NINETY-THIRD REPORT

OF THE

NORTH CAROLINA

UTILITIES COMMISSION

ORDERS AND DECISIONS

ISSUED FROM
JANUARY 1, 2003 THROUGH DECEMBER 31, 2003

NINETY-THIRD REPORT
of the
NORTH CAROLINA UTILITIES COMMISSION

ORDERS AND DECISIONS

Issued from

January 1, 2003, through December 31, 2003

Jo Anne Sanford, Chair

J. Richard Conder, Commissioner

Robert V. Owens, Jr., Commissioner

Sam J. Ervin, IV, Commissioner

Lorinzo L. Joyner, Commissioner

James Y. Kerr, II, Commissioner

Michael S. Wilkins, 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, 2003

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, 2003, we hereby present for your consideration the report of the Commission's decisions for the 12-month period beginning January 1, 2003, and ending December 31, 2003.

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

J. Richard Conder, Commissioner

Robert V. Owens, Jr., Commissioner

Sam J. Ervin, IV, Commissioner

Lorinzo L. Joyner, Commissioner

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Geneva S. Thigpen, Chief Clerk

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OF THE
NORTH CAROLINA UTILITIES COMMISSION

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GENERAL ORDERS – GENERAL

DOCKET NO. M-100, SUB 131

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of the North Carolina Telecommunications Industry Association and Progress Energy Carolinas, Inc. to Amend Rule R12-4	)))	ORDER DENYING PETITIONS TO AMEND RULE

BY THE COMMISSION: On October 1, 2003, the North Carolina Telecommunications Industry Association (NCTIA or Petitioner) and Progress Energy Carolinas, Inc. (Progress Energy or Petitioner) filed a joint petition in this docket whereby the Commission was requested to amend Rule R12-4(c) by deleting the requirement that utilities pay interest on customer deposits at the rate of 8 percent per annum and, instead, require utilities to pay interest based on the three-month Treasury Bill rate in effect as of November 1 of each year with the rate effective on January 1 of the following year, or such other financially reasonable indicator upon which the interested parties can agree.

In support of their joint petition, NCTIA and Progress Energy stated that Commission Rule R12-2(a)(5) provides that a utility may require an applicant for service to make a cash deposit to secure payment of bills in accordance with Commission Rule R12-4. Rule R12-4 provides that such a cash deposit cannot exceed two twelfths of the estimated charges for the service for the ensuing 12 months for the customer in question and that the utility must pay interest on any deposit held more than 90 days at the rate of 8 percent per annum.

As of August 1, 2003, the annual interest rate for one-year constant maturity treasury bills, auctioned monthly, was 1.31 percent; six-month treasury bills sold for 1.06 percent; and Wachovia's fixed 12-17 month Certificates of Deposit less than $50,000 paid 1 percent. NCTIA member utilities currently pay approximately 1.06 percent interest on short-term 1-2 month AA-rated commercial paper. PEC currently pays approximately 1.25 percent interest on 1-month A2/P2 commercial paper.

An interest rate of 8 percent is greatly in excess of the interest rates that a customer could obtain in any government, investment-grade or insured, non-equity investment. It is also greatly in excess of the interest expense NCTIA and Progress Energy can avoid by having the use of these customer cash deposits as capital.

Requiring NCTIA and Progress Energy to pay interest on their cash deposits in the amount of 8 percent causes them to pay an interest rate far greater than the customer could achieve had he or she invested this money in a secure non-equity security; and the interest expense is far greater than the Petitioners can avoid by having the use of these customer cash deposits as capital.

According to the Petitioners, the Public Service Commission of South Carolina recently lowered the interest rate utilities must pay on customer deposits and agreed to review the rate yearly.

Duke Power's Petition

On October 29, 2003, Duke Power, a Division of Duke Energy Corporation (Duke Power or Petitioner), filed a petition in support of the joint petition filed by NCTIA and Progress Energy.

Public Staff's Comments

The Public Staff stated that it opposes the Petitioners' proposal and believes that the present rate of 8 percent should continue in effect, for the following reasons:

a. The existing 8 percent rate is the legal rate of interest provided for in G.S. 24-1. The Commission set the interest rate on customer deposits at its present level in 1980, and it has remained unchanged for 23 years. It has not been increased in times of high interest rates or reduced when interest rates were low.

b. A fixed interest rate is simple, easily understood by customers, and easily administered by utilities. If a floating rate were adopted, the Commission would have to deal with questions of detail, such as the rate to be paid on deposits collected in one year and refunded in another – should such deposits bear interest at the rate in effect when they were collected, the rate in effect when they are refunded, or some blended rate? The Commission regulates hundreds of utilities, some very large and some very small. While the state's larger utilities can undoubtedly be relied upon to administer a floating rate accurately, many of the small utilities are likely to make mistakes.

c. Almost all of the state's utilities earn overall rates of return in excess of 8 percent. Consequently, the 8 percent interest rate on deposits is not causing them any financial loss. The deposits they receive from customers can be invested in their ongoing business operations at a profit.

d. It is certainly true that at today's interest rates, which are far below historical averages, the returns available to investors on bonds, money market funds, certificates of deposit and the like are much less than 8 percent. As the Petitioners point out, an "investment" in a utility deposit at 8 percent may seem attractive. In fact, however, no one can choose to invest in a utility deposit. A utility can decline to require a deposit from a customer, or collect a deposit smaller than the maximum permitted by Rule R12-4; the decision rests with the utility, not the customer.

e. Utilities do not ordinarily require deposits from customers who are able to establish credit by other means. Most customers who are asked to provide deposits have limited financial resources. Such customers typically have unpaid balances on credit card accounts, with interest rates at 18 percent or higher, or other high-interest obligations such as payday loans. Customers are not benefited, but on the contrary are harmed, when they must put up a deposit at an 8 percent interest rate instead of paying down a credit card balance that accrues 18 percent interest.

The Public Staff stated that it believes that the current 8 percent interest rate should not be reduced. However, if the Commission determines that a reduction should be made, the Public Staff recommended (a) that the Commission adopt a fixed rather than floating rate, and (b) that interest begin to accrue when a deposit is received, rather than 90 days later as Rule R12-4 now provides. The Public Staff stated that it would not object to allowing a utility to return a deposit to the customer within 30 days without interest. However, if the deposit is retained for more than 30 days, interest should begin to accrue on the date of collection, rather than 30 or 90 days later.

Attorney General's Comments

According to the Attorney General, the Petitioners approach the interest rate question as if customers are making a voluntary investment choice. The Commission should not adopt that perspective. The more appropriate view is that security deposits are monies that utility customers are required to pay to receive necessary services. These funds benefit the companies as both collateral to ensure customer payments and as useful capital. Therefore, the companies should pay a fair rate of interest for the period they use these funds.

Under G.S. 62-130(e), the Commission is authorized to set interest rates on customer refunds at a just and reasonable level, not to exceed 10 percent. The present 8 percent fixed rate on security deposits is the same as the statutory legal rate of interest under G.S. 24-1. The Commission set the interest rate on customer deposits at 8 percent in 1980. It has remained unchanged for 23 years, even during periods of significantly higher and lower interest rates.

The Attorney General asserted a belief that the present 8 percent rate is just and reasonable. It provides a fair middle ground between what the companies pay for borrowing and what the companies and their shareholders earn as a reasonable return. Also, the fixed nature of the rate makes it easy to administer and for consumers to understand. In addition, there are several other factors that the Commission should consider.

First, the Petitioners can choose not to require that a customer provide a security deposit, so long as Petitioners exercise this discretion in an equitable and nondiscriminatory manner. Rule R12-1. Further, many customers can avoid posting a deposit. These include customers who own the premises being served, or other local real estate; customers who can provide credit references; and customers who can provide a satisfactory guarantor. Rule R12-2. Thus, it is likely that the people who are most often required to post a security deposit of up to 2/12ths of the estimated annual bill are those for whom it would be a significant financial burden. Rule R12-4(a). Therefore, the interest rate should be at a level that fulfills two goals. One, it should be high enough to provide a fair return on the customer's money. Two, it should be not so low as to encourage utilities to require deposits in situations where they are not necessary.

Second, Rule R12-4(c) exempts the Petitioners from paying any interest on security deposits for the first 90 days that the deposit is held. Further, Rule R12-5(d) allows the Petitioners to refund security deposits, in whole or in part, at any time. Thus, the Petitioners can choose to hold a customer's security deposit for 90 days to gauge whether that customer is a good credit risk. If so, they can refund the deposit without paying any interest. Further, even if petitioners hold the deposit for a full 12 months, the effective rate of interest on the deposit will be only 6 percent, due to the interest exemption during the first 90 days.

Third, the Petitioners have the unrestricted use of these customer monies. Although an individual customer's deposit can only be held a maximum of 12 months if the customer establishes a satisfactory payment record, the security deposit resource as a whole is a steady source of predictable long term capital. For example, at any point during the year the average amount of security deposits held by Progress Energy and Duke Power from their North Carolina customers is about $30 million and $26 million, respectively. The Petitioners seek to compare customer security deposits to the customer's investment in 3-month or 12-month U.S. Treasury bills. However, there are significant differences. Most importantly, a person who buys U.S. Treasury bills is making a voluntary choice about the timing, amount and duration of time that he invests his money. In contrast, the Petitioners' security deposit policies require the customer to make a deposit in order to obtain necessary utility services. The Petitioners decide the amount of the deposit and how long they will hold it. Further, the Petitioners do not offer investment security equal to that of the United States Treasury. Thus, basing the security deposit interest rate on rates paid by U.S. Treasury bills would not be just and reasonable.

The present 8 percent is a just and reasonable interest rate for those customers who have no choice but to deposit security funds. An interest rate based on U.S. Treasury bills, or some utility company borrowing measure, simply does not have the same attributes as interest on a security deposit, and therefore is not appropriate.

Justice Center's Comments

The North Carolina Justice and Community Development Center (Justice Center) asserts that the Commission should reject the industry petition for a number of reasons. The Justice Center endorsed the comments of the Attorney General and the Public Staff, stating that both of those parties did an excellent job of examining the history of the issue and the equities and practicalities of the proposed rule change. The Attorney General's comments are particularly apt in their explanation of both the effective interest rate that is actually paid to consumers (in light of Rule R12-4(c) and its exclusion of the first 90 days from the interest requirement) and in their description of the history of this issue (which points out that there was no apparent effort to raise the rate paid to customers when interest rates were much higher in the early 1980s).

The Justice Center asserted that low-income North Carolinians are the persons most affected by issues related to customer deposits. Not only are low-income households the most likely of all residential customers to be confronted with a deposit requirement, low-income customers are the most likely to be seriously and negatively impacted by a deposit requirement. For low-income households, a security deposit that equates to the cost of two months' service – especially for an energy bill that may run to $200 or more per month – can be an enormous hurdle and hardship.

For these families, a $400 or $500 security deposit is not a mere annoyance or a small diversion of discretionary income, it is a huge and daunting challenge that can be prohibitively expensive. Many households in North Carolina literally do without basic utility service precisely because they cannot come up with the money to meet a deposit requirement – even though they may have sufficient income to meet the monthly cost of service. While the state's utilities have an understandable and legitimate interest in assuring that their customers' bills are paid, there can be no denying the fact that the ability to require large deposits works a great hardship on thousands of North Carolina families each year (and that any reduction in the interest earned on deposits exacerbates this hardship).

Indeed, the issue of deposits and proper reimbursement to customers serves to highlight the pernicious phenomenon under which low-income people – the very people with the least ability to pay – pay more for the essential services of life. As numerous studies have documented, one of the chief roadblocks to achieving economic security for many low-income people is the hard reality that their circumstances often dictate higher prices and expenditures on a wide array of products and services – from gasoline to groceries, health care to home heating, consumer credit to insurance. Utility deposits, therefore, are but one more manifestation of this vicious cycle and a reduction in the interest rate paid on such deposits is but one more bite taken from the small amounts of disposable income of the state's most needy families.

This issue is particularly acute today given North Carolina's wounded and struggling economy. According to the most recent data from the U.S. Census Bureau (September 2003), North Carolina has now experienced two consecutive years of shrinking household incomes and increasing poverty. Between 2000 and 2002, based on two-year averages, median household income in North Carolina decreased by $1,749 or 4.4%. During the same period, the number of people living in poverty grew from an estimated 985,000 to 1.07 million – an increase of nearly a full percentage point.

This trend has continued to persist throughout 2003. In the first half of the year, more than 75,000 unemployed workers exhausted their state unemployment benefits. Recent mass layoffs such as occurred at Pillowtex – have placed even further stress on the state's working families.

All of these factors combine to render the companies' petition for a reduction in the interest paid to consumers particularly ill timed. While the total dollar figure that will accrue to individual customers awarded interest under the current rule can be rather small, the proposed change comes at the very time that low-income North Carolinians are struggling mightily to keep their heads above water. This is a time in which even a loss of $30 or $40 can make an enormous difference to a family living on the edge of financial disaster.

The Commission should deny the companies' petition. The Justice Center stated, however, that it stands ready and willing to work with all parties to this docket in order to ascertain whether there may be other ways to provide reform to the security deposit process (and bill payment process, generally) that might result in rule changes that would both enhance utility collections and provide low-income consumers with more and better options.

Petitioners' Response

The Petitioners filed a response in opposition to the comments of the Public Staff, Attorney General, and Justice Center on November 13, 2003. In their response, the Petitioners stated that the Public Staff, Attorney General, and Justice Center addressed the wrong issue. Their arguments seem to focus upon the burden to some customers from having to provide security deposits and then suggest that since this is such a burden, equity suggests that they be paid a high return significantly above current market rates. That is not the issue. Rather, the issue before the Commission is whether the utilities' customers that do not pay deposits should subsidize the utilities' customers that do.

Commission Rules permit utilities to require a security deposit prior to providing service to customers that have not established sufficient credit. The reason utilities are permitted to obtain security deposits is to minimize bad debt write-offs so that the general body of ratepayers will not have to absorb the bad debt expense, which is appropriately included in the utilities' cost of service. Thus, security deposits are not required to protect a utility, rather they are required to protect a utility's general body of ratepayers.

With regard to what interest rate should be paid on such deposits, again, such costs are properly included in a utility's cost of service and must be borne by the utility's overall customer body. If a utility is required to pay an interest rate above what is appropriate, it is the utility's other customers who must pay this increased cost. It makes no more sense to require the general body of ratepayers to subsidize excessive interest payments than to subsidize a higher level of expenses for bad debt.

The Public Staff, Attorney General, and Justice Center point out that in the past no one petitioned the Commission to raise the interest rate paid on deposits above 8 percent when interest rates in general were high, with their argument apparently being that the interest rate paid on deposits should not now be changed when interest rates are drastically below 8 percent. This argument is flawed for two reasons. First, the fact that a problem, assuming a problem actually existed, was not fixed in the past is no basis on which to refuse to correct the problem now. More importantly, however, the proposal made by the Petitioners will result in the interest rate paid on deposits increasing when interest rates increase. The proposal will work in both directions and will, thus, correct the very problem of which the Public Staff, Attorney General, and Justice Center complain.

Regarding G.S. 24-1, this statute has no relevance to this matter. Had the General Assembly intended G.S. 24-1 to apply to utility customer deposits, they would have so stated in the statute. They did not. More importantly, the interest paid on judgments does not involve one group of North Carolina citizens subsidizing another group of North Carolina citizens as is the case with interest on deposits.

Turning to the issue of the utilities' ability to administer changing the interest rate on an annual basis, the Petitioners would not have requested the change if they could not implement it. No utility has objected or expressed any concerns with the Petitioners' request. It would certainly appear that the utilities are in a better position than the Public Staff, Attorney General, and Justice Center to advise the Commission of any concerns they may have about administering the proposed change.

In summary, the arguments raised by the Public Staff, Attorney General, and Justice Center focus upon the wrong issue. Their arguments focus upon whether it is fair to charge customers, who are often unfortunately economically disadvantaged, a security deposit. The Commission has answered that question in the affirmative, finding that it is necessary to protect a utility's remaining ratepayer body from unduly high uncollectibles. It is the unfortunate necessity of furnishing the security deposit itself which creates the alleged hardship, not the interest rate a utility must pay on such deposits. The interest rate paid by a utility on a security deposit creates no hardship in any form or fashion as long as it is comparable to the interest rate these customers would receive had they placed these monies in investments of comparable risks. The Petitioners' proposal holds these customers harmless by paying them the same interest rate they would receive had they invested this money in such investments.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission finds good cause to deny the petitions from NCTIA, Progress Energy, and Duke Power to amend Rule R12-4 for the reasons generally asserted by the Public Staff, the Attorney General, and the Justice Center. By Order entered in Docket No. M-100, Sub 86 on September 12, 1980, the Commission, citing G.S. 24-1, revised the interest rate that public utilities are required to pay on customer deposits from 6 percent to 8 percent effective October 1, 1980. The rationale which led the Commission to adopt the 8 percent customer deposit interest rate in 1980 was compelling and legitimate at that time and remains so today. G.S. 24-1 has not been amended by the General Assembly since 1980, and 8 percent continues to be the legal rate of interest in North Carolina.

Specifically, the Commission set forth the following rationale in support of its 1980 decision:

> "On June 23, 1980, the General Assembly of the State of North Carolina amended G.S. 24-1 effective July I, 1980, to increase the legal rate of interest in this State from six percent per annum to eight percent per annum. Commission Rule R12-4(c) presently provides that customer deposits held by utilities for more than ninety (90) days shall draw interest at the rate of six percent per annum. The Commission concludes that Rule R12-4(c) should be revised by incorporating therein the legal rate of interest of eight percent per annum which is presently in effect in this State. The Commission further concludes that an increase in the level of interest to be paid on customer deposits from six percent per annum to eight percent per annum is clearly responsive to the statutory duty of this

Commission to engage in responsive and reasonable regulation in the State of North Carolina. The Commission is also of the opinion, and therefore concludes, that the rule revision described hereinabove is both fair and equitable in nature."

In contrast to the 1980 decision, the Petitioners have demonstrated no compelling justification in support of their proposed rule revision, while the Public Staff, Attorney General, and Justice Center have made a convincing case in support of maintaining the status quo. The Commission agrees that a fixed interest rate is simple, easily understood by customers, and easily administered by utilities. Because almost all of the state's utilities earn overall rates of return in excess of 8 percent, the 8 percent interest rate on deposits is not causing them any financial loss. The deposits they receive from customers can be invested in their ongoing business operations at a profit. Security deposits, being monies that utility customers are required to pay to receive necessary services, benefit the utilities as both collateral to ensure customer payments and as useful capital. Therefore, utilities should pay a fair rate of interest for the period they use these funds. The present 8 percent rate is equitable, just, and reasonable. It provides a fair middle ground between what utilities pay for borrowing and what they and their shareholders earn as a reasonable return. In addition, the Commission believes that the interest rate for customer deposits should be at a level high enough to provide a fair return to customers on their money, but not so low as to encourage utilities to require deposits in situations where they are not necessary.

The Commission further notes that Rule R12-4(c) exempts the Petitioners from paying any interest on security deposits for the first 90 days that the deposits are held, while Rule R12-5(d) allows the Petitioners to refund security deposits, in whole or in part, at any time. Thus, the Petitioners can choose to hold a customer's security deposit for 90 days to gauge whether that customer is a good credit risk. If so, they can refund the deposit without paying any interest. Even if deposits are held for a full 12 months, the effective rate of interest paid by utilities on the deposit is only 6 percent, due to the interest exemption during the first 90 days.

Accordingly, for all of the reasons set forth above, the Commission finds good cause to deny the petitions to amend Rule R12-4(c) and to continue to require payment of an interest rate on customer deposits which is set consistent with the legal rate of interest in North Carolina established by the North Carolina General Assembly in G.S. 24-1.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 23rd day of December, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bb120503.01

Commissioner Sam J. Ervin, IV concurs.
Commissioners James Y. Kerr and Michael S Wilkins concur.
Commissioner J. Richard Conder dissents.

DOCKET NO. M-100, SUB 131

COMMISSIONER SAM J. ERVIN, IV, CONCURRING: Although I agree with the majority of my colleagues that the Commission should deny the joint petition filed by the North Carolina Telephone Industry Association (NCTIA) and Carolina Power & Light Company, doing business as Progress Energy Carolinas, Inc. (PEC), and the separate petition filed by Duke Energy Corporation (Duke) requesting the Commission to amend Commission Rule R12-4(c) by deleting the requirement that utilities pay interest on customer deposits at an annual rate of 8 percent, I cannot completely join in the reasoning that leads them to reach this conclusion. As a result, I write separately to explain the reasons that I do not believe that Duke, NCTIA, and PEC have demonstrated the appropriateness of modifying the interest rate provision of Commission Rule R12-4(c) at this time.

As I indicated in my partial dissent in In re Western Carolina University, Order on Reconsideration and Approving Purchased Power Cost Rider Schedule "CP" on a Provisional Basis, Docket No. E-35, Subs 25, 26, and 27, Ninetieth Report of the North Carolina Utilities Commission: Orders and Decisions 248, 253 (2000) (Commissioner Ervin, dissenting in part), "[t]he reason that the Commission has historically required public utilities and other suppliers 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 that were higher than those ultimately deemed appropriate." The same logic applies to the customer deposits that are at issue here. Customer deposits of the type governed by Commission Rule R12-4(c) constitute money belonging to ratepayers in the possession of utilities, albeit money held for the entirely legitimate reason of ensuring payment of that customer's bill. As a result, 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 . . . ." In re Western Carolina University, Order on Reconsideration and Approving Purchased Power Cost Rider Schedule "CP" on a Provisional Basis, Docket No. E-35, Subs 25, 26, and 27, Ninetieth Report of the North Carolina Utilities Commission Orders: and Decisions 248, 253 (2000) (Commissioner Ervin, dissenting in part).

The essential argument advanced by Duke, NCTIA, and Progress in support of their request for a modification of the interest rate on customer deposits required by Commission Rule R12-4(c) is that individual customers could not obtain an 8 percent return by purchasing other investment vehicles of comparable risk and that requiring utilities to pay more than the rate associated with the purchase of such alternative investment vehicles results in inequitable cross-subsidization among customers. I simply cannot agree with this argument. First, as other parties to this proceeding have pointed out, a customer deposit is not a voluntary investment made by a customer on the basis of an economically rational survey of available alternatives. On the contrary, the requirement that a customer pay a deposit involves involuntary use of the customer's money to assure that the customer's utility bill will be paid. Although the requirement that a particular customer provide security in the form of a customer deposit is an appropriate exercise of utility authority under this Commission's rules, it should not be confused with or equated to a voluntary investment decision made by the customer. Secondly, and more importantly, the specific interest rates cited by Duke, NCTIA, and PEC do not adequately reflect the value of the customer's loss of access to his or her funds for at least two reasons. First, a customer with complete freedom to make any investment decision he or she might desire could conceivably be able to obtain a higher percentage return than those cited in support of the various petitions by accepting a higher degree of risk. Furthermore, a customer required to make a deposit in accordance with Commission Rule R12-4(c) is probably among the most economically deprived component of the using and consuming public. Such persons are likely to be debtors or otherwise experiencing financial difficulties. If such persons had additional disposable income, they would probably use the extra money to pay down credit card debit or similar obligations, all of which involve a higher rate of interest than those cited in support of the various petitions. As a result, the information contained in the various petitions suggests those customers required to make a deposit of the type at issue in Commission Rule 12-4(c) will not be made whole by a floating interest rate of the type advocated by Duke, NCTIA, and PEC. Finally, it is not inequitable to require other customers to bear the expense of paying interest rates on customer deposits that adequately compensate those required to make such deposits for loss of access to their money, since the former are receiving the benefit of the security resulting from the payment of the deposit in the form of lower bad debt costs and should have to bear the full cost of equitably minimizing the risk of non-payment. Thus, the proposal advanced in the various petitions is not consistent with considerations of sound regulatory policy because it does not adequately compensate those required to make a customer deposit for the inability to access that portion of their money used to make the deposit.

The filings by the Attorney General, the Justice Center, and the Public Staff upon which other members of the Commission rely go somewhat beyond this logic in seeking rejection of the petitions filed by Duke, NCTIA, and PEC. At this point, I see no need to address the additional issues raised in these filings. The purpose of requiring the payment of interest on customer deposits is to compensate the affected customers for the loss of the use of their money. The proposal espoused in the various petitions does not, at least to my way of thinking, adequately accomplish that goal. This conclusion, standing alone, is sufficient to require rejection of the utilities' proposal and I see no need to say more. As a result, I concur in the Commission's decision without adopting all of the logic utilized by my colleagues in denying the utilities' petitions.

\s\ Sam J. Ervin, IV
Commissioner Sam J. Ervin, IV

DOCKET NO. M-100, SUB 131

COMMISSIONERS JAMES Y. KERR, II AND MICHAEL S. WILKINS, CONCURRING: We concur in the result reached but write separately to articulate our view that simplicity and fairness dictate that the rate paid on customer deposits should be that established by the General Assembly in N.C.G.S. § 24-1. No compelling case has been made to do differently in this context. Moreover, following this approach will relieve the parties and this Commission from litigating this issue in the future, including times when the current interest rate environment has changed.

\s\ James Y. Kerr, III
Commissioner James Y. Kerr, II

\s\ Michael S. Wilkins
Commissioner Michael S. Wilkins

DOCKET NO. M-100, SUB 131

COMMISSIONER J. RICHARD CONDER DISSENTING: Respectfully, I must disagree with my colleagues concerning their determination that utilities must continue to pay an 8% interest rate on customer deposits. Instead, I support the request made by the Petitioners for the same general reasons set forth by them in support of their request.

In addition, it simply makes better sense to allow the interest rate on customer deposits vary over time in accordance with the general change in the level of interest rates, rather than requiring a constant rate of 8%. I realize that 8% is the maximum legal rate of interest established by G.S. 24-1. However, since 8% is a maximum, the interest rate on utility customer deposits can be lower. Further, I am not convinced that G.S. 24-1 has relevance to this matter at all. The mere existence of G.S. 62-130(e), under which the Commission is authorized to set interest rates on refunds for utility customers up to a rate of 10%, suggests that G.S. 24–1 may not be relevant, or at least controlling, with respect to the interest rate on deposits of utility customers.

Today, the prime rate of interest is 4%. However, major utility companies can borrow short-term at even lower rates. I point out that those borrowing rates are also typically indexed to Treasury bills or LIBOR. While it may not result in a material amount of money, I simply do not agree with requiring utility companies to pay 8% on utility customer deposits when they can borrow at rates of less than 4%. From the affected customer's viewpoint, I find regular savings accounts paying as little as 0.4% and certificates of deposit paying 1% to 2%. Therefore, it seems unreasonable to me that a utility customer should even expect a utility to pay 8% on a utility deposit. In my opinion, requiring utility companies to pay 8% on customer deposits simply adds an unnecessarily high cost to their business.

I further feel that both the companies and their general body of ratepayers will be adversely impacted by this decision. Until the companies file another general rate case, the companies must bear the unnecessarily high cost. However, when new rates are established, this unnecessarily high cost will be passed along to their general body of ratepayers as an allowable operating expense in their cost of service.

I do not necessarily agree that the interest rate on customer deposits should be tied to Treasury bills and I note that the Petitioners were amenable to using another financially reasonable indicator upon which the interested parties could have agreed. I feel as though we had the opportunity to help both the utility companies and their general body of customers in a win-win situation, but failed to do so.

We adjust utility rates for our movers, natural gas distribution utilities, and electric utilities, as fuel prices fluctuate. Fuel prices, particularly gasoline and oil, fluctuate much more frequently than interest rates and utility rates are adjusted as required. I think we could have established a much better method to determine the interest rate on utility customer deposits by allowing this rate to change as proposed by the Petitioners. It would have been fair and reasonable to the companies and their customers. To me, 8% is an exorbitant rate and should not be tolerated under current economic conditions.

\s\ J. Richard Conder
COMMISSIONER J. RICHARD CONDER

DOCKET NO. E-100, SUB 56

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Decommissioning Costs for Nuclear Power Plants Owned by Carolina Power & Light Company, Duke Power, a Division of Duke Energy Corporation (Duke), and Virginia Electric and Power Company d/b/a Dominion North Carolina Power (Dominion NC)	)	ORDER PROTECTING DECOMMISSIONING FUNDS

BY THE COMMISSION: On September 11, 2002, the North Carolina Utilities Commission (Commission) issued an Order in this Docket. Ordering Paragraph No. 5 of said Order required "[t]hat the Stipulating Parties shall file a proposed order within thirty (30) days of the date of this Order which is designed to protect the integrity of decommissioning funds." (The Stipulating Parties consist of the Public Staff of the North Carolina Utilities Commission (Public Staff) and CP&L, Duke and Dominion NC, which are referred to collectively hereinafter as the "Utilities.")

On November 15, 2002, the Utilities filed a proposed order and comments regarding the proposed order to protect the integrity of both externally and internally-held decommissioning funds in the event that a utility seeks protection by filing a petition under the United States Bankruptcy Code, 11 U.S.C. §101 et. seq.. (the "Bankruptcy Code").

On November 19, 2002, the Commission issued an Order which allowed intervenors to comment on the proposed order of the Utilities.

The Public Staff filed comments and recommended modifications to the proposed order of the Utilities on December 6, 2002, December 9, 2002, and December 20, 2002. According to the Public Staff, the Utilities did not oppose the modifications recommended by the Public Staff.

On December 10, 2002, the Carolina Utility Customers Association (CUCA) filed comments on the proposed order of the Utilities. In its comments, CUCA stated its belief that the Utilities' proposal to address the preservation of internal funds for nuclear decommissioning was inadequate to protect retail ratepayers and recommended that the Commission order the Utilities to transfer the internal funds to an external trust.

After careful consideration of the foregoing and the Commission's entire files and records in this matter, the Commission now makes the following

FINDINGS OF FACT

1. Funds collected by the Utilities from their customers for the specific purpose of providing the funding for eventual radiological decommissioning of nuclear generating facilities are held by each utility in its own external trust fund (the "External Fund"), in accordance with requirements imposed by the United States Nuclear Regulatory Commission (the "NRC") to

effectuate the NRC's statutory mandate to protect public health and safety in the area of radiological hazards. Certain of the Utilities also hold monies for non-radiological decommissioning in External Funds.

2. The External Fund is operated as a trust fund established pursuant to a master decommissioning trust agreement (the "Trust Agreement"). The terms of each Utility's Trust Agreement are consistent with the requirements and guidance of the NRC. Pursuant to the respective trust agreements, the Utilities transfer certain monies collected from their customers for decommissioning to a master trust administered by a bank as the trustee (the "Trustee"). Under the Trust Agreements, the Trustee holds all right, title and interest in the decommissioning funds exclusively for the purpose of decommissioning and to comply with any order to decommission any of the Utilities' plants. Each fund comprising the decommissioning funds is segregated pursuant to the Trust Agreements. Moreover, the Trust Agreements provide that the Utilities' interest in the trust is not transferable and is not subject to claims of creditors, with the exception of certain creditors who incur debt while performing decommissioning work.

3. Certain of the Utilities also maintain an internal fund (the "Internal Fund"), which holds monies also earmarked for decommissioning. Each utility administers its own Internal Fund. As the Internal Funds for decommissioning of certain Utilities' nuclear plants are collected from its customers, such amounts are recorded into a separate account. An Internal Fund is not required by, or subject to regulation by, the NRC but is subject to regulation by the North Carolina Utilities Commission, the Public Service Commission of South Carolina and the State Corporation Commission of Virginia. Each utility maintains sole control over its account and the funds therein and invests such funds into general assets which assets are held in the utility's name.

4. All decommissioning funds, whether invested internally or externally, represent, on the books of the respective utility, reserved amounts collected from customers solely for the purpose of decommissioning pursuant to regulatory authority. These funds will be utilized as the actual decommissioning costs are incurred.

CONCLUSIONS OF LAW

I. NRC Regulations Comprehensively Address Funding Assurance For and Decommissioning of Nuclear Power Plants with Respect to Radiological Decommissioning

The nuclear generating facilities operated by the Utilities are licensed to operate by the NRC. The NRC's regulatory plan to assure protection of the health and safety of the public extends to the decommissioning of commercial nuclear power plants. The NRC defines "radiological decommissioning" as the safe removal of nuclear facilities from service and the reduction of residual radioactivity to a level that permits termination of the license and release of the property either for unrestricted use or restricted use with conditions.[1] The stated purpose of the NRC's decommissioning regulations is to assure that decommissioning will be carried out "with minimal impact on public and occupational health and safety and the environment."[2] NRC regulations make clear that NRC licensees are responsible for the funding and completion of decommissioning, and that they must do so "in a manner which protects public health and safety."[3]

The mechanisms currently acceptable to the NRC for providing the requisite financial assurance for decommissioning are set forth in 10 C.F.R. § 50.75(e).[4] For power reactor licensees, the principal funding methods include prepayment, external sinking fund, or a surety, insurance, or other guarantee method. Consistent with the practice of other electric utility licensees and NRC requirements, the Utilities' External Funds are external sinking funds. The funds collected for decommissioning must be maintained separate from other assets of the utility, and must not be under the utility's direct administrative control. *See* 10 C.F.R. § 50.75(e)(1)(i)-(ii). Certain of the Utilities also hold monies intended for non-radiological decommissioning in External Funds.

II. Decommissioning Funds Held in Properly Structured External Trusts Will be Protected From the Reach of Creditors in the Event of a Bankruptcy Filing by a Utility

Section 541 of the Bankruptcy Code makes a distinction between an equitable interest and legal title such that express and valid constructive trusts are excluded from the property of the estate and funds held in such trusts are therefore not subject to the claims of a debtor's creditors. *See, e.g., The Official Committee of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 997 F.2d 1039, 1054 (3d Cir. 1993) (Where a debtor possesses only legal title to funds, such funds are not an asset of the bankruptcy estate and may not be distributed to creditors); *In re Surplus Furniture Liquidators, Inc. of High Point*, 199 B.R. 136, 142 (Bankr. M.D.N.C. 1995) ("It is generally held that [section 541(d)] excludes from the bankruptcy estate property which is subject to a constructive or other trust. Because such trust property is not part of the estate under § 541(d),

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1 *See* 10 C.F.R. § 50.2; *see also* 53 Fed. Reg. 24,018, 24,019 (June 27, 1988) ("General Requirements for Decommissioning Nuclear Facilities; Final Rule"). As used in the decommissioning context, "nuclear facility" refers to the contaminated components of the site, buildings and their contents, and the equipment associated with NRC activities within the scope of NRC regulations in 10 C.F.R. § 50.75. It also includes those non-contaminated components that must be dismantled to obtain access to contaminated components. *See* 50 Fed. Reg. 5600 (Feb. 11, 1985) ("Decommissioning Criteria for Nuclear Facilities; Proposed Rule"); *see also* NRC Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" (Aug. 1990), at p.1.159-1.

2 *See* 53 Fed. Reg. at 24,019.

3 *Id.*

4 NRC regulations recognize that funding for reactor decommissioning may also be the subject of regulation by Federal or State government agencies that have jurisdiction over rate regulation. NRC decommissioning requirements supplement, and do not supplant, such State regulations. *See* 10 C.F.R. § 50.75(a).

the beneficiary of the constructive or other trust is entitled to recover such property from the bankruptcy trustee or debtor").[1]

Because an express trust is not subject to the claims of a debtor's creditors, an externally held fund that is structured in the nature of a trust will be protected from creditors in the event of a utility bankruptcy. According to the *Restatement (Second) of Trusts*, an express trust is:

> A fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intent to create it.

Restatement (Second) of Trusts § 2 (1959). In addition, under North Carolina law, an express trust requires: (1) sufficient words to create it, (2) a definite subject matter, (3) an ascertained object, and (4) designated beneficiaries. *See Williams v. Mullen*, 31 N.C. App. 41, 45 (N.C. App. 1976).

The External Funds established by the Utilities satisfy all of the indicia of an express trust that would not be subject to claims of creditors in the event of a Utility's bankruptcy filing. Specifically, the External Funds:

- Create a fiduciary relationship whereby the Trustee administers the trust assets;
- Were created and are administered pursuant to the trust agreements;
- Have the Decommissioning Contributions as a definite subject matter;
- Have a defined purpose (*i.e.*, to pay for ordered decommissioning costs); and
- Have the public as its designated beneficiaries.

Moreover, under the Trust Agreement, the Trustee holds all right, title and interest in the decommissioning funds exclusively for the purpose of decommissioning and to comply with any order to decommission any of the Utilities' plants, and the funds placed in the External Funds are not available for any other purpose until and after the Trust Agreements terminate. Accordingly, the External Funds are structured such that they would not be property of a bankruptcy estate in the event of a bankruptcy and would therefore not be subject to claims of creditors.[2]

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1 *See also* 5 *Collier on Bankruptcy*, ¶ 541.11[5], Lawrence P. King, ed. (15th ed. rev. 2002) (Assets held in trust are "not available to the debtor or the debtor's creditors"); *Matter of Quality Holstein Leasing*, 752 F.2d 1009, 1013-14 (5th Cir. 1985) (Estate succeeds only to rights and title debtor possessed); *In re Howard's Appliance Corp.*, 874 F.2d 88, 93-05 (2nd Cir. 1989) (Bankruptcy estate does not include property in which debtor merely has bare legal title).

2 Further, irrespective of bankruptcy cases, the NRC has reserved the right to take measures to assure the adequacy of decommissioning funding, including taking steps independently or in cooperation with the Federal Energy Regulatory Commission and the licensee's state Public Utilities Commission. *See* 10 C.F.R. § 50.75(e)(2).

III. The Internal Funds of Certain Utilities Provide Assets for Additional Decommissioning Activities

The Commission allows the Utilities to include in their customer rates not only costs for radiological decommissioning, but also other decommissioning costs not related to radiological hazards. Because the NRC does not regulate Utilities' non-radiological decommissioning funding, there is no NRC requirement that these monies be placed in an External Fund. Accordingly, the Utilities variously either place funds for non-radiological decommissioning in an Internal Fund, in an External Fund, or in some combination of the two.

Although Internal Funds may be subject to the claims of creditors in the hypothetical event of a bankruptcy filing, the Commission finds that the Utilities are prohibited from transferring their nuclear plants, such as in any liquidation or reorganization, without necessary federal or state regulatory approvals. Any such transfer will be made subject to any restrictions deemed necessary at the time to assure that assets and funds are transferred, or other provisions made, to address any obligation related to internally funded decommissioning. Moreover, the Utilities will be prohibited from abandoning the facilities without performing the necessary decommissioning, and any claims for internally funded decommissioning work actually performed would be entitled to an administrative priority in bankruptcy.[1]

Finally, the funds authorized by the Commission for nuclear decommissioning create a trust relationship between the Utilities and their customers[2] because the Commission allows the Utilities to assess and collect a fee for the benefit of their customers for internally funded decommissioning costs. The Utilities record these amounts in a separate account and invests these funds internally.

As such, assurance exists that funding will be available for internally funded decommissioning.

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1 *See Midatlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 507 (1986); *Commonwealth of Pennsylvania, Dept. of Environmental Resources v. Conroy (In re Conroy)*, 24 F.3d 568 (3d Cir. 1994) (Where the debtor's failure to dispose of hazardous wastes properly endangered public safety, the state environmental agency cleaned up the property and was entitled to have its claim treated as an administrative expense); *In re Mahoney-Troast Construction Co.*, 189 B.R. 57, 61 (Bankr. D.N.J. 1995) ("[I]n this circuit, it appears amply clear that expenses incurred post-petition to clean up continuing environmental hazards created pre-petition may be granted administrative expense priority"); *In re Chateaugay Corp.*, 944 F.2d 997, 1010 (2d Cir. 1991) (Relying on *Midatlantic*, the court held that since the debtor could not abandon the property, the cost to remedy contamination ordered by regulatory authority was necessary to preserve the estate and this cost was entitled to administrative priority); *In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 123-24 (6th Cir. 1987) (same).

2 *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3rd Cir. 1994), *quoting Goldberg v. New Jersey Lawyers' Fund*, 932 F.2d 273, 280 (3rd Cir. 1991); *see also In re Columbia Gas Sys. Inc.*, 997 F. 2d 1039, 1061 and 1063 (3rd Cir. 1993).

IV. Funds Collected for Decommissioning Costs Pursuant to Orders of the North Carolina Utilities Commission Can Only be Used to Pay Decommissioning Costs of Nuclear Plants as Authorized by the North Carolina Utilities Commission and/or the Nuclear Regulatory Commission.

The North Carolina Utilities Commission authorized these Utilities to include in their rates a component to cover the costs of decommissioning nuclear plants. As such, those decommissioning funds, whether invested internally or externally, are to be used solely for that purpose until decommissioning is satisfactorily completed, and only after the necessary authority is given by the appropriate state and/or federal regulatory agencies. Those funds are not to be used for any other purpose. It is important for the public health and safety that these funds be protected.

IT IS, THEREFORE, ORDERED, based on the foregoing, that:

1. Funds collected for purposes of radiological decommissioning are maintained in External Funds consistent with NRC regulations, and shall be considered to be adequately protected. Funds collected for non-radiological decommissioning that are held in External Funds are equally protected.

2. Funds collected for decommissioning that are held in Internal Funds are tracked in a separate account, as they would be entitled to administrative priority in bankruptcy, are in the nature of a trust and shall be considered to be adequately protected.

3. Funds collected for purposes of decommissioning, whether invested internally or externally, are considered both a constructive and an explicit trust. Those funds are only to be used after required regulatory approval of the appropriate regulatory authorities. These funds are of primary importance to the public health and safety of North Carolina citizens.

4. Duke and CP&L shall continue their study on the financial impacts of moving internal decommissioning revenue to external trusts and file a report concerning these studies as directed in the September 11, 2002 Order.

ISSUED BY ORDER OF THE COMMISSION.
This the 7th day of February, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

je020603.01

DOCKET NO. E-100, SUB 90

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Investigation of Voluntary Green and Public Benefit Fund Check-Off Programs	)))	ORDER APPROVING NC GREENPOWER

BY THE COMMISSION: On November 22, 2002, Advanced Energy Corporation (AEC) filed a revised administrative and operational plan to implement, in conjunction with the utilities, a statewide, voluntary green power pricing program in North Carolina – NC GreenPower. Carolina Power and Light Company, Duke Energy Corporation, and Dominion North Carolina Power, in addition to several of the State's electric membership cooperatives, filed green power pricing tariffs to support the implementation of NC GreenPower.

As indicated by AEC, the revised NC GreenPower proposal now includes two products: (1) a "mass-market" product to be offered primarily to residential customers that is comprised of higher-priced renewable resources; and (2) a "large-volume" product to be offered to large-volume customers that is more price competitive in comparison to out-of-state green tags. The revised proposal also attempts to balance the interests of all stakeholders by narrowing the types of renewable resources included in the mass-market product while incorporating a broader spectrum of resources in the lower-cost large-volume product. AEC further states that although no single interest or representative group may be completely satisfied with the revised plan, it believes that the revised proposal comes much closer than the initial May 31, 2002, filing to gaining the necessary support for the program.

The Commission issued an Order on December 11, 2002, commending AEC, the utilities, and the diverse stakeholders in this proceeding for their work in together developing the NC GreenPower proposal. In that Order, the Commission stated that there appears to be considerable consensus and support for the revised plan and that it, therefore, was inclined to approve the revised NC GreenPower proposal and necessary utility tariffs and to allow the program to move forward to implementation. Lastly, however, noting that at least one issue, that of the use of wood waste in the large-volume product, remained contentious, the Commission allowed interested persons until December 31, 2002, within which to file dissenting comments on any aspect of the revised NC GreenPower proposal and utility tariffs.

Of the five comments received on or about December 31, 2002, three expressed support for the inclusion of biomass and waste wood energy facilities in the NC GreenPower proposal. (Comments of Tennessee Power Company, Craven County Wood Energy, and Green Power Energy Holding, LLC) Mr. Andrew Givens filed comments on January 17, 2003, encouraging the Commission "to act positively and promptly for the approval of the NC GreenPower program."

Hydromatrix Partnership Limited (Hydromatrix), a hydropower developer, filed dissenting comments with the following suggestions: (1) any consumer should be allowed to buy either product; (2) NC GreenPower should provide long term contracts to suppliers; (3) payments to the different supplier technologies should be controlled by the Commission; (4) small hydroelectric facilities should not be subject to Low Impact Hydro Institute (LIHI) standards in order to participate in NC GreenPower; and (5) capacity for hydroelectric projects should not be limited to 10 MW or less. Lastly, Hydromatrix objects to the large disparity between the amounts proposed to be paid to solar and wind versus other generating technologies.

In its comments, Appalachian Voices supports NC GreenPower and the inclusion of solar, wind and, initially, landfill or animal waste methane projects, but believes that conservation "must be the highest priority in NC GreenPower" and that energy efficiency "must also be an integral part" of the program. Appalachian Voices strongly opposes the development of hydropower and the inclusion of municipal solid waste, animal waste, or biomass incineration projects in NC GreenPower. In summary, Appalachian Voices recommends that the NC GreenPower proposal be amended as follows: (1) include conservation and efficiency measures; (2) maximize solar and wind projects over time; (3) minimize landfill gas, wastewater gas and animal waste gasification; (4) phase-out landfill gas, wastewater gas (if included) and animal gasification over time; (5) exclude all plant based material incineration; (6) require LIHI certification for all hydroelectric projects; (7) require the installation of maximum achievable control technologies; (8) exclude wastewater treatment facilities; (9) exclude animal waste facilities from the small-volume product; (10) allow North Carolina's environmental community to select its representatives on the Board of Directors; and (11) provide marketing and information materials designed to alert consumers of the environmental impacts of each technology used to produce NC GreenPower and the benefits and costs associated with both the large- and small-volume products.

With regard to many of the concerns raised by Hydromatrix and Appalachian Voices, the Commission notes that NC GreenPower is designed as a market-driven product in response to a perceived consumer demand. This has affected not only the prices set for the mass-market and large-volume products, the premiums expected to be paid to generators using different technologies, and the terms offered to renewable generators, but also other characteristics which distinguish the two products, such as the accreditation of each and the renewable resources included within each. These distinctions between the two products represent a carefully crafted balance among the diverse stakeholder interests participating in the development of the proposal. As noted by the comments in response to the Commission's request, this has not been an easy process. Moreover, contrary to Hydromatrix's assertions, the Commission understands that NC GreenPower only intends to promote the mass-market product to residential and other low-usage customers in order to avoid public confusion.

Therefore, after careful consideration, the Commission finds good cause to approve the revised NC GreenPower proposal, to allow the associated utility tariffs to become effective as proposed, and to designate AEC as the program administrator. The Commission respects the considerable consensus achieved through the stakeholder process and will allow the market for NC GreenPower and renewable generation to develop under the proposal as filed. Experience marketing the program and working with both consumers and generators will indicate where changes, if any, should be brought back before the Commission to be incorporated into NC GreenPower.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 28th day of January, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Rg012803.01

DOCKET NO. E-100, SUB 96

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2002	) ORDER ESTABLISHING) STANDARD RATES AND) CONTRACT TERMS FOR) QUALIFYING FACILITIES

BY THE COMMISSION: These are the current biennial proceedings held by the North Carolina Utilities Commission pursuant to the provisions of Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and the Federal Energy Regulatory Commission (FERC) regulations implementing those provisions, which delegated responsibilities in that regard to this Commission. These proceedings are also held pursuant to the responsibilities delegated to this Commission under G.S. 62-156(b) to establish rates for small power producers as that term is defined in G.S. 62-3(27a).

Section 210 of PURPA and the regulations promulgated pursuant thereto by the FERC prescribe the responsibilities of the FERC and of state regulatory authorities, such as this Commission, relating to the development of cogeneration and small power production. Section 210 of PURPA requires the FERC to prescribe such rules as it determines necessary to encourage cogeneration and small power production, including rules requiring electric utilities to purchase electric power from, and to sell electric power to, cogeneration and small power production facilities. Under Section 210 of PURPA, cogeneration facilities and small power production facilities that meet certain standards and are not owned by persons primarily engaged in the generation or sale of electric power can become "qualifying facilities" (QFs), and thus become eligible for the rates and exemptions established in accordance with Section 210 of PURPA.

Each electric utility is required under Section 210 of PURPA to offer to purchase available electric energy from cogeneration and small power production facilities that obtain QF status under Section 210 of PURPA. For such purchases, electric utilities are required to pay rates which are just and reasonable to the ratepayers of the utility, are in the public interest, and do not discriminate against cogenerators or small power producers. The FERC regulations require that the rates electric utilities pay to purchase electric energy and capacity from qualifying cogenerators and small power producers reflect the cost that the purchasing utility can avoid as a result of obtaining energy and capacity from these sources, rather than generating an equivalent amount of energy itself or purchasing the energy or capacity from other suppliers.

With respect to electric utilities subject to state jurisdiction, the FERC delegated the implementation of these rules to the state regulatory authorities. The state commissions may implement these rules by the issuance of regulations, on a case-by-case basis, or by any other means reasonably designed to give effect to the FERC's rules.

The Commission determined to implement Section 210 of PURPA and the related FERC regulations by holding biennial proceedings. The instant proceeding is the latest such proceeding to be held by this Commission since the enactment of PURPA. In prior biennial proceedings, the Commission has determined separate avoided cost rates to be paid by four electric utilities to the QFs with which they interconnect. The Commission has also reviewed and approved other related matters involving the relationship between the electric utilities and such QFs, such as terms and conditions of service, contractual arrangements, and interconnection charges.

This proceeding also is a result of the mandate of G.S. 62-156, which was enacted by the General Assembly in 1979. This statute provides that "no later than March 1, 1981, and at least every two years thereafter" this Commission shall determine the rates to be paid by electric utilities for power purchased from small power producers according to certain standards prescribed therein. Such standards generally approximate those prescribed in the FERC regulations regarding factors to be considered in the determination of avoided cost rates. The definition of the term "small power producer" for purposes of G.S. 62-156 is more restrictive than the PURPA definition of that term, in that G.S. 62-3(27a) includes only hydroelectric facilities of 80 MW or less, thus excluding generators utilizing other renewable resources.

On June 19, 2002, the Commission issued its Order Establishing Biennial Proceeding, Requiring Data and Scheduling Public Hearing in this docket. That Order made Carolina Power

& Light Company d/b/a Progress Energy Carolinas, Inc. (Progress), Duke Power, a Division of Duke Energy Corporation (Duke), Virginia Electric and Power Company d/b/a Dominion North Carolina Power (NC Power), and Western Carolina University (WCU) parties to the proceeding to establish the avoided cost rates each is to pay for power purchased from QFs pursuant to the provisions of Section 210 of PURPA and the associated FERC regulations and G.S. 62-156. The Order also required each electric utility to file proposed rates and proposed standard form contracts. The Order stated that the Commission would attempt to resolve all issues arising in this docket based on a record developed through public witness testimony, written statements, exhibits and avoided cost schedules verified by persons who would otherwise be qualified to present expert testimony in a formal hearing, and written comments on the statements, exhibits and schedules, rather than a full evidentiary hearing. Progress, Duke, NC Power, and WCU were required to file their statements and exhibits by November 1, 2002. Other persons desiring to become parties were allowed to intervene and to file their statements and exhibits by January 3, 2003. All parties were allowed to file reply comments and proposed orders. The Commission scheduled a public hearing for January 28, 2003, solely for the purpose of taking non-expert public witness testimony.

On January 3, 2003, Cogentrix Energy, Inc. (Cogentrix) filed a motion to intervene which was granted by Order dated January 7, 2003. Cogentrix also filed the testimony of Thomas J. Bonner.

North Carolina Power Holdings, LLC (North Carolina Power Holdings), Craven County Wood Energy Limited Partnership (Craven County Wood Energy), and Green Power Energy Holdings, LLC (Green Power), filed motions to intervene out of time, which were granted.

The Commission held a hearing on January 28, 2003, solely for the purpose of taking non-expert public witness testimony. The following persons testified at this hearing: Randy Musselwhite, plant manager for the two 35 MW cogeneration facilities (Lumberton Power and Elizabethtown Power) owned by North Carolina Power Holdings, who testified about the importance of access to avoided cost rates to the plants' employees and communities; Robert Hester, Vice President of Finance for Alamac American Knits, LLC, the steam host for the Lumberton power plant, who testified on behalf of Alamac and Lumberton Power urging that they have access to rate structures that would keep them viable businesses; Kenneth Kornegay, Mayor of Elizabethtown and David Smitherman, Town Manager of Elizabethtown, both of whom testified as to the importance of Elizabethtown Power to the local economy; Greg Martin, County Manager of Bladen County, who testified that Elizabethtown Power is an excellent corporate citizen and that the County is concerned about the company's long-term sustainability; Richard Harkrader, Policy Chair of the North Carolina Sustainable Energy Association, who testified as to the critical nature of the availability of avoided cost contracts to the newly approved Green Power program and about his opposition to the utilities' proposals to eliminate long-term contracts; Tim Beaver, an energy engineer involved in the Green Power program, who also voiced concerns; and John Delafield, founder of Future Vision, an educational, advocacy, and outreach company that focuses on renewable energy issues.

The Commission issued an Order on Motion to Require Filing of Documents and Adjust Schedule on April 2, 2003 granting the Public Staff's March 18, 2003, request that the utilities file any documents not previously filed with the Commission that they require QFs to sign. The utilities had until April 7, 2003 to file any such documents and the Public Staff comments to those documents were due on April 28, 2003.

After extensions of time, the Public Staff filed its initial statement and exhibits on March 18, 2003. NC Power filed its reply comments on April 9, 2003. Duke, Progress, North Carolina Power Holdings, and Craven County Wood Energy all filed reply comments on April 14, 2003. Cogentrix, also on April 14, 2004, filed the testimony of Kenneth J. Slater.

On June 4, 2003, the Public Staff filed Comments on Interconnection Agreement. Progress filed a Revised Interconnection and Operation Agreement for Qualifying Facilities on June 5, 2003. On June 13, 2003, Progress, Cogentrix, North Carolina Power Holdings, Green Power and Craven County Wood Energy filed responses to the Public Staff's comments on the agreement.

Various filings were made and orders issued which are not discussed in this Order but are included in the record of this proceeding.

Based on the foregoing, all of the parties' comments and exhibits, the public witness testimony at the hearing, and the entire record in this proceeding, the Commission now makes the following:

FINDINGS OF FACT

1. Progress should offer long-term levelized capacity payments and energy payments for 5-year, 10-year and 15-year periods as standard options to (a) hydroelectric QFs owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell 5 MW or less capacity and (b) non-hydroelectric QFs fueled by trash or methane derived from landfills, hog waste, or poultry waste contracting to sell 5 MW or less capacity. The standard levelized rate options of 10-years and 15-years should include a condition making contracts under those options renewable for subsequent term(s) at the option of the utility on substantially the same terms and provisions and at a rate either (1) mutually agreed upon by the parties negotiating in good faith and taking into consideration the utility's then avoided cost rates and other relevant factors or (2) set by arbitration. Progress shall offer its standard 5-year levelized rate option to all other QFs contracting to sell 3 MW or less capacity.

2. Duke should offer long-term levelized capacity payments and energy payments for 5-year, 10-year and 15-year periods as standard options to (a) hydroelectric QFs owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell 5 MW or less capacity and (b) non-hydroelectric QFs fueled by trash or methane derived from landfills, hog waste, or poultry waste contracting to sell 5 MW or less capacity. The standard levelized rate options of 10-years and 15-years should include a condition making contracts under those options renewable for subsequent term(s) at the option of the utility on substantially the same terms and provisions and at a rate either (1) mutually agreed upon by the parties negotiating in good faith and taking into consideration the utility's then avoided cost rates and other relevant factors or (2) set by arbitration. Duke shall offer its standard 5-year levelized rate option to all other QFs contracting to sell 3 MW or less capacity.

3. NC Power should offer long-term levelized capacity payments and energy payments based on a long-term levelized generation mix with adjustable fuel prices for 5-year, 10-year and 15-year periods as standard options to (a) hydroelectric QFs owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell 5 MW or less capacity and (b) non-hydroelectric QFs fueled by trash or methane derived from landfills, hog waste, or poultry waste contracting to sell 5 MW or less capacity. The standard levelized rate options of 10-years and 15-years should include a condition making contracts under those options renewable for subsequent term(s) at the option of the utility on substantially the same terms and provisions and at a rate either (1) mutually agreed upon by the parties negotiating in good faith and taking into consideration the utility's then avoided cost rates and other relevant factors or (2) set by arbitration. NC Power shall offer its standard 5-year levelized rate option to all other QFs contracting to sell 3 MW or less capacity. NC Power shall offer long-term levelized energy payments as an additional option for QFs rated at 100 kW or less capacity.

4. Progress, Duke, and NC Power should offer QFs not eligible for the standard long-term levelized rates the following three options if the utility has a Commission-recognized active solicitation underway: (1) participating in the utility's competitive bidding process, (2) negotiating a contract and rates with the utility, or (3) selling energy at the utility's Commission-established variable energy rate. If the utility does not have a Commission-recognized active solicitation underway, Progress, Duke, and NC Power should offer QFs not eligible for the standard long-term levelized rates the options of (1) contracting with the utility to sell power at the variable energy rate established by the Commission in these biennial proceedings or (2) contracting with the utility to sell power at negotiated rates. If the utility does not have a solicitation underway, such negotiations will be subject to arbitration by the Commission at the request of either the utility or QF to determine the utility's actual avoided cost, including both capacity and energy components, as appropriate; however, the Commission will only arbitrate if the QF is prepared to commit its capacity to the utility for a period of at least two years. In either case, whether there is an active solicitation underway or not, QFs not eligible for the standard long-term levelized rates of course have the option of selling into the wholesale market. The exact points at which an active solicitation should be regarded as beginning and ending for these purposes should be determined by motion to, and order of, the Commission. Unless there is such a Commission order, it will be assumed that there is no solicitation underway. If the option of the variable energy rate is chosen, such rate may not be locked in by a contract term, but shall instead change as determined by the Commission in the next biennial proceeding.

5. Progress, Duke, and NC Power's rate schedules should be modified, clarified, and rewritten as necessary, to clearly offer variable energy rates to all QFs on an "as available" basis, even if an order has been issued allowing QF capacity offers to be deferred into an active competitive solicitation.

6. Duke and Progress use the peaker method to develop avoided capacity costs. NC Power uses the differential revenue requirement (DRR) methodology. Both the peaker method and the DRR method are generally accepted and used throughout the electric utility industry and are reasonable for use in this proceeding.

7. A performance adjustment factor of 2.0 should be utilized by both Progress and Duke for their respective avoided cost calculations for hydroelectric facilities with no storage capability and no other type of generation.

8. A performance adjustment factor of 1.2 should be utilized by both Progress and Duke for their respective avoided cost calculations for all QFs in this proceeding except hydroelectric facilities with no storage capability and no other type of generation.

9. Duke and NC Power's capacity rates used to calculate avoided capacity costs should continue to be based on actual investment costs that would be avoided because of the existence of a QF rather than on market data.

10. Progress' forecast of gas prices is unreasonably low, and it should be required to rerun its PROMOD simulation and recalculate its avoided cost rates using current Energy Information Administration (EIA) forecasts for the commodity price of gas. In addition, Progress should rerun all other primary energy forecasts using the most current available projections from its previous sources.

11. No new procedures need to be developed at this time to expedite resolution of disagreements between the utilities and QFs. Commission Rule R1-9 addresses the procedure to be followed upon the filing of a complaint, and Commission Rule R1-7 authorizes the filing of motions including motions for expedited review of a complaint. Thus, a full and complete remedy already exists to address any concerns a QF may have regarding a utility's purchase of such QF's power.

12. Progress' proposed standard interconnection and operating agreement should be approved.

13. Investigation of other issues related to interconnection costs is inappropriate as a part of this proceeding.

14. The rate schedules and standard contract terms and conditions proposed in this proceeding by Progress, Duke, and NC Power should be approved except as otherwise discussed herein. The utilities should be required to file new versions of their rate schedules and standard contracts, in compliance with this Order, within 20 days after the date of this Order. They should be allowed to go into effect 10 days after they have been filed. The utilities' filings should stand unless specific objections as to the accuracy of the calculations and conformity to the decisions herein are filed within that 10-day period.

15. Progress, Duke, and NC Power should each file supporting documentation showing the calculations made to arrive at their avoided cost rates, highlighting the additional changes required by this Order.

16. WCU's proposed Small Power Production Supplier Reimbursement Formula is reasonable and appropriate. WCU should not be required to offer any long-term levelized rate options to QFs.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-3

Long-term levelized rates are permitted, but not required, by the regulations implementing Section 210 of PURPA. Long-term contracts are encouraged in order to enhance the economic feasibility of small power production facilities by G.S. 62-156(b)(1). Prior to the 1984 avoided cost proceeding in Docket No. E-100, Sub 41A, Progress and Duke were required to offer long-term levelized rate options to all QFs, and NC Power was required to offer such options only to small power producers as defined in G.S. 62-3(27a). The standard long-term levelized rate options were required by this Commission to encourage the development of cogeneration and small power production facilities.

In the 1984 proceeding, however, both the Public Staff and the utilities raised concerns about these options, and the Commission undertook a re-examination of the issue. The Commission sought a balance between the policy of encouraging QF development, especially the development of small power producers under G.S. 62-156, and the risks posed by defaults and the uncertainty of the long-term projections on which long-term rates are based. The Commission resolved these concerns by requiring Progress, Duke, and NC Power to offer long-term levelized rates for 5-year, 10-year, and 15-year periods as standard options to hydroelectric QFs of 80 MW or less capacity and to non-hydro QFs contracting to sell five MW or less capacity. Non-hydro QFs contracting to sell capacity of more than five MW were given the options of contracts at the variable rates set by the Commission or contracts negotiated with the utility.

The Commission continued this basic framework of long-term levelized rate options through several biennial proceedings with two changes. The first change began with the 1988 proceeding in Docket No. E-100, Sub 57. In that proceeding, NC Power was allowed to change from a long-term levelized energy payment to energy payments based on a long-term levelized generation mix with adjustable fuel prices. (NC Power was required to offer a long-term levelized energy payment as an additional option for QFs of 100 kW or less.)

The second change came about in 1988 for NC Power and in 1994 for Duke, as a result of their pursuit of competitive bidding. In its final order in the 1994 proceeding in Docket No. E-100, Sub 74, the Commission concluded that a utility could refuse to negotiate individually with a QF when the utility is planning to pursue competitive bidding for its next block of capacity needs and the QF is seeking to sell both energy and capacity. Because both NC Power and Duke had active competitive bidding processes underway, the Commission concluded that QFs desiring to sell capacity to either of them should participate in their competitive bidding processes. The Commission noted that QFs offering to sell greater than five MW of capacity to Duke and NC Power were still eligible to sell energy at the approved variable rates without participating in a competitive bidding process. Because Progress, at that time, was not pursuing a competitive bidding process, the requirement was continued that QFs larger than five MW desiring to sell energy and/or capacity should have the option of the variable rates or negotiated contracts. The exact point at which a utility could invoke a refusal to negotiate with a larger QF was left to be resolved by the filing of a motion and the receipt of an order from the Commission, which Progress pursued in 1996.

In the 1996 proceeding in Docket No. E-100, Sub 79, Progress, Duke, and NC Power proposed eliminating the 10-year and 15-year levelized rate options from the standard rates available to QFs. Progress and the Public Staff entered into a compromise under which 5-year, 10-year and 15-year levelized rates would be made available only to hydro QFs of five MW or less capacity and to QFs of five MW or less capacity fueled by trash or methane from landfills or hog waste. They also agreed that Progress would offer five-year levelized rates to all other QFs with three MW or less capacity. The Commission ordered that all three utilities had to make available 5-year, 10-year and 15-year levelized rates to hydro QFs contracting to sell five MW or less and to QFs contracting to sell five MW or less fueled by trash or methane from landfills or hog waste. The Commission's Order further provided that Progress, Duke, and NC Power should offer 5-year levelized rates to all other QFs contracting to sell three MW or less, five MW or less, and 100 kW or less, of capacity, respectively.

In the 1998 proceeding, Docket No. E-100, Sub 81, Duke and NC Power again proposed eliminating the 10-year and 15-year levelized rate options from their standard rates available to hydro QFs of five MW or less capacity and to QFs of five MW or less capacity fueled by trash or methane from landfills or hog waste. The Public Staff and the QFs opposed this proposal, and the Commission rejected it. In order to provide for uniform treatment of non-hydro QFs other than those fueled by trash or methane from landfills or hog waste, the Commission ordered that Progress, Duke, and NC Power all make 5-year levelized rates available to QFs of all types contracting to sell three MW or less.

In the 2000 proceeding, Docket No. E-100, Sub 87, Progress, Duke, and NC Power once again proposed that the 10-year and 15-year levelized rate options be eliminated. The utilities contended that these rates are based on long-term projections of costs that are inherently unreliable. The utilities further noted that 10-year and 15-year levelized rates are not specifically required by either state or federal law. The Public Staff and a QF intervenor strongly opposed the utilities' proposal. They contended that eliminating the 10-year and 15-year rate options would be inconsistent with prior Commission rulings, especially with regard to encouraging hydro development. The Public Staff also cited State policy encouraging reduction of landfill size and control of associated methane gas. The Commission concluded that the utilities should continue to offer the 10-year and 15-year levelized rate options.

In the present proceeding, Duke and NC Power have again proposed, and the Public Staff has again opposed, the elimination of the 10-year and 15-year rate options.

Public Staff's Position

This is an issue that the Commission must continually reconsider as economic circumstances change from one biennial proceeding to the next. In doing so, the Commission must balance the need to encourage QF development, on the one hand, and the risk of overpayments and stranded costs, on the other. The increasingly competitive nature of the utility industry makes the latter considerations more compelling today than in the past. The Commission should conclude that Progress, Duke, and NC Power should each continue to offer long-term levelized rate options of 5-year, 10-year and 15-year terms to hydro QFs contracting to sell five MW or less and to QFs contracting to sell five MW or less that are fueled by trash or methane from landfills or hog waste, and that they should offer five-year levelized rates to all other QFs contracting to sell three MW or less.

With these limitations, long-term contract options serve important statewide policy interests while reducing the utilities' exposure to overpayments. The policy interests to be served include G.S. 62-156(b)(1), which specifically provides that long-term contracts "shall be encouraged in order to enhance the economic feasibility of small power production facilities." The statewide policy of reducing and managing solid waste landfills set forth in G.S. 130A-309.01 to -309.29 supports extending these options to facilities fueled by trash or methane from landfills. Although there is no specific statute dealing with hog waste, the Public Staff nonetheless believes that there is an environmental policy to be served by encouraging facilities fueled by methane from hog waste. The facilities entitled to long-term rates are generally of limited number and size. Few new hydro facilities are being certificated; most sites are already developed. The number of trash and methane sites large enough to support generation also appears to be limited. Although G.S. 62-156(b)(1) applies to hydros of 80 MW or less, there are few large hydro sites available in North Carolina, and the Commission has limited long-term rates to hydros contracting to sell five MW or less in order to further reduce the exposure inherent in rates based on long-term forecasts of the utilities' costs. The Public Staff notes that Richard Harkrader, Policy Chair of the North Carolina Sustainable Energy Association, and other public witnesses testified as to the possible negative effects of the elimination of long-term contracts on the newly approved Green Power program.

Finally, the Public Staff observed that NC Power has again proposed to limit its Schedule 19, which includes all of its standard rates for power purchases from QFs, to facilities with a capacity of 100 kW or less. NC Power made similar proposals in the 1998 and 2000 avoided cost proceedings, and the Commission declined to adopt them. Instead, the Commission directed NC Power, as well as the other electric utilities, to offer five-year levelized rates to all QFs contracting to sell three MW or less capacity. The Public Staff stated that NC Power has not presented any valid reason why the Commission should depart from the position taken in its 1998 and 2000 orders.

Duke's Position

Duke noted that long-term levelized rates are permitted, but not required, by the regulations implementing Section 210 of PURPA. G.S. 62-156(b)(1) states that "long term contracts shall be encouraged in order to enhance the economic feasibility of small power production facilities." However, long-term contracts, as defined by current electric utility practice, are of shorter and shorter duration.

Fixed rates for 10-year and 15-year contract terms (or for any specified term length, for that matter) are not required by state law or federal law. Furthermore, requiring 10-year and 15-year contract terms with fixed rates (requiring utilities to purchase unknown quantities of non-dispatchable power at fixed prices) is inconsistent with the current state of the electric utility industry and subjects the utilities and their customers to price risks that they would not voluntarily undertake in the current wholesale market. Avoided cost rates for both capacity and energy are a prediction of future values and will always contain a degree of uncertainty which increases the farther out in time the prediction is made. With long term rates of ten and fifteen years, there is a greater risk that any avoided cost projections made today will not accurately reflect future avoided costs.

Other jurisdictions have reached similar conclusions based upon current market trends. In connection with an application filed by Appalachian Power Company (APCo), the Virginia State Corporation Commission (VSCC) permitted APCo to modify its cogeneration and small power production rates paid to QFs to reflect zero avoided capacity, as APCo has estimated that it would add no capacity for five years. *In re Application of Appalachian Power Co.*, Case No. PUE970001, 1998 WL 67087 (Va. State Corp. Comm.) In this case the Hearing Officer agreed with VSCC Staff that "long-term avoided costs hold no validity in the current environment and . . . that [APCo's] expansion plan is rational and is typical of the responses of most electric utilities to the changes occurring in the electric utility industry." *Id.* at 1. The VSCC also determined that "the current condition of the electric utility industry warrants shorter term commitments for qualifying facility purchases" and that "shortening utilities' commitments to purchase energy and capacity made available by qualifying facilities will provide an incentive for electric utilities to minimize the incurrence of potential stranded costs, which is appropriate public policy given the present state of the industry." *Id.* at 2-3.

Duke cited that in its Initial Statement, the Public Staff objected to Duke's proposal to recalculate its levelized energy rates every two years for QFs that enter into new contracts with long term, levelized capacity rates. Duke stated that the Public Staff argued that this procedure would be inconsistent with 18 CFR §292.304(d) of the PURPA regulations. Duke noted that under §292.304(d), QFs have the option of choosing to be paid avoided costs as they are projected at the time they make a legally enforceable obligation to sell energy and/or capacity. This section does not give QFs the unilateral right to dictate the length of time over which rates are fixed. Duke's avoided cost rate proposal for new QF contracts would continue to provide QFs with levelized capacity payments fixed for the entire 5-year period, but adjust the energy rates every two years. Duke offered that its proposal is consistent with the PURPA regulations and that Duke's proposal provides QFs with appropriate certainty regarding payment of capacity, and appropriately modifies energy costs to reflect changes in market conditions and/or costs.

NC Power's Position

NC Power also noted that long-term levelized rates are permitted but not required, by the regulations implementing Section 210 of PURPA and that similarly, G.S. 62-156 does not require 10-year and 15-year contract terms. The use of a higher cost CT unit during a declining trend of avoided capacity costs actually indicates a greater, rather than lesser, risk of stranded costs. These lower rates are a direct result of declining avoided costs. Holding avoided cost rates constant over a long term while actual costs are declining ensures that utilities over-pay for purchases from QFs and small power producers. Such a result would be detrimental to electric customers and is contrary to the intent of PURPA.

It is contrary to the interests of NC Power, its customers, and the QFs to force the parties into long-term, captive relationships within the current changing market. Historically, long-term fixed QF prices have resulted in the ratepayer paying significantly more for QF energy than market. If the traditional utility role ends, the DRR method used by NC Power is not appropriate for calculating avoided costs. Rather than initiating a change to market rates for energy in this proceeding, NC Power could assume the risk of maintaining a DRR calculation for five years for this proceeding. Hopefully, by the next biennial proceeding, the role of the utility and the emergence of a deregulated market will be more defined; however, at this time of uncertainty, commitment to longer terms for energy is not appropriate.

Conclusion

Progress, Duke, and NC Power should each continue to offer long-term levelized rate options of 5-year, 10-year and 15-year terms to hydroelectric QFs owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell five MW or less and to non-hydroelectric QFs contracting to sell five MW or less that are fueled by trash or methane from landfills or hog waste. They should also continue to offer 5-year levelized rates to all other QFs contracting to sell three MW or less.

With these limitations, long-term contract options serve important statewide policy interests, such as that expressed in G.S. 62-156(b)(1), which specifically provides that long-term contracts "shall be encouraged in order to enhance the economic feasibility of small power production facilities," while reducing the utilities' exposure to overpayments. In addition, if long-term contracts were eliminated at this time, it might have negative effects on the newly approved Green Power program. The statewide policy of reducing and managing solid waste landfills set forth in G.S. 130A-309.01 through 309.29 supports the continued availability of these long-term options to facilities fueled by trash or methane from landfills. In addition, as pointed out by the Public Staff, there is an environmental policy to be served by encouraging facilities fueled by methane from hog waste. The Commission also concludes that a similar environmental policy would be served by extending the option of long-term contracts to QFs contracting to sell five MW or less that are fueled by methane derived from poultry waste. Since this issue was not addressed by the comments herein, the Commission will allow 10 days from the date of this Order for parties who wish to do so to provide specific information as to why QFs fueled by methane derived from poultry waste should not be eligible for the long-term contracts.

Finally, as noted by the Public Staff in its comments, NC Power has again proposed to limit its Schedule 19, which includes all of its standard rates for power purchases from QFs, to facilities with a capacity of 100 kW or less. NC Power made similar proposals in the 1998 and 2000 avoided cost proceedings and the Commission declined to adopt them. Instead, the Commission directed NC Power, as well as the other electric utilities, to offer 5-year levelized rates to all QFs contracting to sell three MW or less capacity. NC Power has not presented any compelling reason why the Commission should depart from the position taken in its 1998 and 2000 orders.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NO. 4

There has been very little interest in the variable rates over the years. As a result, there has been very little consideration of the fundamental policy issues now before the Commission with respect to the requirements that should be imposed on utilities and QFs regarding availability of the variable capacity rate. The recent complaint in Docket No. E-2, Sub 823 has highlighted the need for a detailed examination of this issue. In addition, the existence of a number of larger QFs that have recently completed, or will soon be reaching the end of, their initial contracts has increased the level of interest in variable rates and contracts.

Progress' Position

Progress' reply comments asserted that in order for a QF's capacity to allow the utility to avoid capacity costs, the QF capacity in question had to be sufficiently reliable and available for a sufficiently long period of time to impact the utility's capacity needs. The starting point therefore is whether the utility has a need for additional capacity. If the utility has no such need, then it does not avoid capacity costs and cannot be required to pay the QF a capacity payment. Progress further asserted that granting larger QFs the right to the standard variable capacity rate will inevitably cause a utility to pay more than its avoided costs. This is compounded by the Public Staff's proposal to make the variable capacity rate available to existing larger QFs if they commit to a two-year contract. Progress asserted that it does not need any new capacity in 2003 and 2004, other than the nuclear uprates it has planned.

Progress also argued that requiring larger QFs to negotiate with utilities to obtain capacity payments will not harm the QFs in any way because there is now a vibrant wholesale market into which they can sell their electricity. Progress opined that the Public Staff has acknowledged this fact by its position with regard to Progress' selling electricity to wholesale customers at native load priority, characterizing the Public Staff's position in those dockets as wholesale customers no longer being entitled to native load priority service because they are free to purchase from whomever they choose. In Progress' opinion, the Public Staff cannot have it both ways: relying on the existence of a viable wholesale market when it advocates against native load priority to wholesale customers and ignoring that very market when it makes arguments in favor of larger QFs.

Progress explained that 16 U.S.C.A. § 824a-3(d) defines "incremental costs of alternative electric energy" as "the cost to the electric utility of the electric energy which, but for the purchase from such co-generator or small power producer, such utility would generate or purchase from another source." The only factors that can be considered in establishing a utility's avoided cost are the costs the utility will avoid by purchasing electricity from a QF.

Progress further provided that 18 C.F.R. § 292.304(c) provides that a state commission in implementing PURPA shall put into effect standard rates or purchases for QFs with a design capacity of 100KW or less. Thus, very small QFs are entitled to standard avoided cost rates. However, standard rates are not required for any other type of QF. 18 C.F.R. § 292.304(c) states that in determining a utility's avoided costs a state shall take into account a number of factors, including the reliability of the QF, the dispatchability of the QF, the availability of capacity or energy from the QF during the utility's system daily and seasonal peak periods, and the relationship of the availability of energy or capacity from a QF to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use. This FERC regulation requires state commissions to recognize that the costs a utility will avoid by purchasing electricity from a QF depends on the operating characteristics of the QF in question. Sound public policy decisions can only be made when all such characteristics are properly balanced and considered. The PURPA requirement that a utility cannot be forced to pay more than its avoided cost for the capacity in question must control the Commission's decision on this issue. No other factors can be considered. In fact, the Commission has already ruled on this very issue. By order issued February 26, 1993 in Docket Nos. E-22, Subs 333 and 335, the Commission rejected as too high the avoided cost rates established in Virginia by the VSCC for NC Power with regard to several QF contracts on the grounds that the VSCC improperly considered "intangible environmental and societal benefits associated with quality facilities power." The "societal benefits" in question included the economic health of the community surrounding the QF plants in question. Such an inquiry is equally improper in this proceeding. The State's utilities should not be forced to subsidize inefficient forms of generation because of apparent concerns about adverse social consequences. This leads to an extremely important point: PURPA and its enabling regulations specifically provide that a utility's retail customers shall not be harmed as a result of the utility being required to purchase power from QFs.

According to Progress, the starting point, therefore, for determining whether a QF's offer to sell capacity has any value to a utility is whether the utility has a need for additional capacity during the time period in question. If no such need exists, the utility does not avoid any capacity cost and, therefore, it cannot be required to pay the QF a capacity charge. As explained by Progress in its Reply Comments, Progress' resource plan demonstrates that for the years 2003 and 2004 the only capacity additions it needs will be in the form of uprates to its nuclear generating plants. The next capacity addition is not scheduled until 2005, with no additions planned for 2006. Therefore, QF capacity in the years 2003, 2004 and 2006 will not allow Progress to avoid any capacity costs and, therefore, has no value under PURPA.

