail is still owned by Marlow Bostic and Roger Page, neither of whom were able to ensure the operation of North Topsail in an acceptable manner. A sale of North Topsail is inevitable given the necessity for the United States Bankruptcy Court for the Eastern District of North Carolina to utilize the stock in North Topsail owned by Mr. Bostic and Mr. Page to satisfy the claims of their creditors. A sale of North Topsail to an adequately-capitalized owner will clearly serve the public interest by eliminating the unusual procedures which have been utilized to finance the operation, maintenance, and expansion of the North Topsail system and ensuring that sufficient resources will be available to ensure the provision of adequate service to current and future North Topsail customers. UI is clearly a competent, adequately-capitalized, professionally-operated water and sewer utility.

Accordingly, the Commission concludes that UI possesses the financial and operational expertise and wherewithal to receive and operate the franchise and assets of NTWS. The transfer proposed herein will benefit the customers of NTWS by ensuring the long-term viability of their sewer system, in that it will be owned and operated by a professional utility company with the technical, managerial and financial capability to ensure the long-term provision of adequate service. Accordingly, the Commission approves UI's request to obtain the franchise and assets of NTWS. Such approval furthers the goal of promoting transfers of troubled systems to professional, well-capitalized owners.

With regard to the position taken by Onslow County that the public interest would be best served if the County rather than UI acquires NTWS, the Commission notes that the County did not participate in the bankruptcy bidding process to acquire NTWS and that there is no request to transfer NTWS to the County pending before the Commission. UI is the only transfer applicant.

The Benefits of UI's Ownership Do Not Outweigh the Costs of Including the Purchase Price in Rate Base

Notwithstanding the fact that NTWS is a financially-troubled system, the Commission determines that UI's purchase price should not be included in rate base because the benefits to

NTWS's ratepayers from UI's ownership do not outweigh any costs that may result from establishing rate base in this fashion. Although reaching the same result as that advocated by the Public Staff with respect to this issue, the Commission cannot adopt either the Public Staff's conclusion that North Topsail is not a "troubled" utility or the analysis which both UI and the Public Staff have utilized to support their ultimate conclusions with respect to the acquisition adjustment issue. After examining the relevant policy considerations and the prior decisions of the Commission, the Commission concludes that the outcome in an acquisition adjustment case should hinge upon whether the party seeking rate base treatment for an acquisition adjustment has established by the greater weight of the evidence that the purchase price which the purchaser has agreed to pay is prudent and that the benefits of including the acquisition adjustment in rate base outweigh any resulting burden to ratepayers. After conducting such an analysis, the Commission concludes that inclusion of the acquisition adjustment in North Topsail's rate base would be inappropriate because UI is obligated to purchase North Topsail regardless of our decision with respect to the acquisition adjustment issue and because UI has failed to meet its burden of proving that the benefits to affected customers from the inclusion of the acquisition adjustment in rate base outweigh the resulting harm.

The Commission's evaluation of utility mergers is governed by G.S. 62-111(a), which provides, in pertinent part, that "[n]o franchise now existing or hereafter issued under the provisions of this Chapter. . .shall be sold, assigned, pledged or transferred. . . except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity." G.S. 62-111(a) requires the Commission to "inquire into all aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the transfer will serve the public convenience and necessity." State ex rel. Utilities Commission v. Village of Pinehurst, 99 N.C. App. 224, 299, 393 S.E.2d 111 (1990), aff'd 331 N.C. 278, 415 S.E.2d 199 (1992). As a result, the Commission must determine on the basis of an examination of all relevant facts and circumstances whether the proposed transfer, either as proposed by the applicant or as modified to reflect the imposition of conditions as authorized by G.S. 62-113, is in the best interest of the relevant members of the using and consuming public.

The Commission establishes the rate base of North Carolina utilities by ascertaining "the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service to the public within the State, less that portion which has been consumed by previous use recovered by depreciation," plus, to a limited extent not applicable here, construction work in progress. G.S. 62-133(b)(1). Although the appellate courts have apparently never had the opportunity to determine the meaning of the reference to "reasonable original cost" in G.S. 62-133(b)(1) in an instance when property previously dedicated to the public service is purchased by another public utility at a premium over net book value, the Commission has dealt with this issue on numerous occasions. We do not, however, appear to have ever enunciated a single, specific method for determining whether requests such as that advanced by UI in connection with this transfer application should be granted or denied.

The appropriateness of including an acquisition adjustment in rate base came before a Commission Hearing Examiner in In re Carolina Water Service, Inc., of North Carolina, Docket Nos. W-354, Subs 39, 40, 41, Seventy-Sixth Report of the North Carolina Utilities Commission: Orders and Decision 739 (1986) (Carolina Water I); the Hearing Examiner's decision became that of the Commission after no party excepted to his proposed resolution of the acquisition adjustment issue.

In re Carolina Water Service, Inc., of North Carolina, Docket No. W-354, Subs 39, 40, 41, Seventy-Sixth Report of the North Carolina Utilities Commission: Orders and Decisions 769 (1986). After noting that requests for rate base treatment of acquisition adjustments should be dealt with on a case-by-case basis, the Hearing Examiner opined that "the benefits of the acquisition to the acquired customers and to existing customers [may] merit the inclusion of the debit acquisition adjustment" in rate base in some instances. Carolina Water I 739, 756 (1986). The Hearing Examiner approved inclusion of an acquisition adjustment associated with the Mecklenburg systems in rate base because the prior owner had failed to operate the systems properly, existing customers had better prospects for receiving adequate service as a result of the transfer, the sale price for the systems had been negotiated at arms length and was prudent, and the inclusion of the Mecklenburg systems in Carolina Water Service's rate base would tend to decrease rates for all other Carolina Water Service customers. Carolina Water I 739, 756-757 (1986). The Hearing Examiner reached the opposite conclusion with respect to the Chapel Hills and High Meadows systems since the record did not establish that the prior owner would have failed to make necessary system improvements in the absence of a transfer, the amount which Carolina Water Service had spent on service improvements was unclear, there had been no violations assessed against the High Meadows system, the record did not demonstrate that the sales had been conducted at arms length and that the purchase prices were reasonable, the circumstances surrounding the transfers were unclear, the purchases had been effectuated without prior Commission approval, and it was doubtful that the benefits to customers outweighed the costs. Carolina Water I 739, 757-758 (1986). The Hearing Examiner finally noted that a blanket refusal to allow the inclusion of acquisition adjustments in rate base might provide an undue stimulus to utility construction in lieu of asset purchases; that the potential harm from the inclusion of an acquisition adjustment in rate base could be minimized by carefully scrutinizing each "transaction to ensure that it is prudent, at arms length, and that the benefits accruing to the customers outweigh the costs of inclusion in rate base of the excess purchase price;" and that allowing the inclusion of acquisition adjustments in rate base might encourage the transfer of small, poorly-operated systems to more qualified operators. Carolina Water I 739, 758 (1986).

The Commission subsequently discussed the acquisition adjustment issue in a 1990 Carolina Water Service general rate case, where it stated that, "[a]s a general proposition, when a public utility buys assets that have previously been dedicated to public service as utility property, the acquiring utility is entitled to include in rate base the lesser of the purchase price or the net original cost of the acquired facilities in the hands of the transferor at the time of the transfer." In re Carolina Water Service, Inc., of North Carolina, Docket Nos. W-354, Subs 74, 79, 81, Eightieth Report of the North Carolina Utilities Commission: Orders and Decisions 342, 394 (1990) (Carolina Water II). The Commission adopted this general principle on the grounds "that the investor in utility property should only be entitled to recover his own investment" and that "public utility ratepayers normally should only be responsible for reimbursing an investor once for the cost of public utility property through depreciation expense recovered through rates and through payment of a return on the unrecovered investment." Carolina Water II 342, 394 (1990). After making this initial statement, the Commission analyzed the facts and circumstances surrounding each acquisition adjustment challenged by the Public Staff, generally refusing to allow the inclusion of these amounts in rate base on the grounds that "the developers contributed the system, and presumably intended to recover their costs through lot sales;" that the extent to which "they actually recovered their utility system investment through lot sales, or are still doing so, is irrelevant at this point for regulatory purposes;" and that the record did not reflect whether any other system improvements had, in fact, been made.

Carolina Water II 342, 395-396 (1990). As a result, the Commission indicated a strong general policy against the inclusion of acquisition adjustments in rate base subject to exceptions in appropriate instances. See also: In re Transylvania Utilities, Inc., Docket No. W-1012, Sub 2, 3 (1995) (Transylvania) ("the Commission agrees with the Hearing Examiner that the Company has not carried the burden of proof that the benefits to ratepayers outweigh the cost of inclusion in rate base of the excess purchase price or that system deficiencies would have gone unaddressed if not for the acquisition by the acquiring company").

The Commission recently considered an acquisition adjustment issue in connection with an application by Heater Utilities, Inc., to purchase a water utility system in the Hardscrabble Plantation subdivision. In that case, the Public Staff argued that, under a "three prong" test allegedly established in Carolina Water I, Heater should not be allowed to include an acquisition adjustment in rate base unless "[t]he benefits to ratepayers. . . outweigh. . .the cost of inclusion in rate base of the excess purchase price," "[s]ystem deficiencies would have gone unaddressed if not for the acquisition by the acquiring company," and "[t]he acquisition was the result of arms' length bargaining." In re Heater Utilities, Inc., Docket No. W-274. Sub 122, 9 (1997) (Hardscrabble). In rejecting the Public Staff's argument, the Commission noted that the Hearing Examiner "discussed a large number of specific facts" in Carolina Water I, "including: (1) service improvements that would have gone unaddressed; (2) increased rates; (3) arms' length bargaining; (4) prudent purchase price; (5) benefits to acquired and acquiring customers; (6) average per customer rate base of the acquiring company as opposed to the per customer purchase price; (7) operating efficiencies; and (8) spreading costs under unified rate structure and other items" and pointed out that "[t]he three-prong test" upon which the Public Staff relied "does not appear, verbatim, in [the Hearing Examiner's] order." Hardscrabble 10 (1997).

Heater, on the other hand, claimed that the test adopted by the Hearing Examiner in Carolina Water I focused on "whether the purchase price was prudent, whether the purchase price resulted from arms' length bargaining, and whether the "benefits to consumers. . .outweigh[ed] the cost of including the purchase price in rate base." Hardscrabble 10-11 (1997). Although the Commission concluded that the entire cost of the Hardscrabble system had been recovered through fees paid to the developers of the system, Hardscrabble 9 (1997), and that there were no deficiencies in the Hardscrabble system, Hardscrabble 11 (1997), it refused to treat these facts as dispositive since "it. . . would conflict with sound regulatory policy and practice, to send a signal to the water utility industry that a small system should be allowed to deteriorate so that it can command a higher sales price, since the acquiring company could then obtain rate base treatment on its purchase price." Hardscrabble 11 (1997). After concluding that the purchase price that Heater paid for the Hardscrabble system was lower than its existing per-customer investment, that the Hardscrabble system was in good condition and located near other Heater-owned systems, that the purchase of the Hardscrabble system would tend to reduce rates for other Heater customers, and that the transfer of the Hardscrabble system to Heater would allow customers located on that system to receive service from a professionally-operated utility and prior to refusing to allow Heater to change its uniform rates to customers of the Hardscrabble system, the Commission concluded "that Heater should be allowed to make the requested debit acquisition adjustment to rate base" since "[t]he Commission has articulated a position of encouraging the orderly transfer of water systems from developers and small owners to reputable water utilities like Heater" and since "its decision herein, based on the facts and circumstances presented, promotes and serves the public interest and is in the public interest." Hardscrabble 11 (1997).

The Commission Orders discussed above do not clearly state a single, definitive test for resolving acquisition adjustment issues in water and sewer transfer cases. Carolina Water I does not, for example, explicitly mention the three-prong test upon which the Public Staff relied in Hardscrabble or establish the appropriateness of using an eight-factor test like that emphasized by the Public Staff at one point in this case. Although Carolina Water I does recite the three factors upon which Heater relied in Hardscrabble, that test does not neatly cover or place equal emphasis upon all of the factors mentioned by the Hearing Examiner in Carolina Water I or explicitly place the burden of proof in acquisition adjustment cases upon the applicant utility as apparently required by Carolina Water II and Transylvania. The lack of clarity in the nature of the test which should be employed in resolving acquisition adjustment issues is heightened when one compares the language of Carolina Water II, which expresses a strong skepticism about allowing rate base treatment of acquisition adjustments, and the equally clear language of Hardscrabble, which stresses the benefits of transferring small water and sewer utilities to larger, more professional operations. As a result, it is appropriate for the Commission to begin its analysis in this case by developing a test for identifying the circumstances in which rate base treatment of acquisition adjustments is appropriate based upon the relevant provisions of North Carolina law and considerations of sound regulatory policy.