Progress seeks to revise its avoided cost rate schedule to ensure that it is consistent with the Commission's prior avoided cost orders and protect itself against claims from large QFs that they are entitled to both the variable energy and capacity payments under the standard rate schedule as a matter of right.

Duke's Position

Duke suggested that the primary reason for the current interest in variable capacity and energy rates among larger QFs not eligible for the standard rates may be that the rates are above the prices that such QFs could receive in the competitive market either by participating in a competitive bidding process or via bilateral agreement with a utility or other wholesale purchaser. Duke also commented that, as Progress pointed out, large QFs seek to require utilities to offer a standard variable capacity rate for such QFs to rely upon during "bust" cycles in the wholesale market, while allowing them to sell into the wholesale market during "boom" cycles.

More recently, FERC reiterated and further clarified the avoided costs capacity purchase obligation *in City of Ketchikan, Alaska, Copper Valley Electric Association, Inc., City of Petersburg, Alaska, City of Wrangell, Alaska*, 94 FERC ¶ 61,293 (2001) (*Ketchikan*). Citing its earlier decision in *CL&P*, FERC described the PURPA § 210(b) purchase obligation as follows:

> In implementing section 210 of PURPA, the Commission made clear that an avoided cost rate need not include capacity costs (as distinct from energy costs) where a QF does not 'permit the purchasing utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or reduce firm power purchases from another utility.' Order No. 69, FERC Stats, & Regs. Preambles 1977 - 1981 ¶ 30,128 at 30,865.

This Commission previously recognized that avoided capacity payments are inappropriate when no capacity is avoided. In its Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, issued on July 16, 1999 in Docket E-100, Sub 81, the Commission found that "NC Power should not be required to offer capacity credits to qualifying facilities prior to year 2000 for purposes of this proceeding."

Whether the utility will avoid capacity costs is the only relevant inquiry with respect to this issue. Cogentrix witness Bonner, Craven County Wood Energy, and North Carolina Power Holdings make arguments regarding the community benefits of their generation resources; however, under PURPA it is simply unlawful for this Commission to take such factors into consideration.

Cogentrix's Position

Cogentrix believes that there should be both a two- and five-year contract option. According to Cogentrix, the treatment of QFs not qualifying for the long-term, levelized rate option due to size and/or fuel-type has been one of the principal points of dispute in this proceeding. Progress, Duke, and NC Power all oppose the establishment of standard rates, terms or conditions for purchases of electrical energy from new or existing QFs that do not qualify for long-term levelized contracts. These utilities argue that such QFs should be required either to reach negotiated agreements with a utility or to participate in a utility bid process in order to determine the rates, terms and conditions of any sales of energy or capacity to these utilities. These utilities, however, have not demonstrated in this proceeding that the use of a bidding procedure occurs with sufficient frequency to meaningfully affect the use or development of QF generation.

On the other hand, the Public Staff and the owners/operators of several existing QFs in excess of 5 MW, such as Cogentrix, NC Holdings, Craven County Wood Energy, and NC Greenpower, urge the Commission to establish standard rates, terms and conditions for the sale of energy and capacity by larger QFs. These parties emphasize that the obligations of utilities under PURPA to allow the interconnection of QFs, to sell power to QFs, and to purchase the output of QFs, were imposed as a matter of law precisely because utilities have economic incentives and the market power to reduce competition by simply refusing to deal with these types of generators, or by using delay to create economic pressure to accept whatever terms and conditions a utility may dictate. Indeed, in establishing its implementing regulations, FERC expressly noted the decision to extend a QF the option of requiring a utility to enter into a "legally enforceable obligation" was intended to prevent a utility from circumventing the requirement of a capacity credit for an eligible QF facility merely by refusing to enter into a contract with the QF.

North Carolina Power Holdings' Position

North Carolina Power Holdings agreed with the Public Staff's recommendations and noted that the utilities are rightly concerned that falling energy prices could burden them with expensive long-term contracts. On the other hand, QFs must worry that rising energy prices may leave them with low price contracts in a rising fuel price market. It recommended that a balance between predictability of rates over a moderate time period and a frequent re-setting of those rates to prevent pricing dislocations, should provide the best solution for all parties.

A QF of any size that is willing to commit its output to the receiving facility for a period of greater than two years should be eligible to receive both the capacity credits and the energy credits portions of the proposed rates. Both the plain language of Progress' tariffs and the language and rationale underlying PURPA compel such treatment.

Public Staff's Position

The Public Staff's Initial Statement indicated that it is concerned that the effects of the position outlined by Progress on the State's existing QFs could be extremely harsh, and that it could well force these QFs to go out of business at the expiration of their existing contracts. This would negatively affect their steam hosts and result in the loss of many jobs in areas of the State that are already faced with serious economic problems. Cogentrix's commitment to sell steam to its host industrial plants is significantly higher than the minimum required for the plants to qualify under PURPA. Testimony at the public hearing and several letters that have been filed all indicate how important these plants are to the communities in which they are located.

While Progress has taken the position that its tariff was not intended to apply to larger QFs and proposed changes to its tariff to that effect, the Commission's previous avoided cost orders and the tariffs Progress filed in compliance therewith contradict Progress' assertions in this regard. The Commission's 1985 Order in Docket No. E-100, Sub 41A, made no other change in this regard other than to limit the availability of the long-term levelized rates to certain specified QFs, leaving the variable energy and capacity rates available to all QFs. Thus, the Commission's use of the language that nonhydro QFs seeking to sell more than five MW should have the option of contracts at variable rates or at negotiated rates clearly meant both variable energy and capacity rates, to the extent the QF otherwise met the qualifications for the capacity payment (i.e., being new capacity and making the 5-year commitment required in the Commission's initial avoided cost proceeding).

The clearest proof that Progress' interpretation is erroneous is Progress' own tariffs at the time. The only change made by Progress to the availability sections of the tariff after the Commission's 1985 order was to insert language into its tariff limiting the availability of the long- term levelized rates to small QFs. No comparable limitation based on size was imposed upon the variable energy or capacity rates, leaving them available to larger QFs.

The Commission's Order in the Sub 74 proceeding merely provided that if (1) a utility had an active solicitation underway, (2) the utility filed a motion asking to defer QF offers of capacity into that solicitation, and (3) the Commission issued an order granting such a motion, then the utility could defer QF offers of capacity into the solicitation. The conclusion is inescapable that absent an active solicitation, a motion, and an order, the availability of the variable energy and capacity rates became active again.

However, historically, QF developers have shown little interest in variable rates. New plants typically require long-term contracts in order to obtain financing. Given this lack of interest, there appears to be little reason to provide for the availability of variable energy and capacity rates to new QFs. However, existing larger QFs have indicated interest in such rates and present different issues entirely.

Progress' argument that granting larger QFs the right to the standard variable capacity rate will inevitably cause a utility to pay more than its avoided costs must be rejected because it confuses the policy issue of whether standard rates should be made available to a QF with the determination of avoided cost. A declaration that the Commission's established avoided cost rates should be available to a given class of QFs cannot by definition be equated to a requirement that a utility pay more than its avoided costs. Given the fact that no party has proposed adjustments to the capacity rates filed by Progress, Progress' argument in this regard amounts to an argument that Progress' own calculation of avoided capacity costs, pursuant to the methodology approved numerous times by the Commission in the past, results in the QF being paid in excess of avoided costs.

Equally without merit is Progress' argument that the Public Staff's position is inconsistent with its position in the native load priority dockets. The Public Staff's position in those cases has not been premised on the existence of a viable wholesale market. It has been explicitly premised on the FERC's adoption of a policy, at the urging of the wholesale customers, that the utilities' historical obligation to serve such wholesale customers and any corresponding obligation in them for stranded cost liability should end.

Progress' argument that it does not need capacity is contradicted by its own calculation of its avoided cost rates. If it needs no capacity in one or more years, its rates should reflect that lack. The opposite, in fact, appears to be true. Progress' Annual Plan filed in September 2002 shows limited capacity additions as discussed by Progress, but they also show reserve margins below Progress' target reserve margin.

Given the price volatility of natural gas, the currently expected supply problems, and the expected high prices, the existing coal- and wood waste-fired QFs bring added value. The capacity rates that Progress would deny them are based on the least expensive type of capacity, so self-build options by definition cannot be less expensive. Marginal energy costs that include fuels other than natural gas in some hours are less than the cost of the natural gas Progress would burn as an alternative. Continued purchases from these plants at avoided cost rates, therefore, cannot harm ratepayers.

The Public Staff also noted that the issue as to whether the variable rates would change during the two-year commitment would need to be resolved. Because the variable rates are based on the projection of avoided costs over the first two years after the rates are filed, the Public Staff stated that it understands the concern that allowing the variable rates to stay in effect past those two years (i.e., 2003 and 2004 for the current rates), would result in a mismatch. On the other hand, requiring a QF to make a two-year commitment without granting it the right to exercise the option it has under the PURPA regulations to receive avoided costs as calculated at the time the commitment is made could be viewed as a violation of PURPA. This is particularly true given that the utilities' estimates of avoided costs are not predictable (e.g., Progress' proposed 20 percent decrease in the variable energy rate).

The Public Staff identified two ways that the tension between these two legitimate concerns could be resolved. They are:

1) Coordinate the terms of renewal contracts with the issuance of the Commission's biennial orders. The first renewal contract for a particular QF should begin at the expiration of the long-term contract and continue until a specified number of days (e.g., 15 days) after the filing of the utilities' QF tariffs following the Commission's next avoided cost order. If the QF then enters into a second renewal contract, it should extend until 15 days after the filing of the utilities' tariffs following the next avoided cost order. In this way, there will be only a limited number of days in each biennium during which the QF will be receiving payments based on superseded avoided-cost rates.

2) Another option for resolving this problem, and one that avoids the tight overlap between avoided cost orders and the expiration of a contract, would be to establish two different variable rate options. The utilities currently provide projections of avoided costs for a 15-year period in each biennial proceeding. The variable rate currently is based on the first two years of data, while the five-year levelized rate is based on the first five years of data. Using these data, a two-year rate could be produced for contracts beginning in 2003 (based on projected avoided costs for 2003 and 2004) and a different two-year rate for contracts beginning in 2004 (based on projected avoided costs for 2004 and 2005). The rates for a contract beginning in 2004 would not change until 2006. This approach would cure the mismatch problem and also produce rates that would be available in two-year increments: 2003-2004 and 2004-2005, for example. Under such an approach, the QF would have sufficient notice of the newly approved variable rates to decide if it wanted to make a new two-year commitment well in advance of the expiration of its current contract. This would make a reasonable notice provision possible, which would provide benefits to the utility for planning purposes.

Conclusion

The Commission concludes that QFs not eligible for the standard long-term levelized rates have three options if the utility has a Commission-recognized active solicitation underway: (1) participating in the utility's competitive bidding process, (2) negotiating a contract and rates with the utility, or (3) selling energy at the utility's Commission-established variable energy rate. If the utility does not have a Commission-recognized active solicitation underway, Progress, Duke, and NC Power should offer QFs not eligible for the standard long-term levelized rates the options of contracting with the utility to sell power (1) at the variable energy rate established by the Commission in these biennial proceedings or (2) at negotiated rates (including both capacity and energy components, if appropriate). If the utility does not have a solicitation underway and negotiations fail to produce an agreement, the terms and conditions of such an agreement are subject to arbitration by the Commission at the request of either the utility or QF to determine the utility's actual avoided cost, including both capacity and energy components, as appropriate;

however, the Commission will only arbitrate if the QF is prepared to commit its capacity to the utility for a period of at least two years. Whether there is an active solicitation underway or not, QFs not eligible for the standard long-term levelized rates of course have the option of selling into the wholesale market instead of to the utility, at the QF's election. The exact points at which an active solicitation shall be regarded as beginning and ending for these purposes shall be determined by motion to, and order of, the Commission. Unless there is such a Commission order, it will be assumed that there is no solicitation underway.

The Commission concludes that the variable rates will change as determined by the Commission in each successive avoided cost proceeding for the reasons set forth in the recently-decided Cogentrix complaint case. Summary Judgment and Order Denying Petition to Intervene, Docket No. E-2, Sub 823 (Mar. 7, 2003). In that case, the Commission reasoned that variable rates are by definition "liable or likely to change." Thus, the Commission concluded that Cogentrix, while entitled to receive both the variable energy and the variable capacity rates "cannot 'lock in' the variable rates for a term[,] and the variable rates will change when updated in the next biennial proceeding." *Id.* at 9. As was noted in that proceeding, the utilities have the option under relevant provisions of PURPA and the FERC's regulations to voluntarily agree to rates, terms, and conditions that provide QFs more than the minimum required by federal law and our orders implementing same.

This biennial proceeding has presented the Commission with a number of new and complex issues. In reaching its decisions, the Commission recognized and has carefully considered the impacts of the various policy choices on QFs, utilities, and ratepayers. The Commission believes that the result reached herein most appropriately balances these interests and avoids overpayment to QFs while ensuring that QFs are reasonably compensated for the power they provide to the utility. The Commission recognizes that, in general, larger QFs are being given more limited options than smaller QFs; however, such treatment has been a part of these avoided cost proceedings for many years and is consistent with the Commission's previous decisions concerning this issue. The Commission believes that the different options made available to the QFs are justified as a matter of policy based upon the larger QFs' greater resources and ability to negotiate with the utilities and their option to sell into the wholesale market.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NO. 5

Public Staff's Position

Cogentrix witness Slater recommended that the Commission require Progress to provide actual hourly avoided energy cost payments to larger uncontracted QFs for "as available" energy. Whether there is any interest in such an option being provided by Duke or NC Power is unclear at this time. The Public Staff recommended that the Commission conclude that Progress should be required to file a proposed amendment to its avoided cost tariff that would provide for an "as available" energy rate and that comments should then be solicited from interested parties as to whether such a proposal should be approved. It then requested the Commission to consider whether there is sufficient interest in such a requirement being extended to Duke and NC Power during the next biennial proceeding.

Duke's Position

The concept of "as available" delivery is that no commitment or advance notice from the QF is required, and thus no pre-determined price for such deliveries can be determined. The QF energy rates established in these proceedings are calculated based on a constant delivery of a block of energy across all hours. "As available" energy deliveries are by nature intermittent. Depending on when the QF actually delivered its "as available" energy, the cost of energy avoided by the purchase would be higher or lower than the fixed price. To have pre-established rates for "as available" service is to provide QFs a free "put" option, and would likely result in utilities' purchase of such energy at above market prices. When market prices are higher than the utilities' variable energy rates, QFs would sell into the market. When market prices are below the variable energy rate, the QFs would sell energy to the utilities. Therefore, the appropriate rate at which utilities should be required to purchase "as available" energy from QFs is the prevailing hourly market price, which represents the utilities' avoided energy cost on a real-time basis. Such arrangements should be negotiated on a case-by-case basis.

Conclusion

As noted by the Public Staff, the FERC's regulations and the Commission's orders clearly establish that a QF has the right to the following four options: (1) to sell energy directly to a utility on an "as available" basis and be paid the purchasing utility's avoided costs at the time of the delivery; (2) to sell pursuant to any standard rates and terms and conditions that a state commission has put into effect, with the rates being the purchasing utility's avoided costs at the time of delivery or the time the commitment is made, at the option of the QF; (3) to sell pursuant to negotiated rates and terms and conditions; and (4) to sell to a distant utility.

Prior Commission orders have required all utilities to offer variable energy rates to all QFs even if an order had been issued allowing QF capacity offers to be deferred into an active competitive solicitation. The tariffs as proposed by the utilities do not appear to be clearly consistent with this requirement. Modifications should be made as necessary to bring such tariffs into compliance with this requirement. The Commission concludes that the utilities shall reword their tariffs, as necessary, to make it clear that QFs always have the option of selling energy to the utility at the variable energy rate.

According to Duke, the concept of "as available" delivery is that no commitment or advance notice from the QF is required, and thus no pre-determined price for such deliveries can be determined. However, it is the Commission's conclusion that absent negotiated rates, the variable energy rate is intended to be the "as available" rate. If rates other than those approved in these proceedings are used by the utilities on an hourly basis for their "as available" variable energy rates, the Commission will be unable to insure their accuracy and appropriateness. The Commission therefore concludes that it should not require (or allow) the utilities to establish separate variable hourly energy rates. Energy sold to the utility at the variable energy rate should continue to be differentiated only as either on-peak or off-peak.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NO. 6

Progress and Duke have used the peaker methodology to develop their avoided costs in each of the past several avoided cost proceedings; NC Power has used the DRR methodology.

According to the theory underlying the peaker method, if the utility's generating system is operating at equilibrium (i.e., at the optimal point), the cost of a peaker (a combustion turbine or CT) plus the marginal running costs of the system will produce the utility's avoided cost. It will also equal the avoided cost of a baseload plant, despite the fact that the capital costs of a peaker are less than those of a baseload plant. This is because the lower capital costs of the CT are offset by the fuel and other operational and maintenance expenses included in system marginal running costs, which are higher for a peaker than for a new baseload plant. Thus, the summation of the peaker capital costs plus the system marginal running costs will theoretically match the cost per kWh of a new baseload plant, assuming the system is operating at the optimum point. Stated simply, the fuel savings of a baseload plant will offset its higher capital costs, producing a net cost equal to the capital costs of a peaker.

The DRR methodology involves a comparison of the revenue requirements which result from two alternative system expansion plans, one including a block of new QF capacity and the other excluding such a block. The utility's generation costs are calculated on a yearly basis for an extended period of time for each of these two scenarios. The difference between the two scenarios is then computed for each year, and the results converted into present value terms, thereby providing an estimate of the present value of the total avoided cost of the assumed block of QF capacity.

In previous biennial proceedings, the Commission concluded that it should not require Progress, Duke, and NC Power to utilize a common methodology for calculating avoided costs. There are widely divergent options among even those who are most expert in these matters as to what costs are actually avoided and what methodologies will best identify those costs. The peaker method and the DRR method are generally accepted and used throughout the electric utility industry. NC Power's comparison of the results of the peaker and DRR methodologies as applied to them in a previous proceeding showed very little difference between the methodologies.

The Commission also concluded in previous biennial proceedings that it should not require the utilities to adopt a specific generating unit or type of unit for calculating avoided costs. The Commission has consistently found in previous biennial proceedings that the avoided cost of a utility system is not necessarily unit specific. Addition or deletion of a given generating unit affects how the remaining generating units are run. The economics of a generation mix is usually determinative, not the economics of a single unit.

For the purposes of this proceeding, the Commission concludes that both the peaker method and the DRR method are still generally accepted and used throughout the electric utility industry and are reasonable for use in this proceeding. No party to this proceeding advocated that the Commission revise its conclusions in the previous biennial proceedings regarding appropriate methodologies.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 7-8

Avoided capacity cost rates established by the Commission using the peaker methodology have traditionally included a performance adjustment factor (PAF). The function of this factor is to allow a QF to experience some level of outages and yet still recover its full capacity credits. The calculation of a PAF is a critical part of developing avoided cost capacity rates under the peaker methodology.

All of the parties to the various avoided cost proceedings have agreed that a QF should be allowed to have some appropriate level of outages without losing the ability to earn full capacity credits; the issue is the appropriate outage level to incorporate into the avoided cost capacity rate through the PAF.

Public Staff's Position

The Public Staff stated that the Commission has consistently concluded in prior biennial proceedings that a PAF of 1.2 is appropriate for Progress and Duke for all QFs except hydro facilities with no storage capability and no other type of generation and that a PAF of 2.0 is appropriate for such hydro facilities. The use of a 1.2 PAF requires a QF to operate 83% of the time in order to collect its entire capacity credit; the use of a 2.0 PAF requires a QF to operate 50% of the time in order to collect its entire capacity credit. Progress proposes to continue using this same set of PAFs.

The Public Staff pointed out that when power is sold in the wholesale market, a contract typically includes a capacity charge that is calculated on a per-kW basis and is payable regardless of the number of kWh the seller provides, as long as it does not exceed the number of outages allowed by the contract. Duke's proposed PAF of 1.129 for all QFs is based only on the availability of its combustion turbines. While the costs of a combustion turbine are used as a proxy for a utility's generic cost of capacity, the Public Staff explained that the rates in this proceeding would apply to every type of QF.

The Public Staff further contended that a PAF of 1.129 was especially inappropriate for run-of-river hydro QFs because the output of these facilities is dependent on rainfall and cannot be controlled by the operator. The Public Staff also noted that the General Assembly, through its enactment of G.S. 62-156, has encouraged hydro generation and that hydro generation is environmentally friendly.

Duke's Position

Duke pointed out that under typical wholesale power purchase agreements, the calculation of capacity payments is based upon the total firm capacity the seller can generate at the time of the utility's peak demand. The use of a 2.0 PAF in calculating avoided cost rates for run-of-river hydro QFs bears little resemblance to the wholesale market. These QFs provide little or no capacity value during the peak hours, which occur during the hot, dry summer months. The Public Staff argued that since these run-of-river hydros cannot possibly be operated at 88.6% of their full capacity over the course of a year, a PAF of 2.0 gives them a more reasonable opportunity to receive their full capacity payments. However, under this analysis a hypothetical small hydro which could only operate 20% of the time should have a PAF of 5.0 so that it too could receive the same capacity payment as a hydro that operates 50% of the time, the payment to which they both are "entitled". The critical fact is that a hydro with a PAF of 2.0 or 5.0 would not enable the utility to avoid the full cost of a CT, and therefore neither should receive the full capacity payment of a CT.

A utility only avoids capacity additions by contracting with a QF to the extent it can rely on such capacity when it needs it – during its peak. Duke's proposed capacity rates utilizing a PAF of 1.129 appropriately and fully compensate the QF for capacity that the QF actually provides. In fact, the QF is paid 113% of Duke's cost of capacity for every kW the QF delivers to Duke.

The Public Staff argued that run-of-river hydros QFs are entitled to preferential treatment because "these facilities are environmentally friendly, and G.S. 62-156 reflects a State policy encouraging their use." The Commission cannot consider such arguments in the context of determining avoided cost rates.

Suggesting that G.S. 62-156 provides a basis for requiring that utilities pay run-of-river hydro QFs capacity rates in excess of avoided cost would subject the statute to federal preemption.

Conclusion

The Commission concludes that no change should be made from current practice. The Commission has consistently concluded in prior biennial proceedings that a PAF of 1.2 is appropriate for Progress and Duke for all QFs except hydro facilities with no storage capability and no other type of generation and that a PAF of 2.0 is appropriate for such hydro facilities. The use of a 1.2 PAF requires a QF to operate 83% of the time in order to collect its entire capacity credit; the use of a 2.0 PAF requires a QF to operate 50% of the time in order to collect its entire capacity credit. Progress, in fact, proposes to continue using this same set of PAFs.

The Public Staff pointed out that when power is sold in the wholesale market, a contract typically includes a capacity charge that is calculated on a per-kW basis and is payable regardless of the number of kWh the seller provides, as long as it does not exceed the number of outages allowed by the contract. Duke's proposed PAF of 1.129 for all QFs is based only on the availability of its own combustion turbines.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NO. 9

Public Staff's Position

The Public Staff pointed out that market data are not available to estimate the price of capacity beyond five years into the future. When the Public Staff requested 10-year and 15-year avoided capacity rates, Duke simply assumed that in years six through 15 the market price of capacity would equate to the cost of a CT. NC Power responded to the Public Staff's request by citing the PJM Interconnection's Unforced Capacity rate of $65.75/kW-year, which is also based on the cost of a CT.

The Public Staff noted concern that Duke's proposed capacity rate is based solely on a negotiated contract with Progress Ventures, and that Duke's proposed rate represents negotiations with one entity for an already constructed CT rather than offers from a variety of market participants.

In regard to NC Power, the Public Staff commented that given the developmental state of the PJM capacity market, the uncertainties with FERC's Notice of Proposed Rulemaking on the Standard Market Design, and the lack of liquidity in the spot and forward markets, it is difficult to place complete confidence in the current functioning of the marketplace.

The Public Staff also noted that the collapse of Enron and the credit problems of a number of large energy traders have led to a dramatic decline in electricity trading and that the reduction in liquidity has reached a point where forward electricity prices may not be a reliable measure of future capacity values. At the same time, the initial rush of investment in merchant power plants has led to a temporary glut of supply. Some industry observers have suggested that the current market prices of electricity are at relatively depressed levels and that prices may begin to increase as soon as 2005. The current levels of available capacity may dissipate as the demand for power grows with the expected rebound in the State's and the nation's economies.

Thus, the Public Staff concluded that it is inappropriate to use the current low prices of capacity in determining avoided cost rates and recommended that avoided capacity costs for Duke and NC Power continue to be based on actual investment costs. This rate reflects the value of capacity after adjustments for forced outages that would be avoided because of the existence of a QF, rather than on a capacity market that is not functioning acceptably at this time.

Duke's Position

Duke noted that when it needs capacity, it examines self-build and purchase options to determine the most cost-effective acquisition for customers. Duke further provided, that as the Public Staff pointed out, the rush of investment in merchant power plants has led to a temporary glut of supply and lower prices than new CT investment.

Duke observed that in previous biennial proceedings, the Commission concluded that it should not require Progress, Duke, and NC Power to utilize a common methodology for calculating avoided costs. The Commission also concluded in previous proceedings that it should not require the utilities to adopt a specific generating unit or type of unit for calculating avoided costs.

Duke's use of actual purchased capacity market data through the year 2007 is necessary and appropriate under PURPA because purchased capacity is lower cost than construction of new CT capacity during that time period. This approach is entirely consistent with the peaker methodology. The component or "peaker" method of determining avoided capacity costs does not dictate that the cost of peaking capacity be calculated using the cost of new CT construction.

Rather, the peaker method should represent the lowest cost of acquiring peaking capacity, which in the current case is represented by the Duke-Progress Ventures purchased power contract through the year 2007. The capacity costs in the Duke-Progress Ventures agreement represent Duke's "actual investment cost" of capacity that properly serves as a proxy for its avoided capacity cost rate. The market in many regions of the country now has excess capacity due to the rush of construction by independent power producers. Anytime there is a surplus of capacity, economic theory demands a reduction in capacity value, as the market is correctly reflecting. Therefore, Duke's avoided capacity costs should reflect the availability of low-cost purchased capacity contracts.

Duke asserted that the Commission previously determined that where a competitive solicitation yields capacity at costs lower than the cost to the utility of constructing and operating a generation facility, the price of capacity arising from that competitive solicitation must be used to calculate avoided costs. In 1992, the VSCC ordered Virginia Electric and Power Company (VEPCO) to enter into power purchase agreements with a QF and ordered that the avoided cost payments, including capacity payments, should be based on the costs of constructing and operating one of VEPCO's gas-fired facilities. The VSCC entered this order over VEPCO's objections that it had conducted a competitive solicitation for QF proposals and that the capacity rates required by the VSCC were in excess of the bid prices it received. In a subsequent rate proceeding initiated by NC Power, this Commission disallowed $1.39 million in expenses for capacity payments to the QF under the agreements as ordered by the VSCC on the grounds that the payments exceeded NC Power's avoided costs. In upholding the Commission's order, the North Carolina Supreme Court stated:

> We conclude that it was not unreasonable for the North Carolina Utilities Commission to use the competitive bidding measure in determining avoided costs, thereby rejecting the measure used by the VSCC. In fact, NC Power argued before the VSCC that competitive bidding should be the measure used. The North Carolina Utilities Commission carefully reviewed the capacity rate set by the Virginia arbitrator's decision and found that he did not properly take into account other potential sources of power. Thus, the Virginia arbitrator greatly overestimated NC Power's avoided costs. The North Carolina Utilities Commission's exclusion of $ 1.39 million in expenses for capacity payments for the Ultra Cogen cogeneration projects is nothing more than the disallowance of the amount by which the contract rate exceeded NC Power's avoided costs.

Utilities Comm'n v. North Carolina Power, 338 N.C. 412, 421, 450 S.E.2d 896, 901 (1994).

The Commission would find it imprudent if Duke rejected all of the purchase power bids it has received and built a new facility, if the lowest cost reliable options were to purchase capacity. Similarly, neither should Duke be required to pay QFs amounts in excess the cost of capacity from other suppliers.

NC Power's Position

NC Power's methodology is still the DRR; however, its inputs to the DRR model reflect NC Power's current capacity plans, which are to buy capacity from the market rather than build CT generating units. It is clear from NC Power's Integrated Resource Plan (IRP), which was approved by the Commission on February 20, 2003, in Docket No. E-100, Sub 97, that the company intends to use market purchases for its capacity needs. Members of both the United States Senate and the House of Representatives have introduced bills that would eliminate the requirement in PURPA that electric utilities purchase electric energy from QFs if FERC finds that the QF has access to competitive wholesale markets. The Public Staff's use of hypothetical CT costs, in direct conflict with the company's actual capacity plan using market purchases, is contrary to the intent of PURPA because it makes it likely that rates will exceed actual avoided capacity costs. It is certain that the use of higher avoided capacity cost rates by use of a "CT build scenario" may expose North Carolina ratepayers to higher rates.

Conclusion

The Commission notes the reasons that Duke and NC Power have laid out concerning the appropriateness of using market pricing as inputs to its modeling process. However, the Commission concludes that the Public Staff puts forth a stronger argument, at the present time, as to the reasons that both Duke and NC Power should continue to base their capacity rates on actual investment costs that would be avoided because of the existence of a QF.

As the Public Staff pointed out, market data are not available to estimate the price of capacity beyond five years into the future. When the Public Staff requested 10-year and 15-year avoided capacity rates, Duke simply assumed that in years six through 15 the market price of capacity would equate to the cost of a CT. NC Power responded to the Public Staff's request by citing the PJM Interconnection's Unforced Capacity rate of $65.75/kW-year, which is also based on cost of a CT.

The Public Staff properly noted concern that Duke's proposed capacity rate is based solely on a negotiated contract with Progress Ventures, and that Duke's proposed rate represents negotiations with one entity for an already constructed CT rather than offers from a variety of market participants. The Commission also agrees with the Public Staff's comments that, given the developmental state of the PJM capacity market, the uncertainties with FERC's Notice of Proposed Rulemaking on the Standard Market Design and the limited liquidity in the spot and forward markets, it is difficult to place complete confidence in the current functioning of the market place. The Public Staff also noted that the collapse of Enron and the credit problems of a number of large energy traders have led to a dramatic decline in electricity trading and that the reduction in liquidity has reached a point where the forward electricity prices may not be a reliable measure of future capacity values.

The Commission therefore concludes that it is inappropriate, at this time, to use the market price of capacity in determining the avoided cost rates as proposed by Duke and NC Power. Avoided capacity costs for Duke and NC Power should continue to be based on actual investment costs.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NO. 10

In developing its avoided cost rates, each utility must make an estimate of its fuel prices, including natural gas prices, to be paid in future years. To arrive at its forecast of gas prices for 2003-06, Progress averaged the forecast prices published in June 2002 by the EIA for the twelve months of 2003. This average of $3.23/MMBtu was used as Progress' projected Henry Hub gas prices, not only for 2003, but also for each year through 2006. Progress then used these projected commodity prices to derive its delivered gas prices.

Public Staff's Position

In its Initial Statement, the Public Staff asserted that Progress' gas price forecasts for 2003-06 are overly conservative, and therefore Progress' proposed avoided energy rates are unreasonably low. The Public Staff noted that Progress' forecasts are well below those of Duke and NC Power for the same period. The Public Staff further noted that a 33 percent increase in the three-year forward NYMEX gas prices occurred from February 10, 2002, to July 7, 2002, as shown in Public Staff Exhibit 4, and it was well known that these increases were continuing up until Progress' filing in this docket on November 1, 2002. Given the condition of the gas market in the months before the filing, the Public Staff asserted that there is no justification for Progress to have reduced its price forecast from the forecast used in the last biennial proceeding, both of which it showed on Public Staff Exhibit 1.

The Public Staff recommended that the Commission require Progress to re-run its PROMOD simulation using revised short-term natural gas price forecasts. This could be done in several different ways: by using an average of Duke's and NC Power's projections, an average of Progress' "high" and "forecast" scenarios, or Progress' "high" scenario. The Public Staff opined that any of these approaches would allow for a more reasonable forecast and one that is more comparable to the forecasts used by the other utilities. The lowest of the these three alternatives, which is the average of Progress' "high" and "forecast" scenarios, was shown on Public Staff Exhibit 5.

In its Reply Comments, Progress presented a number of arguments against the Public Staff's position that are either without merit or not relevant. For example, Progress contended that "the Public Staff advocates pricing policies that favor QFs and are detrimental to North Carolina's electric utilities and their ratepayers. These positions may be anti-utility but they are not pro-consumer." This argument is without merit. Under G.S. 62-15 it is the duty of the Public Staff to represent the interests of the using and consuming public, not to provide automatic support for every proposal that may reduce a utility's expenditures. Reductions in utility operating costs are frequently beneficial to consumers, especially if they result in lower rates. However, in some cases increased utility expenditures may benefit consumers, for example, by promoting the public safety, protecting the environment, or ensuring diversity in energy sources. The Public Staff must be allowed to balance competing interests and advocate the position that it finds to be in the best interests of the using and consuming public. Setting avoided cost rates using artificially low fuel prices would not only reduce, and perhaps eliminate, the benefits of existing and potential new cogeneration and renewable resource projects, but it would also violate federal law.

The Public Staff noted that other arguments made by Progress in its Reply Comments include the following: its proposed reductions in QF energy rates are relatively small and are offset to some degree by increases in its proposed capacity rates; gas prices have only a limited impact on overall generation costs; that much of the energy generated at its gas-fired plants is sold to other utilities; its overall energy rates approved in Docket No. E-100, Sub 87, were in excess of its system lambda for 2001-02; and through an inadvertent error in its Initial Statement, the Public Staff incorrectly described Progress' new gas-fired units as having higher heat rates than the older units, when in fact the new units have lower heat rates. The Public Staff offered that these arguments are irrelevant to the issue at hand — the issue of whether Progress' forecast of gas prices for 2003-06 is unreasonably low.

Progress' Position

A substantial portion of the energy Progress generated with natural gas would have been classified as sales to other utilities. Such sales are irrelevant in setting avoided cost energy credits. In fact, over one million MWh of these sales were associated with two gas-indexed "peaking" contracts. Simply raising the near-term price of natural gas 15% as suggested by the Public Staff will not drive the composite projection of marginal cost to anywhere near prior levels and would be of limited value in determining accurate forecasted avoided costs. The independent source of data used by Progress for gas prices for 2003-2007 is a branch of the federal government with the mandate, and the considerable resources necessary, to produce an unbiased and informed projection of short-term gas prices. On the other hand, the data relied upon by the Public Staff is from a gas marketer.

Progress' independent source for long-term gas prices was in fact projecting gas prices below the forecast of the federal government agency described above for 2003 and the ensuing four years. Thus, by fixing the values at the short-term projection, Progress actually raised the resultant marginal energy costs coming out of PROMOD over what they otherwise would have been. (The independent source used by Progress to derive long-term gas prices is equally credible, a research and consulting firm with 25 years of experience.)

North Carolina Power Holding's Position

North Carolina Power Holdings agrees with the Public Staff that Progress should be required to re-run its rate projections to reflect more realistic fuel prices. As the Public Staff correctly points out, the forecast of natural gas prices used by Progress was not reflective of price levels or trends at the time it was utilized, nor is it reflective of current price levels or trends. While the discussion in its initial comments focused on the forecast of natural gas prices, North Carolina Power Holdings pointed out that the prices for all fossil fuels (coal, natural gas, and liquid fuels used as back-up for gas turbines), as well as the prices for purchased power, are highly interactive. Updating only the forecast of natural gas prices will likely cause a significant distortion in the projected rate. Progress should utilize a revised price forecast for all of its primary energy sources, including purchased power, that is consistent with current price levels and trends.

Conclusion

The Commission concludes that Progress' gas price forecasts are overly conservative. The Commission does not doubt that EIA is an unbiased and well-informed government agency with expertise in the field of gas prices. The issue in question, however, is not the integrity of the forecast. The issue is whether it is appropriate for Progress to rely on a June 2002 forecast to project prices for four years at a time when changes in the gas market were causing sharp increases in spot and forward NYMEX prices. As a result, the Commission concludes that the forecast of $3.23/MMBtu used by Progress for 2003-06 is unreasonably low.

Since Progress has used an unreasonably low forecast of gas prices, it should be required to rerun its PROMOD simulation and recalculate its avoided cost rates using current EIA forecasts for the commodity price of gas. In addition, the Commission agrees with North Carolina Power Holdings that the prices for all fossil fuels are interactive and that Progress should utilize a revised price forecast for all of its primary energy sources.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NO. 11

The Commission has stated in previous orders that if a QF undertakes negotiations with a utility, the utility should negotiate in good faith for terms fair to the QF and to the ratepayers, noting that the QF may file a complaint if it believes the utility is not negotiating in good faith.

Public Staff's Position

A QF currently has the right to file a complaint if it reaches an impasse in negotiations. The Commission's biennial avoided cost orders have emphasized the utilities' obligation to negotiate in good faith and the Commission's willingness to resolve disputes and determine the terms of an agreement. As the Cogentrix complaint proceeding demonstrates, however, the complaint process, by its very nature, is lengthy and costly. An expedited complaint procedure would enable both the QFs and the utilities to resolve negotiating impasses more efficiently and at lower costs.

The model proposed by the Public Staff would be similar to the process prescribed by the Commission to settle the interconnection rates, terms and conditions of the contract between Rockingham Power, L.L.C., and NUI North Carolina Gas in Docket No. SP-132. If an agreement is not reached within the specified negotiating period, the utility and the QF would be required to file their last best offers, and the Commission would then determine the disputed rates, terms and conditions.

Progress' Position

Commission Rule R1-9 addresses the procedure to be followed upon the filing of a complaint. Commission Rule R1-7 authorizes the filing of motions including motions for expedited review of a complaint. Thus, a full and complete remedy already exists to address any concerns a QF may have regarding a utility's purchase of such QF's power. There is no need to create a new procedure.

Duke's Position

The Public Staff recommends that the Commission adopt a dispute resolution procedure based on the procedure adopted in Docket No. SP-132, which would require a QF and utility that had reached an impasse in negotiations to file their last best offers and have the Commission determine the disputed rates, terms and conditions. This process is recommended in order to avoid delays that can result from formal complaint proceedings.

In Docket No. SP-132, upon the parties reaching an impasse in the negotiation of a gas supply agreement, the Commission required that each party submit its position on the issues to the Commission and requested that the Public Staff review and comment on such positions. Further, no testimony was filed and no evidentiary hearing was held. Rather, after an oral argument, the Commission decided the unresolved issues regarding the appropriate rates, terms and conditions. The primary difference between the model proposed by the Public Staff and the more formal proceedings provided for in the Commission's Rules and Regulations is that the Public Staff recommendation omits testimony and an evidentiary hearing.

Duke stated that it did not object to the use of such an alternative dispute resolution mechanism to the extent that use of such procedures is optional and requires the consent of each party involved.

NC Power's Position

NC Power stated that since this issue is unrelated to this avoided cost proceeding it should be considered separately. When parties agree to alternative dispute resolution procedures, however, a final decision of the Commission should be binding.

Cogentrix's Position

Cogentrix noted that the Commission has consistently emphasized that the utilities have an obligation to negotiate in good faith with the QFs for the purchase of power. However, where those negotiations do not result in an agreement, the current complaint procedure is too lengthy and too costly to provide a meaningful remedy, particularly for existing QFs. Cogentrix agrees with the Public Staff's proposal of an expedited procedure for the resolution of the terms and conditions of agreements between the utilities and the QFs.

North Carolina Power Holdings' Position

North Carolina Power Holdings supported the Public Staff's proposal, citing the need to avoid a situation in which the utility has the power to control the outcome of a dispute by virtue of delay.

Craven County Wood Energy's Position

Craven County Wood Energy supported the Public Staff's proposal, citing the potential chilling effect on the industry of long and costly disputes over avoided cost rates.

Conclusion

In Docket No. SP-132, upon the parties' reaching an impasse in the negotiation of a gas supply agreement, the Commission required that each party submit its position on the issues to the Commission and requested that the Public Staff review and comment on such positions. Further, no testimony was filed and no evidentiary hearing was held. Rather, after an oral argument, the Commission decided the unresolved issues regarding the appropriate rates, terms and conditions. The primary difference between the model proposed by the Public Staff and the more formal proceedings provided for in the Commission's Rules and Regulations is that the Public Staff recommendation omits testimony and an evidentiary hearing.

The Commission recognizes that there may be cases when the presentation of testimony and briefs may provide greater assistance to the Commission in reaching a well-reasoned decision. In such cases, more formal proceedings, as provided under the Commission's Rules and Regulations, remain appropriate.

The Commission therefore concludes that no new procedures should be established at this time. Commission Rule R1-9 addresses the procedure to be followed upon the filing of a complaint, and Commission Rule R1-7 authorizes the filing of motions, including motions for expedited review of a complaint. Thus, a remedy already exists to address any complaints a QF may have regarding a utility's purchase of the QF's power. The Commission is not convinced at this time that there is a need to create a new procedure.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 12-13

In the Cogentrix complaint proceeding, it was revealed that Progress requires every large QF to sign a standard agreement, entitled Operation Agreement for Qualifying Facilities with Generating Capacity Greater than 5 MW, in order to receive even the variable energy rate. The Commission required all utilities in this proceeding to file any operating agreements, interconnection agreements, or other documents that they require QFs to sign but have not previously filed.

On April 7, 2003, Progress filed its proposed standard Operation Agreement for Qualifying Facilities with Generating Capacity Greater than 5 MW. The Public Staff filed comments on June 4, 2003, noting that Progress had provided a revised agreement to the Public Staff that resolved most of the issues raised by the Public Staff. Two issues warranted further comment: (a) the applicability of the standard interconnection agreement and (b) the appropriateness of the current interconnection charges.

Public Staff's Position

With respect to the applicability of the standard interconnection agreement, the Public Staff noted that there has been some confusion as to whether QF interconnection issues are a matter of state or federal jurisdiction. The Public Staff offered that the current status of the law appears to be that as long as a QF is not selling to a utility other than the one to which it is directly interconnected, the interconnection is governed by PURPA. The regulations adopted by the FERC pursuant to PURPA, specifically 18 CFR §292.303(c)(1), delegate enforcement authority over interconnection to the relevant State regulatory authority. However, the FERC has concluded that if a QF is selling to another utility, then the delegation in the PURPA regulations to state authority is not applicable and both the obligation to interconnect with the QF and the transmission of its electricity by the directly-interconnected utility (to a distant utility) are FERC jurisdictional. This conclusion has been upheld by the United States Court of Appeals for the District of Columbia in *Western Massachusetts Electric Company v. FERC*, 165 F.3d 922 (D.C. Cir. 1999).

Given this understanding of the relevant laws, the Public Staff noted that the form Operating Agreement that Progress used with NC Power Holdings and proposed to use with Cogentrix raised several issues that were not entirely resolved by the changes in the standard agreement filed by Progress on April 7, 2003. The Public Staff noted that it now understood Progress to agree that it cannot require a larger QF, as condition of interconnection, to (1) sign Progress' form Application for Standard Contract by a Qualifying Cogenerator or Small Power Producer, (2) sell pursuant to the avoided cost tariff, and (3) sell pursuant to the Terms and Conditions for the Purchase of Electric Power or Qualifying Facilities with Generating Capacity Greater than 5 MW, as required by its earlier agreements and accommodated by the insertion of blanks in the April 7 filing.

The Public Staff further noted that a QF selling exclusively to Progress would have an absolute right under PURPA to be interconnected to Progress and paid by Progress for any energy it made available. The QF cannot be required to (a) submit a form application, (b) otherwise commit its output, or (c) make itself subject to any terms and conditions inconsistent with the foregoing without violating PURPA.

On June 5, 2003, Progress filed the revised agreement that it had made available to the Public Staff. This agreement, as now formulated, would apply to QFs larger than five MW that are selling energy only or energy and capacity pursuant to Progress' approved avoided cost tariff. To the extent a larger QF negotiates a purchase agreement with Progress, interconnection and operation terms and conditions would be subject to negotiation.

With respect to interconnection charges, the Public Staff's comments noted that Progress has previously used and had approved a monthly facilities charge of two percent of the installed cost of the facilities necessary to interconnect the QF. The two percent rate is a blend of transmission and distribution cost components. The Public Staff's June 4 comments indicated that the FERC uses a 1.33 percent factor for interconnections at the transmission level. However, the Public Staff also stated that it is not sufficiently familiar with the FERC's derivation of the 1.33 percent factor to recommend its use at this point in time, but that it recommended that the Commission consider whether a transmission only factor, rather than a factor that includes a blend of transmission and distribution costs, should be used for the larger QFs in Progress' territory which are interconnected at the transmission level.

In addition, the Public Staff noted that the FERC has recently disallowed some of the costs Progress included in the interconnection costs charged to Cogentrix because the FERC considers some of the facilities to be network upgrades and therefore properly includable in Progress' transmission rates, rather than charged to the individual generator. While the Public

Staff did not recommend that the Commission change its policy generically with respect to what constitutes interconnection facilities to be borne by the QF, as opposed to being socialized among all transmission users, the Public Staff stated that it believes that the Commission should be aware that if Cogentrix, for example, begins to sell to another utility in the future, the lower FERC-approved charge will become applicable. In addition, the FERC's recent action on the interconnection agreement with Cogentrix raises the question of whether some of the costs currently being charged to the larger QFs have been or will be included in Progress' transmission rates, which, if it occurred, would result in double recovery by Progress.

Progress' Position

Progress emphasized its concerns with, and opposition to, an investigation of the 2% facilities charge paid by QFs for interconnection facilities. As explained in Progress' comments filed on June 13, 2003, in this docket and in its proposed order, the 2% facilities charge was established in Progress' last rate case and is a base rate just like all other non-fuel rates established by the Commission in that case to allow Progress to earn its revenue requirement. According to Progress, any attempt to examine and revise this rate in isolation would constitute single issue ratemaking which is prohibited. More importantly, G.S. 62-133.6(e) provides that the base rates of Progress are frozen until January 1, 2008. Therefore, the 2% charge cannot be changed prior to that time, so an investigation of this charge would be of little value.

Progress further provided that Cogentrix's June 13, 2003 Reply Comments suggest that Cogentrix does not understand the conditions pursuant to which Progress' Interconnection and Operation agreement would apply. Progress stated that if the Commission determines that QFs larger than 5 MW are eligible for one or more of the rates in Progress' CSP rate schedule and a QF advises Progress that it wishes to sell power to Progress pursuant to Progress' CSP rate schedule, then the Interconnection and Operation Agreement filed by Progress on June 5, 2003, would apply to such a QF.

As discussed above, the Public Staff mentions that FERC has recently disallowed certain costs Progress included in interconnection costs charged to Cogentrix and that recovery of these costs through Progress' transmission rates, as deemed by FERC to be the proper method of recovery for these specific facilities, could result in double recovery. Progress responded to this assertion by explaining that it has requested a rehearing by FERC on the issue of cost recovery for the specific facilities in question and that this matter is still pending.

Duke's Position

Duke stated that it individually negotiates all agreements with QFs not eligible for Schedule PP rates and does not have standard form agreements that it requires QFs larger than 5 MWs to sign. Duke's practice is to negotiate agreements with such QFs and file the executed agreements with the Commission for information in the then current avoided cost docket.

Duke responded that many, if not most, interconnecting utilities do not have a "standard" form of interconnection agreement approved by FERC. The FERC has not chosen to require such a standard agreement. To the extent a QF believes a FERC interconnection agreement should apply, but a utility does not, the QF is free to take its belief to the FERC. Duke does not have a required standard form agreement for large QFs and argued that the Company does not believe that such is necessary or appropriate since QFs larger than 5 MW cannot sell energy only or energy and capacity pursuant to Duke's avoided cost tariff. Such QFs must negotiate or bid into Duke's competitive solicitation. FERC-approved rates and state-approved rates almost always differ to some degree, due to technical differences, differences in assumptions, and differences in philosophy. Duke stated that intervenors have not made any showing in this docket that the Progress factor previously considered and approved by this Commission in a general ratemaking proceeding is unjust, and thus Duke concluded that there is no reason to re-examine it at this time.

North Carolina Power Holdings' Position

The Commission should open an investigation into the basis for the practice of charging a QF, delivering its output at transmission voltage, different recovery rates for its interconnection facilities than would apply to a plant delivering its output to distant customers or as an exempt wholesale generator.

Progress argued that the Commission must defer consideration of the facilities charge until its next general rate proceeding. However, if the facilities charge reflects a "blended" recovery rate for transmission and distribution facilities as the Public Staff suggests, and the blended rate is improperly applied to QF's that interconnect at the transmission level, then North Carolina Power Holdings may seek relief via a complaint proceeding that allows rates to be adjusted outside the context of a general rate case.

Because of the significant impact of such an operating cost on QFs delivering their output at transmission voltage, North Carolina Power Holdings respectfully urges that the Public Staff conduct such an investigation on an expedited basis so that if any revised charge results, it can become effective at either the same time, or shortly after, Progress' CSP-21 rates.

Conclusion

The Commission notes the concerns and questions raised by the parties as to the appropriateness of fees and charges relating to interconnection facilities, and as to enforcement authority of state commissions and the FERC. However, the Commission concludes that a decision on interconnection issues as a part of this proceeding is inappropriate because such issues are not limited to QF facilities.

For the reasons set forth by the Public Staff, the Commission concludes that Progress' proposed revised standard Interconnection and Operating Agreement, as filed on June 5, 2003, should be approved. This agreement, as now formulated, applies to QFs larger than five MW that are selling energy only or energy and capacity pursuant to Progress' approved avoided cost tariff. To the extent a larger QF negotiates a purchase agreement with Progress, interconnection and operation terms and conditions shall be subject to negotiation. For QFs of five MW or less capacity that are selling pursuant to Progress' approved avoided cost tariff, interconnection is addressed in the standard contract terms and conditions approved hereinafter.

DISCUSSION AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 14-15

The Commission makes the following conclusions with respect to the proposed schedules and standard terms and conditions:

The rate schedules and standard contract terms and conditions proposed in this proceeding by Progress, Duke, and NC Power should be approved except as otherwise discussed herein. The utilities should be required to file new versions of their rate schedules and standard contracts, in compliance with this Order, within 20 days after the date of this Order, to be effective 10 days after their filing. The utilities' filings shall go into effect 10 days after they have been filed unless specific objections as to the accuracy of the calculations and conformity to the decisions herein are filed within that 10-day period. Progress, Duke, and NC Power should file supporting documentation showing the calculations made to arrive at their avoided cost rates, highlighting the additional changes required by this Order.

The recent complaint case in Docket No. E-2, Sub 823 has underscored the need for utilities to review the wording of their avoided cost tariffs to ensure that the tariffs accurately reflect the rates and options established by the Commission, or any more generous terms that the utilities may elect to offer. All utilities are urged to carefully review their tariffs and to make such revisions as needed to ensure that the tariffs accurately reflect the provisions ordered herein, or any more generous terms that a utility may elect to offer.

DISCUSSION AND CONCLUSIONS FOR FINDING OF FACT NO. 16

WCU does not generate its own electricity; it buys its power wholesale from Nantahala (a division of Duke Energy Corporation) at rates approved by the FERC. The avoided cost formula proposed by WCU would reimburse a QF based on the rates charged to WCU by Nantahala at any point in time, and it is the same formula approved by the Commission in previous avoided cost proceedings. No party challenged the avoided cost formula proposed by WCU. The Commission concludes that WCU's proposed Small Power Production Supplier Reimbursement Formula should be approved. Consistent with our conclusions in past proceedings, WCU should not be required to offer any long-term levelized rate options.

IT IS, THEREFORE, ORDERED as follows:

1. That Progress shall offer long-term levelized capacity payments and energy payments for 5-year, 10-year and 15-year periods as standard options to (a) hydroelectric QFs owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell 5 MW or less capacity and (b) non-hydroelectric QFs fueled by trash or methane derived from landfills, hog waste, or poultry waste contracting to sell 5 MW or less capacity. The standard levelized rate options of 10-years and 15-years should include a condition making contracts under those options renewable for subsequent term(s) at the option of the utility on substantially the same terms and provisions and at a rate either (1) mutually agreed upon by the parties negotiating in good faith and taking into consideration the utility's then avoided cost rates and other relevant factors or (2) set by arbitration. Progress shall offer its standard 5-year levelized rate option to all other QFs contracting to sell 3 MW or less capacity;

2. That Duke shall offer long-term levelized capacity payments and energy payments for 5-year, 10-year and 15-year periods as standard options to (a) hydroelectric QFs owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell 5 MW or less capacity and (b) non-hydroelectric QFs fueled by trash or methane derived from landfills, hog waste, or poultry waste contracting to sell 5 MW or less capacity. The standard levelized rate options of 10-years and 15-years should include a condition making contracts under those options renewable for subsequent term(s) at the option of the utility on substantially the same terms and provisions and at a rate either (1) mutually agreed upon by the parties negotiating in good faith and taking into consideration the utility's then avoided cost rates and other relevant factors or (2) set by arbitration. Duke shall offer its standard 5-year levelized rate option to all other QFs contracting to sell 3 MW or less capacity;

3. That NC Power shall offer long-term levelized capacity payments and energy payments based on a long-term levelized generation mix with adjustable fuel prices for 5-year, 10-year and 15-year periods as standard options to (a) hydroelectric QFs owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell 5 MW or less capacity and (b) non-hydroelectric QFs fueled by trash or methane derived from landfills, hog waste, or poultry waste contracting to sell 5 MW or less capacity. The standard levelized rate options of 10-years and 15-years should include a condition making contracts under those options renewable for subsequent term(s) at the option of the utility on substantially the same terms and provisions and at a rate either (1) mutually agreed upon by the parties negotiating in good faith and taking into consideration the utility's then avoided cost rates and other relevant factors or (2) set by arbitration. NC Power shall offer its standard 5-year levelized rate option to all other QFs contracting to sell 3 MW or less capacity. NC Power shall offer long-term levelized energy payments as an additional option for QFs rated at 100 kW or less capacity;

4. That the Commission will allow 10 days from the date of this Order for parties to provide specific information as to why QFs fueled by methane derived from poultry waste should not be eligible for long-term levelized contracts as hereinabove provided;

5. That Progress, Duke, and NC Power shall offer QFs not eligible for the standard long-term levelized rates the following three options if the utility has a Commission-recognized active solicitation underway: (1) participating in the utility's competitive bidding process, (2) negotiating a contract and rates with the utility, or (3) selling energy at the utility's Commission-established variable energy rate. If the utility does not have a Commission-recognized active solicitation underway, Progress, Duke and NC Power shall offer QFs not eligible for the standard long-term levelized rates, the options of contracting with the utility to sell power (1) at the variable energy rate established by the Commission in these biennial proceedings or (2) at negotiated rates. If the utility does not have a solicitation underway, such negotiations will be subject to arbitration by the Commission at the request of either the utility or QF to determine the utility's actual avoided cost, including both capacity and energy components, as appropriate; however, the Commission will only arbitrate if the QF is prepared to commit its capacity to the utility for a period of at least two years. In either case, whether there is an active solicitation underway or not, QFs not eligible for the standard long-term levelized rates of course have the option of selling into the wholesale market. The exact points at which an active solicitation shall be regarded as beginning and ending for these purposes shall be

determined by motion to, and order of, the Commission. Unless there is such a Commission order, it will be assumed that there is no solicitation underway. If the variable energy rate option is chosen, the rate may not be locked in by a contract term, but shall instead change as determined by the Commission in the next biennial proceeding.

6. That Progress, Duke, and NC Power's rate schedules shall be modified, clarified, and rewritten as necessary to clearly offer variable energy rates to all QFs on an "as available" basis, even if an order has been issued allowing QF capacity offers to be deferred into an active competitive solicitation;

7. That a performance adjustment factor of 2.0 shall be utilized by both Progress and Duke for their respective avoided cost calculations for hydroelectric facilities with no storage capability and no other type of generation;

8. That a performance adjustment factor of 1.2 shall be utilized by both Progress and Duke for their respective avoided cost calculations for all QFs in this proceeding except hydroelectric facilities with no storage capability and no other type of generation;

9. That Duke and NC Power's capacity rates used to calculate avoided capacity costs shall continue to be based on actual investment costs that would be avoided because of the existence of a QF, rather than on market data;

10. That Progress shall rerun its PROMOD simulation and recalculate its avoided cost rates using current EIA forecasts for the commodity price of gas. In addition, Progress shall rerun all other primary energy forecasts using the most current available projections from its previous sources;

11. That Progress' proposed standard interconnection and operating agreement is approved;

12. That investigation of other issues related to interconnection costs is inappropriate as a part of this proceeding;

13. That the rate schedules and standard contract terms and conditions proposed in this proceeding by Progress, Duke, and NC Power are approved except as otherwise discussed herein. The utilities shall file new versions of their rate schedules and standard contracts, in compliance with this Order, within 20 days after the date of this Order to be effective 10 days after their filing. The rate schedules and contracts shall go into effect 10 days after they have been filed unless specific objections as to the accuracy of the calculations and conformity to the decisions herein are filed within that 10-day period and a further order is issued;

14. That Progress, Duke, and NC Power shall each file supporting documentation showing the calculations made to arrive at their avoided cost rates, highlighting the additional changes required by this Order; and

15. That WCU's proposed Small Power Production Supplier Reimbursement Formula is reasonable and appropriate and WCU shall not be required to offer any long-term levelized rate options to QFs.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of October, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr102903.01

DOCKET NO. E-100, SUB 97

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Investigation of Integrated Resource Planning in North Carolina - 2002	)))	ORDER APPROVING INTEGRATED RESOURCE PLANS

BY THE COMMISSION: North Carolina General Statute 62-110.1(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 next succeeding the annual September 1 filing date. Finally, in that order and subsequent proceedings, the Commission required the utilities to file in their annual reports 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.

On or about September 1, 2002, the current Integrated Resource Plan (IRP) filings were made under the Commission's Rules by Progress Energy Carolinas, Inc., f/k/a Carolina Power & Light Company (Progress), Duke Power, a division of Duke Energy Corporation (Duke), Virginia Electric and Power Company, d/b/a Dominion North Carolina Power (NC Power), and North Carolina Electric Membership Corporation (NCEMC). On November 15, 2002, the Public Staff filed its comments on the IRPs submitted by the utilities, including a discussion of reserve margins. No party formally petitioned to intervene in this proceeding.

On December 2, 2002, Duke filed reply comments regarding the issue of reserve margins, and the Public Staff's request for information on levelized busbar costs for various generation technologies in future filings.

A public hearing was held on February 3, 2003, in Raleigh, for the purpose of receiving non-expert public witness testimony. Two people appeared to testify at the hearing. One represented Craven County Wood Energy, a 45 MW wood-waste fuel plant. The other spoke on behalf of the North Carolina Sustainable Energy Association.

COMPLIANCE WITH FILING REQUIREMENTS

The Public Staff comments contained a review of the utilities' responses to information requirements contained in Rules R8-60(c) and R8-62(p). According to the Public Staff, the utilities responded to all subsections.

PEAK AND ENERGY FORECASTS

The Public Staff noted that all of the utilities continue to use accepted econometric and end-use analytical models to forecast their peak and energy needs. As with any forecasting methodology, there is a degree of uncertainty associated with these models that rely, in part, on assumptions that certain historical trends or relationships will continue in the future.

The following table summarizes the 2002-2012 growth rates for the utilities' system peak and energy sales.

2002 - 2012 Growth Rates

	Summer Peak[1]	Average Annual MW Growth	Winter Peak	Energy Sales
Progress	2.0%	237	2.0%	2.0%
Duke	1.8%	322	1.4%	1.8%
NC Power	1.1%	179	0.7%	1.3%
NCEMC	2.7%	92	2.7%	2.8%

The loss of wholesale loads and moderate forecasts of economic activity, especially within the textile industry, have contributed to somewhat lower energy sales growth forecasts for Progress, Duke and NCEMC. The growth rate projected by NC Power remains about the same as that shown in their 2001 report.

DEMAND SIDE MANAGEMENT (DSM) OPTIONS

The Public Staff pointed out that the utilities' emphasis on DSM has waned since the mid-1990's. As in recent past proceedings, the Public Staff recommends the Commission continue to monitor and evaluate the appropriateness of the utilities' DSM efforts.

According to the Public Staff, all of the utilities complied with the letter of Rule R8-60(c)(9), by providing a list of current DSM programs. The Public Staff noted that most of the utility programs designated as DSM resources in the 2001 IRP reports were again included as such in the 2002 IRP annual reports.

> G.S. 62-2(3a) provides that it is the policy of this State "[t]o assure that resources necessary to meet future growth through the provision of adequate, reliable utility service include use of the entire spectrum of demand-side options. . ."And "[t]o that end, to require energy planning and fixing of rates in a manner to result in the least cost mix of generation and demand-reduction measures. . ." None of the utilities' filings listed any planned programs, new programs under consideration, or modifications to existing programs.

[1] All of the utilities consider their summer peak to be the annual system peak.

Projected DSM as Percent of Total Peak Requirements

	Progress	Duke	NC Power	NCEMC
Summer 2003	3.2%	4.6%	0.4%	8.9%
Winter 2003	4.7%	2.8%	1.0%	7.2%
Summer 2012	2.8%	3.7%	0.3%	7.2%
Winter 2012	4.4%	2.5%	0.7%	5.8%

RESERVE MARGINS

Reserve margins shown in the current IRP filings are comparable to those submitted in the last proceeding. For the planning period 2002 to 2012, the range of reserve margins reported by the utilities remains below 20%. For this period, the planned reserves are: Progress, 12.4% to 15.1%; Duke, 17.0% to 19.3%; NC Power, 12.5% to 14.3%; and NCEMC, 0%. (NCEMC's data indicated that it has no reserves for its power supply sources. It expects its suppliers to provide the necessary reserves for its contracted purchases.)

The Public Staff stated that in the 1970's and 1980's it was necessary to use a minimum 20% planning reserve margin target due to the size of the baseload powerplants (coal and nuclear) relative to the size of utility systems they served, and the high rate and duration of forced and scheduled outages during that period, particularly for nuclear plants. The Public Staff noted that today, however, those same nuclear plants are operating with very low forced outage rates and short refueling outages, and the large baseload generating units are responsible for meeting a significantly smaller portion of the system peak demand. Thus, the use of lower reserve margins may be justified.

According to the Public Staff, North Carolina utilities recorded peak loads at an all-time high in the summers of 1998, 1999, 2000, 2001 and 2002, resulting in weekly operating reserve margins that were often below five percent. The Public Staff believes five percent to be, at best, a minimally acceptable operating reserve margin. For these utilities' summer peak loads, such a reserve margin would range from 600 to 900 MWs, approximately equal to the capacity of each respective utility's smallest nuclear unit.

Because of the decline in actual summer operating reserve margins and planned reserve margins reported to the Commission in Docket No. E-100, Sub 82, the Public Staff filed Comments on December 3, 1998, contending that the issue of declining reserve margins required further explanation by the utilities. On July 19, 1999, the Commission ordered the utilities to file a detailed justification for the adequacy and appropriateness of the level of the projected reserve margin in their annual filings due on September 1st of each year. The utilities responded to this continuing requirement in their 2002 filings.

The Public Staff provided the following comments related to the utilities' responses:

1. Progress provided an assessment of the adequacy and appropriateness of its level of projected reserves. Progress did not provide a target reserve margin or reserve level, but indicated that the reserve margin range of 12.4% to 15.1% for this period was adequate. Progress determined that the industry's widely used "one day in ten years" Loss-of-Load Expectation (LOLE) criteria would be satisfied by its filed reserve margins for the planning period. Progress used computer modeling, its own studies, and assessment of capacity assistance from neighboring electric systems to evaluate the reliability criteria. Progress also contended that the high reliability and small size of planned additions allow these lower reserve margins. Progress was again the only party to include information on levelized busbar costs for various generation technologies in its filing. The Public Staff found this information to be of great interest and value and requested that the Commission require all of the parties to file such information in future filings.

2. Duke responded that its 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 also factored in its operating experience when it selected a 17% reserve margin. Duke reported that between July 2000 and July 2002, there was only one day when generating reserves dropped below 500 MW, not including purchases and Demand Side Management (DSM). When purchases and DSM were factored in the calculation, the lowest reserve margin reached was 826 MW. Duke's reserve margin is at or above the 17% target for the entire planning period.

3. NC Power reported that its target reserve margin is 12.5%. In 1999, NC Power initiated a review of this reserve planning criterion to evaluate its appropriateness. An executive committee determined that a target reserve margin of 12.5% would be adequate to cover various contingencies.

4. NCEMC did not provide an assessment of the adequacy of its reserve margin, as it expects its suppliers to provide adequate reserves for its contracted purchases.

The Public Staff believes that the Commission should continue to require reserve adequacy reports, including the criteria used to determine reserve margin targets, in the annual filings. The information supplied is important and not found elsewhere. Progress, Duke, and NC Power appear to meet their projected reserve margin targets for the planning period. The Public Staff recommends that Duke and NC Power maintain reserve margins of approximately 17% and 12.5%, respectively.

It should also be noted that the Public Staff expects a slight fossil unit derate, in future years, for Duke and CP&L as they begin installation of the emission control devices required under the "Clean Smokestacks" Bill.

On December 2, 2002, Duke filed reply comments in this docket to address two issues raised by the Public Staff: appropriate operating reserve margins and the need to file busbar costs.

- Issue One: Reserve Margins

  The Public Staff's Comments included the following statement: The Public Staff believes five percent to be, at best, a minimally acceptable operating reserve margin. For these utilities' summer peak loads, such a reserve margin would range from 600 to 900 MWs, approximately the capacity of each respective utility's smallest nuclear unit. The actual forecasted level of the operating reserve margins even fell below one percent at times. Put in perspective, a one percent reserve margin is 160 MWs for a peak load of 16,000 MWs; 160 MWs is approximately the size of one combustion turbine.

Duke's Response

The Public Staff raised this issue of a "minimally acceptable operating reserve margin" in the 2001 Integrated Resource Planning proceeding, Docket No. E-100, Sub 93 (2001), and in its Reply Comments in that proceeding, Duke disagreed with the Public Staff's characterization of five percent as a minimally acceptable operating reserve margin. The characterization incorrectly implies that reserve margins during the periods referred to were inadequate and so Duke continues to disagree with the Public Staff's characterization.

The Public Staff's reference to weekly operating reserve margins appears to be based upon operating statistics reported to the Public Staff by utilities on a weekly basis. Viewed in isolation, these statistics provide an inadequate portrayal of reliability. For example, Duke's weekly report does not reflect interruptible Demand-Side Management resources. Additionally, The NERC Policy 1 Generation Control and Performance Requirements are recognized as the industry standard regarding provision of sufficient operating reserves. Duke complies with this Policy in part through its participation in the VACAR Reserve Sharing Agreement. Five VACAR utilities are members of a Reserve Sharing Group, which has specific Contingency Reserve requirements. The VACAR Reserve Sharing Agreement currently provides that the members collectively must maintain minimum Contingency Reserves equal to 150% of the largest generating unit in VACAR. Duke's 2002 share of total VACAR Contingency Reserves is 509 megawatts. Each VACAR Reserve Sharing Group member maintains its share of Contingency Reserves, enabling the members to reduce their individual costs for operating reserves while maintaining the ability to respond to such factors as generation and transmission equipment unavailability. Duke believes that NERC Policy 1, established by a recognized independent organization focused solely on reliability, is an appropriate standard and that it would be inappropriate to create additional and possibly inconsistent reserve measures and requirements.

- Issue Two: The Public Staff's Request for Busbar Information

  The Public Staff requested in its Comments that the Commission order all parties to include information on levelized busbar costs for various generation technologies in future filings.

Duke's Response

To the extent that the Commission requires utilities to file busbar costs, Duke cautions that such information has certain limitations. In isolation, busbar cost information has limited applicability in decision-making because it is very dependent upon the set of circumstances being considered. Results of studies including busbar costs can vary widely depending upon the assumptions implicit in the underlying data. Inappropriate application of busbar cost information, therefore, could result in erroneous conclusions.

In addition, if the Commission requires the filing of such information, then Duke requests that provisions be made for the information to be filed on a confidential basis. Duke's busbar cost information is competitive information because it includes Duke's projected initial and on-going capital costs for each generating technology, fuel cost projections, and operating and maintenance costs. Suppliers and competitors could use this information to Duke's and its customers' disadvantage in negotiating purchase and sales opportunities, including Duke's competitive solicitations for purchased power. The resulting competitive disadvantage to Duke directly impacts Duke's ability to serve customers economically.

TRANSMISSION ADEQUACY

The March 28, 2002, Commission Order Approving Integrated Resource Plans required that future IRP filings by all utilities shall include a discussion of their respective utility's transmission system (161 kV and above). The Commission also required that the utilities shall meet with the Public Staff within 30 days of the filing date of their annual reports to discuss detailed information concerning their transmission system.

The Public Staff indicated that the companies included in their annual report filings, in addition to the data required by Rule R8-60, discussions of the adequacy of their transmission systems and copies of their most recent completed FERC Form 715 including all attachments and exhibits. The companies also met with the Public Staff within 30 days following the filing date of the annual report to discuss detailed information concerning their transmission line inter-tie capabilities, transmission line loading constraints, and planned new construction and upgrades, within their respective control areas, for the planning period under consideration.

GENERATION FACILITIES

In its March 28, 2002 Order Approving Integrated Resource Plans, the Commission requested that in order to develop a more complete list of total generation resources located in the State, the utilities provide a separate list of all non-utility electric facilities in the North

Carolina portion of their control areas, including customer-owned and stand-by generating facilities, to the extent possible.

All utilities complied with this request in their 2002 reports.

CONCLUSIONS

Peak and Energy Forecasts

The Commission finds that the utilities used accepted econometric and end-use analytical models to forecast their peak and energy needs.

Demand-Side Management (DSM) Options

The Commission reaffirms the value of cost-effective DSM programs, and concludes that it should continue to encourage the appropriate application of DSM options to the total resource mix of each utility.

Reserve Margins

The Commission recognizes that the electric power industry remains 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 continue 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. The Commission believes that existing generation resources are adequate in light of current conditions. The Commission does, however, want the record to clearly indicate that providing adequate service remains 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 IRP filings by all utilities 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 the discussions between the companies and Public Staff relating to transmission adequacy. Each utility provided a copy of their most recent completed FERC Form 715 in their annual report filings, including attachments and exhibits, and met with the Public Staff within 30 days of the filing date of their annual report to discuss various transmission related issues. The Commission supports this continuing dialogue between the companies and the Public Staff.

The Commission further concludes that future IRP filings by all utilities should continue to include a discussion of the adequacy of the respective utility's transmission system (161 kV and above), as well as a copy of the most recent completed FERC Form 715, including all its attachments and exhibits.

Generation Facilities

The Commission finds that all utilities included a separate list of non-utility electric facilities in their 2002 annual reports.

Busbar Information

In its Comments, the Public Staff noted that Progress was the only party to include information on levelized busbar costs for various generation technologies in its filing. The Public Staff requested that the Commission require all of the parties to file such information in future filings.

In its Reply Comments, Duke cautioned that such information has certain limitations, and that the results of studies including busbar costs can vary widely depending upon the assumptions implicit in the underlying data. Duke requested that if the Commission requires the filing of such information, provisions be made for the information to be filed on a confidential basis due to the competitive nature of such information.

The Commission agrees with the Public Staff that this type of information has value in understanding the screening process of various generation alternatives by the utilities. The Commission therefore requests that Progress, Duke and NC Power include information on levelized busbar costs for various generation technologies in future annual IRP filings. Any claim of confidentiality under the North Carolina Public Records Act shall be set forth with specificity at the time this information is filed and shall conform to each of the conditions specified in G.S. 132-1.2. In addition, a redacted, non-confidential version of the information in question shall also be included in the annual report filings.

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.

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. 62-110.1(c);

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

3. That future IRP filings by all utilities shall continue to include a detailed explanation of the basis and justification for the adequacy and appropriateness of the level of the respective utility's projected reserve margins;

4. That future IRP filings by all utilities shall continue to include a discussion of the adequacy of the respective utility's transmission system (161 kV and above). In addition, each utility shall include a copy of the most recent completed FERC Form 715, including all its attachments and exhibits;

5. That the utilities shall meet with the Public Staff within 30 days of the filing date of future annual reports to discuss detailed information concerning their transmission line inter-tie capabilities, transmission line loading constraints, and planned new construction and upgrades within their respective control areas for the planning period under consideration;

6. That future IRP filings by all utilities shall continue to provide a separate updated list of all non-utility electric generating facilities in the North Carolina portion of their control areas, including customer-owned and stand-by generating facilities, to the extent possible. This information should include facility name, primary fuel type, capacity and location, and should indicate which facilities are included as part of their total supply resources; and

7. That future IRP filings by Progress, Duke and NC Power shall include information on levelized busbar costs for various generation technologies. Any claim of confidentiality under the North Carolina Public Records Act shall be set forth with specificity at the time this information is filed and shall conform to each of the conditions specified in G.S. 132-1.2. In addition, a redacted, non-confidential version of the information in question shall also be included in the annual report filings.

ISSUED BY ORDER OF THE COMMISSION.
This the 20th day of February, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

mr020603.01

DOCKET NO. G-100, SUB 86

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition for Rulemaking to Revise the Rule	)	
Governing Natural Gas Local Distribution	)	ORDER REVISING
Companies' Biennial Reports on Plans to	)	COMMISSION RULE R6-5(11)
Serve Unserved Areas	)	

BY THE COMMISSION: Commission Rule R6-5(11) was adopted by the Commission on October 25, 1989, in Docket No. G-100, Sub 53, in order to implement the reporting requirements of G.S. 62-36A.

On July 11, 2003, the Public Staff filed a Petition for Rulemaking asking the Commission to initiate a new rulemaking proceeding to revise Rule R6-5(11) in order to simplify the biennial reporting requirements for natural gas local distribution companies (LDCs) that no longer have unserved areas within their franchised territories for which expansion funds could be used pursuant to G.S. 62-158. The Public Staff asserted that great progress has been made in the extension of natural gas infrastructure into unserved areas of the State since the passage of G.S. 62-36A and adoption of Rule R6-5(11). The Public Staff stated that it had circulated a proposed revision to Rule R6-5(11) among representatives of Piedmont Natural Gas Company (Piedmont), Public Service Company of North Carolina, Inc. (PSNC), North Carolina Natural Gas Corporation, the Attorney General, and the Carolina Utility Customers Association, Inc., and that consensus on a proposed revision had been reached. The proposed revision to Rule R6-5(11) was attached to the petition.

The Commission issued an order on July 31, 2003, initiating a rulemaking proceeding in this docket and requesting comments on the proposed revision to Rule R6-5(11). This order was served on the franchised LDCs regulated by the Commission and the parties who participated in Docket No. G-100, Sub 53, and all of them were made parties to this new rulemaking proceeding.

Responses were filed by Piedmont and PSNC. Both support the proposed revision to Rule R6-5(11).

Based upon the filings herein, the Commission finds good cause to revise Rule R6-5(11) in order to simplify the biennial reporting requirements for LDCs that no longer have unserved areas within their franchised territories. The Commission will revise the Rule as proposed by the Public Staff with one clarification. The phrase "beyond that required above" shall be added to subsection (d) in order to make clear that LDCs subject to subsection (d) must still file the information required by subsections (a), (b), and (c). The Commission believes that this is consistent with the Public Staff's original proposal, not a change from the Public Staff's proposal. The revision adopted herein shall be effective immediately and shall apply to the reporting required from the LDCs this year.

IT IS, THEREFORE, ORDERED that Commission Rule R6-5(11) is hereby revised to read as provided in Appendix A attached hereto.

ISSUED BY ORDER OF THE COMMISSION
This the 4th day of September, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Ah090403.01

Appendix A

Revised Commission Rule R6-5(11)

(11) Each franchised natural gas local distribution company (LDC) shall file reports with the Commission detailing its plans for providing natural gas service in unserved areas of its franchised territory. Such reports shall be updated at least every two years on or before October 31 of odd-numbered years and, at a minimum, shall include the following:

(a) A map or maps that show the LDC's existing franchise area and areas where gas is currently available, including municipalities and unincorporated areas, and the locations of transmission and high pressure distribution mains outside of corporate limits.

(b) If the LDC had a project to serve an unserved area in progress at the time the immediately preceding report was filed, a description of each such project, including, as appropriate, its current status and its estimated date of completion.

(c) A summary of all requests or inquiries about service from potential large commercial and industrial customers considering locations not economically feasible to serve under the LDC's approved plan for the extension of mains and service lines.

(d) If the LDC has no unserved areas, the report should so state and no further information, beyond that required above, is required to be included.

(e) If the LDC has one or more unserved areas within its franchise territory, the following additional information must be included:

(i) A description of project(s) that would extend natural gas to such unserved areas, including maps showing the proposed routes for natural gas pipelines and the proposed timetable for completion of the project(s). Said maps should show the areas in which the LDC plans to offer natural gas service within the next three years, including the location of proposed facilities, relative to currently served areas.

(ii) An explanation of the reason(s) it is not proposing to extend natural gas service to each unserved area.

(iii) Construction budgets for each planned project.

(iv) An estimate of the number of customers to be served from each planned project, broken down as to customer class with projected annual revenues from each class and total revenues from all projects for each of the next three years subsequent to completion.

(v) A present value analysis for each planned project.

(vi) A financing plan detailing the key terms for possible sources of funds to finance each planned project, including natural gas expansion funds, natural gas bonds, contributions in aid of construction, various types of public financing, or issuances of debt, equity, and other types of external financings.

(vii) All workpapers supporting the determinations, analysis, or conclusions contained in the study or studies shall be provided to the Commission and the Public Staff. If additional information is required, each LDC will provide such information promptly upon request to the Commission and the Public Staff.

DOCKET NO. P-100, SUB 72

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Investigation to Consider Whether Competitive	)	
Intrastate Offerings of Long Distance Telephone	)	ORDER ADOPTING APPLICATION
Service Should be Allowed in North Carolina and	)	AND CERTIFICATE FORMS
What Rules and Regulations Should be	)	
Applicable to Such Competition if Authorized	)	

BY THE COMMISSION: On June 6, 2003, the Public Staff filed a Motion to Revise Application Process for Long Distance Carriers in light of the General Assembly's recent amendments to G.S. 62-2 set forth in Session Law 2003-91 (Senate Bill 814).

The Commission found good cause to enter an Order in this docket on June 17, 2003, granting the Public Staff's motion and stating the intent to revise the application and certificate forms as set out in Appendix A and Appendix B thereto, unless cogent and substantial objections were received by Monday, June 30, 2003. In the meantime, the Commission approved the proposed application and certificate forms for use on an interim basis pending further Order.

No comments or objections were filed in response to the Order of June 17, 2003.

WHEREUPON, the Commission finds good cause to give final approval to the application and certificate forms attached hereto as Appendices A and B.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 3rd day of July, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

bb070203.01

APPENDIX A

APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OFFER LONG DISTANCE TELECOMMUNICATIONS

To Be Completed by Chief Clerk
DOCKET NO. P-________, SUB ______
Filing Fee Received $__________

Note: To apply for a Certificate, the Applicant must submit a filing fee of $250.00 and the typed original and 7 copies of this document to the Commission at the following address:

Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

The application must be properly completed and correctly verified. If it is not, a copy of the application will be returned to the Applicant, and the application will not be further processed. If the Applicant wishes to continue with the application, a correct application must be resubmitted with a new filing fee. The original filing fee will not be returned.

APPLICANT

____
(NAME)

____
(ASSUMED [D/B/A] NAMES, IF APPLICABLE)

____
(PHYSICAL ADDRESS - STREET, SUITE NUMBER, CITY, STATE, ZIP)

____
(MAILING ADDRESS - IF DIFFERENT FROM ABOVE)

COMMISSION CONTACTS

FOR: GENERAL REGULATORY MATTERS

(NAME AND TITLE)

(PHYSICAL ADDRESS – STREET, SUITE NUMBER, CITY, STATE, ZIP)

(MAILING ADDRESS – IF DIFFERENT FROM ABOVE)

(TELEPHONE NUMBER) (FACSIMILE NUMBER) (E-MAIL ADDRESS)

FOR: REGULATORY FEE PAYMENT

(NAME AND TITLE)

(PHYSICAL ADDRESS – STREET, SUITE NUMBER, CITY, STATE, ZIP)

(MAILING ADDRESS – IF DIFFERENT FROM ABOVE)

(TELEPHONE NUMBER) (FACSIMILE NUMBER) (E-MAIL ADDRESS)

FOR: SLAMMING OR CRAMMING COMPLAINTS

(NAME AND TITLE)

(PHYSICAL ADDRESS – STREET, SUITE NUMBER, CITY, STATE, ZIP)

(MAILING ADDRESS – IF DIFFERENT FROM ABOVE)

(TELEPHONE NUMBER) (FACSIMILE NUMBER) (E-MAIL ADDRESS)

CERTIFICATION

1. The Applicant has reviewed and acknowledges that it is subject to North Carolina Utilities Commission Rule 20-1, "Slamming, cramming and related abuses in the marketing of telecommunications services."

2. The Applicant has ____ has not ____ been penalized in any jurisdiction for slamming or cramming. If the Applicant has been penalized for any such violation, it must attach a separate sheet listing and explaining in detail each instance in which it has been penalized.

3. The Applicant agrees to notify the North Carolina Utilities Commission of any change in its (1) address, either physical or mailing, (2) Commission Contacts, or (3) name under which it does business (d/b/a name) within thirty (30) days of the effective date of any such change. The notification must be mailed to: Chief Clerk, North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325.

4. The Applicant understands that falsification or failure to disclose any required information in the application may be grounds for denial or revocation of any certificate.

Name of Applicant: ____________________

By: ____________________

Title: ____________________

VERIFICATION

STATE OF ____________________ COUNTY OF ____________________

The above-named ____________________ personally appeared before me this day, and being first duly sworn, says that (s)he signed the foregoing application, and that the facts stated therein, and in any exhibits, documents and statements thereto attached, are true, as (s)he verily believes after due and diligent inquiry.

WITNESS my hand and notarial seal, this the _____ day of ____________________, 20___.

My Commission expires:____________________

____
Signature of Notary Public

____
Name of Notary Public – Typed or Printed

APPENDIX B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-______, SUB _____

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AUTHORIZING THE PROVISION OF INTRASTATE INTEREXCHANGE TELEPHONE SERVICE

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Know All Men By These Presents, That

APPLICANT NAME

Applicant Address
City, State Zip Code

is hereby granted this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

This Certificate is hereby granted to APPLICANT NAME pursuant to NCGS 62-110(b) authorizing the provision of intrastate interexchange telephone service in North Carolina.

ISSUED BY ORDER OF THE COMMISSION.

This the ____ day of Month, XXXX.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen, Chief Clerk

DOCKET NO. P-100, SUB 110

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Telecommunications Relay Service (TRS), Relay North Carolina	))	ORDER APPROVING SELECTION OF CONTRACTOR

BY THE COMMISSION: On July 15, 2003, the Department of Health and Human Services (DHHS) issued a Request for Proposals (RFP) to select a vendor to provide telecommunications relay service to North Carolina citizens. Pursuant to G.S. 62-157, DHHS administers the statewide telecommunications relay service program (TRS), including its establishment, operation, and promotion. DHHS may contract out provision of this service for a four-year period. The present contractor is Sprint Communications Company (Sprint), and its contract expires in March 29, 2004.

On December 10, 2003, the Public Staff filed a Motion for Approval of Selection of Contractor, seeking the Commission's approval of the selection of Sprint to be the provider of relay services for the next four year contract period. The Public Staff noted that an evaluation committee reviewed the three proposals from Sprint, MCI, and Hamilton Relay. That committee was comprised of a person with a speech-impairment; a DHHS budget officer; a representative from the Division of Services for the Deaf and Hard of Hearing; a representative from the North Carolina Assistive Technology Project; and representatives from North Carolina Self-Help for Hard of Hearing and the North Carolina Association for the Deaf. The committee considered the following: each proposal's compliance with the RFP; the cost of service; and the additional services offered by the company. Furthermore, committee members performed test relay calls and solicited references from other states. Each of these areas was weighted and scored by the committee. Based on its review of the proposals, the evaluation committee recommended that Sprint receive the next four-year contract, beginning in March 30, 2004.

The evaluation committee then submitted its recommendation to the Office of Information Technology Services (ITS). After a careful review of the evaluation process and selection, ITS approved the DHHS recommendation.

The Public Staff reviewed the RFP and consulted with representatives of DHHS and ITS. Based on its consultations and review, the Public Staff recommended that the Commission issue an Order approving the selection of Sprint as the contractor for TRS services for the four-year period beginning March 30, 2004. Such approval does not result in any increase in the TRS surcharge or in any rate for local telephone service paid by North Carolina ratepayers.

Based upon the recommendation of the Public Staff, the Commission agrees with DHHS's selection of Sprint as the TRS contractor in North Carolina for the four-year period beginning March 30, 2004.

IT IS, THEREFORE, ORDERED that the award of the contract to Sprint is approved.

ISSUED BY ORDER OF THE COMMISION.
This the 15th day of December, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bb121103.01

DOCKET NO. P-100, SUB 133

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Local Exchange and Local Exchange Access	)	ORDER AMENDING CLP
Telecommunication	)	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) exempts 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). In addition, G.S 62-110(f2) prohibits these companies from competing in territories outside of their franchise area for local exchange and exchange access services until such time as the franchise area is opened to competing local providers.

On December 18, 2002, the Commission issued its Order Allowing for CLP and IXC Certification in Docket No. P-120, Subs 15 and 16. The order accepted the applications of the Town of Pineville, d/b/a Pineville Telephone Company (Pineville or the Town), contingent upon Pineville opening up its existing franchise area to local exchange competition. On March 12, 2003, the Commission issued its Order Granting Certificate, which granted Pineville CLP authority and required Pineville to open its existing LEC-franchise area to local exchange and exchange access competition.

The certificates issued to the competitive local providers 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 areas of

Concord Telephone Company (Concord), MEBTEL, Inc. (MEBTEL) and North State Telephone Company, (North State). Concord, MEBTEL, and North State serve less than 200,000 access lines, but entered into Price Plans effective September 1, 1997, January 1, 2000, and December 11, 2002, respectively.

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 existing LEC-franchise service area of the Town of Pineville, d/b/a Pineville Telephone Company, effective March 12, 2003.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of March, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb031903.03

DOCKET NO. P-100, SUB 133c

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Designation of Carriers Eligible for Universal)
Carrier Support) ORDER GRANTING PETITION

BY THE COMMISSION: On May 1, 2003, ALLTEL Communications, Inc. (ALLTEL), a commercial mobile radio service (CMRS) provider, filed a Petition seeking an affirmative declaratory ruling that the Commission lacks jurisdiction to designate CMRS carrier eligible telecommunications carrier (ETC) status for the purposes of receiving federal universal service support.

In support of its Petition, ALLTEL stated that it was a CMRS provider authorized by the Federal Communications Commission (FCC) to provide cellular mobile radio telephone service in North Carolina, and that the FCC had clearly recognized that CMRS carriers such as ALLTEL may be designated as ETCs. ETC status is necessary for a provider to be eligible to receive universal service support. Section 214(e)(6) of the Telecommunications Act provides that if a state commission determines that it lacks jurisdiction over a class of carriers, the FCC is charged with making the ETC determination. The FCC has stated that, in order for the FCC to consider requests pursuant to this provision, a carrier must provide an "affirmative statement" from the state commission or court of competent jurisdiction that the state lacks jurisdiction to perform the designation. To date, several state commissions have declined to exercise such jurisdiction.

North Carolina has excluded CMRS form the definition of "public utility." See, G.S. 62-3(23)j. Pursuant to this, the Commission issued its Order Concerning Deregulation of Wireless Providers in Docket Nos. P-100, Sub 114 and Sub 124 on August 28, 1995, concluding that the Commission no longer has jurisdiction over cellular services. Accordingly, ALLTEL has now requested the Commission to issue an Order stating that it does not have jurisdiction to designate CMRS carriers ETC status for the purposes of receiving federal universal service support.

The Commission requested comments from interested parties.

The Public Staff filed comments on June 3, 2003, in which it stated that it believes that ETC designation by the Commission of CMRS providers is not necessary and may not be appropriate under G.S. 62-3(23)j. Thus the Public Staff recommended that the Commission grant ALLTEL's Petition and issue an Order stating that it lacks jurisdiction to designate ETC status for CMRS carriers. This is consistent with the Commission's December 15, 1997 Order in this docket regarding ETC designation for telephone membership corporations.

There were no reply comments filed.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that it should grant ALLTEL's Petition and issue an Order stating that it lacks jurisdiction to designate ETC status for CMRS carriers. As noted above, in its August 28, 1995, Order in Docket Nos. P-100, Sub 114 and Sub 124, the Commission noted that G.S. 62-3(23)j, enacted on July 29, 1995, has removed cellular services, radio common carriers, personal communications services, and other services then or in the future constituting a mobile radio communications service from the Commission's jurisdiction. 47 USC 3(41) defines a "state commission" as a body which "has regulatory jurisdiction with respect to the intrastate operation of carriers." Pursuant to 47 USC 214(e)(6), if a state commission determines that it lacks jurisdiction over a class of carriers, the FCC must determine which carriers in that class may be designated as ETCs. Given these circumstances, it follows that the Commission lacks jurisdiction over CMRS services and the appropriate venue for the designation of ETC status for such services is with the FCC.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 24th day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb062303.02

DOCKET NO. P-100, SUB 133c

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Designation of Carriers Eligible for Universal)
Carrier Support) ORDER GRANTING PETITION

BY THE COMMISSION: On August 22, 2003, North Carolina RSA3 Cellular Telephone Company, d/b/a Carolina West (Carolina West), a commercial mobile radio service (CMRS) provider, filed a Petition seeking an affirmative declaratory ruling that the Commission lacks jurisdiction to designate CMRS carrier eligible telecommunications carrier (ETC) status for the purposes of receiving federal universal service support.

In support of its Petition, Carolina West stated that it was a CMRS provider authorized by the Federal Communications Commission (FCC) to provide cellular mobile radio telephone service in North Carolina, and that the FCC had clearly recognized that CMRS carriers such as Carolina West may be designated as ETCs. ETC status is necessary for a provider to be eligible to receive universal service support. Section 214(e)(6) of the Telecommunications Act provides that if a state commission determines that it lacks jurisdiction over a class of carriers, the FCC is charged with making the ETC determination. The FCC has stated that, in order for the FCC to consider requests pursuant to this provision, a carrier must provide an "affirmative statement" from the state commission or court of competent jurisdiction that the state lacks jurisdiction to perform the designation. To date, several state commissions have declined to exercise such jurisdiction.

North Carolina has excluded CMRS form the definition of "public utility." See, G.S. 62-3(23)j. Pursuant to this, the Commission issued its Order Concerning Deregulation of Wireless Providers in Docket Nos. P-100, Sub 114 and Sub 124 on August 28, 1995, concluding that the Commission no longer has jurisdiction over cellular services. Accordingly, Carolina

West has now requested the Commission to issue an Order stating that it does not have jurisdiction to designate CMRS carriers ETC status for the purposes of receiving federal universal service support.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that it should grant Carolina West's Petition and issue an Order stating that it lacks jurisdiction to designate ETC status for CMRS carriers. As noted above, in its August 28, 1995, Order in Docket Nos. P-100, Sub 114 and Sub 124, the Commission observed that G.S. 62-3(23)j, enacted on July 29, 1995, has removed cellular services, radio common carriers, personal communications services, and other services then or in the future constituting a mobile radio communications service from the Commission's jurisdiction. 47 USC 3(41) defines a "state commission" as a body which "has regulatory jurisdiction with respect to the intrastate operation of carriers." Pursuant to 47 USC 214(e)(6), if a state commission determines that it lacks jurisdiction over a class of carriers, the FCC must determine which carriers in that class may be designated as ETCs. Given these circumstances, it follows that the Commission lacks jurisdiction over CMRS services and the appropriate venue for the designation of ETC status for such services is with the FCC. Accord., Order Granting Petition, ALLTEL Communications, Inc., June 24, 2003.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 28th day of August, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

pb082503.01

DOCKET NO. P-100, SUB 133d

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
General Proceeding to Determine Permanent	)	ORDER ADOPTING
Pricing for Unbundled Network Elements	)	PERMANENT UNBUNDLED
	)	NETWORK ELEMENT
	)	RATES FOR BELLSOUTH
	)	TELECOMMUNICATIONS, INC.

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, beginning on November 18, 2002 and ending on November 21, 2002

BEFORE: Commissioner James Y. Kerr, II, Presiding; Chair Jo Anne Sanford, Commissioners J. Richard Conder, Robert V. Owens, Jr., Sam J. Ervin, IV, and Michael S. Wilkins

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Edward L. Rankin, III – General Counsel NC
Post Office Box 30188
Charlotte, North Carolina 28230-0188

Andrew D. Shore, Attorney at Law
R. Douglas Lackey, Attorney at Law
675 West Peachtree Street N.E.
Suite 4300
Atlanta, Georgia 30375-0747

FOR COVAD COMMUNICATIONS:

Charles E. Watkins, Senior Counsel
1230 Peachtree Street N.E.
Promenade II, 19th Floor
Atlanta, Georgia 30309

Henry C. Campen, Jr., Attorney at Law
Parker, Poe, Adams & Bernstein
1400 First Union Capitol Center
Raleigh, North Carolina 27602-0389

FOR AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC:

Loretta A. Cecil, Attorney at Law
Womble, Carlyle, Sandridge & Rice
1201 West Peachtree Street
Suite 3500
Atlanta, Georgia 30309

Suzanne Ockleberry, Attorney at Law
1200 Peachtree Street N.E.
Suite 8107
Atlanta, Georgia 30331

FOR MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, MCI WORLDCOM COMMUNICATIONS, INC., AND MCI WORLDCOM NETWORK SERVICES, INC.:

Dulaney L. O'Roark, III, Attorney at Law
Concourse Corporate Center Six
Six Concourse Parkway
Suite 3200
Atlanta, Georgia 30328

Ralph McDonald, Attorney at Law
Bailey & Dixon
Post Office Box 1351
Raleigh, North Carolina 27602-1351

FOR THE DEPARTMENT OF DEFENSE AND ALL OTHER FEDERAL EXECUTIVE AGENCIES:

Terrance A. Spann, Attorney at Law
Department of Defense
901 North Stuart Street
Suite 700
Arlington, Virginia 22203

FOR THE USING AND CONSUMING PUBLIC:

Lucy E. Edmondson, Staff Attorney
Robert S. Gillam, Staff Attorney
Public Staff - North Carolina Utilities Commission
4326 Mail Service Center
Raleigh, North Carolina 27699-4326

BY THE COMMISSION: Section 251(c)(3) of the Telecommunications Act of 1996 (TA96, the 1996 Act, or the Act) requires incumbent local exchange companies (ILECs) to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Section 252(d) provides as follows:

(1) Interconnection and network element charges. – Determination by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

Pursuant to this statutory mandate, the Federal Communications Commission (FCC) has determined that prices for unbundled network elements (UNEs) must be based on the total element long-run incremental cost (TELRIC) of providing those elements.[1] The "forward-looking economic cost of an element is the sum of (1) the total element long-run incremental cost of the element [TELRIC,] and (2) a reasonable allocation of forward-looking common costs,"[2] incurred in providing a group of elements that "cannot be attributed directly to individual elements."[3] Further, TELRIC "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent['s] wire centers."[4]

The FCC's TELRIC methodology, which was upheld by the United States Supreme Court,[5] was the basis for the UNE prices established by this Commission in its order issued December 10, 1998[6] (the *First UNE Order*) and subsequent orders in this docket.

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15844-47, paras. 674-79 (1996) (Local Competition First Report and Order) (subsequent history omitted); 47 C.F.R. §§ 51.501-51.515 (2001).

[2] 47 C.F.R. § 51.505(a).

[3] 47 C.F.R. § 51.505(c)(1).

[4] 47 C.F.R. § 51.505(b)(1).

[5] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

[6] 88 N.C.U.C. 139 (1998).

On February 5, 2002, WorldCom, Inc. (WorldCom) filed its Petition for Expedited Commission Action to Promote Local Competition. In its Petition, WorldCom argued that UNE rates were too high in North Carolina which inhibited competition.

By Order dated February 7, 2002, the Commission requested comments from interested parties on WorldCom's Petition.

By Order issued March 20, 2002 in response to WorldCom's Petition, the Commission initiated a new UNE proceeding, restricted to BellSouth Telecommunications, Inc. (BellSouth) only. The Commission stated in the *March 20, 2002 Order* that the primary reasons for the new proceeding were that the data on which the current UNE rates were based were several years old and that a new loop model, the BellSouth Telecommunications Loop Model (BSTLM), was available and used in other states. The *March 20, 2002 Order* stated that the validity of the BSTLM would be assumed and that the case would be restricted to the inputs and assumptions affecting recurring and nonrecurring UNE rates. The Commission specified that neither collocation rates nor nonrelevant policy issues would be considered.

On April 19, 2002, the Commission issued its *Order Establishing Schedule for New UNE Proceeding* wherein it set dates for prefiled testimony and an evidentiary hearing to begin on November 18, 2002.

The prefiled testimony of the following witnesses was either presented at the hearing or entered into the record by stipulation of the Parties: BellSouth witnesses W. Bernard Shell, Jane Raulerson, W. Keith Milner, Walter S. Reid, G. David Cunningham, D. Daonne Caldwell, John A. Ruscilli, and Dr. Randall S. Billingsley (direct and rebuttal), and witness James W. Stegeman (rebuttal); Department of Defense and all other federal executive agencies (jointly referred to as the Department of Defense) witness Harry Gildea (rebuttal); Public Staff witness John Robert Hinton (rebuttal); AT&T of the Southern States, LLC (AT&T)/WorldCom witnesses Thomas Weiss, Steven Turner, Catherine Pitts, Brian Pitkin, Joseph Gillan, and Greg Darnell (rebuttal); AT&T, WorldCom, Birch Telecom of the South, Inc., Access Integrated Networks, Inc., ITC DeltaCom Communications, Inc., NuVox Communications, Inc., and Network Telephone Corporation (collectively the competing local providers - CLPs) witness Joseph Gillan (revised rebuttal testimony and exhibits).

The evidentiary hearing was held beginning on November 18, 2002 and ending on November 21, 2002.

After requests for extensions of time were filed and granted, on February 14, 2003, Proposed Orders, Briefs, and Issue Matrices were filed by the Parties, as follows:

Company	Issues Matrix	Proposed Order	Post-Hearing Brief
BellSouth	X		X
AT&T/WorldCom	X	X	X
Covad			X
Department of Defense			X
Public Staff	X	X	

The Parties appear to agree on what the actual issues are before the Commission for a decision. AT&T/WorldCom, BellSouth, and the Public Staff each filed an Issues Matrix and all three Matrices reflect the same 17 issues to be addressed and decided by the Commission, as follows:

<u>Issue No. 1</u> – Do BellSouth's cost models and cost studies comply with the 1996 Act and the FCC's UNE pricing rules?

<u>Issue No. 2</u> – Should the engineered, furnished, and installed cost of outside plant be calculated using in-plant factors, as is done in BellSouth's cost study filing in this docket, or by utilizing so-called "bottoms-up" inputs in the BSTLM?

<u>Issue No. 3</u> – If in response to **Issue No. 2** above the Commission determines that it is appropriate to utilize in-plant factors, Issue No. 3 is moot. If, however, the Commission determines that it will utilize "bottoms-up" inputs in the BSTLM to calculate UNE rates, then what are the appropriate "bottoms-up" inputs?

<u>Issue No. 4</u> – Should the Commission use multiple scenarios in the BSTLM to set UNE loop rates?

<u>Issue No. 5</u> – How should shared digital loop carrier equipment costs be allocated in the BSTLM?

<u>Issue No. 6</u> – Is BellSouth's use of a melded value based on the costs of its two vendors' prices for digital loop carrier (DLC) equipment appropriate?

<u>Issue No. 7</u> – What fill factors should be used in BellSouth's cost model?

<u>Issue No. 8</u> – What is the appropriate cost of capital to use in calculating BellSouth's UNE rates?

<u>Issue No. 9</u> – What depreciation rates/economic lives should be used in calculating BellSouth's UNE rates?

<u>Issue No. 10</u> – What are the appropriate shared and common cost factors to use in calculating BellSouth's UNE rates?

<u>Issue No. 11</u> – Is it appropriate to decrease UNE rates based on AT&T/WorldCom's forecasted "growth" adjustment?

<u>Issue No. 12</u> – What is the appropriate application of the Commission's previously ordered geographic deaveraging methodology to the UNE loop costs produced by the BSTLM?

<u>Issue No. 13</u> – Are AT&T/WorldCom's proposed adjustments to BellSouth's switching cost study appropriate?

<u>Issue No. 14</u> – What are the appropriate task times and other inputs to use in calculating BellSouth's nonrecurring rates?

<u>Issue No. 15</u> – Should disconnect costs be recovered through nonrecurring charges?

<u>Issue No. 16</u> – Should the costs BellSouth incurs when CLPs access BellSouth's operations support systems (OSS) be recovered as a nonrecurring charge on a per Local Service Request (LSR) basis?

<u>Issue No. 17</u> – Are AT&T/WorldCom's proposed adjustments to BellSouth's Daily Usage File (DUF) cost study appropriate?

On February 20, 2003, the FCC reached a decision in its UNE Triennial Review proceeding. The FCC released its Order in this regard on August 21, 2003[1]. Part of the FCC's decision was a clarification on the cost of capital and depreciation used in TELRIC-compliant cost studies. The cost of capital and depreciation are identified as separate issues to be decided in the instant docket, specifically Issue Nos. 8 and 9.

On August 8, 2003, the Commission issued an *Order Requesting Late-Filed Exhibits* which asked for AT&T/WorldCom and BellSouth to file additional information regarding the DUF cost studies.

By Order dated August 27, 2003, the Commission scheduled a conference call among the Parties to discuss outstanding matters related to this docket to be held on August 28, 2003.

On August 28, 2003, the Commission held the conference call as scheduled.

On August 29, 2003, the Commission issued its *Order Requesting Late-Filed Exhibit.* The Commission requested the Public Staff to provide a late-filed exhibit containing the UNE rates produced by the Public Staff's recommendations with geographic deaveraging based on (1) loop investment; and (2) UNE cost by wire center along with the statewide average rate for each UNE.

On September 2, 2003, AT&T/WorldCom and BellSouth separately filed their late-filed exhibits on the DUF cost studies in compliance with the Commission's *August 8, 2003 Order.*

On October 17, 2003, the Public Staff filed its late-filed exhibit showing UNE rates as ordered in the Commission's *August 29, 2003 Order.*

A glossary of the acronyms referenced in this Order is attached hereto as Appendix A.

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[1] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* issued in CC Docket No. 01-338 (Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers), CC Docket No. 96-98 (Implementation of the Local Competition Provisions of the Telecommunications Act of 1996), and CC Docket No. 98-147 (Deployment of Wireline Services Offering Advanced Telecommunications Capability) (Triennial Review Order or TRO).

WHEREUPON, based upon a careful consideration of the entire record in this proceeding, the Commission now makes the following

FINDINGS OF FACT

1. BellSouth's cost models, from a design perspective, are capable of developing UNE prices which comply with the Act and the FCC's pricing rules, when the factors and inputs are correctly calculated.

2. It is appropriate for BellSouth to use a "tops-down" approach in its cost studies.

3. Since the Commission determined that the "tops-down" approach should be used, Issue No. 3 concerning the appropriate inputs for a "bottoms-up" model is moot.

4. It is appropriate for BellSouth to use its proposed five-scenario methodology in the BSTLM to determine BellSouth's UNE loop rates.

5. It is appropriate for BellSouth to allocate investments on a per DS0 equivalent basis.

6. BellSouth's use of a melded value based on the costs of its two vendors' prices for DLC equipment is appropriate.

7(a). An input value higher than 1.25 pairs is not justified for residential locations, and BellSouth should adjust its input values accordingly in its cost study.

7(b). It is appropriate for BellSouth to base its factors for feeder facilities on the FCC's inputs from the Synthesis Model, since BellSouth does not have utilizations by density.

7(c). BellSouth's proposed interoffice transport factors and methodology are appropriate for use in this proceeding.

7(d). BellSouth's proposed transport study input for busy hour CCS per circuit of 18.7 CCS is appropriate.

8. BellSouth's reasonable and appropriate forward-looking cost of capital associated with the provision of UNEs and interconnection is 9.79%, based on the following capital structure and cost rates:

Cost Weighted Component	Ratio	Rate	Cost Rate
Long-Term Debt	40%	7.23%	2.89%
Common Equity	60%	11.50%	6.90%
Total	100%		9.79%

The Commission will consider the potential impact of the FCC's TRO on the cost of capital as reflected in the UNE rates for BellSouth, Carolina Telephone and Telegraph Company (Carolina), Central Telephone Company (Central), and Verizon South, Inc. (Verizon) by soliciting comments in this regard by separate order.

9. The reasonable and appropriate economic lives and future net salvage values for calculating depreciation rates for use in the cost studies continue to be those within the FCC-authorized ranges and approved by the Commission in the *First UNE Order* with the exception of digital switching, which should have a life of 12 years.

The Commission will consider the potential impact of the FCC's TRO on depreciation as reflected in the UNE rates for BellSouth, Carolina, Central, and Verizon by soliciting comments in this regard by separate order.

10. BellSouth's proposed shared and common cost factors, adjusted for the effects of changes to the annual cost factors, cost of capital, capital structure, depreciation rates, and effective tax rates, are reasonable and appropriate. BellSouth should revise its shared and common cost factors to the extent necessary to reflect modifications ordered herein regarding the underlying factors included in the calculations of the shared and common cost factors.

11. It is not appropriate to decrease UNE rates based on AT&T/WorldCom's forecasted "growth" adjustment.

12. BellSouth should group wire centers based on UNE costs, and not investment, as originally decided by the Commission in its March 15, 2001 *Recommended Order Concerning Geographic Deaveraging*. The Commission will explore and address this issue as it relates to Sprint's and Verizon's deaveraging methodology by separate order.

13. The switching costs proposed by BellSouth are reasonable and appropriate subject to the applicable adjustments and modifications concerning the various cost and capital expense factors discussed elsewhere herein to calculate its UNE rates. Vertical features should be unbundled and priced separately from the local switch. Additionally, BellSouth should be allowed to combine vertical features in a bundled package, and thus, offer a composite features per port rate which includes all available vertical features.

14. The nonrecurring charges currently filed and approved by the Commission in BellSouth's Statement of Generally Available Terms and Conditions (SGAT) are reasonable and appropriate for recovering its nonrecurring costs associated with providing UNEs and interconnection.

15. BellSouth should not create a separate recurring rate to recover the costs of disconnection for loops and ports. The costs associated with the disconnection of the various loops and ports are already included in the nonrecurring rates of those UNEs and should not be added to BellSouth's recurring rates.

16. Recovery of one-time developments costs for new OSS and improvements to existing systems through nonrecurring charges on a per-LSR basis are appropriate. The correct nonrecurring charges for OSS costs are those in the SGAT currently approved for BellSouth.

17(a). BellSouth's DUF cost study appropriately attributes costs for specific jobs to the messages being processed by those jobs, whether the messages considered are CLP messages, BellSouth messages, or a combination of both. AT&T/WorldCom's proposed adjustments to the per message costs are inappropriate.

17(b). The BellSouth DUF cost study should be adjusted to reflect a cost recovery period of five years for Optional Daily Usage File (ODUF) and Enhanced Optional Daily Usage File (EODUF), as a five-year period would match the recovery period to the useful economic life of the DUF systems. There should be no change with respect to the 10-year Access Daily Usage File (ADUF) recovery period since BellSouth voluntarily offered and agreed to the longer period and has not requested any change.

17(c). BellSouth's decision to expense computer resource costs is reasonable.

17(d). BellSouth should revisit the Employment Cost Index (ECI) and submit calculations based on updated ECI data. BellSouth should also submit evidence of all contract terms, if any, which tend to show BellSouth is bound to a contractual labor inflation rate that cannot be adjusted based on changes in economic and market conditions.

17(e). AT&T/WorldCom's proposal that the cost for magnetic tape development be removed from the message processing costs for ODUF and moved into the magnetic tape provisioning costs is inappropriate.

17(f)(1). BellSouth's DUF cost study should be amended to reflect input of actual message volume data from October 2001 through November 2002 in the cost per message calculations and this data should also be used to revise the levels of growth in DUF messages for future years contained in the cost study.

17(f)(2). BellSouth should modify its Operating Carrier Number (OCN) cost study assumptions to reflect a decrease in the number of OCNs purchasing ADUF and ODUF over the respective cost study periods.

17(g). BellSouth's cost study does not double recover for switching investment by including Automated Message Accounting (AMA) recording costs in the ODUF recording rate element, which is charged only to CLPs that would not be charged a usage rate for switching due to the fact that they own their own switches.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

ISSUE NO. 1: Do BellSouth's cost models and cost studies comply with the 1996 Act and the FCC's UNE pricing rules?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth believes that its cost models comply with both the Act and the FCC's pricing rules. BellSouth asserted that it developed cost studies to reflect the costs BellSouth expects to incur in providing UNEs and interconnection services on a going-forward basis in North Carolina. Further, BellSouth stated in its Issues Matrix that its cost methodology was approved by the Commission in the past and has been endorsed as TELRIC-compliant by the FCC in approving each BellSouth Section 271 application.

AT&T/WORLDCOM: AT&T/WorldCom stated that with proper inputs, BellSouth's cost models may be used to develop UNE prices which comply with the Act and the FCC's pricing rules. However, AT&T/WorldCom argued that because BellSouth used embedded and other improper inputs in both its "tops-down" and "bottoms-up" versions of the BellSouth Telecommunications Loop Model - Cost Pro© (referred to as the BSTLM-CP or BSTLM), as well as its other cost models, the UNE prices proposed by BellSouth do not comply with the Act or the FCC's pricing rules.

COVAD: Covad maintained that BellSouth's proposed nonrecurring rates should be rejected. Covad contended that the Commission should treat the nonrecurring rates in BellSouth's May 7, 2002 SGAT as the highest potential rates that could be ordered in this proceeding. In support of its position, Covad observed that this Commission and the FCC agreed that BellSouth's nonrecurring SGAT rates are TELRIC-compliant. With regard to recurring UNE rates for digital subscriber line (DSL)-critical network elements, Covad asserted that the Commission should accept the recurring rates set forth in BellSouth's Revised Exhibit JAR-3 [John A. Ruscilli] upon modification to reflect the cost of capital revisions proposed by the Public Staff.

DEPARTMENT OF DEFENSE: The Department of Defense stated that BellSouth's cost models and studies do not comply with the requirements of the Act and the FCC's pricing rules in some important respects. In particular, the Department of Defense maintained that the models and studies do not accurately portray the costs for facilities provided to competitors; they do not account for anticipated productivity improvements; they do not reflect BellSouth's expected distribution cable fill and capital structure; and BellSouth should not require users to pay bundled feature charges, instead, competitors should be permitted to acquire individual features.

PUBLIC STAFF: The Public Staff stated that BellSouth's cost models and studies are in compliance with the Act and the FCC's pricing rules.

DISCUSSION

Pursuant to Section 252(d)[1] of the Act, the FCC determined that prices for UNEs must be based on the TELRIC of providing those elements. According to FCC Rule 51.505(a) and (c)(1), the forward-looking economic cost of an element is the sum of: (1) the TELRIC of the element and (2) a reasonable allocation of forward-looking common costs incurred in providing a group of elements that "cannot be attributed directly to individual elements." The TELRIC of an element, as defined in FCC Rule 51.505(b) is "the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements." Further, pursuant to FCC Rule 51.505(b)(1), TELRIC "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers."

The FCC's TELRIC methodology, which was upheld by the United States Supreme Court, (*Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002)) was the basis for the UNE prices established by this Commission in its December 10, 1998 *Order Adopting Permanent Prices for Unbundled Network Elements* and subsequent orders in this docket.

By *Order* issued March 20, 2002, in Docket Nos. P-100, Sub 133d and P-55, Sub 1022, in response to a WorldCom Petition titled "Petition for Expedited Commission Action to Promote Local Competition", the Commission instituted a new UNE proceeding, restricted to BellSouth only. According to the *Order*, the primary reasons for the new proceeding were that the data on which the current rates are based are several years old and that a new cost model, the BSTLM, is available, and BellSouth is using it in other states. The *Order* specifically concluded the following:

1. That this UNE proceeding be restricted to BellSouth only.

2. That the validity of BellSouth's new loop model, the BSTLM, will be assumed and the scope of the case will include both recurring and nonrecurring rates but will be restricted to the inputs and assumptions affecting those rates.

3. Neither collocation rates nor non-relevant policy issues, such as whether "currently combined" or "ordinarily combined" UNEs should be made available, will be considered.

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[1] "252(d) Pricing Standards.-

"(1) Interconnection and Network Element Charges.- Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

"(A) shall be-

"(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

"(ii) nondiscriminatory, and

"(B) may include a reasonable profit."

By Order issued April 19, 2002, the Commission established the schedule for the new proceeding and stated that the scope of the hearing would be as set forth in its *March 20, 2002 Order*.

In its Post-Hearing Brief, BellSouth reported that in the first phase of this proceeding, the Commission conducted an extensive, detailed investigation into UNE cost methodology and concluded that "the most appropriate basis for establishing permanent prices for UNEs and interconnection is TELRIC plus a reasonable allocation of joint and common costs, which include a reasonable profit or return."[1] Further, BellSouth stated that although the Commission made adjustments to BellSouth's cost studies (e.g., cost of capital, depreciation, etc.), the Commission accepted BellSouth's cost methodology; that is, "The Commission concludes that the cost studies proposed by the ILECs, subject to the modifications outlined herein, are reasonable and appropriate and should be adopted."[2]

Additionally, BellSouth noted that in reviewing BellSouth's Section 271 application for North Carolina, the FCC agreed with the Commission's finding that the prices it established for BellSouth's UNEs were based upon the FCC's TELRIC principles: "The North Carolina Commission demonstrated its commitment to developing UNE prices based on a forward-looking cost methodology and the Commission's [FCC's] TELRIC principles."[3] Furthermore, BellSouth pointed out that after a thorough review of the Commission's decisions in the earlier phases of this docket, the FCC concluded: "[W]e find that BellSouth's UNE rates in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina are just, reasonable, and nondiscriminatory, and are based on cost plus a reasonable profit as required by Section 252(d)(1)."[4]

BellSouth asserted that its fundamental cost methodology supporting the costs BellSouth filed in the instant proceeding is identical to the approach approved by the Commission in the earlier phases of this docket. BellSouth explained that this methodology reflects the costs BellSouth expects to incur in providing competitors with UNEs on a going-forward basis in North Carolina. These costs, according to BellSouth, are based on an efficient network, designed to incorporate currently available forward-looking technology, and recognize BellSouth's provisioning practices and network guidelines associated with these forward-looking technologies as well. Additionally, BellSouth stated that shared and common costs – based on a projection of BellSouth's anticipated expenses – were considered.

BellSouth contended that its costing methodology and cost models fully comply with the Act and the FCC's pricing rules. In developing both recurring and nonrecurring costs, BellSouth reported that it utilized several cost models. As provided in the testimony of BellSouth witness

[1] *First UNE Order* at Page 11.

[2] Id. Page 26.

[3] Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC Docket 02-150, Memorandum Opinion and Order, (*Five-State 271 Order*), Paragraph 48.

[4] Id. Paragraph 33.

Caldwell, BellSouth used the following models in this proceeding: (1) the BSTLM to support the cost development for unbundled loop elements and combinations; (2) Telcordia's Switching Cost Information System/Model Office (SCIS/MO) and the Switching Cost Information System/Intelligent Network (SCIS/IN), and BellSouth's Simplified Switching Tool© (SST) to support the development for all switch-related elements, including ports, usage, and vertical features; (3) the BellSouth Cost Calculator©, which converts input data (material prices/investments by field reporting code, recurring additives, nonrecurring additives, and work times by job function code) into cost; (4) the Capital Cost Calculator©, which produces depreciation, cost of money, and income tax factors that are applied to investments to calculate capital costs; (5) the Synchronous Optical Network (SONET) and Digital Service One (DS1) price calculators, which develop the material price of specialized components used in the provisioning of various network capabilities; and (6) the Nonrecurring Cost Model to develop estimates of the activities and time required to provision the element under study, with the estimates being input into the BellSouth Cost Calculator©. BellSouth stated that the Parties agree that these models are appropriate for use in establishing rates in this proceeding.

BellSouth commented that it developed recurring and nonrecurring costs, as appropriate, for all network elements and interconnection services, including unbundled local loops (*Elements A.1-A.18*); unbundled local exchange ports and features (*Elements B.1-B.5*); unbundled switching and local interconnection (*Elements C.1-C.2*); unbundled transport and interoffice transport (*Elements D.1-D.12*); signaling network, data bases, and service management systems (*Elements E.1-E.6*); selective routing (*Elements G.9 and G.11*); dark fiber (*Element J.1*); loop make-up and line sharing (*Elements J.3-J.4*); access to the DCS *(Element J.5)*; advanced intelligent network services (*Elements K.1-K.2*); access daily usage (*Element L.1*); daily usage files (*Elements M.1-M.2*); service order *(Element N.1)*; and combinations (*Elements P.1-P.58*). BellSouth's proposed rates for these elements are set forth in Revised Exhibits JAR-1, JAR-2, and JAR-3 to the prefiled testimony of BellSouth witness Ruscilli. BellSouth contended that these rates are "just and reasonable" and comply with all applicable requirements of the Act and the FCC Rules.

BellSouth maintained that the CLPs would have the Commission believe that, if BellSouth has used any factor, input assumption, decision, or practice that has any basis in BellSouth's existing network, then its resulting costs cannot be TELRIC-compliant. BellSouth pointed out that the Commission has rejected that argument in the past and suggested that it should again be rejected. BellSouth explained that even in a forward-looking cost study, past results which are indicative of future trends provide valid input in TELRIC-compliant cost analysis. In particular, BellSouth observed that the Commission has recognized that forward-looking studies can include costs that "are sufficiently grounded in the ILECs' actual operating conditions and experience to offer a realistic and achievable measure of the costs on which the Act says prices should be based."[1]

According to BellSouth, in the study filed in this proceeding, BellSouth used year-end expenses and investment data as starting points in developing some cost factors. BellSouth stated that projected forecast information is then used to determine future investments and expenses and, ultimately, the factors. In some cases, however, BellSouth acknowledged that actual historical data was used to develop ratios that predict future relationships with respect to

[1] *First UNE Order* at Page 18.

forward-looking investments and expenses. BellSouth remarked that in all such cases, the historical relationships were used only if they were accurate representations of the future. In other words, BellSouth stated that these factors were only used if the data is a realistic indicator of incremental costs BellSouth "actually expect[s] to incur." Moreover, BellSouth reported that these ratios are applied against forward-looking material prices/investments, and thus, produce forward-looking costs.

BellSouth stated that its new model, the BSTLM, properly computes the costs of loops[1] and related elements. BellSouth provided that, in conjunction with INDETEC International, Inc., CostQuest Associates, and Stopwatch Maps, BellSouth developed a new BellSouth proxy model for loop investment calculations that replaced the loop sample approach used by BellSouth in the first phase of this proceeding.

BellSouth witness Stegeman testified that the BSTLM has been filed and adopted "as-is" in six other BellSouth states over the last 2½ years as the appropriate model to calculate BellSouth's loop and loop-related costs.[2] Furthermore, BellSouth noted that the FCC found the rates produced by the BSTLM in Alabama, Kentucky, Louisiana, Mississippi, and South Carolina to be TELRIC-compliant in accordance with the FCC's pricing rules in its *GA/LA II 271 Order*[3] and in its *Five-State 271 Order*.

BellSouth commented that the new model incorporates geographically coded ("geocoded") BellSouth customer serving addresses and the types and quantities of services at each location. When combined with BellSouth-specific input values, according to witness Caldwell, the model produces loop investments that reflect the forward-looking, most efficient costs of providing service in BellSouth's territory in North Carolina at a more detailed level than a statewide average. Further, witness Caldwell stated that since the BSTLM is a proxy model, it produces a hypothetical network that incorporates efficiencies (for example, cable sizes and route lengths) that may or may not exist in BellSouth's actual network. To satisfy the FCC's TELRIC principles with respect to cost development, BellSouth explained that it is critical that the inputs reflect the costs BellSouth will incur on a going-forward basis. The inputs BellSouth used in running the BSTLM for this proceeding are provided in Exhibit DDC-7, submitted by BellSouth witness Caldwell.

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[1] Witness Caldwell testified that although the model has the ability to develop investments for high-capacity loops, BellSouth confined the use of the BSTLM to loops with transmission rates up to DS1. According to witness Caldwell, the current, limited customer demand for high-capacity loops and high-capacity local channels would create unrealistic results, since common system costs would necessarily be spread over a small number of customers. Witness Caldwell stated that this calculation would not be indicative of an efficient, least-cost network. Thus, BellSouth developed the investments for high capacity (DS3 and higher) facilities on spreadsheets outside the BSTLM.

[2] In its Proposed Order, BellSouth stated that the Alabama, Florida, Kentucky, Louisiana, Mississippi, and South Carolina Commissions have all issued UNE orders adopting loop rates calculated by the BSTLM. BellSouth provided the Commission with these decisions as a late-filed exhibit on December 20, 2002.

[3] Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Georgia and Louisiana, CC Docket No. 01-35, FCC 02-147, Memorandum Opinion and Order (May 15, 2002) (*GA/LA II 271 Order*).

Finally, BellSouth contended that the use of the BSTLM to generate rates in this proceeding is not in dispute. In fact, BellSouth stated that AT&T/WorldCom specifically asked the Commission to order BellSouth to file loop costs generated by the BSTLM.[1] Importantly, BellSouth pointed out that in the Commission's *Order Ruling on WorldCom Petition* issued March 20, 2002, the Commission ordered "[t]hat the validity of BellSouth's new loop model, the BSTLM, will be assumed and the scope of the case will include both recurring and non-recurring rates but will be restricted to the inputs and assumptions affecting those rates."

AT&T/WorldCom did not dispute that BellSouth's cost models "as designed" could produce UNE prices which comply with the Act and the FCC's pricing rules. In fact, in their Proposed Order, AT&T/WorldCom pointed out that they had agreed they would not challenge the design of BellSouth's cost models in this proceeding. Instead, AT&T/WorldCom agreed that this proceeding would be limited to inputs to the models.

AT&T/WorldCom argued that under FCC Rule 51.505(e), BellSouth bears the burden of proving that its proposed UNE prices do not exceed forward-looking costs on a per-unit basis. Additionally, AT&T/WorldCom maintained that FCC Rule 51.505(b)(1) prohibits BellSouth's use of embedded or historical costs. AT&T/WorldCom argued that the factors and other costs used by BellSouth in its "tops-down" version of the BSTLM are based on BellSouth's embedded and historical costs and thus by definition are based on embedded or historical costs.

Additionally, AT&T/WorldCom argued that pursuant to FCC Rule 51.511(a), in determining the forward-looking economic cost of an element, costs must be divided by a reasonable sum of the total units of the element in demand. AT&T/WorldCom argued that BellSouth had failed to comply with this FCC rule for many key elements because BellSouth uses a numerator (cost) that is too high and a denominator (demand) that is too low, resulting in proposed UNE prices which are greatly inflated.

In their Proposed Order, AT&T/WorldCom stated that because they had agreed that this proceeding would be limited to inputs to BellSouth's cost models, the Commission should conclude that BellSouth's cost models, from a design perspective, are capable of developing UNE prices which comply with the Act and the FCC's pricing rules. However, AT&T/WorldCom maintained that the issue of whether BellSouth's cost model inputs develop such compliant UNE prices is another matter. AT&T/WorldCom argued that because BellSouth used factors and other inputs which are based on BellSouth's embedded and historical costs and other improper inputs, BellSouth's proposed UNE prices based on its "tops-down" version of the BSTLM are not TELRIC-compliant; and BellSouth's cost models' inputs do not satisfy the FCC's requirement that a reasonable amount of demand for services must be considered in establishing cost-based UNE prices.

Covad explained that on May 7, 2002, BellSouth filed a revised SGAT adopting any nonrecurring rates ordered in Louisiana that were lower than the nonrecurring rates in North Carolina in order to avoid any conceivable issue during BellSouth's efforts to win Section 271 approval from the FCC. On July 9, 2002, after minor amendment, the Commission approved

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[1] WorldCom's Petition for Expedited Commission Action to Promote Local Competition, February 5, 2002; AT&T's Motion in Support of Petition for Expedited Commission Action, February 22, 2002.

BellSouth's revised SGAT price list in its *Order and Advisory Opinion Regarding Section 271 Requirements* issued in Docket No. P-55, Sub 1022.

Covad observed that BellSouth readily admitted that BellSouth's May 7, 2002 SGAT filing contained nonrecurring rates that were cost-based and TELRIC compliant. Nevertheless, as stated by Covad, on June 10, 2002, in this docket, BellSouth filed a cost study reflecting enormously higher rates. However, Covad pointed out that BellSouth's witnesses admitted that BellSouth could not specifically identify cost elements that had increased since BellSouth's May 7, 2002 SGAT filing, nor could BellSouth provide a cost study to allow a comparison to identify those elements that may have increased since May 7, 2002. Covad argued that BellSouth had failed to fulfill its obligation under 47 C.F.R. §51.507(e) to "prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and section 51.511."

Covad asserted that the Commission should set the nonrecurring rates contained in BellSouth's current SGAT as a ceiling for nonrecurring UNE rates because BellSouth had failed to prove that the prices it seeks "do not exceed the forward-looking economic cost per unit of providing the element." Covad maintained that the FCC, this Commission, and BellSouth all agree that BellSouth's nonrecurring SGAT rates are TELRIC-compliant in North Carolina. Furthermore, Covad argued that BellSouth had failed to provide any evidence supporting the massive increase it seeks in nonrecurring SGAT rates.

In regard to recurring UNE rates for DSL-critical network elements, a list of which was attached to Covad's Post-Hearing Brief as Exhibit A, Covad stated that the Commission should accept the recurring rates set forth in BellSouth's Revised Exhibit JAR-3, submitted by BellSouth witness Ruscilli, subject to the cost of capital revisions proposed by Public Staff witness Hinton.

The Department of Defense contended that BellSouth's models do not accurately portray the costs for facilities provided to competitors. In particular, the Department of Defense asserted that BellSouth's cost models do not account for anticipated productivity improvements. The Department of Defense witness Gildea explained in his direct testimony that it is important to give significant weight to past productivity increases in the process of determining future UNE prices. Witness Gildea observed that according to the Bureau of Labor Statistics, the Labor Productivity Index for the telecommunications industry has experienced steady increases in recent years. Witness Gildea maintained that BellSouth used incorrect inputs in its cost models which result in higher costs. Additionally, the Department of Defense concurred with AT&T/WorldCom that the "bottoms-up" approach would provide a better basis for establishing the UNE charges. Furthermore, the Department of Defense stated that the Commission should reject BellSouth's proposals to increase charges above the levels claimed in obtaining Section 271 approval.

In its Issues Matrix attached to its Proposed Order, the Public Staff stated that BellSouth's cost models and studies are in compliance with the Act and the FCC's pricing rules. The Public Staff noted that the Commission has found several of the models, either the specific version used in this proceeding or earlier versions, to be TELRIC-compliant. However, the

Public Staff pointed out that the inputs used by BellSouth differ from those previously adopted by the Commission. The Public Staff recommended that the Commission find that the cost studies presented by BellSouth, with certain input modifications and adjustments, are reasonable and appropriate for determining its recurring costs of providing UNEs and interconnection.

Further, the Public Staff contended that the nonrecurring charges currently filed and approved by the Commission in BellSouth's SGAT are reasonable and appropriate for recovering its nonrecurring costs associated with providing UNEs and interconnection. The Public Staff accepted the statements made by BellSouth in its May 7, 2002, SGAT filing and its June 20, 2002, Five-State 271 filing with the FCC that the rates contained in the SGAT are cost-based and TELRIC-compliant.

In summary, the Parties' positions on this issue are as follows:

(1) BellSouth believes that its cost models comply with both the Act and the FCC's pricing rules;

(2) AT&T/WorldCom agreed they would not challenge the design of BellSouth's cost models in this proceeding. However, AT&T/WorldCom asserted that many of BellSouth's cost model inputs used in developing recurring and nonrecurring rates are inappropriate;

(3) Covad agreed that the Commission should accept BellSouth's proposed recurring rate development for DSL-critical elements except that the cost of capital input should be revised. Further, Covad contended that the nonrecurring rates in BellSouth's May 7, 2002 SGAT should be the highest potential rates that could be ordered in this proceeding;

(4) The Department of Defense maintained that BellSouth used incorrect inputs in its cost models which result in higher costs. The Department of Defense also stated that the Commission should reject BellSouth's proposals to increase charges above the levels claimed in obtaining Section 271 approval; and

(5) The Public Staff stated that BellSouth's cost models and studies are in compliance with the Act and the FCC's pricing rules. However, the Public Staff also stated that the nonrecurring charges currently filed and approved by the Commission in BellSouth's SGAT are reasonable and appropriate for recovering its nonrecurring costs associated with providing UNEs and interconnection.

Based upon the foregoing, the Commission understands that the Parties are in agreement that BellSouth's cost models may be used to develop UNE prices which comply with the Act and the FCC's pricing rules. However, the Commission also understands that many of the inputs to BellSouth's cost models have been contested in this proceeding. The Parties' proposed modifications and adjustments, along with the question of the appropriateness of BellSouth's nonrecurring charges currently approved by the Commission as filed in BellSouth's SGAT filing on May 7, 2002, will be addressed in the remaining issues discussed in this Order.

Further, the Commission notes that in the *Order Ruling on WorldCom Petition,* issued March 20, 2002, in Docket Nos. P-100, Sub 133d and P-55, Sub 1022, in response to a WorldCom Petition titled "Petition for Expedited Commission Action to Promote Local Competition", the Commission instituted a new UNE proceeding, restricted to BellSouth only and stated that the validity of BellSouth's new loop model, the BSTLM, will be assumed and the scope of the case will include both recurring and nonrecurring rates but will be restricted to the inputs and assumptions affecting those rates.

Accordingly, the Commission believes that BellSouth's cost models and cost studies used in this proceeding will comply with the Act and the FCC's pricing rules when appropriate factors and inputs are used, as addressed in the subsequent issues.

CONCLUSIONS

The Commission concludes that, since the Parties essentially agree that the issues in this proceeding are limited to modifications and adjustments to inputs to BellSouth's cost models, BellSouth's cost models, from a design perspective, are capable of developing UNE prices which comply with the Act and the FCC's pricing rules, when the factors and inputs are correctly calculated.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

ISSUE NO. 2: Should the engineered, furnished, and installed cost of outside plant be calculated using in-plant factors, as is done in BellSouth's cost study filing in this docket, or by utilizing so-called "bottoms-up" inputs in the BSTLM?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth's use of in-plant factors produces TELRIC compliant costs. The in-plant calculation is based upon the latest year-end data available at the time BellSouth's cost studies were conducted. This Commission has previously approved BellSouth's use of in-plant factors. The FCC has concluded that BellSouth's use of these factors and the Commission's reliance upon those factors was consistent with TELRIC principles.

AT&T/WORLDCOM: As stated by AT&T/WorldCom, the engineered, furnished, and installed cost of outside plant should be calculated by utilizing the "bottoms-up" version of the BSTLM with the inputs recommended by AT&T/WorldCom.

COVAD: Covad did not address this issue in its Brief.

DEPARTMENT OF DEFENSE: The "bottoms-up" approach should be employed. The "bottoms-up" approach provides a more accurate gauge of the costs underlying the UNE charges to be established in this case.

PUBLIC STAFF: The Public Staff stated that probably the most hotly contested issue in this proceeding involves whether BellSouth should be permitted to use the "tops-down" approach in determining the costs of UNEs and interconnection. The Public Staff stated that it is appropriate for BellSouth to use a "tops-down" approach in its cost studies.

DISCUSSION

BellSouth stated that the FCC's BellSouth 271 Orders remove any doubt cast by the CLPs concerning whether BellSouth's in-plant loading factors approach in this case is TELRIC compliant. The in-plant factor calculation is based on the latest year-end data available at the time BellSouth's cost studies were conducted. Thus, the foundation of BellSouth's factor development is the most recent calendar year of plant addition activity. As stated by BellSouth, this data provides the most accurate reflection of inputs influencing variables such as vendor's contracts, exempt material prices, and any outsourcing initiatives. The relationship of capitalized labor, exempt material costs and sales tax to material prices is reasonably anticipated to continue into the foreseeable future.

As stated by BellSouth, as in the earlier phase of this docket, the CLPs' principal criticism of BellSouth's UNE cost development focuses on whether those costs are forward looking. The CLPs repeatedly complain that BellSouth's costs are embedded, historical or a product of a monopoly mindset. BellSouth stated that the record evidence in this case demonstrates conclusively that CLPs have proposed network architectures, provisioning processes, and expense reductions that are not attainable by BellSouth, or any other telecommunications provider, in the foreseeable future.

BellSouth commented that the CLPs would have the Commission believe that, if BellSouth has used any factor, input assumption, decision or practice that has any basis in BellSouth's existing network, then its resulting costs cannot be TELRIC compliant. Even in a forward-looking cost study, past results are indicative of future trends which provide valid input in TELRIC-compliant cost analysis. As further stated by BellSouth, the Commission recognized that forward looking studies can include costs that are "sufficiently grounded in the ILECs' actual operating conditions and experience to offer a realistic and achievable measure of the costs on which the access prices should be based." (*First UNE Order*, page 18.)

As further stated by BellSouth concerning the study filed in this proceeding, it used year-end expenses and investment data as starting points in developing some cost factors. Projected forecast information is then used to determine future investments and expenses and ultimately, the factors. BellSouth commented that in some cases actual historical data was used to develop ratios that predict future relationships with respect to forward-looking investments and expenses. Furthermore, historical relationships were used only if they were accurate representations of the future. According to BellSouth, factors were only used if the data is a realistic indicator of incremental costs BellSouth actually expects to incur. BellSouth stated that these ratios are applied against forward-looking material prices/investments and thus produce forward-looking costs.

BellSouth commented that the bottoms-up method requires that specific telephone company activities and associated costs be developed at a more granular level. This method requires a cost developer to attempt to gather inputs that are not readily available or empirically supported at the specific level required by the model. Furthermore, BellSouth stated that the bottoms-up approach does not correlate to more accurate or precise costs. As an example, BellSouth commented that although it is able to determine from existing contracts the per-foot cost of placing cable, actual data is not available to enable determination of how often a particular activity occurs. Furthermore, BellSouth commented that it does not have actual data to forecast how often sod must be cut and restored or how often cable must be bored under driveways or how these probabilities would differ between an urban and rural location.

AT&T/WorldCom witness Pitkin claimed that the development of in-plant factors "reflect the activities associated with smaller construction projects" and thus results in an overstatement of costs. However, BellSouth witness Caldwell demonstrated that large projects do not necessarily cost less than smaller projects and that BellSouth's cost study reflects costs for both large and small construction projects.

As further stated by BellSouth, witness Pitkin complained that BellSouth's loading factors are a "black box." BellSouth commented that its cost study contains the files that developed the in-plant loading factors for both outside plant and circuit accounts, and that the files reflected all calculations and inputs. Therefore, its loading factors have not been hidden from the CLPs or the Commission.

Furthermore, BellSouth commented that its in-plant factors do not distort geographically deaveraged investment, as claimed by witness Pitkin. BellSouth stated that the FCC recognized that the average loading factor will tend to overstate the cost of installing a cable that is larger than average and that it will tend to understate the cost of installing a cable that is smaller than average. BellSouth witness Caldwell stated that the FCC found that use of in-plant factors will provide an accurate estimate of the costs of installing the average size cable when applied to the unloaded cable cost estimate for the average size cable.

BellSouth contended that the level of accuracy through the use of the CLP's bottoms-up approach is no greater than through the use of the in-plant factors. BellSouth stated that "not only has this Commission accepted the use of in-plant factors in developing UNE costs, the FCC has endorsed this approach as well in ruling that North Carolina's current UNE rates satisfy the FCC's pricing rules." Furthermore as BellSouth concluded, "the Commission should continue the use of in-plant factors in this proceeding and reject the CLP's bottoms-up approach."

AT&T/WorldCom witnesses Pitkin and Weiss directed their testimony in opposition to BellSouth's use of in-plant factors versus a "bottoms-up" approach in determining costs. By utilizing in-plant factors and other factors, AT&T/WorldCom argued that BellSouth does not develop "actual" or "direct" costs for much of the network which it models. AT&T/WorldCom argued that this methodology is inaccurate, unreliable and inappropriate because the BSTLM has the capacity to actually or directly develop almost all investments. As stated by AT&T/WorldCom, through various examples, the use of BellSouth's factors can quickly add substantial costs to UNEs without much definitive justification other than their "simplicity."

AT&T/WorldCom argued that unlike the "tops-down" or "factors" approach, the "bottoms-up" approach uses as few loading factors as possible in the development of costs and investments. Furthermore, as stated by AT&T/WorldCom, to the extent factors need to be used, the "bottoms-up" approach applies them in a way that is consistent with the way costs are incurred. AT&T/WorldCom agreed that some factors are necessary to estimate the costs associated with minor materials (i.e., nuts and bolts), but factors should never be used to estimate the cost of major plant items (i.e., poles and conduit) in the way that BellSouth develops costs for these items in using its "tops-down" approach.

As stated by AT&T/WorldCom, BellSouth's "tops-down" approach used factors which reflect BellSouth's embedded and historical costs and thus recovers BellSouth's existing and historical costs. Because BellSouth's loop-related UNE prices are based on BellSouth's use of embedded cost inputs to establish engineering and installation costs, its prices are not compliant with the FCC's rules; and therefore, do not recover forward looking costs.

AT&T/WorldCom commented that BellSouth's approach is inconsistent with the FCC's approach of using specific installed material prices (i.e., for each piece of equipment) to develop forward-looking investment. According to AT&T/WorldCom, BellSouth's methodology cannot identify the total investment for any individual piece of equipment, and therefore cannot be relied on to develop appropriate investments for the network on a deaveraged basis.

The Commission cannot blindly use these embedded relationships as a mechanism for estimating forward-looking installation costs because the mix of technology and the installation practices for those technologies have changed over time. AT&T/WorldCom further stated that the FCC has not adopted the "tops-down" approach for its own universal service purposes, but rather developed a Synthesis Model which engages a multi-year review of cost models and cost model inputs. AT&T/WorldCom stated that the Florida Commission adopted prices based on the "bottoms-up" inputs into the BSTLM rather than relying on the "tops-down" approach and also the Georgia Commission ordered BellSouth to file a "bottoms-up" version.

AT&T/WorldCom stated in its Brief that BellSouth's BSTLM does not calculate all costs based on their "actual" or "direct" costs. For example, costs for items such as cable, feeder/distribution interface equipment and digital loop carrier equipment are based on the "actual" or "direct" investment costs for these items as determined by the BSTLM. AT&T/WorldCom stated that BellSouth calculates other significant material investment items (such as telephone structure) by applying factors to those material costs which have been actually or directly developed.

Furthermore, AT&T/WorldCom commented that BellSouth uses yet another set of factors to develop total engineered and installed costs. These engineering and installation factors are referred to as "in-plant" factors by BellSouth and should not be confused with other "factors" included in the model. AT&T/WorldCom stated that BellSouth's BSTLM develops only a portion of total costs and uses a series of factors to develop all other costs.

As an example of how the model works, AT&T/WorldCom stated that the BSTLM determines the number of feet of cable needed to construct the loop. Next, the model then calculates the investment costs for this cable by multiplying the number of feet of cable needed by the cable vendor's unit price; the product is the actual or direct investment cost of the cable.

AT&T/WorldCom witness Weiss testified, if a 500 ft. long piece of 25-pair aerial cable involves an investment cost of $0.30 per ft. from the cable vendor, then the total direct investment cost is $150.00. It is undisputed that the total material cost of a 500 ft. piece of 25-pair aerial cable does not include any engineering or installation costs. As a comparison, the tops-down BSTLM method produces an investment of $393.20 for this very same plant addition which does not include the cost of installation and engineering. AT&T/WorldCom stated that BellSouth witness Caldwell confirmed the accuracy of witness Weiss's example in testimony.

AT&T/WorldCom commented that the above example provides the Commission with one example of how BellSouth's factors can quickly add substantial costs to UNEs without much definitive justification other than their simplicity.

Unlike the "tops-down" or "factors" approach, the "bottoms-up" approach seeks the use of as few loading factors as possible in the development of costs and investments. One significant difference between the "tops-down" versus "bottoms-up" approach is that with the bottoms-up approach each piece of equipment or material (i.e., whether cable or telephone structure) has a specific unit-cost input. As stated by AT&T/WorldCom, the "bottoms-up" version of the BSTLM explicitly will identify the cost of a pole rather than determining the cost of a pole based on the assumption that the cost of the pole somehow is related to the cost of the cable – as occurs in the tops-down version of the BSTLM. However, AT&T/WorldCom agreed that some "factors" are necessary to estimate the costs associated with minor pieces of equipment such as bolts and nuts, but "factors" should never be used to estimate the cost of major plant items such as poles and conduit as is done in the "tops-down" approach.

The Department of Defense commented that BellSouth proposes a complex set of interrelated models that have important deficiencies. The Department of Defense stated that BellSouth's study of work time inputs for processing and provisioning UNEs rests substantially on present and past work practices. As stated by the Department of Defense, there is no discussion of modifications or adjustments to allow for process improvements in the future, or recognition of work time reductions due to increased productivity for any reason.

Furthermore, the Department of Defense stated that significant productivity improvements should be expected in the telecommunications industry. As a large and diversified telecommunications firm, BellSouth has shared in the significant productivity gains that the industry has enjoyed in the past. The Department of Defense witness Gildea testified that it is important to give significant weight to past productivity increases in the process of determining future UNE prices.

The Department of Defense stated that AT&T/WorldCom commented that since BellSouth's "tops-down" or "factor" approach does not require the application of prices or expenses that can be verified on a unit basis, there is abundant opportunity for confusion in the development of these factors, and by extension opportunity for error in the company's development of proposed UNE prices. The "bottoms-up" approach attempts to use as few loading factors as possible in the development of investments. The Department of Defense commented that with the "bottoms-up" method, each item of material, whether cable or structure, has a specific unit-cost input. However, the bottoms-up approach necessarily employs factors to estimate the costs of minor pieces of equipment such as exempt material, rather than major plant items such as poles and conduit.

As stated by the Department of Defense, a bottoms-up approach should yield more accurate cost estimates than BellSouth's tops-down methodology. However, with incorrect inputs a bottoms-up approach can still yield costs that are much greater than what might be the expected results.

As stated by the Public Staff, BellSouth witness Caldwell described BellSouth's methodology as identical to the approach used by BellSouth in earlier phases of this docket. Furthermore, as commented by the Public Staff, she contended that the CLPs' advocacy for a bottoms-up approach is beyond the scope of this proceeding, as the Commission restricted it to the inputs and assumptions affecting rates. Additionally, witness Caldwell contended that a bottoms-up approach requires the use of many more inputs which add complexity but not accuracy to the cost studies.

The Public Staff stated that AT&T/WorldCom witness Pitkin contended that BellSouth's loading factors are based on the installation of existing equipment and the accounting relationships from BellSouth's existing network design. Therefore, the application of these factors does not reflect technological advances that reduce installation costs when developing forward-looking costs.

As commented upon by the Public Staff, witness Pitkin testified that BellSouth's model is designed to calculate investments at a very discrete level, although BellSouth's study only utilizes a portion of the model's capabilities. Furthermore, witness Pitkin commented that the tops-down methodology calculates average costs and it is inappropriate to rely on averages when UNE rates are supposed to be geographically deaveraged.

The Public Staff stated that CLP witness Weiss testified that the tops-down approach used by BellSouth distorts costs. For example, BellSouth's study assumes that the installed costs of a 25-pair aerial cable and 50-pair cable differ by a factor equal to the difference in cable cost, whereas little, if any, more miscellaneous material and other costs are required to place the same length of either size cable. Thus, a comparison of installed costs of different sized facilities would indicate a distorted ratio between the costs calculated using the tops-down approach versus actual costs.

In response to witness Pitkin's arguments that adjustments should be made to BellSouth's loading factors due to technological advances in installation practices, witness Caldwell pointed to the extremely labor intensive aspects of installing outside plant equipment and cable, which would not experience dramatic changes in installation practices due to technological advancements. With regard to the argument that "in-plant" factors distort the investment costs, witness Caldwell testified that the BSTLM generates the material cost of an average cable, which reflects various cable sizes.

The Public Staff commented that the testimony in this case reveals the fundamental issue between BellSouth and the CLPs is whether BellSouth should be required to use all of the capabilities of the BSTLM in its cost studies. The Public Staff commented that this issue is well within the scope of this proceeding. Furthermore, BellSouth's in-plant approach is viewed as being similar to, but not identical to the approach used in earlier phases of this docket.

As stated by the Public Staff, as a general position, it believes that either the "tops-down" or a "bottoms-up" methodology can produce forward-looking cost studies and TELRIC-compliant rates if the factors and inputs are calculated correctly. The Public Staff commented that it is familiar with the tops-down approach and agrees with BellSouth that it avoids the substantial complexity of the bottoms-up approach without sacrificing accuracy. Furthermore, the Public Staff stated that the CLPs have not presented sufficient evidence to justify BellSouth having to use a bottoms-up approach.

Furthermore, the Public Staff stated that it was concerned that many of the recommendations proposed by witness Pitkin to the bottoms-up study have not been supported with adequate evidence. The number of recommended input adjustments could easily number in the hundreds, with many of those being contended as overstated without providing justification. The Public Staff stated that it was not inclined to adopt such a large number of adjustments without a more thorough review for reasonableness.

The Public Staff stated that it understands witness Pitkin's concern that a tops-down approach that calculates average costs is inappropriate when UNE rates are supposed to be deaveraged. As stated by the Public Staff, it is not recommending modification to the geographically deaveraged zones for BellSouth at this time or the manner in which each zone's rates are calculated, and so the "in-plant" factors will only be used to calculate statewide UNE costs. In summary, the Public Staff stated that it is appropriate for BellSouth to use a "tops-down" approach in its cost studies.

The Commission notes that overall the application of the tops-down or bottoms-up approach, given adequate and reasonable inputs, should yield similar cost outputs. The Commission believes that expanding the number of inputs, as would be the case with a bottoms-up approach, would not necessarily increase the accuracy of the cost outputs. Many of the issues discussed in this proceeding, such as productivity gains, industry changes and advancements in various installation practices and discrete unit specific count versus aggregated investment categories are arguably subject areas which require a great deal of review and sensitivity analyses to prove applicable to the development of UNE costs.

CONCLUSIONS

The Commission concludes that it is appropriate for BellSouth to use a "tops-down" approach in its cost studies.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

ISSUE NO. 3: If in response to Issue No. 2 above the Commission determines that it is appropriate to utilize in-plant factors, Issue No. 3 is **moot.** If, however, the Commission determines that it will utilize "bottoms-up" inputs in the BSTLM to calculate UNE rates, then what are the appropriate "bottoms-up" inputs?

DISCUSSION

The Commission has found in Finding of Fact No. 2 that it is appropriate for BellSouth to use a "tops-down" approach in its cost studies. Therefore, the Commission believes that this issue is moot.

CONCLUSIONS

The Commission concludes that Issue No. 3 is moot due to the fact that the Commission has found in Finding of Fact No. 2 that it is appropriate for BellSouth to use a "tops-down" approach in its cost studies.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

ISSUE NO. 4: Should the Commission use multiple scenarios in the BSTLM to set UNE loop rates?

POSITIONS OF PARTIES

BELLSOUTH: Yes. BellSouth asserted that the use of multiple scenarios in establishing BellSouth's rates for loops and loop combinations has been accepted by every state in BellSouth's region to consider this issue. BellSouth maintained that calculating rates using only the combo scenario leads to an under-recovery of BellSouth's costs because the combo scenario does not accurately reflect the costs associated with unbundled standalone loops, unbundled integrated services digital network (ISDN) loops, or copper-only loops.

AT&T/WORLDCOM: No. AT&T/WorldCom argued that the multiple scenarios proposed by BellSouth are not consistent with a single forward-looking network required by FCC Rules. AT&T/WorldCom maintained that forward-looking costs should be determined by using the UNE combo scenario, which is the scenario proposed by BellSouth that most closely approximates a forward-looking network design.

COVAD: Covad did not take a specific position on this issue.

DEPARTMENT OF DEFENSE: The Department of Defense did not take a specific position on this issue.

PUBLIC STAFF: Yes. The Public Staff argued that it is appropriate for BellSouth to use multiple scenarios in determining the loop investment amounts.

DISCUSSION

AT&T/WorldCom witness Darnell stated in his rebuttal testimony that in BellSouth's five scenario approach, each of the five scenarios assumes different engineering design limits, which forces BellSouth's loop model, the BSTLM, to construct a different type of network in each scenario. Witness Darnell argued that BellSouth's loop cost development does not design the most efficient network. Witness Darnell asserted that there should just be one multi-service network design that provides the greatest efficiency. Witness Darnell noted that BellSouth assumes in each of the five scenarios that all customers who could possibly want a particular type of communications service will require UNEs to provision that type of service. Witness Darnell maintained that BellSouth uses maximum potential customers in each scenario using a customer's historical preferences as a guide and does not use actual demand or forecasted demand in the development of its UNE costs. Witness Darnell stated that as an example, in the development of its proposed ISDN digital-grade loop rates BellSouth assumes a network design to provide ISDN service to the residential plain old telephone service (POTS) customers BellSouth had in calendar year 2000. Witness Darnell argued that it is not reasonable to assume that all residential POTS customers would want ISDN service.

Witness Darnell maintained that BellSouth's cost modeling approach ignores economies of scope. Witness Darnell defined economy of scope as the ability of one system to provide multiple products or services cheaper than two or more systems can provide the same total number of products or services. Witness Darnell stated that this is due to the complementary nature of certain steps of productions between certain products. In contrast, witness Darnell noted, economy of scale is the ability of one system to provide one product or service cheaper than two or more systems can provide the same total number of that one product or service.

Witness Darnell asserted that since BellSouth's model ignores economies of scope, its cost model approach causes rates to exceed those that would exist in a competitive marketplace. Witness Darnell maintained that there are certain economies, or efficiencies, that are gained when multiple types of telecommunications services are provided over the same network. Witness Darnell stated that as an example, some residential customers will want both POTS for voice and DSL service for their personal computers. Witness Darnell argued that an efficient carrier would engineer and deploy a network that could accommodate both POTS and DSL services at the same time using complementary network facilities and production methods. Witness Darnell maintained that the result is that the carrier is able to provide two services without having to double its costs, thus lowering its overall cost of providing each unit of service.

Witness Darnell argued that BellSouth witness Caldwell's assertion that BellSouth's five-scenario approach is justified because certain digital and analog services are incompatible is incorrect. Witness Darnell maintained that BellSouth can and does consider the location of its digital loops to minimize the cost of its analog loops. Likewise, witness Darnell noted, BellSouth can and does consider the location of its analog loops to minimize the cost of its digital loops. He also maintained that BellSouth provides data and voice services using a single network configuration, as is the case when BellSouth provides its voice and FastAccess DSL services over the same line and when fiber optical cable hangs on the same telephone pole or lies in the same conduit with analog copper facilities.

Witness Darnell stated that a specific example of BellSouth's integrated data and voice network is its current initiative to retrofit its network with dual-purpose line cards. Witness Darnell maintained that BellSouth is using dual-purpose line cards in DLC equipment at remote terminals so that it can provide both voice and DSL data services over one existing copper wire. Witness Darnell argued that BellSouth's combined voice and data network exists today and is expected to expand in the future.

Witness Darnell asserted that engineering and deploying a combined voice and data network at one time reduces labor cost. In addition, he stated, material costs incurred in the construction of the combined POTS and DSL network would be less than if the POTS or DSL networks were built at separate times. In short, witness Darnell maintained, BellSouth's loop cost modeling methodology fails to incorporate these economies of scope, and therefore, the loop costs calculated by BellSouth are overstated.

Witness Darnell argued that there are additional problems with the assumptions underlying BellSouth's proposed copper scenario. Witness Darnell maintained that in the development of its proposed Unbundled Copper Loop rate, BellSouth's copper scenario assumes an all-copper network, even though in reality many customers could not receive service with all-copper loops because of the significant loop-length limitations that exist for transmitting signals over copper loops. Witness Darnell maintained that BellSouth's methodology produces copper-loop lengths that are much longer than could be used in practice, and its copper scenario overstates the average length of a copper loop. He explained that because copper-loop costs vary according to loop length, the copper scenario overstates cost. Witness Darnell argued that BellSouth's copper scenario assumes a network design that is inefficient, impractical, and more expensive than the forward-looking network.

Witness Darnell maintained that BellSouth's use of a copper-only scenario to determine the costs of a copper loop is an example of a systemic problem throughout BellSouth's loop cost methodology. Witness Darnell asserted that BellSouth's methodology never attempts to determine the cost of the forward-looking loop; it attempts to determine the cost of a technology. Witness Darnell stated that the forward-looking loop is an amalgamation of many different technologies depending on the distance the customer is located from the wire center, the geography between the customer and the wire center, and the demand density around the wire center. Witness Darnell maintained that as such, the forward-looking loop that should be costed is not any one technology but an average of all technologies to satisfy customer demand in each wire center.

Witness Darnell asserted that the FCC has UNE pricing rules that address economies of scale and scope and that BellSouth's costing methodology clearly violates three of the FCC's Rules. Witness Darnell stated that BellSouth's costing methodology violates FCC Rules 51.505(b), 51.505(b)(1), and 51.511(a). Witness Darnell stated that FCC Rule 51.505(b) requires the cost of a UNE to be calculated by taking as a given the ILEC's provision of other elements. Witness Darnell maintained that FCC Rule 51.505(b)(1) requires that UNE rates be set based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing locations of the ILEC's wire centers. Witness Darnell noted that FCC Rule 51.511(a) requires UNE rates to be set by taking the cost of the UNE as defined in 51.505(b) and dividing it by the anticipated wholesale and retail demand for the UNE. Witness Darnell noted that FCC Rule 51.511(a) ensures that the sum of the parts equals the total forward-looking cost.

Witness Darnell argued that BellSouth's current network design contains inefficiencies and excesses as compared to the network cost that would be recovered in a competitive marketplace.

Witness Darnell argued that the Commission should adopt a network design for cost modeling purposes that is different from both the actual network in place and the network design BellSouth is deploying for the future. Witness Darnell noted that the Commission should do this so that the costs, and, ultimately UNE rates ordered by the Commission, can best approximate the rates that would exist in a competitive marketplace. Witness Darnell stated that in a competitive marketplace, the rates that the market will permit companies to charge customers can be no higher than the rates the least-cost, most-efficient firm in the market would charge.

Witness Darnell maintained that BellSouth's loop model can determine the cost of all UNEs at the same time using the single least-cost, most-efficient network design. Witness Darnell stated that the cost modeling flaws can be corrected. However, witness Darnell maintained, AT&T/WorldCom requested BellSouth provide it with the information necessary to make these corrections, but BellSouth has blocked all attempts to obtain the information necessary to correct these cost modeling flaws.

Witness Darnell noted that although other State Commissions have permitted BellSouth to use its five-scenario costing methodology to develop UNE rates, they did so begrudgingly and have not affirmatively endorsed BellSouth's multiple-scenario costing methodology as the correct way to determine UNE rates. Witness Darnell quoted the Alabama Commission which stated in its *May 2002 Order*[1]:

> [t]he Commission accepts the use of the five different scenarios for the purposes of determining TELRIC rates in this proceeding. That is not to say, however, that we do not have concerns with BellSouth's multiple scenario approach. In particular, we are concerned that the various scenarios presented by BellSouth do not capture the economies of scale associated with the provision of multiple services.