A majority of regulatory agencies in the United States have decided that, all other things being equal, acquisition adjustments should not be afforded rate base treatment. According to Bonbright, "most commissions are skeptical of transfers between utilities at excess costs, so rate base adjustments are generally not made unless the utility can demonstrate actual, distinct and substantial benefits to all affected ratepayers." J. Bonbright, A. Danielson, and D. Kamerschen, Principles of Public Utility Rates 286 (1987). See also: 1 A. Priest, Principles of Public Utility Regulation 189 (1969) (although the majority of regulatory commissions have refused to include acquisition adjustments in rate base, such treatment has been allowed where "the transaction was at arm's-length," "resulted in operating efficiencies," "received regulatory approval as having been in the public interest," or "made possible a desirable integration of facilities"). The adoption of such a general rule is clearly appropriate, for the routine inclusion of acquisition adjustments in rate base would tend to create an incentive for purchasers to pay a high price to acquire utility assets, confident in the knowledge that such payments would be recouped from ratepayers. As a result, the approach the Commission should adopt ought to place the burden of proof on the acquiring utility to demonstrate the appropriateness of including an acquisition adjustment in rate base.

Assuming the appropriateness of adopting a general rule prohibiting the inclusion of acquisition adjustments in rate base in the absence of a showing of special circumstances justifying a contrary decision, the next question becomes one of identifying the circumstances under which rate base treatment of acquisition adjustments should be deemed proper. As should be apparent from an analysis of the Commission's previous Orders concerning this subject, a wide range of factors have been considered relevant in attempting to resolve this question, including the prudence of the purchase price paid by the acquiring utility; the extent to which the size of the acquisition adjustment resulted from an arms length transaction; the extent to which the selling utility is financially or operationally "troubled;" the extent to which the purchase will facilitate system improvements; the size of the acquisition adjustment; the impact of including the acquisition adjustment in rate base on the rates paid by customers of the acquired and acquiring utilities; the desirability of transferring small systems to professional operators; and a wide range of other factors, none of which have been deemed universally dispositive. Although the number of relevant considerations seems virtually unlimited, all of them apparently relate to the question of whether the acquiring utility paid too much for the acquired utility and whether the customers of both the acquired and acquiring utilities are better off after the transfer than they were before that time. This method of analysis is consistent with sound regulatory policy since it focuses on the two truly relevant questions which ought to be considered in any analysis of acquisition adjustment issues. It is also consistent with the construction of G.S. 62-111(a) adopted in State ex rel. Utilities Commission v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd 331 N.C. 278, 415 S.E.2d 199 (1992), which seems to indicate that all relevant factors must be considered in analyzing the appropriateness of utility transfer applications. As a result, contrary to the approaches advocated by both UI and the Public Staff, the Commission should refrain from allowing rate base treatment of an acquisition adjustment unless the purchasing utility establishes, by the greater weight of the evidence, that the price the purchaser agreed to pay for the acquired utility was prudent and that both the existing customers of the acquiring utility and the customers of the acquired utility would be better off [or at least no worse off] with the proposed transfer, including rate base treatment of any acquisition adjustment, than would otherwise be the case.

Although the Public Staff attempted to show that the purchase price which UI agreed to pay for the North Topsail system was imprudent, the Commission concludes that UI has met its burden of proof with respect to this issue. The Commission takes judicial notice that the North Topsail system is located in an area which is experiencing or is likely to experience significant growth. G.S. 62-65(b). A prudent purchaser might well elect to pay more than net book value for a sewer utility with no immediate operational problems, such as North Topsail, on the assumption that acquiring the right to operate that utility's system had independent value over and above the net book value of the acquired utility's assets. In addition, the purchase price which UI agreed to pay was established at an auction conducted under the auspices of the United States Bankruptcy Court for the Eastern District of North Carolina which was intended, for obvious reasons, to maximize the purchase price obtained for the North Topsail system. The price at which UI purchased North Topsail was only $50,000 greater than the last bid submitted by its principal rival during the auction. According to the bidding procedures followed during the auction process, additional bids were required to be submitted in $50,000 increments. As a result of the fact that the purchase price paid by UI was clearly established through an arms length bidding process and the fact that the price which UI ultimately agreed to pay was the minimum amount apparently necessary to prevail in the bidding process, the Commission is satisfied that the purchase price which UI agreed to pay for the North Topsail system was prudent.

In addition to its relevancy to a determination of whether approval of the transfer is in the public interest as previously discussed above, the issue of whether North Topsail should be labeled a "troubled" utility, is also undoubtedly relevant to a proper resolution of the acquisition adjustment issue. The Commission does not, on the other hand, agree that a determination of whether North Topsail is "troubled" should be deemed dispositive of the acquisition adjustment issue as both UI (Tr. Vol. 2, p. 115) (the ultimate issue is whether North Topsail is a "troubled" system and, if so, whether the benefits associated with the proposed acquisition outweigh the cost so as to justify inclusion of the acquisition adjustment in rate base) and the Public Staff (Public Staff Proposed Order, pp. 15, 19-27) (the Commission should analyze the acquisition adjustment issue utilizing the test enunciated by UI) seem to suggest. To the contrary, treating the question of whether North Topsail is a "troubled" utility in this manner is inconsistent with Commission's decision in Hardscrabble and effectively eliminates the necessity for the Commission to consider all relevant factors as required by G.S. 62-111(a).

The fervor of the parties' advocacy with respect to the "troubled" system issue should not obscure the relative clarity of the record with respect to this question. The evidence which the parties used to debate this point included considerable discussion of North Topsail's past travails. The Commission disagrees with UI's contention that our determination of whether North Topsail is a "troubled" system should rest, to an apparently large extent, on North Topsail's indubitably checkered history. The Commission is required to decide whether a transfer of the North Topsail system to UI, including the extent to which the acquisition adjustment should be included in rate base, is currently in the public interest. An analysis of past events is relevant to this issue to the extent that earlier developments impact North Topsail's current situation.

Nevertheless, the customers of North Topsail are not plagued with any serious operational problems at the present time. No customers advanced any serious service quality complaints at the October 12, 1999 public hearing. As a result, the Commission is persuaded that, barring any unforeseen emergency such as another major hurricane, the North Topsail system is currently being operated in a satisfactory manner. In addition, the record does not suggest that an acquisition by UI will have any immediate impact on the quality of the service which North Topsail provides to its customers. That determination, however, does not end the inquiry. The long-term prospects for North Topsail under current ownership and management are not unclouded. The record reveals the existence of potential long-term operational problems arising from limitations upon the capacity of North Topsail's system, including restrictions upon its ability to add new customers. Although the Public Staff may well be correct in asserting that these problems will ultimately be resolved even without a change in ownership or management, the simple fact remains that the limitations in question do exist now. In addition, the record shows that North Topsail does not have access to adequate capital. Although current management has undoubtedly improved North Topsail's ability to serve customers, restored the system to good working order after several major hurricanes, and operated the system well given existing resource constraints, the undisputed evidence of record establishes that, all other things being equal, North Topsail customers would be better off in the event that the system was owned and operated by an adequately-capitalized and professionally-run entity. As a result, the Commission has concluded that North Topsail is a financially-troubled utility. Nevertheless, that conclusion, considered in isolation, is not dispositive of the acquisition adjustment issue.

In that regard, the Commission notes that UI's willingness to purchase the North Topsail system was not conditioned on inclusion of the acquisition adjustment in rate base. Instead, the contract between UI and the Bankruptcy Trustee clearly obligates UI to purchase North Topsail whether or not the Commission approves inclusion of the proposed acquisition adjustment in rate base. At least one other adequately-capitalized utility attempted to buy North Topsail without seeking rate base treatment for an acquisition adjustment. Under this set of circumstances, the customers of North Topsail will get the benefit of ownership and operation by an adequately-capitalized and professionally-run utility regardless of whether the Commission approves inclusion of the acquisition adjustment in rate base or not. For this reason, much of the argument advanced by UI is less than compelling. As a result, the Commission concludes that we should decide the acquisition adjustment issue on the basis of an assumption that current North Topsail customers will receive service from an adequately-capitalized, professionally-run utility regardless of our decision with respect to the acquisition adjustment issue and that the benefits to customers necessary to justify inclusion of the acquisition adjustment in rate base must be found elsewhere.

The fact that UI's obligation to purchase North Topsail is not conditioned on approval of the proposed acquisition adjustment distinguishes this case from the numerous recent Commission decisions upon which UI places emphasis. For example, the Commission expressly noted in In re Heater Utilities, Inc., Docket No. W-274, Sub 215, 2 (1999), that "[t]he contracts for transfer filed with the application are conditioned upon Heater's obtaining Commission approval of an acquisition adjustment allowing Heater to receive rate base treatment of the full $520,000 purchase price." Similarly, in In re Heater Utilities, Inc., Docket Nos. W-274, Subs 233, 234, 235, 236, and 237 (1999), the Commission approved the transfer of various water and sewer utility systems from MidSouth to Heater under a contract which conditioned this transaction "upon Heater obtaining an acquisition adjustment to allow Heater to receive future rate making treatment as [sic] rate base for the full purchase price." Furthermore, the contract for the transfer of the Bragg Estates subdivision from Water, Inc., to Brookwood Water Corporation at issue in In re Brookwood Water Corporation, Docket No. W-177, Sub 46 (1999), expressly provided that the purchase price to be paid by Brookwood to Water, Inc., for the Bragg Estates subdivision was to be the greater of the net original cost investment which Water Inc., had in the Bragg Estates system as determined by the Commission or $15,000 and that the proposed transfer was "null and void" in the event that "the Commission [did] not approve the entire purchase price as rate base." Finally, the Commission's decision in In re Brookwood Water Corporation, Docket No. W-177, Sub 47, 2 (1999), noted that Brookwood's agreement to purchase the Wrightsboro system from Scotsdale Water & Sewer, Inc., "was conditioned on Commission approval of full rate base treatment of the purchase price," which, in turn, included an acquisition adjustment. As a result of the fact that all of these cases involved sale agreements in which the benefits resulting from the proposed transfer were contingent upon Commission approval of the proposed acquisition adjustment, none of these cases support approval of an acquisition adjustment in this case.

Admittedly, the Hardscrabble decision cannot be distinguished on this basis, since the record in Hardscrabble reflects that Heater expressed the intention to consummate the purchase of the Hardscrabble system regardless of the Commission's resolution of the acquisition adjustment issue. Nevertheless, the facts at issue there are sufficiently different from those at issue here to support a different result. At the same time that the Commission approved Heater's request for rate base treatment of an acquisition adjustment in Hardscrabble, it refused to allow Heater to charge its uniform rates, saving Hardscrabble customers from a substantial increase. The Commission also noted in that case that, even after the inclusion of the acquisition adjustment in rate base, Heater's $100 per-customer investment in the Hardscrabble system was substantially less than the $575 per-customer investment which Heater had in the rest of its systems. Finally, the Commission emphasized that the likely effect of encouraging the transfer of the Hardscrabble system to Heater through a decision to approve the inclusion of the acquisition adjustment in rate base would be to place downward pressure on Heater's uniform rates. In this case, on the other hand, inclusion of the acquisition adjustment in rate base would increase North Topsail's per-customer investment from $503 to $1,390, more than eight times the per-customer acquisition adjustment approved in Hardscrabble. In addition, unlike Hardscrabble, the effect of allowing the inclusion of the acquisition adjustment in rate base in this instance would be to place upward pressure on the uniform rates charged by UI's largest North Carolina subsidiary in the event that the two systems were to be consolidated. As a result, the fact that the per-customer impact of including the acquisition adjustment at issue here in rate base is so much greater than was the case in Hardscrabble and the fact that another potential purchaser was willing to forgo inclusion of the acquisition adjustment in rate base makes the two cases fundamentally different.