The Commission notes that the Alabama Commission further stated in its *May 2002 Order*:

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[1] May 31, 2002 Order issued by the Alabama Public Service Commission in the Matter of Generic Proceeding to Establish Prices for Interconnection Services and Unbundled Network Elements, issued in Docket 27821 (*May 2002 Order*).

> We will, therefore, investigate in future proceedings the question of whether a model which prices all elements and combinations in a single scenario can be developed. For the purposes of this proceeding, however, we have focused our efforts on the merits of the Combo and BST 2000 scenarios proposed by BellSouth.

Witness Darnell also noted that the Alabama Commission issued an order in August 2002 to investigate having a follow-up UNE cost case to determine the cost of all loop UNEs with one modeling scenario.

Witness Darnell maintained that the Florida Commission stated in its UNE cost case order that:

> [i]t appears to us that a single unified network design is most appropriate. However, we believe this goal is not attainable based on the record.

Witness Darnell asserted that these Commissions felt they had no choice but to accept BellSouth's methodology at this time and that this Commission should not reward BellSouth's litigation position and accept the five-scenario approach in North Carolina.

Witness Darnell argued that the Commission should use the BellSouth combo scenario to set UNE rates in North Carolina. Witness Darnell maintained that this scenario should be chosen because, of the scenarios presented in this proceeding, it most closely replicates the total cost that would be recovered from customers in a competitive marketplace. Witness Darnell asserted that the combo scenario is the most appropriate because the overwhelming majority of network element demand comes from POTS.

Witness Darnell concluded that if the Commission permits BellSouth to use its five-scenario loop cost methodology, the UNE rates available to CLPs will be higher than the costs that could be incurred by BellSouth; this will provide BellSouth a competitive advantage over CLPs, and competition will not develop as quickly as it should.

Witness Darnell argued in his summary at the hearing that five different networks, as proposed by BellSouth, cannot all be the most economically efficient ways to provide the expected level of service. He asserted that the network design that should be used for costing purposes in this proceeding is the one network design that is the least cost and most efficient to provide service to all demand.

AT&T/WorldCom argued in their Proposed Order that the BSTLM must be adjusted so that it designs a single forward-looking network, as required by the FCC's TELRIC methodology, rather than five networks, as proposed by BellSouth. AT&T/WorldCom noted that BellSouth uses its five network scenarios to generate the costs associated with different elements. AT&T/WorldCom commented that these scenarios assume different engineering design limits which forces the BSTLM to construct a different type of network for each scenario. AT&T/WorldCom asserted that BellSouth's approach artificially increases UNE rates, because it ignores the economies of scope that come from providing multiple services over a single network. AT&T/WorldCom maintained that, for example, BellSouth uses the same network to provide its local voice service and its FastAccess DSL service and indeed provides both services over the same telephone line. AT&T/WorldCom argued that using different scenarios for different products removes cost advantages that a single forward-looking network would provide.

AT&T/WorldCom maintained that the scenario that is most consistent with forward-looking principles is the combo scenario. AT&T/WorldCom asserted that of the scenarios BellSouth has presented in this proceeding, the combo scenario comes closest to replicating the total cost that would be recovered from customers in a competitive marketplace. AT&T/WorldCom argued that rather than distorting UNE rates by using five scenarios, the Commission should determine UNE rates by choosing the combo scenario, which, of the alternatives available, best models a forward-looking network.

AT&T/WorldCom noted that BellSouth relies on decisions by other states that have permitted BellSouth to use its five-scenario costing methodology to develop UNE rates. AT&T/WorldCom footnoted that although the FCC did not reject state commissions' adoption of the five-scenario approach in its Section 271 analysis, the FCC did not approach the issue in total, but rather gave substantial deference to the state commissions' decisions. AT&T/WorldCom asserted that state commissions have expressed serious reservations, however, about the use of BellSouth's multiple-scenario costing methodology.

AT&T/WorldCom argued that the Commission should reject BellSouth's five-scenario approach and determine rates based on the UNE combo scenario. AT&T/WorldCom noted that they are concerned that BellSouth's use of the five scenarios does not truly reflect the cost of a forward-looking network. AT&T/WorldCom maintained that by assuming different networks to handle different types of loops, BellSouth necessarily contemplates network designs that forfeit the efficiencies of using just one network. AT&T/WorldCom commented that although BellSouth asserts that this problem is overcome by exaggerating the demand for the loop types involved, BellSouth did not explain satisfactorily why these adjustments offset the cost savings of using just one network. AT&T/WorldCom asserted that because BellSouth admits that the UNE combo scenario most closely resembles a forward-looking network, this scenario should be used to determine North Carolina UNE rates.

In her direct testimony, BellSouth witness Caldwell provided a description of the five scenarios used by BellSouth in the BSTLM, as follows:

> <u>Scenario #1 – Combo</u> - Used for 2-wire analog unbundled network element - platform (UNE-P) loops.
> This scenario assumes that all switched UNE-P loops served on DLC systems are directly integrated into the BellSouth switch at the DS1 level since these loops are only offered in conjunction with a corresponding switch port. Rather than only using existing customer locations with UNE-P loops as the cost basis for the rates for these UNEs, all POTS, private branch exchange (PBX), Centrex, and Coin services are assumed to be potential UNE-P customers, and the cost study results reflect the average cost of serving all of these locations.

Scenario #2 – BST2001 – Used for all stand-alone UNE loops except copper only loops. This scenario is required to determine the cost of stand-alone loops (those not terminating in a BellSouth switch) except stand-alone copper-only loops. It is identical to the first scenario except stand-alone loops cannot be directly integrated into the BellSouth switch and must be brought into the central office on a nonintegrated basis. Again, all POTS, PBX, Centrex, and Coin customer locations are used as the basis for this cost. The only difference in this scenario and the first occurs in the termination of the loops in the central office.

Scenario #3 – Copper Only – Used for copper-only loops.
This scenario for copper loops is required so that the cost study reflects the cost of providing a copper loop of any length that the CLP might order from BellSouth. Without this scenario, unbundled copper loop costs would be based only on loops less than 12,000 feet from the central office. BellSouth, however, has copper loops that the CLPs may request that are much longer than 12,000 feet. As a result of this mismatch between what the CLPs may order and what is considered in BellSouth's network guidelines, this scenario was created by extending the copper-to-fiber crossover from 12,000 feet to a point where all loops are assumed to be provisioned over copper. The alternative would be to base the unbundled copper loop costs on loops less than 12,000 feet and then limit the offering to loops less than 12,000 feet. This would have restricted CLPs from a large number of potential unbundled copper loop customers.

Scenario #4 – BST2001ISDN – Used for ISDN stand-alone unbundled loops.
Initially, BellSouth based ISDN unbundled loop costs on existing ISDN customer locations. However, some BellSouth wire centers have few, if any, existing ISDN customers. Developing wire center specific costs based on such limited demand for ISDN unbundled loops would not have been appropriate. Therefore, BellSouth assumed that all POTS customer locations were potential ISDN unbundled loop customers and based the costs for these unbundled loops on all ISDN and POTS locations. To do this, all POTS customers were converted to ISDN by using an ISDN card rather than a POTS card in the cost model.

Scenario #5 – COMBOISDN – Used for ISDN UNE-P loops.
The UNE-P scenario for the 2-wire analog UNE-P loop (Scenario #1) was modified by replacing the POTS card at the DLC with an ISDN card to get an ISDN UNE-P loop based on all POTS and ISDN customer locations.

Witness Caldwell argued that BellSouth's use of multiple scenarios is consistent with the FCC's TELRIC pricing rules. Witness Caldwell asserted that the multiple scenarios approach fulfills the FCC's directive that a reasonable projection of the sum of the total number of units be considered. Witness Caldwell maintained that this methodology is appropriate since BellSouth cannot anticipate the ultimate use for any particular loop. Witness Caldwell stated that a loop delivering voice-grade service today potentially can be utilized to provide digital service tomorrow. Witness Caldwell asserted that if the existing loop to the end-user has the technical specifications such that it can provide the loop under consideration, then it is considered to be part of the universe.

Witness Caldwell asserted that BellSouth does not posses any CLP marketing plans. Witness Caldwell maintained that BellSouth cannot anticipate where CLP customers will be located and what types of loops they will purchase. Witness Caldwell stated that the use of one-scenario that CLPs have advocated in prior proceedings adds no accuracy to the model's results since BellSouth cannot project where the particular loop will be located. Witness Caldwell noted that any attempt to assign a loop type to a specific customer location would be an exercise based on unsupportable and arbitrary assumptions. Witness Caldwell commented that by assuming all customer locations are potential candidates for a particular unbundled loop, BellSouth has eliminated the random assignment process. Further, witness Caldwell noted, the assumption that all customers can be converted to unbundled loops or combinations allows BellSouth to reflect economies of scale and scope. Witness Caldwell maintained that the universe is larger in BellSouth's proposal, thus, larger cables can be considered and more efficient network configurations can be established, which results in lower costs.

Witness Caldwell argued that in responding to criticism concerning the use of multiple scenarios, every state commission that ruled on this issue accepted BellSouth's methodology. Witness Caldwell maintained that the Mississippi Public Service Commission (PSC), Kentucky PSC, the PSC of South Carolina, the Alabama PSC, the Florida PSC, and the Louisiana PSC all adopted the multiple scenario methodology proposed by BellSouth.

Witness Caldwell also noted that the FCC, in its approval of BellSouth's GA/LA Section 271 Application, stated in Paragraph 41 of its *Order*:

> We reject commenters' criticism that the multiple scenario approach means that BellSouth's cost model does not capture economies of scope inherent in the network. We agree with BellSouth that because it considers the entire quantity of lines in each scenario, its methodology reflects economy of scope.

In rebuttal testimony, witness Caldwell asserted that witness Darnell is incorrect in his contention that BellSouth's multiple scenario methodology is inappropriate and that only the combo scenario should be used. Witness Caldwell argued that the combo scenario cannot be used exclusively for two reasons. First, witness Caldwell noted, the combo scenario cannot be used to accurately determine the cost of an unbundled loop. Witness Caldwell stated that the combo scenario is based on loops being provided on fiber-based DLC systems directly integrated into the switch at the central office. Witness Caldwell maintained that stand-alone unbundled loops do not terminate in BellSouth switches and, therefore, cannot be terminated at a DS1 level directly into the switch. Witness Caldwell noted that BellSouth studied the cost of network elements that were unbundled in compliance with the FCC's definition of an unbundled local loop released as part of its *UNE Remand Order*. Second, witness Caldwell stated, the combo scenario cannot be used to accurately determine the costs of xDSL-compatible copper loops. Witness Caldwell noted that this scenario assumes all loops greater than 12,000 feet from the wire center are served on fiber-fed DLC systems. Therefore, witness Caldwell remarked, the only copper loops in the combo scenario are loops less than 12,000 feet. Witness Caldwell asserted that if one were to accept the AT&T/WorldCom argument that the combo scenario should be used for all unbundled loops, the average cost of all copper-only loops would be based only on those loops less than 12,000 feet in length. Witness Caldwell maintained that since the

CLPs request copper-only loops of all lengths, this approach is unreasonable and understates the cost.

Witness Caldwell maintained that the CLPs' argument for use of the combo scenario was made in every state where the BSTLM has been filed and before the FCC in response to BellSouth's Five-State and Georgia/Louisiana Section 271 applications. Witness Caldwell noted that every state commission that has used the BSTLM to calculate UNE costs has used the multiple scenarios filed by BellSouth. Witness Caldwell stated that in addition, in the FCC's approval of BellSouth's Five-State Section 271 Application, the FCC rejected the single-scenario argument argued by witness Darnell and stated in Paragraph 61 of its *Order*:

> A proper costing methodology must reflect that some customers purchase stand-alone loops, and BellSouth is entitled to recover the forward-looking costs associated with provisioning those loops that may differ from costs associated with provisioning a loop/switch combination (UNE-platform). WorldCom does not explain how exclusive use of the Combo scenario would provide for recovery of those costs.

Witness Caldwell maintained that it is inappropriate to utilize only one scenario to develop loop investments. Witness Caldwell argued that use of one scenario would result in an under-recovery of BellSouth's costs, because all possible uses for a loop to a specific customer location are not considered with a single scenario. Witness Caldwell provided an example wherein a customer is located 17,000 feet from the central office and is served by copper. Witness Caldwell asserted that if the combo scenario was used exclusively, this customer would never be considered for an unbundled copper loop since, in the combo run, all loops over 12,000 feet are served via DLC on fiber. However, witness Caldwell maintained, CLPs request loops in excess of 12,000 feet to provide xDSL service.

Witness Caldwell noted that if this combo-based loop was used to calculate the costs associated with a stand-alone unbundled loop, the cost is understated. Witness Caldwell maintained that an unbundled loop cannot be directly integrated into BellSouth's switch. Therefore, witness Caldwell noted, before a voice-grade circuit can go to a CLP switch, this loop must be removed from the DLC digital DS1, converted to voice grade, and terminated on the Main Distribution Frame (MDF). Witness Caldwell stated that the costs for this conversion and the MDF termination are not included in the combo scenario. Witness Caldwell argued that multiple scenarios are the only way to ensure that all costs of the various types of loops are properly identified.

Witness Caldwell asserted that even though individual digital signal zeros (DSOs) can be groomed using Next Generation DLC (NGDLC) systems, it is not the most economical means of delivering an unbundled loop to a CLP's collocation space. In fact, witness Caldwell stated, the FCC has reviewed each of the methods required to use integrated DLC in the unbundling of loops and has noted the limitations of each.

Witness Caldwell maintained that as the FCC recognized, all of the integrated digital loop carrier (IDLC) unbundling methods suggested by AT&T/WorldCom have cost implications, yet

CLPs have never presented any evidence to quantify those incremental costs so that such costs would be reflected in the unbundled loop rates. Additionally, witness Caldwell noted, these alternative arrangements consume switch or DCS resources that would need to be considered in any cost analysis.

Witness Caldwell also addressed witness Darnell's contention that the use of multiple scenarios ignores economies of scope. Witness Caldwell maintained that contrary to witness Darnell's assertion, the opposite is true. Witness Caldwell noted that multiple scenarios will optimize the utilization of the network equipment since in each scenario the entire quantity of lines is considered in providing a specific loop type. Witness Caldwell stated that in each of the scenarios BellSouth built, the total quantity of facilities was considered, and thus, this modeling technique fulfills the FCC's directive that a reasonable projection of the sum of the total number of units be considered.

Witness Caldwell also addressed witness Darnell's contention that this modeling technique results in a loss of efficiencies caused by creating networks designed to provide only one type of service. Witness Caldwell argued that witness Darnell is incorrect, and in each of the scenarios, the BSTLM builds a network to serve 2-wire analog loops, 4-wire analog loops, DS1 loops, etc. Therefore, witness Caldwell asserted, witness Darnell's implication that each scenario only models a particular type of loop is not true.

Witness Caldwell further explained why a multiple scenario approach is necessary. Witness Caldwell noted that to accurately capture the costs associated with BellSouth's different loop types – SL1, SL2, ISDN, ADSL, HDSL, UCL-Short, UCL-Long, UCL-ND, UNE-P, etc.- loops which CLPs request, the multiple scenarios approach should be used. Witness Caldwell stated that there are two main reasons why multiple scenarios should be used in the BSTLM instead of just one scenario.

First, witness Caldwell argued that insufficient demand for many types of unbundled loops precluded BellSouth from using existing UNE customer locations as the basis for cost studies of unbundled loops. Witness Caldwell maintained that using only existing UNE customer locations would have resulted in costs that were not representative of future UNE customer locations. Further, witness Caldwell asserted, BellSouth does not possess the CLPs' marketing plans that would allow an accurate projection of loop types by customer location; thus, any such attempt would be arbitrary. Witness Caldwell also noted that there are many types of unbundled loops offered by BellSouth that are not presently ordered in many wire centers.

Second, witness Caldwell asserted, loop deployment guidelines are inconsistent with the network from which CLPs order UNEs. As an example, witness Caldwell noted, network guidelines and the BSTLM state that all loops greater than 12,000 feet from the central office can be most efficiently served using fiber feeder and DLC systems. But in reality, witness Caldwell maintained, a CLP may order an unbundled copper loop of any length – and BellSouth has very long copper loops in its network today. Witness Caldwell maintained that this created an inconsistency between what a CLP might order as a copper loop and what would have been modeled if only one scenario was used. Witness Caldwell stated that a copper loop greater than

12,000 feet ordered by a CLP would never be reflected in a cost study that assumed that no copper loop exceeded 12,000 feet; resulting in an understatement of unbundled copper loop costs/rates.

Witness Caldwell commented that to overcome these problems, BellSouth created five scenarios, each of which contains the same total demand (number of loops, customer locations, etc.) to accurately capture the costs of all types of unbundled loops offered by BellSouth.

Witness Caldwell maintained that all five scenarios use the same total demand from BellSouth's billing systems' extracts such that all economies of scale and scope are reflected in all scenarios. Witness Caldwell explained that because the scenarios are often based on an "all or none" type network some false economies of scale are actually introduced into the cost results.

Witness Caldwell also asserted that the copper-only scenario produces false economies of scale since all loops are served on copper, resulting in larger copper cables and lower per unit costs, than would result from some mix of copper and fiber cables. Witness Caldwell stated that BellSouth's approach is the only method that would capture copper loops in excess of 12,000 feet and also produce a copper loop of unspecified length, as the CLPs have requested.

Witness Caldwell disagreed with witness Darnell's statement that the copper scenario overstates cost. Witness Caldwell noted that even though the copper limit is set at one million feet in BellSouth's BSTLM copper-only scenario, the individual loop types have specific length limits that are taken into consideration when developing costs. Witness Caldwell asserted that from the entire universe of copper loops considered in the copper-only scenario, only loops that meet these length limitations are included when the costs are calculated and there is no overstatement of costs from loops in excess of these limitations, other than the false economies of scale.

Witness Caldwell also disagreed with witness Darnell's claim that BellSouth's methodology never attempts to determine the cost of the forward-looking loop, but rather attempts to determine the cost of a technology. Witness Caldwell asserted that apparently, since witness Darnell proposes the use of the combo scenario, he would agree that the combo scenario does indeed assume the correct technologies for each type of loop based on distance from the central office, type and number of services at a given customer location, and other engineering guidelines. Witness Caldwell stated that given that, the scenario used by BellSouth to determine the costs of stand-alone unbundled loops is identical to the combo scenario with one exception – switched retail services have been converted to stand-alone UNE loops. Witness Caldwell maintained that the only change in the network between these two scenarios occurs in the central office. Witness Caldwell stated that switched retail services can terminate directly into the BellSouth switch while nonswitched stand-alone UNE loops, by definition, cannot terminate into the BellSouth switch. Witness Caldwell noted that other than that one change, the scenarios are identical. Witness Caldwell commented that when witness Darnell states that the combo scenario rather than the scenario for stand-alone loops should be used, he is really arguing that the Commission should assume that stand-alone unbundled loops can be directly integrated into a BellSouth switch. Witness Caldwell maintained that as the Commission and all other state commissions in BellSouth's territory have realized, this is not technically possible and is not the appropriate network design for unbundled loops. Witness Caldwell argued that realizing this, the only alternative approach available in the BSTLM would be to base the cost of the stand-alone UNE loops on existing customer locations that currently have unbundled loops. It is inappropriate, witness Caldwell asserted, to attempt to base a rate on such a limited number of customer locations.

Witness Caldwell stated that as to the ISDN scenarios, BellSouth originally computed ISDN loops based only on existing ISDN customer locations. Witness Caldwell noted that after receiving criticism that the universe of ISDN customers in some wire centers was not adequate as the basis for a forward-looking cost, BellSouth converted to the two ISDN scenarios (i.e., BST2001ISDN and ComboISDN) in which all POTS customer locations are also considered to be potential ISDN locations.

Witness Caldwell stated that every state in which BellSouth has filed the BSTLM – Alabama, Florida, Kentucky, Louisiana, Mississippi, and South Carolina – has adopted the use of the multiple scenarios in determining the recurring costs of loops in their recent generic cost proceedings. Witness Caldwell noted that every state commission that has considered this issue has rejected the same arguments made in this docket by AT&T/WorldCom and has used multiple scenarios to establish UNE rates.

Witness Caldwell stated in her summary at the hearing

> . . . AT&T and WorldCom also argue that one scenario should be used in the BSTLM to model all types of UNE loops rather than the five scenarios proposed by BellSouth. BellSouth would have used one scenario if that one scenario could accurately develop costs for all unbundled loop types, but it can't. For example, when Mr. Pitkin uses his one scenario, what is called the Combo scenario, to develop costs for all unbundled loop types, the resulting ISDN loops are predominately based on DLC-based loops that use a regular POTS, or plain old telephone service, card rather than the proper ISDN card. The result is significantly understated ISDN loop cost. That's why we had to create the ISDN scenario for the BSTLM. When Mr. Pitkin uses his one Combo scenario for all loop types, the result is an understated copper-only long (loop). And a long loop is a loop that is composed of copper of 18,000 feet or greater – or actually, greater than 18,000 feet. In fact, his cost is based - - instead of loops with 18,000 feet of copper at a minimum, they only have 12,000 feet in the length due to the cross over from copper feeder to fiber feeder. That's why BellSouth developed a specific copper-only scenario. While BellSouth uses multiple scenarios in the BSTLM, the total demand for services, each of the scenarios guarantees the optimum efficiencies. Every State Commission that has used the BSTLM has used multiple scenarios to calculate UNE costs and has rejected the one scenario approach proposed by AT&T and WorldCom. The FCC confirmed that multiple scenarios are appropriate and rejected the same arguments the CLPs make in this case. . .

During cross-examination, witness Caldwell noted that the Florida Commission adopted the three-scenario version of the BSTLM as opposed to the five-scenario version proposed in North Carolina. Witness Caldwell explained that Florida was the first State that BellSouth filed the BSTLM and at that point, BellSouth had not developed the ISDN scenarios. Witness Caldwell stated that every State Commission that has considered the BSTLM since then, including Alabama, South Carolina, Mississippi, and Kentucky, has adopted the five-scenario approach. Witness Caldwell noted that the BSTLM has not been filed in Tennessee yet and that, at the time of the hearing, the Georgia Commission had not yet made its decision in its generic costing docket. The Commission notes that on March 18, 2003, the Georgia Commission made its decision in its generic UNE docket and released its Order on June 24, 2003. The Georgia Commission stated in its Order:

> Another important capability of the BSTLM is the ability to use multiple scenarios to set UNE rates. Although most of the CLECs objected to use of multiple scenarios based on 47 C.F.R. §51.511(a), this multiple scenario methodology accounts for the 'total number of units of the element' by incorporating the same overall line count in each scenario. Therefore, the Commission finds that BellSouth's use of multiple scenarios in its BSTLM is consistent with FCC rules. The use of one scenario as advocated by various parties is not appropriate in all instances. Although AT&T/WorldCom indicate that such a loop could be 'groomed' without any additional costs, the evidence reflects that that [sic] the use of one scenario would result in an under-recovery of BellSouth's costs. (Tr. 606). The Federal Act provides that just and reasonable rates for network elements shall be based on the cost of providing the network element. 47 U.S.C. § 252(d)(1)(A)(i). As the single scenario would not allow for recovery of the cost of providing the network elements, the Commission agrees with BellSouth that UNE loop and loop combinations rates shall be set using multiple scenarios of the BSTLM.

BellSouth witness Milner agreed on cross-examination that the UNE-combo scenario looks most like what BellSouth would consider to be a forward-looking network. Witness Milner also agreed that the copper scenario basically assumes an all-copper network, a network with no DLC. Witness Milner also agreed that the all-copper scenario does not look anything like BellSouth's current network, from the 50,000 foot level. Witness Milner asserted that a good portion of BellSouth's customers are served only on all-copper loops today.

BellSouth witness Stegeman argued in rebuttal testimony that it depends whether one run of the BSTLM can capture the forward-looking costs of all UNEs. Witness Stegeman noted that from a modeler's perspective, there are a number of issues that limit the ability of the user to use one run, or scenario, of the BSTLM to accurately model all types of unbundled loops offered by BellSouth. Witness Stegeman asserted that to use only one scenario may require the user to accurately predict how the customer mix would change over the study period given the existing customer locations and the types and quantities of each service at each location.

Witness Stegeman continued to explain that if the user attempts to use only one scenario for all UNEs offered by BellSouth, the engineering constraints of a number of the UNEs may be in contrast to each other. Witness Stegeman stated that as an example, in modeling a least-cost forward-looking network, the user may set the limits for copper loops to a user-defined length. In reality, witness Stegeman noted, copper loops beyond that length may exist in BellSouth's current network and may be ordered by CLPs. Witness Stegeman maintained that yet, if only one scenario in BSTLM were used as recommended by witness Darnell and witness Pitkin, no copper loops would exist beyond the model's user-defined copper limit so the costs for BellSouth's unbundled copper loops would not be reflective of any current copper loops beyond that limit that the CLP would like to order. Witness Stegeman asserted that such an approach could seriously understate the cost of unbundled cooper loops. In addition, witness Stegeman noted, by using only the combo scenario, the ISDN costs assume that service can be provided by POTS plug-in cards unless service locations are restricted to only existing ISDN customers.

Witness Stegeman asserted that to work around these issues, multiple scenarios may help the user frame the possible future costs based upon the particular cost question being asked. For example, witness Stegeman noted, the user, as BellSouth has done, may wish to use a current set of customers as surrogate locations of where a UNE may be sold. As such, witness Stegeman commented, the user of the BSTLM selects inputs for a scenario run that will design a forward-looking network that assumes that all of these surrogate customers are engineered in one manner for a particular UNE. However, witness Stegeman stated, such specific engineering may not be appropriate for all UNEs. Therefore, witness Stegeman commented, if the same set of current customers are used as possible surrogate locations for multiple future UNE customers and the different UNEs sold require different engineering, then multiple runs of the BSTLM may be required due to the current structure and data of the BSTLM.

BellSouth explained in its Brief that to run the BSTLM, one must establish the defining attributes of the loops and local channels under study. BellSouth noted that to develop the costs of the various unbundled loops and loop combinations, BellSouth ran the BSTLM under five-different (multiple) network scenarios. BellSouth noted that Exhibit DDC-6 to BellSouth witness Caldwell's direct testimony illustrates the physical loop make-up assumed under each scenario.

BellSouth commented that AT&T/WorldCom witness Darnell conceded on cross-examination that the use of multiple scenarios in establishing BellSouth's rates for loops and loop combinations has been accepted by every state in BellSouth's region to consider the issue, including Alabama, Florida, Kentucky, Louisiana, Mississippi, and South Carolina. BellSouth also asserted that the use of the multiple scenarios in establishing BellSouth's rates for loops and loop combinations also has been endorsed by the FCC in both its *GA/LA 271 Order* and its *Five-State 271 Order*.

BellSouth noted that AT&T/WorldCom witness Pitkin used only the combo scenario to calculate the CLPs' proposed rates for all unbundled loops and loop combinations. BellSouth asserted that calculating rates in this manner leads to an under-recovery of BellSouth's costs, because the combo scenario does not accurately reflect the costs associated with unbundled stand-alone loops, unbundled ISDN loops, or copper-only loops.

BellSouth maintained that the combo scenario assumes that loops can be provided on fiber-based DLC systems directly integrated into BellSouth's switch at the central office. BellSouth asserted that as witness Caldwell observed, this is an utterly unrealistic assumption in developing the cost of a voice-grade unbundled loop, because voice-grade unbundled loops, by definition, must terminate on the MDF and cannot be directly integrated into BellSouth's switch. BellSouth argued that before a voice-grade unbundled loop can be provisioned to a CLP collocation space, the loop must be removed from the DLC digital DS1, converted to voice grade, and terminated on the MDF. BellSouth maintained that the costs associated with this conversion, and the MDF termination of the voice-grade circuit, are not included in the combo runs.

BellSouth noted that unbundled ISDN loops served over fiber-fed DLC systems require a special, more expensive, ISDN plug-in rather than the standard POTS plug-in. BellSouth stated that in its ISDN scenarios, all POTS customers are assumed to have been converted to ISDN service by replacing the POTS cards in the DLC systems with ISDN cards. BellSouth argued that this accurately develops the costs of providing unbundled ISDN loops. BellSouth stated that on the other hand, the CLPs simply used the combo scenario to determine their ISDN loop proposals. BellSouth asserted that by using the combo scenario, the CLPs incorrectly assume that a POTS card can be used to provide ISDN service for the vast majority of the ISDN DLC-served loops. BellSouth argued that this significantly understates the cost of ISDN unbundled loops, both standalone ISDN loops and ISDN-combo loops.

BellSouth asserted that the CLPs' contention that the use of multiple scenarios violates FCC Rule 51.505(b) is without merit. BellSouth stated that the total quantity of facilities was considered in each scenario because BellSouth used the same overall line count in each scenario. BellSouth argued that the multiple scenario approach also captures economies of scale and scope, as required by FCC Rule 51.505(b). BellSouth maintained that its scenarios appropriately account for the differences in the manner in which BellSouth provisions different loops and reflects the cost differences in each. BellSouth argued that because BellSouth cannot know today how a loop may be used by a CLP in the future, its use of multiple scenarios is appropriate and, in fact, necessary to accurately calculate BellSouth's costs.

The Public Staff stated in its Proposed Order that assuming that all customer locations are candidates for a particular unbundled loop, BellSouth's use of multiple scenarios eliminates the random assignment process and allows larger and more efficient network configurations to be established. Therefore, the Public Staff opined, the Commission should agree that BellSouth's method of utilizing the entire quantity of its lines and customer locations captures economies of scope.

The Public Staff further maintained that given the varying requirements for provisioning the different UNE loop types, it would be inappropriate to utilize just one of BellSouth's scenarios as proposed by AT&T/WorldCom witness Darnell. The Public Staff stated that as the FCC pointed out in its *Five-State 271 Order* in Paragraph 61, BellSouth is entitled to recover the forward-looking costs associated with the provision of standalone loops, as well as the costs associated with provisioning loop-switch combinations. The Public Staff asserted that witness Darnell's proposal to use only the combo scenario would not accomplish such cost recovery.

The Public Staff recommended that the Commission conclude that it is appropriate for BellSouth to use multiple scenarios in determining the loop investment amounts.

The Commission notes that all of the other BellSouth States that have considered BellSouth's multiple-scenario methodology have adopted BellSouth's position on this issue. Further, the Commission notes that the FCC has endorsed a multiple-scenario approach, and the Public Staff has recommended that the Commission adopt BellSouth's multiple scenario approach in this docket. The Commission believes that BellSouth's evidence presented on this issue is more persuasive and that BellSouth has effectively refuted the arguments raised by the CLPs in opposition to the use of the multiple scenario methodology.

Further, the Commission believes that the use of BellSouth's multiple-scenario methodology ensures that all costs of the various types of loops are properly identified. The Commission believes that BellSouth's methodology is generally more appropriate for many reasons, such as: (1) insufficient demand for many types of unbundled loops, for example unbundled ISDN loops, precludes BellSouth from using existing UNE customer locations as the basis for cost studies of unbundled loops; (2) copper loops greater than 12,000 feet ordered by a CLP would never be reflected in a cost study that assumed that no copper loop exceeded 12,000 feet – BellSouth's approach captures copper loops in excess of 12,000 feet and also produces a copper loop of unspecified length, as the CLPs have requested; and (3) nonswitched stand-alone UNE loops, by definition, cannot terminate into the BellSouth switch.

Based upon the foregoing, the Commission finds it appropriate to adopt BellSouth's proposed five-scenario methodology for use in the BSTLM to determine BellSouth's UNE loop rates.

CONCLUSIONS

The Commission finds it appropriate to adopt BellSouth's proposed five-scenario methodology for use in the BSTLM to determine BellSouth's UNE loop rates.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

ISSUE NO. 5: How should shared DLC equipment costs be allocated in the BSTLM?

POSITIONS OF PARTIES

BELLSOUTH: Each BellSouth state commission that has considered this issue has ruled that it is appropriate to allocate investments on a per DS0 equivalent basis. BellSouth's methodology represents the most reasonable approach because DLC common equipment in most cases is actually sized-based on DS0 equivalents.

AT&T/WORLDCOM: Based on the "cost causation" principles of the FCC's Pricing rules, shared DLC equipment costs should be allocated in the BSTLM based on "slots" or "space" used in the equipment to provide particular services, and not allocated based on "DS0 equivalents".

COVAD: Covad did not address this issue in its Post-Hearing Brief.

DEPARTMENT OF DEFENSE: The Department of Defense did not address this issue in its Post-Hearing Brief.

PUBLIC STAFF: DLC equipment should be allocated on a capacity basis (i.e., to allocate investments on a per DS0 equivalent basis).

DISCUSSION

BellSouth asserted in its Brief that shared DLC equipment should be allocated based on "DS0 equivalents". According to BellSouth, every state commission that has considered this issue, including Alabama, Florida, Kentucky, Louisiana, Mississippi and South Carolina, has ruled that it is appropriate to allocate investments on a per DS0 equivalent basis.

BellSouth commented that the only component of a DLC system that is limited by physical size is the channel bank shelf, which is only a minor portion of the total DLC system investment. The majority of investment in a DLC system is made up of equipment, such as common equipment, line cards, and multiplexing equipment which are dependent on, and consumed by, the number of DS0s. That is, when providing a DS1 service, the DLC equipment and transport bandwidth are used at a greater capacity then when used to provide voice grade service.

BellSouth witness Stegeman testified that the BSTLM was designed to use DS0 equivalents not only to assign "fixed" investments among services, but also to size the equipment. Therefore, if common equipment is sized and assigned "based on the space each service requires in the DLC equipment," the capacity requirements of the DLC optical equipment would be inappropriately reduced. Without a corresponding change in the way in which the model develops equipment requirements, AT&T/WorldCom's changes inappropriately understate the amount of DLC system equipment generated by the BSTLM and assigned to UNEs, and therefore, understates the costs.

Finally, in opposition to AT&T/WorldCom's allegation that the cost studies filed in this proceeding are inconsistent with BellSouth's prior practices and methodologies, BellSouth maintained that it has consistently used a cost-causative approach to allocate common equipment in total compliance with the FCC's pricing rules. Thus, in the case of common DLC carrier equipment, the use of DS0 equivalents is the correct cost driver and this approach has been maintained in all of BellSouth's cost filings in North Carolina. BellSouth witness Caldwell explained that the architecture used in this proceeding differs from the manner in which the costs for the DS1 loop were developed in the earlier phase of this docket. Additionally, the BSTLM's algorithms recognize the most forward-looking equipment currently available, including HDSL cards, which were not considered in the earlier study. Also, the earlier studies inadvertently failed to include equipment that was required in the central office and at the customer's premises when the DS1 was provisioned on copper. Therefore, BellSouth claimed that the prior filed costs were, in fact, understated.

AT&T/WorldCom stated in their Proposed Order that based on the "cost causation" principles of the FCC's Pricing rules, shared digital DLC equipment costs should be allocated in the BSTLM based on "slots" or "space" used in the equipment to provide particular services, and not allocated based on "DS0 equivalents."

AT&T/WorldCom claimed that the amount of shared equipment needed is not based on DS0 equivalents. Rather, costs should be assigned based on what drives the number of DLC systems in the network. In virtually every situation, an additional DLC system will be needed because the channel banks or "slots" in the digital carrier loop system are filled up, not because there is no more capacity available in the system's multiplexing equipment.

AT&T/WorldCom argued that there is a significant impact which BellSouth's DS0 equivalents allocation method has in improperly shifting costs of plain-old telephone "POTS" service to higher bandwidth or advanced services. Although investments can be allocated a variety of ways, the FCC has determined that these investments should be allocated based on "cost causative" principles. AT&T/WorldCom stated that BellSouth's DS0 equivalents allocation approach violates the FCC's rules. For example, if a DLC system provides access to 88 POTS lines and two DS1 channels (the digital bandwidth equivalent of 48 POTS lines), then BellSouth would allocate 35.3% of the system common equipment cost to DS1 services and the remaining 64.7% to the POTS lines. AT&T/WorldCom claimed that from an engineering perspective, this allocation scheme is wrong because it fails to capture accurately the way in which DLC common equipment capacity is actually used.

AT&T/WorldCom stated that specifically, NGDLC equipment, the forward-looking technology properly applicable to the determination of loop-related UNE prices, consists of channel bank assemblies that are basically empty line card slots. Each card slot in a channel bank assembly can accommodate either a single POTS card or a single DS1 card. Each POTS card provides the capacity for four DS0s, with each DS0 constituting the digital equivalent of a single voice-grade access line; each DS1 card provides the capacity for one DS1 channel.

AT&T/WorldCom explained that because channel bank assemblies represent capacity that is shared by several different types of line cards, for forward looking cost study purposes, the assembly is considered to be shared equipment, the cost of which must be allocated to services actually provided by the cards that occupy the assembly. Each line card, regardless of the type of service(s) it provides, occupies the same amount of space in the channel bank assembly. Thus, AT&T/WorldCom argued that the cost of the assembly should be allocated to the different services on the basis of the number of individual card types that occupy the assembly and that are served by it.

In the real world network, AT&T/WorldCom commented that channel bank assemblies are occupied by a mixture of POTS and DS1 cards (providing different types of services), and that tends to alter the allocation of shared equipment costs. For example, if the assembly were occupied with a mixture of two DS1 cards and 22 POTS cards, then the one-twelfth (two divided by 24, or 8.33%) of the channel bank capacity would be occupied by DS1 cards with the remaining eleven-twelfths (22 divided by 24, or 91.67%) occupied by POTS cards. Thus, 8.33% of the channel bank assembly cost should be allocated to DS1 services with remaining 91.67% of the cost to POTS services. Based on actual engineering considerations, AT&T/WorldCom stated that this allocation outcome differs significantly from the arbitrary 35/65 DS1/POTS "DS0 equivalent" allocation that results from BellSouth's improper allocation approach.

Furthermore, AT&T/WorldCom claimed that BellSouth's approach is inconsistent with BellSouth's prior practices and the methodology BellSouth used in the prior UNE proceeding. AT&T/WorldCom stated that they were concerned that BellSouth's DS0 equivalents allocation method seems to improperly charge more costs to high capacity loops and related services. In this respect, AT&T/WorldCom noted that this new method of allocation was not considered by the Commission in its prior UNE order. With BellSouth proposing UNE prices for high capacity loops at dramatically increased rates than currently exist, AT&T/WorldCom claimed that BellSouth's new allocation method works to disadvantage CLP's which have just begun to compete with BellSouth for high capacity services. Additionally, AT&T/WorldCom stated that they heard no testimony from BellSouth as to why this new allocation is better or is needed over the allocation method currently in place in North Carolina. AT&T/WorldCom remarked that it is not enough to say that the BSTLM was designed to allocate DLC shared expenses on a DS0 equivalents basis.

The Public Staff stated in its Proposed Order that it concurs with AT&T/WorldCom witness Pitkin, allocation of costs should be based upon cost causation factors. The Public Staff stated that BellSouth's method of allocating DLC equipment based upon equivalent DS0s meets this requirement. The Public Staff agreed that while this methodology allocates a greater amount of DLC equipment to broadband services, the allocation method proposed by witness Pitkin appears to be based upon one small component of DLC equipment. Therefore, the Public Staff concluded that since the majority of the investment in DLC equipment is dependent upon DS0 equivalents, space considerations are not a more appropriate basis for allocating DLC investment.

The Commission notes that with regard to the allocation of DLC equipment, witness Pitkin testified that this investment is dependent upon the number of card slots required, rather than upon the capacity of the service. He stated that an allocation based upon space requirements would comply with the FCC's cost causation principles. He further stated that the proposal of BellSouth to allocate DLC investment based upon capacity shifts the costs from POTS service to higher-bandwidth services and therefore increases the costs that CLPs pay for these advanced services. Witness Pitkin recommended that the Commission allocate DLC investment based upon the space each service requires in the DLC equipment. In the alternative, he recommended that the Commission adjust the service capacity in the BSTLM to reflect the space required by each service.

Witness Caldwell argued that AT&T/WorldCom's proposal to allocate shared DLC investment is a methodology issue, not an input issue, and thus falls outside the scope of this proceeding. Further, she disputed the intervenors' testimony that DLC equipment should be sized based upon the number of card slots required. According to witness Caldwell, the only component of DLC equipment limited by physical size is the channel bank shelf, a minor portion of the total DLC system investment. The majority of investment in DLC equipment is made up of equipment such as common equipment, line cards, and multiplexing equipment, which are dependent on the number of DS0s. Thus, more of the capacity of DLC equipment and transport bandwidth is used to provide DS1 service than to provide POTS or voice grade service.

Based on the evidence presented, the Commission agrees with the Public Staff and accepts BellSouth's methodology. The Commission finds it appropriate to reject the intervenors' proposal to allocate DLC equipment based on space considerations instead of DS0 equivalents. As stated by witness Pitkin, allocation of costs should be based upon cost causation factors. The Commission is convinced that BellSouth's method of allocating DLC equipment based upon equivalent DS0s meets this requirement. While this methodology allocates a greater amount of DLC equipment to broadband services, the allocation method proposed by witness Pitkin appears to be based upon one small component of DLC equipment. According to BellSouth, since the majority of the investment in DLC equipment is dependent upon DS0 equivalents, the Commission agrees that the BSTLM method of allocating shared investments based on DS0 equivalents appears reasonable and should be accepted.

CONCLUSIONS

The Commission concludes that it is appropriate to allocate investments on a per DS0 equivalent basis.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

ISSUE NO. 6: Is BellSouth's use of a melded value based on the costs of its two vendors' prices for DLC equipment appropriate?

POSITIONS OF PARTIES

BELLSOUTH: Issue No. 6 in BellSouth's Issues Matrix refers to the melding of new and growth discounts for switching. The melding of new and growth discounts for switching is actually discussed in Issue No. 13 concerning switching. BellSouth does not address this issue on melding in pricing DLC equipment in its Post-Hearing Brief.

AT&T/WORLDCOM: BellSouth's "two vendor" melded value for developing costs for DLC equipment should not be used because it is inconsistent with BellSouth's actual network which utilizes only one vendor per site (for technological and efficiency purposes) depending on the size of the central office or the remote terminal being served. Because larger DLC's cost more, but are not used at every site, they should not be included in a "two vendor" melded value. Rather, BellSouth should use the cost of the specific vendor's DLC which would be used at each site, or at a minimum, its "Vendor A" cost.

COVAD: Covad did not address this issue in its Post-Hearing Brief.

DEPARTMENT OF DEFENSE: The Department of Defense did not address this issue in its Post-Hearing Brief.

DEPARTMENT OF DEFENSE: The Department of Defense stated that a fill factor of 65% should be used for distribution cable, rather than the 44% fill factor proposed by BellSouth.

PUBLIC STAFF: The Public Staff asserted that BellSouth should use a factor of 1.4 pairs per household in determining its distribution plant investment and the fill factors used in the FCC's Synthesis Model for its feeder and interoffice transport.

DISCUSSION

BellSouth witness Caldwell testified that utilization or fill factors play an important role in the calculation of loop costs. Witness Caldwell explained that the FCC's TELRIC methodology allows for a reasonable projection of actual utilization to be incorporated into the equation.

In their Proposed Order, AT&T/WorldCom observed that a fill factor is the term used to convey how much installed equipment actually is being used to provide services and in BellSouth's BSTLM, fill factors apply to all types of plant and equipment. Thus, AT&T/WorldCom noted that the fill factors have a significant impact on the forward-looking economic costs that are the basis of the recurring loop-related UNE prices that are at issue in this proceeding. AT&T/WorldCom contended that fill factors are important to the process of establishing forward-looking incremental costs because they are used to spread the cost of spare equipment capacity over the units of demand that are actually used to provide service. According to AT&T/WorldCom, the capacity of telephone network equipment is provided at a level that recognizes four basic factors: (1) the projected growth in demand for circuits that actually carry messages; (2) an allowance for uncertainty in demand forecasts; (3) an allowance to account for the modular character of telephone plant; and (4) a reasonable allowance for unforeseen equipment failures and/or other unforeseen network problems. Further, AT&T/WorldCom explained that the engineers design and size the capacity of the network to recognize these factors; thus, the network always contains some amount of capacity in excess of that required to reach current customers and to switch and transport their messages and other traffic. As a result, as observed by AT&T/WorldCom, the cost of that spare capacity generally is loaded into the incremental costs of the services offered by the network through the application of fill factors.

Covad did not explicitly address the issue of fill factors. However, with regard to recurring UNE rates for DSL-critical network elements, Covad asserted that the Commission should accept the recurring rates set forth in BellSouth's Revised Exhibit JAR-3 upon modification to reflect the cost of capital revisions proposed by the Public Staff. Covad's Exhibit A attached to its Post-Hearing Brief provides Covad's specific list of DSL-critical elements. The elements referenced by Covad are found in the following general UNE rate categories: line sharing splitter in the central office, 2-wire integrated services digital network (ISDN) digital grade loop, 2-wire asymmetrical digital subscriber line (ADSL) compatible loop, 4-wire DS1 digital loop, 2-wire copper loop, loop conditioning, interoffice transport – dedicated DS1, interoffice transport – dedicated DS3, collocation charges for power and cross-connects, collocation application fees, loop make-up, and service order charges. Accordingly, the Commission believes that Covad agreed with BellSouth's fill factors, to the extent that the rates for the DSL-critical elements referenced by Covad incorporate BellSouth's fill factors.

The Department of Defense explained that the fill factor for a facility is the proportion of the facility actually used to provide services. The Department of Defense stated that the fill is important because all costs, including those of unused facilities, are allocated over the revenue-producing units of service to determine the total costs and hence the proposed charges for UNEs.

In this proceeding, the Parties have partially disagreed on some of the fill factor inputs to use in BellSouth's cost model. These disputed inputs will be discussed under four categories as follows:

Issue 7(a)	Distribution
Issue 7(b)	Feeder
Issue 7(c)	Interoffice Transport – SONET Model
Issue 7(d)	Common Transport

7(a). Distribution – BellSouth assumed 2.0 pairs to existing residential locations, an average effective fill of 43.67%; AT&T/WorldCom proposed 1.25 pairs to existing residential locations; the Department of Defense proposed a distribution cable fill factor of 65%; and the Public Staff proposed 1.4 pairs to existing residential locations.

Similar to other models, such as the FCC Synthesis Model and the Benchmark Cost Proxy Model (BCPM), BellSouth noted that utilization is not entered as a percentage in the BSTLM. Instead, according to BellSouth, for distribution plant, the distribution cables are sized based upon the appropriate standard size cables and the number of pairs provisioned to each living unit. BellSouth assumed 2.0 pairs per existing residential customer location and used only the existing number of pairs per business location. BellSouth contended that this is a very conservative assumption since no distribution cable pairs are placed by the BSTLM for households without telephone service or housing units not occupied as of the snapshot of BellSouth's billing records. Furthermore, BellSouth represented that only enough distribution pairs are placed to serve the snapshot of current business services. According to BellSouth, no additional pairs are placed to provide any spare pairs for business line growth, maintenance, or administration.

Further, BellSouth witness Caldwell explained that even though it is not an input, the effective distribution utilization can be calculated from the BSTLM. Witness Caldwell noted that the average effective fill for distribution cable in BellSouth's study for North Carolina is 43.76%.[1] According to BellSouth, this result is reflective of BellSouth's anticipated future fill in the distribution route.

[1] Witness Caldwell testified that in the previous phases of this docket, the Commission set the utilization rate at 44.6% for distribution.

AT&T/WorldCom maintained that the BSTLM should place 1.25 pairs to existing customer residential locations. AT&T/WorldCom asserted that BellSouth's assumption of 2.0 pairs to existing residential locations is based on nothing more than BellSouth's continuance of its existing obsolete practices relative to building facilities to residential customers. According to AT&T/WorldCom, BellSouth's position does not take into consideration the capabilities of modern telecommunications equipment which BellSouth has recently deployed in North Carolina which were discussed at length during the cross-examination of BellSouth witness Ruscilli.

AT&T/WorldCom observed that the basic approach to determining how many pairs to install per residential location was developed in the former Bell System in the 1970s; it was formalized in the early 1980s when the Regional Bell Operating Companies (RBOCs) adopted specific policies to deploy early digital loop carrier systems. Further, AT&T/WorldCom stated that in the early 1990s, the Internet was commercialized and access to it was most usually via a voice-grade modem operating over a separate access line in the range of from 4 kilobits per second (Kbps) to 56 Kbps; basic switched access line demand increased briefly in response to broader access to the Internet. However, by the early 1990s, AT&T/WorldCom pointed out that it became both technically and economically feasible to carry voice and lower speed (4 Kbps to 56 Kbps) data simultaneously over the same loop. Thus, AT&T/WorldCom noted that since the mid to late 1990s, it has become common to transport both a voice-grade signal and a separate high-speed data signal (1.544 megabits per second (Mbps) and higher) simultaneously over the same 2-wire loop, thus reducing the demand for a second additional access line. AT&T/WorldCom maintained that because the price of this technology has declined steadily and demand for it has steadily increased (along with the impact of other factors, such as growth in the demand for wireless access), the deployment of this new technology, generally, has reduced the demand for multiple telephone lines in order to receive both voice service and access to the Internet. Consequently, AT&T/WorldCom asserted that the obvious result is that a significant amount of existing plant (that was installed before it became common to transport both a voice-grade signal and a separate high-speed data signal, simultaneously over the same two-wire loop) now is unused and will remain so in a forward-looking environment. Accordingly, AT&T/WorldCom opined that the amount of embedded extra plant capacity has been steadily increasing.

AT&T/WorldCom contended that in response to this trend, throughout the industry, local exchange carriers have been adopting policies that limit the number of distribution pairs deployed to a range of from 1.0 to 1.5 pairs per new residential location. Consistent with this trend, AT&T/WorldCom reported that BellSouth itself has begun to limit its deployment of new distribution capacity to 1.0 pair per residential location. In particular, AT&T/WorldCom asserted that with respect to North Carolina, because BellSouth recently has accelerated and completed its deployment of digital facilities in North Carolina, the vast majority of its residential customers no longer require two or more telephone lines in order to meet their advanced telecommunications needs. Instead, AT&T/WorldCom observed that most North Carolinians can now obtain access to the Internet as well as receive POTS over a single telephone line. Accordingly, AT&T/WorldCom argued that the Commission should reject BellSouth's outdated practice relative to assuming 2.0 pairs to existing residential locations and should instead adopt AT&T/WorldCom's recommendation that BellSouth's loop-related prices should assume, on average, the installation of 1.25 pairs per existing residential location.

The Department of Defense witness Gildea stated that the testimony of BellSouth witness Caldwell may give the impression that cable utilization is a factor outside the company's control, but that is not the case. Witness Gildea explained that by changing assumptions in the cable sizing process, BellSouth can alter the effective fill. The Department of Defense urged the Commission to reject BellSouth's approach that yields such a low fill (44%) for distribution cable.

Witness Gildea pointed out that in this docket in the Commission's December 10, 1998 *Order Adopting Permanent Prices for Unbundled Network Elements*, at Page 66, the Commission stated that the parameters related to fills for BellSouth's distribution plant should be consistent with those set in the *Forward-Looking Economic Cost (FLEC) Order*.[1] However, witness Gildea noted that the Commission issued an *Order on Reconsideration*, in that docket on July 2, 1998, addressing a Motion for Reconsideration submitted by Carolina Telephone and Telegraph Company/Central Telephone Company (Carolina/Central) that sizing parameters should be set such that distribution fills for all the carriers under investigation at that time would be comparable. According to witness Gildea, the modification resulted in a fill factor of 52% for BellSouth's distribution cable. Witness Gildea contended that if 52% was the appropriate fill for distribution cable four years ago then the 44% fill factor proposed by BellSouth is far too low at this time because cable fills should increase over time. Witness Gildea testified that the primary reason that fills should increase is that the number of revenue producing lines for the average residential living unit should be increasing. Witness Gildea explained that distribution cable fills should be increasing over time for the following reasons:

> The number of revenue-producing lines in a living unit may increase when residents order a second line for a computer or as a 'separate line' for additional family members.
>
> With additional carrier participants in the market – competitive LECs that will acquire UNEs if the price is reasonable – there will be additional opportunities for BellSouth to obtain revenue from plant that might otherwise be idle.
>
> Planning activities should become more accurate so it will be possible to employ a smaller safety margin in allowing for future growth.

Witness Gildea asserted in his revised direct testimony that a distribution cable fill of 52% should be used by BellSouth for determining UNE costs and charges. However, in its Post-Hearing Brief, the Department of Defense pointed out that AT&T/WorldCom witness Pitkin supported a distribution fill of as great as 65% for the purpose of establishing UNE costs. Consequently, the Department of Defense urged the Commission to require that UNE charges reflect an effective fill for distribution cable in this range, rather than the fill of 44% reflected in BellSouth's cost models. Further, in its "Proposed Findings", the Department of Defense recommended that a fill factor of 65% should be used for distribution cable.

In its Proposed Order, the Public Staff explained that BellSouth witness Caldwell testified that the BSTLM contains input variables that would allow the user to enter a cable

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[1] The *FLEC Order* was issued in Docket No. P-100, Sub 133b, on April 20, 1998.

sizing factor for sizing the distribution cables in the loop model or, alternatively, the user may enter the number of pairs to be placed to each customer location, as BellSouth has done. The Public Staff noted that BellSouth sized its distribution plant assuming the placement of 2.0 pairs per residential location. The Public Staff acknowledged that witness Caldwell testified that this approach is conservative since only locations that actually have service were considered, when in fact, plant must also be placed to nonrevenue generating locations as well. The Public Staff commented that witness Caldwell also testified that BellSouth's approach is more accurate than the use of a cable sizing factor. Further, the Public Staff noted that witness Caldwell had also stated that even when BellSouth's records indicated a location had more than 2.0 pairs, the model still only places 2.0 distribution pairs.

The Public Staff observed that AT&T/WorldCom witness Weiss contended that BellSouth's use of 2.0 pairs per living unit was obsolete in today's market. The Public Staff stated that witness Weiss had pointed out that carriers have been adopting policies limiting the number of distribution pairs in new areas to a range of 1.0 to 1.5 per living unit. Witness Weiss recommended that BellSouth revise its design guideline downward to 1.25 pairs per residential living unit for purposes of developing UNE loop prices.

Further, the Public Staff commented that in the *FLEC Order*, the Commission found that the appropriate input value for distribution pairs per residential household for use in the FLEC studies was 1.4.[1] The Public Staff stated that the *FLEC Order* indicated that BellSouth had a ratio of approximately 1.12 residential lines in service per household, substantially below the factor of 2.0 it proposes in this case. Furthermore, the Public Staff noted that according to the testimony of witness Caldwell, BellSouth's network guidelines initially establish the number of pairs per household at a base level lower than 1.4. To that base level, according to witness Caldwell, BellSouth adds an amount for anticipated secondary line growth. Further, the Public Staff commented that although witness Caldwell addressed the amounts of potential growth for certain specific individual households, there is no information in the record regarding the current statewide average distribution pairs per residential household. The Public Staff concluded that 1.4 pairs per household was forward-looking and reasonable for the calculation of BellSouth's UNE rates.

The Commission understands that in the BSTLM, the distribution cables are sized based upon the appropriate standard size cables and the number of pairs per residential customer location and the actual existing number of pairs per business location. As noted above, the Parties disagree on the number of pairs per residential customer location, with the proposals ranging from 1.25 pairs to 2.0 pairs.

In regard to the capabilities of modern telecommunications equipment which BellSouth has recently deployed in North Carolina, counsel for AT&T/WorldCom questioned BellSouth witness Ruscilli on certain sections from BellSouth's 2001 Stockholders' Annual Report. Witness Ruscilli agreed that in a passage from Chairman Duane Ackerman's Letter to Shareholders, that the Chairman stated that "to meet the converging needs of customers, we are

[1] The Commission's *FLEC Order*, in Docket No. P-100, Sub 133b, Finding of Fact No. 12, Page 7 and Part 3 - Input 3(i), Page 36.

transforming the technology in our core wire-line from voice to digital data." Witness Ruscilli read the following statement from the 2001 Report:

> In the consumer market, DSL gives us another fast-growing data revenue stream. DSL revenues of $254 million in 2001 were nearly five times higher than the previous year. We are serving well over 600,000 BellSouth FastAccess customers, and we have extended broadband coverage to more than 70 percent of our DSL base. We have led the industry in percentage subscriber line growth in six quarters in a row.

In addition, witness Ruscilli agreed on cross-examination that the Report stated that we "now have one of the most advanced optical networks on the planet." Further, witness Ruscilli agreed that the Report stated that "being able to talk on the same telephone line you are using to surf the Internet certainly is a great feature."

Further, during cross-examination, witness Ruscilli was questioned concerning an April 2, 2002 BellSouth press release which was titled "BellSouth Completes NC Central Office Deployment of Advanced Data Technology". Witness Ruscilli agreed that the document stated that BellSouth has now equipped 136 of its North Carolina central offices with the capability to provide high-speed data technology to its customers. The Commission also notes that the press release stated the following: BellSouth had reached its pledge to equip 136 of its 140 central offices seven months ahead of schedule; BellSouth had deployed 1,500 remote DSL terminals; and BellSouth planned to have a total of 2,100 remote terminals installed by the end of 2002, thereby pushing the technology further out into the distribution network.

Additionally, witness Ruscilli was questioned about his testimony filed on July 16, 2002, in Docket No. P-55, Sub 1013, regarding the five-year review of BellSouth's Price Regulation Plan. Witness Ruscilli acknowledged that in that testimony he stated the following:

> . . . the plan has provided incentives for BellSouth to become more efficient when deploying the most modern technology in North Carolina.
>
> Deployment of digital switching, digital subscriber line equipment, and advanced services technology has provided North Carolinians with access to the most current telecommunications technology available.

The Commission also notes that BellSouth's 2002 Stockholders' Annual Report, as provided on BellSouth's website, contains a "DSL High-Speed Internet" Section, wherein the following question and statement of Jeanette Anderson, Manager, Internet Services appears:

> Is customer growth on target? A little ahead, actually. We were shooting for 1 million broadband customers by the end of 2002, and we finished with over 21,000 more than that. In a tough economy that saw a weak technology sector overall and relatively flat sales of personal computers, this 64 percent annual gain was one of the best growth rates for any tech-related service last year. Analysts are beginning to recognize something we've known all along – speed itself may be the "killer application" everyone talks about. If you're going to be on the Internet, you're going to want broadband speed. With DSL, customers avoid the hassles of dial-up, and they love that they can talk on the same telephone line they're using to surf the Web at high speeds.

The Commission has not found any information in the record which would establish, definitively, BellSouth's current statewide average distribution pairs per residential household. Even BellSouth's own deposed witness, Michael K. Zitzmann, representing BellSouth's engineering staff was unable to provide this when explicitly questioned in this regard.

The Commission agrees with AT&T/WorldCom that BellSouth's position in support of 2.0 pairs does not recognize the capabilities of modern telecommunications equipment which BellSouth has recently deployed in North Carolina, especially considering that BellSouth is now able to provide the transport of both voice and data simultaneously over the same line from virtually all of its wire centers. Additionally, the Commission observes that, pursuant to FCC Rule 51.505(b)(1), TELRIC "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers."

Based upon the evidence presented, the Commission is persuaded by AT&T/WorldCom's assertion that the trend in the local exchange carrier industry is toward a policy that limits the number of distribution pairs deployed to a range of 1.0 to 1.5 pairs per new residential location. Furthermore, since the 1998 time frame, when the Commission issued its *FLEC Order* and adopted a factor of 1.4 pairs per household, BellSouth has accelerated and completed its deployment of digital facilities in North Carolina. In recognition of what appears to be a very significant advancement toward a much more efficient network, i.e., 136 of BellSouth's 140 central offices are now equipped with the capability to provide high-speed data technology to its customers, the Commission believes it would be appropriate and consistent with TELRIC principles for the Commission to adopt an input of 1.25 pairs per existing residential housing unit as recommended by AT&T/WorldCom.

COMMISSION CONCLUSION: The Commission concludes that an input value higher than 1.25 pairs is not justified for residential locations and that BellSouth should adjust its input values accordingly in its cost study.

7(b). Feeder – BellSouth used an average effective fill of 73.79% and the Public Staff supported BellSouth's use of the FCC's inputs from its Synthesis Model; whereas, AT&T/WorldCom proposed a fill factor of 87%.

For feeder cable, BellSouth witness Caldwell observed that the model uses the cable sizing factor and standard size cables to determine the required cables to be placed. As stated by witness Caldwell, the average effective fill of the copper feeder cable in BellSouth's filing is 73.79%.[1] According to BellSouth, this result is reflective of BellSouth's anticipated future fill in the feeder route.

BellSouth noted that AT&T/WorldCom witness Weiss proposed an 87% fill factor for feeder cable (both fiber and metallic) and the associated electronics.[2] BellSouth argued that witness Weiss's analysis, as demonstrated by witness Caldwell, is comprised of purely imaginary numbers with unrealistic assumptions. Essentially, according to BellSouth, witness Weiss assumed a demand each year that allowed him to grow to a 95% end-of-period utilization each year. Witness Caldwell commented that, of course, witness Weiss never highlighted this 95% end-of-period utilization, which is the true driver of his results.

Furthermore, witness Caldwell maintained that while witness Weiss's discussion of just-in-time procurement practices (which he used in support of his 95% end-of-period utilization) may be partially correct for provisioning additional services via plug-in electronics, this argument still ignores the fact that the electronic equipment must be installed and tested prior to service. Additionally, witness Caldwell noted that feeder and interoffice cable cannot be engineered, purchased, installed, and spliced just-in-time. Witness Caldwell explained that substantial lag time between the initial engineering of the cable project and ready-for-service status is normal in constructing telecommunications plant.

Contrary to witness Weiss's assessment, witness Caldwell pointed out that BellSouth's fill factors are not "based on historical practices." Witness Caldwell commented that since BellSouth does not have utilizations by density, the FCC's inputs from the Synthesis Model were used. Witness Caldwell testified that these values were reviewed and approved by BellSouth's network personnel who found them to be reasonable. Additionally, witness Caldwell reported that the results from the BSTLM align themselves with utilizations this Commission previously approved. Consequently, BellSouth asserted that these fill factors reflect a projection of sustainable actual utilization, as outlined in the FCC's *Interconnection Order*.[3]

AT&T/WorldCom contended that BellSouth's assumed fill factors are based on BellSouth's historical practices and not based on a forward-looking environment. AT&T/WorldCom argued that the BSTLM should utilize a forward-looking fill factor of 87% for metallic feeder cable, optical fiber feeder cable, digital loop carrier, and the plant that is used to provide interoffice transport facilities.

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[1] Witness Caldwell testified that in the previous phases of this docket, the Commission set utilization rates at 66% for copper feeder and 74% for fiber feeder.

[2] On cross-examination, witness Weiss admitted that he proposed the same fill factor in a Qwest UNE proceeding in Washington State and that the Washington Commission rejected that proposed factor.

[3] FCC's *First Report and Order* in CC Dockets 96-98 and 95-185 (*Interconnection Order*), issued August 8, 1996, at Paragraph 682.

AT&T/WorldCom maintained that their proposed 87% fill factor is appropriate for several reasons. AT&T/WorldCom stated that today's market for telecommunications services demands deployment of optical/digital facilities because of the value and efficiency offered to carriers by such facilities. Thus, AT&T/WorldCom contended that even those services that have been, and might currently be provided, over metallic copper equipment now are migrating quickly toward optical digital technology. AT&T/WorldCom asserted that it is economically rational for BellSouth to deploy lower cost current optical and digital technology at all levels of the network from the loop to and including interoffice facilities. Additionally, AT&T/WorldCom stated that ILECs also have developed a highly efficient means of shortening the time between the receipt of a telephone company's order and delivery of the ordered equipment. AT&T/WorldCom witness Weiss testified that BellSouth can engage in just-in-time plant provisioning practices which will allow BellSouth to delay bringing new cable and optical and digital plant capacity on line until existing capacity is nearly 100% exhausted, that is, until the fill factor for existing plant approaches 100%. However, AT&T/WorldCom stated that their witness Weiss did not propose a purely just-in-time-based objective fill factor be used (approaching 95% or higher), rather, witness Weiss recommended use of an 87% fill factor as a reasonably achievable fill factor in order to give BellSouth the benefit of the doubt with regard to its own conservative plant provisioning practices and their effect on fill factors.

Furthermore, AT&T/WorldCom explained that an 87% fill factor is even more liberal when one considers that there are two different types of fill factors. AT&T/WorldCom noted that the first type is generally referred to as an objective fill, which is based on an engineer's judgment of how to design the plant. AT&T/WorldCom stated that objective fill factors are used by BellSouth within the BSTLM to help estimate the size of equipment that needs to be installed. For example, AT&T/WorldCom noted that if an engineer determines that it is necessary to have 5% fill to account for future growth, 5% for uncertainty in demand, and 3% for administrative spare, then the engineer would design facilities based on a 13% objective fill; then if current demand is 100 lines, the install capacity would need to be at least 113 lines.

Further, AT&T/WorldCom stated that the second type of fill factor is generally referred to as the effective fill. AT&T/WorldCom explained that the effective fill factor includes the objective fill factor described above, plus any additional spare capacity based on the fact that cable vendors manufacture cables to certain industry standard sizes. In this respect, AT&T/WorldCom noted that cable sizes are not customized as to size; rather they are off-the-shelf commodities with standard cable sizes. For example, AT&T/WorldCom observed that the smallest copper cable manufactured by any cable vendor capable of accommodating 113 lines is a 200-pair cable. AT&T/WorldCom explained that the additional extra capacity of 87 lines in this example (200 minus 113) results from what is referred to in the industry as breakage, or the lumpiness in available equipment sizes. According to AT&T/WorldCom, based on their examples, the effective fill factor therefore represents the total extra capacity of both objective fill (13 lines) plus lumpiness (87 lines). Thus, AT&T/WorldCom observed that the effective fill factor reflects the ratio of working lines to total capacity (in the above example, 100 lines divided by 200 lines or 50%).

Moreover, AT&T/WorldCom stated that it is important to understand that the objective fill factors used by BellSouth in its BSTLM result in greater spare capacity than just what the objective fill factors create because, in addition to the objective fill factors, there is also additional spare capacity created by the lumpiness or effective fill factor. As a result, AT&T/WorldCom argued that the Commission should not be concerned, in adopting AT&T/WorldCom's recommended fill factor of 87%, that it may be unreasonably constraining BellSouth's ability to recover its modeled costs.

In its Proposed Order, the Public Staff pointed out that BellSouth witness Caldwell testified that BellSouth did not use historical fill factors for feeder plant and the plant that is used to provide interoffice transport facilities. Instead, according to witness Caldwell, BellSouth utilized the FCC's inputs from its Synthesis Model. The Public Staff noted that witness Caldwell pointed out that although just-in-time procurement practices may be partially appropriate for electronics, the electronic equipment must still be installed and tested prior to service. Further, witness Caldwell testified that feeder and interoffice cable cannot be engineered, purchased, installed, and spliced just-in-time.

Next, the Public Staff observed that AT&T/WorldCom witness Weiss testified that BellSouth's fill factors for metallic feeder cable plant, digital loop carrier equipment, optical fiber feeder cables, and the plant that is used to provide interoffice transport facilities were understated. The Public Staff stated that witness Weiss explained that telecommunications facilities are not always used to full capacity so as to reflect projected growth in demand, allow for uncertainty in demand forecasts, account for the modular character of the telephone network, and allow for unforeseen equipment failures or other network problems. In particular, witness Weiss stated that the modularity of the network is exemplified by the fact that cables are manufactured in standard, but uneven, increments.[1] However, the Public Staff noted that witness Weiss contended that BellSouth's fill factors include more capacity than is appropriate for a forward-looking cost analysis and reflect historical practices. Witness Weiss recommended a factor of 87% for metallic feeder cable plant, digital loop carrier equipment, optical fiber feeder cables, and the plant that is used to provide interoffice transport facilities.

The Public Staff noted that the purpose of BellSouth's cost studies is to obtain the forward-looking economic cost of providing various elements of its telephone network. In so doing, the Public Staff remarked that BellSouth's BSTLM takes a snapshot of its customers and their associated locations at a point in time and then develops a network designed to serve these customers. For the reasons provided, subsequently, in this Order, in the discussion of AT&T/WorldCom witness Pitkin's proposed growth adjustment under Issue No. 11, the Public Staff contended that it cannot accept the fill factors proposed by witness Weiss. Essentially, in regard to the intervenors' growth adjustment, the Public Staff stated that the intervenors' adjustments to reflect line growth are arbitrary. The Public Staff believes that neither future customers nor the facilities to serve them should be reflected in BellSouth's cost study. The Public Staff contended that BellSouth's proposed fill factors are forward-looking and will result in proper cost recovery of BellSouth's investment in feeder plant and interoffice transport

[1] For example, metallic cables are manufactured in standard but uneven increments – 12, 25, 50, 100, 200, 300, 400, 600, 900, 1200, 1500, 1800 pairs, etc.; transmission plant common equipment is sized to accommodate discrete increments of bandwidth such as 45 Mbps for DS3 systems, 622 Mbps for OC12 systems, etc. This modular characteristic of telephone plant has also been referred to as lumpiness or breakage. (Witness Weiss rebuttal testimony, Page 20, Footnote 13.)

facilities. Accordingly, the Public Staff asserted that it is appropriate for BellSouth to base these factors on FCC inputs to its Synthesis Model. Thus, the Public Staff maintained that the fill factors proposed by BellSouth for feeder plant and interoffice transport facilities are appropriate.

The Commission understands that, as testified by witness Caldwell, for feeder cable BellSouth does not have utilizations by density so BellSouth used inputs from the FCC Synthesis Model. That being the case, BellSouth's fill factors were not based on BellSouth's historical practices as alleged by AT&T/WorldCom witness Weiss.

As noted above, witness Caldwell disagreed with witness Weiss' analysis on the basis that it was "comprised of purely imaginary numbers with unrealistic assumptions." Based on the testimony of witness Caldwell, the Commission believes that just-in-time provisioning practices which were used to support witness Weiss' end-of-period utilization of 95%, are inappropriate as feeder and interoffice cable cannot be engineered, purchased, installed, and spliced just-in-time since the norm in the industry is that considerable lag time exists between the initial time when the cable project is engineered/designed and the point in time when it is ready to be placed into service.

Furthermore, as observed by the Public Staff, the purpose of BellSouth's cost studies is to obtain the forward-looking economic cost of providing various network elements; and in doing this, BellSouth takes a snapshot of its customers and their locations and develops a network to serve these customers. Accordingly, the Commission agrees with the Public Staff, as discussed subsequently in Finding of Fact No. 11, that future customers and their associated requirements for facilities should not be reflected in BellSouth's cost study.

Based upon the foregoing the Commission agrees with BellSouth and the Public Staff that it is appropriate for BellSouth to base its factors for feeder facilities on the FCC's inputs from the Synthesis Model. The Commission accepts BellSouth's position that these fill factors reflect a projection of sustainable actual utilization. Accordingly, the Commission agrees that such factors are consistent with the FCC's *Interconnection Order*, at Paragraph 682, which states, in part, that

> Per-unit costs shall be derived from total costs using reasonably accurate 'fill factors' (estimates of the proportion of a facility that will be 'filled' with network usage); that is, the per-unit costs associated with a particular element must be derived by dividing the total cost associated with the element by a reasonable projection of the actual total usage of the element.

COMMISSION CONCLUSION: The Commission concludes that it is appropriate for BellSouth to base its factors for feeder facilities on the FCC's inputs from the Synthesis Model, since BellSouth does not have utilizations by density.

7(c). Interoffice Transport – SONET Model – BellSouth used North Carolina-specific inputs to develop these costs; whereas, AT&T/WorldCom proposed a utilization factor of 90% for interoffice transport terminal equipment.

In their Proposed Order, AT&T/WorldCom stated that BellSouth's low fill factors improperly increase the price for interoffice transport. AT&T/WorldCom stated that BellSouth claims that it is inappropriate to use universal service inputs for a UNE cost case. However, AT&T/WorldCom observed that this Commission has previously found it reasonable and appropriate to require BellSouth to use loading factors from the Commission's universal service proceeding in developing UNE prices. Thus, AT&T/WorldCom argued that the Commission should reject BellSouth's criticism on this issue.

Furthermore, AT&T/WorldCom noted that BellSouth failed to rebut the overwhelming evidence that other ILECs in various regions across of the country use considerably higher fill factors for transport. According to AT&T/WorldCom, BellSouth merely indicates that its SONET model calculates costs from a more granular level than proxy models used by these other companies. However, AT&T/WorldCom pointed out that BellSouth never indicated why a granular view would result in a lower utilization level and increased interoffice transport costs. AT&T/WorldCom witness Turner contended that the BSTLM should utilize a 90% fill factor for interoffice transport, as recommended by the FCC and approved by the Georgia Public Service Commission in its universal service support proceedings.

BellSouth did not explicitly address this issue in its Proposed Order, however, witness Caldwell filed rebuttal testimony in opposition to AT&T/WorldCom witness Turner's recommendation in this regard. First, witness Caldwell stated that witness Turner's reliance on a Georgia Public Service Commission decision in its Universal Access Fund, Transition to Phase II Pursuant to O.C.G.A. §46-5-167,[1] proceeding (Docket No. 5825-U) is inappropriate. Witness Caldwell stated that the FCC has cautioned against any attempt to support UNE inputs with universal service fund decisions.

Second, witness Caldwell observed that in the Commission's December 31, 2001 *Order Addressing Exceptions on Recommended Order Concerning all Phase I and Phase II Issues Excluding Geographic Deaveraging* in this docket, at Pages 63 and 64, the Commission required that BellSouth reflect North Carolina-specific inputs when developing costs associated with high-capacity elements. Witness Caldwell asserted that is what BellSouth has done in the SONET model – the utilizations are North Carolina-specific.

Third, witness Caldwell testified that witness Turner's proposal belies his lack of understanding with respect to the SONET model utilizations he criticizes in his rebuttal testimony. In this regard, witness Caldwell asserted that the range witness Turner presented is not totally accurate, for in fact, some pieces of equipment reflect 100% utilization. Witness Caldwell also stated that other proxy models supposedly begin with a fully-equipped terminal and then the model applies a utilization factor against the total investment. Witness Caldwell explained that BellSouth's SONET model, on the other hand, determines prices for individual components of the SONET network. According to witness Caldwell, the prices for the components are expressed at various transmission levels, such as DS0, DS1, DS3, STS1, OC3, OC12, and OC48. Witness Caldwell explained that the cost studies for UNEs, which require

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[1] O.C.G.A. § 46-5-167 provides the legal framework for the establishment of a fund to reimburse providers of basic local exchange services upon an application and demonstration of need for universal service support.

SONET equipment, are linked to the appropriate transmission rate output from the SONET model. Further, witness Caldwell pointed out that the model reflects the probabilities of the various designs deployed in BellSouth's network. In other words, according to witness Caldwell, BellSouth's approach is different from and much more granular than the other proxy models referenced by witness Turner. For these reasons, witness Caldwell asserted that the Commission should not adopt witness Turner's recommendations.

The Commission notes that witness Caldwell testified that the FCC in the *UNE Remand Order* required that BellSouth provide interoffice facilities at higher transmission rates. In this regard, witness Caldwell explained that the Commission has previously considered costs and established rates for both dedicated and shared interoffice facilities at DS3, OC3, OC12, OC48, and STS1 transmission rates and ordered that the design probabilities reflect North Carolina-specific data. The Commission understands that BellSouth has updated those costs in this current proceeding and has employed North Carolina-specific utilizations consistent with the Commission's prior decision. Furthermore, the Commission understands that BellSouth's SONET model determines prices for individual components of the SONET network with the prices being expressed at varying transmission levels and that the cost studies for UNEs requiring SONET equipment are linked to the appropriate transmission rate outputs from the SONET model. Based upon the foregoing, the Commission is unconvinced that AT&T/WorldCom's position that a single 90% utilization factor would be appropriate as it seems more reasonable to have factors that track the individual pieces of SONET equipment and the associated specific transmission rate outputs. Accordingly, the Commission believes that BellSouth's proposed interoffice transport factors and methodology are appropriate.

COMMISSION CONCLUSION: The Commission concludes that BellSouth's proposed interoffice transport factors and methodology are appropriate for use in this proceeding.

7(d). Common Transport – BellSouth reflected 18.7 CCS for common transport; whereas, AT&T/WorldCom proposed 27 CCS.

As to the calculation of the common transport element, AT&T/WorldCom stated that BellSouth used an average busy season busy hour CCS per circuit that results in an unreasonably low utilization level for its trunks. AT&T/WorldCom witness Turner testified that this CCS per circuit value, in essence, provides an indication of the utilization BellSouth expects on its trunks (the circuits connecting its switches together). According to witness Turner, the total value of CCS available on any trunk is 36.[1] Witness Turner stated that BellSouth's assertion that during the busy hour that its average usage on a trunk is 18.7 CCS indicates that BellSouth only expects 52% utilization in the busiest hour of the busiest season of the year. Witness Turner stated that this utilization is unreasonably low based upon his experience working in engineering and in reviewing common transport cost studies across the country. Witness Turner contended that a more reasonable utilization percentage during the busy season, busy hour is 75% which equates to a measure of 27 CCS. Accordingly, AT&T/WorldCom asserted that an input of 27 CCS for the common transport portion of BellSouth's cost study was appropriate.

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[1] Witness Turner testified that 36 CCS is the same as saying that there are 3,600 seconds in one hour. Thus, a measure of 10 CCS on a trunk would indicate that 1,000 of the 3,600 seconds of use were occupied.

BellSouth did not explicitly address this issue in its Proposed Order, however, witness Caldwell filed rebuttal testimony in opposition to AT&T/WorldCom witness Turner's recommendation in this regard. Witness Caldwell testified that witness Turner's proposed input of 27 CCS was unrealistic. Witness Caldwell stated that BellSouth proposed a transport study input for busy hour CCS per circuit of 18.7 CCS.