The only additional benefit which may flow to North Topsail customers from inclusion of the acquisition adjustment in rate base in this case stems from UI's offer to withdraw North Topsail's pending application for a general rate increase and to refrain from seeking to increase rates for affected customers for three years. Although such an offer might, under some circumstances, suffice to justify inclusion of an acquisition adjustment in rate base, the Commission is not persuaded that such is the case in this instance. In analyzing this issue, one should remember that the burden of proof is on UI to establish that the benefits of the proposed transfer, including rate base treatment of the acquisition adjustment, outweigh the associated burdens. The undisputed evidence establishes that, all other things remaining equal, inclusion of the acquisition adjustment in rate base would support a $12.00 per month or 38% increase in North Topsail's ordinary residential rates. Although UI has argued that a number of factors, such as customer growth, increased efficiencies, and economies of scale, could well offset some or all this rate increase, the extent to which such factors would have that effect is, at best, uncertain. In the absence of a decision to include the proposed acquisition adjustment in rate base, UI would, presumably, pursue the application for a 22% rate increase which North Topsail filed with the Commission in 1999. Although the record is not entirely clear on this point, the Commission assumes that many of the same factors which allegedly support a 22% increase now would still be present at the time that UI's self-imposed rate increase moratorium expires (a change in the treatment of the overcollected CIAC gross-up may have some impact on the validity of this statement), so that the proper basis for comparison is whether customers are better off with a 22% increase now or a 60% (modified as necessary to reflect the passage of time) increase at the end of three years. Assuming an 8.5% discount rate and a twenty-year calculation period, North Topsail's ratepayers are better off with an immediate 22% increase than with a 60% increase in three years on a net present value basis.

Moreover, the extent to which North Topsail is entitled to a 22% increase at the present time is unclear. The Public Staff contends that North Topsail is only entitled to a 1.67% increase at present; at an absolute minimum, observers of the regulatory process in North Carolina can safely assume that North Topsail's request for increased rates is unlikely to be approved without at least some modification. On the other hand, there does not appear to be any dispute that, all else remaining equal, the inclusion of the proposed acquisition adjustment in rate base will result in a 38% increase for North Topsail's customers separate and apart from other factors. Once again, if one assumes that North Topsail is entitled to either a 1.67% increase or a 10% increase now, the net present value of such an increase calculated over the next twenty years using an 8.5% discount rate is less than the net present value of a 39.67% or a 48% increase, respectively, three years from now calculated using the same assumptions. As a result, the Commission is simply not persuaded that North Topsail's customers are better off, over the long term, with a 38% increase plus any currently justifiable increase, adjusted to reflect the passage of time, three years from now compared to any currently-justified increase implemented in the near future. As a result, given that the immediate improvement in service conditions is not likely to be of overwhelming significance, that the benefits of having an adequately-capitalized owner will be available to North Topsail customers regardless of our decision with respect to this issue, and that the rate impact of the inclusion of the acquisition adjustment in rate base is likely to be greater than the alternatives, the Commission cannot conclude that the benefits of the proposed transfer as outlined by UI outweigh the costs.

In apparent recognition of this problem, UI also indicated that, following completion of the transfer, it would consider consolidating the North Topsail system with its Carolina Water Service systems and charging North Topsail's customers on the basis of the uniform rates currently in effect for Carolina Water Service's customers. The Commission is not persuaded that this proposal overcomes the difficulties outlined above. First, the implementation of this proposal would require Commission authorization at the conclusion of a separate proceeding. As of the present date, UI has not applied for the authority to consolidate North Topsail with Carolina Water Service; there is no guarantee that the Commission would give its blessing to such a transaction if it were to be proposed. Second, the record reflects that substitution of Carolina Water Service's uniform rates for those currently charged by North Topsail would still result in a rate increase for those North Topsail customers with individual pump stations who pay their own pumping expense. Third, and most important, the effect of implementing this proposal would simply be to transfer the burden resulting from the inclusion of the acquisition adjustment in rate base from current North Topsail customers to all customers served by Carolina Water Service. It thus appears that Carolina Water Service customers would receive absolutely no benefit whatsoever in return for the assumption of this burden. As a result, the Commission is unable to conclude that, in the event that UI decides to consolidate the North Topsail system with its Carolina Water Service subsidiary, all affected customers will be better off following a Commission decision to approve the transfer as proposed by UI than would otherwise be the case.

Although UI argues that there are a number of other benefits which it believes will accrue to customers from a transfer of North Topsail to UI, including the ability to reduce connection fees prospectively to costs, UI's ability to post the required bond, the likelihood that UI will be able to refund the overcollected CIAC gross-up, and the Commission's ability to relinquish its role in managing NTWS to UI, all of these additional benefits simply reflect the fact that the new owner of North Topsail will be a financially-viable entity and that such a financially-viable owner will require less Commission supervision and have more financial resources than are currently available to North Topsail. In essence, UI would have the Commission conclude that the benefits which would accrue to customers from transferring ownership of North Topsail to a solvent, competent utility such as UI are sufficient to justify inclusion of the acquisition adjustment in rate base. Nevertheless, at bottom, it appears to the Commission that all of the benefits which would accrue to North Topsail customers from an acquisition by UI will exist whether or not the acquisition adjustment is included in rate base. For that reason, the Commission cannot approve the proposed transfer coupled with rate base treatment of the proposed acquisition adjustment. A decision refusing to approve the transfer in the manner requested by UI is consistent with the Commission's prior acquisition adjustment decisions and with considerations of sound regulatory policy. On the other hand, approval of UI's proposal would, in effect, amount to a decision that an acquisition adjustment would be included in rate base any time that a large, professionally-operated utility acquires a smaller system, an approach which is inconsistent with this Commission's precedent and considerations of sound regulatory policy.

Connection Fees Should Be Established at $1,200

Connection fees should be reduced to $1,200 per residential equivalent unit, equal to 360 gpd, with a minimum of $1,200 for each connection or dwelling unit. Commercial customers would pay a connection fee based on design flow of the business to be served, with a minimum of $1,200. Multi-unit construction would pay $1,200 times the number of units served.

Currently, residential connection fees are $2,000 for a new service connection not requiring the installation of a pumping station and $3,000 for a connection that requires the installation of a pumping station. In its application, UI proposed no change in connection fees. The Public Staff proposes to reduce connection fees to the cost of labor and materials to make the connections plus the $1,000,000 cost of a fourth lagoon. The Public Staff maintains that connection fees at this level would provide UI with the same level of CIAC and is consistent with the connection fees authorized for UI's other affiliated companies.

At the hearing and in its proposed order, UI agreed with the Public Staff recommendation that connection fees charged after the transfer should be reduced. The Commission determines that the level of connection fees agreed to by the parties should be approved prospectively without altering the rights of those who have prepaid connection fees prior to the transfer.

Bond Should be Established at $200,000

The bond for UI with respect to NTWS required pursuant to G.S. 62-110.3(a) should be established at $200,000. The Public Staff addressed the five criteria that must be considered by the Commission in setting the bond amount pursuant to G.S. 62-110(a). In summary, the Public Staff determined that UI is affiliated with companies providing water and sewer utility service in North Carolina; UI's record of operation is satisfactory; there is projected growth of 3%; there is no need to construct new facilities, as the existing facilities were capable of accommodating the flows anticipated for at least the next 15 years; that the NTWS facilities are in excellent condition; and that NTWS has made expenditures to repair damage caused by adverse weather events. The Public Staff recommended a bond of $200,000, which is the largest amount of damage NTWS has suffered as a result of a single hurricane. UI does not object to the bond. The Commission agrees with the parties as to the size of the bond.

NTWS was initially franchised prior to September 1987, when the bonding legislation was enacted. G.S. 62-110.3(b), however, imposes a bonding requirement on contiguous extensions regardless of when a franchise was issued. Furthermore, G.S. 110.3(c) authorizes the Commission, at any time, to reevaluate the amount of a bond based on changed circumstances. The Commission is of the opinion that the proposed transfer is such a change.

UI Should Refund Overcollected CIAC Gross-Up

The sum of $337,200, representing the overcollection of gross-up on CIAC, that NTWS has been unable or unwilling to refund, should be refunded by UI. In Docket No. W-754, Sub 12, the Commission ordered NTWS to refund $241,150 plus accrued interest to customers for overcollection of the gross-up for income taxes on CIAC by filing a refund plan and beginning repayment in July

1992. On August 20, 1992, in response to a motion of the Public Staff, the Commission found that NTWS had failed to file a plan and make refunds as ordered. At a Show Cause Hearing on September 23, 1992, in Docket No. W-754, Sub 12, NTWS submitted financial information prepared by its accountant and testified about the financial problems it was experiencing. The Commission approved a Joint Stipulation in Docket No. W-754, Subs 12 and 14 treating the gross-up as cost-free capital and deducting it from rate base. The Commission stated that if NTWS were transferred or sold, the gross-up should be refunded to the CIAC contributor as originally stipulated by NTWS and as ordered by the Commission.

In this docket, the Public Staff recommends that $337,200 be refunded to the CIAC contributors as originally ordered by the Commission. Also, the Public Staff recommended that UI file a refund plan.

At an earlier proceeding in this docket, Joseph N. Callaway, Bankruptcy Trustee in the Mr. Bostic bankruptcy proceeding, asserted that the unclaimed portion of the $337,200, if any, was part of the assets of the bankruptcy estate that should be included within the funds to be distributed to creditors.

Although UI does not wish to become embroiled in the dispute over the disposition of the CIAC gross-up, UI does not contest refunding the $337,200 to the contributors to the extent these funds are released by the Bankruptcy Trustee and are provided from the preexisting fund. UI submitted a refund plan with its proposed order. The refund plan outlines a procedure to identify contributors, make refunds, and treat unclaimed refunds as cost-free capital.

The Commission concludes that the amount of $337,200 should be refunded to the contributors of the CIAC; provided, however, that any unclaimed refunds will be retained by UI as cost-free capital. With support from the Public Staff, UI will be expected to obtain records from NTWS and proceeds from the Trustee with which to make refunds.

UI Should Maintain the Connection Fee Escrow Account for Capital Improvements

In Docket Nos. W-754, Subs 12 and 14, the Commission established a connection fee escrow account. Connection fee receipts are placed in this escrow account, and specific Commission approval is required before spending any of the funds in the account. Since the escrow account was set up, the Commission has allowed NTWS to use the funds to upgrade the sewer system and purchase land, building, vehicles and other utility assets.

In this docket, the Public Staff recommends that the balance in the connection fee escrow account on the date NTWS is sold be maintained by UI for the purposes of capital improvements for use only to upgrade and improve NTWS's sewer system. The Public Staff recommends that UI be required to file annually a report with the Commission listing the balance in the account, investment income received and expenditures made from the account. The Public Staff recommends that the balance in the escrow account will only affect rate base once expenditures are made from it and that UI increase both plant in service and CIAC for any amount spent out of the escrow fund.

UI expresses no objection to the Public Staff proposal. However, UI expresses its willingness to administer the escrow account in accordance with the Commission's wishes and directives without the need to file an annual report. UI is willing for the Commission to rely upon UI to use the escrow account funds reasonably and prudently and for the Commission to assess the prudence of UI's administration of the escrow fund in subsequent rate cases.

The Commission approves the recommendation for UI to maintain the connection fee escrow account to upgrade and improve the NTWS sewer system and to account for funds expended from the account. As connection fees are being reduced and UI will be responsible for funding most capital additions through its own resources, UI is released from the responsibility of placing connection fees collected after the transfer into the escrow account. The Commission concludes that it is unnecessary for UI to file an annual report, but the Commission will require UI to demonstrate its prudence in managing the escrow account in subsequent general rate cases.

UI's Management Plan is Acceptable

At the Public Staff's request, the Commission in its Order establishing hearing required UI to provide a proposed management plan for NTWS after UI's acquisition. In his direct testimony UI witness Wenz stated that a detailed plan could be formulated only after UI gains experience in operating the system. Mr. Wenz testified that UI had no immediate plans for cutbacks, but if UI can operate the system more efficiently, UI will do so. Mr. Wenz testified that if North Topsail can be operated with fewer people, after giving reasonable notice, UI would look for opportunities for current North Topsail employees elsewhere in the UI organization.

The Public Staff encourages UI to retain the current NTWS personnel, based on the Public Staff's belief that such employees will be critical to the continued satisfactory operation of the system. The Public Staff recommends that four months' notice be required prior to termination of any employee for any reason other than nonfeasance or malfeasance of duties.

The Commission concludes that UI's willingness not to make any immediate cutback in NTWS employees and to provide notice and seek to place such employees elsewhere in the UI system is adequate protection. The Commission finds good cause to approve UI's management plan.

IT IS, THEREFORE, ORDERED as follows:

1. That the transfer of the franchise to provide sewer utility service in North Topsail Beach, North Carolina, from North Topsail Water and Sewer Inc., to Utilities, Inc., be, and the same is hereby, approved, contingent upon Utilities, Inc., complying with decretal paragraph 2 below.

2. That Utilities, Inc., shall complete one of the attached bonds (Appendices A-1, A-2, or A-3) and <u>return said bond to the Commission</u>. If the bond selected is Appendix A-1, UI shall deposit the appropriate surety in the amount of $200,000 with Branch Banking & Trust Company, Attention: Julia Percivall, Trust Administrator, 3605 Glenwood Avenue, Raleigh, North Carolina 27612. If the bond selected is Appendix A-2 or Appendix A-3, UI shall file the appropriate surety and commitment letter (see Filing Requirement for Bonding, Appendix A-4) with the Commission.

3. That the request by Utilities, Inc., that the amount it is paying in excess of NTWS's original cost net investment be placed in its rate base as a debit plant acquisition adjustment be, and the same is hereby, denied.

4. That connection fees to be collected subsequent to the transfer shall be reduced to $1,200 per residential equivalent unit, equal to 360 gpd, with a minimum of $1,200 for each connection or dwelling unit. Commercial customers shall pay a connection fee based on the design flow of the business to be served, with a minimum of $1,200. Multi-unit construction shall pay $1,200 times the number of units served.

5. That, not later than 30 days from the date of this Order, the Public Staff shall review UI's refund plan for the refund of the overcollection of gross-up on CIAC and file its comments. The Commission will approve a refund plan by further Order.

6. That the connection fee escrow account established by the Commission in Docket Nos. W-754, Subs 12 and 14 shall be transferred to Utilities, Inc., as a source of funds used to upgrade the sewer system and Utilities, Inc., shall be relieved of the responsibility to place future connection fees into the escrow account.

7. That Utilities, Inc., shall follow the management plan approved herein.

8. That, upon Commission approval of the bond, surety and commitment letter, a further Order shall be issued granting a Certificate of Public Convenience and Necessity, approving a Schedule of Rates, and requiring public notice.

ISSUED BY ORDER OF THE COMMISSION.
This 6th day of January, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mh010700.03

Commissioner Judy Hunt concurring and dissenting.

Chairman Jo Anne Sanford and Commissioner Robert V. Owens, Jr., did not participate in this decision.

DOCKET NO. W-1000, SUB 5

COMMISSIONER JUDY HUNT, CONCURRING AND DISSENTING: I agree with the Commission in approving the transfer, but disagree with the decision to deny acquisition adjustment.

The acquisition adjustment should be allowed for the following reasons:

1) Good public policy - encourages larger, more efficient, well-capitalized water companies to acquire smaller under-capitalized, troubled water companies.

2) Commission precedent - Commission has in recent past allowed acquisition adjustment in certain cases such as financially troubled; this company certainly qualifies as financially troubled because it is in bankruptcy.

\s\ Judy Hunt
Judy Hunt, Commissioner

NCUC DOCKET NO. W-1000, SUB 5 APPENDIX A-1

BOND

_______________________________ of ____________________________,
(Name of Utility) (City)
_______________________________, as Principal, is bound to the State of North
(State)
Carolina in the sum of ____
_______________________________________ Dollars ($_____________)
and for which payment to be made, the Principal by this bond binds himself, his, and its successors and assigns.

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water or sewer utility ________________
____
(describe utility)
____ and,

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in G.S. § 62-110.3, and Commission Rules R7-37 and/or R10-24, and,

WHEREAS, the Principal has delivered to the Commission ____________________
____
(description of security)
with an endorsement as required by the Commission, and,

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. §62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, this bond shall become effective on the date executed by the Principal, and shall continue from year to year unless the obligations of the Principal under this bond are expressly released by the Commission in writing.

NOW THEREFORE, the Principal consents to the conditions of this Bond and agrees to be bound by them.

This the ____________ day of ____________________, 2000.

____
(Name)

NCUC DOCKET NO. W-1000, SUB 5 APPENDIX A-2

BOND

__________________________________ of __________________________,
(Name of Utility) (City)
______________________________, as Principal, is bound to the State of North
(State)
Carolina in the sum of ____
____________Dollars ($_____________) and for which payment to be made, the Principal by this bond binds ____________ and ____________ successors and assigns.
(himself)(itself) (his)(its)

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water and/or sewer utility ______________
____
(describe utility)
____ and,

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water and/or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in G.S. § 62-110.3, and Commission Rules R7-37 and/or R10-24, and

WHEREAS, the Principal has delivered to the Commission an Irrevocable Letter of Credit from

____
(Name of Bank)
with an endorsement as required by the Commission, and,

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. 62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, if for any reason, the Irrevocable Letter of Credit is not to be renewed upon its expiration, the Bank shall, at least 60 days prior to the expiration date of the Irrevocable Letter of Credit, provide written notification by means of certified mail, return receipt requested, to the Chief Clerk of the North Carolina Utilities Commission, Post Office Box 29510, Raleigh, North Carolina

27626-0510, that the Irrevocable Letter of Credit will not be renewed beyond the then current maturity date for an additional period, and

WHEREAS, failure to renew the Irrevocable Letter of Credit shall, without the necessity of the Commission being required to hold a hearing or appoint an emergency operator, allow the Commission to convert the Irrevocable Letter of Credit to cash and deposit said cash proceeds with the administrator of the Commission's bonding program, and

WHEREAS, said cash proceeds from the converted Irrevocable Letter of Credit shall be used to post a cash bond on behalf of the Principal pursuant to North Carolina Utilities Commission Rules R7-37(e) and/or R10-24(e), and

WHEREAS, this bond shall become effective on the date executed by the Principal, and shall continue from year to year unless the obligations of the Principal under this bond are expressly released by the Commission in writing.

NOW THEREFORE, the Principal consents to the conditions of this Bond and agrees to be bound by them.

This the ____________ day of ____________________ 2000.

____
(Principal)

BY: ______________________________

NCUC DOCKET NO. W-1000, SUB 5 APPENDIX A-3

BOND

____________________ of ____________________, ____________________, (Name of Utility) (City) (State)
as Principal, and ____________________, a corporation created and existing under (Name of Surety)
the laws of ____________________, as Surety (hereinafter called "Surety"), are (State)
bound to the State of North Carolina in the sum of ______________ Dollars ($__________) and for which payment to be made, the Principal and Surety by this bond bind themselves and their successors and assigns.

THE CONDITION OF THIS BOND IS:

WHEREAS, the Principal is or intends to become a public utility subject to the laws of the State of North Carolina and the rules and regulations of the North Carolina Utilities Commission, relating to the operation of a water and/or sewer utility ________________

____
(Describe utility)
____ and,

WATER AND SEWER - SALE/TRANSFER

WHEREAS, North Carolina General Statutes § 62-110.3 requires the holder of a franchise for water and/or sewer service to furnish a bond with sufficient surety, as approved by the Commission, conditioned as prescribed in § 62-110.3, and Commission Rules R7-37 and/or R10-24, and

WHEREAS, the Principal and Surety have delivered to the Commission a Surety Bond with an endorsement as required by the Commission, and

WHEREAS, the appointment of an emergency operator, either by the Superior Court in accordance with G.S. § 62-118(b) or by the Commission with the consent of the owner, shall operate to forfeit this bond, and

WHEREAS, if for any reason, the Surety Bond is not to be renewed upon its expiration, the Surety shall, at least 60 days prior to the expiration date of the Surety Bond, provide written notification by means of certified mail, return receipt requested, to the Chief Clerk of the North Carolina Utilities Commission, Post Office Box 29510, Raleigh, North Carolina 27626-0510, that the Surety Bond will not be renewed beyond the then current maturity date for an additional period, and

WHEREAS, failure to renew the Surety Bond shall, without the necessity of the Commission being required to hold a hearing or appoint an emergency operator, allow the Commission to convert the Surety Bond to cash and deposit said cash proceeds with the administrator of the Commission's bonding program, and

WHEREAS, said cash proceeds from the converted Surety Bond shall be used to post a cash bond on behalf of the Principal pursuant to North Carolina Utilities Commission Rules R7-37(e) and/or R10-24(e), and

WHEREAS, this bond shall become effective on the date executed by the Principal, for an initial
__________ year term, and shall be automatically renewed for additional __________
(No. of Years) (No. of Years)
year terms, unless the obligations of the principal under this bond are expressly released by the Commission in writing.

NOW, THEREFORE, the Principal and Surety consent to the conditions of this bond and agree to be bound by them.

This the ____________ day of ________________________ 2000.

____
(Principal)

BY: ____________________________

____
(Corporate Surety)

BY: ____________________________

APPENDIX A-4

Filing Requirements for Bonding

Type of Bond

	Cash / Certificate of Deposit Bond	Irrevocable Letter of Credit Bond	Commercial Surety Bond
Bond A-1	X 1/		
Bond A-2		X 1/	
Bond A-3			X 1/
Cash / CD	X 2/		
Letter of Credit		X 3/	
Surety Bond			X 4/
Commitment Letter		X 5/	X 5/

(To be filed with the Chief Clerk - where applicable)

1/ Copy of the Original Bond - Preferably on the forms prescribed in the Commission Order dated July 19, 1994, in Docket No. W-100, Sub 5 (Bond forms are usually attached to Order Requiring Bond for each specific franchise).

2/ Notification from Branch Banking & Trust Company (BB&T is the Commission's custodian for bond sureties) that cash or CD surety has been received for a given bond.

3/ Copy of Original Non-Perpetual Irrevocable Letter of Credit [Letter of Credit must comply with Rule R7-37 New Section (e)(4) as adopted by the Commission in its Order dated July 19, 1994, In Docket No. W-100, Sub 5.]

4/ Copy of Original Non-Perpetual Commercial Surety Bond [See No. 3 above]

5/ Copy of Commitment Letter

(a) This letter need only contain a statement indicating whether the utility is required to pledge utility company assets (collateral and type) to secure the bond or irrevocable letter of credit; and

(b) The premium paid by the utility (if any) to the bank and/or lending institution for their accommodation of the borrower.

WATER AND SEWER - SALE/TRANSFER

DOCKET NO. W-1000, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of Utilities, Inc., for Transfer of the Certificate of Public Convenience and Necessity for Providing Sewer Utility Service on North Topsail Island and Adjacent Mainland Areas in Onslow County from North Topsail Water and Sewer, Inc.; and for Temporary Operating Authority	)	ORDER OF CLARIFICATION

BY THE COMMISSION: On January 6, 2000, an Order was entered in this docket approving the transfer of the franchise to provide sewer utility service in the North Topsail Beach and Sneads Ferry area in Onslow County, North Carolina, from North Topsail Water and Sewer, Inc., to Utilities, Inc. (UI). Such Order provided that UI refund $337,200, representing the overcollection of gross-up on CIAC, to the contributors of the CIAC; provided, however, that any unclaimed refunds will be retained by UI as cost-free capital.

On January 31, 2000, a Joint Motion For Turnover of Property was filed by UI, this Commission and the Public Staff requesting that the United States Bankruptcy Court for the Eastern District of North Carolina turn over to UI $337,200 to allow UI to implement a refund plan approved by the Commission. On February 14, 2000, the Trustee entered its Response to Joint Motion for Turnover.

Based upon such filings, it appears that UI, the Public Staff, and the Bankruptcy Trustee agree that the refunds to the contributors should be made. However, a difference of opinion obviously exists as to whether the unrefunded balance should be retained by the Bankruptcy Trustee for distribution to creditors or should be retained by UI as a source of cost-free capital. After the entry of the January 6, 2000, Order, the Bankruptcy Trustee took the position that he ought to administer the refund process; that he would make refunds to eligible NTWS customers who could be identified; and that any unclaimed refunds should be distributed to the creditors of Marlow Bostic and Robert Page, the owners of NTWS' stock. Further, the Bankruptcy Trustee took the position that the January 6, 2000, Order was not inconsistent with this approach, since UI's obligation to deduct the amount of any unclaimed refunds from rate base as cost-free capital was independent of whether UI actually received the money in question for use in serving NTWS' customers. In his January 19, 2000, letter to the Commission's Chief Clerk, the Bankruptcy Trustee stated that regardless of the outcome, the unclaimed funds will be treated as cost-free capital to UI. The Commission has decided to enter this Order of Clarification for the purpose of eliminating any confusion about the intent underlying the refund provisions of its January 6, 2000, Order.