Witness Caldwell pointed out that witness Turner ignored the fact that BellSouth's network is comprised of varying sizes of trunk groups, as it is more efficient to deploy only the amount of trunks necessary to handle anticipated trunk busy hour load. Witness Caldwell noted that under the FCC's TELRIC principles, the existing wire center locations are maintained. Thus, as explained by witness Caldwell, the expected busy load and the subsequent trunk group sizing can be determined based upon BellSouth's actual busy hour usage. Furthermore, witness Caldwell testified that witness Turner has ignored the interrelationship between the trunk group size and the busy hour CCS that can be handled by that trunk group (assuming an objective blocking rate). Witness Caldwell explained that using a Neal-Wilkinson Trunk Capacity Table, a standard tool used to size trunk groups, a trunk group comprised of two trunks can handle only 8 busy hour CCS or a utilization of 11% [8 ÷ (2 x 36)]. On the other hand, witness Caldwell stated that a trunk group comprised of 50 trunks handles 1,367 busy hour CCS or a utilization of 76% [1,367 ÷ (50 x 36)]. Based on these facts, witness Caldwell asserted that the Commission should ignore witness Turner's proposed input.

Based upon the evidence presented on this issue, the Commission believes that it would be more appropriate to accept BellSouth's proposed input of 18.7 CCS. The Commission understands that the value of this input should take into consideration the expected trunk busy load and the fact that the network consists of various trunk group sizes and that there is an interrelationship between the trunk group size and the busy hour CCS that can be handled by that trunk group (assuming an objective blocking rate). Based upon our review, it does not appear that witness Turner considered this significant interrelationship in making his proposal of 27 CCS.

COMMISSION CONCLUSION: The Commission concludes that the appropriate transport study input for busy hour CCS per circuit is 18.7 CCS as proposed by BellSouth.

SUMMARY OF CONCLUSIONS

7(a). Distribution – The Commission concludes that an input value higher than 1.25 pairs is not justified for residential locations and that BellSouth should adjust its input values accordingly in its cost study.

7(b). Feeder – The Commission concludes that it is appropriate for BellSouth to base its factors for feeder facilities on the FCC's inputs from the Synthesis Model, since BellSouth does not have utilizations by density.

7(c). Interoffice Transport – SONET Model – The Commission concludes that BellSouth's proposed interoffice transport factors and methodology are appropriate for use in this proceeding.

7(d). Common Transport – The Commission concludes that BellSouth's proposed transport study input for busy hour CCS per circuit of 18.7 CCS is appropriate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

ISSUE NO. 8: What is the appropriate cost of capital to use in calculating BellSouth's UNE rates?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth asserted that the Commission should use BellSouth's cost of capital inputs. In light of the capital market data analyzed by BellSouth witness Billingsley, the use of an 11.25% forward-looking, overall weighted cost of capital input is reasonable and, in fact, conservative.

AT&T/WORLDCOM: AT&T/WorldCom argued there has been little change to the cost of capital since the Commission's *December 10, 1998 Order*, and, if anything, the cost of capital has decreased since then. The Commission should select a cost of capital input in the 9.79% to 9.96% range.

COVAD: In its Post-Hearing Brief, Covad stated that it has no objection to the recurring UNE rates for DSL-critical network element set forth in Revised JAR-3, subject to the cost of capital revisions proposed by Public Staff witness John Robert Hinton.

DEPARTMENT OF DEFENSE: The Department of Defense took the position that the Commission should use the cost of capital adopted in the previous UNE case. However, if the Commission believes it is a appropriate to take a more conservative approach, the maximum excursion from that last prescription by the Commission is a capital structure with 40% debt and 60% equity as discussed in the testimony of witness Gildea.

PUBLIC STAFF: The Public Staff recommended an overall weighted cost of capital of 9.79% based upon a capital structure consisting of 40% debt at a cost rate of 7.23% and 60% common equity at a cost rate of 11.5%.

DISCUSSION

Section 252(d)(1) of the Act allows rates for interconnection and access to UNEs to include a "reasonable profit." To determine a reasonable profit, the cost study or model must incorporate a forward-looking cost of capital for network elements. The forward-looking cost of capital must be based on forward-looking estimations of capital structure, cost of debt, and cost of equity. Because the Local Competition First Report and Order provides no guidelines on the meaning of a forward-looking and risk-adjusted economic cost of capital, the principles set forth by the United States Supreme Court in *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923), and *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 602 (1944), should continue to guide the Commission. Essentially, these cases require that the return on common equity set by the Commission be commensurate with returns on investments in enterprises with similar risks, adequate to ensure the confidence of the financial markets, and sufficient to allow the utility to maintain its creditworthiness and attract capital as required on reasonable terms.

Capital Structure

BellSouth witness Billingsley recommended that the Commission adopt a capital structure consisting of 84.92% common equity and 15.08% debt. Department of Defense witness Gildea and Public Staff witness Hinton recommended a capital structure containing 60% common equity and 40% debt.

In his direct testimony, BellSouth witness Billingsley testified that the appropriate capital structure should be based on market valuations of common equity and debt for his comparable group of 20 unregulated companies. He argued that capital structures based on book value do not recognize the reality of obtaining capital in today's financial marketplace. Instead, witness Billingsley advocated the use of market valuations because they are dynamically determined in the marketplace by investors, while book values result from historical accounting practices.

The Department of Defense witness Gildea recommended a forward-looking capital structure of 60% equity and 40% debt. He stated that witness Billingsley's proposed market value-based capital structure of 85% equity and 15% debt was based on fictional target ratios. Witness Gildea noted that his recommended capital structure contained a higher equity ratio and a lower debt ratio than BellSouth's actual 2001 capital structure which consisted of 55% equity and 45% debt. Further, he testified that the Florida Public Service Commission had adopted a capital structure of 60% equity and 40% debt and that BellSouth itself proposed this capital structure in a recent UNE case in Louisiana.

Public Staff witness Hinton recommended a capital structure of 60% equity and 40% debt, derived by averaging *Value Line Investment Survey's* projected percentages of common equity for a comparable group of seven publicly traded telephone companies involved in providing local exchange telecommunications services. Witness Hinton testified that BellSouth's financial planning incorporates a target capital structure containing 35% to 45% debt capital and the Company has stated that a target debt ratio of 35% to 45% allows it to maintain financial flexibility and access to capital. Further, witness Hinton pointed out that even BellSouth used a capital structure consisting of 60% equity and 40% debt in its UNE cost model.

In his rebuttal testimony, BellSouth witness Billingsley disagreed with witness Hinton's proposed capital structure. Witness Billingsley argued that witness Hinton apparently relied upon book values in his capital structure recommendations. For the reasons set forth in his direct testimony, witness Billingsley restated his preference for the use of market valuations in determining capital structure. Witness Billingsley also rebutted witness Hinton's selection of seven telecommunications companies, characterizing that selection as arbitrary.

COMMISSION CONCLUSIONS: The Commission believes that a forward-looking capital structure associated with the provision of UNEs is better determined by analysts' forecasts of telecommunications companies as advocated by witness Hinton rather than basing such a capital structure on market valuations of equity and debt for unregulated companies as advocated by witness Billingsley. Based on the foregoing and all of the evidence presented, the Commission finds and concludes that the capital structure proposed by witnesses Hinton and Gildea, consisting of 60% common equity and 40% long-term debt, is forward-looking and should be used in determining the cost of capital associated with the provision of UNEs.

Cost of Debt

Because the amount of BellSouth's debt leverage impacts its creditworthiness, the cost of debt should be consistent with the capital structure. Further, the cost of debt should reflect forward-looking costs. In estimating the forward-looking cost of debt, BellSouth witness Billingsley used a spread approach that calculated the difference between the yields on an index of Moody's Public Utility Bonds and the yields on 10-year treasury notes and added this difference to the yields on 10-year treasury notes. Public Staff witness Hinton based his recommendation on the yields to maturity of BellSouth's outstanding issues of long-term debt.

In his rebuttal testimony, witness Billingsley updated his direct testimony on the cost of debt. He added a 2.81% spread to the 10-year treasury yield of 4.26% to determine his recommended cost of debt of 7.07%. His spread calculation was based on a three-month average differential from July 2002 through September 2002. Public Staff witness Hinton recommended a cost of debt of 7.23%, derived using a weighted average of the published yields to maturity for specific BellSouth long-term debt issues. Witness Hinton's recommendation was based on data reported in the July 2002 through September 2002, monthly editions of the *Standard & Poor* (S&P) *Bond Guide*.

COMMISSION CONCLUSIONS: The Commission recognizes that both witnesses have incorporated current debt costs as opposed to embedded debt costs. The Moody's Public Utility Bonds Index employed by witness Billingsley in his spread analysis included the interest rates on the debt of gas and electric companies. The Commission believes that the interest rates on the debt of nontelephone companies are inferior as an indicator of BellSouth's cost of debt versus the interest rates for specific BellSouth long-term debt issues. Therefore, the Commission finds that the market-based cost rate of 7.23% recommended by witness Hinton is reflective of the current and prospective cost of long-term debt associated with the provision of UNEs by BellSouth.

Cost of Common Equity

In his direct and in his updated rebuttal testimony, BellSouth witness Billingsley stated that he used three approaches to determine the cost of equity. In his first approach, he applied a quarterly Discounted Cash Flow (DCF) model, which included an adjustment to account for flotation costs, to a group of 20 comparable risk companies. He used a cluster analysis based on BellSouth's financial and operating risks to identify a group of comparable risk companies outside of the telecommunications industry. Based on his DCF analysis, witness Billingsley determined a cost of equity range of 13.45% to 13.85%. In his second approach, he used the Capital Asset Pricing Model (CAPM) applied to the same group of non-regulated companies. Using an average beta coefficient of 0.72 for his comparable group and expected returns on the S&P 500 in the range of 15.26% to 15.35%, his CAPM indicated a cost of equity for BellSouth between 12.21% and 12.28%. His third approach included a risk premium analysis based on the 1987-2002 spread between Moody's "A" rated public utility bond yields and the expected return on the S&P 500. Witness Billingsley increased the risk premium to account for the negative relationship between risk premiums and interest rates. The risk premium analysis indicated a cost of equity range of 15.49% to 16.63%. From these three approaches, witness Billingsley concluded that the cost of equity should be between 12.21% and 13.85%.

As discussed in his rebuttal testimony, witness Billingsley objected to Public Staff witness Hinton's use of the annual DCF model. He also objected to the lack of an adjustment for flotation costs in witness Hinton's use of the DCF model. Witness Billingsley argued that witness Hinton's failure to make these adjustments explicitly could lead to a downward bias in his cost of equity estimates.

The Commission has rejected the quarterly DCF model in several telephone cases, including *Citizens Telephone Co.*, 81 N.C.U.C. 635, 662 (1991). In reviewing the quarterly DCF model, the Commission has consistently rejected the argument that a quarterly payment of dividends warrants an upward adjustment to results yielded by the annual DCF model. In the *Citizens Telephone* decision, the Commission found that it was unnecessary for ratepayers to provide the added or incremental return associated with the quarterly payment of dividends, because shareholders can obtain this increment to the return simply by investing the dividends they receive.[1] In the *First UNE Order*, the Commission also adopted the annual DCF model recommended by Public Staff witness Hinton.[2] Witness Billingsley has provided no justification for the Commission to depart from its prior holdings and the Commission concludes that its reasoning on this issue in the *Citizens Telephone* decision still stands. The Commission agrees with witness Hinton's recommendation that the annual DCF model is appropriate.

Witness Billingsley included a flotation cost adjustment in his quarterly DCF model to account for the presumed 5% downward pressure on stock prices associated with the issuance of new common stock. Witness Hinton disagreed with this adjustment, and testified that since there was no evidence in the record that BellSouth expected a common stock issuance in the future, there was no basis for a flotation cost adjustment.

This Commission has previously concluded that without evidence in the record of plans to issue new common stock in the near term, an allowance for flotation costs is not justified.[3] Additionally, in *State ex rel. Utilities Commission v. Public Staff*, 331 N.C. 215, 415 S.E.2d 354 (1992), the North Carolina Supreme Court reversed a Commission decision that included an increment for purported future financing costs for Duke Power on the grounds that the record contained no evidence that the company intended to issue stock in the immediate future. For this

[1] Citizens Telephone Co., 81 N.C.U.C. at 662 - (citing *Carolina Power and Light Co.*, 78 N.C.U.C. 238, 413-14 (1988)).

[2] 88 N.C.U.C. at 170.

[3] *Citizens Telephone Co.*, 81 N.C.U.C. at 663.

same reason, the Commission did not accept witness Billingsley's recommended flotation cost adjustment in the *First UNE Order.*[1]

Based on the foregoing and all of the evidence presented, the Commission rejects witness Billingsley's 5% adjustment for flotation costs as being unsupported by the evidence. None of the witnesses for BellSouth indicated that a common stock issuance is expected in the immediate future. Rather, AT&T's cross-examination of BellSouth witness Ruscilli indicated that BellSouth had enough available cash to reduce its debt outstanding and repurchase shares of its common stock to bolster its earnings per share. Therefore, the Commission is not persuaded to accept any adjustments for flotation costs in this proceeding.

Public Staff witness Hinton applied the annual DCF model to his comparable group of seven telecommunications companies that provide local exchange services and to another group of 38 companies outside the regulated utility industry that exhibit risk measures similar to the group of seven telecommunications companies. To determine comparability of the group, witness Hinton reviewed published risk measures available to investors through *Value Line* and S&P. Based on his DCF analysis, witness Hinton recommended a cost of equity of 11.50%, which was the center of his range of 11.00% to 12.00%. He used the CAPM as a check on his DCF study. His CAPM analysis indicated costs of equity of 9.96%, 11.68%, and 11.92%, which supported his recommended 11.50% cost of equity.

BellSouth witness Billingsley testified that competition in the telephone industry has increased dramatically in recent years, and that rapidly changing technology, increased mergers, bypass, and regulatory constraints have increased risks for ILECs. Department of Defense witness Gildea testified, however, that BellSouth has a virtual monopoly in the wholesale market for UNEs. Witness Hinton testified that providing UNEs is less risky than BellSouth Corporation's[2] overall operations. His Exhibits JRH-5 and JRH-9 contain various investor-related risk measures from *Value Line* and S&P credit rating reports that indicate investors are mindful of the competitive risks facing BellSouth Corporation, including risks with its international businesses and ventures into wireless communications.

In his rebuttal testimony, BellSouth witness Billingsley stated that witness Hinton did not conduct a systematic, empirical analysis before he selected his group of seven telecommunications companies to estimate the cost of equity associated in the provision of UNEs. He contended that it was inappropriate to simply assume BellSouth's comparability with other telecommunications companies that provide local service.

The Commission notes that witness Billingsley used risk measures in his cluster analysis that are not as readily observable to investors as witness Hinton's risk measures. Second, in the *First UNE Order*, the Commission accepted witness Hinton's application of the annual DCF model to comparable groups of telecommunications companies and other companies that exhibit

[1] 88 N.C.U.C. at 170.

[2] BellSouth Corporation is the parent company of BellSouth Telecommunications, Inc.

similar risk measures.[1] Thus, the Commission is not persuaded that the cluster analysis advocated by witness Billingsley is appropriate in this proceeding.

As in the first UNE proceeding, the Commission is persuaded that the evidence contained in witness Hinton's testimony in this proceeding is the most credible. The Commission believes that the CAPM and the risk premium models involve a sufficiently high level of subjectivity with regard to the beta coefficient, the expected return on the equity market, and the risk-free rate of return to render these methods unpersuasive. As with the other cost of capital models, there are differences of opinion associated with the DCF methodology, usually with regard to the expected growth rate in dividends. Nonetheless, none of the other approaches are generally more reliable and persuasive than the market-based methods embodied in the DCF. In determining the expected dividend growth rate, the Commission notes that witness Billingsley gave exclusive weight to security analysts' earnings per share forecasts compiled by Zacks Investment Research (*Zacks*) and The Institutional Brokers Estimate System. In contrast, Public Staff witness Hinton considered the historical per share growth rates of earnings, dividends, and book value, with an emphasis on the forecasted growth rates by *Value Line* and *Zacks*. The Commission is persuaded that investors consider a company's historical performance along with its forecasts when assessing its long-run growth potential. Based upon the evidence, the Commission believes that the annual DCF, as proposed by witness Hinton, should be given the greatest weight for purposes of determining the cost of equity capital, and that only minimal weight should be given to the CAPM and risk premium models.

COMMISSION CONCLUSIONS: Based on the foregoing and all of the evidence presented, the Commission adopts the 11.50% cost of common equity recommended by Public Staff witness Hinton. The Commission finds and concludes that the 11.50% return on equity capital is appropriate, reflects a forward-looking approach, and will allow BellSouth the opportunity to earn a fair and reasonable return on equity.

Overall Cost of Capital

Based on his cost of capital study, witness Billingsley testified on the reasonableness of an overall 11.25% cost of capital. Witness Hinton testified that the 11.25% cost of capital was not forward-looking and thus was inappropriate. Witness Hinton noted that witness Billingsley advocated this same cost of capital in the first UNE proceeding. As noted in the Commission's *First UNE Order*, the FCC had prescribed an 11.25% overall rate of return in 1990, in connection with interstate access charges. Nevertheless, the Commission rejected witness Billingsley's proposed cost of capital in the *First UNE Order*.[2]

Witness Hinton argued in this proceeding that economic conditions are significantly different today than in 1990, and there is no economic reason for concluding that the forward-looking cost of capital is higher today than at the time of the first UNE proceeding. As

[1] 88 N.C.U.C. at 169-70.

[2] *Id.*

demonstrated in Exhibit JRH-1, current inflation and interest rates are comparable to those in 1998 and are at significantly lower levels than in 1990.

The Commission agrees with witness Hinton's testimony regarding current economic conditions. Also, for similar reasons expressed in the *First UNE Order* and in the *FLEC Order,*[1] the Commission concludes that the FCC's prescribed interstate overall rate of return of 11.25% is not a forward-looking cost of capital and is inappropriate in determining the cost of capital for the provision of UNEs in this proceeding.

Based upon his recommended capital structure, cost of debt, and cost of equity, witness Hinton determined an overall cost of capital of 9.79%. He testified that his recommendation supported an "A" debt rating, which should allow BellSouth to maintain its creditworthiness and an opportunity to earn its required return on its investments. The Commission finds and concludes that the forward-looking capital structure and cost rates for debt and common equity recommended by Public Staff witness Hinton should be adopted for purposes of this proceeding.

COMMISSION CONCLUSIONS: Based on the foregoing, and after careful consideration of the entire record of evidence, the Commission finds and concludes that BellSouth's overall weighted cost of capital associated with the provision of UNEs is 9.79% based upon a capital structure consisting of 40% debt at a cost rate of 7.23% and 60% common equity at a cost rate of 11.5%.

Further, the Commission recognizes that on August 21, 2003, the FCC released its TRO. The FCC stated

> [w]e conclude that it is necessary to clarify the application of two components of TELRIC that have a major impact on UNE prices – cost of capital and depreciation. These two components of TELRIC are the primary vehicles by which any risks associated with the new facilities and new services may be reflected in UNE prices, and therefore it is appropriate to consider these issues in response to the question presented in the *Triennial Review NPRM.* We believe the guidance we provide below is responsive to the concerns raised by the parties and will assist states in their efforts to establish UNE prices that appropriately reflect these risks. (Paragraph 675)

The FCC specifically addresses the cost of capital in paragraphs 677 through 684 of the TRO.

The Commission recognizes that the issuance of the TRO may impact the decision on the cost of capital in this instant proceeding. Therefore, the Commission finds that it is appropriate to seek comments on the impact of the TRO on the cost of capital as reflected in the UNE rates for BellSouth, Carolina, Central, and Verizon. By separate Order the Commission will solicit comments on the impact of the TRO in this regard.

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[1] *Establishment of Universal Service Support Mechanisms Pursuant to Section 254 of the 1996 Telecommunications* Act, Docket No. P-100, Sub 133b, Order Adopting Forward-Looking Economic Cost Model and Inputs, 88 N.C.U.C. 58 (1998) (FLEC Order).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

ISSUE NO. 9: What depreciation rates/economic lives should be used in calculating BellSouth's UNE rates?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth asserted that the Commission should use BellSouth's depreciation rates/economic lives. BellSouth maintained that the forward-looking economic lives used in BellSouth's cost studies are consistent with the economic lives used to determine the depreciation rates booked in North Carolina for intrastate and for external reporting purposes.

AT&T/WORLDCOM: AT&T/WorldCom argued that the Commission's *First UNE Order* in this docket directed that the lives and future net salvage values within the FCC's ranges be used in BellSouth's cost studies. AT&T/WorldCom asserted that there is no reason why the Commission should change this input to BellSouth's cost model.

COVAD: Covad did not take a specific position on this issue.

DEPARTMENT OF DEFENSE: The Department of Defense did not take a specific position on this issue.

PUBLIC STAFF: The Public Staff maintained that BellSouth should continue to use the economic lives and net salvage values found appropriate in the Commission's *First UNE Order* in this docket, except that the economic life for digital switching should be 12 years. The Public Staff further recommended that the software assets in Account 2690 should reflect the same economic lives as their associated capital assets.

DISCUSSION

The Commission notes that in the *First UNE Order*, the Commission found that then current FCC-authorized ranges of economic lives and future net salvage values were forward-looking and appropriate for use as inputs to the TELRIC cost studies. In this proceeding, BellSouth witness Cunningham recommended economic lives and salvage values from BellSouth's 2001 North Carolina Depreciation Study, while AT&T/WorldCom witness Pitkin recommended that the Commission continue to utilize the depreciation inputs it adopted in the *First UNE Order*. Because the economic lives recommended by witness Cunningham are generally shorter than those previously adopted by the Commission, his recommendation would result in higher depreciation costs being included in the determination of UNE rates.

According to witness Cunningham, BellSouth analyzed its planning data, conducted a mortality analysis, and used life analysis techniques that take into account technological substitution in determining the asset lives appropriate for use in the cost studies. He stated that BellSouth used economic lives in its cost studies consistent with those used to determine the depreciation rates currently being booked in North Carolina for intrastate and external reporting purposes. BellSouth also compared its proposed lives to the lives prescribed by the FCC for AT&T in 1994.

Witness Cunningham testified that using lives and future net salvage values within the FCC's ranges is not appropriate because the lives are too long and that most of the ranges were based on 1990-992 data that have not been updated. He opined that the "old regulatory paradigm" lengthened plant lives beyond their economic lives because an ILEC would recover the investments over a longer period of time. According to witness Cunningham, rapid technology changes shorten asset lives and BellSouth does not believe that looking at the past can indicate what will happen in the future with equipment that is sensitive to rapid changes in technology.

In its Proposed Order, the Public Staff stated that the FCC conducts periodic reviews of the economic lives and salvage values applicable to ILECs. The most recent review was conducted in 1999 and the conclusions of the FCC are set forth in its December 17, 1999 order. In this order, the FCC modified the economic life range for digital switching equipment; dropping the current 16-year minimum to 12 years. The FCC commented that, with the exception of digital switching equipment, the recent ILEC retirement rates had either dropped or remained constant in recent years.

The Public Staff also stated that an FCC report on the depreciation reserves of ILECs, issued in October 2002, which found the January 1, 2002, BellSouth North Carolina book reserve to be 56.3% as compared with a theoretical reserve of 49.3%. The Public Staff commented that, for a capital intensive company experiencing "rapid technology changes," these data contradict BellSouth's position that economic lives used in determining depreciation rates are too long. The FCC also reaffirmed its conclusion that its authorized economic lives and salvage values are forward-looking and appropriate for use in UNE cost studies.

The Public Staff proposed that the reasonable and appropriate economic lives and future net salvage values for calculating depreciation rates for use in the cost studies continue to be those within the FCC-authorized ranges and approved by the Commission in the *First UNE Order* with the exception of digital switching, which should have a life of 12 that the economic lives and future net salvage values found appropriate in the *First UNE Order* continue, with one exception, to be reasonable and appropriate for determining the cost of providing UNEs and interconnection. As in the *First UNE Order*, the Public Staff believed that the FCC-authorized lives are sufficiently forward-looking and should enable BellSouth to recover the cost of its assets.

Further, the Public Staff noted that BellSouth's Capital Cost Calculator model reflects economic lives for several software related intangible assets in Account 2690. The assets include General Purpose Software RTU, Network Circuit Software RTU, Network Software Other RTU, Network Switch Software RTU, and Operator Services Software RTU, all of which are software associated with various switching and circuit equipment that BellSouth is required to capitalize. BellSouth's study reflects economic lives ranging from three to five years for these intangible assets. However, witness Cunningham proposed economic lives for the associated capital assets ranging from 4.5 to ten years. (Exhibit GDC-1) For example, the cost study reflects an economic life for Operator Service Software RTU of three years, while Operator Systems (Account 2220) has an economic life of ten years. The Public Staff suggested that one can find nothing in the testimony of witness Cunningham or BellSouth's cost studies to explain or support its proposed economic lives for these intangible assets.

The Public Staff stated that according to BellSouth witness Reid, BellSouth began booking Software Right-To-Use (RTU) as an intangible asset in 1999 to be amortized over a period of years instead of as an expense item. This change was in response to Statement of Position 98-1, Accounting for the Costs of Computer Software Developed or Obtained for Internal Use (SOP 98-1). It appears that in the cost study, BellSouth selected economic lives for Software Right-To-Use from three to five years. This issue is addressed neither in the testimony nor exhibits.

The Commission concurs with the Public Staff's position that one cannot from the evidence presented, determine that the economic lives used by BellSouth for Account 2690 in its cost study are cost-based and TELRIC-compliant. Accordingly, the Commission believes that the reasonable and appropriate economic lives and future net salvage values for calculating depreciation rates for use in the cost studies continue to be those within the FCC-authorized ranges and approved by the Commission in the *First UNE Order*. Additionally, because the FCC has altered the range of economic lives for digital switching since the *First UNE Order* and the Commission agrees that digital switching is subject to rapid technological change, the Commission believes it is appropriate to reduce the economic life for digital switching to 12 years.

Finally, the Commission recognizes that on August 21, 2003, the FCC released its TRO. The FCC stated

> [w]e conclude that it is necessary to clarify the application of two components of TELRIC that have a major impact on UNE prices – cost of capital and depreciation. These two components of TELRIC are the primary vehicles by which any risks associated with the new facilities and new services may be reflected in UNE prices, and therefore it is appropriate to consider these issues in response to the question presented in the *Triennial Review NPRM*. We believe the guidance we provide below is responsive to the concerns raised by the parties and will assist states in their efforts to establish UNE prices that appropriately reflect these risks. (Paragraph 675)

The FCC specifically addresses depreciation in paragraphs 685 through 691 of the TRO.

The Commission recognizes that the issuance of the TRO may impact the decision on depreciation in this instant proceeding. Therefore, the Commission finds that it is appropriate to seek comments on the impact of the TRO on depreciation as reflected in the UNE rates for BellSouth, Carolina, Central, and Verizon. By separate Order the Commission will solicit comments on the impact of the TRO in this regard.

CONCLUSIONS

The Commission concludes that the reasonable and appropriate economic lives and future net salvage values for calculating depreciation rates for use in the cost studies continue to be those within the FCC-authorized ranges and approved by the Commission in the *First UNE Order* with the exception of digital switching, which should have a life of 12 years and that the software assets in Account 2690 should reflect the same economic lives as their associated capital assets.

The Commission will consider the potential impact of the FCC's TRO on depreciation as reflected in the UNE rates for BellSouth, Carolina, Central, and Verizon by soliciting comments in this regard by separate order.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

ISSUE NO. 10: What are the appropriate shared and common cost factors to use in calculating BellSouth's UNE rates?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth's shared and common cost factors are reasonable and forward-looking, and should be adopted by the Commission.

AT&T/WORLDCOM: AT&T/WorldCom take no position regarding the appropriate shared and common cost factors to be applied. However, without taking a position, they did state in their brief that BellSouth's shared and common cost factors are acceptable.

PUBLIC STAFF: BellSouth's proposed shared and common cost factors, adjusted for the effects of changes to the annual cost factors, cost of capital, capital structure, depreciation rates, and effective tax rates, are reasonable and appropriate.

COVAD: Covad took no position on BellSouth's shared and common cost factors.

DEPARTMENT OF DEFENSE: The Department of Defense took no position on BellSouth's shared and common cost factors.

DISCUSSION

The Commission notes that shared costs are those costs specific to a service or product, but that are unaffected by change in demand or volume of any one service or the addition or removal of any service. Common costs are those that are incurred for the benefit of the entire firm, but not for the benefit of any individual product or family of products, such that they do not change when there is a change in the firm's product mix or volume of output. Previously, both the FCC and the Commission have recognized that an ILEC's prices for interconnection and UNEs may include recovery for reasonable forward-looking common costs and incremental shared costs for facilities and operation. (*FCC Local Competition First Report and Order*, ¶ 682; *First UNE Order*.)

With regard to cost development for a UNE, shared and common cost factors are applied based on the amount and type of forward-looking investment required to provision the UNE. BellSouth witness Reid explained the shared and common cost model used by BellSouth to calculate the shared and common features applicable to the development of TELRIC economic costs for UNE. He stated that shared cost factors reflect the relationships of shared costs that have been attributed to an investment category to the related investment in that category. They are calculated "by determining the relationship, by investment type, between wholesale shared costs related to investment accounts and the associated network investment." Witness Reid stated that the common cost factor represents the relationship of wholesale common costs (excluding all retail-related common costs) to total direct and shared wholesale costs.

BellSouth's proposed cost factors result in an approximate 1% decrease in total wholesale shared and common costs since the UNE rates were first set by the Commission. No party other than BellSouth presented testimony on the appropriateness of BellSouth's proposed shared and common cost factors, and AT&T/WorldCom stated in their Brief that the cost factors are acceptable.

CONCLUSIONS

The Commission concludes that BellSouth's proposed shared and common cost factors, adjusted for the effects of changes to the annual cost factors, cost of capital, capital structure, depreciation rates, and effective tax rates, are reasonable and appropriate. The Commission further concludes that BellSouth should revise its shared and common cost factors to the extent necessary to reflect any modifications ordered herein regarding the underlying factors included in the calculations of the shared and common cost factors.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

ISSUE NO. 11: Is it appropriate to decrease UNE rates based on AT&T's/WorldCom's forecasted "growth" adjustment?

POSITIONS OF PARTIES

BELLSOUTH: No. BSTLM's use of current customer base, services sold and roads provides the best and most accurate basis to estimate the forward-looking costs of BellSouth's UNEs and complies with all FCC rules regarding TELRIC development. No BellSouth state has adjusted the BSTLM for growth.

AT&T/WORLDCOM: UNE rates should be decreased to account for BellSouth's failure to appropriately account for growth in its cost models.

COVAD: Covad did not address this issue in its Post-Hearing Brief.

DEPARTMENT OF DEFENSE: The Department of Defense did not address this issue in its Post-Hearing Brief.

PUBLIC STAFF: It is not appropriate to decrease UNE rates based on AT&T/WorldCom's forecasted "growth" adjustment.

DISCUSSION

BellSouth stated in its Brief that the BSTLM constructs a forward-looking, optimal network to meet current demand and the resulting network investment is then "unitized" based on that same demand. This is logical and consistent with the FCC's TELRIC pricing rules. However, the resulting network has capacity only guaranteed to meet the demand of today. What witness Pitkin fails to admit is that as growth and demand occurs, the network investment will grow. BellSouth noted that as witness Stegeman demonstrated when updated line data (with increased demand) was used in the forward-looking BSTLM with the corresponding updated customer locations and roads, the per line cost did not change, since there was a corresponding increase in the network routing and plant requirements as a result of the demand growth.

BellSouth commented that witness Pitkin erroneously asserted that the network built by the BSTLM to meet the demand requirements reflected in the June 2000 BellSouth customer file has "sufficient capacity to accommodate a certain amount of customer growth" and therefore the cost of the BSTLM's network should be divided by future demand. As witness Stegeman noted, the BSTLM, like all forward-looking models, builds a network optimized to meet the demand of the customer base taken as a snapshot in time. The network is sized appropriately and optimally to provide service to these customers with the assumption that the network was built today to meet this demand. BSTLM does not guarantee that facilities will exist for future demand. While there may be spare distribution pairs or feeder distribution interface connectors, there are no algorithms in the model that build fully functioning circuits for an unknown growth in the customer base. The model does not build down roads that are to be newly-built three years from now. It does not place drops to and network interface devices on yet-to-be-constructed homes. BellSouth asserted that to assume that BSTLM's network is not only built to meet current demand, but also has all the facilities to serve the future is simply incorrect.

BellSouth stated that the use of future line counts is not required or even beneficial in developing TELRIC-compliant UNE rates. Neither the Act nor the FCC's pricing rules lay out a clear definition of what line counts or customer locations should be used in a forward-looking model. Section 51.505 of the FCC's rules sets forth the rules to calculate the costs of a network element. This section states that the cost should be derived using the "total quantity of facilities" considering the "provision of other elements." BellSouth argued that is exactly what the BSTLM constructed and costed out based on the filed customer data. BellSouth stated that the FCC's rule does not state that projected future demand should be used in the development of costs.

BellSouth noted that witness Pitkin cited paragraph 682 of the FCC's *First Report and Order* as support for his position that projected demand be considered in the cost development of loops. That paragraph describes how fill factors should be considered in a TELRIC analysis and does not speak to or even imply that projected demand must be entered into the proxy model that is used to develop loop costs. Additionally, BellSouth stated that its use of multiple scenarios and resulting costs considers all of the potential demand of each type of unbundled loop element. Thus, the full hypothetical economic efficiency of the network is realized, which results in a conservative estimate of UNE costs.

BellSouth stated that section 51.511 of the FCC's rules refers to the calculation of per unit costs, including the use of a "reasonable projection" of the units likely to be used "during a reasonable measuring period". As witness Stegeman stated, the reasonable development of costs should synchronize the demand with the locations, roads, and network requirements so that the forward-looking costs are accurate. Given that the only synchronized data set in this proceeding is the BellSouth-provided BSTLM input data, the FCC's standard has been met, because this is the data from a "reasonable measuring period". As far as including a "reasonable projection" of competitive use of BellSouth's facilities, BellSouth, in its runs of BSTLM, assumes that all lines will be used as UNEs. BellSouth pointed out that this assumption, in fact, assumes greater UNE utilization than will occur in the near future and effectively reduces the unit cost since it assumes full efficiency.

In summary, BellSouth stated that the use of the current customer base, services sold, and roads provides the best and most accurate basis to estimate the forward-looking costs of BellSouth's UNEs and is compliant with all FCC rules regarding TELRIC development. Furthermore, BellSouth commented that in the six states where the BSTLM has been filed to support UNE rates and the state commission has issued an order, none of those states adjusted the BSTLM output to account for "growth."

AT&T/WorldCom stated in their Proposed Order that BellSouth's cost methodology allows it to over-recover its costs on every single loop-related UNE. This is because BellSouth's so-called "current" per-line loop costs are based on BellSouth's second quarter 2000 line count data, which substantially understates the number of BellSouth lines as of today. Logically, understated line counts understate the economies of scale by failing to recover the cost of the telecommunications network from all of the customer demand on that network. AT&T/WorldCom argued that because line counts are understated, loop costs are overstated.

AT&T/WorldCom commented that in many other industries, greater economies of scale and scope are experienced by sheer volume. Large companies experience two forms of economies of scale that allow them to sell products at much lower per-unit costs. First, they have significant purchasing power because they are able to purchase products in large quantities (such as BellSouth's purchasing power for telecommunications equipment). Second, they have very high sales volume and thus, each piece of merchandise pays a much smaller portion of the fixed costs (such as land and buildings). AT&T/WorldCom stated that by failing to reflect the full amount of demand currently for its network, BellSouth vastly overstates its per-unit cost of loops.

AT&T/WorldCom stated that forward-looking projections are part and parcel of establishing forward-looking economic costs as required by the FCC. Moreover, investments generated by BellSouth's model include sufficient capacity to accommodate a certain amount of customer growth. AT&T/WorldCom alleged that the model assumes a three year planning horizon from 2002–2004 and provides sufficient capacity to meet increases in demand. Accordingly, AT&T/WorldCom argued that BellSouth's model should reflect the recovery of these investments from all customers using the network during this time, not just the lower number of customers at the beginning of the planning horizon. Otherwise, in determining cost per line, there is a significant mismatch between the numerator of the cost per line (which reflects investment large enough to accommodate line growth) and the denominator (which ignores line growth). AT&T/WorldCom alleged that the resulting cost per line is too high for today's customers because it includes more investment than is necessary to serve today's customers and it is too high for customers in years two and three because it fails to take into account the higher number of customers that will be served by this investment in years two and three.

In its Proposed Order, the Public Staff stated that it agrees with witness Caldwell that AT&T/WorldCom's adjustments to reflect line growth are arbitrary. Rather, the Public Staff commented that it believes neither future customers nor the facilities intended to serve them should be reflected in BellSouth's cost study. The Public Staff stated that it is satisfied that BellSouth's model, with the inputs recommended by the Public Staff, adequately captures economies of scale in the network and will result in appropriate cost recovery.

Based on the evidence presented, the Commission finds it appropriate to reject AT&T/WorldCom's adjustments to reflect line growth. The Commission agrees with BellSouth and the Public Staff that such adjustments are arbitrary. The Commission notes that witness Caldwell contended that additional costs are required to support additional demand. Thus, she maintained that witness Pitkin's growth adjustment is inappropriate absent a further adjustment for the added costs associated with the growth.

Additionally, the Commission notes that witness Stegeman demonstrated, when updated line data (with increased demand) was used in the forward-looking BSTLM with the corresponding updated customer locations and roads, the per line cost did not change, since there was a corresponding increase in the network routing and plant requirements as a result of the demand growth. Further, BellSouth noted that in the six states where the BSTLM has been filed to support UNE rates and the state commission has issued an order, none of those states adjusted the BSTLM output to account for "growth".

CONCLUSIONS

The Commission concludes that it is not appropriate to decrease UNE rates based on AT&T/WorldCom's forecasted "growth" adjustment.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

ISSUE NO. 12: What is the appropriate application of the Commission's previously ordered geographic deaveraging methodology to the UNE loop costs produced by the BSTLM?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth maintained that the Commission should approve BellSouth's application of the deaveraging methodology adopted by the Commission in its *December 11, 2001 Order*[1] in this docket.

AT&T/WORLDCOM: AT&T/WorldCom stated that they take no position regarding the appropriate application of the Commission's previously ordered geographic deaveraging methodology.

COVAD: Covad did not take a specific position on this issue.

DEPARTMENT OF DEFENSE: The Department of Defense maintained that UNE charges for each of the three pricing zones should be determined by ranking the costs for wire centers from lowest to highest cost. The Department of Defense asserted that rankings should be based on total recurring costs, i.e., monthly costs, and not investment costs. The Department of Defense asserted that wire centers with total recurring costs less than 115% of the statewide average should be included in Zone 1; wire centers with total recurring costs between 115% and 160% of the statewide average should be included in Zone 2; and wire centers with total recurring costs greater than 160% of the statewide average should be included in Zone 3. The Department of Defense asserted that this procedure should enable UNE charges to track geographical cost variations for local loops quite well. The Department of Defense also stated that the procedure appears to follow generally the method prescribed by the Commission in its March 2001 Notice concerning UNEs. The Department of Defense noted that while adhering closely to the disaggregation methodology prescribed previously, BellSouth has made some improvements. The Department of Defense urged the Commission to adopt the approach that most accurately portrays cost variations among the different types of areas in North Carolina. The Department of Defense maintained that if charges do not match the extent of cost variations, either subscribers in urban areas or subscribers in rural areas will be penalized.

PUBLIC STAFF: The Public Staff asserted that BellSouth should continue to group its wire centers and calculate the rates for the geographic zones as determined in the Commission's *December 11, 2001 Order* in this docket.

DISCUSSION

BellSouth witness Ruscilli stated in direct testimony that the deaveraging methodology used by BellSouth follows the methodology adopted by the Commission in its *December 11 2001 Order* in this docket. Witness Ruscilli explained that the *December 11, 2001 Order* determined that wire centers should be grouped into zones as follows:

Zone 1 – All wire centers with **loop investment** of up to 115% of the statewide average.

[1] *Order Finalizing Deaveraged UNE Rates and Denying ALLTEL's Motion to Deaverage Nonrecurring Rates* issued on December 11, 2001 (*December 11, 2001 Order*).

Zone 2 – All wire centers with **loop investment** above 115% and up to 160% of the statewide average.

Zone 3 – All wire centers with **loop investment** above 160% of the statewide average.

Witness Ruscilli stated that in order to develop the geographically deaveraged loop rates proposed by BellSouth in this proceeding, BellSouth considered the percentages as outlined above to establish which wire centers belong in each of the three zones. However, witness Ruscilli noted, the percentages were based on loop cost by wire center rather than being based on loop investment by wire center.

Witness Ruscilli maintained that the Commission's *Recommended Order Concerning Geographic Deaveraging* issued on March 15, 2001 required that the percentages be based on UNE costs. Witness Ruscilli noted that in its Exceptions to the Commission's *Order*, BellSouth explained that it was not able, at that time, to develop the deaveraging factors based on loop costs, because the BCPM produced investments at the wire center level. Witness Ruscilli noted that BellSouth's current model, the BSTLM-CP, is able to develop monthly costs at the wire center level. Witness Ruscilli stated that this method of developing the deaveraged costs is consistent with what other state commissions in BellSouth's region have ordered when deaveraging by wire center and using the BSTLM-CP, and prior versions of the model, to develop the loop costs. Witness Ruscilli noted that witness Caldwell's Exhibit DDC-4 illustrates the results for a Service Level (SL) 1 loop and displays the mapping of the wire center into the three zones that BellSouth proposes.

Witness Ruscilli noted that his Exhibit JAR-2 provides a list of the wire centers in each UNE zone resulting from BellSouth's application of the Commission's geographic deaveraging methodology. Witness Ruscilli stated that in the cases where a wire center has moved into a different zone, that change is indicated on the exhibit. Witness Ruscilli remarked that when such a change occurred, in all but two cases, the wire centers moved from a higher cost zone to a lower cost zone.

In his supplemental direct testimony, witness Ruscilli stated that to develop the deaveraged rates shown on Exhibit JAR-3, BellSouth started with the statewide average loop costs and applied the deaveraging factors that resulted from the Commission's approval of BellSouth's deaveraged rates in its *April 5, 2002 Order*. Witness Ruscilli noted that those deaveraging factors are as follows:

Zone 1 – 75.81%
Zone 2 – 134.37%
Zone 3 – 213.90%

Witness Ruscilli argued that BellSouth believes that the methodology used to develop the deaveraged rates as shown on Exhibit JAR-1 is more appropriate and comports with the Commission's previous orders establishing the geographic deaveraging methodology. Witness Ruscilli explained that to develop the deaveraged rates on Exhibit JAR-1, the wire centers were ranked from lowest cost to highest cost, and the Commission-ordered break-points were applied to determine which wire centers would be in each of the zones. Witness Ruscilli stated that this application of the Commission's geographic deaveraging methodology resulted in 30 wire centers changing zones when compared to the current wire center designations. Witness Ruscilli noted that 28 of those moves were from a higher priced zone to a lower priced zone.

Witness Ruscilli stated that BellSouth considers the Commission's establishment of specific break-points to be the ultimate guide in deaveraging costs. Witness Ruscilli noted that obviously, if the Commission had chosen different break-points, the deaveraging factors would be different. Witness Ruscilli commented that given the Commission's prior decision to begin its deaveraging methodology by ranking the wire centers from the lowest cost to the highest cost, BellSouth contends that the more appropriate way to deaverage the statewide costs is as proposed in BellSouth's June 10, 2002 filing of witness Ruscilli's direct testimony in which wire center costs are ranked from lowest to highest, the Commission-ordered break-points are applied, and zone-specific rates are calculated.

On July 31, 2002, the Commission issued its *Order Granting, in Part, the Public Staff's Motion to Require BellSouth to Re-File Cost Study and Proposed Rates*. In the *Order*, the Commission required BellSouth to file a cost study and resulting rates to reflect the Commission's previous decisions on geographic deaveraging, among other issues. The Public Staff had noted in its Motion that BellSouth did not reflect the geographic deaveraging methodology approved by the Commission and that BellSouth's changes substantially altered the assignment of wire centers to geographic zones as adopted by the Commission in its *April 5, 2002 Order*.

In response to the *July 31, 2002 Order*, witness Ruscilli filed Supplemental Direct Testimony on August 12, 2002 to reflect the changes introduced by witness Caldwell in BellSouth's proposed deaveraging methodology. Revised Exhibit JAR-3 was filed to reflect the changes in the cost study supported by witness Caldwell.

In rebuttal testimony, witness Ruscilli commented that BellSouth's application of the deaveraging methodology differs from the Public Staff's proposal. Witness Ruscilli stated that none of the CLP witnesses stated an opinion or a preference for how the statewide average loop costs should be deaveraged. Witness Ruscilli maintained that, although it is clear that witness Pitkin did not develop his proposed deaveraged costs by applying the current deaveraging factors to the statewide average costs, BellSouth has not been able to determine exactly how witness Pitkin developed the deaveraged costs he proposed.

Witness Ruscilli stated that BellSouth urges the Commission to approve BellSouth's application of the deaveraging methodology previously approved by the Commission in its *December 11, 2001 Order*. Witness Ruscilli noted that the actual deaveraging should be dependent on the break-points that the Commission established, because the break-points ultimately determine to which zone each wire center is mapped. Witness Ruscilli argued that there is nothing magic about the deaveraging factors that resulted from the mapping that was done in Phase I of this proceeding.

Witness Ruscilli commented that it is reasonable to assume that, when a new cost study is done, some wire centers will move from one zone to another. Witness Ruscilli argued that as shown on Revised Exhibit JAR-2, BellSouth's application of the Commission's deaveraging methodology to the new cost study results in 32 wire centers moving to a different zone; however, all but two of the moves were from a higher cost zone to a lower cost zone.

Witness Ruscilli maintained that if the current wire center to zone designations were maintained and applied to the new cost study, the SL1 loop costs by wire center in Zone 1 as expressed as a percent of the statewide average cost would range from 64.7% to 194.2%, the costs in Zone 2 would range from 124.9% to 245.2%, and the costs in Zone 3 would range from 189.3% to 484.3%. Witness Ruscilli stated that this result obviously does not comport with the zone grouping break-points established by the Commission in Phase I of this docket.

Witness Ruscilli stated that given the Commission's prior decision to begin its deaveraging methodology by ranking the wire centers from lowest cost to highest cost, the more appropriate way to deaverage the state-wide costs is to rank the wire center costs from lowest to highest, apply the Commission-ordered break-points, and calculate the zone-specific rates.

BellSouth witness Caldwell stated in direct testimony that BellSouth followed the wire center based methodology previously ordered by the Commission. Witness Caldwell maintained that as the Commission determined, only loops and local channels possess attributes that reflect geographic cost differences and, thus only loops and local channels below DS3 transmission rates should be deaveraged. Witness Caldwell asserted that other UNEs either do not display the same level of cost variation by geographic location or have price structures that already account for geographic cost differences. Witness Caldwell noted that subloops and combinations that have a loop as a component also should be deaveraged since they also reflect cost variations by geographic area.

Witness Caldwell asserted that the same basic geographic deaveraging process the Commission used previously was employed to calculate zone rates. However, witness Caldwell explained that there are a few differences. Witness Caldwell stated that use of an external model is no longer required for deaveraging because BellSouth can now determine loop costs at the wire center level using the BSTLM-CP. Another difference witness Caldwell noted was the BSTLM-CP cannot currently produce per loop investments at the wire center level; therefore, rankings are based upon costs rather than on investments. Witness Caldwell stated that BellSouth ranked the BSTLM-CP's wire center level results and compared them to the statewide average costs. Witness Caldwell noted that if the wire center level cost is less than 115% of the statewide average then it is placed in Zone 1; 115%-160% in Zone 2; and greater than 160% in Zone 3. Witness Caldwell commented that her Exhibit DDC-4 illustrates this exercise for a SL1 loop and displays the mapping of the wire centers into the three zones that BellSouth proposes. Witness Caldwell noted that the results are reflected in the rate sheet attached to witness Ruscilli's testimony.

BellSouth urged in its Brief that the Commission approve BellSouth's application of the deaveraging methodology the Commission has previously approved in its *December 11, 2001 Order*. BellSouth argued that none of the CLP witnesses stated an opinion or a preference for how the statewide average loop cost should be deaveraged. BellSouth noted that as witness Ruscilli described in his prefiled testimony, the Commission's establishment of specific break-points should be the ultimate guide in deaveraging costs.

BellSouth maintained that it is reasonable to assume that when a new cost study is performed some wire centers will move from one zone to another. BellSouth stated that as shown on revised Exhibit JAR-2 attached to witness Ruscilli's October 1, 2002 prefiled testimony, BellSouth's application of the Commission's deaveraging methodology to the new cost study resulted in 32 wire centers moving to a different zone; however, all but two of the moves were from the higher cost zone to a lower cost zone – a development that benefits the CLPs.

BellSouth asserted that if the current wire center-to-zone designations were maintained and applied to the new cost study, the SL1 loop costs by wire center in Zone 1 expressed as a percentage of the statewide average cost would range from 39.5% to 118.6%; the costs in Zone 2 would range from 76.3% to 149.7%; and the costs in Zone 3 would range from 115.6% to 295.7%. BellSouth argued that this result obviously does not comport with the zone grouping break-points established by the Commission in phase one of this docket.

BellSouth stated that given the Commission's prior decision to begin its deaveraging methodology by ranking the wire centers from lowest cost to highest cost, the more appropriate way to deaverage the statewide costs is to rank the wire center costs from lowest to highest, apply the Commission-ordered break-points, and calculate the zone-specific rates. BellSouth noted that the deaveraged rates that result from BellSouth's proposal are shown in Revised Exhibit JAR-1, attached to witness Ruscilli's October 1, 2002 testimony.

The Department of Defense witness Gildea stated in direct testimony that he believes that BellSouth's disaggregation procedure should be adopted. Witness Gildea noted that the procedure should enable UNE charges to track geographical cost variations for local loops reasonably well. Moreover, witness Gildea asserted, the procedure appears to follow generally the method prescribed by the Commission in its March 15, 2001 *Recommended Order Concerning Geographic Deaveraging* in this docket concerning UNEs. Witness Gildea commented that while adhering closely to the disaggregation methodology prescribed previously, BellSouth has made some improvements. Witness Gildea stated that, for example, BellSouth no longer relies on a cost proxy approach, but determines loop costs at the wire center level through a more direct method. Also, witness Gildea stated, BellSouth is basing the disaggregation on loop costs rather than loop investments. Witness Gildea stated that rankings by cost may be different from rankings by investment, since the former may also reflect costs that are not investment sensitive. Therefore, witness Gildea concluded, incremental costs are more appropriate than incremental investments as a basis for recurring UNE charges.

The Public Staff noted in its Proposed Order that according to BellSouth witness Ruscilli, BellSouth used the deaveraging methodology adopted by the Commission in its *December 11, 2001 Order* in this docket. The Public Staff noted that witness Ruscilli stated that in BellSouth's original filing in this proceeding, BellSouth grouped wire centers based on loop cost by wire center rather than on loop investment by wire center. The Public Staff stated that witness Ruscilli explained that at the time of the initial deaveraging order, BellSouth's loop model was able to produce investment but not costs at the wire center level, whereas BellSouth's new loop model can now develop costs at the wire center level.

The Public Staff maintained that when the Commission initiated this proceeding, it stated that nonrelevant policy issues would not be considered. The Public Staff argued that whether to group wire centers based on loop investment or loop cost is such an issue. Further, the Public Staff opined, if the Commission were to approve BellSouth's methodology for deaveraging, other companies not party to this proceeding could also be affected. The Public Staff asserted that the Commission has already conducted extensive proceedings on deaveraging, and the Public Staff believes that it is neither necessary nor appropriate to revisit this issue in this proceeding. The Public Staff recommended that the Commission conclude that BellSouth should continue to group its wire centers and calculate the rates for the geographic zones as determined in the *December 11, 2001 Order* in this docket.

The Commission believes it is helpful to fully outline the background on geographic deaveraging. On March 15, 2001, the Commission issued its *Recommended Order Concerning Geographic Deaveraging*. In its *Order*, the Commission found that the State should be broken up into geographic zones which should be established at the wire center level by grouping wire centers. The Commission further found that each ILEC should divide up its service territory into Zones based on the following bands:

> **Zone 1** – All wire centers with **UNE costs** of 115% or less of the statewide average for that UNE.
>
> **Zone 2** – All wire centers with **UNE costs** of 115% to 160% of the statewide average for that UNE.
>
> **Zone 3** – All wire centers with **UNE costs** of 160% or greater of the statewide average for that UNE.

Parties filed Motions for Reconsideration of the March 15, 2001 *Recommended Order* and on August 7, 2001, the Commission issued its *Order Addressing Exceptions Filed to Recommended Order Concerning Geographic Deaveraging*. In the *August 7, 2001 Order*, the Commission found it appropriate to alter its *Recommended Order* to recognize the limitations of the ILECs' cost models by allowing BellSouth, Carolina, Central, and Verizon to assign wire centers to rate zones based on **loop investment** instead of cost at the wire center level, creating a single set of three rate zones. Further, the Commission clarified the break point for zones in order to correct the overlap. Therefore, the following Zones were established:

> **Zone 1** – All wire centers with **loop investment** of up to 115% of the statewide average.
>
> **Zone 2** – All wire centers with **loop investment** above 115% and up to 160% of the statewide average.
>
> **Zone 3** – All wire centers with **loop investment** above 160% of the statewide average.

On December 11, 2001, the Commission issued its *Order Finalizing Deaveraged UNE Rates and Denying ALLTEL's Motion to Deaverage Nonrecurring Rates.* The Commission instructed the Companies to make various revisions to their cost studies in order for them to be in compliance with the Commission's *March 15, 2001 Order* and *August 7, 2001 Order*. By Order dated April 5, 2002, the Commission found that:

> (1) the deaveraged UNE rates produced from the cost study filed on December 14, 2001 by BellSouth are the final, permanent deaveraged UNE rates for BellSouth;
>
> (2) the deaveraged UNE rates produced from the cost study filed on February 26, 2002 by Sprint are the final, permanent deaveraged UNE rates for Sprint;
>
> (3) the deaveraged UNE rates produced from the cost study filed on March 5, 2002 by Verizon are the final, permanent deaveraged UNE rates for Verizon; and
>
> (4) the effective date of the deaveraged UNE rates was December 11, 2001.

The Commission notes that the March 15, 2001 *Recommended Order* was subsequently altered based on representations made by BellSouth that its then-current cost model could not determine UNE cost by wire center. Therefore, the Commission's August 7, 2001 *Order Addressing Exceptions Filed to Recommended Order Concerning Geographic Deaveraging* required BellSouth, Carolina, Central, and Verizon to assign wire centers to rate zones based on loop investment instead of cost at the wire center level. In this proceeding, BellSouth now states that its BSTLM can determine UNE cost at the wire center level, as originally ordered by the Commission.

The Commission finds it appropriate to require BellSouth to reflect the Commission's original decision on the appropriate geographic deaveraging methodology as expressed in the Commission's March 15, 2001 *Recommended Order Concerning Geographic Deaveraging.* The only reason the Commission altered its original decision on this issue was due to the fact that BellSouth's previous cost models could not deaverage based on cost at the wire center level. Since BellSouth's new model, the BSTLM-CP, can deaverage based on cost at the wire center level, the Commission finds it appropriate to require BellSouth to deaverage based on cost. The Commission notes that it will explore and address this issue as it relates to Sprint's and Verizon's deaveraging methodology by separate order.

CONCLUSIONS

The Commission concludes that BellSouth should reflect the Commission's original decision on the appropriate geographic deaveraging methodology based on cost at the wire center level as expressed in the Commission's March 15, 2001 *Recommended Order Concerning Geographic Deaveraging.* The Commission will explore and address this issue as it relates to Sprint's and Verizon's deaveraging methodology by separate order.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

ISSUE NO. 13: Are AT&T/WorldCom's proposed adjustments to BellSouth's switching cost study appropriate?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth asserted that its switching cost studies accurately calculated the cost of unbundled local switching and its "features per port" cost element, among other things.

AT&T/WORLDCOM: AT&T/WorldCom argued that the appropriate new switch discount for input into the Switching Cost Information System/Model Office (SCIS/MO) should be computed based upon comparing BellSouth's manufacturer billed data for its switch material, vendor engineering, and installation costs to the SCIS/MO output for vendor engineered, furnished and installed switch prices. The melded discount should include a greater amount of the new discount than what BellSouth used in its cost study. The getting started cost and Equivalent POTS Half Calls (EPHC) investment should be assigned to the ports. The feature rate should be zero because the composite feature cost study BellSouth relies upon is fatally flawed and all of the additional costs unique to features have been or are recovered in other switch rate elements.

COVAD: Covad did not specifically address this issue in its Post-Hearing Brief.

DEPARTMENT OF DEFENSE: The Department of Defense stated that BellSouth's proposed pricing plan for switch features is anticompetitive. A bundled structure is not efficient because competitors would be forced to pay for extra services. The Department of Defense urged the Commission to rule consistently with prior findings on this issue and establish individual rates for each feature.

PUBLIC STAFF: The Public Staff took the position that the switching costs proposed by BellSouth, subject to certain modifications and adjustments, are reasonable and appropriate for determining the rates associated with providing unbundled switching. Vertical features should be unbundled and priced separately from the local switch. However, BellSouth may also offer combined vertical features in a bundled package.

DISCUSSION

BellSouth witness Shell and AT&T/WorldCom witness Pitts testified on the inputs and cost study methodology used to develop investment or costs associated with unbundled switch-related elements. BellSouth witness Ruscilli and Department of Defense witness Gildea testified on the vertical feature issue.

BellSouth witness Shell testified that BellSouth developed switching material prices in a two step process. In the first step, BellSouth used Telecordia's SCIS/MO model to determine fundamental switching investments, just as it did in the previous UNE proceeding. Witness Shell stated that because switches perform a number of functions, a sophisticated model like SCIS/MO is required to determine the fundamental unit switch investments associated with each function.

According to his testimony, an important aspect of SCIS/MO is that it used a "bottoms-up" approach to costing and is based on vendor engineering specifications and vendor pricing. BellSouth noted that although Telecordia works with the switch vendors to incorporate the correct engineering algorithms and appropriate list prices for switching equipment into the model, BellSouth is responsible for populating the model with the correct inputs.

In order to develop the switching costs using the SCIS/MO, witness Shell explained that input information is entered for each digital switch in North Carolina. He testified that SCIS/MO contains a material price table that includes the switch vendor's list price for various switch equipment items. For each item, witness Shell explained that SCIS/MO allows the user to input one discount off the list price. According to witness Shell, switches are normally purchased with sufficient capacity to serve the current demand plus two years of growth. This initial purchase is considered "new" or "replacement". Equipment purchased to serve additional demand is considered "growth". Since switch vendors typically establish higher discounts on new/replacement switching equipment and lower discounts on growth equipment, witness Shell testified that BellSouth used the new/replacement discount for the initial purchase items and used a melded new/replacement and growth discount for items that could be purchased both initially and to serve additional demand in existing switches. To determine the initial discount, BellSouth used actual new/replacement switch orders placed under BellSouth's current switch contracts. To determine the melded new/replacement and growth discount, BellSouth used percentages based on the number of lines projected to be purchased at the new/replacement discount rate and the growth discount rate to meld a discount rate for each switch type. Witness Shell testified that it is appropriate to use a melded new/replacement and growth discount to calculate switching investment costs. He stated that the FCC clearly intended for ILECs to use the costs that they may reasonably expect to incur on a going-forward basis. Because BellSouth expects to add capacity to existing switches, witness Shell believed it was appropriate to reflect the lower discount for growth investment in the price for switching, which he also contended is consistent with real-world concepts. Witness Shell testified that the basic material prices from the SCIS/MO determined by BellSouth in this proceeding are lower than the material prices in the last UNE proceeding, because the discount BellSouth has negotiated with its switch vendors has increased. He believed the downward trend in switching cost is reasonable and appropriate given the change in switching architecture and price levels over the past several years.

In step two of the process to develop switching investment or costs, witness Shell testified that BellSouth employed a new, internally developed cost model. This new model, named the Simplified Switching Tool (SST), identifies which of the basic switching functions are used or required by each switch-related network element and any additional investment unique to each such element. BellSouth used the SST model to determine the investment cost or UNE material prices for individual exchange ports, local usage elements, and the composite vertical features. Witness Shell testified that the SST replaced Telecordia's Switching Cost Information System/Intelligent Network (SCIS/IN) and BellSouth's Switched Network Calculator (SNC) models used in the previous UNE study. According to his testimony, BellSouth had developed the SST model as an outgrowth of its desire to improve its cost modeling in terms of methodology and operational efficiency. Unlike the SCIS/IN, the SST model is inherently open, available for public inspection and use, and also provides the flexibility to add or change elements in a matter of hours.

In his testimony, witness Shell also described how BellSouth used the SST model to determine the investment or UNE material price for the composite vertical features. In this proceeding, BellSouth proposed a composite features per port rate of $2.33 for access to all available vertical features. He explained that because BellSouth has no way of knowing exactly how many or which features a CLP's customers will use, BellSouth developed a composite vertical feature, or "feature per port" cost by projecting an average amount of feature usage. According to witness Shell, in order to obtain average busy hour usage data, a representative group consisting of 56 features was analyzed to enable BellSouth to determine which switch resources are required to process the feature calls. The next step was to consider that the typical end user customer utilizes a certain number of features. Multiplying the average busy hour demand by the number of features per average user yielded the average busy hour features calls per line for input to the SST. A feature specific hardware study was performed to provide input values to the SST, which requires the average busy hour investment in feature specific hardware per CCS (hundred call seconds) of use. Witness Shell testified that the objective was to produce a single cost number, for pricing purposes, which is representative of all major types of switch hardware used for features.

The Commission notes that BellSouth made a supplemental filing on August 12, 2002 that contained proposed rates for individual vertical features, pursuant to the Commission Order dated July 31, 2002 in this docket. The individual vertical feature rates were developed by BellSouth using the SCIS/IN model to calculate the investments of individual features, since the SST is evidently not currently capable of calculating individual vertical feature costs.

AT&T/WorldCom witness Pitts raised several issues to dispute BellSouth's determination of switch-related investments or costs. In general, witness Pitts testified that BellSouth used cost methodologies that overstate the price BellSouth pays for switching equipment, improperly attributed fixed and port-related costs to minute of use and feature rate elements, and relied on unsupported or illogical assumptions. Witness Pitts recommended changes to switch investment, which in conjunction with other changes regarding loading factors, expense factors, and annual cost factors, were used to calculate AT&T/WorldCom's proposed UNE switch rates presented by witness Pitkin. Witness Pitts also recommended that the composite feature cost element, as well as any vertical feature element, should be zero.

Witness Pitts testified that there are two major errors in BellSouth's determination of switch prices. First, she stated that BellSouth used incorrect new switch prices that do not reflect the prices BellSouth claims it pays for new switches. According to her testimony, when the discount that BellSouth calculated for new switch purchases is used as an input in SCIS/MO, the model calculates total switch investments much higher than the actual purchase prices BellSouth paid according to the same workpapers BellSouth used to derive the discount. In rebuttal, BellSouth witness Shell testified that witness Pitts was wrong because witness Pitts used the wrong data in BellSouth's workpapers. According to witness Shell, the purpose of BellSouth's calculation was to determine the discount for the material, not the total engineered, furnished, and installed (EF&I) investment. Nevertheless, witness Shell testified that the total switch investments calculated by the model for all the new or replacement jobs is actually less than the actual purchase price BellSouth paid for the same switch jobs as shown on the same workpapers used by witness Pitts. In addition, witness Shell stated that the engineering and installation investments used in the investment tables in SCIS/MO came from the vendors. Therefore, witness Shell contended that BellSouth's derivation of the new switch discount should be accepted as the appropriate methodology.

Second, witness Pitts testified that BellSouth also erred in its determination of switch prices because the melded price is composed of mostly growth equipment which has a lower discount and thus a higher price, rather than new/replacement switch equipment. According to her testimony, BellSouth only looked at a snapshot of switch purchases over three particular years which caused it to be an embedded analysis, as opposed to forward-looking. Further, she testified that BellSouth should have assumed new switches are purchased today to serve current demand and include forecasted growth based on reasonably foreseeable demand. In rebuttal, BellSouth witness Shell pointed out that melding new and growth discounts for switches was approved by this Commission in the first UNE proceeding and by the FCC in the *GA/LA II* and *Five State 271 Orders*. Moreover, witness Shell testified that BellSouth's methodology for deriving the melded discounts was based on actual switch purchases, as opposed to witness Shell's methodology of relying on projected and hypothetical assumptions, and reflects the rate that BellSouth will pay on a going-forward basis.

AT&T/WorldCom witness Pitts also contended that BellSouth improperly attributed and allocated fixed costs that are port-related to minutes of use and features rate elements. In her testimony, witness Pitts explained that "getting started" investment costs are the costs associated with the central computer processor and other start-up equipment in the switch that is purchased when the switch is first installed. She also explained that the EPHC cost category captures investment in common equipment in the switch module of the Lucent 5ESS switch. Based upon an examination of Telecordia's User Guide and the switch processor fill factors used in BellSouth's switch cost study, witness Pitts argued that these cost categories are fixed and incurred due to port exhaust, as opposed to processor limitations or call traffic, and should be assigned to the ports.

In rebuttal on this issue, BellSouth witness Shell testified that BellSouth appropriately assigned the SCIS/MO outputs for the getting started investment and EPHC to the minutes of use and feature elements. He argued that such investment is driven by usage volumes and the amount of lines or trunks is only relevant as it pertains to the amount of usage created. Witness Shell contended that it is not appropriate to use the process utilization factor referred to by witness Pitts to support a statement that the switch processors are underutilized because it does not represent the literal processor fill. Witness Shell also testified that allocating the getting started investment based on the machine call capacity is consistent with Telecordia's 5ESS User Guide as well as the guide for Nortel Digital Multiplex System (DMS) switches. Witness Shell explained that the SCIS/MO produced output for the getting started investment in terms of milliseconds and for the switching module in terms of half calls, which are both usage-related items. Further, witness Shell commented that the SCIS/MO User Guide states that machine call processing capacity is normally the first to reach exhaust. Since usage and feature demand impact call processing, which drives the investments for the getting started and switching module equipment, witness Shell believed that it is only appropriate that the investments are assigned to minutes of use and feature elements.

AT&T WorldCom witness Pitts also testified that BellSouth's vertical features cost study is flawed for several reasons. First, as discussed above, she believed that BellSouth had misallocated the getting started and EPHC costs. In addition, she testified that although BellSouth's composite vertical feature cost purportedly represents an average of all vertical features that are provisioned on an average subscriber port that orders features, she contended that it is meaningless to attempt to derive a theoretical average feature cost for an average subscriber when none exists. She also testified that BellSouth's theoretical average composite feature cost study made numerous incorrect estimates concerning the number, types, and usage of features on an average customer line. For example, she testified that BellSouth had admitted that most of the 56 features that it analyzed in this study had zero subscribers. Even more importantly, according to witness Pitts, BellSouth double-counted vertical feature hardware costs by including the costs of feature hardware in both the basic switch investments per line to produce the port and minutes of use rate elements, and again in the feature cost study to produce the vertical feature rate elements. Witness Shell testified that the individual feature costs contained in the BellSouth supplemental filing also suffered from the use of inflated SCIS/MO outputs, double-counted hardware costs, and misallocated getting started costs, as discussed above. In addition, she testified that BellSouth had not appropriately substantiated feature usage estimates for the individual features' cost.

In rebuttal to the testimony of witness Pitts concerning BellSouth's feature cost study, witness Shell explained that since BellSouth does not know exactly how many or what kind of features a CLP's customers will use, it developed a composite "features per port" cost by projecting an average amount of vertical feature usage based on the average busy hour usage of a representative mix of features. Thus, the resulting composite UNE features cost assumes that the CLP customer has access to and can use every feature offered in the end office. More specifically, as described in more detail above, witness Shell testified that the getting started investment and the switching module investment per EPHC are driven by usage volume and should be included, as supported by switch vendors and Telecordia. Concerning witness Pitts' testimony that BellSouth had admitted that most of the 56 features analyzed in the study had zero subscribers, witness Shell testified that witness Pitts had misinterpreted a BellSouth response to an interrogatory and equated zero percent penetration to zero subscribers. Nonetheless, he testified that even though some of 56 features have zero subscribers, the 56 features are representative of a mix of features requiring different switch components. In response to the testimony of witness Pitts wherein she argued that BellSouth had double-counted vertical feature hardware costs, witness Shell contended that there was no double-counting of such costs because the costs of that hardware are not included in the calculation of the basic switch investment per line. He explained that although witness Pitts Exhibit CEP-5 shows a Nortel Firm Price Quote for a switch including feature hardware, BellSouth did not use this information in its development of the switch-related costs. As noted above, witness Pitts also testified that BellSouth had not appropriately substantiated feature usage estimates for the individual features' costs. However, witness Shell responded that BellSouth had used the same usage input currently being used for retail studies.

BellSouth witness Ruscilli testified that BellSouth initially proposed a bundled rate for access to all features of the switch in this docket. However, pursuant to the Commission Order dated July 31, 2002, BellSouth filed proposed rates for individual vertical features.

The Department of Defense witness Gildea urged the Commission to uphold its finding in the *First UNE Order* that vertical features should be unbundled and priced separately from the local switch. Witness Gildea pointed out that a bundled features offering is inefficient because a competitor could be forced to pay for services that were not required.

In its Proposed Order, the Public Staff recommended that the switching costs proposed by BellSouth, subject to certain modifications and adjustments to the studies concerning the various cost and capital expenses discussed on other issues, were reasonable and appropriate. In addition, the Public Staff recommended that vertical features should be unbundled and priced separately from the local switch as required by the Commission in the previous UNE proceeding. However, the Public Staff added that BellSouth should be allowed to combine vertical features in a bundled offering.

Based upon the evidence, the Commission concludes that BellSouth's calculation of the switch-related investments using the SCIS/MO, SST, and SCIS/IN models is reasonable. The Commission believes that BellSouth has appropriately calculated the switch discounts, appropriately allocated the getting started and EPHC investment, and has not double-counted the hardware costs for vertical features. Therefore, the Commission finds that the switching investment costs proposed by BellSouth are reasonable. In addition, the Commission notes that it has given extensive consideration to the vertical features issue in prior proceedings. The Commission agrees with witness Gildea that it would be inefficient and anticompetitive to require a CLP to buy a more expensive bundled offering for all vertical features when a CLP needs only a few vertical features to serve customers. Therefore, as in the previous UNE proceeding, the Commission concluded that vertical features should be unbundled and priced separately from the local switch based on the investment costs determined by BellSouth's cost studies. Accordingly, BellSouth should continue to offer, on a "per feature" basis, each feature that it makes available to its own subscribers. However, the Commission believes that is it certainly appropriate for BellSouth to also offer vertical features on a bundled basis and recommends that BellSouth should be allowed to offer a composite "feature per port" rate, with multiple vertical features. Finally, the switching investment costs determined by BellSouth should be subject to the applicable adjustments and modifications concerning the various cost and capital expense factors discussed elsewhere herein to calculate its UNE rates.

CONCLUSIONS

The Commission concludes that the switching costs proposed by BellSouth are reasonable and appropriate subject to the applicable adjustments and modifications concerning the various cost and capital expense factors discussed elsewhere herein to calculate its UNE rates. Vertical features should be unbundled and priced separately from the local switch, i.e., BellSouth should offer rates, on a per-feature basis, for each feature that it makes available to its own subscribers. Additionally, BellSouth should also be allowed to combine vertical features in a bundled package, and thus, offer a composite features per port rate which includes all available vertical features.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

ISSUE NO. 14: What are the appropriate task times and other inputs to use in calculating BellSouth's nonrecurring rates?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth stated that its personnel familiar with the provisioning process identified the amount of time it takes to complete the necessary tasks. These personnel considered anticipated productivity improvements and potential technological improvements. As stated by BellSouth, the Commission should conclude that BellSouth's proposed task times and the non-recurring charge inputs are appropriate.

AT&T/WORLDCOM: AT&T/WorldCom stated that BellSouth's task times must be modified significantly to reflect tasks performed in a forward-looking environment and not rely upon the Georgia flawed time and motion study. Furthermore, BellSouth's current processes do not take into account the most efficient manner in which CLPs orders should be processed during the cost study period.

COVAD: Covad commented that this Commission should set the nonrecurring rates contained in BellSouth's current SGAT as a ceiling for nonrecurring UNE rates because BellSouth has failed to prove that the prices it seeks do not exceed the forward-looking economic cost per unit of providing the element.

DEPARTMENT OF DEFENSE: The Department of Defense stated that it concurs with Covad that the Commission should reject BellSouth's proposals to increase charges above the levels claimed in obtaining Section 271 approval.

PUBLIC STAFF: The Public Staff stated that the nonrecurring charges currently filed and approved by the Commission in BellSouth's SGAT are reasonable and appropriate for recovering its nonrecurring costs associated with providing UNEs and interconnection.

DISCUSSION

BellSouth witness Raulerson testified that work time inputs used in BellSouth's nonrecurring cost study were provided by subject matter experts (SMEs) familiar with the work performed by each group described in her testimony. BellSouth asked the SMEs to provide an estimate of how long it would take to handle each task their particular center may perform regarding the ordering and provisioning of a UNE, assuming use of the most efficient technology currently available. Furthermore, the SMEs were asked to consider efficient practices that would be found in a forward-looking environment.

AT&T/WorldCom witness Turner testified that rather than obtaining nonrecurring inputs from SMEs responsible for the provisioning of the unbundled network elements, BellSouth obtained its inputs from a time and motion study conducted at the direction of the Georgia Public Service Commission. BellSouth commented that for some work centers involved in the loop provisioning process, BellSouth performed a traditional time and motion study, and in others BellSouth used work sampling to measure the time to perform the tasks. The results of the time and motion studies were one factor considered in establishing forward-looking work times. BellSouth stated that the SMEs determined whether the work sampling or self-reported time and motion results were consistent with forward-looking estimates, while in other cases the work sampling or self-reported time and motion results were used as a data point in the development of forward-looking estimates.

As further stated by BellSouth, in either case, BellSouth provided forward-looking work times that were incorporated into the nonrecurring cost studies filed by BellSouth in Georgia, and it is these forward-looking work times that BellSouth's proposed nonrecurring rates were based. The time and motion study conducted pursuant to the Georgia Commission's order was not the ultimate source of the cost study input in North Carolina or Georgia, and BellSouth did not mislead this Commission, as AT&T/WorldCom witness Turner asserted.

BellSouth stated that AT&T/WorldCom witness Turner claimed that BellSouth inappropriately included labor time and costs that are already recovered through recurring rates for unbundled loops. As stated by BellSouth, the nonrecurring costs it incurs to provision an unbundled loop are incremental to BellSouth's capitalized costs associated with the initial installation of facilities. BellSouth commented that nonrecurring costs reflect the activities required to activate the circuit upon receipt of a service request from the CLP.

According to BellSouth, AT&T/WorldCom witness Turner further commented that installing plug-ins at the remote terminal, establishing connections at the remote terminal, or performing continuity testing on the unbundled loop are activities that take place with the initial placement of the cable, i.e., they are reflected in the recurring costs. However, BellSouth commented that witness Turner is incorrect and that none of the costs associated with the activities he described were included in BellSouth's recurring costs. Furthermore, they are specifically removed from the plant-specific expense factor. Also, witness Turner stated BellSouth always errs on the side of overstating labor requirements in its nonrecurring cost study. BellSouth commented that each SME carefully reviewed inputs across services and compared data for reasonableness. BellSouth stated that when changes were made to inputs, in most cases, conservative decisions were made that benefited the CLPs.

As stated by BellSouth, AT&T/WorldCom witness Turner also challenged the reasonableness of BellSouth's nonrecurring costs by comparing them to nonrecurring rates in nine other states outside of BellSouth's region. BellSouth commented that such a comparison proves nothing about the reasonableness of BellSouth's proposed nonrecurring rates. Furthermore, it may be imprecise to attempt to compare BellSouth's nonrecurring costs to other ILECs' nonrecurring costs without also comparing what is actually included in the underlying service offerings and/or the recurring charges.

BellSouth commented that the work activities associated with the ordering and provisioning of unbundled network elements are complex and time-consuming and the cost of such activities can be expensive. BellSouth stated that the CLPs should not be permitted to avoid such costs by proposing adjustments based on hypothetical networks that do not exist and on unsupported theories of how long it should take BellSouth to perform various work activities.

AT&T/WorldCom commented that nonrecurring charges are the one-time costs for activities required by BellSouth to initiate or provide unbundled network elements which are necessary for establishing, disconnecting or arranging telecommunications service for a CLP customer. BellSouth developed the non-recurring cost study in this proceeding by looking at the time it takes for each discrete activity involved in completing a CLP order from start – receipt of the request to provide service to the CLP customer, to finish – when the customer's service is installed.

AT&T/WorldCom stated that BellSouth has ten work centers that are involved with ordering and provisioning UNEs for CLPs. According to BellSouth witness Raulerson, each of the SMEs assigned to those work centers developed the task times based upon their personal experience taking into account any improvements or efficiencies that would be expected in a forward-looking environment.

AT&T/WorldCom commented that the nonrecurring cost study filed by BellSouth utilized time and motion study results rather than inputs from BellSouth SMEs. BellSouth contended that the SMEs used the study merely as a data point in developing forward-looking task time estimates.

Contrary to assertions by AT&T/WorldCom, BellSouth contends that the nonrecurring charges for the OC-TS hot cuts are not recovered in the nonrecurring charges for all unbundled loops. Furthermore, AT&T/WorldCom commented that many of the task times BellSouth proposes are the exact same task times as those in the time and motion study.

AT&T/WorldCom contended that the work times should be reduced for the technicians installing jumpers and performing tests on the loops because it should take the same amount of time to install and disconnect a jumper, only one technician is needed to wire and test an SL1 loop and only a limited amount of time is required. AT&T/WorldCom stated that it also eliminated the CWINS task times for local number portability (LNP) because BellSouth has separate rate elements in the cost study to recover LNP costs. As stated by AT&T/WorldCom, the other modifications it made to the non-recurring cost study were for removal of the costs for I&M labor except for the incremental costs for travel time to install plug-ins at the remote terminal, reducing dispatch probabilities for I&M by using the CWINS dispatch probabilities and accounting for dedicated inside plant (DIP) and dedicated outside plant (DOP), and eliminating the reliance upon work sampling data for CWINS task times.

As to the nonrecurring charges BellSouth wants to impose for hot cuts, AT&T/WorldCom stated that its main criticism is that costs are inflated because BellSouth has relied on task time data for CWINS that was a part of the time and motion study. Furthermore, according to AT&T/WorldCom, BellSouth includes task time for three managers to oversee a project that is performed by technicians in the field and includes two levels of technicians for a job that only requires one technician according to BellSouth's Florida cost study. AT&T/WorldCom also addressed the service order costs and nonrecurring UNE-P migration charges proposed by BellSouth. The service order costs which are primarily based on labor costs for the LCSC are inflated because the task times are based on the time and motion study.

AT&T/WorldCom stated that BellSouth is not entitled to rely upon a time and motion study to establish task times for nonrecurring charges. As stated by AT&T/WorldCom, FCC rules require cost based rates to be based upon the Total Element Long Term Incremental Cost of the element.

Covad commented that this Commission should set the nonrecurring rates contained in BellSouth's current SGAT as a ceiling for nonrecurring UNE rates because BellSouth has failed to prove that the prices it seeks do not exceed the forward-looking economic cost per unit of providing the element. Furthermore, if BellSouth wants rates increased as much as 200% based on a cost study filed in June 2002, BellSouth should demonstrate either what specific costs have increased or provide some other basis to allow the Commission to make that determination. Covad stated that BellSouth has done neither.

The Department of Defense stated that Covad explained that less than a week after the Commission's Order setting UNE prices, BellSouth acknowledged that some of its nonrecurring charges in North Carolina were significantly higher than the corresponding charges in other states. Furthermore, to avoid controversy during its then – current efforts to obtain Section 271 approval to offer in-region message toll services, BellSouth filed a revised SGAT adopting nonrecurring rates ordered in Louisiana that were lower than the corresponding nonrecurring rates in North Carolina. The Department of Defense commented that with the authority to provide long distance services, BellSouth seeks multi-fold increases in the SGAT rates that it claimed were cost based and appropriate only six months ago. The Department of Defense stated it concurs with Covad that the Commission should reject BellSouth's proposals to increase charges above the levels claimed in obtaining Section 271 approval.

The Public Staff commented that on May 7, 2002, BellSouth filed a revised SGAT Price List containing any nonrecurring UNE rates ordered in Louisiana that were lower than those in North Carolina. Also, according to the cover letter accompanying the filing, the revised SGAT price rate list was cost based and appropriate at this time, based on the current market, economic and regulatory conditions in North Carolina. Furthermore, the application stated, in part, that the new SGAT prices were cost based and TELRIC compliant. On June 10, 2002, BellSouth filed its UNE cost studies for this proceeding in which a number of the nonrecurring rates were significantly higher than those reflected in the May 7, 2002, SGAT filing, with some of the rates increasing by as much as 200%.

As stated by the Public Staff, BellSouth witness Raulerson, explained the basic process used to determine nonrecurring costs begins with an analyst responsible for obtaining estimates of the activities required to provision each element under study. Personnel familiar with the provisioning process identify the work groups involved and the amount of time necessary to complete the necessary tasks. Consideration is then given to anticipated productivity improvements and potential technological advances that may impact the amount of time required for various work items.

AT&T/WorldCom witness Turner pointed out discrepancies in the sources of many inputs used by BellSouth in its nonrecurring studies. Some of these discrepancies include entries that BellSouth reflected as being provided by SMEs, but actually were hard-coded entries of defective time and motion studies performed by BellSouth in a proceeding held in Georgia. As stated by the Public Staff, other problems delineated by witness Turner include simple mathematical errors made in the work papers supporting BellSouth's studies. Furthermore, BellSouth did not accurately implement the method it attempted to use to determine the nonrecurring inputs for its study.

The Public Staff commented that in response to witness Turner's testimony regarding the time and motion studies, witness Raulerson stated that BellSouth relied on SME projections of forward-looking task times and that the Georgia time and motion study was but one piece of data considered by SMEs in developing their time inputs. However, under cross-examination, witness Raulerson admitted that some of the SME estimates match the times generated by the time and motion study in Georgia.

BellSouth witness Caldwell disputed witness Turner's contention that BellSouth's cost studies reflect a false representation of the source for the nonrecurring cost inputs. According to witness Caldwell, the inputs were provided by SMEs responsible for the provisioning of the UNEs.

The Public Staff stated that the Commission should not be inclined to believe that the rates BellSouth filed in its SGAT on May 7, 2002, are below cost, as indicated by BellSouth witness Ruscilli. As stated by the Public Staff, the Commission should accept the statements made by BellSouth in its May 7, 2002, SGAT filing and its June 20, 2002, Five State 271 filing with the FCC that the rates contained in the SGAT are cost based and TELRIC compliant. The Public Staff stated that the nonrecurring charges currently filed and approved by the Commission in BellSouth's SGAT are reasonable and appropriate for recovering its nonrecurring costs associated with providing UNEs and interconnection.

The Commission concludes, based on the foregoing comments and all the evidence presented, that the costs contained in BellSouth's revised SGAT Price List should be adopted for use in this proceeding. As pointed out by the Public Staff, CLP witness Turner identified problems with the underlying data that support BellSouth's time estimates for its proposed nonrecurring costs. BellSouth similarly has taken issue with the assumptions in adjustments made by AT&T/WorldCom and other Parties. The Commission also believes, as stated by the Public Staff, that based on the record of evidence the nonrecurring costs proposed by BellSouth do not justify a rate revision, nor are the adjustments suggested by the intervenors definitive enough to make changes to the proposed nonrecurring charges presented by BellSouth in this proceeding. As such, the Commission finds that the nonrecurring charges currently filed and approved by the Commission in BellSouth's SGAT are reasonable and appropriate for recovering its nonrecurring costs associated with providing UNEs and interconnection.

CONCLUSIONS

The Commission concludes that the nonrecurring charges currently filed and approved by the Commission in BellSouth's SGAT are reasonable and appropriate for recovering its nonrecurring costs associated with providing UNEs and interconnection.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

ISSUE NO. 15: Should disconnect costs be recovered through nonrecurring charges?

POSITIONS OF PARTIES

BELLSOUTH: Yes. There are specific activities and costs incurred when facilities are disconnected. Establishment of a separate disconnect charge will ensure that CLPs pay these charges when BellSouth incurs the cost.

AT&T/WORLDCOM: BellSouth's nonrecurring charges should be reduced to reflect BellSouth's use of Dedicated Outside Plan (DOP) and Dedicated Inside Plant (DIP). DOP and DIP eliminate virtually all nonrecurring disconnect charges because orders can be fulfilled electronically. Since the nonrecurring costs are minimal, those costs for disconnection should be recovered through a recurring rate associated with loops and ports.

COVAD: Covad did not address this issue in Post-Hearing Brief.

DEPARTMENT OF DEFENSE: The Department of Defense did not address this issue in its Post-Hearing Brief.

PUBLIC STAFF: Yes. BellSouth should not be required to create a separate recurring rate to recover the costs of disconnection of loops and ports in this proceeding. Costs associated with the disconnection of loops and ports are already included in the nonrecurring rates for these UNEs and should not be added to BellSouth's recurring rates.

DISCUSSION

The Commission notes that in the *First UNE Order* the Commission directed BellSouth to identify and amortize disconnect costs associated with UNE loops and ports separately and to recover the costs in the monthly recurring rates for these elements. Pursuant to the Commission's July 31, 2002, Order in this docket, BellSouth converted its proposed nonrecurring disconnect costs for loops and ports into monthly recurring rates to comply with the previously approved methodology for recovery of these costs.

However, BellSouth witness Ruscilli proposed that nonrecurring disconnect costs be recovered at disconnection because that is when costs are incurred. He stated that, by recovering the disconnect costs as a monthly recurring charge as currently ordered by the Commission, BellSouth is required to estimate how long a UNE will remain in service, on average, and that an incorrect estimate results in an over- or under-recovery of this cost. Witness Ruscilli noted that no other state regulatory commission has ordered BellSouth to recover these costs through a recurring rate. Moreover, recovering these costs through a recurring monthly rate results in recurring rates in North Carolina that are not comparable with the rates for the same UNEs in other states. Additionally, witness Ruscilli pointed out that CLP witness Pitkin also proposed nonrecurring disconnection rates.

In the first UNE proceeding, BellSouth proposed to recover the costs of disconnection of loops and ports through a nonrecurring charge imposed at the time of installation. The CLPs opposed this proposal, arguing that such a charge would be a significant barrier to entry into the local exchange market. The Commission addressed the CLPs' concern by adopting the Public Staff's proposal that the disconnection costs be recovered as a recurring charge by spreading the discounted costs over the expected life of the installation.

While BellSouth's current proposal to impose a separate disconnect charge would not be a barrier to entry into the local market, it is possible, even probable, that this type of cost recovery would lead to CLPs charging their end user customers a disconnect fee and potentially refusing to allow customers to change carriers until they paid the fee. This would clearly impede customer choice and thwart competition.

Elsewhere in this Order, the Commission has adopted the nonrecurring rates in BellSouth's current SGAT. A review of the nonrecurring costs for loops and ports, i.e., those rate elements affected by the disconnect cost issue, shows the rates in the SGAT to be lower than those previously approved by this Commission. Thus, it appears that, for the nonrecurring costs associated with loops and ports, BellSouth's SGAT reflects the Louisiana UNE rates. Based on the testimony of witness Ruscilli that no other state public service commission has ordered BellSouth to recover these costs through a recurring rate, the Commission concludes that costs associated with disconnection are already included in the current SGAT nonrecurring rates for loops and ports.

Unfortunately, one cannot from the evidence presented isolate the disconnect costs from other costs contained in the nonrecurring rates for loops and ports. Witness Caldwell testified that, while BellSouth could file the study it submitted in Louisiana, the rates adopted by the Louisiana commission reflect adjustments made by that commission to BellSouth's study. Thus, BellSouth would face a difficult task if it attempted to isolate the costs associated with disconnection from the rates ultimately found appropriate in Louisiana.

The SGAT rates for nonrecurring charges are significantly lower than the disconnect rates previously approved by the Commission. Therefore, any concern that the recovery of disconnect through nonrecurring charges might pose a barrier to entry should be moot.

CONCLUSIONS

The Commission concludes that BellSouth should not create a separate recurring rate to recover the costs of disconnection for loops and ports but rather finds that the costs associated with the disconnection of the various loops and ports are already included in the nonrecurring rates of those UNEs and should not be added to BellSouth's recurring rates.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

ISSUE NO. 16: Should the costs BellSouth incurs when CLPs access BellSouth's OSS be recovered as a nonrecurring charge on a per-local service request (LSR) basis?

POSITIONS OF PARTIES

BELLSOUTH: Yes. Applying the nonrecurring charges on a per-LSR basis is a more equitable way to recover OSS costs because the charges paid by any given CLP would correspond directly to the costs the CLP causes BellSouth to incur.

AT&T/WORLDCOM: No. Any OSS costs that BellSouth incurs are recovered in the recurring rates and a specific non-recurring OSS charge is unwarranted.

COVAD: Covad did not address this issue in its Post-Hearing Brief.

DEPARTMENT OF DEFENSE: The Department of Defense did not address this issue in its Post-Hearing Brief.
PUBLIC STAFF: Yes. Recovery of one-time development costs for new OSS and improvements to existing systems through nonrecurring charges on a per-LSR basis are appropriate. The correct nonrecurring charges for OSS costs are those in the SGAT currently approved for BellSouth.

DISCUSSION

The Commission notes that BellSouth witness Ruscilli testified that BellSouth proposes to recover its OSS costs by imposing a nonrecurring charge per LSR. This differs from the method adopted by the Commission in the *First UNE Order*. In that Order, the Commission concluded that BellSouth could recover its OSS costs for both one-time development and improvements in the existing system, but required BellSouth to amortize those costs and convert them to a monthly recurring charge that would apply to each CLP that ordered UNEs.

Witness Ruscilli argued that BellSouth's proposed method of recovering its OSS costs is consistent with cost recovery principles. He further stated that attempting to convert these costs to a "per-CLP" basis introduces a significant degree of uncertainty since the number of CLPs submitting LSRs varies widely. According to witness Ruscilli, BellSouth's cost study for OSS costs in the first proceeding contained an error in the calculation of the existing "per-CLP" rate, which significantly understated the resulting rate per CLP. Moreover, he noted that under the "per-CLP" rate structure CLPs that send BellSouth a large amount of orders each month pay far less per order than CLPs that send only a few orders.

AT&T/WorldCom witness Turner argued that BellSouth's nonrecurring charges for OSS duplicate costs already recovered through BellSouth's shared and common cost factors. However, BellSouth witness Caldwell testified that BellSouth has removed all directly identified costs from the development of shared and common costs. Therefore, BellSouth contends that it does not recover OSS costs via shared and common cost factors.

In its Proposed Order, the Public Staff agreed with BellSouth that OSS costs are not included in the shared and common costs and that recovery of OSS costs on a per-LSR basis is reflective of the manner in which the costs are incurred. The Public Staff stated that the recovery of one-time development costs for new OSS and improvements to existing systems should be accomplished through nonrecurring charges on a per-LSR basis. Further, the Public Staff asserted that the correct nonrecurring charges for OSS costs are those in BellSouth's currently-approved SGAT.

Based on a review of the evidence, the Commission believes BellSouth's assertion that OSS costs are not included in the shared and common costs should be accepted. Therefore it is appropriate to adopt UNE rates that allow BellSouth to recover its OSS costs. BellSouth's position that recovering OSS costs on a per-LSR basis is reflective of the manner in which the costs are incurred should also be accepted. Although BellSouth also incurs these costs on a "per-CLP" basis, there is merit in BellSouth's argument that the "per-CLP" method introduces uncertainty.

CONCLUSIONS

The Commission concludes that recovery of one-time developments costs for new OSS and improvements to existing systems through nonrecurring charges on a per-LSR basis are appropriate. The correct nonrecurring charges for OSS costs are those in the SGAT currently approved for BellSouth.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

ISSUE NO. 17: Are AT&T/WorldCom's proposed adjustments to BellSouth's DUF cost study appropriate?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth stated that its DUF rates are TELRIC-compliant and should be adopted by the Commission.

AT&T/WORLDCOM: AT&T/WorldCom argued that the inputs BellSouth has used in the DUF Cost Study result in CLPs paying inflated DUF charges, and asserted that significant modifications are required for the DUF charges in North Carolina to be forward-looking cost based rates.

PUBLIC STAFF: The Public Staff stated that AT&T/WorldCom's proposed adjustments to BellSouth's DUF cost study are not appropriate.

COVAD: Covad took no position on the DUF cost study or the proposed DUF rates.

DEPARTMENT OF DEFENSE: The Department of Defense took no position on the DUF cost study or the proposed DUF rates.

DISCUSSION

As explained by AT&T/WorldCom in their Brief, BellSouth provides DUF files to CLPs who use the files to bill end user customers. In addition, CLPs use DUF files generally to track the usage of unbundled network elements such as switching. There are three types of DUF Files: ODUF or Optional Daily Usage Feed Files, ADUF or Access Daily Usage Files, and EODUF or Enhanced Daily Usage Files. ODUF tracks local calls made by CLP customers who are served via UNE-P or resold lines. ADUF tracks calls where access or reciprocal compensation billing is required for an originating or terminating toll or local call on a UNE-P switch port. EODUF files are usage records used by CLPs who resell BellSouth's wholesale service. The DUF files are compiled by BellSouth Billing, Inc. (BBI) which processes messages for CLPs and BellSouth. BellSouth includes all three categories of DUF in its cost study.

AT&T/WorldCom raised several issues regarding BellSouth's DUF cost study. Each issue or item of dispute identified by AT&T/WorldCom witness Turner has been categorized and is set forth and discussed below in Sections 17(a) through 17(g).

17(a). Development of Per Message Costs

AT&T/WorldCom's witness Turner testified as follows: BellSouth did not develop "per message" DUF costs consistent with considering the total demand of messages that must be processed. According to AT&T/WorldCom, much of the cost that BellSouth developed evaluates only CLP demand even though BellSouth Billing Inc. also handles BellSouth's own generation of messages. BellSouth's cost study overstated the costs ultimately borne by CLPs on a per message basis, because it failed to evaluate costs across all of the messages processed.

BellSouth's evidence, presented through its witness Caldwell, can be summarized as follows: BellSouth's study reflected the fact that both BellSouth and CLP messages must be processed. The "per message costs" were developed by dividing the total cost of the job by the number of messages (including BellSouth message volumes, if applicable) processed by that application. If a job processed both BellSouth and CLP messages, then the BellSouth and CLP messages were added to determine the denominator (or demand) by which to divide the total cost of the job. If only CLP messages (for example, ODUF messages) were being processed by the job for which per message costs were being developed, then the denominator (demand) used in the cost calculation would be comprised only of the total number of CLP messages (ODUF messages) being processed by the job at issue. The cost study shows which jobs processed BellSouth and CLP messages and which jobs were dedicated to CLP messages. BellSouth therefore asserted that the cost of a given job in terms of both labor and computer resources was spread over the number of messages processed by that particular job. According to BellSouth, its cost study used a basic cost-causation methodology that complies with incremental cost principles. Witness Caldwell's Exhibit DDC-12 shows the different jobs used to process messages and the types of messages processed by each job.

The Public Staff generally stated that AT&T/WorldCom's proposed adjustments were not appropriate, but presented no further argument on the issue.

Based on a review of the evidence, the Commission finds as stated below. BellSouth's DUF cost study accurately reflects the appropriate mix of message types based on the application in the allocation process. BellSouth did not arbitrarily assign message types to the jobs for which costs were being developed. For purposes of the cost study, messages were assigned to the jobs that processed them. The "per job" costs are determined first and the costs are then recovered over the appropriate number of messages that the job handles. Thus, if a job processes ODUF messages only, the cost of that job will be recovered over ODUF messages only. By way of example, it would be inappropriate to recover the cost of such a job over both BellSouth messages and ODUF messages when the job does not process or handle BellSouth messages. If cost recovery for a job is calculated considering messages not handled by the job, BellSouth's costs could be understated.

COMMISSION CONCLUSIONS: The Commission concludes that BellSouth's DUF cost study appropriately attributes costs for specific jobs to the messages being processed by those jobs, whether the messages considered are CLP messages, BellSouth messages, or a combination of both. The Commission believes AT&T/WorldCom's proposed adjustments to the per message costs are inappropriate.

17(b). Cost Recovery Periods

Witness Turner testified to AT&T/WorldCom's position as follows: BellSouth fundamentally made an arbitrary choice of the time period over which the investment in DUF system development should be averaged and thus recovered. Regarding costs for system development, BellSouth has several one-time costs to recover. In the case of ADUF, BellSouth developed its cost estimate for the system development investment and spread the cost across the anticipated demand over a 10-year period. BellSouth's cost recovery period for ADUF is the same as its 10-year study period for cost and demand. In the case of ODUF and EODUF, BellSouth developed its cost estimate for the system development investment and spread the cost across the anticipated demand over a three-year period. BellSouth's cost recovery period for ODUF and EODUF is the same as its three-year study period for cost and demand. Witness Turner concluded in his testimony that the cost recovery periods for these DUF elements should be the same, and he recommended that the Commission find 10 years to be the appropriate recovery period. He argued it was arbitrary for BellSouth to claim that a 10-year recovery period was chosen for ADUF in order to lower unreasonably high per message costs caused by high development costs, when a three-year period was chosen for ODUF, which involved greater development costs. Current ADUF developmental costs are about $329,000, while the current ODUF developmental costs are about $961,000 (Exhibit SET 29, Cell F14; Exhibit SET-24, Cell F13).

In her rebuttal testimony, BellSouth witness Caldwell testified to the following: BellSouth used a three-year study period, capturing three years worth of costs and three years worth of demand, to develop the average "per ODUF message" investment. This investment amount is the amount that BellSouth used for depreciation of the investment asset, and the asset is currently scheduled to be depreciated over five years. Ten-year study and recovery periods were used for ADUF because, when ADUF costs were first developed (some years ago), the projected development costs were so high and the projected demand was so low that the resulting per message cost was unreasonably high. Thus, BellSouth made the decision to expand the study and recovery periods for ADUF to 10 years. Although BellSouth and witness Caldwell provided no evidence of the time period that resulted in the unreasonably high per message cost for ADUF, witness Caldwell testified that a 10-year period was used for ADUF due to the high initially projected developmental costs of over $2.4 million. However, she admitted in her testimony that the current ADUF developmental costs are only about $329,000.

Witness Caldwell testified further that BellSouth does not agree with witness Turner's recommendation that both the ODUF and ADUF studies should be based upon a 10-year study period since this would only exacerbate BellSouth's potential risk of having understated the cost, especially if the projected 10-year demand for ADUF does not materialize. She stated that the accuracy of demand projections decreases as the time period of the study is expanded.

The Public Staff took the position that AT&T/WorldCom's proposed adjustments were not appropriate, but presented no further argument on Issue No. 17(b).

Based on a review of the evidence, the Commission finds as follows. It is reasonable to conclude that BellSouth has arbitrarily chosen the periods of time over which to recover for system development of each of the different DUF elements. At best, the testimony shows that BellSouth determined the recovery periods based on achieving per message costs that it deemed reasonable, notwithstanding the fact that the ADUF per message cost was lowered by expanding the study and recovery periods. The periods chosen were not decided using objective measures. While it is perhaps not unreasonable to use differing recovery periods for different DUF elements and while BellSouth has offered explanations for its choice of different recovery periods for ADUF and ODUF, BellSouth has offered no evidence to explain why the precise period of three years was chosen for ODUF and EODUF recovery or why three years was an appropriate time period. That is to say, the record contains no evidence, such as an accounting rule or principle, explaining why a three-year recovery period is any more appropriate than recovery periods of two, four, or six years. For that matter, the record contains no similar evidence as to why 10 years, e.g., as opposed to eight or twelve years, was chosen as the cost recovery period for ADUF system development.

The DUF systems are developed to handle messages over a period of time. It is reasonable and logical that the time period for cost recovery be rationally related to the useful economic life of the systems. The strongest evidence in this docket of the systems' useful economic lives is the testimony of witness Caldwell and Exhibits SET-24 and 29 establishing DUF systems as 460C assets that are depreciated over five years. Depreciation periods are generally matched to the best estimate of the useful economic life of the asset-types being depreciated. The 10-year recovery period for ADUF is some evidence that the useful economic lives of the systems may be at least 10 years, but in accord with the above discussion regarding the arbitrary selection of this period, this evidence is weak. Furthermore, as the evidence tends to show, the accuracy of both demand and cost projections decreases as the time period is expanded. Without stronger and reliable evidence regarding the appropriateness of a 10-year recovery period, a 10-year period may unfairly increase the amount of risk borne by BellSouth, especially given the fast pace of change in the relevant market. In any case, a three-year recovery period for DUF systems is too short and would allow for full recovery before full depreciation of the economic value.

COMMISSION CONCLUSIONS: The Commission concludes that the BellSouth DUF cost study should be adjusted to reflect a cost recovery period of five years for ODUF and EODUF, as a five-year period would match the recovery period to the useful economic life of the DUF systems. Although the Commission has concerns with BellSouth's proposed 10-year ADUF recovery period as outlined above, the Commission orders no change in this regard since BellSouth voluntarily offered and agreed to the longer period and has not requested any change. Also, AT&T/WorldCom raised no objection to the ADUF recovery period.

17(c). Capitalization of Costs Associated with System Development

AT&T/WorldCom argued through witness Turner's testimony that while BellSouth properly capitalized labor hours associated with DUF system development, it inappropriately expensed "computer resource costs" associated with DUF development. AT&T/WorldCom maintained these computer resource costs should have been capitalized with the labor hours used in development. According to witness Turner, if labor hours that are expended in the system development effort are to be capitalized, then the system resource costs should be capitalized as well. Witness Turner explained that Accounting Statement of Position (SOP) 98-1, ¶ 15 does not allow for the expensing of costs associated with development of computer software that is used by or marketed to third parties. According to witness Turner, BellSouth is marketing DUF software to CLPs as an unbundled element. Witness Turner argued that while SOP 98-1 is inapplicable to computer resource costs in this instance, Financial Accounting Statement No. 86 does apply and requires capitalization of the costs at issue. Moreover, witness Turner argued that print charges for paper should not be included in the computer resource cost as it is more efficient to use information directly from the computer screen rather than print the information on paper.

BellSouth witness Caldwell responded to AT&T/WorldCom's argument by explaining that BellSouth followed accepted accounting principles in expensing the computer resource costs. Per SOP 98-01, Accounting for the costs of Computer Software Developed or Obtained for Internal Use, actual programming costs (labor hours) are capitalized, but overhead (one-time) costs associated with development of internal software are properly expensed and recovered on a per message basis. Further, witness Caldwell stated that computer resource costs in support of development of DUF products include Central Processing Unit (CPU), Direct Access Storage Device (DASD), Tape and printing costs. She refuted witness Turner's argument to exclude printing charges. She testified that each productive programming hour has associated with it some paper print, which allows the programmer to print memory dumps for debugging and testing operations. The input used in BellSouth's cost study for the amount of paper associated with the programming hour came directly from the Information Technology Department, which actually supports the process.

The Public Staff took the position that AT&T/WorldCom's proposed adjustments were not appropriate, but presented no further argument on this issue.

Having reviewed the evidence, the Commission finds as follows. BellSouth's decision to expense computer resource costs is reasonable and in accordance with accepted accounting principles. BellSouth does not market DUF software to the CLPs, but instead provides CLPs with DUF reports. CLPs do not acquire from BellSouth any DUF software or the future right to use it. *Five-State 271 Order*, ¶ 117, n. 398.

COMMISSION CONCLUSIONS: The Commission concludes that BellSouth's decision to expense computer resource costs is reasonable. Accordingly, BellSouth's DUF cost study shall remain unchanged with respect to the decision not to capitalize computer resource costs.

17(d). Contractor Labor Inflation Rate

AT&T/WorldCom witness Turner testified that BellSouth's assumed inflation rates for contractor labor costs are too high. Witness Turner relied on AT&T/WorldCom witness Pitkin's study of BellSouth's data which suggests that BellSouth's historical inflation rate for wages is closer to 3%.

BellSouth witness Caldwell testified in response to witness Turner's position that contractor labor rates and their related inflation rates are not associated with inflation rates which BellSouth uses for its own labor. Instead, at the time of the cost study development, contractor rates for the period from 2002-2004 were negotiated and agreed upon with the contractor-vendor. The contractual inflation rate was based on a compounded inflation factor from the Employment Cost Index (ECI) and yielded over a 7% increase per year for 2002-04. For the period 2005-2011, BellSouth estimated the contractor labor rates, which reflected a 6% year-over-year inflation rate for the same period.

The Public Staff took the position that AT&T/WorldCom's proposed adjustments were not appropriate, but presented no further argument on this issue.

Having reviewed the evidence, the Commission agrees with BellSouth that the use of the ECI to determine the appropriate labor inflation rate for the communications industry may be appropriate. However, because, based on a cursory review of current ECI data and general public knowledge that the economy is in a period of very low inflation, it appears that updated ECI data may yield a lower contractor inflation rate, the Commission believes BellSouth should revisit the ECI to obtain current inflation data for use in its inflation rate calculations. The Commission further believes BellSouth should show all calculations that yield and support any proposed inflation rate. BellSouth should also be required to provide evidence of all applicable contract terms, if any, tending to show that it is bound to contractor labor inflation rates without the ability to adjust or re-open the relevant terms due to changes in economic and market conditions.

COMMISSION CONCLUSIONS: With regard to contractor labor inflation rates, the Commission finds it appropriate to instruct BellSouth to revisit the ECI and submit calculations based on updated ECI data. BellSouth should also submit evidence of all contract terms, if any, which tend to show BellSouth is bound to a contractual labor inflation rate that cannot be adjusted based on changes in economic and market conditions. The Commission finds that

BellSouth should file the above evidence in support of its proposed contractor labor inflation rate at the time it files its new cost study and that any such proposed and properly supported rate be reflected in the new cost study.

17(e). Cost Recovery for Magnetic Tape Development

Witness Turner testified that BellSouth's DUF cost study inappropriately includes costs for magnetic tape feed in the cost of ODUF message processing generally. He further testified that such costs should not be attributed across all ODUF messages, but instead should be included in the magnetic tape cost study, i.e., the cost of provisioning magnetic tape to those CLPs who choose to receive DUF records by tape. Witness Turner stated that it is not appropriate for CLPs to be charged for the cost of tapes if they do not order tapes, but instead elect to receive DUF records electronically.

BellSouth offered the testimony of witness Caldwell to establish that its DUF cost study correctly attributes the cost of magnetic tape development, a one-time developmental cost associated with the initial production of magnetic tapes, across the projected number of ODUF messages. One-time developmental costs cannot be added to the recurring monthly charge for provisioning of the tape product. Witness Caldwell testified that in BellSouth's cost study, all developmental costs, including the developmental costs associated with creating the initial magnetic tape, are recovered over the projected number of messages.

The Public Staff took the position that AT&T/WorldCom's proposed adjustments were not appropriate, but presented no further argument on this issue.

Having considered the evidence, the Commission believes that BellSouth's DUF cost study appropriately spreads the cost of magnetic tape development over the projected number of messages in the same way that it treats all developmental costs. It would be inappropriate to attempt to recover what is essentially a "system development cost" associated with the initial production of magnetic tapes through a recurring monthly "provisioning charge" to CLPs that order tape feeds of DUF information.

COMMISSION CONCLUSIONS: The Commission concludes that AT&T/WorldCom's proposal that the cost for magnetic tape development be removed from the message processing costs for ODUF and moved into the magnetic tape provisioning costs is inappropriate.

17(f). DUF Processing Forecasts

<u>17(f)(1). Forecast of message demand</u>

AT&T/WorldCom presented evidence through its witness Turner that BellSouth used outdated data from 2000 and early 2001 to forecast DUF message demands through the remainder of 2001, 2002 and into the future. According to witness Turner, in 2000, UNE-P competition was in an earlier stage of development and demand was lower. More recent actual message volume data was produced by BellSouth as part of discovery in this docket. Using this actual data, witness Turner presented figures to support his conclusion that actual monthly data for ADUF message volume from June 2001 through July 2002 show that BellSouth's forecast using older data understates message volume by more than 700 million messages. Likewise, witness Turner used the actual monthly data for ODUF message volume from May 2001 through July 2002 to show that BellSouth's forecast based on older data understates ODUF message volume by more than 800 million messages.

According to AT&T/WorldCom, the understatement of DUF message demand results in the application of an understated monthly growth rate in the cost per message calculation. BellSouth's cost study based on the forecasted message volume assumed a monthly ADUF growth rate of "confidential number X" messages for 2001 and, for 2002 through 2011, assumed a growth rate much lower than confidential number X. However, using actual message volume for the 12 months from July 2001 through July 2002 (data supplied by BellSouth to AT&T/WorldCom), witness Turner calculated the average monthly ADUF growth rate to be about four times greater than confidential number X. For the ODUF 2001 monthly growth rate, the BellSouth study assumed a monthly growth rate of "confidential number Y", and, for 2002 through 2004, assumed a monthly growth rate significantly lower than confidential number Y. Using the actual data from July 2001 through July 2002, witness Turner calculated a monthly ODUF growth rate more than four times greater than confidential number Y.

BellSouth did not challenge the evidence showing that its forecasts tend to understate DUF message volume and thus lead to a significant understatement of the growth rate for DUF messages in North Carolina.

The Public Staff took the position that AT&T/WorldCom's proposed adjustments were not appropriate, but presented no further argument on this issue.

Based on a review of the evidence, the Commission makes the following findings. BellSouth's use of outdated data to forecast DUF volumes in the future has resulted in a significant understatement of the demand volumes and the projected growth rates in demand volumes used to calculate per message costs for the years stated in BellSouth's cost study. BellSouth offered no reason for its assumption that the monthly growth rates for ADUF and ODUF messages would decline from confidential number X and confidential number Y, respectively, in 2001 to lower levels for the subsequent years from 2002-2011. The problem with assuming declining rates is only magnified by the evidence showing that from July 2001 to July 2002 actual monthly growth rates for ADUF and ODUF were at least four times greater than confidential number X and confidential number Y. Understated demand volumes would tend to result in overstated per message costs.

17(f)(2). Forecast of Growth Rate for OCNs[1]

AT&T/WorldCom witness Turner testified that BellSouth's monthly growth rate assumptions for ODUF OCNs and ADUF OCNs are overstated. Witness Turner pointed out that, based on actual data from January 2001 through April 2001, the average monthly growth rate for ODUF OCNs is significantly lower than what BellSouth forecasts. In addition, witness Turner testified that there has been a recent and significant reduction in the number of CLPs

[1] OCN is the Operating Company Number that is used to track usage to a CLP for billing purposes.

participating in the local telecommunications market, as the industry has been affected by firms filing for bankruptcy. Therefore, Turner argued that BellSouth should assume a decline of OCNs in its forecasts. Turner further testified that an overstated growth rate and total number of OCNs leads to an overstatement of costs. According to witness Turner, this overstatement is the result of BellSouth's assumption that each OCN requires "support" labor each month and the incurrence of additional development costs to implement each additional OCN in BellSouth's billing system.

At the hearing BellSouth presented no evidence in response to witness Turner's testimony, but did file a late-filed exhibit on September 2, 2003 in response to the Commission's Order seeking additional information from both BellSouth and AT&T/WorldCom. Whereas witness Turner's testimony was based on more recent data from January through April 2001, BellSouth's filing demonstrated that its forecast figures were the average of the actual monthly ODUF and ADUF counts from September 2000 through February 2001. For both ODUF and ADUF, once BellSouth calculated the average of the actual monthly counts, it was the average figure used in the cost study for OCN growth for each year forecast in the study period. The figure was not increased nor decreased for any future year.

The Public Staff took the position that AT&T/WorldCom's proposed adjustments to BellSouth's DUF cost study were not appropriate, but presented no further argument on this issue.

After reviewing the evidence, the Commission notes that only two of the six months that BellSouth used to determine the increase in OCNs for each year forecasted were in 2001. The other four were in 2000. The actual figures over the six month period used by BellSouth clearly show a significant drop between the number of additional OCNs added each month during each of the last four months of 2000 and the number added in January 2001 and in February 2001. Moreover, the March and April 2001 cost study data, which were included in AT&T/WorldCom's analysis but not in BellSouth's, also support the continued downward trend in the OCN growth rate. The Commission is persuaded that OCN growth data from the year 2000 is a less accurate indicator of the level of future growth than the more recent 2001 data. Since the year 2000, the number of CLPs has fallen and is expected to continue falling due to economic conditions affecting the telecommunications industry. Use of older data from 2000 causes the OCN growth rate assumptions used in BellSouth's cost study to be overstated and the overstated growth rate ultimately leads to an overstatement of costs.

COMMISSION CONCLUSIONS: 17(f) (1). The Commission concludes that BellSouth's DUF cost study should be amended to reflect input of actual message volume data from October 2001 through November 2002 in the cost per message calculations and that this data should also be used to revise the levels of growth in DUF messages for future years contained in the cost study.

17(f)(2). The Commission finds it appropriate to require BellSouth to modify its cost study for monthly incremental OCNs purchasing ODUF by decreasing the average count per month for 2001 to five (5). In accordance with the conclusions for Issue 17(b) of this Order, the Commission finds it appropriate to require BellSouth to further modify its cost study for monthly incremental OCNs purchasing ODUF to four (4) per month for 2002, three (3) per month for 2003-2005 and two (2) for 2006. With respect to ADUF, the Commission finds it appropriate to require BellSouth to modify its cost study for monthly incremental OCNs purchasing ADUF to seven (7) per month for 2002, six (6) per month for 2003-2004, five (5) per month for 2005-2006, four (4) per month for 2007-2009, and three (3) per month for 2010-2011.

17(g). Recovery of Switching Investment

AT&T/WorldCom presented the testimony of witness Turner to establish that it is improper for BellSouth to recover for switching investment by including it in ODUF costs. According to witness Turner, inclusion of switching investment in ODUF costs would lead to double-recovery, because switching investment is already included in another part of Bellsouth's cost study specifically addressing switching costs.

BellSouth witness Caldwell testified that BellSouth has not attempted to double-recover for switching costs. The ODUF recording rate element, which witness Turner believes improperly includes switching investment, applies only to those CLPs using their own switches and ordering BellSouth Operator Services to provide directory assistance capabilities. BellSouth explained that the charge recovers the Automated Message Accounting (AMA) cost in the BellSouth Traffic Operator Position System switches, which is needed to develop detail recordings such that CLPs can bill their end customers. Witness Caldwell explained that while it is true that the usage elements also reflect AMA recording costs, these usage charges would not be applicable to a CLP purchasing the ODUF recording element since that CLP would have its own switch.

The Public Staff took the position that AT&T/WorldCom's proposed adjustments to BellSouth's DUF cost study were not appropriate, but presented no further argument on this issue.

Based on the evidence presented, the Commission finds as follows. A CLP using BellSouth's switching would pay AMA recording costs through a usage rate element contained in the switching portion of BellSouth's cost study. A CLP using its own switch would not incur such a usage charge, but would pay for AMA recording costs through the ODUF recording rate element, when BellSouth provides directory assistance to the CLP's customers. Accordingly, the inclusion of AMA recording costs in the ODUF recording rate element does not result in a double-recovery of switching investment.

COMMISSION CONCLUSIONS: The Commission concludes that BellSouth's cost study does not double recover for switching investment by including AMA recording cost in the ODUF recording rate element, which is charged only to CLPs that would not be charged a usage rate for switching due to the fact that they own their own switches.

SUMMARY OF CONCLUSIONS

17(a). Development of Per Message Costs. The Commission concludes that BellSouth's DUF cost study appropriately attributes costs for specific jobs to the messages being processed by those jobs, whether the messages considered are CLP messages, BellSouth messages, or a combination of both. The Commission believes AT&T/WorldCom's proposed adjustments to the per message costs are inappropriate.

17(b). Cost Recovery Periods. The Commission concluded that the BellSouth DUF cost study should be adjusted to reflect a cost recovery period of five years for ODUF and EODUF, as a five-year period would match the recovery period to the useful economic life of the DUF systems. The Commission orders no change with respect to the 10-year ADUF recovery period since BellSouth voluntarily offered and agreed to the longer period and has not requested any change. AT&T/WorldCom raised no objection to the ADUF recovery period.

17(c). Capitalization of Costs Associated with System Development. The Commission concludes that BellSouth's decision to expense computer resource costs is reasonable. Accordingly, BellSouth's DUF cost study shall remain unchanged with respect to the decision not to capitalize computer resource costs.

17(d). Contractor Labor Inflation Rate. With regard to contractor labor inflation rates, the Commission orders BellSouth to revisit the ECI and submit calculations based on updated ECI data. BellSouth should also submit evidence of all contract terms, if any, which tend to show BellSouth is bound to a contractual labor inflation rate that cannot be adjusted based on changes in economic and market conditions. The Commission finds that BellSouth should file the above evidence in support of its proposed contractor labor inflation rate at the time it files its new cost study and that any such proposed and properly supported rate be reflected in the new cost study.

17(e). Cost Recovery for Magnetic Tape Development. The Commission concludes that AT&T/WorldCom's proposal that the cost for magnetic tape development be removed from the message processing costs for ODUF and moved into the magnetic tape provisioning costs is inappropriate.

17(f). DUF Processing Forecasts

17(f)(1). Forecast of message demand. The Commission concludes that BellSouth's DUF cost study should be amended to reflect input of actual message volume data from October 2001 through November 2002 in the cost per message calculations and that this data should also be used to revise the levels of growth in DUF messages for future years contained in the cost study.

17(f)(2). Forecast of Growth Rate for OCNs. The Commission finds it appropriate to require BellSouth to modify its OCN cost study assumptions as stated hereinabove to reflect a decrease in the number of OCNs purchasing ADUF and ODUF over the respective cost study periods.

17(g). Recovery of Switching Investment. The Commission concludes that BellSouth's cost study does not double recover for switching investment by including AMA recording costs in the ODUF recording rate element, which is charged only to CLPs that would not be charged a usage rate for switching due to the fact that they own their own switches.

IT IS, THEREFORE, ORDERED as follows:

1. That no later than Thursday, January 29, 2004, BellSouth shall refile its cost studies, supporting documentation, and resulting rate schedules based on the conclusions reached in this *Order*. Further, concerning Issue No. 17(d), BellSouth shall revisit the ECI and submit calculations based on updated ECI data. BellSouth shall submit evidence of all contract terms, if any, which tend to show BellSouth is bound to a contractual labor inflation rate that cannot be adjusted based on changes in economic and market conditions. BellSouth shall file the above evidence in support of its proposed contractor labor inflation rate at the time it refiles its cost studies and any such proposed and properly supported rate shall be reflected in said cost study.

2. That no later than Monday, March 1, 2004, the Public Staff shall file comments on whether BellSouth's cost studies and resulting rate schedules are in compliance with this *Order*.

3. That, after approval by the Commission, the rates filed pursuant to this *Order* shall be deemed permanent prices pursuant to Section 252(d) of TA96 for purposes of replacing prior rates contained in existing interconnection agreements and BellSouth's SGAT.

ISSUED BY ORDER OF THE COMMISSION.
This the 30th day of December, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bp122903.01

Appendix A

Glossary of Acronyms
Docket No. P-100, Sub 133d

1996 Act	Telecommunications Act of 1996
Act	Telecommunications Act of 1996
ADSL	Asymmetrical Digital Subscriber Line
ADUF	Access Daily Usage File
AMA	Automated Message Accounting
AT&T	AT&T Communications of the Southern States, Inc.
BCPM	Benchmark Cost Proxy Model
BellSouth	BellSouth Telecommunications, Inc.
BSTLM	BellSouth Telecommunications Loop Model
BSTLM-CP	BellSouth Telecommunications Loop Model – Cost Pro©
CAPM	Capital Asset Pricing Model
CCS	Centum (Hundred) Call Seconds
Carolina	Carolina Telephone and Telegraph Company
Central	Central Telephone Company
CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
Covad	Dieca Communications, Inc., d/b/a Covad Communications
CPU	Central Processing Unit
CWINS	Customer Wholesale Interconnection Network Service Center
DASD	Direct Access Storage Device
DCF	Discounted Cash Flow
DCS	Digital Cross-Connect System or Data Customer Support
Department of Defense	The Department of Defense and All Other Federal Executive Agencies
DIP	Dedicated Inside Plant
DLC	Digital Loop Carrier
DMS	Digital Multiplex System
DOP	Dedicated Outside Plant
DS0	Digital Signal Zero
DS1	Digital Signal One

DS3	Digital Signal Three
DSL	Digital Subscriber Line
DUF	Daily Usage File
ECI	Employment Cost Index
EF&I	Engineered, Furnished, and Installed
EODUF	Enhanced Optional Daily Usage File
EPHC	Equivalent POTS Half Calls
FCC	Federal Communications Commission
GA/LA	Georgia and Louisiana
HDSL	High-Bit-Rate Digital Subscriber Line
IDLC	Integrated Digital Loop Carrier
ILEC	Incumbent Local Exchange Company (Carrier)
I&M	Installation and Maintenance
ISDN	Integrated Services Digital Network
Kbps	Kilobits Per Second
LCSC	Local Carrier Service Center
LNP	Local Number Portability
LSR	Local Service Request
Mbps	Megabits Per Second
MDF	Main Distribution Frame
NGDLC	Next Generation Digital Loop Carrier
OC3	Optical Carrier Three
OC12	Optical Carrier Twelve
OC48	Optical Carrier Forty-Eight
OCN	Operating Carrier Number
ODUF	Optional Daily Usage File
OSS	Operations Support Systems
PBX	Private Branch Exchange
POTS	Plain Old Telephone Service
PSC	Public Service Commission
Public Staff	Public Staff – North Carolina Utilities Commission

RBOCs	Regional Bell Operating Companies
RTU	Right-to-Use
SCIS/IN	Switching Cost Information System / Intelligent Network
SCIS/MO	Switching Cost Information System / Model Office
SGAT	Statement of Generally Available Terms and Conditions
SL1	Service Level 1
SL2	Service Level 2
SME	Subject Matter Expert
SNC	Switched Network Calculator
SONET	Synchronous Optical Network
SOP	Statement of Position
S&P	Standard & Poor
SST	Simplified Switching Tool©
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long-Run Incremental Cost
UCL	Unbundled Copper Loop
UCL-ND	Unbundled Copper Loop – Non-Designed
UNE	Unbundled Network Element
UNE-P	Unbundled Network Element – Platform
Verizon	Verizon South, Inc. f/k/a GTE South Incorporated
WorldCom	MCIMetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., and MCI WorldCom Network Services, Inc.

DOCKET NO. P-100, SUB 133j

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Generic Proceeding on the Provisioning of Collocation Space	) ORDER GRANTING SPRINT'S) MOTION FOR RECONSIDERATION) AND SETTING RATES FOR) AUGMENTS AND ADJACENT) COLLOCATION

BY THE COMMISSION: On December 28, 2001, the Commission issued its *Order Addressing Collocation Issues*. The *Order* required the Parties to attempt to negotiate the following rates:

(1) Cross-connects (**Commission Note:** Motions for Reconsideration on the disputed language in the Standard Offering need to be resolved before further action can be taken on this issue);

(2) Cable Installation (**Commission Note:** Motions for Reconsideration on the disputed language in the Standard Offering need to be resolved before further action can be taken on this issue);
(3) Augments (**Commission Note:** This issue is addressed in this Order);
(4) Adjacent Collocation (**Commission Note:** This issue is addressed in this Order); and
(5) Premises Space Report (**Commission Note:** The Commission approved rates for the Premises Space Report in its *September 24, 2002 Order*).

The *Order* also required Parties to file Supplemental Briefs on the rate issues that were not successfully negotiated.

On September 24, 2002, the Commission issued its *Order Addressing Unresolved Collocation Rate Issues*. In our Ordering Paragraphs, we:

1. requested the Public Staff to file written comments on the disputed cross-connect rates proposed by BellSouth Telecommunications, Inc. (BellSouth), Carolina Telephone and Telegraph Company and Central Telephone Company (collectively Sprint), and Verizon South Inc. (Verizon) by no later than Wednesday, November 13, 2002.

2. ordered Sprint to file a cost study and proposed rate for lit fiber cross-connects by no later than Thursday, October 24, 2002. The competing local providers (CLPs) and the Public Staff were allowed the opportunity to file written comments on Sprint's proposed rate by no later than Wednesday, November 13, 2002.

3. requested the Public Staff to file written comments on the disputed cable installation rates proposed by BellSouth, Sprint, and Verizon by no later than Wednesday, November 13, 2002.

4. ordered Sprint and Verizon to refile by no later than Thursday, October 24, 2002 cost studies and proposed rates for simple, minor, intermediate, and major augments. The CLPs and the Public Staff were allowed the opportunity to file written comments on the rates proposed by no later than Wednesday, November 13, 2002.

5. ordered BellSouth to file cost studies and proposed rates by no later than Thursday, October 24, 2002 for augments using the four categories of simple, minor, intermediate, and major and reflecting the September 3, 2002 decision made by the Commission on the disputed language in the Standard Offering. The CLPs and the Public Staff were allowed the opportunity to file written comments on the rates proposed by no later than Wednesday, November 13, 2002.

6. requested the Public Staff to file written comments on the disputed adjacent collocation rates proposed by BellSouth by no later than Wednesday, November 13, 2002.

7. ordered Sprint to file a cost study and proposed rates for adjacent collocation by no later than Thursday, October 24, 2002. The CLPs and the Public Staff were allowed the opportunity to file written comments on those proposed rates by no later than Wednesday, November 13, 2002.

8. requested the Public Staff to file written comments on the disputed adjacent collocation rates proposed by Verizon by no later Wednesday, November 13, 2002.

9. adopted BellSouth's, Sprint's, and Verizon's proposed rates for Premises Space Report.

On October 15, 2002, Verizon filed its Motion for Reconsideration of the Commission's *September 24, 2002 Order* and the Commission's September 3, 2002 *Order Addressing Disputed Language in the Standard Offering*. Verizon is seeking reconsideration of the Standard Offering language the Commission adopted in its *September 3, 2002 Order* concerning cross-connects. The Commission notes that this Motion for Reconsideration is pending a decision before the Commission.

On October 17, 2002, Sprint filed its Motion for Reconsideration and Stay of the *September 24, 2002 Order*. On October 22, 2002, the Commission issued its *Order Granting Sprint's Request for Stay and Requesting Comments on Sprint's Motion for Reconsideration* wherein the Commission granted Sprint's request for a stay in application of Ordering Paragraph No. 2 of the September 24, 2002 *Order* and any other provisions of that *Order* which are the subject of Sprint's Motion for Reconsideration. Further, the Commission requested interested Parties to file initial comments by November 5, 2002 and reply comments by November 19, 2002 on Sprint's Motion for Reconsideration.

On November 5, 2002, the Public Staff filed initial comments on Sprint's Motion. No other party filed initial comments.

On November 14, 2002, the Commission issued its *Order Addressing the Public Staff's November 12, 2002 Motion*. In the *Order*, we:

(1) Required BellSouth and Verizon to make a filing by no later than Friday, November 22, 2002 clarifying their previous filings of fiber cross-connect rates in this docket by specifying whether the rates therein are for cross-connections of dark fiber, lit fiber, or both types; and if they are associated exclusively with dark fiber, to state clearly what pricing procedure they propose to employ if CLPs request cross-connection of lit fiber;

(2) Stayed Ordering Paragraph Nos. 1 and 3 of the Commission's September 24, 2002 *Order Addressing Unresolved Collocation Rate Issues* until further Commission notice due to the uncertainty of the final Commission ruling on certain cross-connect issues and the apparent overlap in the cross-connect rate issue and the cable installation rate issue;

(3) Granted all Parties an extension of time from Tuesday, November 19, 2002 to Monday, December 9, 2002 to file reply comments on Sprint's Motion for Reconsideration in order to allow the Parties an opportunity to review the additional information to be filed by BellSouth and Verizon on November 22, 2002;

(4) Granted the Public Staff and the CLPs an extension of time to file written comments on (a) the rates proposed by BellSouth, Sprint, and Verizon for simple, minor, intermediate, and major augments; and (b) the rates proposed by Sprint for adjacent collocation from November 13, 2002 to Tuesday, November 26, 2002; and

(5) Granted the Public Staff an extension of time to file written comments on the disputed adjacent collocation rates proposed by BellSouth and Verizon from November 13, 2002 to Tuesday, November 26, 2002.

On November 26, 2002, the Public Staff filed its comments on the disputed rates for augments and adjacent collocation filed by the ILECs. No CLP filed comments on the disputed augment or adjacent collocation rates.

On December 9, 2002, the Public Staff filed reply comments on Sprint's Motion for Reconsideration. No other party filed reply comments on the Motion.

COMMISSION DISCUSSION

There are two separate issues that need to be discussed and resolved. The first issue is Sprint's Motion for Reconsideration on portions of the Commission's *September 24, 2002 Order* (Issue No. I). The second issue is the disputed rates proposed by the ILECs for augments and adjacent collocation (Issue No. II). Each issue will be addressed separately below.

ISSUE NO. I – SPRINT'S MOTION FOR RECONSIDERATION

SPRINT: The Commission found in its *September 24, 2002 Order* that Sprint should be required to provide a specific proposed rate for lit fiber cross-connects instead of reflecting an individual case basis (ICB) rate. In Ordering Paragraph No. 2 of the *Order*, the Commission found it appropriate to require Sprint to file a cost study and a proposed rate for lit fiber cross-connects.

On October 17, 2002, Sprint filed its Motion for Reconsideration on certain aspects of the *September 24, 2002 Order*. Specifically, Sprint stated that it seeks reconsideration of the *Order* for two reasons: (1) Sprint believes that the Commission has confused fiber cross-connects with lit fiber cross-connects; and (2) Sprint noted that the FCC has recently issued its *Order on Reconsideration of Fourth Report and Order, and Fifth Report and Order* in CC Docket No. 98-147 released on September 4, 2002 which clearly supports Sprint's position that lit fiber cross-connects should be priced on an ICB.

Sprint further stated that the Commission did not order either BellSouth or Verizon to file cost studies for lit fiber cross-connects even though neither BellSouth nor Verizon has proposed costs for this rate element. Sprint maintained that it believes a misunderstanding exists as to what lit fiber cross-connects are and how they should be priced. Sprint noted that it has drawn a distinction between lit fiber cross-connects and dark fiber cross-connects, and other ILECs have done so as well. Sprint noted that in Verizon's Federal Access Services Tariff, Verizon separates dark fiber from lit fiber cross-connects and indicates that lit fiber cross-connects will be priced on an ICB. Sprint stated that it is its understanding that the fiber cross-connect rate elements proposed in North Carolina by both BellSouth and Verizon are merely fiber cross-connects rather than lit fiber cross-connects. Sprint noted that it may be that the Commission and the CLPs have accepted BellSouth's and Verizon's fiber cross-connect rates as applying to lit fiber when, in fact, they do not, but, for the reasons set forth in Sprint's Supplemental Brief of the non-negotiated rate issues, fiber cross-connects and lit fiber cross-connects should not receive the same pricing treatment.

Sprint noted that the FCC stated in Paragraph 11 of its *September 4, 2002 Order*:

> . . . we have previously concluded **that individual case basis pricing is appropriate until a carrier acquires sufficient experience with a particular service** to develop generally available rates. We decline to depart from that policy by prohibiting such pricing for cross-connects in all instances because we are unable to determine, from the record before us, the extent to which generally available offerings at standardized rates will be possible. Moreover, individual case basis pricing may still be appropriate where there is not adequate experience to develop such rates. Although we expect that, as a general matter, incumbent LECs have sufficient experience with most forms of cross-connects to establish firm prices for them, **there may be specific types of cross-connects (e.g., "lit fiber" cross connects) with which incumbent LECs have little or no experience.** In such cases, individual case basis pricing may be appropriate until adequate experience is developed." [emphasis added by Sprint]

Sprint noted that in footnote 37 of the FCC's *Order*, the FCC states that "'lit fiber' refers to fiber-optic cable that has been equipped with electronic devices allowing it to send transmission signals while 'dark fiber' is fiber-optic cable that has not been so equipped." Sprint maintained that thus far, this definition of lit fiber is the only definition Sprint has found. Sprint noted that the FCC does not indicate who (ILEC or CLP) owns the electronic devices in the FCC's definition, and the definition is too broad to enable Sprint to develop standard rates.

Sprint argued that the difficulty of developing standard rates for an offering which the carrier has had little or no experience providing should not be underestimated. Sprint maintained that there is a multitude of combinations to be priced if there is to be compliance with this provision of the Commission's *Order*. Sprint noted that lit fiber could include varying bandwidths (i.e., OC3, OC12, OC48), 2 fiber or 4 fiber configurations, could be with or without multiplexing, and could use either digital cross-connect systems or cross-connect panels. Sprint stated that the FCC's findings regarding pricing from lit fiber cross-connects and the positions taken by Verizon and BellSouth in this matter are entirely consistent with the position expressed by Sprint in its

Supplemental Brief on non-negotiated items and with the relief Sprint is seeking in its Motion for Reconsideration.

Therefore, Sprint proposed to let its rates for "12 Fiber High-Frequency Cable", "12 Fiber Patch Panel Connection", and "12 Fiber Jumper" remain as filed representing fiber optic cross-connects while assuming that CLPs will be providing the necessary electronics. Sprint stated that in the event it is to provide lit fiber, Sprint should be permitted to do so on an individual case basis.

INITIAL COMMENTS

The Public Staff was the only party to file initial comments on Sprint's Motion. The Public Staff stated in its comments that in light of the new information provided by Sprint in its Motion, the Public Staff recommended that the Commission require BellSouth and Verizon to clarify their previous filings of fiber cross-connect rates. The Commission notes that it requested this information in its *November 14, 2002 Order*, and BellSouth and Verizon did file the additional, clarifying information.

CLARIFICATION BY BELLSOUTH AND VERIZON

In the Commission's November 14, 2002 *Order Addressing the Public Staff's November 12, 2002 Motion*, the Commission required BellSouth and Verizon to make a filing by no later than Friday, November 22, 2002 clarifying their previous filings of fiber cross-connect rates in this docket by specifying whether the rates therein are for cross-connections of dark fiber, lit fiber, or both types; and if they are associated exclusively with dark fiber, to state clearly what pricing procedure they propose to employ if CLPs request cross-connection of lit fiber. On November 22, 2002 BellSouth made its filing and on November 20, 2002 Verizon made its filing.

BELLSOUTH – BellSouth noted in its filing that although the Commission's *November 14, 2002 Order* refers to cross-connect rates, BellSouth believes that the Commission intended to refer to co-carrier cross-connects. BellSouth maintained that Sprint's Motion for Reconsideration relates to the *Order Addressing Unresolved Collocation Rate Issues* wherein the Commission directed Sprint to file a rate for lit fiber cross-connects after the conclusion of a discussion of co-carrier cross-connects. BellSouth stated that, specifically, in the paragraph immediately preceding the imposition of this requirement upon Sprint, the *Order* contains a discussion of co-carrier cross-connects, which includes a specific reference to "Section 5.5 of the Standard Offering which is titled 'Co-Carrier Cross Connect (CCCX).'"

BellSouth maintained that with this clarification, BellSouth responds by stating that it offers co-carrier cross-connects for either copper/coaxial or fiber cable support structure. BellSouth stated that the CLP is required to provide the actual cable. Thus, BellSouth asserted, its rates are designed to recover the cost of the required cable support structure based on the type of cable. BellSouth noted that these rates do not vary depending upon the use that the CLPs make of the cable, i.e., whether the fiber is lit or dark. Therefore, BellSouth maintained, its co-carrier cross-connect rates for fiber cable apply equally to dark fiber and to lit fiber.

VERIZON – Verizon noted in its filing that its fiber cross-connect rate structure is for unlit or dark fiber. Verizon stated that it is a misnomer, however, to identify fiber optic cross-connect as "lit" or "unlit". Verizon maintained that the fiber connection (patchcord) is a passive cable that connects the CLP's fiber terminal equipment to the ILEC's fiber distribution panel. Verizon noted that the CLP's fiber terminal equipment essentially "lights" the fiber.

Verizon stated that it is not aware of any CLP request to an ILEC to provide fiber termination equipment between the collocation cage and the fiber distribution panel. Verizon maintained that this would duplicate equipment and provide no value to a CLP. Verizon noted that by obtaining unlit fiber cross-connect, the CLP controls the bandwidth that is transmitted through its collocation node. Verizon stated that if, however, a CLP requests fiber termination equipment between the collocation cage and the fiber distribution panel, Verizon will accommodate the request on an individual case basis, assuming it is technically feasible.

Verizon noted that its rate structure allows the CLP to establish an optical connection from its collocation cage to Verizon's fiber distribution panel. Verizon maintained that there are several rate elements involved in establishing this connection. Verizon stated that the engineering of the fiber facility, pulling the fiber (patchcord) from the cage to the distribution panel, and the pro-rated costs of the distribution panel, terminating the patchcord onto the distribution panel, and the pro-rated costs of the distribution panel, cable rack space in which the cable is placed, and material costs of the fiber patchcord must all be represented within the rate structure. Verizon maintained that the fiber patchcord that terminates on the fiber distribution panel can be utilized to connect to a dark fiber unbundled network element or to make an optical connection to other CLP arrangements through Verizon's dedicated transit. Verizon argued that it is not possible, however, to cost out such a configuration until the CLP describes the type of fiber terminal and amount of bandwidth desired.

REPLY COMMENTS

The Public Staff was the only party to file reply comments on Sprint's Motion. The Public Staff stated in its reply comments that the fiber cross-connect rates proposed by BellSouth, Sprint, and Verizon provide for a fiber cable to run directly from a CLP's collocation space to an ILEC's fiber distribution panel or to another CLP's collocation space. The Public Staff noted that it believes that such cross-connects are properly characterized as "dark fiber" cross-connects, because the ILECs' proposed rates do not contemplate the ILEC furnishing the fiber terminating equipment which would actually "light" the fiber, i.e., transmit and receive pulses of light through it for transmission purposes.

The Public Staff noted that it is clear from the filed comments that the ILECs have little or no experience provisioning lit fiber cross-connects and that there is little demand for this service. The Public Staff maintained that it believes that pricing for lit fiber cross-connects should be handled on an individual case basis until the ILECs gain adequate experience in provisioning this type of service. The Public Staff, therefore, recommended that the Commission withdraw Ordering Paragraph No. 2 of its September 24, 2002 *Order Addressing Unresolved Collocation Rate Issues* and find that Sprint is not required to file a cost study and rates for lit fiber cross-connects.

DISCUSSION

After reviewing the comments filed by the Parties and the FCC's *September 4, 2002 Order*, the Commission believes that it is appropriate to rescind our decision requiring Sprint to provide a specific rate for lit fiber cross-connects. The Commission notes that the FCC specifically noted in its *September 4, 2002 Order* that lit fiber cross-connects may be elements with which ILECs have little or no experience and, therefore, individual case basis pricing may be appropriate until adequate experience is developed. Further, the Commission notes that no Party that filed comments proposed that the Commission deny Sprint's Motion.

The Commission, therefore, finds it appropriate to grant Sprint's Motion for Reconsideration in this regard thereby withdrawing Ordering Paragraph No. 2 from our *September 24, 2002 Order* and allow Sprint to reflect individual case basis pricing for lit fiber cross-connects. Further, the Commission notes that currently Ordering Paragraphs Nos. 1 and 3 from the *September 24, 2002 Order* have been suspended and that the Parties will be able to move forward on those Ordering Paragraphs after the Commission issues its Order on the Motions for Reconsideration filed in response to the Commission's September 3, 2002 *Order Addressing Disputed Language in the Standard Offering*. Reply comments were filed on December 18, 2002 and the matter is currently pending.

▶ **COMMISSION CONCLUSIONS:** The Commission finds it appropriate to grant Sprint's Motion for Reconsideration in this regard thereby withdrawing Ordering Paragraph No. 2 from its September 24, 2002 Order and allow Sprint to reflect individual case basis pricing for lit fiber cross-connects.

ISSUE NO. II – DISPUTED RATES FOR AUGMENTS AND ADJACENT COLLOCATION

The Commission's *September 24, 2002 Order*:

> ▶ ordered Sprint and Verizon to refile by no later than Thursday, October 24, 2002 cost studies and proposed rates for simple, minor, intermediate, and major augments. The CLPs and the Public Staff were allowed the opportunity to file written comments on the rates proposed.
>
> ▶ ordered BellSouth to file cost studies and proposed rates by no later than Thursday, October 24, 2002 for augments using the four categories of simple, minor, intermediate, and major and reflecting the September 3, 2002 decision made by the Commission on the disputed language in the Standard Offering. The CLPs and the Public Staff were allowed the opportunity to file written comments on the rates proposed.
>
> ▶ requested the Public Staff to file written comments on the disputed adjacent collocation rates proposed by BellSouth.

▶ ordered Sprint to file a cost study and proposed rates for adjacent collocation by no later than Thursday, October 24, 2002. The CLPs and the Public Staff were allowed the opportunity to file written comments on those proposed rates.

▶ requested the Public Staff to file written comments on the disputed adjacent collocation rates proposed by Verizon.

On October 24, 2002, BellSouth, Sprint, and Verizon filed cost studies and proposed rates for augments, and Sprint filed cost studies and proposed rates for adjacent collocation. On November 26, 2002, the Public Staff filed its comments on those proposed rates. No CLP filed comments on the proposed rates for augments or adjacent collocation. On December 9, 2002, Verizon filed a letter with the Commission stating that it agrees that, as outlined by the Public Staff in its November 26, 2002 comments, the adjacent collocation rates numbered 67-89 in Verizon's cost study should be labeled as monthly recurring charges (and not nonrecurring charges).

COMMENTS

The Public Staff was the only Party to file comments. The Public Staff addressed the proposed rates for (1) augments and the proposed rates for (2) adjacent collocation separately in its comments.

<u>RATE ISSUE NO. 1 - AUGMENTS</u>: Concerning augments, the Public Staff noted that it was guided by the following classifications, which the Commission set forth in its *Decembe 28,2001 Order*:

<u>Simple Augments</u> – include such activities such as placing additional AC convenience outlets, or making fuse changes to accommodate additional DC power needs.

<u>Minor Augments</u> – consist primarily of interconnection cabling modifications where the panels, relay racks, and other infrastructure already exist.

<u>Intermediate Augments</u> – augments where minor infrastructure work, such as the installation of additional interconnection panels/blocks, cabling, or DC power arrangements, is required to perform the upgrades.

<u>Major Augments</u> – augments for which major infrastructure work is required, such as cage expansion or power cabling.

The Public Staff stated that BellSouth's cost study detailed the individual labor functions and hours that the company anticipated would be necessary to handle each of the four types of augments. The Public Staff noted that the labor functions were identified as:

Account Team Collocation Coordinator (ATCC)
Customer Point of Contact
Interexchange Network Access Coordinator (INAC)
Circuit Capacity Management (CCM)
Corporate Real Estate and Support (CRES)
Common Systems Capacity Management (CSCM)
Power Capacity Management (PCM)
Parsons Engineering

The Public Staff noted that BellSouth's study allocated five hours for an ATCC to review a simple, minor, intermediate, or major augment application and work out any preliminary concerns with the applicant and company interdepartmental coordinators; to review the interconnection agreement between the parties; and to prepare and distribute a response to the applicant. The Public Staff noted that these activities are outlined in greater detail on pages 25-30 of the study.

The Public Staff maintained that based on its review of BellSouth's study, it recommends the following changes to BellSouth's proposed rates for simple and minor augments. The Public Staff stated that it is willing to accept BellSouth's ATCC time estimates for the more complex intermediate and major augments, but recommends that the Commission limit BellSouth's ATCC labor allocation to one hour for simple augments and two and a half hours for minor augments. The Public Staff noted that BellSouth claims that two hours of time would be required for the ATCC to review the interconnection (collocation) agreement as part of any augmentation process, but the Public Staff argued that simple and minor augments should <u>not</u> require anything beyond a cursory examination of the interconnection agreement between the parties. The Public Staff maintained that the other responsibilities of the ATCC should be substantially less time-consuming for simple and minor augments than for intermediate and major augments.

The Public Staff further stated that it believes that very little interdepartmental coordination will be required to manage the tasks associated with simple and minor augments. The Public Staff noted that based on the detailed work function descriptions that BellSouth provided on pages 25-30 of its cost study, the Company's projections that two INAC hours and two CCM hours would be required to complete simple augments and two INAC hours and five CCM hours would be required to compete minor augments are excessive. The Public Staff, therefore, recommended that the Commission direct BellSouth to reduce the hours shown for these two labor functions by 50% for both simple and minor augments. However, the Public Staff proposed no changes at this time to BellSouth's proposed rates for intermediate and major augments.

The Public Staff stated that it examined Sprint's augment cost studies, focusing on the following workgroups that Sprint identified as participants in the augment completion process:

> The Application Engineer and Network Sales Manager complete the collocation application on behalf of the customer and coordinate changes with the customer.

The Network Project Manager coordinates construction and completion of the project (Administration).

Engineering inspects facilities and records to determine that the requested services can be provided to the collocator.

The Public Staff noted that Sprint's cost study provides for five and a half hours of "Application Engineer" time for all four types of augments. The Public Staff maintained that while it believes that five and a half hours may be appropriate for the complex applications that CLPs will submit in connection with intermediate and major augments, application review and coordination of changes with the customer are likely to be much less onerous and time-consuming tasks for simple and minor augments. The Public Staff, therefore, recommended that the Commission require Sprint to reduce the Application Engineer hours from five and a half to one for simple augments and from five and a half to two for minor augments.

The Public Staff noted that Sprint predicts that two hours of Network Project Manager time will be required to complete simple, minor, and intermediate augments. The Public Staff commented that the amount of time necessary for a Network Project Manager to coordinate construction and completion of a simple augment should be substantially less than that required to coordinate construction and completion of a minor or intermediate augment. The Public Staff, therefore, recommended that the Commission require Sprint to reduce the Network Project Manager hours from two to one for simple augments.

The Public Staff also stated that it believes that Sprint's cost studies overstate the Engineering hours that would typically be needed to handle simple and minor augments. The Public Staff argued that neither of these augment types involve any infrastructure changes, nor should they require significant engineering activity. The Public Staff, therefore, recommended that the Commission require Sprint to reduce the proposed Engineering Cost hours by 50% for both the simple and minor augment categories.

The Public Staff stated that it does not object to the augment rates proposed by Verizon, with the exception of the Company's proposed rate for minor augments. The Public Staff noted that the Building Engineer labor time that Verizon proposes in its proprietary Cost Development page (Section 3, page 10 of its cost study) is excessive for the minor augment category. The Public Staff maintained that since no building infrastructure changes are required for this type of augment, very little work activity should be required from a Building Engineer. The Public Staff recommended that the Commission require Verizon to allocate no more than 3.00 hours as the total Building Engineer work time for minor augments.

DISCUSSION – AUGMENTS

The Commission has reviewed the cost studies for augments filed by BellSouth, Sprint, and Verizon. The Commission agrees with the proposals made by the Public Staff to make certain adjustments to those cost studies. Specifically, the Commission finds it appropriate to:

(1) Require BellSouth to limit its ATCC labor allocation to one hour for simple augments and two and a half hours for minor augments. BellSouth proposed five hours for ATCC labor for simple and minor augments.

(2) Require BellSouth to reduce the hours reflected for INAC and CCM by 50% for both simple and minor augments. BellSouth proposed two INAC hours and two CCM hours for simple augments; two INAC hours and five CCM hours for minor augments; two INAC hours and seven CCM hours for intermediate augments; and two INAC hours and eight CCM hours for major augments.

(3) Require Sprint to reduce the Application Engineer hours from five and a half hours to one hour for simple augments and from five and a half hours to two hours for minor augments.

(4) Require Sprint to reduce the Network Project Manager hours from two hours to one hour for simple augments.

(5) Require Sprint to reduce the proposed Engineering Cost hours by 50% for both simple and minor augments.

(6) Require Verizon to allocate no more than three hours as the total Building Engineer work time for minor augments.

▶ **COMMISSION CONCLUSIONS – RATE ISSUE NO. 1 - AUGMENTS:** The Commission finds it appropriate to require BellSouth, Sprint, and Verizon to reflect the revisions outlined above in their augment cost studies and refile their cost studies and resulting rates by no later than Thursday, February 13, 2003.

RATE ISSUE NO. 2 - ADJACENT COLLOCATION: Concerning adjacent collocation, the Public Staff stated that it has reviewed the filings by BellSouth, Sprint, and Verizon pertaining to adjacent collocation. The Public Staff stated that it believes that the stay on comments regarding cross-connect rates and cable installation rates for physical collocation should also apply to rates for cross-connects and cable installation for adjacent collocation arrangements. The Public Staff recommended that the Commission defer taking any action on the rates for these two categories of adjacent collocation elements pending resolution of the issues described in the *Order Addressing the Public Staff's November 12, 2002 Motion.*

The Public Staff stated that BellSouth proposed power rates for adjacent collocation in Elements H.4.16, H.4.17, H.4.18, and H.4.19, which are for the provision of, respectively, 120V Single Phase AC Power, 240V Single Phase AC Power, 120V Three Phase AC Power, and 277V Three Phase AC Power. The Public Staff noted that BellSouth maintained that these rates are the same as the physical collocation rates ordered by the Commission for the same power elements. The Public Staff noted that the CLPs contended that these rates are inflated for the reasons previously discussed in their Supplemental Brief on the unresolved collocation rate issues filed on April 15, 2002. The Public Staff stated that in that case, the Commission found that the fused amp rates proposed by BellSouth were appropriate. The Public Staff recommended that the same determination be made here.

The Public Staff further noted that the CLPs asserted that BellSouth is refusing to provide DC power to an adjacent collocation by failing to propose a DC rate element for adjacent collocation. The Public Staff noted that in Finding of Fact No. 34 in the Commission's December 28, 2001 *Order Addressing Collocation Issues*, the Commission concluded that

> ILECs are required to provide AC and DC power from the central office to adjacent collocation, upon request, where technically feasible. This power should have the same performance and reliability characteristics as the power that the ILEC provides to collocations within its central office. The CLP should have the option to secure its own AC power to the adjacent structure from the same provider that furnishes commercial AC power to the ILEC. The ILEC should not be required to provide the power to the demarcation point of the adjacent collocation site. Any converting or fusing of the power source beyond that point will be the responsibility of the CLP. If an ILEC receives a request to provide power to an adjacent collocation space, within 45 days the ILEC and the CLP shall either negotiate a mutually agreed-upon price or the ILEC shall submit a cost study and proposed generic rates for providing power to adjacent collocation spaces for Commission approval. (emphasis added)

The Public Staff stated that it believes this language does not require an ILEC to provide power rates to adjacent collocation space until a request to provision such power is received. The Public Staff noted that, therefore, BellSouth is not required to propose a rate until a request is made to provide DC power to an adjacent collocation space. The Public Staff maintained that when a request is received, BellSouth must then negotiate a price or submit a cost study with a proposed rate for approval by the Commission for the DC power within 45 days of the request. The Public Staff stated that in the alternative, BellSouth must prove to the Commission that it is technically infeasible to provide DC power to the adjacent collocation site.

The Public Staff noted that the CLPs dispute BellSouth's rate element H.4.9, Adjacent Collocation – Application Cost. The Public Staff stated that the CLPs contended that it is inappropriate to charge an application fee for adjacent collocation because this process is a continuation of the physical collocation application and because the application fees are excessive. The Public Staff maintained that the CLPs also noted that this rate contains inappropriate costs for real estate support.

The Public Staff stated that it believes that CLPs will request adjacent collocation only when it is determined that other types of collocation space are unavailable. The Public Staff maintained that the ILEC will incur additional cost in processing such a request, and therefore, the ILEC should be able to recover those costs. The Public Staff noted that BellSouth proposed a rate of $2,287 in its Supplemental Brief and maintained that this rate is lower than the rate for physical collocation and that the costs of processing an application for physical collocation and adjacent collocation are similar. The Public Staff argued that BellSouth has not yet provided a cost study for this rate and that the Public Staff is unable to comment on the inputs used to calculate this rate. Therefore, the Public Staff recommended that the Commission require BellSouth to file a cost study supporting the $2,287 rate or a lower rate.

The Public Staff stated that it believes that Sprint's Adjacent Collocation Application Fee fails to comply with the Commission's directive in Finding of Fact No. 47 (Rate Issue No. 2) of the Commission's *Order Addressing Collocation Issues.* The Public Staff noted that the Commission directed ILECs to revise their cost studies for application fees to reflect no more than 24 hours for labor and engineering hours. The Public Staff noted that Sprint's application fee study includes 24.00 hours for Total Labor plus 46.00 hours for Additional Engineering for Adjacent Collocation. The Public Staff recommended that the Commission require Sprint to prorate the Total Labor and Additional Engineering hours shown to reflect a combined total of no more than 24.00 hours.

The Public Staff noted that Verizon maintained that it did not develop rates for power costs to an adjacent collocation space because the CLP can provision its own power efficiently. Also, the Public Staff noted that Verizon maintained that it does not extend DC power from the central office to an adjacent structure including its own facilities.

The Public Staff noted that the Commission determined that an ILEC must, upon request, provide adjacent collocation spaces with AC and DC power that has the same performance and reliability characteristics as the power that the ILEC provides to collocations within its central office, unless the ILEC can convince the Commission that it is infeasible to provide such power. Therefore, the Public Staff recommended that the Commission require Verizon to provide rates for AC or DC power to an adjacent collocation space upon request, unless it can show that such a request is technically infeasible.

DISCUSSION – ADJACENT COLLOCATION

The Commission notes that Sprint was required to file a new cost study for adjacent collocation rates since it initially proposed ICB pricing which the Commission rejected. BellSouth and Verizon initially filed cost studies for adjacent collocation in April 2002, and did not have to refile their cost studies based on the Commission's *September 24, 2002 Order.*

The Commission agrees with the Public Staff that the Commission-ordered stay on comments regarding cross-connect rates and cable installation rates for physical collocation should also apply to rates for cross-connects and cable installation for adjacent collocation arrangements. Therefore, the Commission finds it appropriate to defer taking any action on the rates for cross-connects and cable installation for adjacent collocation elements pending resolution of the issues described in the *Order Addressing the Public Staff's November 12, 2002 Motion.* As previously noted, a decision on these matters is currently pending.

The Commission has reviewed the proposed cost studies of BellSouth, Sprint, and Verizon on adjacent collocation. The Commission agrees with the proposals made by the Public Staff to make certain adjustments to those cost studies. Specifically, the Commission hereby:

(1) Finds that BellSouth's proposed fused amp rates are appropriate.

(2) Finds that the Commission's December 28, 2001 *Order Addressing Collocation Issues* does not require an ILEC to provide AC and DC power from the central office to adjacent collocation space until a request to provision such power is received. Further, the Commission reiterates that if an ILEC receives a request to provide power to an adjacent collocation space, within 45 days the ILEC and the CLP must either (a) negotiate a mutually agreed-upon price or (b) the ILEC must submit a cost study and proposed generic rates for providing power to adjacent collocation spaces for Commission approval.