The Order of January 6, 2000, clearly provided that UI, with support from the Public Staff, would be expected to obtain proceeds in the amount of $337,200 from the Bankruptcy Trustee in order to make the refunds in question. It is also clear that the Commission did not intend for any unclaimed refunds to be returned to the Bankruptcy Trustee for distribution to creditors in view of the holding that UI should retain any unclaimed refunds as cost-free capital. Furthermore, the Commission did not make a finding in the Order of January 6, 2000, that UI's obligation to deduct the amount of any unclaimed refunds from rate base as cost-free capital was independent of whether or not UI actually received the funds in question from the Bankruptcy Trustee or was actually allowed to retain those funds. After learning of the Bankruptcy Trustee's insistence that any unclaimed refunds should be utilized to satisfy the claims of creditors, UI sought relief from that portion of the January 6, 2000, Order requiring it to deduct the amount of unclaimed refunds. The Commission specifically deferred as premature, until after a ruling from the Bankruptcy Court, any ruling on refund-related issues by Order entered in this docket on February 6, 2000. As a result, the Commission has not, at this point, made a determination of the nature upon which the Bankruptcy Trustee appears to rely.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 1st day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mb030100.01

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P-100, SUB 133 - Order Seeking Comments and Implementing on Interim Basis* (07/19/2000)

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P-100, SUB 133D - Order Adopting Carolina/Central's and GTE's Refiled Interim Line Sharing Rates (07/07/2000)

P-100, SUB 133D - Order Granting Motion to Disallow BellSouth's Interim Line Sharing Rate Increases (07/27/2000)

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P-100, SUB 133D - Order Adopting BellSouth's Refiled Interim Line Sharing Rates (08/09/2000)

P-100, SUB 133D - Order Holding Ruling on Motion to Adopt Interim Deaveraged UNE Rates in Abeyance (08/14/2000)

P-100, SUB 133D - Order Adopting Interim xDSL Rates for Carolina/Central (08/14/2000)

P-100, SUB 133F - Order Requiring Lifeline/Link-Up Participation Reports and Requesting Specific Recommendations (04/11/2000)

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P-100, SUB 137 - Order Addressing Number Optimization Measures Ordered by the FCC (06/20/2000)

P-100, SUB 137 - Order Regarding Compliance With Commission Order Dated October 6, 2000 (11/03/2000)

P-100, SUB 137 - Further Order Regarding Compliance with Commission Order Dated October 6, 2000 (12/06/2000)

P-100, SUB 137A - Order Changing Date for Mandatory Ten-Digit Dialing for Area Code Overlay (04/25/2000)

P-100, SUB 138; P-759, Sub 1 - Order Affirming Previous Commission Order Canceling Certificate (U.S. Network Services) (02/17/2000)

P-100, SUB 138; P-480, Sub 1 - Order Affirming Previous Commission Order Canceling Certificate (Pantel Communications) (08/04/2000)

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P-100, SUB 138; P-616, Sub 3 - Order Vacating Orders of 10/28/99 and 12/13/99 and Reinstating Operating Authority (Teltrust Communications Services, Inc.) (02/07/2000)

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P-100, SUB 140 - Errata Order (04/13/2000)

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P-100, SUB 146 - Order Establishing the Reclamation Procedure for Unused Central Office Codes (NXXs) (12/21/2000)

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FERRIES - Cancellation of Certificate

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THE LOCAL YOKEL FERRY & TOURS - Order Approving Name Change
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J & J TRAVEL AND TOURS; JOHNNY NARRON, DBA - Order Granting Broker's License
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ELECTRIC - Accounting

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Carolina Power & Light Company - Order Dismissing Complaint of Rosemary Smith and Closing Docket
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Carolina Power & Light Company - Order Reopening Docket and Holding in Abeyance
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Duke Power, a Division of Duke Energy Corporation - Order Denying Complaint of William H. Isely
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Duke Power, a Division of Duke Energy Corporation - Final Order Finding No Reasonable Grounds to Proceed in Complaint of John Lee Morris, Sr.
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Duke Power, a Division of Duke Energy Corporation - Order Closing Docket in Complaint of Howard Nilsen
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Duke Power, a Division of Duke Energy Corporation - Order Closing Docket in Complaint of Ed Gosart
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Duke Power, a Division of Duke Energy Corporation - Order Withdrawing Complaint of Jackie Walker and Closing Docket
E-7, SUB 671 (12/12/2000)

Duke Power, a Division of Duke Energy Corporation - Order Closing Docket in Complaint of Colony Park Homeowners Association
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NC Eastern Municipal Power Agency - Order Closing Docket
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Carolina Power & Light Company - Order Issuing Certificate of Environmental Compatibility and Public Convenience and Necessity
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New River Light and Power Company - Order Approving Rate Decrease and Requiring Public Notice
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NATURAL GAS

NATURAL GAS - Adjustments of Rates/Charges

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NUI North Carolina Gas - Order Allowing Rate Changes Effective March 1, 2000
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NUI North Carolina Gas - Order Allowing Rate Changes Effective June 1, 2000
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G-3, SUB 231 (10/03/2000)

NUI North Carolina Gas - Order Allowing Rate Changes
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NUI North Carolina Gas - Order Allowing Rate Changes Effective January 1, 2001
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NORTH CAROLINA NATURAL GAS CORPORATION - Order Allowing Rate Changes Effective January 1, 2000
G-21, SUB 390 (01/04/2000)

NORTH CAROLINA NATURAL GAS CORPORATION - Order Allowing Rate Changes Effective June 1, 2000
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G-21, SUB 405 (10/31/2000)

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Piedmont Natural Gas Company, Inc. - Order Allowing Rate Increases Effective May 1, 2000
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Piedmont Natural Gas Company, Inc. - Order on Annual Review
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Piedmont Natural Gas Company, Inc. - Order Allowing Rate Changes Effective October 1, 2000
G-9, SUB 437 (10/03/2000)

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G-5, SUB 414 (10/18/2000)

Public Service Company of N.C., Inc. - Order Allowing Rate Changes Effective July 1, 2000
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NATURAL GAS - Certificate

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NORTH CAROLINA NATURAL GAS CORPORATION - Order Allowing Contract to Become Effective and Approving Accounting Treatment
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North Carolina Natural Gas Corporation; Carolina Power & Light Company; Interpath Communications, Inc. - Order Accepting Form of Agreement for Filing and Allowing Utilities to Pay Bills
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Piedmont Natural Gas Company, Inc. - Order Approving Waiver
G-9, SUB 435 (09/19/2000)

Piedmont Natural Gas Company, Inc. - Order On Affiliated Contract
G-9, SUB 440 (12/22/2000)

Public Service Company of N.C., Inc. - Order Allowing Contract to Become Effective and Approving Accounting Treatment
G-5, SUB 398 (05/23/2000)

NATURAL GAS - Depreciation Rates/Amortization

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NATURAL GAS - Expansion

NORTH CAROLINA NATURAL GAS CORPORATION - Order Granting Motion
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Piedmont Natural Gas Company, Inc. - Order Approving Additional Funding
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NATURAL GAS - Merger

Public Service Company of N.C., Inc; SCANA Corporation. - Order Denying Reconsideration
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Public Service Company of N.C., Inc.; SCANA Corporation - Order Settling Record on Appeal
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Public Service Company of N.C., Inc.; SCANA Corporation - Order Accepting Service Agreement for Filing
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Piedmont Natural Gas Company, Inc. - Order on Forfeiture Proceeding
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Public Service Company of N.C., Inc. - Order on Forfeiture Proceeding
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NATURAL GAS - Rate Increase

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NORTH CAROLINA NATURAL GAS CORPORATION - Order Granting Authority to Issue Long-Term Debt Securities
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Frontier Utilities of North Carolina, Inc.; Frontier Energy, LLC - Order Allowing Expiration of $4.5 Million Security Bond
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TELEPHONE - Cancellation of Certificate

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Ameritech Communications International, Inc. - Order Canceling Certificate
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BroadSpan Communications, Inc. - Order Canceling Certificate
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Cable & Wireless Global Markets, Inc. - Order Canceling Certificate
P-844, SUB 1 (12/04/2000)

CapRock Communications Corp. - Order Canceling Certificate
P-647, SUB 3 (11/13/2000)

Cincinnati Bell Long Distance, Inc. - Order Canceling Reseller Certificate
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Cleartel Communications, Inc. - Order Canceling Reseller Certificate
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FaciliCom International, L.L.C. - Order Canceling Certificate
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Frontier Communications of the West, Inc. - Order Canceling Reseller Certificate
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Intelnet International Corp. - Order Canceling Certificate
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International Telecommunications Corporation - Order Canceling Certificate
P-551, SUB 3 (12/06/2000)

INTEROUTE-RETAIL, INC. - Order Canceling Certificate
P-540, SUB 2 (11/20/2000)

KCI Long Distance, Inc. - Order Canceling Certificate
P-676, SUB 1 (03/06/2000)

Long Distance International, Inc. - Order Canceling Certificate
P-644, SUB 1 (03/29/2000)

LEC Link; Jerry La Quiere, dba - Order Canceling Certificate
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P.V. Tel of North Carolina, LLC - Order Canceling Certificates
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Telec, Inc. - Order Canceling Certificate
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The Furst Group, Inc. - Order Canceling Reseller Certificate
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TELEPHONE - Certificate

@Link Networks, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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2nd Century Communications, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Access Integrated Networks, Inc. - Order Granting Waiver
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P-886, SUB 1 (02/25/2000)

Aspire Telecom, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Aspire Telecom, Inc. - Order Allowing Recommended Order to Become Final
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Avana Communications Corporation - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Broadband Office Communications, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Broadplex, LLC - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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CTSI, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Campuslink Communications Systems, Inc. - Order Allowing Withdrawal of Applications
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Cardinal Communications of North Carolina, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Columbia Telecommunications, Inc. - Order Dismissing Application Without Prejudice
P-871, SUB 1 (02/28/2000) Order Reinstating Application (03/06/2000)

Computer Business Sciences, Inc.. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Concentric Carrier Services, Inc. - Order Allowing Withdrawal of Applications
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Empire Communications, Inc., d/b/a Fast Tel - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competitive Local Provider
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ESSENTIAL.COM, INC. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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GSIWAVE.COM, INC. - Order Granting Interim Construction Authority
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International Telephone Group, Inc.. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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LightNetworks, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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MGC Communications, Inc.. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Network Access Solutions Corporation - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
P-860, SUB 0 (05/02/2000) Order Allowing Recommended Order to Become Final (05/16/2000)

Network Plus, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
P-314, SUB 3 (02/08/2000)

New Edge Network, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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OptiLink Communications, Inc. - Order Allowing Withdrawal of Application
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P.V. Tel of North Carolina, LLC - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Talk Too Communications - Order Concerning Dismissal
P-865, SUB 0 (08/14/2000)

Tin Can Communications Company, LLC, d/b/a The Cube - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Transtar Communications, L.C. - Order Regarding Application
P-848, SUB 0 (04/04/2000)

TRIVERGENT COMMUNICATIONS, INC. - Order Amending Certificate
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USA Telecom, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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Universal Access, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Telecommunications Services as a Competing Local Provider
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VERIZON ADVANCED DATA, INC. - Order Allowing Deletion of Certain Tariffs and Granting Certificate
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American Fiber Network, Inc.	P-937, SUB 1	(08/16/2000)
Arbros Communications Licensing Company S.E., LLC	P-975, SUB 1	(09/07/2000)
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Carolina Broadband, Inc.	P-987, SUB 1	(09/11/2000)
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Claricom Networks, Inc.	P-611, SUB 3	(11/16/2000)
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HJN Telecom, Inc.	P-760, SUB 1	(07/25/2000)
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Paramount Communications, Inc.	P-1026, SUB 0	(12/12/2000)
Pathnet Operating, Inc.	P-1012, SUB 0	(12/05/2000)
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Purepacket Communications of the South, Inc.	P-967, SUB 0	(08/16/2000)
Ready Telecom, Inc.	P-1023, SUB 0	(12/04/2000)
SBC Telecom, Inc.	P-936, SUB 0	(08/07/2000)
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AT&T Communications of the Southern States, Inc. - Order Approving Amendment to Interconnection Agreement
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AT&T Communications of the Southern States, Inc.; TCG of the Carolinas, Inc. - Order Resolving Certain Issues
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Alltel Carolina, Inc. - Order Approving Interconnection Agreement with CTC Exchanges Services, Inc.
P-118, SUB 97 (04/18/2000)