(3) Requires BellSouth to file a cost study supporting its proposed rate of $2,287 for Adjacent Collocation – Application Cost by no later than Monday, February 3, 2003 and request the Public Staff to file comments on that cost study by no later than 20 days after the cost study is filed.

(4) Requires Sprint to prorate the Total Labor and Additional Engineering hours for Adjacent Collocation – Application Fee to reflect a combined total of no more than 24.00 hours.

(5) Requires Verizon to provide rates for AC or DC power to an adjacent collocation space upon request, unless it can show that such a request is technically infeasible.

► **COMMISSION CONCLUSIONS – RATE ISSUE NO. 2 - ADJACENT COLLOCATION:** The Commission finds it appropriate to defer taking any action on the rates for cross-connects and cable installation for adjacent collocation elements pending resolution of the issues described in the *Order Addressing the Public Staff's November 12, 2002 Motion.* The Commission further finds it appropriate to require BellSouth, Sprint, and Verizon to reflect the revisions outlined above in their adjacent collocation cost studies and refile their cost studies and resulting rates by no later than Thursday, February 13, 2003.

IT IS, THEREFORE, ORDERED as follows:

1. That Sprint's Motion for Reconsideration is hereby granted. Therefore, Ordering Paragraph No. 2 from the Commission's *September 24, 2002 Order* is hereby withdrawn, and Sprint shall be allowed to reflect individual case basis pricing for lit fiber cross-connects. Further, the Commission notes that currently Ordering Paragraphs Nos. 1 and 3 from the *September 24, 2002 Order* have been suspended and that the Parties will be able to move forward on those Ordering Paragraphs after the Commission issues its Order on the Motions for Reconsideration filed in response to the Commission's September 3, 2002 *Order Addressing Disputed Language in the Standard Offering.*

2. That BellSouth is required to limit its ATCC labor allocation to one hour for simple augments and two and a half hours for minor augments.

3. That BellSouth is required to reduce the hours reflected for INAC and CCM by 50% for both simple and minor augments.

4. That Sprint is required to reduce the Application Engineer hours from five and a half hours to one hour for simple augments and from five and a half hours to two hours for minor augments.

5. That Sprint is required to reduce the Network Project Manager hours from two hours to one hour for simple augments.

6. That Sprint is required to reduce the proposed Engineering Cost hours by 50% for both simple and minor augments.

7. That Verizon is required to allocate no more than three hours as the total Building Engineer work time for minor augments.

8. That BellSouth, Sprint, and Verizon shall file revised cost studies and resulting rates to reflect the revisions outlined in Ordering Paragraphs 2-7 above by no later than Thursday, February 13, 2003.

9. That BellSouth's proposed fused amp rates are appropriate.

10. That the Commission's December 28, 2001 *Order Addressing Collocation Issues* does not require an ILEC to provide AC and DC power from the central office to adjacent collocation space until a request to provision such power is received. Further, the Commission reiterates that if an ILEC receives a request to provide power to an adjacent collocation space, within 45 days the ILEC and the CLP must either (a) negotiate a mutually agreed-upon price or (b) the ILEC must submit a cost study and proposed generic rates for providing power to adjacent collocation spaces for Commission approval.

11. That BellSouth is required to file a cost study supporting its proposed rate of $2,287 for Adjacent Collocation – Application Cost by no later than Monday, February 3, 2003 and that the Public Staff is requested to file comments on that cost study by no later than 20 days after the cost study is filed.

12. That Sprint is required to prorate the Total Labor and Additional Engineering hours for Adjacent Collocation – Application Fee to reflect a combined total of no more than 24.00 hours.

13. That Verizon is required to provide rates for AC or DC power to an adjacent collocation space upon request, unless it can show that such a request is technically infeasible.

14. That it is appropriate to defer taking any action on the rates for cross-connects and cable installation for adjacent collocation elements pending resolution of the issues described in the *Order Addressing the Public Staff's November 12, 2002 Motion.*

15. That BellSouth, Sprint, and Verizon are required to file revised cost studies and resulting rates to reflect the revisions outlined in Ordering Paragraphs 9-13 above by no later than Thursday, February 13, 2003.

ISSUED BY ORDER OF THE COMMISSION.
This the 14th day of January, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

bp011303.01

DOCKET NO. P-100, SUB 133j

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Generic Proceeding on the Provisioning of Collocation Space	) ORDER GRANTING, IN PART,) SPRINT'S MOTION FOR) RECONSIDERATION AND RULING) ON BELLSOUTH'S RATE FOR) ADJACENT COLLOCATION–) APPLICATION FEE

BY THE COMMISSION: On September 24, 2002, the Commission issued its *Order Addressing Unresolved Collocation Rate Issues.* In its *Order*, the Commission noted that BellSouth Telecommunications, Inc. (BellSouth) had proposed a nonrecurring rate of $2,287 for Element H.4.9 – Adjacent Collocation – Application Fee. The competing local providers (CLPs) did not accept BellSouth's proposed rate of $2,287. The Commission requested that the Public Staff file written comments on the disputed adjacent collocation rates proposed by BellSouth by no later than November 13, 2002.

After an extension of time, on November 26, 2002, the Public Staff filed its written comments on BellSouth's proposed rate of $2,287. The Public Staff noted that BellSouth had not yet filed a cost study for the rate and that the Public Staff was unable to comment on the inputs used to calculate the rate.

On January 14, 2003, the Commission issued its *Order Granting Sprint's Motion for Reconsideration and Setting Rates for Augments and Adjacent Collocation.* In its *Order*, the Commission concluded that BellSouth should file a cost study to support its proposed rate of $2,287 for Adjacent Collocation – Application Fee by February 3, 2003 and that the Public Staff should file written comments on that cost study by no later than 20 days after the cost study is filed.

On February 3, 2003, BellSouth filed its cost study for Adjacent Collocation - Application Fee. BellSouth's cost study reflects a fee of $2,290 which is comprised of 24 labor hours for BellSouth employees and an additional 11 hours for Parsons Engineering. Based on a review of BellSouth's cost study, BellSouth apparently believes that 40.3750 labor hours are actually required. However, BellSouth used a weighted percentage to force its proposed 40.3750 hours to be lowered to 24 hours. Therefore, it appears that BellSouth has accepted the 24 labor hours as the appropriate labor hours for BellSouth employees to be included in Adjacent Collocation – Application Fee.

On February 12, 2003, the Commission issued an *Order Granting Sprint's Motion for an Extension of Time for All Parties to File Motions for Reconsideration and Adjacent Collocation Cost Studies.* In the *Order*, all Parties were granted an extension of time until March 5, 2003 to file any motions for reconsideration of the Commission's *January 14, 2003 Order.*

On February 27, 2003, Carolina Telephone and Telegraph Company, Central Telephone Company, and Sprint Communications Company, L.P. (collectively Sprint) filed a Motion for Reconsideration of the Commission's *January 14, 2003 Order.*

No other Party filed a Motion for Reconsideration of the Commission's *January 14, 2003 Order.*

On February 28, 2003, the Public Staff filed its comments on BellSouth's proposed rate of $2,290 for Adjacent Collocation – Application Fee. The Public Staff opined that BellSouth's cost study does not comply with the Commission's *December 28, 2001 Order* to reflect no more than 24 hours for labor and engineering. The Public Staff also noted that the shared and common cost factor used in the study reflects the amount recommended by BellSouth in the proceeding in Docket No. P-100, Sub 133d currently under consideration by the Commission with adjustments to reflect depreciation lives, cost of capital, and income tax adjustments previously approved by the Commission. The Public Staff stated that this shared and common cost factor is somewhat higher than the factor used by the Commission when approving earlier unbundled network element (UNE) and collocation rates. The Public Staff recommended that the Commission require BellSouth to prorate the hours reflected in its study for the adjacent collocation application fee to reflect no more than 24 engineering and labor hours for BellSouth and non-BellSouth employees combined. The Public Staff stated that with respect to the common and shared cost factor, the Commission should either require BellSouth to reflect the common and shared cost factor previously approved by the Commission or use the factor it has proposed subject to true-up once the Commission issues a final order in Docket No. P-100, Sub 133d.

By Order dated March 6, 2003, the Commission requested interested Parties to file Initial Comments on Sprint's Motion for Reconsideration by no later than March 21, 2003 and Reply Comments by no later than April 4, 2003.

On March 21, 2003, Initial Comments were filed by MCImetro Access Transmission Services, LLC, and MCI WorldCom Communications Inc. (collectively WorldCom), and AT&T Communications of the Southern States, LLC (AT&T), and the Public Staff.

On March 31, 2003, Sprint filed its Motion for Extension of Time in which it requested a two week extension of time to file Reply Comments in this regard. By Order dated April 2, 2003, the Commission granted Sprint's Motion for Extension of Time to file Reply Comments by no later than April 21, 2003.

Sprint filed its Reply Comments on April 21, 2003.

On May 13, 2003, BellSouth filed its Supplemental Information concerning its February 3, 2003 Adjacent Collocation – Application Fee cost study as requested by the Commission.

SPRINT'S MOTION FOR RECONSIDERATION

Sprint stated in its Motion for Reconsideration that it is seeking reconsideration of the Commission's *Order Granting Sprint's Motion for Reconsideration and Setting Rates for Augments and Adjacent Collocation* issued on January 14, 2003 for the following reasons. First, Sprint stated that it believes that the Commission has inadvertently understated the engineering estimates for work that is required to establish adjacent collocation arrangements. Second, Sprint stated that it does not believe that the Commission's *Order Addressing Collocation Issues* issued on December 28, 2001 (hereinafter referred to as the *December 28, 2001 Order*) was intended to bind incumbent local exchange carriers (ILECs) performing adjacent collocation arrangements to the same 24-hour engineering work estimates that the Commission established for collocation arrangements within a central office. Finally, Sprint maintained, it is not reasonable to apply the findings of the *December 28, 2001 Order* on Rate Issue No. 2 to Sprint's adjacent collocation rates since Sprint was first directed by Order dated September 24, 2002 to file cost studies and rates for adjacent collocation by October 24, 2002.

Sprint noted that the Commission, in its *January 14, 2003 Order*, determined, among other things, the level of Sprint's adjacent collocation rates. Sprint stated that as part of its determination, the Commission specifically limited Sprint's adjacent collocation application work hours to 24 hours. Sprint asserted that this 24-hour application allowance is the same as the collocation application work hours allowance that the Commission established for traditional collocation within a central office.

Sprint commented that when the Commission made its determination as to the application work hours for traditional collocation, Sprint was not yet ordered to file its rates for adjacent collocation. In addition, Sprint asserted, none of the testimony, discovery, or hearings that led up to the Commission's issuance of the *December 28, 2001 Order* discussed the topic of rates for Sprint's adjacent collocation application work hours. Therefore, Sprint believes that under these circumstances the Commission did not intend its *December 28, 2001 Order* to apply to Sprint's adjacent collocation application fee.

Sprint noted that this issue may have been further confused when the Public Staff stated in its November 26, 2002 Comments on Augments and Adjacent Collocation that it believed Sprint was not in compliance with the Commission's *December 28, 2001 Order* as Sprint submitted costs for more than 24 hours in its adjacent collocation application fee. Again, Sprint argued that it was not ordered to file any adjacent collocation rates until the Commission required Sprint to do so in the Commission's *Order Addressing Collocation Rate Issues* released on September 24, 2002. Sprint stated that since it had not filed its rates prior to the release of the *December 28, 2001 Order*, the Commission's resolution of Rate issue No. 2 is inapplicable to Sprint's adjacent collocation application rates.

Sprint stated that its position regarding its collocation application fee acknowledges that there are unique questions presented during the evaluation of a competitive local provider (CLP) application for adjacent collocation and in determining the appropriate location of such an adjacent collocation structure. Specifically, Sprint argued that it believes that it must consider the following criteria when reviewing applications for adjacent collocation: (1) the optimal placement of the structure, as it relates to the services provided by the CLP and the costs of provisioning the collocation arrangement; (2) the physical restraints on placement and location of the structure due to various local regulations and Sprint's building expansion plans at the site area; (3) the demands of AC power ordered by the CLP on existing power panels and the estimation of work and costs involved in developing power panel augments to accommodate the CLP's power demands; and (4) case-by-case design and costing of power cabling to serve the CLP's adjacent collocation request.

Sprint maintained that the optimal placement of an adjacent collocation structure is important in limiting unnecessary CLP costs and providing the most efficient arrangement to the CLP. However, Sprint argued that unlike traditional collocation arrangements inside a central office that are housed in an area that has been designated for collocation, adjacent collocation must start from scratch as no designated areas exist.

Sprint maintained that the designated areas for traditional collocation are typically designed to provide a CLP access to floor space, power supply, the Main Distribution Frame (MDF), DS1 and DS3 panels, fiber panels, and the cable vault. In contrast, Sprint asserted, when dealing with adjacent collocation arrangements, access to all of the collocation elements must be considered on a case-by-case basis to determine the optimal placement of the adjacent structure.

Sprint noted that because the quality of high-speed data services is degraded as the distance from the end-user customer increases, excessive distance between the CLP's structure and the MDF or DS1 and DS3 panels can adversely impact the quality of the CLP's service to its customers. In addition, Sprint argued that excessive distance between the power source or cable vault may result in higher collocation costs to the CLP. Sprint maintained that this is due to the fact that longer cables must be used, which results in higher material and labor costs to install. Sprint noted that in the event DC power is used by the CLP, the diameter of the copper cable increases dramatically as the length of the power run grows. Sprint argued that large diameter copper power cables are costly and time consuming to install, which also results in higher collocation costs to the CLP.

Sprint maintained that placement of the adjacent collocation structure may necessitate site preparation work such as trenching and concrete cutting as well as landscaping. Sprint stated that even though these costs are borne by the CLP, Sprint must still determine what work must be done at the site to accommodate adjacent collocation. Sprint asserted that this requires Sprint engineers to balance all of the considerations discussed above when determining the appropriate location of the adjacent collocation structure.

Sprint stated that in most circumstances, plans for building new structures to house adjacent collocating CLPs must be approved by local government authorities charged with oversight of construction projects. Sprint noted that seeking local approval involves filing forms and supporting data, conducting conferences with local officials, answering local government agencies' inquiries, and possibly reworking plans in the event the original plan as submitted is not approved. In addition, Sprint maintained that as part of the application process, local government agencies often require filing of detailed blueprints of the proposed project. Sprint noted that consulting engineers must be hired by Sprint to perform this work, and, by necessity, Sprint engineers are required to assist these consultants.

Sprint asserted that it is important to note a site which may be otherwise acceptable as the location of the adjacent structure may conflict with existing Sprint plans for building and/or grounds expansion. Sprint argued that in order to ensure that this is not the case, the engineer evaluating the application must consult with Sprint Real Estate Planning personnel. Sprint maintained that with all of these considerations, Sprint Engineering estimates that an average of 28 hours is required to do all the work discussed for this function.

Sprint noted that another major item required for an adjacent collocation arrangement is the availability of AC power to serve the CLP. As part of this determination, Sprint stated that its engineers conduct power load studies. Sprint asserted that these studies are not ordinarily required for collocation arrangements with the central office. Normally, Sprint noted, DC power orders within the central office are for 60 amps or less. Sprint commented that orders of that type are usually easily accommodated from existing panels. Sprint maintained that if the existing system is not capable of serving the CLP, plans must be made to increase capacity. Sprint stated that the time requirements for this work will vary depending on complexity of increasing capacity. Sprint asserted that Sprint Engineering estimates that an average of 12 hours is required to complete load studies and plan and cost increases in capacity.

Sprint argued that the work required to route power cables through the central office (as well as the length of such cable) is subject to a great deal of variance. Sprint noted that this variance in design is recognized in Section 3 of the Standard Offering, which provides for individual-case-basis costing of power for adjacent collocation. Sprint maintained that engineering work must be done to design and to determine the cost of power cabling to the proximity of the adjacent structure. Sprint stated that once the cost is determined, a price quote must be provided to the CLP. Sprint noted that Sprint Engineering estimates that six hours is the most likely requirement for power cable evaluation and costing.

Sprint maintained that each adjacent collocation arrangement is unique and requires a time consuming evaluation performed on a case-by-case basis. As a result, Sprint noted, Sprint Engineering estimates that 46 additional hours of work are needed to prepare evaluations of, and costing for, adjacent collocation applications in addition to the 24 hours required to evaluate an application for a traditional collocation arrangement within the central office.

Finally, Sprint stated that it believes that it is not appropriate to hold Sprint to the findings related to Rate Issue No. 2 as discussed in the Commission's *December 28, 2001 Order* since Sprint was not ordered to file, and did not file, cost studies and rates for Adjacent Collocation until October 24, 2002. Therefore, Sprint argued, the Commission's decision on this issue was not based on substantial, competent, or material evidence.

Sprint requested that the Commission reconsider its *January 14, 2003 Order* to permit Sprint an additional 46 hours in its adjacent collocation application fee. Sprint maintained that if the Commission is not inclined to grant Sprint's request, Sprint requests that it be permitted the opportunity to present evidence on this issue to the Commission.

INITIAL COMMENTS

PUBLIC STAFF: The Public Staff noted that on December 28, 2001, the Commission issued its *Order Addressing Collocation Issues*. The Public Staff stated that in that *Order*, the Commission considered the amount of labor hours required to process an application for physical collocation. The Public Staff commented that Sprint had submitted a cost study reflecting 77 hours of labor to process an application, and BellSouth had submitted a cost study reflecting 51 labor hours. The Public Staff observed that the Commission rejected Sprint's 77 labor hours and BellSouth's proposed 51 hours as excessive, concluding that:

> 24 hours (or three, eight hour days) is a reasonable level of labor hours for ILECs to process collocation applications. Therefore the Commission concludes that the ILECs should revise their cost studies for application fees to reflect no more than 24 hours.

The Public Staff maintained that the *December 28, 2001 Order* also required the Parties to negotiate, among other issues, the rates for adjacent collocation. The Public Staff noted that the Commission instructed that if the Parties were unable to negotiate these rates successfully, then they were to submit supplemental briefs on those issues. The Public Staff noted that the Parties submitted their supplemental briefs on the disputed issues on April 22, 2002.

The Public Staff stated that on September 24, 2002, the Commission issued its *Order Addressing Unresolved Collocation Rate Issues*. The Public Staff maintained that in that *Order*, the Commission directed Sprint to file a cost study and proposed rates for adjacent collocation; Sprint did so on October 24, 2002. The Public Staff commented that Sprint's support as provided in its study for the 70 hours of labor is the following:

> The 24 hours ordered by the NCUC was multiplied by the composite labor rate of all workgroups involved in the application process. The adjacent collocation application requires additional time by the Building Engineering department to evaluate and plan for the adjacent space, AC power requirements, dedicated cable racking and modifications to CO walls.

The Public Staff noted that Sprint stated that the source for the first 24 hours was the Commission's *December 28, 2001 Order* and that the source for the additional 46 hours came from a subject matter expert.

The Public Staff stated that it filed its comments on these rates on November 26, 2002 and that no CLP filed comments on the disputed augment or adjacent collocation rates. The Public Staff maintained that the Commission addressed Sprint's proposed adjacent collocation rates in its *January 14, 2003 Order*, directing Sprint to prorate the Total Labor and Additional Engineering hours for Adjacent Collocation – Application Fee to reflect a combined total of no more than 24 hours.

The Public Staff noted that Sprint is seeking reconsideration of the Commission's decision to direct Sprint to limit its adjacent collocation application fee labor and engineering hours to 24 hours on the grounds that the Commission's decision was not based on substantial, competent, or material evidence.

The Public Staff maintained that in making its initial recommendation after review of this cost study, the Public Staff believed that the Commission's conclusion that 24 labor hours is reasonable to process a collocation application should guide evaluation of an application for adjacent collocation. The Public Staff argued that Sprint presented no argument to the contrary. The Public Staff noted that BellSouth had previously stated in its Supplemental Brief that the costs of processing an application for physical collocation and adjacent collocation are similar. Moreover, the Public Staff stated that it believes that Sprint had failed to support the additional 46 hours it claims are necessary to process adjacent collocation applications. Therefore, the Public Staff stated that it believes that the 70 hours requested by Sprint to process an application for adjacent collocation was excessive.

The Public Staff commented that Sprint, however, now argues that processing an application for adjacent collocation is far more complex than processing an application for traditional physical collocation. The Public Staff noted that Sprint's Motion for Reconsideration contains more detail in support of the additional 46 labor hours than its October 24, 2002 cost study. For example, the Public Staff stated, Sprint did not include in its cost study the assertion that it requires outside consulting engineers to assist in processing adjacent collocation applications nor did it outline the various tasks that it must perform to process these applications. The Public Staff noted that Sprint instead summarizes these tasks in its Motion for Reconsideration, tasks it claims inflate the engineering and work hours beyond the 24 hours needed for the consideration of a physical collocation application. In sum, the Public Staff maintained, Sprint asserted that, while physical collocation applications can be processed in 24 hours, Sprint requires 70 hours of labor and engineering hours to process adjacent collocation applications.

The Public Staff noted that Sprint asserted that, since the Commission's *December 28, 2001 Order* did not consider adjacent collocation rates, it is inapplicable to the labor hours at issue here. The Public Staff stated that Sprint next asserted that, since adjacent collocation, unlike traditional collocation, occurs outside the central office, it must start from scratch. The Public Staff argued that Sprint, however, did not "start from scratch" in its cost study. Instead, the Public Staff opined, it started from the 24 hours allowed in the Commission's *December, 28, 2001 Order* for evaluation of an application for traditional collocation. Therefore, the Public Staff maintained, if Sprint's thesis is true, that the Commission's *December 28, 2001 Order* did not consider adjacent collocation hours and adjacent collocation starts from scratch, then Sprint's cost study should have likewise begun with zero engineering and labor hours. The Public Staff asserted that Sprint should have then supported *both* the 24 hours and the 46 *additional* hours required for evaluation of an application for adjacent collocation. However, the Public Staff stated, as reflected in its cost study, Sprint simply took the 24 hours from the Commission's *December 28, 2001 Order* and added labor hours to it. The Public Staff asserted that Sprint has provided no support or justification for the first 24 labor hours in either its cost study or Motion for Reconsideration.

The Public Staff stated that it continues to believe that the 24 engineering and labor hours allowed to process a traditional collocation application is adequate time to process an adjacent collocation application. The Public Staff noted that Sprint, however, has stated that adjacent collocation is unique. The Public Staff maintained that based on Sprint's cost study and Motion for Reconsideration, the Public Staff is unsure how Sprint utilizes the full 24 labor and engineering hours previously provided for evaluation of a traditional collocation application, in addition to the 46 labor hours or whether there is any duplication or elimination of tasks. The Public Staff noted that a CLP seeks adjacent collocation only when there is no space for physical collocation in the ILEC's premises. Notably, the Public Staff commented, the Commission's *December 28, 2001 Order* requires Sprint to make available a list of its central offices with no available collocation space, measures being taken to create additional collocation space, the projected date when more collocation space will be available, and notice whenever space becomes available at any previously exhausted location. Therefore, the Public Staff asserted, it is unlikely that Sprint would have expended any labor or engineering hours to process an application for physical collocation prior to receiving an application for adjacent collocation.

The Public Staff commented that Sprint also lists concerns that its engineers must consider in processing an application for adjacent collocation. The Public Staff opined that many of these concerns, however, appear to be speculative or based on responsibilities that are borne by the CLPs. For example, the Public Staff noted, Sprint states that, "[p]lacement of the adjacent collocation structure *may* necessitate site preparation work such as trenching and concrete cutting as well as landscaping." The Public Staff asserted that Sprint fails to quantify how much trenching, concrete cutting, and landscaping work it must perform to merely process an application for adjacent collocation, as opposed to actually provisioning an adjacent collocation site. Moreover, the Public Staff maintained, it is the CLP that constructs or otherwise procures an adjacent structure. The Public Staff noted that Sprint acknowledged that the CLPs bear the preparation costs, but nonetheless claimed that it must "balance" these preparation considerations when determining placement of adjacent collocation.

The Public Staff stated that Sprint also noted that excessive distance between the power source or cable vault may result in higher collocation costs for the CLPs, yet failed to show how this CLP-borne cost has any connection to the number of labor and engineering hours required to process an application for adjacent collocation. The Public Staff commented that Sprint also revives the argument that governmental permitting for construction of a collocation site can be expensive and time-consuming, an argument the Commission has already rejected with regard to justifying longer provisioning intervals. The Public Staff noted that Sprint stated obtaining the permits involves filing forms and supporting data, as well as "possibly" reworking plans if the original plans are not approved. However, the Pubic Staff argued that it is the collocating CLP, and not Sprint, that obtains these permits. Moreover, the Public Staff opined, the CLP would obtain such permits after the application has been approved.

The Public Staff concluded by stating that Sprint has failed to justify the amount of engineering and labor hours the additional considerations for adjacent collocation applications require. Thus, the Public Staff stated that it remains unpersuaded that processing an application for adjacent collocation requires more than 24 engineering and labor hours, much less the 70 hours claimed by Sprint.

The Public Staff recommended that the Commission deny Sprint's request to permit an additional 46 hours in its adjacent collocation application fee on the ground that Sprint has failed to show that processing an application for adjacent collocation requires more than 24 labor hours. The Public Staff stated that while Sprint's Motion for Reconsideration contains more detail than its cost study, it still falls short of justifying 46 additional hours. The Public Staff stated that it believes that 24 hours is an adequate amount of time to process a collocation application, either for the traditional physical collocation space or for an adjacent collocation site.

The Public Staff commented that, nevertheless, in the interest of providing a complete record before the Commission, the Public Staff does not oppose a Commission order permitting Sprint to re-file its cost study for adjacent collocation application fee. However, the Public Staff asserted that Sprint's new cost study should begin with zero labor and engineering hours and provide detailed support for all the labor and engineering hours requested to process an application fee. The Public Staff maintained that the new cost study should also expressly and clearly explain how each task performed or considered by Sprint relates to the processing of an application for adjacent collocation space. The Public Staff, however, respectfully reserved the right to file any comments it deems necessary in response to the new study.

WORLDCOM AND AT&T: WorldCom and AT&T stated that given the period and proceedings in this docket that have transpired since its commencement, a brief review of the background respecting Sprint's development of a rate for an application for adjacent collocation is instructive.

WorldCom and AT&T stated that on May 19, 2000, as a result of negotiations in this docket, Sprint joined the CLPs in submitting an initial form of the Standard Offering. WorldCom and AT&T asserted that the document addressed the terms and conditions for adjacent physical collocation, as well as for physical collocation in the central office. WorldCom and AT&T noted that subsequent to the evidentiary hearing held in November 2000, Sprint and the CLPs revised the Standard Offering, which again addressed the terms and conditions for adjacent and central office physical collocation. WorldCom and AT&T asserted that the Standard Offering as negotiated was premised on a single application and single application fee submitted by a CLP for physical collocation; i.e., the document did not distinguish an application for adjacent collocation from an application for any other kind of physical collocation. WorldCom and AT&T maintained that the Standard Offering as filed on November 18, 2002 with the Commission likewise makes no such distinction. In other words, WorldCom and AT&T stated, a CLP applies for physical collocation; if, after the ILEC has removed unused, obsolete equipment and non-essential administrative personnel from the central office, space is then determined to be unavailable in the central office, the ILEC considers the availability of space on the property in which the central office is situated. Thus, WorldCom and AT&T asserted, the Standard Offering, as negotiated by Sprint and the CLPs, was premised on the fact that one does not apply for "adjacent collocation."

WorldCom and AT&T stated that this premise was also consistent with the CLPs' position and Sprint's expressed position in this docket, which has not been affirmed by the United States Supreme Court, that the Federal Communications Commission's (FCC's) TELRIC pricing methodology, commonly referred to as "scorched node," requires ILECs to figuratively burn their central offices to the ground and to reconstruct them, taking into account current and anticipated demand for collocation. WorldCom and AT&T maintained that many central offices in fact were constructed well before physical collocation was required by law or even contemplated. WorldCom and AT&T asserted that a central office constructed today, in an effectively competitive market for wholesale services, would take into account demand for collocation. WorldCom and AT&T asserted that this is because ILECs in such a scenario would have to compete for CLP customers, and CLPs that would encounter higher costs, from building huts, installing facilities, etc., outside a central office would instead seek to collocate with an ILEC that passed along or facilitated lower costing collocation. WorldCom and AT&T maintained that this effort, if undertaken in an effectively competitive market, would result in pricing that is not premised specifically on placing a CLP *outside* the central office, particularly to the extent that costs are higher (to the ILEC or CLP) as a result of placing collocation space outside the central office. Consequently, WorldCom and AT&T argued, there should be no difference in pricing application fees, as between adjacent collocation and physical collocation within the central office.

WorldCom and AT&T stated that given this background, the Commission understandably and appropriately expressed concern "about the labor hours reflected in the cost studies (51 hours for BellSouth and 77 hours for Sprint)". WorldCom and AT&T noted that the Commission stated that it

> . . . believes that 24 hours (or three, eight-hour days) is a reasonable level of labor for ILECs to process collocation applications. Therefore, the Commission concludes that the ILECs should revise their cost studies for application fees to reflect no more than 24 labor hours.

WorldCom and AT&T noted that at the same time, the Commission directed the Parties to negotiate concerning the rates for adjacent collocation. WorldCom and AT&T asserted that reading the *December 28, 2001 Order* as a whole, one must conclude the Commission clearly expressed, *at a minimum*, its intent that ILECs not claim excessive costs for review of an application for physical collocation that, because of the unavailability of space within a central office, would need to encompass adjacent collocation. Indeed, WorldCom and AT&T stated, subsequent proceedings in this docket have made it clear that the Commission specifically intended that it is unreasonable for Sprint to claim that review of an application for adjacent collocation takes more than 24 hours of labor and engineering time.

WorldCom and AT&T commented that after negotiations between the Parties following the *December 28, 2001 Order*, Sprint contended that "it is appropriate to provision and bill for adjacent collocation on an individual case basis," given "variables such as zoning or central office differences which could cause variances in the methods of provisioning and the resulting rates." WorldCom and AT&T stated that on September 24, 2002, in an attempt to resolve this issue, the Commission issued its *Order Addressing Unresolved Collocation Rate Issues*. WorldCom and AT&T commented that the *Order* noted at pages 18-19 that BellSouth proposed a nonrecurring application rate for adjacent collocation (Rate Element H.4.9) that was lower than the nonrecurring rates that BellSouth had submitted for Physical Collocation - Application Cost - Initial (Rate Element H.1.1.) and Physical Collocation - Application Cost - Subsequent (Rate Element H.1.46), respectively. WorldCom and AT&T asserted that the *Order* also noted that BellSouth had stated that the costs involved in processing an application for physical collocation within the central office and adjacent collocation are very similar. WorldCom and AT&T noted that the Commission then agreed with the CLPs' argument that the fact that Sprint had never had an order for adjacent collocation should not prevent standardizing pricing for it and instructed Sprint to file cost studies and proposed rates for adjacent collocation.

WorldCom and AT&T noted that Sprint then filed its cost studies, claiming that review of an application for adjacent collocation should assume 70 hours of labor and engineering time. WorldCom and AT&T commented that on November 26, 2002, the Public Staff filed comments regarding the ILECs' proposed adjacent collocation rates. WorldCom and AT&T noted that the Public Staff recommended that the Commission require Sprint to prorate the number of hours to reflect a combined total of no more than 24 hours for labor and engineering to review an application for adjacent collocation. WorldCom and AT&T stated that on January 14, 2003 the Commission issued its *Order Granting Sprint's Motion for Reconsideration and Setting Rates for Augments and Adjacent Collocation*. WorldCom and AT&T noted that the Commission directed Sprint, consistent with the *December 28, 2001 Order*, to prorate the total labor and engineering hours for review of an adjacent collocation application to reflect a combined total of no more than 24 hours. Consequently, WorldCom and AT&T asserted, the Commission acknowledged that its intent in the *December 28, 2001 Order* was to treat an application resulting in physical collocation in adjacent collocation space the same as other applications requesting physical collocation. WorldCom and AT&T commented that on February 27, 2003 Sprint filed its Motion for Reconsideration of the Commission's *January 14, 2003 Order*; and that no other party, including BellSouth, filed a motion for reconsideration of the *Order*. WorldCom and AT&T noted that Sprint argued that the "unique questions" presented by an application for adjacent collocation – namely, the "optimal" placement of the structure housing the CLP's equipment, the "physical restraints" on placement of the structure "due to various local regulations and Sprint's building expansion plans," the demands of AC power ordered by the CLP, and "case-by-case design and costing of power cabling" – justifies Sprint in assuming nearly three times the total hours for engineering and labor that Sprint concedes the Commission has determined are the maximum necessary for reviewing an application for physical collocation within the central office.

WorldCom and AT&T stated that from Sprint's Motion it is evident that, despite its protestations to the contrary, it does not apply the FCC's TELRIC pricing rules, 47 C.F.R. §51.501 et seq., or this Commission's directives regarding the appropriate determination of collocation rates.

WorldCom and AT&T argued that Sprint continues to premise its proposed costs for adjacent collocation on an individual-case-basis approach. In so doing, WorldCom and AT&T contended, Sprint contrasts physical collocation within the central office, in which it maintains that designated space is "typically designed" to provide a CLP access to power and other needs, with adjacent collocation, in which access to elements "must be considered on a case-by-case basis to determine the optimal placement."

Therefore, WorldCom and AT&T maintained, Sprint somewhat understates the space available for central office collocation and grossly overstates the "unique" nature of adjacent collocation. WorldCom and AT&T argued that with regard to central office collocation, ILECs have limited discretion to place CLP equipment in areas selected by the ILECs within the central office, and central offices currently are not necessarily designed for collocation; instead, it is the rates for collocation that must be premised on such a design. WorldCom and AT&T argued that concerning adjacent collocation, Sprint consistently assumes a worst-case scenario. WorldCom and AT&T argued that Sprint justifies its proposed rates based on its assertion that "excessive distance" between the power source or cable vault "may result" in higher collocation costs. WorldCom and AT&T maintained that since placement of the adjacent collocation structure "may necessitate" site preparation, which also "may conflict" with Sprint's expansion plans, Sprint contended that the engineering and labor costs for reviewing applications resulting in adjacent collocation are high. WorldCom and AT&T commented that 47 C.F.R. §51.511(a), however, requires the forward-looking economic cost per unit to equal the forward-looking economic cost of the element divided by a reasonable projection of the sum of the total number of units of the element that the ILEC is likely to provide to CLPs and the total number of units of the element the ILEC is likely to use in offering its own services. WorldCom and AT&T argued that Sprint consistently assumes scenarios that are unlikely.

Moreover, WorldCom and AT&T maintained, Sprint assumes the worst-case scenario in its contention that municipal authorities must approve adjacent collocation. WorldCom and AT&T stated that this assertion, which is unsupported by evidence in the record, is inconsistent with the finding in the *December 28, 2001 Order*, that local building codes cannot be assumed to be so onerous as to necessarily result in delays in the Commission-ordered intervals. Moreover, WorldCom and AT&T commented, in its assumption of engineering and cabling costs, Sprint confuses the provisioning of adjacent collocation, which necessarily takes into consideration certain characteristics of the premises of central offices and other ILEC installations, with the pricing of adjacent collocation. WorldCom and AT&T maintained that Sprint appears to have assumed that each time adjacent collocation is needed a new structure must be built by the ILEC.

For these reasons, WorldCom and AT&T requested that the Commission deny Sprint's Motion for Reconsideration, and order Sprint to submit cost studies, without further delay, that comport with TELRIC and the Commission's directives.

REPLY COMMENTS

SPRINT: Sprint maintained in its reply comments that the positions set forth by the Public Staff, WorldCom, and AT&T are without merit. Sprint argued that for reasons set forth in its Reply Comments, the Commission should permit Sprint a total of 70 hours to complete application work for adjacent collocation. However, Sprint asserted, if the Commission is not inclined to make such a finding, Sprint should be permitted the opportunity to present additional evidence on this issue.

Sprint commented that adjacent collocation is extremely rare in the industry, and Sprint has completed no actual adjacent collocations, so basing work hours on subject matter expert data is the most reasonable and reliable approach. Sprint stated that it should be remembered that Sprint is both an ILEC and a CLP, and, as a result, Sprint has every incentive to establish reasonable rates that reflect the true economic cost of providing services.

Sprint noted that the Public Staff, in its Initial Comments, offers an opinion unsupported by the evidence that 24 hours is adequate to complete an application for adjacent collocation. Sprint argued that no material support for a 24-hour adjacent collocation application fee can be found either in the Public Staff's Initial Comments or in the record in this proceeding. Sprint argued that the Public Staff seeks to justify this arbitrary limitation by relying on the Commission's *December 28, 2001 Order*. Sprint maintained that this reliance is misplaced.

Sprint asserted that the Public Staff simply restates that the 24 hours ordered for traditional collocation is appropriate for adjacent collocation. In addition, Sprint noted, the Public Staff claims that Sprint has failed to justify the need for additional engineering hours. Sprint disagreed and stated that unlike the Public Staff, Sprint has presented ample evidence supporting its position. Sprint maintained that its work hours are based on expert opinions of subject matter experts in the field of Buildings Engineering. Sprint stated that these subject matter experts have dealt with building additions, electrical work, and building permit issues many times in the past.

Sprint stated that in its Motion for Reconsideration filed on February 27, 2003, it showed that the 24 hours ordered for the processing of collocation applications is for traditional collocation and is not enough time to process an application for adjacent collocation. Sprint noted that this is true even though the Commission's decision in its *Order Granting Sprint's Motion for Reconsideration and Setting Rates for Augments and Adjacent Collocation* limits such work to 24 hours. Sprint asserted that regrettably, the Commission's decision was not based on substantial, competent, or material evidence, rather it was based on comments made by BellSouth in its April 2, 2002 Supplemental Brief.

Sprint maintained that the Public Staff places a great deal of weight on the statements BellSouth made in its Supplemental Brief. Sprint noted that the Public Staff quotes BellSouth as stating that "the costs of processing an application for physical collocation and adjacent collocation are similar." However, Sprint argued that this statement is not evidence, and even if it was, it does not support the finding that 24 hours of cost for an adjacent collocation application is sufficient.

Sprint stated that as evidenced by BellSouth's cost study for adjacent collocation, BellSouth itself does not believe that 24 hours is adequate for adjacent collocation applications. Sprint noted that in BellSouth's study, in addition to 24 hours of employee engineering time, BellSouth added an almost equal amount of cost for outsourced consulting engineering work. Therefore, Sprint maintained, the amount of cost claimed for adjacent collocation by BellSouth is not consistent with the 24 hours established for traditional collocation.

Sprint commented that the Public Staff criticized Sprint's cost study by stating that Sprint simply assumed the same 24 hours allotted for traditional collocation as the starting point for adjacent collocation, and as a result was seeking to double recover. However, Sprint asserted, the initial 24 hours in Sprint's cost study reflects work hours that traditional and adjacent collocation applications have in common. For example, Sprint noted, both traditional and adjacent collocation applications must be evaluated to determine if the existing facilities in the central office will support the proposed collocation, whether it is adjacent or traditional. Sprint stated that this evaluation also includes issues related to space on the Main Distribution Frame, cross-connect panels, shared cable racking, entrance cabling through the vault and cable duct space. Sprint argued that an additional time requirement included in the 24 hours, and common to both types of collocation is the time for Sprint's Wholesale Markets Group to administer the back office functions of processing either adjacent or traditional collocation applications. In effect, Sprint maintained, it did "start from scratch" as the Public Staff has demanded. Also, Sprint stated that it should be understood that, although Sprint acquiesced to beginning with 24 hours in its cost study for adjacent collocation, contrary to the claim made by the Public Staff, Sprint has never stated that traditional collocation applications can be completed within 24 hours.

Sprint maintained that the focus of the collocation application process is evaluating a CLP's request to determine if the CLP's needs can be met. Sprint commented that the goal of the evaluation in turn is to determine the best alternatives and select the most efficient means to provide adjacent collocation while minimizing the costs to collocating carriers. Sprint asserted that this is exactly what is contemplated by the TELRIC methodology. However, as Sprint insisted it has consistently said, it takes more time to evaluate the needs and requirements for adjacent collocation than the time needed to evaluate traditional collocation. For instance, Sprint commented, with adjacent collocation, all interfaces to power, cross-connects, and entrance cabling must be planned on a case-by-case basis due to the unique nature of each adjacent collocation arrangement. Sprint noted that once alternatives have been evaluated, the CLP is quoted a price.

Sprint commented that despite the obvious differences between traditional and adjacent collocation, the Public Staff erroneously concluded that Sprint's work hours are overstated because CLPs obtain construction permits and that permits are obtained after the application process. In fact, Sprint maintained, in order to quote a price as a part of the application process, Sprint must know that a construction plan and placement of the hut have been approved by applicable governmental agencies. Sprint stated that it must also know where the hut will be located so it can determine such things as the need for site preparation work, landscaping, length of power runs, and cross-connect runs. Sprint stated that if it does not know this information, its evaluation of an adjacent collocation application would be reduced to a mere guessing game in arriving at a price quote and construction requirements to be paid for by the CLP.

Sprint noted that WorldCom and AT&T's position that a single application fee should apply to both traditional and adjacent collocation arrangements assumes, in theory that there will always be room inside the central office for collocation. However, Sprint argued, the fact that the FCC issued rules pertaining to adjacent collocation in 1999 demonstrates that the FCC recognized that in real world situations there will not always be available space in central offices. Moreover, Sprint commented, in light of the FCC's rules, one cannot assume that TELRIC pricing anticipates that adjacent collocation outside the central office should be priced the same as traditional collocation inside the central office. Indeed, Sprint noted that the Commission itself recognized the differences between traditional collocation and adjacent collocation when it ordered ILECs to file rates specifically for adjacent collocation.

Sprint requested that the Commission approve a total of 70 hours to complete application processing work for adjacent collocations. In the alternative, Sprint stated, if the Commission is not inclined to make such a ruling at this time, Sprint requests that it be permitted the opportunity to present to the Commission additional evidence on this issue.

DISCUSSION

The Commission notes that it concluded in its *December 28, 2001 Order* that:

(1) it would only be setting rates for physical collocation in that phase of the docket;

(2) it was concerned about the 77 labor hours proposed by Sprint for Physical Collocation in the Central Office – Application Fee;

(3) 24 hours (or three, eight-hour days) is a reasonable level of labor hours for the ILECs to reflect in the Physical Collocation in the Central Office – Application Fee; and

(4) the Parties should attempt to negotiate appropriate rates for adjacent collocation and if negotiations failed, file Supplemental Briefs discussing the issue in greater detail.

The Commission notes that Sprint was the <u>only</u> Party to file a Motion for Reconsideration on the Commission's conclusion in the *December 28, 2001 Order* that 24 hours (or three, eight-hour days) is a reasonable level of labor hours for the ILECs to reflect in the Physical Collocation in the Central Office – Application Fee. On August 20, 2002, the Commission issued its *Order Addressing Motions for Reconsideration and Clarification*. The *Order* outlined Sprint's contention that in addition to verifying the availability of floor space, time is also spent in verifying availability of main distribution frame space, conduit space, and DC power, and administrative, legal, and contract negotiation/review time is also required as part of the application process. Sprint asserted that 24 hours is not a reasonable amount of time to perform all of those activities. The Commission found that no new information was provided which would warrant the Commission altering its decision on the issue; therefore, the Commission denied Sprint's Motion for Reconsideration of the *December 28, 2001 Order* in this regard.

Concerning **<u>adjacent collocation</u>**, the Commission notes that the Parties were unable to negotiate appropriate rates. Therefore, the Parties filed Supplemental Briefs on the issue. On September 24, 2002, the Commission issued its *Order Addressing Unresolved Collocation Rate Issues*. The Commission noted that Sprint had not filed any proposed rates for adjacent collocation, and instead proposed that adjacent collocation rates be set on an individual case basis. The Commission found that it was inappropriate for Sprint to only reflect individual-case-basis rates for adjacent collocation since both BellSouth and Verizon had developed rates for adjacent collocation. Therefore, the Commission ordered Sprint to file a cost study and proposed rates for adjacent collocation by no later than October 24, 2002 and requested that the Public Staff file written comments on the cost studies by November 13, 2002.

On October 24, 2002, Sprint filed its cost study and proposed rates for adjacent collocation. Sprint proposed a rate for Adjacent Collocation – Application Fee which included **70 labor hours** – 24 labor hours as ordered by the Commission in its *December 28, 2001 Order* for physical collocation in the central office **plus** an additional 46 hours as proposed by Sprint's subject matter experts. The Commission notes that Sprint had proposed **77 labor hours** for Physical Collocation in the Central Office - Application Fee, although it argued that adjacent collocation requires **more** labor hours.

On January 14, 2003, the Commission issued its *Order Granting Sprint's Motion for Reconsideration and Setting Rates for Augments and Adjacent Collocation.* In its *Order*, the Commission noted that the Public Staff does not believe that Sprint's Adjacent Collocation - Application Fee complies with the Commission's *December 28, 2001 Order*. The Commission noted that the Public Staff commented that Sprint's Application Fee cost study includes 24 hours for Total Labor plus 46 hours for Additional Engineering for Adjacent Collocation. The Commission concluded in Ordering Paragraph No. 12 that Sprint must prorate the Total Labor and Additional Engineering hours for Adjacent Collocation – Application Fee to reflect a combined total of no more than 24 hours. Ordering Paragraph No. 12 of the *January 14, 2003 Order* is the subject of Sprint's Motion for Reconsideration.

Concerning BellSouth's proposed rates for Adjacent Collocation – Application Fee, the Commission notes that on February 3, 2003, BellSouth filed its cost study for Adjacent Collocation – Application Fee. BellSouth's cost study reflects a fee of $2,290 which is comprised of 24 labor hours for BellSouth employees and an additional amount for Parsons Engineering. Based on a review of BellSouth's cost study, BellSouth apparently believes that 40.3750 labor hours for BellSouth employees are actually required. However, BellSouth used a weighted percentage to force its proposed 40.3750 hours to be lowered to 24 hours. Therefore, it appears that BellSouth has accepted the 24 labor hours as the appropriate labor hours for BellSouth employees to be included in Adjacent Collocation – Application Fee.

However, BellSouth's February 3, 2003 cost study also lists $1,013 for Parsons Engineering. The Public Staff stated in its February 28, 2003 Comments on BellSouth's proposed rates:

> [t]he study filed by BellSouth reflects costs for BellSouth labor and engineering hours that do not exceed 24 hours. However, based upon **supplemental information** provided by BellSouth, the non-recurring additive charge reflects costs for labor performed by outside consultants. As a result, the sum of the labor hours included in the study for BellSouth and BellSouth's consultants exceeds 24 hours. Therefore, BellSouth's study does not comply with the Commission *December 28, 2001 Order* to reflect no more than 24 hours of labor and engineering hours. [emphasis added]

At the request of the Commission, on May 13, 2003, BellSouth filed the "supplemental information" referenced in the Public Staff's February 28, 2003 Comments. BellSouth noted that Parsons Engineering, as shown in its February 3, 2003 cost study, reflects an average of 11 hours of time required by an outside consulting firm to process an application.

Therefore, BellSouth has reflected a total of 35 labor hours, 24 labor hours for BellSouth personnel and 11 labor hours for outside consultants, in its proposed Adjacent Collocation – Application Fee of $2,290.

Concerning Verizon's adjacent collocation rates, the Commission has reviewed the rates proposed by Verizon as outlined in the Commission's *September 24, 2002 Order*, pages 22 through 23. It does not appear to the Commission that Verizon has proposed a rate for an application fee for adjacent collocation.

The Commission agrees with Sprint that the *December 28, 2001 Order* limited labor to only 24 hours for application fees <u>for physical collocation in the central office and not adjacent collocation</u>. However, the Commission believes that it is reasonable and appropriate to order Sprint to reflect the same 24 labor hours in an application fee for adjacent collocation <u>unless</u> Sprint provides sufficient evidence to warrant additional hours for labor.

Sprint has argued that there are "unique questions" that are presented during the evaluation of a CLP application for adjacent collocation and in determining the appropriate location for such an adjacent collocation structure. Specifically, Sprint asserted that it must consider the following criteria when reviewing applications for adjacent collocation:

(1) the optimal placement of the structure, as it relates to the services provided by the CLP and the costs of provisioning the collocation arrangement;

(2) the physical restraints on placement and location of the structure due to various local regulations and Sprint's building expansion plans at the site area;

(3) the demands of AC power ordered by the CLP on existing power panels and the estimation of work and costs involved in developing power panel augments to accommodate the CLP's power demands; and

(4) case-by-case design and costing of power cabling to serve the CLP's adjacent collocation request.

However, Sprint's adjacent collocation cost study simply lists 24 hours for labor as directed by the Commission in its *December 28, 2001 Order* **<u>plus</u>** an additional 46 hours to perform tasks per Sprint's subject matter experts. Sprint asserted that since it has not completed any actual adjacent collocations, basing work hours on subject matter expert data is the most reasonable and reliable approach.

The Commission also notes that Sprint proposed **<u>77 labor hours</u>** for Physical Collocation in the Central Office – Application Fee which the Commission denied; the Commission ordered a total of 24 hours. However, in its proposal for Adjacent Collocation – Application Fee, Sprint argued that adjacent collocation requires additional steps but only proposed a total of **70 labor hours**. The Commission believes these two positions taken by Sprint are inconsistent with one another.

The Commission notes that Sprint has attempted to support its additional 46 labor hours for Adjacent Collocation – Application Fee in its October 24, 2002 adjacent collocation cost study, in its Motion for Reconsideration, and in its Reply Comments. The Commission does not believe that Sprint has adequately supported its **entire** proposed additional 46 labor hours.

The Commission notes that Sprint has stated that the following activities account for the additional 46 labor hours:

28 hours – to assure the optimal placement of an adjacent collocation structure and restraints on placement of adjacent collocation structure

12 hours - to complete load studies and plan and cost increases in capacity

6 hours - for power cable evaluation and costing

In some respects, the Commission believes that Sprint has assumed the worst-case scenario when estimating labor hour requirements. For example, the Commission notes that Sprint stated that for the **28 hour** time estimate "placement of the adjacent collocation structure **may** necessitate site preparation work such as trenching and concrete cutting as well as landscaping" [emphasis added]. For the **12 hour** time estimate, Sprint stated that "**if** the existing system isn't capable of serving the CLP, plans must be made to increase capacity" [emphasis added]. Further, for the **6 hour** time estimate, Sprint stated that "the **work required** to route power cables through the CO [central office] (as well as the length of such cables) is **subject to a great deal of variance**" [emphasis added]. The Commission believes that Sprint's labor hour estimate contains a lot of speculation and that Sprint has not proven that 46 additional labor hours will be required for each and every adjacent collocation application. The Commission believes that Sprint did not provide adequate support for its **entire** amount of 46 additional labor hours.

Further, the Commission agrees with the Public Staff and is unsure how Sprint utilizes the full 24 labor hours and engineering hours previously provided for evaluation of a physical collocation in the central office application, in addition to the 46 labor hours or to what extent there is any duplication or elimination of tasks.

The Commission notes that WorldCom and AT&T, and the Public Staff recommended that the Commission deny Sprint's Motion for Reconsideration and find that 24 labor hours are sufficient for processing an application for adjacent collocation. However, the Commission believes that Sprint has presented sufficient evidence in its Motion for Reconsideration and Comments that the number of labor hours required for adjacent collocation most likely will be greater than the number of labor hours required for physical collocation in the central office; but not to the same level as Sprint has proposed. The Commission believes it is reasonable to allow Sprint an additional 12 labor hours (or 1 ½ working days) in addition to the 24 labor hours allowed for physical collocation in the central office for processing an application. This would result in a total of 36 labor hours for processing an application for adjacent collocation. The Commission believes that some applications may require more than 36 labor hours and some may require less than 36 labor hours but that 36 labor hours is a reasonable estimate for the average labor hours necessary to process an application for adjacent collocation. The Commission also notes that BellSouth has proposed a total of 35 labor hours in its cost study for Adjacent Collocation - Application Fee.

In addition, the Commission finds it appropriate to rule on BellSouth's February 3, 2003 cost study on its proposed rate for Adjacent Collocation - Application Fee since the issue is the same as the issue presented in Sprint's Motion for Reconsideration. The Commission approves the total 35 labor hours reflected in BellSouth's February 3, 2003 proposed rate of $2,290 for Adjacent Collocation – Application Fee, however, finds it appropriate to require BellSouth to use the common and shared cost factor previously approved by the Commission in Docket No. P-100, Sub 133d.

CONCLUSIONS

The Commission finds it appropriate to allow Sprint to reflect a total of 36 labor hours for processing an application for adjacent collocation, thereby denying Sprint's request for a total of 70 labor hours.

Further, the Commission finds it appropriate to approve the total 35 labor hours reflected in BellSouth's February 3, 2003 proposed rate of $2,290 for Adjacent Collocation – Application Fee, however, require BellSouth to use the common and shared cost factor previously approved by the Commission in Docket No. P-100, Sub 133d in its cost study.

IT IS, THEREFORE, ORDERED as follows:

1. That Sprint's Motion for Reconsideration is hereby granted, in part. Sprint is allowed to reflect a total of 36 labor hours for processing an application for adjacent collocation.

2. That BellSouth's proposed 35 labor hours for Adjacent Collocation – Application Fee are hereby approved. However, BellSouth should revise its cost study to use the common and shared cost factors previously approved by the Commission in Docket No. P-100, Sub 133d.

3. That Sprint, BellSouth, and Verizon shall revise their adjacent collocation cost studies in accordance with this Order and with the Commission's *January 14, 2003 Order* and file the new cost studies and revised rates by no later than Monday, June 23, 2003.

4. That the Public Staff shall file comments on Sprint's, BellSouth's, and Verizon's revised adjacent collocation cost studies and rates by no later than Monday, July 14, 2003.

ISSUED BY ORDER OF THE COMMISSION.
This the 23rd day of May, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

bp052203.01

DOCKET NO. P-100, SUB 133j

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Generic Proceeding on the Provisioning of	)	ORDER ESTABLISHING RATES
Collocation Space	)	FOR VIRTUAL COLLOCATION,
	)	ASSEMBLY POINTS, PHYSICAL
	)	COLLOCATION IN A REMOTE
	)	TERMINAL, COLLOCATION CABLE
	)	RECORDS, AND VIRTUAL
	)	COLLOCATION IN A REMOTE
	)	TERMINAL FOR BELLSOUTH
	)	AND VERIZON

BY THE COMMISSION: On May 23, 2002, the Commission issued its *Notice of Decision* in BellSouth Telecommunications, Inc.'s (BellSouth's), Section 271 docket (Docket No. P-55, Sub 1022). In the *Notice*, the Commission stated

> . . . It is furthermore provided that BellSouth's rates as denoted in the SGAT (Statement of Generally Available Terms and Conditions) for remote terminal and virtual collocation elements, cable records, the assembly point arrangement and UCL-ND, including engineering information testing are hereby approved as interim rates subject to true-up; and the SGAT shall be revised accordingly as soon as possible.

On June 13, 2002, BellSouth filed a Motion in the Commission's unbundled network element (UNE) docket (Docket No. P-100, Sub 133d) requesting the Commission to establish permanent rates for the interim collocation elements reflected in the May 23, 2002 *Notice of Decision* – specifically, Virtual Collocation, Assembly Points, Physical Collocation in a Remote Terminal, Collocation Cable Records, and Virtual Collocation in a Remote Terminal – by expanding the scope of its pending UNE proceeding. Up to that point, the Commission had not considered these collocation rate elements in either the Commission's generic collocation docket (Docket No. P-100, Sub 133j) or its generic UNE docket.

On June 18, 2002, MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., and MCI WorldCom Network Services, Inc. (collectively WorldCom), and AT&T Communications of the Southern States, Inc., (AT&T) filed a Response in Opposition to BellSouth's Motion. WorldCom and AT&T maintained that BellSouth's Motion was untimely and ill-advised in the context of the UNE proceeding. WorldCom and AT&T argued that at the appropriate time, in the appropriate proceeding, there may be consideration of the matters BellSouth raised.

On June 21, 2002, the Public Staff filed a Response to BellSouth's Motion stating that it believed that the appropriate place for the Commission to consider these rate elements would be in the generic collocation docket. Also on June 21, 2002, BellSouth filed a Response to WorldCom's and AT&T's Response, stating that the Commission could establish a separate phase in Docket No. P-100, Sub 133j to consider the elements.

On June 25, 2002, WorldCom and AT&T filed a Response to BellSouth's June 21, 2002, filing wherein they argued that BellSouth should file a motion in the collocation docket to establish certain collocation rates.

On August 7, 2002, the Commission issued its *Order Setting Hearing on Certain Collocation Elements*. The Commission set the hearing in this docket for the restricted purpose of setting permanent rates for Virtual Collocation, Assembly Points, Physical Collocation in a Remote Terminal, Collocation Cable Records, and Virtual Collocation in a Remote Terminal on behalf of BellSouth and any other incumbent local exchange company (ILEC) to which Docket No. P-100, Sub 133j was applicable which indicated by no later than August 15, 2002, that it wished to participate. Direct testimony and cost studies by BellSouth and any other participating ILEC were to be filed by no later than September 30, 2002. Rebuttal testimony by the competing local providers (CLPs) and other intervenors was due no later than October 21, 2002. The hearing was scheduled to begin on October 30, 2002.

On August 14, 2002, Verizon South, Inc. (Verizon), filed a letter with the Commission advising the Commission that it would participate in this docket in setting rates for these collocation elements.

On August 21, 2002, BellSouth filed a Motion for a Revised Scheduling Order, requesting that the Commission allow for the filing of surrebuttal testimony by the ILECs. BellSouth requested in its Motion that ILEC direct testimony and supporting cost studies be due on September 23, 2002, CLP and Intervenor testimony be due on October 14, 2002, and surrebuttal testimony by the ILECs be due on October 21, 2002. By Order dated August 22, 2002, the Commission granted BellSouth's Motion.

On September 23, 2002, BellSouth prefiled its cost study and the direct testimony of witness W. Bernard Shell and Verizon prefiled its cost study and the direct testimony of witnesses John Ries and Barbara K. Ellis. On October 1, 2002, BellSouth filed a revised Exhibit WBS-1 to the testimony of witness Shell that was filed on September 23, 2002.

BellSouth noted that the revised exhibit reflects the corrections made to the loading factors filed in Docket No. P-100, Sub 133d.

On October 14, 2002, the Southeastern Competitive Carriers Association (SECCA)[1] prefiled the rebuttal testimony of witness Gary Ball and AT&T prefiled the rebuttal testimony of witness Jeffrey A. King. On October 21, 2002, BellSouth prefiled the surrebuttal testimony of witness Shell and Verizon prefiled the surrebuttal testimony of witnesses Ries and Ellis.

On October 23, 2002, BellSouth and Verizon collectively, with the concurrence of the other Parties, filed a Joint Motion to Cancel the Hearing scheduled for October 30, 2002, and to have the proceeding decided on written filings. By Order dated October 24, 2002, the Commission cancelled the hearing and required the Parties to file Briefs and/or Proposed Orders by no later than December 9, 2002.

On December 6, 2002, the Public Staff filed a Motion for an Extension of Time for all Parties to submit Briefs and/or Proposed Orders until December 16, 2002. By Order dated December 9, 2002, the Commission granted the Public Staff's Motion.

On December 16, 2002, SECCA filed its Brief and Proposed Order, and AT&T, BellSouth, and Verizon filed their Briefs.

On January 22, 2003, BellSouth filed a revised Exhibit WBS-1 to the testimony of witness Shell. BellSouth explained that the cost element summary report submitted on October 1, 2002, omitted rates for Cost Element H.8 as well as the note paragraph.

Based on the foregoing and the entire record in this matter, the Commission makes the following

FINDINGS OF FACT

1. BellSouth's and Verizon's cost studies filed in this proceeding are total element long-run incremental cost (TELRIC)-compliant and do not reflect embedded costs.

2. The issue of whether CLPs should be permitted to place line cards into ILEC remote terminals is beyond the scope of this proceeding.

3. BellSouth's virtual collocation rates for floor space, DC power, security escorts, cable installation, and nonrecurring components of the cross-connect elements should be the same as the physical collocation rates ultimately adopted by the Commission in Docket No. P-100, Sub 133j. Further, BellSouth's proposed rates for the additional elements (Elements H.2.1 through H.2.22) required for virtual collocation as outlined by BellSouth witness Shell are approved.

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[1] Southeastern Competitive Carriers Association (SECCA) consists of ASCENT, CompTel, ICG Telecom, Inc., KMC Telecom, Inc., Network Telephone, Inc., Time Warner Telecom, Inc., US LEC, WorldCom, Inc., XO Communications, Inc., and Xspedius.

Further, the following rates for virtual collocation as proposed by Verizon are adopted:

Virtual Engineering – New (nonrecurring)	$ 734.06
Virtual Equipment Maintenance (recurring)	$ 50.06
Virtual Equipment Engineering and Installation (nonrecurring)	$3,928.23

Finally, Verizon is required to alter its Virtual Card Installation cost study to reflect: (1) 30 minutes of Central Office Equipment Engineering Hours; and (2) no more than 15 minutes of travel time per base unit in the Central Office Equipment Installation Tech Hours. Also, Verizon should alter its Virtual Software Upgrades cost study to reflect no more than 15 minutes of travel time per base unit in Labor Hours per Software Upgrade.

4. BellSouth is allowed to provide assembly point collocation at the nonrecurring rates ordered for the physical collocation cross-connect elements. Also, Verizon will not be required to offer assembly point collocation. ILECs are reminded that they should not use assembly point offerings to avoid their obligation to combine elements for competitors.

5. Verizon's proposed rates for physical collocation in a remote terminal are both reasonable and TELRIC-compliant. Therefore, Verizon's proposed rates for physical collocation in a remote terminal are approved. However, BellSouth is required to revise its cost study inputs for physical collocation in a remote terminal to reflect the actual percentages of cabinets, huts, and controlled environment vaults (CEVs) in operation within North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise.

6. BellSouth's proposed nonrecurring rates for collocation cable records are approved. These collocation cable records should be provided to CLPs at their option and should be maintained at the level of detail BellSouth has proposed. However, the Commission finds that the ILECs should not be allowed to charge the CLPs for cable record information that, as a matter of routine, is maintained and shared in the provisioning of services. Further, the Commission finds that, if a CLP requests similar information in the form of a query of the ILEC's informational database of collocation cable records, the ILEC must provide the information at an ICB rate.

7. BellSouth is required to revise its cost study inputs for virtual collocation in a remote terminal to reflect the actual percentages of cabinets, huts, and CEVs in operation in North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise. Further, for Verizon, the Commission finds it appropriate to adopt the same rates as approved in Issue No. 3 – Virtual Collocation in the central office for Verizon's rates for virtual collocation in the remote terminal.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

ISSUE NO. 1: Are BellSouth's and Verizon's collocation cost studies TELRIC-compliant?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth argued that its cost studies are TELRIC-compliant.

VERIZON: Verizon argued that its cost studies are TELRIC-compliant.

AT&T: AT&T did not take a specific position on this issue.

PUBLIC STAFF: The Public Staff did not take a specific position on this issue.

SECCA: SECCA asserted that BellSouth's and Verizon's proposed rates do not comply with Federal Communications Commission (FCC) Rule 51.505. SECCA argued that rates must (1) reflect the ILECs' TELRIC; and (2) reasonably allocate forward-looking common costs. SECCA maintained that a proper TELRIC study must be based upon an efficient network configuration and must not include embedded costs, retail costs, opportunity costs, and revenues to subsidize other services. SECCA alleged that the ILECs' costing methodology in this proceeding does not meet these requirements. SECCA recommended that the Commission reject the ILECs' rates; require BellSouth to conduct a new study that does not include embedded costing; and direct both ILECs to demonstrate through an imputation test whether CLPs can utilize the proposed elements to create a service in an economical manner.

DISCUSSION

The Commission has reviewed the cost studies filed by BellSouth and Verizon in this docket. The Commission finds that BellSouth's and Verizon's cost studies are generally TELRIC-compliant and, contrary to SECCA's assertion, do not include embedded costs. The Commission notes that SECCA did not cite any specific instances in which BellSouth's or Verizon's cost studies fail to comply with TELRIC pricing standards.

The Commission further notes that the CLPs presented the same argument concerning TELRIC cost studies in the Commission's generic UNE docket (Docket No. P-100, Sub 133d). In that docket, the Commission rejected the CLPs' arguments. In the Commission's Order *Adopting Permanent Prices for Unbundled Network Elements*, issued on December 10, 1998, the Commission found that "the appropriate basis for establishing permanent prices for UNEs and interconnection is TELRIC plus a reasonable allocation of joint and comment costs, which include a reasonable profit or return" and that "the cost studies presented by the ILECs, with certain modifications and adjustments, are reasonable and appropriate for determining their respective costs of providing UNEs and local interconnection." Further, the Commission stated in its August 18, 1999 *Order Ruling on Motions for Reconsideration and Clarification and Comments* in Docket No. P-100, Sub 133d that "the cost studies presented by the ILECs, with appropriate modifications and input adjustments, follow the FCC's TELRIC principles, are consistent with Section 252(d) of the Act, and are an appropriate basis for determining permanent prices for UNEs." The Commission has reviewed the cost studies filed by BellSouth and Verizon in this proceeding, and finds those cost studies to generally be TELRIC-compliant.

Finally, the Commission notes that SECCA's proposal for the Commission to direct BellSouth and Verizon to demonstrate through an imputation test whether CLPs can utilize the proposed elements to create a service in an economical manner is not part of the TELRIC pricing methodology and is not an appropriate proposal for the Commission to adopt. Therefore, the Commission rejects SECCA's recommendation concerning an imputation test.

CONCLUSIONS

The Commission finds it appropriate to conclude that BellSouth's and Verizon's cost studies are generally TELRIC-compliant and do not include embedded costs.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

ISSUE NO. 2: Should CLPs be permitted to place line cards into an ILEC's remote terminal devices?

POSITIONS OF PARTIES

BELLSOUTH: No. This issue has already been addressed and ruled upon by the Commission in its June 7, 2001, Order in Docket No. P-100, Sub 133d, where the Commission ruled that ILECs are not required to provide CLPs with unbundled access to packet switching capabilities unless certain conditions, set forth in FCC Rule 51.319 (c)(5), have been met. The CLPs have presented no basis to disturb this ruling, where the ILECs have noted various additional technical, operational, and security difficulties with this proposal.

VERIZON: No. Verizon echoed BellSouth's arguments that this issue has already been addressed and decided. Indeed, the placement of CLP line cards into ILEC equipment does not constitute collocation. Verizon also pointed out that the FCC currently has the issue of line card installation by CLPs on ILEC equipment under advisement In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (TA96 or the Act), Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 16 FCC Recd 2101, 2127 at Para. 56 (2001).

AT&T: AT&T did not address this issue in its Brief, but indicated in the Joint Matrix that it concurs with SECCA and WorldCom.

PUBLIC STAFF: No. The question of whether CLPs should be permitted to place line cards into an ILEC's remote terminal devices is beyond the scope of this proceeding, which was intended to determine the appropriate rates for various types of collocation. Moreover, the Commission has already decided this issue in a prior Order.

SECCA: Yes. SECCA argued that the ability of CLPs to collocate line cards in remote terminals is critical to fair competition. The configurations proposed by BellSouth and Verizon will prevent CLPs from competing in an economically viable manner for customers who are served off remote terminals and any operational or safety issues can be eliminated by reasonable collocation terms.

DISCUSSION

The Commission concurs with the arguments of the Public Staff and the ILECs that the issue of whether CLPs should be permitted to place line cards into the ILECs' remote terminal devices is beyond the scope of this proceeding, which was intended to determine the appropriate rates for specified types of collocation. Furthermore, the Commission has already ruled on this matter in Docket No. P-100, Sub 133d in its *June 7, 2001, Order* where the Commission ruled that ILECs are not required to provide CLPs with unbundled access to packet switching capabilities unless certain conditions, set forth in FCC Rule 51.319 (c)(5) have been met. Accordingly, it would be inappropriate to consider the issue again here. The Commission further notes that the FCC has under advisement the issue of whether an ILEC must allow the installation of a line card in the ILECs' remote terminal equipment. Consequently, there may be an appropriate time in the future to revisit this issue, but that time has not arrived.

CONCLUSIONS

The Commission finds it appropriate to conclude that the issue of whether CLPs should be permitted to place line cards into ILEC remote terminals is beyond the scope of this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

ISSUE NO. 3: What are the appropriate rates for virtual collocation in the central office for BellSouth and Verizon?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth argued that its witness Shell's testimony on the issue of virtual collocation rates is essentially uncontroverted. BellSouth noted that the appropriate rates are those supported by the testimony of witness Shell and the cost studies filed in Exhibit WBS-1. BellSouth argued that its cost studies use Commission-approved methodology and are TELRIC-compliant.

BellSouth noted that, as witness Shell explained, virtual collocation permits a CLP to install equipment in BellSouth's central office within BellSouth's existing equipment bays. BellSouth stated that in this arrangement, the CLP owns the equipment, but leases it to BellSouth for a nominal fee. BellSouth stated that it maintains the leased equipment at the CLP's request. BellSouth asserted that virtual collocation elements for floor space, DC power, security escorts, cable installation, and nonrecurring cost components of the cross-connect elements are the same as the elements for physical collocation. Therefore, BellSouth maintained, the rates for these elements were established in the first phase of this docket. BellSouth noted that witness Shell filed with his testimony proposed rates for the additional elements necessary for virtual collocation. BellSouth asserted that no party took issue with any of the rates filed on behalf of BellSouth. Accordingly, BellSouth argued, witness Shell's testimony as to the appropriate rates for virtual collocation in the central office is uncontroverted, and BellSouth's proposed rates should be accepted and ordered by the Commission.

VERIZON: Verizon argued that it has proposed appropriate rates for virtual collocation. Verizon stated that virtual collocation is an arrangement in which the ILEC installs and maintains CLP-provided equipment, which is dedicated to the exclusive use of the CLP. Verizon noted that, generally, a CLP provides fiber optic facilities through the ILEC entrance manholes for connection to the CLP's virtual collocation transmission equipment that provides interconnection to the ILEC facilities located in the premises.

Verizon noted that it listed 113 rate elements (in witness Ries' testimony - Attachment JR-1) that apply to the provisioning of collocation arrangements. Verizon maintained that the majority of these rate elements apply to all types of arrangements, including virtual arrangements. Verizon asserted that consistent with the TELRIC methodology approved by the Commission on December 28, 2001, for the development of Verizon's physical collocation costs, Verizon estimated the forward-looking economic costs of virtual collocation. Verizon asserted that its cost study is based on identifying the activities required to provision the requested services to CLPs using Verizon's current engineering practices and standards. Verizon maintained that all of the activity times are clearly identified in the cost support provided in the cost study and are applied to the current labor rates for the labor group responsible for providing the service.

Verizon noted that it has introduced five new rate elements specific to a virtual arrangement: three nonrecurring charges tied to the installation of equipment (Virtual Equipment Engineering and Installation, Virtual Software Upgrades, and Virtual Card Installation), one nonrecurring charge tied to the virtual application (Virtual Engineering - New), and one monthly recurring charge tied to the maintenance of equipment (Virtual Equipment Maintenance and Frame Space). [**Commission Note**: Verizon's virtual collocation study is presented in witness Ellis' Exhibit BKE-1]. Verizon stated that for all of these nonrecurring rate elements, Verizon's nonrecurring costs equal its proposed nonrecurring rates. Verizon noted that its proposed monthly recurring rate for Virtual Equipment Maintenance includes a 14% fixed allocator mark-up as a contribution towards the recovery of Verizon's common costs.

Verizon maintained that its **Virtual Equipment Engineering and Installation Element** includes the activities associated with installing the virtual collocation equipment. Verizon asserted that a weighted cost, based upon the type and frequency of the specific virtual arrangements, is used to develop an average engineering and installation cost. Verizon stated that its network planning subject matter experts (SMEs) developed the engineering and installation times associated with each type of equipment placed in virtual arrangements. Verizon noted that these time estimates are multiplied by current engineering labor rates to produce the total engineered and installed costs for each specific type of equipment. Verizon stated that the average number of units that can utilize a rack is then determined for each equipment type based on the dimensions of the equipment. Verizon maintained that a weighted cost per rack of equipment is calculated using a frequency analysis based upon the occurrence of equipment used in virtual collocation arrangements. Verizon argued that in order to provide CLPs with the option to request less than a full rack of equipment, the Virtual Equipment Engineering and Installation rate element is based on a per quarter rack cost. Verizon noted that SECCA's claim that this rate element is inflated is without support. Verizon argued that SECCA does not attack Verizon's cost study method or any of the cost components. Verizon noted that SECCA witness Ball merely recited the charge for a full rack. Verizon asserted that with no further explanation, SECCA's criticism is not persuasive.

Verizon maintained that its **Virtual Software Upgrades Element** accounts for the costs associated with a central office equipment installer's time required to install software upgrades.

Verizon noted that these are performed as requested by the CLPs. Verizon stated that these costs are also based on a weighting of the types of virtual collocation equipment that have software upgrades installed. Verizon maintained that this rate element is calculated per upgrade and applies to each base unit being upgraded.

Verizon noted that its **Virtual Card Installation Element** captures the time required by the central office equipment engineer to engineer the installation of the card as well as the time spent by a central office equipment installer to install the card. Verizon stated that the average installation cost per card is based on the percentage of virtual equipment that requires card installations. Verizon maintained that its rate reflects a weighted-cost comprised of all the equipment requiring card installation and the frequency of this equipment in virtual arrangements. Verizon noted that it also includes engineering time, as well as travel time, for the central office technician. Verizon stated that SECCA witness Ball's naming of this rate element as inflated suffers from the same deficiency as his criticism of the Virtual Equipment Engineering and Installation rate element – he offered no specific factual support for his claim, nor did he discuss the cost study generally or any specific cost components. Verizon argued that, contrary to witness Ball's testimony on behalf of SECCA, the installation of a card is not a simple activity that can be performed in five minutes.

Verizon asserted that its **Virtual Engineering – New Element** captures the time spent by the building engineer, outside plant engineer, and central office equipment engineer to evaluate and process a request for virtual collocation. Verizon maintained that the engineers determine if virtual collocation space is available and where the equipment would be best located, identify the cable requirements, and generally engineer and oversee the project. Verizon noted that the costs and tasks included in this rate element only reflect the engineering activities associated with planning and managing the implementation of the virtual arrangement. Verizon stated that specific engineering times required to install equipment or provision other aspects of the project are separate and are included in the applicable cost elements.

Verizon noted that its **Virtual Equipment Maintenance and Frame Space Element** includes the cost of maintaining the CLP's virtual equipment and the frame space. Verizon asserted that equipment maintenance costs include both routine and trouble maintenance activities and are based on the SME estimates provided by Verizon's National Operations Center managers and central office technicians responsible for maintaining the CLP virtual equipment. Verizon maintained that the costs are developed on a per quarter rack basis in the same manner as the Virtual Equipment Engineering and Installation element. Verizon noted that the frame space cost includes the cost of both the relay rack and the floor space the relay rack occupies. Verizon maintained that the development of floor space cost uses the same methodology approved by the Commission for the development of floor space cost for physical collocation arrangements. Verizon noted that the square footage for the frame space takes into account the size of the relay rack, equipment in the rack, and one-half of the aisle in front and in back of the equipment. Verizon maintained that since both cost components included in this rate element are based on a per quarter rack unit, the monthly recurring charge is simply the sum of these cost components plus a contribution toward common and shared costs. Verizon asserted that the fixed allocator of 14% approved by the Commission in Verizon's physical collocation proceeding was applied to the total monthly cost of maintenance and frame space to develop the rate element. Verizon argued that, once again, SECCA failed to articulate any facts or examples as to why and how this rate element is inflated. As a result, Verizon asserted, the Commission should reject SECCA witness Ball's challenge to this rate element.

Verizon concluded that its virtual collocation cost study accurately reflects Verizon's cost of providing the five rate elements specific to a virtual collocation arrangement. Verizon recommended that the Commission approve the prices for these services as presented in witness Ellis' Exhibit BKE-1.

AT&T: AT&T did not address Issue No. 3 in its Brief.

PUBLIC STAFF: The Public Staff noted that it does not object to BellSouth using the physical collocation rates adopted in this docket as surrogates for the virtual collocation rates. The Public Staff maintained that BellSouth should be required to ensure that the virtual collocation activities it undertakes pursuant to CLP requests are mapped to the appropriate physical collocation rate elements in assessing the charges to CLPs. The Public Staff recommended that the Commission conclude that it is appropriate for BellSouth to use the physical collocation rates adopted in this docket to charge for the activities it undertakes to engineer and implement CLP requests for virtual collocation. The Public Staff proposed that the Commission note that it expects BellSouth to ensure that the CLPs are charged appropriately for virtual collocation through the application of the appropriate physical collocation rate elements and charges.

The Public Staff further maintained that it has reviewed Verizon's proposed rates, which are based on cost studies provided by Verizon witness Ellis. The Public Staff noted that, while it agrees with SECCA that the Virtual Equipment Engineering and Installation rate of $3,928.23 per installed quarter frame of equipment is substantial, Verizon appears to have relied on actual work orders or inputs from its SMEs to obtain the engineering and installation costs to reflect the functional types of equipment that have been historically placed in virtual collocation arrangements, according to Verizon witness Ellis. The Public Staff asserted that the CLPs' SMEs, who should have an understanding of the engineering and installation activities required to install racks and bays of equipment in ILEC central offices, did not specifically dispute any of the underlying figures provided in witness Ellis' Virtual Equipment Engineering and Installation cost study. The Public Staff maintained that, accordingly, it recommends that the Commission approve Verizon's proposed nonrecurring charge for this rate element.