Alltel Carolina, Inc. - Order Approving Interconnection and Resale Agreement with Adelphia Business Solutions of North Carolina, L.P.
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Alltel Carolina, Inc. - Order Approving Interconnection Agreement with Sprint Spectrum, L.P., d/b/a Sprint PCS
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Alltel Carolina, Inc. - Order Approving Interconnection Agreement with Universal Telecom, Inc.
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ALLTEL Communications, Inc. - Order Approving Agreement with dPi-Teleconnect, L.L.C.
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ALLTEL Communications, Inc. - Order Approving Resale Agreement with EZ Talk Communications, L.L.C.
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ALLTEL Communications, Inc. - Order Approving Resale Agreement with Choctaw Communications, L.C., d/b/a Smoke Signal Communications
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AmeriMex Communications Corp. - Order Approving Resale Agreement with ALLTEL Communications Services Corporation/ALLTEL Carolina, Inc.
P-834, SUB 2 (03/14/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement with ITC^DeltaCom Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection Agreement with ALLTEL Communications, Inc.
P-55, SUB 1049 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment to Resale Agreement with Telephone Company of Central Florida, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment with CTC Exchange Services, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment with Business Telecom, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment with US West Interprise America, d/b/a Interprise America
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection Agreement with U.S. West Interprise America, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection and Collocation Agreement with Interpath Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendments to Interconnection Agreement with NEXTLINK North Carolina, L.L.C.
P-55, SUB 1102 (10/04/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment with NEXTLINK North Carolina, Inc.
P-55, SUB 1102 (12/27/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment with DIECA Communications, Inc., d/b/a Covad Communications Company
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BellSouth Telecommunications, Inc. - Order Approving Amendment with MEBTEL Integrated Communications Solutions, L.L.C.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection Agreement with Rhythms Links, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection and Resale Agreement with dPi-Teleconnect, L.L.C.
P-55, SUB 1143 (08/24/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment to Resale Agreement
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BellSouth Telecommunications, Inc. - Order Approving Amendment with DSLNet Communications, L.L.C.
P-55, SUB 1149 (02/09/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendments to Interconnection Agreement
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection Agreement with DSLNet Communications, L.L.C.
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BellSouth Telecommunications, Inc. - Order Approving Amendment with Adelphia Business Solutions of North Carolina, L.P.
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BellSouth Telecommunications, Inc. - Order Approving Amendments with State Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment P.V. Tel of North Carolina, L.L.C.
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BellSouth Telecommunications, Inc. - Order Approving Amendment with Navigator Telecommunications, L.L.C.
P-55, SUB 1159 (02/09/2000)

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BellSouth Telecommunications, Inc. - Order Approving Amendment to Resale Agreement with Universal Telecom, Inc.
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P-55, SUB 1168 (05/16/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment to Resale Agreement ALLTEL Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Agreement with Teleport Communications Group, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection and Resale Agreement TCG of the Carolinas, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Agreement with Network Access Solutions Corporation
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P-55, SUB 1172 (08/24/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment Network Access Solutions Corporation
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement with Access Point, Inc.
P-55, SUB 1175 (02/16/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection Agreement with Access Point, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with The Other Phone Company, Inc., d/b/a OmniCall, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment with The Other Phone Company, Inc., d/b/a OmniCall, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Collocation Agreement with DukeNet Communications, Inc.
P-55, SUB 1179 (03/02/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement with JATO Operating Two Corporation
P-55, SUB 1180 (02/16/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendments to Interconnection Agreement with JATO Operating Two Corporation
P-55, SUB 1180 (10/04/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement Annox, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Resale Agreement BellSouth BSE, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement Alliance Network, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement BlueStar Networks, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement with PageMart Wireless, Inc.
P-55, SUB 1188 (03/30/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement Crystal Clear Connections, Inc.
P-55, SUB 1189 (03/30/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment with Crystal Clear Connections, Inc.
P-55, SUB 1189 (05/16/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with CAT Communications International, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement AVANA Communications Corporation
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection and Resale Agreement Avana Communications Corporation
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement with MGC Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement OptiLink Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection and Resale Agreement with OptiLink Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection and Resale Agreement with OptiLink Communications, Inc.
P-55, SUB 1198 (10/04/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement with New Edge Networks, Inc.
P-55, SUB 1199 (05/16/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment with New Edge Network, Inc.
P-55, SUB 1199 (12/27/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with FairPoint Communications Corporation
P-55, SUB 1200 (05/16/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment to Interconnection and Resale Agreement with FairPoint Communications Solutions Corporation
P-55, SUB 1200 (10/04/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with Phone-Link, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Resale Agreement with Tin Can Communications Company, L.L.C.
P-55, SUB 1204 (10/04/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with American Fiber Network, Inc.
P-55, SUB 1205 (06/06/2000)

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BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with EZ Talk Communications, L.L.C.
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BellSouth Telecommunications, Inc. - Order Approving Amendment to Resale Agreement with EZ Talk Communications, Inc.
P-55, SUB 1206 (08/24/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement NuStar Communications Corporation
P-55, SUB 1207 (06/06/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with Suretel, Inc.
P-55, SUB 1208 (06/06/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with Aspire Telecom, Inc.
P-55, SUB 1209 (06/28/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with The Other Phone Company, Inc., d/b/a Access One Communications, Inc.
P-55, SUB 1211 (06/28/2000)

BellSouth Telecommunications, Inc. - Order Approving Amendment with The Other Phone Company, Inc., d/b/a Access One Communications
P-55, SUB 1211 (12/27/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with Business Telecom, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with Image Access, Inc., d/b/a NewPhone
P-55, SUB 1213 (06/28/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with Choctaw Communications, L.C.
P-55, SUB 1214 (06/28/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with Global Crossing Local Services, Inc., and Global Crossing Telemanagement, Inc.
P-55, SUB 1216 (08/24/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with Level 3 Communications, LLC
P-55, SUB 1217 (08/24/2000)

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BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with USA Telecom, Inc.
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P-55, SUB 1220 (08/24/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with Broadband Office Communications, Inc.
P-55, SUB 1222 (08/24/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with Mpower Communications Corporation
P-55, SUB 1223 (09/26/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with 2nd Century Communications, Inc.
P-55, SUB 1224 (09/26/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with SBC Telecom, Inc.
P-55, SUB 1227 (09/26/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with Birch Telecom of the South, Inc.
P-55, SUB 1228 (09/26/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with United States Telecommunications, Inc.
P-55, SUB 1229 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement with TriVergent Communications, Inc.
P-55, SUB 1231 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement with Maxcess, Inc.
P-55, SUB 1232 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with NOW Communications, Inc.
P-55, SUB 1235 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with LCI International, Inc.
P-55, SUB 1236 (11/28/2000)

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BellSouth Telecommunications, Inc. - Order Approving Interconnection Agreement WinStar Wireless, Inc.
P-55, SUB 1237 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with MCImetro Access Transmission Services, L.L.C.
P-55, SUB 1238 (11/28/2000)

BellSouth Telecommunications, Inc. - Order Approving Collocation Agreement with WinStar Wireless, Inc.
P-55, SUB 1239 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with HJN Telecom, Inc.
P-55, SUB 1240 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Resale Agreement with Consumers Telephone and Telecom, LLC
P-55, SUB 1241 (11/08/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with NET-tel Corporation
P-55, SUB 1242 (11/28/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with Intetech, L.C.
P-55, SUB 1243 (11/28/2000)

BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with Navigator Telecommunications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection and Resale Agreement with CTC Exchange Services, Inc.
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P-55, SUB 1247 (11/28/2000)

BellSouth Telecommunications, Inc. - Order Approving Agreement with Universal Telecom, Inc.
P-55, SUB 1248 (12/27/2000)

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BellSouth Telecommunications, Inc. - Order Approving Agreement with NorthPoint Communications, Inc.
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Carolina Telephone and Telegraph Company; Central Telephone Company - Order Allowing Withdrawal of Resale Agreement with Comm South Companies, Inc.
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Carolina Telephone and Telegraph Company; Central Telephone Company - Order Approving Agreement with ITC^DeltaCom Communications, Inc.
P-7, SUB 909; P-10, Sub 553 (01/11/2000)

Carolina Telephone and Telegraph Company; Central Telephone Company - Order Approving Resale Agreement with Choctaw Communications, Inc., d/b/a Smoke Signal Communications
P-7, SUB 910; P-10, Sub 555 (02/09/2000)

Carolina Telephone and Telegraph Company; Central Telephone Company - Order Approving Interconnection Agreement with 360° Communications Company of North Carolina, L.P., d/b/a ALLTEL
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Carolina Telephone and Telegraph Company; Central Telephone Company - Order Approving Resale Agreement with Compass Telecommunications, Inc.
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Carolina Telephone and Telegraph Company; Central Telephone Company - Order Approving Interconnection Agreement with TDPC, Inc.
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LEXCOM Telephone Company - Order Approving Interconnection Agreement with BellSouth Carolinas PCS, L.P.
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P-19, SUB 388 (09/26/2000)

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P-19, SUB 391 (12/27/2000)

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VERIZON SOUTH INC. - Order Approving Agreement with TCG of the Carolinas, Inc.
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BellSouth Telecommunications, Inc. - Order Closing Docket in Complaint of Terrence W. Reigel
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BellSouth Telecommunications, Inc. - Order Reopening Docket and Serving Answer*
P-55, SUB 1167 (04/07/2000)

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P-55, SUB 1176 (06/05/2000)

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P-55, SUB 1190 (08/07/2000)

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P-55, SUB 1195 (05/23/2000)

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Carolina Telephone and Telegraph Company - Order Closing Docket in Complaint of Laura Johnson
P-7, SUB 907 (08/03/2000)

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P-89, SUB 73 (06/23/2000)

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P-89, SUB 73 (08/03/2000)

Empire Communications, Inc. - Order Dismissing Complain of Kimberly Calhoun, et.al., in Part and Requiring Respondent to Correct and Refile Application
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Thrifty Call, Inc. - Order Allowing Voluntary Dismissal with Prejudice in Complaint of Carolina Telephone and Telegraph Company and Central Telephone Company
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VERIZON SOUTH INC. - Order Closing Docket in Complaint of White Directory of Carolina, Inc.
P-19, SUB 336 (08/16/2000)

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P-19, SUB 351 (02/25/2000)

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P-55, SUB 1215 (09/12/2000)

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P-7, SUB 923 (08/22/2000)

Carolina Telephone and Telegraph Company - Order Approving Extended Area Service
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CAROLINA BROADBAND, INC. - Order Granting Interim Construction Authority
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DIECA Communications, Inc. - Order Dismissing Application Without Prejudice
P-775, SUB 2 (02/28/2000)

Georgia National Acceptance Corp. - Order Allowing Withdrawal of Application
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Norcom, Inc. - Order Dismissing Application Without Prejudice
P-803, SUB 0 (02/28/2000) Order Reinstating Application (03/06/2000)

Park 'N View, Inc. - Order Dismissing Application Without Prejudice
P-730, SUB 0 (02/28/2000)

Telstar International, Inc. - Order Dismissing Application Without Prejudice
P-637, SUB 0 (02/28/2000)

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ACN Communication Services, Inc.	P-944, SUB 0	(02/10/2000)
ACSI Local Switched Services, Inc.	P-695, SUB 1	(02/17/2000)
ATN, INC.	P-1022, SUB 0	(08/04/2000)
ATX LICENSING, INC.	P-972, SUB 0	(05/05/2000)
ADVANCED TELCOM, INC.	P-962, SUB 1	(05/05/2000)
AFFORDABLE VOICE COMMUNICATIONS, INC.	P-1011, SUB 0	(07/07/2000)
Allegiance Telecom of North Carolina, Inc.	P-997, SUB 1	(06/28/2000)
Ameracall, Inc.	P-902, SUB 0	(02/24/2000)
American Fiber Network, Inc.	P-937, SUB 0	(01/13/2000)
Arbros Communications Licensing Company S.E., LLC	P-975, SUB 0	(05/05/2000)
Atlantic Telephone Membership Corporation	P-1006, SUB 0	(06/28/2000)
BCGI Communications Corp.	P-925, SUB 0	(01/14/2000)
Bell Atlantic Network Data, Inc.	P-1010, SUB 1	(07/07/2000)
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BROADSTREET COMMUNICATIONS, INC.	P-966, SUB 1	(05/05/2000)
CALL PROCESSING, INC.	P-1048, SUB 0	(09/28/2000)
Calls for Less, Inc.	P-693, SUB 0	(03/07/2000)
CAM-COMM, INC.	P-935, SUB 0	(01/13/2000)
CapRock Communications Corp.	P-647, SUB 2	(03/21/2000)
CAT COMMUNICATIONS INTERNATIONAL, INC.	P-869, SUB 0	(02/04/2000)
CBEYOND COMMUNICATIONS, LLC	P-1044, SUB 0	(10/12/2000)
CLEAR CALL TELECOM, LLC	P-1005, SUB 0	(06/28/2000)

Compass Telecommunications, Inc.	P-899, SUB 0	(02/25/2000)
COMTECH 21, LLC	P-995, SUB 0	(07/11/2000)
COMTEL NETWORK, LLC	P-1052, SUB 0	(10/12/2000)
Connect!LD, Inc.	P-903, SUB 0	(07/07/2000)
CYBERTEL COMMUNICATIONS CORP	P-986, SUB 0	(05/31/2000)
Cypress Communications Operating Company, Inc.	P-1027, SUB 1	(08/22/2000)
DIGITAL BROADBAND COMMUNICATIONS, INC.	P-1053, SUB 0	(10/13/2000)
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E-Z TEL, INC.	P-656, SUB 3	(10/19/2000)
ECOCOM USA LIMITED	P-1050, SUB 0	(10/19/2000)
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Enhanced Communications Group, L.L.C.	P-910, SUB 0	(03/24/2000)
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ESSENTIAL.COM, INC.	P-943, SUB 0	(06/15/2000)
Essex Communications, Inc.	P-1049, SUB 1	(10/19/2000)
EVULKAN, INC.	P-991, SUB 0	(06/15/2000)
ezTel Network Services, LLC	P-929, SUB 0	(02/17/2000)
GLOBALCOM, INC.	P-998, SUB 0	(06/28/2000)
GO SOLO TECHNOLOGIES, INC	P-1030, SUB 0	(08/22/2000)
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LD EXCHANGE.COM, INC	P-982, SUB 0	(05/31/2000)
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Purepacket Communications of the South, Inc.	P-967, SUB 1	(05/05/2000)
Push Button Paging and Communications, Inc.	P-1036, SUB 0	(10/06/2000)
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T-NETIX INTERNET SERVICES, INC.	P-1047, SUB 0	(09/28/2000)
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TALKINGNETS HOLDINGS, LLC	P-1067, SUB 1	(12/22/2000)
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TELEPHONE ASSOCIATES, INC.	P-1064, SUB 0	(12/05/2000)
TELERA COMMUNICATIONS, INC.	P-1031, SUB 0	(08/22/2000)
TELERGY NETWORK SERVICES, INC.	P-994, SUB 0	(11/17/2000)
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TotalAxcess.com, Inc.	P-955, SUB 0	(03/08/2000)
TRI-COUNTY COMMUNICATIONS, INC.	P-1001, SUB 0	(06/28/2000)
TRI-M Communications, Inc.	P-776, SUB 0	(01/31/2000)
UKI Communications, Inc.	P-916, SUB 0	(02/10/2000)
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Universal Access, Inc.	P-939, SUB 1	(02/25/2000)
UNIVERSAL TELECOMMUNICATIONS, INC.	P-1028, SUB 0	(09/14/2000)
UTILITY.COM, INC.	P-1021, SUB 0	(08/04/2000)
VIVO-NC, LLC	P-1073, SUB 0	(12/27/2000)
Vox Populi Telecommunications, Inc.	P-1045, SUB 0	(10/23/2000)
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WEBNET COMMUNICATIONS, INC.	P-976, SUB 0	(05/05/2000)
WORKNET COMMUNICATIONS INC	P-1038, SUB 0	(09/07/2000)
XSPEDIUS CORP.	P-1013, SUB 1	(12/27/2000)
YADKIN VALLEY TELECOM, INC.	P-968, SUB 0	(07/20/2000)
ZONE TELECOM, INC.	P-1033, SUB 0	(08/25/2000)

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CTSI, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity
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NEXTLINK Long Distance Services, Inc.. - Recommended Order Granting Certificate of Public Convenience and Necessity
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United Services Telephone, LLC - Errata Order
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Worldwide Fiber Networks, Inc. - Recommended Order Granting Certificate of Public Convenience and Necessity
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AS Telecommunications, Inc. - Order Approving Transfer of Control
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Group Long Distance, Inc. - Order Approving Transfer of Control
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MCI WorldCom Communications, Inc. - Order Approving Reorganization and Related Transactions
P-659, SUB 8; P-356, Sub 4 (11/27/2000)

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OnePoint Communications Corp. - Order Approving Merger and Transfer of Control
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Other Phone Company, Inc.; The - Order Approving Transfer of Control
P-738, SUB 4; P-668, Sub 4 (05/24/2000)

Time Warner Telecom of North Carolina, L.P. - Order Approving Transfer of Control
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BellSouth Telecommunications, Inc. - Order Dismissing Petition and Closing Docket
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BlueStar Networks, Inc. - Recommended Arbitration Order
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Carolina Telephone and Telegraph Company - Order Allowing Tariffs to Become Effective June 24, 2000
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FairPoint Communications Solutions Corp. - Order Allowing Withdrawal of Petition
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JATO Operating Two Corp. - Order Granting Waiver
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MCImetro Access Transmission Services, Inc. - Order Resolving Issues
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Sprint Communications Company L.P. - Order Approving Amendment to Interconnection Agreement
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Time Warner Telecom of North Carolina, L.P. - Order Closing Docket
P-472, SUB 8 (03/29/2000)

Time Warner Telecom of North Carolina, L.P. - Order Approving Amendment to Interconnection Agreement
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VERIZON SOUTH INC. - Order Allowing Tariffs to Become Effective June 24, 2000
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Single Billing Services, Inc. - Order Closing Docket
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P-55, SUB 1225 (08/02/2000)

BellSouth Telecommunications, Inc. - Order Allowing Tariff Subject to Conditions
P-55, SUB 1225 (12/19/2000)

Concord Telephone Company - Order Allowing Tariff
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VERIZON SOUTH INC. - Order Suspending Tariffs
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TELEPHONE - Sale/Transfer

1-800-RECONEX, INC. - Order Approving Transfer of Control
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ATX LICENSING, INC. - Order Approving Transfer of Control
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Access Point, Inc. - Order Approving Transfer of Assets and Customers
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Adelphia Business Solutions of North Carolina, L.P. - Order Approving Transfer of Assets and Certificates
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Alliance Group Services, Inc. - Order Approving Asset Transfer and Canceling Certificate
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ALLTEL Communications, Inc. - Order Approving Merger and Canceling Certificate
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Convergent Communications Services, Inc. - Order Approving Transfer of Control
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Cooperative Communications, Inc. - Order Approving Transfer of Control
P-787, SUB 1 (05/24/2000)

dPi Teleconnect, L.L.C. - Order Approving Transfer of Control
P-836, SUB 3 (02/11/2000)

DIECA Communications, Inc. - Order Approving Transfer of Control
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Discounted Long Distance, Inc. - Order Canceling Certificate
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Easton Telecom Services, Inc. - Order Approving Transfer of Control
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Excel Operations, Inc. - Order Rescinding Authority and Closing Dockets
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IDT America, Corp. - Order Approving Customer Transfer
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Intellicall Operator Services, Inc. - Order Approving Asset Transfer And Canceling Certificate
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LightNetworks, Inc. - Order Approving Transfer of Assets and Customers
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Max-Tel Communications, Inc. - Order Approving Transfer of Control
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NorthPoint Communications, Inc. - Order Approving Transfer of Control
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PNG Telecommunications, Inc. - Order Approving Asset Transfer and Canceling Certificate
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PNG Telecommunications, Inc. - Order Approving Transfer of Customers
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State Communications, Inc. - Order Approving Transfer of Assets and Certificates and Granting Waiver of Price List
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Telecare, Inc. - Order Approving Transfer of Assets and Customers
P-302, SUB 2; P-380, Sub 6 (11/02/2000)

Telecarrier Services, Inc. - Order Approving Transfer of Control
P-432, SUB 1 (05/24/2000)

TeleConex, Inc. - Order Approving Transfer of Control
P-745, SUB 1 (11/27/2000)

Teleglobe USA, Inc. - Order Approving Transfer of Control
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Telscape USA, Inc. - Order Approving Transfer of Control
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The Furst Group, Inc. - Order Approving Transfer of Control
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The Furst Group, Inc. - Order Approving Transfer of Assets and Customers
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US Wats, Inc. - Order Approving Merger and Certificate Transfer
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W2COM International, LLC - Order Approving Transfer of Ownership and Control
P-920, SUB 1 (09/20/2000)

Zenex Long Distance, Inc. - Order Approving Transfer of Control
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SPECIAL CERTIFICATE/PSP - Cancellation of Certificate

A+ Public Pay Phone Corporation - Order Canceling PSP Certificate
SC-1337, SUB 2 (04/19/2000)

AD Glasgow Enterprises; Andrew & Denise Glasgow, dba - Order Canceling PSP Certificate
SC-927, SUB 1 (09/07/2000)

Acker Enterprises; Marjorie L. Acker, dba - Order Canceling PSP Certificate
SC-1091, SUB 2 (08/15/2000)

Allgood; Jerry W. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1512, Sub 1 (08/07/2000)

Barnette; Joyce L. - Order Canceling PSP Certificate
SC-1581, SUB 1 (11/15/2000)

Benchmark Management Group, Inc. - Order Canceling PSP Certificate
SC-315, SUB 1 (02/02/2000)

Blayco Pay Phone; Mark D. Blashaw, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1037, Sub 1 (08/07/2000)

Bouthiller; Lee G. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1451, Sub 1 (08/07/2000)

Buchanan; Tony - Order Canceling PSP Certificate
SC-1554, SUB 1 (01/18/2000)

Burr Communications; Thomas M. Burr, dba - Order Canceling PSP Certificate
SC-1513, SUB 1 (08/24/2000)

ORDERS AND DECISIONS LISTED

Burris Foods, Inc. - Order Canceling PSP Certificate
SC-1374, SUB 1 (06/07/2000)

Call Central, Incorporated - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1541, Sub 1 (08/07/2000)

Cape Woods, Inc. - Order Canceling PSP Certificate
SC-1538, SUB 1 (02/02/2000)

Carney; Joe - Order Canceling PSP Certificate
SC-838, SUB 1 (05/26/2000)

Carolina Mountain Communications; Nancy K. Baumgarten, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1489, Sub 1 (08/07/2000)

Carraway; Gerald - Order Canceling PSP Certificate
SC-1562, SUB 1 (12/18/2000)

Charlotte Novelty - Order Canceling PSP Certificate
SC-324, SUB 1 (10/17/2000)

Communications Central, Inc. - Order Canceling PSP Certificate
SC-7, SUB 5 (10/10/2000)

Convenient Corner, Inc. - Order Canceling PSP Certificate
SC-13, SUB 1 (02/07/2000)

Cotton; Warren Peter - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1565, Sub 1 (11/15/2000)

De Jong; Cornelis J. - Order Canceling PSP Certificate
SC-1462, SUB 1 (07/26/2000)

Duvall; Ernest - Order Canceling PSP Certificate
SC-687, SUB 1 (10/24/2000)

East Carolina Telecommunications, LLC - Order Canceling PSP Certificate
SC-1259, SUB 3 (12/29/2000)

East Coast Payphones - Order Canceling PSP Certificate
SC-1491, SUB 1 (02/10/2000)

FSG Properties, Inc. - Order Canceling PSP Certificate
SC-1549, SUB 1 (02/14/2000)

ORDERS AND DECISIONS LISTED

GCB Communications, Inc. - Order Canceling PSP Certificate
SC-1573, SUB 1 (08/24/2000)

Gardner Bonding Company, Inc. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-532, Sub 1 (08/07/2000)

Gilbert Technologies; Ricky D. Gilbert, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1344, Sub 1 (08/07/2000)

Graham Associates, Ltd. - Order Canceling PSP Certificate
SC-1579, SUB 1 (06/13/2000)

HNB Communications; Henry N. Banks, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1209, Sub 2 (08/07/2000)

Hadden; Eugene S. - Order Canceling PSP Certificate
SC-1448, SUB 1 (02/22/2000)

Henderson; H.J. - Order Canceling PSP Certificate
SC-781, SUB 1 (02/02/2000)

Holoday; Michael Anthony - Order Canceling PSP Certificate
SC-1383, SUB 1 (10/19/2000)

Hospitality Payphone Service; Ronald C. Summerlin, dba - Order Canceling PSP Certificate
SC-841, SUB 2 (08/24/2000)

Huff; Steve - Order Canceling PSP Certificate
SC-1499, SUB 3 (03/16/2000)

Izuogu; Jacobs - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1520, Sub 1 (08/07/2000)

Jackson; S. Brad - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1525, Sub 1 (08/07/2000)

Jefferson Motel, Inc. - Order Canceling PSP Certificate
SC-1305, SUB 1 (01/24/2000)

Judy; William - Order Canceling PSP Certificate
SC-1534, SUB 1 (07/20/2000)

Lester; Carl - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1392, Sub 1 (09/01/2000)

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Logan Trading Co., Inc. - Order Canceling PSP Certificate
SC-1422, SUB 1 (11/02/2000)

Long; William T. and Ruth - Order Canceling PSP Certificate
SC-659, SUB 1 (11/16/2000)

Longbrake; Robert - Order Canceling PSP Certificate
SC-985, SUB 3 (02/22/2000)

Lunsford; Craig - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-630, Sub 2 (09/01/2000)

Marbet, Jr.; Manuel R. - Order Canceling PSP Certificate
SC-1517, SUB 1 (03/14/2000)

McCanna; Clarence E. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1391, Sub 1 (08/30/2000)

McKinney: Charles D. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1318, Sub 1 (09/01/2000)

Measurement Incorporated - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1514, Sub 1 (08/07/2000)

Mercer; Alan - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-642, Sub 1 (08/07/2000)

Mill Creek Communications, Inc. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1478, Sub 1 (09/01/2000)

Millennium Telecom, Inc. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1531, Sub 1 (08/07/2000)

Mountain Crossing Mercantile, LLC - Order Canceling PSP Certificate
SC-1136, SUB 1 (02/08/2000)

North American Intelecom, Inc. - Order Canceling PSP Certificate
SC-1126, SUB 4 (04/12/2000)

North South Telcom; Gayle M. Wylie and Ann C. Wylie, dba - Order Canceling PSP Certificate
SC-1214, SUB 2 (08/09/2000)

Northside Bowling Lanes, Inc. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-295, Sub 1 (08/07/2000)

ORDERS AND DECISIONS LISTED

Outerbridge; Corinthian - Order Canceling PSP Certificate
SC-1175, SUB 1 (09/27/2000)

Payphone Concepts; Mansoor Ahmad, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1500, Sub 1 (09/01/2000)

Payphones Plus; William Downes, dba - Order Canceling PSP Certificate
SC-1388, SUB 1 (02/04/2000)

People's Telephone Company, Inc - Order Canceling PSP Certificate
SC-286, SUB 8 (10/10/2000)

Performance, Inc. - Order Canceling PSP Certificate
SC-231, SUB 1 (09/27/2000)

Plantation Laundry; Gail D. Miller, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1006, Sub 1 (08/07/2000)

Pope, Jr.; William E. - Order Canceling PSP Certificate
SC-1416, SUB 1 (12/28/2000)

Preferred Solutions, Inc. - Order Canceling PSP Certificate
SC-1387, SUB 1 (05/17/2000)

Pres Com.; Sharyn's Ltd., dba - Order Canceling PSP Certificate
SC-1086, SUB 1 (04/12/2000)

Pro Talk Communications; Robert M. Reid, dba - Order Canceling PSP Certificate
SC-1219, SUB 3 (07/25/2000)

PykaTel, Inc. - Order Canceling PSP Certificate
SC-1220, SUB 2 (09/07/2000)

R & S Communications; Robert Grugg, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1403, Sub 1 (08/07/2000)

Regional Telephone Service; Vernon Ewell Riggs, Jr., dba - Order Canceling PSP Certificate
SC-1460, SUB 1 (01/24/2000)

Roy; Patricia Ewing - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-947, Sub 1 (08/07/2000)

ORDERS AND DECISIONS LISTED

Scott; Loman - Order Canceling PSP Certificate
SC-1506, SUB 1 (05/23/2000)

Skyline Vending; Artice L. Council, Jr., dba - Order Canceling PSP Certificate
SC-1404, SUB 1 (06/26/2000)

Smith; Mary B. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1480, Sub 1 (08/07/2000)

Soustek; Gregory - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1495, Sub 1 (08/07/2000)

Southeastern Cable Products, Inc. - Order Canceling PSP Certificate
SC-1486, SUB 1 (07/25/2000)

Southeastern Pay Phone And Communications Company; Edward C. Tatum, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1505, Sub 1 (09/01/2000)

Southern T-Comm, Inc. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-301, Sub 1 (09/01/2000)

T & S Telecommunications; Theressa S. Waters And Sheryl W. Harvey, d/b/a - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1417, Sub 1 (08/07/2000)

TSC Payphone Corp. - Order Canceling PSP Certificate
SC-1437, SUB 3 (05/16/2000)

Taylor; Gary L. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1438, Sub 1 (09/01/2000)

Tele-Comm Solutions, Inc. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1335, Sub 1 (09/01/2000)

TENNESSEE PAYPHONE SERVICES; MATTHEW BROWN, DBA - Order Canceling PSP Certificate
SC-1584, SUB 1 (12/04/2000)

Terwilliger; Theresa And Howard - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1034, Sub 2 (08/07/2000)

Townley; David H. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-1198, Sub 1 (08/07/2000)

ORDERS AND DECISIONS LISTED

TRILOGY; GREENSBORO GOURMET, INC., DBA - Order Canceling PSP Certificate
SC-1572, SUB 1 (12/18/2000)

Trinity Furniture, Inc. - Order Canceling PSP Certificate
SC-1121, SUB 1 (01/24/2000)

WNC Coin Telephone; Land of the Sky Communications Wiring, Inc., dba - Order Canceling PSP Certificate
SC-1527, SUB 1 (11/13/2000)

Warren; Ronald P. - Order Affirming Previous Commission Order Canceling Certificate
SC-1000, Sub 7; SC-343; Sub 2 (08/07/2000)

Watauga Telephone Company; Michael T. Varner, dba - Order Canceling PSP Certificate
SC-827, SUB 2 (11/20/2000)

WhitCor Farms, Inc. - Order Canceling PSP Certificate
SC-1524, SUB 1 (01/24/2000)

White; Charles - Order Canceling PSP Certificate
SC-1528, SUB 1 (01/07/2000)

Wolfnose Services, Inc. - Order Canceling PSP Certificate
SC-1522, SUB 1 (04/26/2000)

Christian Pay Phone & Communications/Tele.Comm.Serv; Clay H. Koontz, dba - Recommended Order Revoking Certificate
SC-950, SUB 4 (01/06/2000)

SPECIAL CERTIFICATE/PSP - Certificate

Company	Docket No.	Date
A. Classic Touch; Shirley A. Hall, dba	SC-1594, SUB 0	(05/25/2000)
Barnette; Joyce L.	SC-1581, SUB 0	(03/17/2000)
Baumann; Jack	SC-1576, SUB 0	(02/15/2000)
Blayco Pay Phone; Elaine Lockhead, dba	SC-1609, SUB 0	(08/17/2000)
Blue Ridge Payphones; Mr. & Mrs. David G. Freeman, dba	SC-1595, SUB 0	(06/08/2000)
Bottomly; Barbara A.	SC-1606, SUB 0	(08/09/2000)
Burns Communication Industries; James Lester Burns&James Lief Burns, dba	SC-1574, SUB 0	(02/08/2000)
C.C., INC.	SC-1593, SUB 0	(05/19/2000)
Cabal Services, Inc.	SC-1592, SUB 0	(05/19/2000)
Cannon; Mark	SC-1587, SUB 0	(05/04/2000)
Coin Phone Management Company	SC-1583, SUB 0	(04/06/2000)
Coin-Tel, Inc.	SC-1597, SUB 0	(06/26/2000)

ORDERS AND DECISIONS LISTED

SPECIAL CERTIFICATE/PSP - Miscellaneous

Alpha Tel-Com, Inc. - Order Reissuing PSP Certificate Due to Address Change
SC-1115, SUB 3 (11/22/2000)

Computerized Payphone Systems - Order Reissuing Special Certificate Due to Address And Telephone Number Changes
SC-332, SUB 4 (02/15/2000)

Crabtree; Orville R. - Order Reissuing Special Certificate Due to Address And Telephone Number Changes
SC-1378, SUB 2 (02/21/2000)

Crabtree; Orville R. - Order Reissuing PSP Certificate Due to Address And Telephone Number Changes
SC-1378, SUB 3 (10/19/2000)

East Carolina Telecommunications, LLC - Order Reissuing Special Certificate Due to Address Change
SC-1259, SUB 2 (01/21/2000)

ETS Payphones, Inc. - Order Reissuing PSP Certificate Due to Address Change
SC-1434, SUB 1 (10/03/2000)

Harrison; Michael - Order Reissuing Special Certificate Due to Address And Telephone Number Changes
SC-1577, SUB 1 (08/24/2000)

Seymour; Thomas M. - Order Reissuing Special Certificate Due to Address And Telephone Number Changes
SC-1005, SUB 1 (02/02/2000)

Southeastern Telephone Service, Inc. - Order Reissuing Certificate
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The Ocracoke Telephone Company; Sean Trainor, dba - Order Reissuing Special Certificate Due to Address And Telephone Number Changes
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China Grove & Landis Moving; Ecil Campbell, dba - Final Order Overruling Exceptions And Affirming Recommended Order
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Magnum Moving & Storage, Inc. - Order Granting Common Carrier Authority
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Miller's Moving Pick-Up & Delivery; Bobby E. Miller dba - Order Granting Common Carrier Authority
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Miller's Moving Pick-Up & Delivery; Bobby E. Miller dba - Order Granting Common Carrier Authority
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Turner's Moving Service; Thomas A. Turner, dba - Order Affirming Previous Commission Order Canceling Operating Authority
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Twin Creeks Utilities - Order Approving Tariff Revision
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RESALE OF WATER/SEWER - Certificate

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Atlantic Multifamily Limited Partnership I - Order Granting Certificate of Authority, Approving Rates, And Requiring Refund Plan
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BNP/CHRYSSON PHASE I, LLC - Order Granting Certificate of Authority And Approval of Rates
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Camden Operating LP - Order Granting Certificate of Authority And Approval of Rates
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SCA-NORTH CAROLINA LIMITED PARTNERSHIP - Order Granting Certificate of Authority, Approving Rates, And Requiring Refund Plan
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SCA-NORTH CAROLINA LIMITED PARTNERSHIP - Order Granting Certificate of Authority, Approving Rates, And Requiring Refund Plan
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SCA-NORTH CAROLINA LIMITED PARTNERSHIP - Order Granting Certificate of Authority, Approving Rates, And Requiring Refund Plan
WR-35, SUB 4 (03/17/2000) Order Approving Refund Plan (05/18/2000) Order Closing Docket (09/13/2000)

SCA-NORTH CAROLINA LIMITED PARTNERSHIP - Order Granting Certificate of Authority And Approving Rates
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SCA-NORTH CAROLINA LIMITED PARTNERSHIP - Order Granting Certificate of Authority And Approval of Rates
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SCA-NORTH CAROLINA LIMITED PARTNERSHIP - Order Granting Certificate of Authority, Approving Rates, And Requiring Refund Plan
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