The Public Staff noted that it agrees with the CLPs that Verizon's proposed rate for Virtual Card Installation is excessive and proposed that the Commission require Verizon to substitute a Central Office Equipment Engineering Hours figure of 0.50 hours in lieu of the time proposed on page 21 of the cost study. The Public Staff stated that it believes that the only engineering functions likely to be required to install a virtual card in a prewired frame of equipment would be a quick review of the CLP's card installation request and a quick update to the ILEC's records to reflect the new card installation; half an hour should generally be adequate to perform these tasks. The Public Staff further recommended that the Commission require Verizon to revise the Central Office Equipment Installation Tech Hours on page 21 of the cost study to reflect no more than 15 minutes of travel time per base unit for card installation. The Public Staff stated that it considers it likely that Verizon will typically schedule its central office installation technician visits efficiently and will dispatch technicians to a central office to perform other ILEC-assigned responsibilities, as well as virtual card installations, whenever possible. The Public Staff asserted that it is inappropriate to expect the CLPs to bear all or most of the cost associated with the travel time to perform such tasks in the central office.

The Public Staff recommended that the Commission find that the Public Staff has proposed sound and reasonable changes to the engineering and travel times underlying Verizon's Virtual Card Installation rate element. The Public Staff argued that it seems unlikely that there would be a significant amount of engineering time and effort necessary to either evaluate a request for card installation in a piece of central office equipment or to update records to reflect the change. The Public Staff maintained that it also seems reasonable that Verizon's central office technicians would handle a mixture of ILEC and CLP work orders whenever they make central office visits. The Public Staff asserted that, since the overwhelming majority of equipment in Verizon's central offices is Verizon's, it also seems reasonable that the overwhelming majority of the travel expense associated with these visits should be borne by Verizon. The Public Staff recommended, therefore, that the Commission require Verizon to modify its cost study to reflect the Public Staff's recommendations on engineering hours and installation travel time and to submit a revised rate for Virtual Card Installation.

The Public Staff maintained that it does not take issue with Verizon's proposed rates for Virtual Engineering – New, Virtual Software Upgrades, or Virtual Equipment Maintenance.

The Public Staff noted that SECCA has not offered any substantive evidence in opposition to Verizon's other proposed virtual collocation rates for Virtual Engineering - New, Virtual Equipment Engineering and Installation, Virtual Software Upgrades, and Virtual Equipment Maintenance. The Public Staff argued that in light of the lack of opposition from SECCA and the Public Staff, the Commission should conclude that these rate elements and rates are appropriate and should be approved as proposed by Verizon.

SECCA: SECCA asserted that BellSouth's and Verizon's proposed rates for virtual collocation in the central office do not comply with FCC Rule 51.505. SECCA argued that rates must (1) reflect the ILECs' TELRIC; and (2) reasonably allocate forward-looking common costs. SECCA maintained that a proper TELRIC study must be based upon an efficient network configuration and must not include embedded costs, retail costs, opportunity costs, and revenues that subsidize other services. SECCA alleged that the ILECs' costing methodology in this proceeding does not meet these requirements. SECCA recommended that the Commission reject the ILECs' rates; require BellSouth to conduct a new study that does not include embedded costing; and direct both ILECs to demonstrate through an imputation test that CLPs can utilize the proposed elements to create a service in an economical manner.

SECCA asserted that its witness Ball testified that in its costing methodology, BellSouth impermissibly relies upon embedded costing, both in the development of investments, as well as the development of costing factors to apply to the investments. SECCA noted that BellSouth then applies what it calls Telephone Plant Indices and Investment Inflation Factors to the embedded cost information. SECCA commented that BellSouth did not attempt to refute this point, even after it was pointed out by witness Ball. SECCA recommended that the Commission find that any forward-looking study of telecommunications networks must include some reasonable forward-looking analysis of both of these items to be a credible TELRIC analysis.

SECCA noted that witness Ball also specifically identified problems with BellSouth's Remote Terminal Offering. For example, SECCA maintained, BellSouth assumed excessive underlying investment values, without support for its Cost Elements (H.6.2 and H.8.2 Physical Collocation in the Remote Terminal – Per Rack/Bay and Virtual Collocation in the Remote Terminal – Per Rack/Bay). SECCA maintained that, as a result, BellSouth charges $203.57 per month for a frame, while Verizon only charges $25.92 per month. Further, SECCA stated that BellSouth, without support, assumed that two-thirds of the remote terminal collocations would be based in more expensive huts and controlled environmental vaults as opposed to basic external remote locations.

SECCA stated that witness Ball further identified specific problems with Verizon's proposed rates for Virtual Equipment Engineering and Installation, Virtual Card Installation, and Virtual Equipment Maintenance. For example, SECCA noted, Verizon proposed to charge almost $16,000 to install a full rack. Additionally, SECCA stated, Verizon proposed to charge $253 for card installation, an activity that should typically be performed in five minutes.

SECCA maintained that, considering these inconsistencies in the ILECs' rates, the Commission should find that the ILECs' rates ought to be rejected until the ILECs can demonstrate through an imputation test that CLPs can utilize the proposed offering to provide service in an economical manner. SECCA asserted that BellSouth should also be required to recalculate its rates so as to remove all embedded costs.

SECCA concluded that the Commission should reject the ILECs' proposed rates for virtual collocation in the central office.

DISCUSSION

BELLSOUTH:

BellSouth witness Shell explained in direct testimony that virtual collocation permits the CLP to install equipment in the central office within BellSouth's existing equipment bays alongside BellSouth equipment. Witness Shell stated that, in a virtual collocation arrangement, BellSouth does not own the equipment but leases the equipment from the CLP for a nominal fee of $1.00 as outlined in BellSouth's Tariff FCC No. 1, Section 20. However, witness Shell noted, BellSouth maintains the leased equipment at the CLP's request. Witness Shell stated that his filing reflects some of the elements necessary for a CLP to enter into a virtual collocation arrangement. Witness Shell noted that, in addition to the virtual collocation elements in his filing, CLPs would also need the following elements: floor space, DC power, security escorts, cable installation, and the nonrecurring components of the cross-connect elements. Witness Shell stated that for these additional virtual collocation elements, BellSouth will use the physical collocation rates approved for the same elements in the first phase of this docket. Witness Shell maintained that the costs for these elements are the same in a virtual collocation arrangement as they are for a physical collocation arrangement.

BellSouth is proposing the following rates for **virtual collocation in the central office** (Exhibit WBS-1, Revision 1 as filed on October 1, 2002, Element Summary Report, Page 1 of 2):

Element	Description	Monthly Recurring Charge	Nonrecurring Charge
H.2.1	Application Cost		$1,208
H.2.1	Application Cost – Disconnect Only		$1.16
H.2.5	Cable Support Structure, Per Entrance Cable	$12.60	
H.2.6	2-Wire Cross-Connects	$0.0208	
H.2.7	4-Wire Cross-Connects	$0.0417	
H.2.8	DS1 Cross-Connects	$0.3978	
H.2.9	DS3 Cross-Connects	$4.18	
H.2.16	2-Fiber Cross-Connect	$1.86	
H.2.17	4-Fiber Cross-Connect	$3.73	
H.2.20	Maintenance in the central office – Basic, per half hour – First		$52.59
H.2.20	Maintenance in the central office – Basic, per half hour – Additional		$21.45
H.2.21	Maintenance in the central office – Overtime, per half hour – First		$70.24
H.2.21	Maintenance in the central office – Overtime, per half hour – Additional		$28.11
H.2.22	Maintenance in the central office – premium, per half hour – First		$87.88
H.2.22	Maintenance in the central office – Premium, per half hour – Additional		$34.77

In addition to the rates listed above, the Commission notes that BellSouth has stated that virtual collocation elements for floor space, DC power, security escorts, cable installation, and nonrecurring components of the cross-connect elements are the same as the elements for physical collocation. The Public Staff agreed with this proposal, and the CLPs did not argue that this proposal was inappropriate. Therefore, the Commission finds that BellSouth's virtual collocation rates for floor space, DC power, security escorts, cable installation, and nonrecurring components of the cross-connect elements should be the same as the physical collocation rates ultimately adopted by the Commission in Docket No. P-100, Sub 133j.

Further, the Commission notes that BellSouth witness Shell filed with his testimony proposed rates for the additional elements necessary for virtual collocation as outlined in the chart above. The Commission agrees with BellSouth that no party took specific issue with any of the rates filed on behalf of BellSouth. Therefore, the Commission notes that BellSouth's proposed rates are uncontroverted, and the Commission finds it appropriate to adopt those rates.

Concerning SECCA's assertion that BellSouth's proposed rates for virtual collocation in the central office are not TELRIC-compliant and that an imputation test should be adopted, the Commission notes that it has rejected SECCA's comments in this regard in Finding of Fact No. 1.

VERIZON:

Verizon is proposing the following five rate elements specific to virtual collocation in the central office (Exhibit BKE-1, Page 9):

Description	Monthly Recurring Rate	Nonrecurring Rate
Virtual Engineering – New – per occurrence		$734.06
Virtual Equipment Engineering and Installation – per quarter rack		$3,928.23
Virtual Software Upgrades – per base unit		$108.07
Virtual Card Installation – per card		$253.08
Virtual Equipment Maintenance – per quarter rack	$50.06	

SECCA witness Ball asserted in rebuttal testimony that Verizon's proposed rates for Virtual Equipment Engineering and Installation, Virtual Card Installation, and Virtual Equipment Maintenance are all inflated. For example, witness Ball noted, Verizon proposed to charge $3,928 for Virtual Equipment Engineering and Installation for a quarter rack, meaning that installation for a full rack will amount to almost $16,000. Additionally, witness Ball asserted, Verizon proposed to charge $253 for card installation, which is a simple activity that can usually be done in five minutes based upon his own industry experience.

Verizon witness Ellis stated in surrebuttal testimony that SECCA witness Ball failed to offer any support for his statement that Verizon's proposed rates for Virtual Equipment Engineering and Installation, Virtual Card Installation, and Virtual Equipment Maintenance are all inflated. Witness Ellis argued that Verizon disagrees with witness Ball's opinions about inflated rates. Witness Ellis noted that, without any explanation of why, witness Ball believes Verizon's cost study reflects inappropriate rates. Verizon argued that it cannot guess what witness Ball's concerns might be. Witness Ellis maintained that she assumes that witness Ball would have supported his criticisms with evidence if such evidence existed. Witness Ellis asserted that Verizon has fully explained and documented the development and components of its virtual collocation cost study. Witness Ellis argued that witness Ball's vague, conclusory, and unsupported statements about allegedly inflated rates cannot seriously call into question the accuracy of Verizon's detailed cost studies.

Witness Ellis also addressed witness Ball's complaint about Verizon's Virtual Equipment Engineering and Installation rate for a quarter rack in her surrebuttal testimony. Witness Ellis argued that witness Ball did not criticize Verizon's cost study methodology or identify any cost components he believes are problematic. Instead, witness Ellis maintained, he asserted that Verizon's Virtual Equipment Engineering and Installation rate for a quarter rack is too high because it results in a high cost when the costs are extrapolated to a full rack. Witness Ellis asserted that witness Ball's one sentence opinion should not be given any weight when compared with the detailed cost support and description Verizon provided in its direct testimony and cost study.

Witness Ellis also argued that witness Ball's critique of Verizon's Virtual Card Installation rate is not valid. Witness Ellis noted that witness Ball claimed that Verizon's rate is too high because card installation, in witness Ball's opinion, is a simple activity that can be performed in five minutes. However, witness Ellis asserted that witness Ball does not provide any support for this five minute time estimate nor does he identify the type of experience from which that time estimate was produced. Witness Ellis alleged that witness Ball apparently failed to understand the components of Verizon's Virtual Card Installation rate. Witness Ellis maintained that rate reflects a weighted-cost comprised of all the equipment requiring card installation and the frequency of this equipment in virtual arrangements. Witness Ellis also noted that the rate includes engineering time, as well as travel time for the central office technician. Therefore, witness Ellis argued that witness Ball's view that the Virtual Card Installation rate represents only the act of installing the card into the equipment is too simplistic and would deny Verizon recovery of legitimately incurred costs.

Witness Ellis also noted that witness Ball did not criticize the methodology Verizon used to develop the cost estimates for the "inflated" elements.

Witness Ellis maintained that Verizon's virtual collocation cost study is forward-looking and accurately reflects the costs that Verizon would expect to incur to provide virtual collocation services to CLPs in North Carolina using current technology in an efficient manner. Witness Ellis asserted that Verizon's cost estimates for providing virtual collocation services to CLPs are based upon identifying the activities required to provision the requested service using Verizon's current engineering practices and standards. Witness Ellis stated that all of the activity times are clearly identified in the cost support provided in the cost study and are applied to the current labor rates of the labor group responsible for providing the service.

As noted above in the Positions of Parties, the Public Staff stated that it agrees with the CLPs that Verizon's proposed rate for Virtual Card Installation is excessive and proposed that the Commission require Verizon to substitute a Central Office Equipment Engineering Hours figure of 0.50 hours in lieu of the time proposed on page 21 of the cost study. The Public Staff stated that it believes that the only engineering functions likely to be required to install a virtual card in a prewired frame of equipment would be a quick review of the CLP's card installation request and a quick update to the ILEC's records to reflect the new card installation; half an hour should generally be adequate to perform these tasks. The Public Staff further recommended that the Commission require Verizon to revise the Central Office Equipment Installation Tech Hours on page 21 of the cost study to reflect no more than 15 minutes of travel time per base unit for card installation. The Public Staff stated that it considers it likely that Verizon will typically schedule its central office installation technician visits efficiently and will dispatch technicians to a central office to perform other ILEC-assigned responsibilities, as well as virtual card installations, whenever possible. The Public Staff asserted that it is inappropriate to expect the CLPs to bear all or most of the cost associated with the travel time to perform such tasks in the central office.

The Commission notes that Verizon has proposed five new rate elements needed to provide virtual collocation. The Commission notes that no party provided any <u>specific</u> objections to the following rates proposed by Verizon:

Virtual Engineering – New (nonrecurring)	$734.06
Virtual Software Upgrades (nonrecurring)	$108.07
Virtual Equipment Maintenance (recurring)	$ 50.06

SECCA objected to Verizon's proposed nonrecurring rate of $3,928.23 per quarter rack for Virtual Equipment Engineering and Installation while the Public Staff did not object to the rate. As the Public Staff noted, Verizon's proposed rate was developed using actual work orders or inputs from its SMEs to obtain the engineering and installation costs to reflect the functional types of equipment that have been historically placed in virtual collocation arrangements. The Public Staff also correctly noted that no CLP witness specifically disputed any of the underlying figures provided in Verizon's cost study for Virtual Equipment Engineering and Installation. The Commission has reviewed Verizon's cost study for this element and agrees with the Public Staff that this element should be approved. Therefore, the Commission finds it appropriate to adopt a nonrecurring rate of $3,928.23 per quarter rack for Virtual Equipment Engineering and Installation for Verizon.

Both the CLPs and the Public Staff argued that Verizon's proposed nonrecurring rate of $253.08 per card for Virtual Card Installation should not be approved because it is excessive. The Public Staff argued that Verizon's proposed central office equipment engineering hours are excessive. The Public Staff maintained that the only engineering functions likely to be required to install a virtual card in a prewired frame of equipment would be a quick review of the CLP's card installation request and a quick update to the ILEC's records to reflect the new card installation. The Public Staff asserted that half an hour should generally be adequate to perform these tasks. Further, the Public Staff maintained that Verizon's proposed travel time for card installation as reflected in the central office equipment installation tech hours is unreasonable. The Public Staff argued that it considers it likely that Verizon will typically schedule its central office installation technician visits efficiently and will dispatch technicians to a central office to perform other ILEC-assigned responsibilities, as well as virtual card installations, whenever possible. Therefore, the Public Staff asserted that it is inappropriate to expect the CLPs to bear all or most of the cost associated with the travel time to perform such tasks in the central office. The Commission has reviewed Verizon's cost study for Virtual Card Installation and agrees with the Public Staff's two recommendations on this rate element. Therefore, the Commission finds it appropriate to require Verizon to alter its Virtual Card Installation cost study to reflect: (1) 30 minutes of Central Office Equipment Engineering Hours; and (2) no more than 15 minutes of travel time per base unit in the Central Office Equipment Installation Tech Hours.

Finally, although no Party objected to Verizon's proposed nonrecurring charge of $108.07 for Virtual Software Upgrades, the Commission notes that Verizon has reflected [CONFIDENTIAL number] hours/minutes of travel time per base unit, which in most cases, accounts for 50% of the total labor hours per software upgrade. Consistent with our conclusions for Verizon's Virtual Card Installation, the Commission finds it appropriate to require Verizon to alter its Virtual Software Upgrades cost study to reflect no more than 15 minutes of travel time per base unit in Labor Hours per Software Upgrade.

Concerning SECCA's assertion that Verizon's proposed rates for virtual collocation in the central office are not TELRIC-compliant and that an imputation test should be adopted, the

Commission notes that it has rejected SECCA's comments in this regard in Finding of Fact No. 1.

CONCLUSIONS

The Commission concludes that BellSouth's virtual collocation rates for floor space, DC power, security escorts, cable installation, and nonrecurring components of the cross-connect elements should be the same as the physical collocation rates ultimately adopted by the Commission in Docket No. P-100, Sub 133j.

The Commission also finds that, since no party took specific issue with any of the proposed rates for the additional elements necessary for virtual collocation filed by BellSouth witness Shell (Elements H.2.1 through H.2.22), it is appropriate to adopt those rates.

Further, the Commission finds it appropriate to adopt the following rates for virtual collocation as proposed by Verizon:

Virtual Engineering – New (nonrecurring)	$ 734.06
Virtual Equipment Maintenance (recurring)	$ 50.06
Virtual Equipment Engineering and Installation (nonrecurring)	$3,928.23

Finally, the Commission finds it appropriate to require Verizon to alter its Virtual Card Installation cost study to reflect: (1) 30 minutes of Central Office Equipment Engineering Hours; and (2) no more than 15 minutes of travel time per base unit in the Central Office Equipment Installation Tech Hours. The Commission also finds it appropriate to require Verizon to alter its Virtual Software Upgrades cost study to reflect no more than 15 minutes of travel time per base unit in Labor Hours per Software Upgrade.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

ISSUE NO. 4: What are the appropriate rates for assembly point collocation for BellSouth and Verizon?

POSITIONS OF PARTIES

BELLSOUTH: The appropriate rates for assembly point collocation are those supported by the testimony of BellSouth witness Shell and the cost studies filed in Exhibit WBS-1. The cost studies use Commission approved methodology and are TELRIC compliant. Additionally, BellSouth is not proposing any changes to its process of complying with Commission orders to combine UNEs at TELRIC rates.

VERIZON: Verizon has no plans to offer assembly point collocation. There are no FCC guidelines or mandates relating to this service, and from Verizon's perspective, there is not a sufficient market or need for it. Verizon does not believe the service constitutes collocation.

AT&T: AT&T's position is the same as SECCA's position, which is provided below.

PUBLIC STAFF: BellSouth should be allowed to offer assembly point service as an alternative to physical or virtual collocation at its premises, so long as the company's physical and virtual collocation offerings and rates remain unaffected by the change. The rates for this element should be the rates established for physical collocation cross-connect elements in this docket.

SECCA: The ILECs' rates do not comply with TELRIC and should be rejected. BellSouth's rates impermissibly contain embedded costs. The ILECs should have conducted an imputation test to demonstrate whether CLPs can utilize the proposed offering to provide service in an economical manner. The Commission should find that the ILECs should not use assembly point offerings to avoid their obligation to combine elements for competitors.

DISCUSSION

In its Brief, BellSouth stated that no party to the proceeding took issue with the rates proposed by BellSouth. According to BellSouth, SECCA expressed a "concern" that the availability of the assembly point offering not be used to relieve BellSouth of its obligation to combine elements on behalf of competitors. BellSouth stated that it complies and will continue to comply with Commission Orders to combine network elements at TELRIC rates. Furthermore, BellSouth stated that it is simply offering assembly point collocation as an alternative to collocation where a CLP desires to combine two network elements without purchasing collocation. BellSouth commented that the nonrecurring costs and rates for the assembly point cross-connects are the same as the cross-connect elements for physical collocation approved by the Commission in the first phase of this docket.

Verizon stated that assembly point collocation provides the CLP a location in the central office where it may have access to perform loop and line port combinations on a CLP termination frame. Verizon opined that this service is not collocation, as the CLP does not provide equipment (i.e., transmission, digital subscriber line access multiplexer (DSLAM), or switching) to the configuration for connection to the ILEC network. Verizon stated that it has no plans to offer assembly point service and further stated that there are no FCC mandates or guidelines for offering this service to CLPs.

In its Brief, SECCA commented that the Commission should specifically direct that the ILECs not use assembly point offerings to avoid their obligation to combine elements for competitors. As stated by SECCA, the ILECs are obligated to provide access to combinations of elements already combined in the ILEC network. Furthermore, SECCA commented that, while the option of providing assembly point service should be available to CLPs, it should not excuse ILECs from their obligation to combine elements. AT&T supported SECCA's position in this regard.

The Public Staff stated that assembly point collocation could be a useful alternative to physical or virtual collocation in circumstances where a CLP does not need or want to install equipment within a BellSouth central office or wire center. Furthermore, as stated by the Public Staff, BellSouth should be allowed to offer assembly point collocation as an option at the nonrecurring rates ordered for the physical collocation cross-connect elements in the first phase of this docket.

The Commission believes that BellSouth should be allowed to offer assembly point collocation as an option at the nonrecurring rates ultimately ordered for the physical collocation cross-connect elements in the first phase of this docket. Furthermore, Verizon is not required to offer assembly point collocation since there was no opposition by any party challenging Verizon's decision to not offer this service. The Commission further finds it appropriate to remind the ILECs that they should not use assembly point offerings to avoid their obligation to combine elements for competitors.

Concerning SECCA's assertion that BellSouth's and Verizon's proposed rates for assembly point collocation are not TELRIC-compliant and that an imputation test should be adopted, the Commission notes that it has rejected SECCA's comments in this regard in Finding of Fact No. 1.

CONCLUSIONS

The Commission finds it appropriate to allow BellSouth to provide assembly point collocation at the nonrecurring rates ultimately ordered for the physical collocation cross-connect elements. Further, Verizon is not required to offer assembly point collocation.

The Commission reminds the ILECs that they should not use assembly point offerings to avoid their obligation to combine elements for competitors.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

ISSUE NO. 5: What are the appropriate rates for physical collocation in a remote terminal for BellSouth and Verizon?

POSITIONS OF PARTIES

BELLSOUTH: The appropriate rates for physical collocation in a remote terminal are those supported by the testimony of BellSouth witness Shell and the cost studies filed in Exhibit WBS-1. The cost studies use Commission approved methodology and are TELRIC-compliant.

VERIZON: Verizon has established pricing, terms, and conditions for physical collocation in a remote terminal, which is available provided there is space for the CLP's equipment within Verizon's existing remote structure. The rate elements for cageless collocation apply to remote collocation, including floor space for equipment racks, provisioning of power and environmental conditions, access to the equipment, and pulling and termination of all cable facilities. If there is no space available for the CLP's equipment within the remote structure, the CLP must provide an interconnection cabinet on a CLP-secured easement near Verizon's remote structure. An individual case basis (ICB) rate would apply to such a configuration.

AT&T: AT&T's position is the same as SECCA's position, which is provided below.

PUBLIC STAFF: BellSouth should revise its cost study inputs for physical collocation in a remote terminal to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina. BellSouth should then submit adjusted rates reflecting this change. Subject to this modification, the rates proposed by BellSouth and Verizon for physical collocation in a remote terminal are reasonable and appropriate.

SECCA: The ILECs' rates do not comply with TELRIC and should be rejected. BellSouth's rates impermissibly contain embedded costs. The ILECs should have conducted an imputation test to demonstrate whether CLPs can utilize the proposed offering to provide service in an economical manner.

DISCUSSION

In its Brief, BellSouth claimed that it offers remote terminal collocation to CLPs on rates, terms, and conditions that are just, reasonable, nondiscriminatory, and consistent with the rules of the FCC. BellSouth disputed SECCA's claim that it uses an inappropriate cost methodology to determine the rate elements for physical collocation in a remote terminal. BellSouth maintained that it used the cost methodology previously approved by the Commission in Docket No. P-100, Sub 133d. BellSouth stated that the factors used in the cost study were applied against nonembedded, forward-looking investments that depict a forward-looking, least-cost network. Furthermore, BellSouth disagreed with SECCA's comparison of rate Element H.6.2 – Physical Collocation in the Remote Terminal – Per Rack/Bay to Verizon's frame space rate for virtual collocation. BellSouth stated that its rate includes all normal infrastructure charges associated with a remote collocation, while Verizon's rate structure applied several rate elements in addition to the frame space charge.

Verizon stated that its rate elements for cageless collocation will apply to physical collocation in the remote terminal. Verizon also noted that if there is no space available for the CLP's equipment within the remote structure, the CLP must provide an interconnection cabinet on a CLP-secured easement near Verizon's remote structure. Verizon explained that, because there has been no demand for this arrangement, Verizon has no experience pricing it. Therefore, Verizon stated that it will calculate costs for this configuration on an ICB. According to Verizon, since there are many different configurations for connecting the CLP cabinet or pedestal to Verizon's remote structure, each configuration must be negotiated individually. Verizon also indicated that there are too many cost variables for it to estimate an accurate connectivity charge, including the size and location of the CLP structure, a connectivity field between the two structures to allow appropriate access, and the number of terminations that the CLP requests into the ILEC network.

In its Brief, SECCA contended that the rates proposed by Verizon and BellSouth are not TELRIC-based and should be rejected. SECCA claimed that BellSouth's rates contain embedded costs, which should not be included. SECCA specifically objected to BellSouth's proposed rates for elements H.6.2 (Physical Collocation in the Remote Terminal – Per Rack/Bay) and H.8.2 (Virtual Collocation in the Remote Terminal – Per Rack/Bay), which provided for a monthly recurring charge of $203.57 [**COMMISSION NOTE:** $149.70 per revised witness Shell Exhibit WBS-1 filed on October 1, 2002]. SECCA claimed that these rates are excessive and compared them to Verizon's Frame Space rate of $25.92. SECCA suggested that BellSouth's rates assumed excessive underlying investment values and loading factors that were applied to the investments, for which it was unable to locate a supporting study. SECCA also noted that BellSouth had assumed that many of the remote terminal collocations would be based in more expensive huts and CEVs, as opposed to basic remote locations. AT&T supported SECCA's position in this regard.

The Public Staff argued that it is reasonable for Verizon to use its existing rate elements for cageless collocation to address CLP requests for physical collocation at remote terminals, provided space is available within a terminal to accommodate the CLP. Additionally, the Public Staff stated that Verizon should be allowed to price remote site collocations on an ICB in situations where space is unavailable within an existing Verizon remote terminal. The Public Staff rejected SECCA's contention that the $203.57 rate for BellSouth's element H.6.2 should match Verizon's frame space rate of $25.92. The Public Staff pointed out that, per BellSouth, its remote terminal charge per rack/bay included "all of the normal remote terminal network infrastructure requirements to make the space available and usable by a CLP (e.g., power requirements, environmental requirements, and space requirements)," whereas Verizon's rate structure requires CLPs to purchase additional elements to implement the remote collocation. The Public Staff maintained that BellSouth should revise its cost study inputs for physical collocation in a remote terminal to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina. BellSouth should then submit adjusted rates reflecting this change.

After careful consideration, the Commission believes that Verizon's proposed rates for physical collocation in the remote terminal are reasonable and appropriate. The Commission believes that it is reasonable for Verizon to use its existing rate elements for cageless collocation to address CLP requests for physical collocation at remote terminals. Where sufficient space exists to accommodate a CLP's equipment in a remote terminal, the Commission concurs with the Public Staff and believes that the costs Verizon would incur in physically collocating that equipment within the remote terminal should closely resemble the costs for cageless collocation within the central office. The Commission concurs with Verizon's claim that it lacks the experience necessary to accurately estimate the cost associated with collocation requests at remote terminals where there is no existing space for physical collocation in the terminals to develop standardized pricing. The Commission believes Verizon's comment that no demand and lack of historical data coupled with the many cost variables associated with remote adjacent collocation arrangements supports Verizon's argument. Therefore, Verizon should be allowed to determine these rates on an ICB at this time. The Commission finds that: (1) where sufficient space exists in the remote terminal, Verizon should be allowed to use its cageless collocation rates for physical collocation in a remote terminal; and (2) where no space exists in the remote terminal, Verizon should be allowed to use ICB pricing.

Addressing BellSouth's proposed rates, the Commission concurs with the Public Staff in rejecting SECCA's contention that the rate for BellSouth's element H.6.2 should match Verizon's frame space rate. BellSouth noted that Verizon's rate per rack/bay in the remote terminal would be closer to BellSouth's rate if the CLPs would combine the separate Verizon elements and rates necessary to provide what BellSouth offers through its single element H.6.2 (Physical Collocation in the Remote Terminal – Per Rack/Bay).

However, the Commission concurs with the Public Staff and finds it appropriate to require BellSouth to revise its cost study inputs for physical collocation in a remote terminal to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise. BellSouth simply reflected in its cost study that one-third of remote terminals in operation in North Carolina are cabinets, one-third are huts, and one-third are CEVs. The Commission believes it is more appropriate, unless proof is given otherwise, to represent actual percentages.

Concerning SECCA's assertion that BellSouth's and Verizon's proposed rates for physical collocation in a remote terminal are not TELRIC-compliant and that an imputation test should be adopted, the Commission notes that it has rejected SECCA's comments in this regard in Finding of Fact No. 1.

CONCLUSIONS

The Commission finds it appropriate to conclude that Verizon's proposed rates for physical collocation in a remote terminal are both reasonable and TELRIC-compliant. Therefore, the Commission approves Verizon's proposed rates for physical collocation in a remote terminal.

Concerning BellSouth's proposed rates for physical collocation in a remote terminal, the Commission finds it appropriate to require BellSouth to revise its cost study inputs to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

ISSUE NO. 6: What are the appropriate rates for collocation cable records for BellSouth and Verizon?

POSITIONS OF PARTIES

BELLSOUTH: The appropriate rates for collocation cable records are those supported by the testimony of BellSouth witness Shell and the cost studies filed in Exhibit WBS-1. The cost studies use Commission-approved methodology and are TELRIC-compliant. BellSouth developed standard rates for this one-time manual effort performed solely at the CLP's request.

VERIZON: Verizon does not offer this type of record keeping. When the CLP orders cross-connect circuits, Verizon provides the CLP with a design layout record detailing the cables that are terminated onto Verizon's frame. The CLP will use this facility assignment information when ordering services onto the cross-connects. Verizon's operations in North Carolina do not track the assignment of services ordered by the CLP onto the cross-connect within its systems.

AT&T: The cost for cable records is recovered through application of loading factors to recurring rates. Consequently, the charge for collocation cable records should be zero.

PUBLIC STAFF: BellSouth's proposed rates for collocation cable record services should be approved. However, the charges for records maintained at the detail that BellSouth proposes should be an option which CLPs may choose. ILECs should maintain and share any cable record information CLPs need to routinely order, provision, and maintain the services they provide to their customers. ILECs should not impose any additional charges on CLPs for maintaining and sharing cable records in this manner.

SECCA: SECCA's position is the same as AT&T's position noted above.

DISCUSSION

In its Brief, BellSouth stated that its proposed nonrecurring rates for collocation cable records reflect the work required to build cable records identifying cable termination in BellSouth's system. BellSouth witness Shell testified that the collocator's vendor installs the cable from the collocation space to BellSouth's distribution frame. BellSouth stated that the building of cable records is a one-time manual effort that is strictly driven by a collocation application and the need to input new information in current systems for the benefit of the collocator.

BellSouth stated that AT&T opposed BellSouth's proposed rates for collocation cable records because: (1) BellSouth's maintenance factors already recover these nonrecurring costs relating to collocation; (2) the costs at issue are recurring rather than nonrecurring; and (3) an additional charge would result in an overrecovery of costs. BellSouth argued that AT&T confuses maintenance factors, which are associated with BellSouth's normal repair and maintenance of systems, with specific work done for collocators.

BellSouth stated that it is simply proposing nonrecurring charges for this collocation element based on the fact that the work required, as a result of the CLP's request, is nonrecurring. BellSouth noted that if a CLP did not make the request, the work would not be necessary. BellSouth commented that the work is done in response to the CLP's one-time request and the resulting costs are nonrecurring.

Verizon stated that BellSouth's collocation cable records element is for the establishment of CLP cable records within the ILEC's system. Verizon asserted that it does not offer this type of record keeping. Verizon further stated that its operations in North Carolina do not track the assignment of services ordered by the CLP onto the cross-connect within its system. Verizon commented that it sees no need to track this type of information. Verizon stated that it provides the CLP with a circuit design layout record detailing the cables that are terminated onto Verizon's frame. Verizon witness Ries testified that Verizon is not required to duplicate assignment information within its databases that would also require it to incur expenses to update its system to store, track, and update this type of information.

According to AT&T, BellSouth is proposing a new set of rate elements to charge CLPs for providing copies of collocation cable assignment records. AT&T commented that BellSouth is proposing a second group of rate elements to charge CLPs for posting this cross-connect record in the BellSouth operations support systems (OSS) to enable BellSouth to make assignments to the CLP cables (cross-connects).

AT&T argued that BellSouth should not have a separate nonrecurring charge for updating its OSS with record information, because posting OSS records of cross connect cables terminating on a BellSouth frame is a routine maintenance operation. AT&T stated that BellSouth recovers the cost of updating and maintaining the records through a maintenance loading factor. AT&T opined that BellSouth would obtain double recovery for the same activity if allowed to impose a nonrecurring and a recurring charge on CLPs.

Furthermore, AT&T commented that neither Verizon, Sprint, nor any other ILEC in the country has a separate nonrecurring charge for these activities. AT&T commented that any additional charge for these activities would allow BellSouth to engage in anticompetitive behavior. AT&T maintained that the Commission should not accept BellSouth's proposed nonrecurring rate or should rate the element as zero.

The Public Staff stated that it believes that BellSouth's proposed nonrecurring rates for collocation cable records maintained at the detail that BellSouth proposes should be an option which a CLP may choose. As such, the Public Staff recommended that the Commission approve BellSouth's proposed rates for collocation cable records.

Furthermore, the Public Staff stated that the ILECs and the CLPs are each responsible for managing their records so that services can be ordered and provisioned using accurate information. The Public Staff recommended that the ILECs not be allowed to charge the CLPs for cable record information that, as a matter of routine, is maintained and shared in the provisioning of services.

BellSouth is proposing the following rates for collocation cable records (Exhibit WBS-1, Revision 1 as filed on October 1, 2002, Element Summary Report):

Element	Description	Nonrecurring Charge – Initial	Nonrecurring Charge – Subsequent
H.7.1	Collocation Cable Records – per Request	$1,474.00	$947.42
H.7.1	Collocation Cable Records – per Request – Disconnect only	$247.64	$247.64
H.7.2	Collocation Cable Records – per VG/DS0 Record	$629.42	$629.42
H.7.2	Collocation Cable Records – per VG/DS0 Record – Disconnect only	$350.10	$350.10
H.7.3	Collocation Cable Records – per each 100 pair VG/DS0	$8.87	$8.87
H.7.3	Collocation Cable Records – per each 100 pair VG/DS0 – Disconnect only	$10.43	$10.43
H.7.4	Collocation Cable Records – DS1, per T1TIE	$4.40	$4.40
H.7.4	Collocation Cable Records – DS1, per T1TIE – Disconnect only	$5.17	$5.17

Element	Description	Nonrecurring Charge – Initial	Nonrecurring Charge – Subsequent
H.7.5	Collocation Cable Records – per DS3, per T3TIE	$15.38	$15.38
H.7.5	Collocation Cable Records – per DS3, per T3TIE – Disconnect only	$18.09	$18.09
H.7.6	Collocation Cable Records – per each fiber record	$165.38	$165.38
H.7.6	Collocation Cable Records – per each fiber record – disconnect only	$144.87	$144.87

The Commission finds it appropriate to approve BellSouth's proposed rates for collocation cable records as outlined above. These collocation cable records should be provided to CLPs at their option and should be maintained at the level of detail BellSouth has proposed. The Commission agrees with the Public Staff that the ILECs should not be allowed to charge the CLPs for collocation cable record information that, as a matter of routine, is maintained and shared in the provisioning of services.

The Commission notes that Verizon is not proposing to offer collocation cable records and finds that there appears to be no requirement for ILECs to provide this service to CLPs. However, the Commission believes that if a CLP requests similar information in the form of a query of the ILEC's informational database of collocation cable records, the ILEC must provide the information at an ICB rate.

CONCLUSIONS

The Commission finds it appropriate to approve BellSouth's proposed nonrecurring rates for collocation cable records. These collocation cable records should be provided to CLPs at their option and should be maintained at the level of detail BellSouth has proposed. However, the Commission finds that the ILECs should not be allowed to charge the CLPs for cable record information that, as a matter of routine, is maintained and shared in the provisioning of services.

Further, the Commission finds that if a CLP requests similar information in the form of a query of the ILEC's informational database of collocation cable records, the ILEC must provide the information at an ICB rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

ISSUE NO. 7: What are the appropriate rates for virtual collocation in a remote terminal for BellSouth and Verizon?

POSITIONS OF PARTIES

BELLSOUTH: BellSouth maintained that its position on Issue No. 7 is the same as its position on Issue No. 3 (virtual collocation in a central office). BellSouth stated that, again, in a virtual collocation arrangement, the CLP's equipment is placed in BellSouth's existing equipment bays. BellSouth noted that the CLPs have expressed interest in obtaining virtual collocation arrangements in remote terminals. Accordingly, BellSouth stated that it filed, along with the testimony of witness Shell, the appropriate cost elements associated with this arrangement.

BellSouth noted that the only testimony in opposition to the BellSouth proposed rates was that of witness Ball on behalf of SECCA. BellSouth argued that witness Ball's objections, however, did not relate specifically to virtual collocation in remote terminals. Instead, BellSouth stated, witness Ball objected to BellSouth's physical and virtual collocation rates based on the extremely general (and flawed) rationale discussed in Issue No. 5. BellSouth maintained that the reasons that witness Ball's objections are not well taken are also discussed in Issue No. 5. BellSouth noted that beyond this, no party filed testimony in opposition to the BellSouth-proposed rates. Accordingly, BellSouth argued that its proposed rates for virtual collocation in a remote terminal should be adopted and approved by the Commission.

VERIZON: Verizon stated that virtual collocation in a remote terminal is the same as virtual collocation in the central office, except that it is in a remote terminal. Verizon noted that the rate elements applied to virtual collocation within a central office (i.e., Virtual Equipment Engineering and Installation, Virtual Software Upgrades, Virtual Card Installation, and Virtual Equipment Maintenance) would also apply for virtual collocation in a remote terminal, assuming there was available space within the structure to install and maintain the equipment. Verizon noted that other costs (such as providing power to the equipment and pulling and terminating the associated cable) would be recovered utilizing the same elements referenced in the Physical Collocation in the Remote Terminal discussion (Issue No. 5).

AT&T: AT&T did not address Issue No. 7 in its Brief.

PUBLIC STAFF: The Public Staff maintained that both BellSouth and Verizon indicated that the appropriate elements and rates that should apply for virtual collocation in a remote terminal are the elements and rates that should apply for virtual collocation in a central office. The Public Staff noted that SECCA raised no objections to these proposals. The Public Staff, therefore, recommended that the Commission approve BellSouth's and Verizon's proposals to use the approved rates for virtual collocation within a central office (Issue No. 3) as the approved rates for virtual collocation within a remote terminal (Issue No. 7).

The Public Staff recommended that the Commission conclude that the elements and rates adopted by the Commission for virtual collocation within a central office should also apply for virtual collocation within a remote terminal.

SECCA: SECCA took the same position as it did for Issue No. 3 – Virtual Collocation in the central office.

DISCUSSION

BELLSOUTH:

BellSouth witness Shell stated that, as he discussed for Issue No. 3, in a virtual collocation arrangement, the CLP's equipment is placed in BellSouth's existing equipment bays alongside BellSouth equipment. Witness Shell noted that the CLP owns the equipment and BellSouth leases and maintains it. Witness Shell maintained that CLPs have expressed an interest in obtaining a similar arrangement in remote terminals. Witness Shell stated that his filing reflects the elements and costs associated with such an arrangement.

According to BellSouth witness Shell Exhibit WBS-1, remote site locations include cabinets, huts, and CEVs owned by BellSouth that house BellSouth Network Facilities. Additionally, Exhibit WBS-1 notes that remote site virtual collocation can occur where technically feasible, and where space exists.

On January 22, 2003, BellSouth filed a revised Element Summary Report from Exhibit WBS-1 which lists the following rates for virtual collocation in a remote terminal which BellSouth is proposing in this docket:

Element No.	Element Description	Monthly Recurring Rate	Nonrecurring Rate
H.8.1	Virtual Collocation in the Remote Terminal – Application Fee (Same as H.6.1)		$595.74
H.8.1	Virtual Collocation in the Remote Terminal – Application Fee – Disconnect Only (Same as H.6.1)		$261.17
H.8.2	Virtual Collocation in the Remote Terminal – Per Bay/Rack of Space (Same as H.6.2)	$149.70	
H.8.3	Virtual Collocation in the Remote Terminal – Space Availability Report Per Premises Requested (Same as H.6.4)		$217.88
H.8.4	Virtual Collocation in the Remote Terminal – Remote Site CLLI Code Request, Per CLLI Code Requested (Same as H.6.5)		$71.41

SECCA witness Ball explained in rebuttal testimony that remote terminals can be housed within buildings, but are generally thought of as the large green metallic boxes located at the edge of subdivisions and office parks.

SECCA witness Ball argued in rebuttal testimony that BellSouth's proposed rate element H.8.2 – Per Bay/Rack of Space of $203.57 (which is the same as H.6.2) [**COMMISSION NOTE:** $149.70 per revised witness Shell Exhibit WBS-1 filed on October 1, 2002], which is simply rental space on a rack, is clearly excessive. Witness Ball maintained that as a comparison, Verizon offers Frame Space at a rate of $6.73 per quarter frame, or $25.92 per frame.

Witness Shell stated in surrebuttal testimony that witness Ball's comparison of one of BellSouth's cost elements with one of Verizon's cost elements is flawed because the cost elements are different. Witness Shell noted that BellSouth's Remote Terminal, Per Rack/Bay charge (Elements H.8.2 and H.6.2) covers all of the normal remote terminal network infrastructure requirements to make the space available and usable by a CLP (e.g., power requirements, environmental requirements, and space requirements). Witness Shell noted that there are no other network or infrastructure charges listed under Remote Terminal collocation for BellSouth. Witness Shell noted that Verizon witness Ries stated in his testimony that Verizon applies its cageless collocation rates to remote collocation, including floor space, provisioning for power and environmental conditioning, access to equipment, and pulling and termination of cable facilities. Witness Shell noted that witness Ball produced Verizon's proposed Virtual Frame Space rate in his testimony. Witness Shell asserted that this rate element is described in witness Ellis' testimony as the cost of both the relay rack and the floor space the relay rack occupies. Witness Shell argued that even without fully understanding Verizon's rate structure, one can easily determine that Verizon would apply several rate elements to a CLP collocating in a remote terminal arrangement. Thus, witness Shell argued, witness Ball's simple comparison is not valid and should be disregarded. Witness Shell argued that BellSouth has proposed TELRIC-compliant costs for Remote Terminal collocation.

SECCA witness Ball maintained that he has an objection to the way in which the rate was developed. Witness Ball asserted that a fundamental problem is that BellSouth assumed excessive underlying investment values, for which he was unable to locate a supporting study.

The Commission notes that BellSouth, in its original September 23, 2002, cost study, Exhibit WBS-1, reflected the same rates for virtual collocation in the remote terminal and physical collocation in the remote terminal. However, in BellSouth's revised Exhibit WBS-1 filed on October 1, 2002, rates for virtual collocation rates were the only rates reflected and virtual collocation rates in the remote terminal were not specifically listed. However, in its Brief, BellSouth argued that its position on virtual collocation in the remote terminal (Issue No. 7) was the same as its position on virtual collocation in the central office (Issue No. 3). As noted above, BellSouth filed a revised list of proposed rates for virtual collocation in a remote terminal (revised Exhibit WBS-1) on January 22, 2003, which shows that BellSouth is proposing the same rates for physical collocation in the remote terminal and virtual collocation in the remote terminal. After reviewing the cost study, the Commission finds it appropriate to adopt the same rates for virtual collocation in a remote terminal as for physical collocation in the remote terminal as proposed by BellSouth. However, BellSouth is required to reflect our conclusion in Issue No. 5 (Physical Collocation rates in the Remote Terminal) for BellSouth to revise its cost study inputs to reflect the actual percentage of cabinets, huts, and CEVs in operation in North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise. Finally, the Commission rejects SECCA's other arguments in opposition to BellSouth's proposed rates for virtual collocation in a remote terminal for the same reasons it rejected those arguments in connection with Issue No. 3 – Virtual Collocation in the Central Office.

VERIZON:

SECCA witness Ball alleged that Verizon assumed that [**CONFIDENTIAL number**] percent of the remote terminal collocations would be based in more expensive huts and controlled environment vaults as opposed to basic external remote locations. Witness Ball argued that he was unable to determine the loading factors that were applied to the underlying investments, but they could be a contributing factor as well.

Verizon witness Ellis stated that witness Ball, in his discussion of TELRIC methodology, criticized Verizon for its costing of remote terminal collocations. Witness Ellis argued that witness Ball's criticism has nothing to do with Verizon. Witness Ellis commented that witness Ball mentioned Verizon's name during his discussion of TELRIC methodology in his rebuttal testimony; however, witness Ball's statement that Verizon assumed a greater portion "of the remote terminal collocations would be based in more expensive huts and controlled environment vaults as opposed to basic external remote locations" is incorrect. Witness Ellis asserted that Verizon applies its cageless collocation elements for remote collocation arrangements. Witness Ellis maintained that Verizon makes no assumption about the type of or frequency of enclosures used for remote collocation. Witness Ellis noted that she can only conclude that witness Ball's criticism was to be leveled at BellSouth, not Verizon.

The Commission notes that Verizon recommended that the Commission use its proposed virtual collocation rates in the central office as its virtual collocation in the remote terminal rates. The Commission further notes that neither the CLPs nor the Public Staff opposed this proposal. The Commission rejects SECCA's general arguments in opposition to Verizon's proposed rates for virtual collocation in a remote terminal for the same reason it rejected those arguments in connection with Issue No. 3 – Virtual Collocation in a Central Office. Based upon the foregoing, the Commission believes that it is appropriate for Verizon to reflect the same rates for virtual collocation whether the collocation is in a central office or a remote terminal. Therefore, the Commission finds it appropriate to adopt the same rates as approved in Issue No. 3 - Virtual Collocation in the central office for Verizon in connection with this issue (Issue No. 7 - Virtual Collocation in the remote terminal).

CONCLUSIONS

The Commission finds it appropriate to require BellSouth to revise its cost study inputs for virtual collocation in a remote terminal to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise.

Further, for Verizon, the Commission finds it appropriate to adopt the same rates as approved for Verizon in Issue No. 3 – Virtual Collocation in the central office for Verizon's rates for virtual collocation in the remote terminal.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth's and Verizon's cost studies are TELRIC-compliant and do not reflect embedded costs and that no imputation test is required.

2. That the issue of whether CLPs should be permitted to place line cards into ILEC remote terminals is beyond the scope of this proceeding.

3. That BellSouth's virtual collocation rates for floor space, DC power, security escorts, cable installation, and nonrecurring components of the cross-connect elements should be the same as the physical collocation rates ultimately adopted by the Commission in Docket No. P-100, Sub 133j. Further, BellSouth's proposed rates for the additional elements necessary for virtual collocation filed by BellSouth witness Shell (Elements H.2.1 through H.2.22) are hereby adopted.

4. That the following rates for virtual collocation proposed by Verizon are hereby adopted:

Virtual Engineering – New (nonrecurring)	$ 734.06
Virtual Equipment Maintenance (recurring)	$ 50.06
Virtual Equipment Engineering and Installation (nonrecurring)	$3,928.23

5. That Verizon is required to alter its Virtual Card Installation cost study to reflect: (1) 30 minutes of Central Office Equipment Engineering Hours; and (2) no more than 15 minutes of travel time per base unit in the Central Office Equipment Installation Tech Hours. The Commission also finds it appropriate to require Verizon to alter its Virtual Software Upgrades cost study to reflect no more than 15 minutes of travel time per base unit in Labor Hours per Software Upgrade.

6. That BellSouth is allowed to provide assembly point collocation at the nonrecurring rates ordered for the physical collocation cross-connect elements. Further, Verizon is not required to offer assembly point collocation. The ILECs are reminded that they should not use assembly point offerings to avoid their obligation to combine elements for competitors.

7. That Verizon's proposed rates for physical collocation in a remote terminal are both reasonable and TELRIC-compliant. Therefore, the Commission approves Verizon's proposed rates for physical collocation in a remote terminal. Concerning BellSouth's proposed rates for physical collocation in a remote terminal, the Commission finds it appropriate to require BellSouth to revise its cost study inputs to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise.

8. That BellSouth's proposed nonrecurring rates for collocation cable records are approved. These collocation cable records should be provided to CLPs at their option and should be maintained at the level of detail BellSouth has proposed. However, the Commission finds that the ILECs should not be allowed to charge the CLPs for cable record information that, as a matter of routine, is maintained and shared in the provisioning of services. Further, if a CLP requests similar information in the form of a query of the ILEC's informational database of collocation cable records, the ILEC must provide the information at an ICB rate.

9. That BellSouth's proposed rates for virtual collocation in a remote terminal should be revised to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise. Further, for Verizon, the Commission finds it appropriate to adopt the same rates as approved in Issue No. 3 - Virtual Collocation in the central office for Verizon's rates for virtual collocation in the remote terminal.

10. That BellSouth and Verizon shall file revised cost studies and resulting rates to reflect the revisions outlined in this Order by no later than Monday, July 7, 2003.

11. That the Public Staff is hereby requested to file comments on BellSouth's and Verizon's revised cost studies and resulting rates and file its comments on their compliance with this Order by no later than Monday, July 28, 2003.

ISSUED BY ORDER OF THE COMMISSION.
This the 5th day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bp060403.01

Appendix A

Generic Collocation Proceeding
Docket No. P-100, Sub 133j

Act	Telecommunications Act of 1996
AT&T	AT&T Communications of the Southern States, Inc.
BellSouth	BellSouth Telecommunications, Inc.
CEV	Controlled Environment Vault
CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
DSLAM	Digital Subscriber Line Access Multiplexer
FCC	Federal Communications Commission
ICB	Individual Case Basis
ILEC	Incumbent Local Exchange Company (Carrier)
OSS	Operations Support Systems
Public Staff	Public Staff – North Carolina Utilities Commission
SECCA	Southeastern Competitive Carriers Association
SGAT	Statement of Generally Available Terms and Conditions
SME	Subject Matter Expert
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long-Run Incremental Cost
UNE	Unbundled Network Element
Verizon	Verizon South, Inc. f/k/a GTE South Incorporated
WorldCom	MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., and MCI WorldCom Network Services, Inc.

DOCKET NO. P-100, SUB 133j

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Generic Proceeding on the Provisioning	)	ORDER ADDRESSING
of Collocation Space	)	MOTIONS FOR
	)	RECONSIDERATION
	)	AND CLARIFICATION
	)	REGARDING DISPUTED
	)	LANGUAGE

BY THE COMMISSION: On September 3, 2002, the Commission issued its *Order Addressing Disputed Language in the Standard Offering.*

On October 15, 2002, Verizon South, Inc. (Verizon), filed its Brief in Support of its Motion to Reconsider Collocation Issues. Verizon requested reconsideration of two decisions in the September 3, 2002 *Order*. In particular, Verizon filed Exceptions on Issue No. 11 – Section 5.5.3 regarding Co-Carrier Cross-Connect (CCXC) and competing local provider (CLP) certification of volumes of interstate traffic and Issue No. 12 - Section 6.1.4 regarding application for multiple methods of collocation.

On November 4, 2002, BellSouth Telecommunications, Inc. (BellSouth), filed its Motion for Reconsideration and/or Clarification of the Commission's *Order*. BellSouth filed Exceptions on Issue No. 2 - Section 1.2 regarding the right to occupy, Issue No. 5 - Section 3.3.1 regarding shared and subleased caged collocation, Issue No. 9 - Section 5.5.1.1 regarding applications and subsequent applications for cross-connect facilities, and Issue No. 11 - Section 5.5.3 regarding CCXC and CLP certification of volumes of interstate traffic.

On November 15, 2002, the Commission issued an *Order* requesting initial comments and reply comments on Verizon's and BellSouth's Motions for Reconsideration and/or Clarification. Initial comments were filed on December 4, 2002 by AT&T Communications of the Southern States, LLC (AT&T), and MCImetro Access Transmission Services, LLC, and WorldCom, Inc. (collectively referenced as WorldCom). Reply comments were filed on December 18, 2002 by BellSouth and the Public Staff.

On December 20, 2002, Verizon filed a Motion to Respond to the Reply Comments of the Public Staff and attached its Response. Verizon asserted that if the Public Staff had filed its comments on December 4, 2002, as initial comments, then Verizon would have had an opportunity to file reply comments on December 18, 2002. Further, in its Response, Verizon requested reconsideration of Section 5.5 regarding CCXC, in conjunction with its Exception on Issue No. 11 - Section 5.5.3.

The following is a discussion with conclusions, by Issue Number, of the Motions for Reconsideration and Clarification filed regarding the *Order Addressing Disputed Language in the Standard Offering.*

<u>ISSUE NO. 2</u>: Section 1.2 – Right to Occupy

INITIAL COMMISSION DECISION

The Commission adopted the CLPs' language as modified by the Public Staff, as follows:

> 1.2 <u>Right to Occupy</u>. Subject to Section 2.1, the ILEC shall offer the CLP collocation on rates, terms, and conditions that are just, reasonable, non-discriminatory and comply with the rules of the Federal Communications Commission (FCC). Under the terms of this Standard Offering described below, the ILEC grants to the CLP a right to occupy an area designated by the ILEC within the ILEC Premises, of a size specified by the CLP and agreed to by the ILEC (hereinafter Collocation Space). ILEC Premises (hereinafter ILEC Premises or Premises) shall include the ILEC Central Offices and Serving Wire Centers, as well as all buildings or similar structures owned or leased by the ILEC that house the ILEC's Network Facilities and all structures that house facilities on public rights-of-way, including but not limited to, vaults containing loop concentrators and other similar structures and microwave collocation area[s] on the rooftop of the aforementioned locations. <u>Premises, however, shall not include remote sites used for collocation.</u> To the extent this Standard Offering does not include all the necessary rates, terms, and conditions for ILEC Premises other than the ILEC Central Offices, the Parties will negotiate said rates, terms, and conditions at the request for collocation at other than a Central Office.

OBJECTIONS

BELLSOUTH: BellSouth argued that the language approved by the Commission contains an internal conflict in that the approved definition of "premises" includes a description of remote collocation sites (specifically the clause in Section 1.2, sentence three beginning with "as well as all buildings . . ."), but also includes the provision that the definition shall not include remote collocation sites. BellSouth suggested that the Commission should either delete the description of remote collocation sites or modify the definition by adding a statement to Section 1.2 to provide (1) that each ILEC is obligated to allow collocation at all buildings owned or leased by the ILEC and (2) that the terms and conditions of this collocation should be set forth in a separately negotiated agreement.

INITIAL COMMENTS

AT&T and WORLDCOM: AT&T and WorldCom stated that the language adopted by the Commission incorporates the appropriate definition for premises as required by 47 C.F.R. §51.5. AT&T and WorldCom noted that a broad definition is needed to ensure that ILECs remove obsolete equipment from locations that can be used for collocation. AT&T and WorldCom feared that the language proposed by BellSouth would relieve or dilute the ILECs' responsibilities in this regard.

REPLY COMMENTS

PUBLIC STAFF: Although the Public Staff initially supported language specifically exempting remote site collocation, it now agrees with BellSouth that the language does appear to pose a conflict. The Public Staff believes that the sentence exempting remote terminal collocation is unnecessary. Thus, the Public Staff proposed that the Commission remove the sentence in Section 1.2 which states that

> Premises, however, shall not include remote sites used for collocation.

Further, the Public Staff suggested that the last sentence of Section 1.2 of the Standard Offering should be modified to also include serving wire centers. The Public Staff proposed that the last sentence be modified to read as follows:

> To the extent this Standard Offering does not include all the necessary rates, terms, and conditions for ILEC Premises other than the ILEC Central Offices or <u>Serving Wire Centers</u>, the Parties will negotiate said rates, terms, and conditions at the request for collocation at other than a Central Office or <u>Serving Wire Center</u>.

The underlined text in the foregoing sentence denotes the Public Staff's recommended additions. The Public Staff believes that the foregoing sentence is sufficient to recognize that the Parties would negotiate the rates, terms, and conditions for collocation at remote collocation sites to the extent that all the necessary rates, terms, and conditions for such collocation have not been included in the Standard Offering. The Public Staff asserted that its proposed version of Section 1.2 is clearer and preserves the FCC's definition while addressing AT&T and WorldCom's concerns. [**Commission Note:** In 47 C.F.R. §51.5, the FCC defines "Premises" as follows: "'Premises' refers to an incumbent LEC's central offices and serving wire centers, as well as all buildings or similar structures owned or leased by an incumbent LEC that house its network facilities, and all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures."] Accordingly, the Public Staff recommended that the sentence, "Premises, however, shall not include remote sites used for collocation" be removed from Section 1.2 and the last sentence be amended as set forth above.

DISCUSSION

Upon reflection, the Commission agrees with the Public Staff and BellSouth that there is a potential conflict in the language as currently written, which sets out a description of "premises" but then excludes remote collocation sites. The Commission concurs with the Public Staff that this matter can best be addressed by adding the language suggested by the Public Staff at the end of the section and deleting the sentence "Premises, however, shall not include remote sites used for collocation."

CONCLUSIONS

The Commission concludes that it is appropriate to add the language suggested by the Public Staff at the end of Section 1.2 and to delete the sentence "Premises, however, shall not include remote sites used for collocation."

ISSUE NO. 5: Section 3.3.1 – Shared and Subleased Caged Collocation

INITIAL COMMISSION DECISION

The Commission adopted the CLPs' language, except that it included an additional sentence at the end stating: "Should the Host or Guest CLP in a shared arrangement add equipment or augment existing collocation arrangements, the provisions set forth in Section 9 of the Standard Offering governing additions and augments shall apply." Accordingly, the Commission concluded that Section 3.3.1 should be worded as follows:

> 3.3.1 Except as described below or as agreed upon by the Host CLP and the ILEC, a Host CLP shall be the sole interface and responsible party to the ILEC for the purpose of submitting applications for initial and additional equipment placements of the Guest(s) (to the extent required under other sections of the Standard Offering); for assessment and payment of rates and charges applicable to the Collocation Space; and for the purposes of ensuring that the safety and security requirements of this Standard Offering are fully complied with by the Guest, its employees and agents. The Guest may arrange directly with the ILEC for the provision of the interconnecting facilities between the ILEC and the Guest(s) and for the provision of the services and access to unbundled network elements and the ILEC will bill the Guest(s) directly for these services. In making shared or subleased caged arrangements available the ILEC may not impose an additional Application Fee or increase the cost of site preparation or nonrecurring charges above the cost of provisioning such a cage of similar dimensions and material to a single collocating party. Should the Host or Guest CLP in a shared arrangement add equipment or augment existing collocation arrangements, the provisions set forth in Section 9 of the Standard Offering governing additions and augments shall apply.

OBJECTIONS

BELLSOUTH: BellSouth noted that the language in the sentence added by the Commission included express reference to "shared arrangements" but does not refer to subleased arrangements that were specifically included as part of Section 3.3.1. BellSouth assumed this was an oversight and suggested that the Commission add the words "or subleased" to the last sentence of Section 3.3.1.

INITIAL COMMENTS

No party filed initial comments.

REPLY COMMENTS

BELLSOUTH: BellSouth noted that no party had filed comments of any sort and thus argued that its recommendation should be adopted.

PUBLIC STAFF: The Public Staff noted that AT&T and WorldCom did not object to or comment on the proposed change by BellSouth. The Public Staff stated that it believes the change suggested by BellSouth clarifies this section and should be adopted by the Commission.

DISCUSSION

The Commission concurs with BellSouth and the Public Staff that the change suggested by BellSouth will clarify this section and should be adopted.

CONCLUSIONS

The Commission concludes that the last sentence of Section 3.3.1 should be amended to read: "Should the Host or Guest CLP in a shared or subleased arrangement add equipment or augment existing collocation arrangements, the provisions set forth in Section 9 of the Standard Offering governing additions and augments shall apply."

ISSUE NO. 9: Section 5.5.1.1 – Applications and Subsequent Applications for Cross-Connect Facilities

INITIAL COMMISSION DECISION

The Commission found that the Public Staff's proposal, with one modification such that if the telecommunications carrier submits a Subsequent Application for Co-Carrier Cross-Connect (CCXC) only, the Subsequent Application fee for CCXC will be assessed pursuant to Section 7, is appropriate and should be adopted. Accordingly, the Commission required that Section 5.5.1.1 should be worded as follows:

> 5.5.1.1 The telecommunications carrier may order CCXC in its initial Application. In the Application, the telecommunications carrier must include the type of cross-connect facilities to be used, the name of the telecommunications carrier(s) to whom the CCXC is to be routed, and a copy of the authorization from all other telecommunications carriers involved. If the telecommunications carrier, or the telecommunications carrier's Guest(s) in a shared arrangement, desires to order CCXC after the Bona Fide Firm Order, the telecommunications carrier must submit to the ILEC a complete Subsequent Application containing the same CCXC information as required in an initial Application. If the telecommunications carrier submits a Subsequent Application for CCXC only, the Subsequent Application fee for CCXC will be assessed pursuant to Section 7. If

the telecommunications carrier submits a Subsequent Application for CCXCs in addition to other modifications to the Collocation Space, a Subsequent Application Fee will be assessed pursuant to Section 7. No Subsequent Application Fee is required if there is no construction or installation required of the ILEC.

OBJECTIONS

BELLSOUTH: BellSouth objected to the Commission's decision concerning Issue No. 9, stating that even when no construction is required by BellSouth in response to a subsequent application for CCXC facilities, it is still necessary for a BellSouth employee to evaluate the application to determine what is required to comply with the CLP's request. For example, BellSouth stated that when an application for CCXC is submitted, BellSouth must determine whether additional cable racking facilities would be required to accommodate the CCXC facilities between two noncontiguous collocation spaces. In addition, BellSouth noted that it is also necessary for BellSouth to determine the amount of linear feet of cable racking that would be required to span the distance between one CLP's collocation space and the other CLP's collocation space.

BellSouth remarked that, aside from the cost of construction that would be necessary to add support facilities in appropriate circumstances which could be recouped under the Commission's *Order*, it is also necessary in every instance to make a determination of what is required to implement the CCXC. Consequently, BellSouth asserted that it should be allowed to assess a reasonable charge to recover the labor costs associated with such an evaluation. BellSouth stated that in negotiations it has proposed such a fee of $583.66, which is approximately ¼ of the regular subsequent application fee ($2,311) for CCXCs. BellSouth acknowledged that it had not filed a cost study that includes this rate; nevertheless, it believes this amount is very close to the fee that would be supported by a formal cost study. Accordingly, BellSouth asked the Commission to allow BellSouth to recover the costs attributable to a subsequent application for CCXC and to require BellSouth to file a cost study to establish such a rate.

INITIAL COMMENTS

AT&T AND WORLDCOM: AT&T and WorldCom stated in their initial comments that when the CLP self-provisions its own cross-connects, BellSouth would not be involved in the process and would have no cost basis for compensation. AT&T and WorldCom stated that it is the certified vendor who determines the cable path between co-carriers; these are the only cable records used in this process. Although, BellSouth has provided two examples of when additional work might be required, AT&T and WorldCom pointed out that BellSouth has provided no evidence regarding how often these situations may arise or how much work would be involved when they do. AT&T and WorldCom stated that they are not opposed to BellSouth submitting a cost study on this matter and having the Commission reconsider the issue when sufficient evidence in the record justifies imposition of a cost-based fee for any ILEC labor required when a CLP self-provisions cross-connects.

REPLY COMMENTS

BELLSOUTH: BellSouth stated in its reply comments that AT&T and WorldCom are mistaken in their contention that BellSouth would not be involved in the process and would have no cost basis for compensation, because BellSouth is very much involved in the process of preparing for the placement of CCXCs. Specifically, BellSouth noted that it must review the CLPs' applications to ensure that they contain the necessary information and to determine that both parties have the appropriate rates, terms, and conditions in their contracts for the CCXC. BellSouth also maintained that it must determine whether sufficient overhead cable racks for fiber trays exist when the two carriers are not located in contiguous spaces. Thus, BellSouth asserted that, given the fact that these tasks must be performed by BellSouth, the assertion of AT&T and WorldCom that BellSouth has "no cost basis" is clearly wrong.

Further, BellSouth stated that AT&T and WorldCom are mistaken in their contention that the certified vendor necessarily determines the cable path. BellSouth explained that the certified vendor cannot unilaterally make this determination because, if it did, its choice of route might not be feasible. Accordingly, BellSouth noted that the selection of both the appropriate route and the appropriate support structure is jointly made by BellSouth and the certified vendor.

Additionally, BellSouth pointed out that there is an inconsistency in AT&T and WorldCom's argument to rely on the lack of a proper evidentiary record as a basis for denying BellSouth's Motion while, at the same time, including in their own comments, an argument based on their offering of facts not in evidence.

However, BellSouth noted that AT&T and WorldCom agreed that BellSouth could submit a cost study on this matter and that the Commission could reconsider the issue. In support of its proposed application fee for CCXCs, BellSouth filed a cost study which was attached as Exhibit 1 to its reply comments. BellSouth stated that based on the consent of AT&T and WorldCom and consistent with the practice that has been followed throughout this proceeding, it submitted said cost study to provide the Commission with sufficient information to approve the rate for its Subsequent Application Fee for CCXC.

PUBLIC STAFF: The Public Staff stated in its reply comments that it concurred with AT&T and WorldCom that there is not sufficient evidence in the record to impose a fee for ILEC labor in the installation and construction of CLP-provisioned CCXCs. Thus, the Public Staff recommended that the Commission deny BellSouth's Motion. However, the Public Staff noted that if BellSouth did submit a cost study, the Commission should reconsider the issue at that time.

VERIZON: Verizon did not file reply comments on this issue.

DISCUSSION

The last sentence in Section 5.5.1.1 of the Standard Offering is worded as follows:

No Subsequent Application Fee is required if there is no construction or installation required of the ILEC.

As noted above, BellSouth is requesting that the Commission reconsider its decision on this issue such that BellSouth would be allowed to charge a Subsequent Application Fee for the CCXC. BellSouth asserted that even when no construction is required by BellSouth in response to a subsequent application for CCXC facilities, it is still necessary for a BellSouth employee to evaluate the application to determine what is required to comply with the CLP's request. At the time of filing its reply comments, BellSouth submitted a cost study to support its request for the imposition of such a fee.

The Commission agrees with AT&T, WorldCom, and the Public Staff that the evidence before the Commission at the time of its initial decision was insufficient to support the imposition of a fee for ILEC labor when no construction or installation was required of the ILEC. However, BellSouth has since filed a cost study in support of its request, and AT&T, WorldCom, and the Public Staff suggested that, if BellSouth filed a cost study, the Commission should reconsider the issue. BellSouth is the only ILEC making such a request; as was noted in the *Order Addressing Disputed Language in the Standard Offering*, "BellSouth permits the CLPs to self-provision the CCXC, while Sprint and Verizon provision the CCXC for the CLP."

Based upon the data provided in Exhibit 1, attached to BellSouth's reply comments, which provides a summary of its cost study results, the Commission understands that BellSouth is now proposing a nonrecurring Subsequent Application Fee of $549.60 per occurrence. This rate element is referenced as "H.1.59 Physical Collocation – Subsequent Application for Co-Carrier Cross-Connect, per Occurrence." Exhibit 1 provides brief statements concerning the element description, study technique, and study assumptions as follows:

<u>Element Description</u>

Physical Collocation – Subsequent Application for Co-Carrier Cross-Connect, per Occurrence develops the cost to process an application when a co-carrier cross-connect request is received.

<u>Study Technique</u>

Microsoft Excel Spreadsheets were used to calculate the nonrecurring costs. Each work time associated with a work function was multiplied times a labor rate to develop the total unit nonrecurring cost.

<u>Study Assumptions</u>

Other elements apply to recover the support structure cost.

In Exhibit 1, BellSouth has calculated its Subsequent Application Fee based upon a total of 11 labor hours. BellSouth's work papers refer to these hours as "Installation Worktime." BellSouth allocated the 11 labor hours among five functions and provided a description of the underlying activities as follows:

1. (5 hrs.) Account Team Coordinator Collocation (ATCC)

Initiation of application: Initial receipt and review of application in order to validate integrity of data and discussion with applicant. Explain application contents and its impact to the overall project with applicant. Include any clarification of application information necessary for the Interdepartmental Coordinators.

Review collocation agreement: Review applicant's specific terms, conditions, and rates for physical collocation. Clarify physical agreement terms and conditions for evaluation of their impact specific to project. Identify impacting terms and conditions to Interdepartmental Coordinators (i.e., unique time frames).

Gather response data from INAC: Respond to questions from the Interdepartmental Coordinators and review the responses for clarification (i.e., ATCC verifies that response provided by Interdepartmental Team matches terms of CLP's agreement).

Preparation and distribution of response: Update response information from the Interdepartmental Coordinators and prepare a response for the customer. Review terms, conditions, rates, and translation of Interdepartmental response into written contract commitments. Prepare written response and cover letter. Determine expiration date to place Bona Fide Firm Order. Assemble response package.

Process application fee: Request service order issuance to bill the application fee.

2. (½ hr.) Customer Point of Contact

Receive and review Fee Processing Request Form. Verify customer credit information. Manually enter Access Service Request (ASR) with customer information. Query mechanized system for Billing Account Number assignment. Generate Service Order Work Aid (SOWA) and enter appropriate application information. Issue a service order to establish billing account for processing the Application Fee. Follow up to ensure completion of service order.

3. (2 hrs.) Interexchange Network Access Coordinator (INAC)

Receive and evaluate inquiry. Contact Area Provisioning Team, if required. Initiate and facilitate follow-up planning meetings with Area work groups and customer, if required. Work with Area Team to develop the plan, establish tentative schedules, and identify major construction items that will affect critical dates. Serve as technical consultant to Area Provisioning Team, account team coordinator, and customer for identification and resolution of issues. Interface with Regulatory and Collocation Project Team for policy development and issue resolution. Receive inquiry response data from Area Team. Analyze data and determine project schedule. Resolve network issues. Review response data and notify account team coordinator that inquiry is complete.

4. (3 hrs.) Common Systems Capacity Management (CSCM)

Review application for cable support structure requirements. Perform site visit to evaluate cable support structures between collocators. Prepare construction order/determine structure type and route. Measure distance and submit for billing purposes. Complete application.

5. (½ hr.) Central Office Work Group (COWG)

Review method of procedure for compliance.

At this point, the Commission considers the record to be insufficient to simply accept BellSouth's proposal based upon its cost study reflecting that 11 labor hours are required to process a subsequent application for a CLP-provisioned CCXC. The Commission notes that in the *Order Granting Sprint's Motion for Reconsideration and Setting Rates for Augments and Adjacent Collocation*, issued on January 14, 2003, in this docket, the Commission, in regard to BellSouth's rates for simple and minor augments, required BellSouth to reduce its proposed labor allocations for activities relating to the ATCC, INAC, and the Circuit Capacity Management functions. Similarly, in regard to the issue here, some adjustments may be deemed necessary. The Commission believes that this matter should be reconsidered and that it would be very beneficial to have comments from interested parties on the appropriateness of BellSouth's proposed nonrecurring Subsequent Application Fee of $549.60 per occurrence and the underlying assumptions contained in BellSouth's cost study prior to making a determination in this regard.

CONCLUSIONS

The Commission will reconsider the issue of subsequent applications for CCXC after it receives comments from the Parties. Accordingly, the Commission believes it is appropriate to request that the interested parties file comments addressing the appropriateness of BellSouth's proposed nonrecurring Subsequent Application Fee of $549.60 per occurrence and the underlying assumptions, including tax and common cost factors, labor hours and associated activities, and labor rates, contained in BellSouth's cost study. The Commission finds that it should request that the Public Staff and other interested parties file initial comments on BellSouth's cost study, and resulting rate and related language modifications for Section 5.5.1.1, by no later than 20 days after the issuance of this Order, and thereafter, interested parties should be given 10 days to file reply comments.

ISSUE NO. 11: Section 5.5.3 – CCXC and CLP Certification on Volume of Interstate Traffic

INITIAL COMMISSION DECISION

The Commission found that (1) the ILECs' proposal to include language allowing the rates, terms, and conditions for CCXCs requested under 47 U.S.C. Section 201 to be decided under separate agreements was inappropriate; (2) the CLPs' proposal to include language recognizing that the CLP may deploy connections directly between its own facilities and the facilities of other collocators without being routed through the ILEC's equipment was appropriate; (3) the first appearance of the word "connection" in Section 5.5.3 should be changed to "cross-connect"; and (4) the reference to the "Commission" in Section 5.5.3 should be changed to "FCC". Accordingly, the Commission required Section 5.5.3 to be worded as follows:

> 5.5.3 The ILEC is not required to allow or provide a cross-connect between the equipment in the collocated spaces of two or more telecommunication carriers if the connection is requested pursuant to 47 U.S.C. Section 201, unless the CLP submits to the ILEC certification that ten (10) percent of the amount of the traffic to be transmitted through the connection will be interstate. The ILEC shall not refuse to accept the certification, but instead must, where requested by the CLP, provision the service promptly. The ILEC may file a complaint pursuant to 47 U.S.C. Section 208 with the FCC challenging the certification if it believes that the certification is deficient. The ILEC shall not require a certification for connections where such connection is being made under section 251 of the Act, as amended. Such connections to other carriers may be made using either optical or electrical facilities. The CLP may deploy such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment.

OBJECTIONS

BELLSOUTH: BellSouth objected to Issue No. 11 by stating that the Commission should reconsider its finding that "the ILECs' proposal to include language allowing the rates, terms, and conditions for CCXCs requested under 47 U.S.C. Section 201 to be decided under separate agreements is inappropriate" and should instead require that Section 5.5.3 contain a statement that "the rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. § 201 shall be as set forth in the respective ILEC's federal tariff."

In this regard, BellSouth noted that the ILECs, as stated in the *Order Addressing Disputed Language*, had taken the position that regulation of interstate traffic is exclusively within the jurisdiction of the FCC. Therefore, BellSouth commented that the ILECs had contended that it is appropriate for CCXCs requested pursuant to 47 U.S.C. Section 201 to be dealt with in separate agreements or by ILEC tariffs. Further, BellSouth pointed out that the Public Staff, as stated in the *Order Addressing Disputed Language*, had noted that in the *Order Addressing Collocation Issues*, "the Commission did not indicate that it considered requests for cross-connects pursuant to 47 U.S.C. Section 201 to be outside of its jurisdiction." BellSouth also noted that in the *Order Addressing Disputed Language* the Commission stated that "in the record of evidence on which the *Order Addressing Collocation Issues* was based, the Commission did not have before it the question of its jurisdiction over this matter"; and accordingly, the Commission concluded that rates for cross-connects should be assessed pursuant to Section 7 once there is an agreement on rates and terms.

BellSouth commented that on September 4, 2002, one day after the Commission issued its *Order*, the FCC addressed the jurisdictional issue more specifically in its *Order on Reconsideration of Fourth Report and Order, and Fifth Report and Order* (In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147.) BellSouth explained that the FCC's September 4, 2002 *Order on Reconsideration* was issued in response to a petition that was submitted by a number of CLPs (the Association for Local Telecommunications Services, e.spire Communications, Inc., KMC Telecom, Inc., McLeodUSA Telecommunications Services, and NuVox Inc.) requesting the FCC to "clarify that incumbent LECs must include their cross-connect offerings in the interstate tariffs they file with the Commission pursuant to Sections 201, 202 and 203 of the Act", as noted in Paragraph 5. Further, BellSouth pointed out that in Paragraph 9 of the *Order on Reconsideration*, the FCC stated specifically "that incumbent LECs must file tariffs for cross-connect offerings made pursuant to Section 201 at the federal level."

BellSouth contended that the ruling of the FCC in its *Order on Reconsideration* makes it clear that CCXCs requested pursuant to 47 U.S.C. Section 201 are appropriately addressed in federal tariffs rather than in the standard offering language ordered by this Commission. Accordingly, BellSouth requested that the Commission reconsider its decision in light of this subsequent decision by the FCC, such that it should modify its decision and require that language be inserted into Section 5.5.3 of the Standard Offering to state that the rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. Section 201 shall be as set forth in the respective ILEC's federal tariff.

VERIZON: Verizon objected to Issue No. 11 by stating that it opposed the Commission's adoption of the CLPs' language, which permits CLPs to deploy cross-connects and requires, upon CLP request, that cross-connects be provisioned directly between collocators rather than traversing the CLP's circuit through an ILEC's point in the network. Verizon contended that the Commission should reconsider its decision because there is no legal authority either permitting collocating CLPs to deploy their own cross-connects in an ILEC's premises or mandating ILECs to provision cross-connects in any specific manner. Verizon asserted that the law requires the opposite: (1) the ILEC, not the CLP, determines who will provision the cross-connect; and (2) the ILEC, not the CLP, determines how it will be provisioned.

First, Verizon addressed its assertion that the ILEC, not the CLP, determines who will provision the cross-connect upon the CLP's reasonable request. Verizon stated that the language in Paragraph 76 of the FCC's *Collocation Remand Order*, issued August 8, 2001, does not support the Commission's adoption of language that allows a CLP to "deploy . . . connections between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment." Verizon contended that the Commission's adoption of this language is inconsistent with both the D.C. Circuit's ruling in *GTE v. FCC* and the FCC's subsequent *Collocation Remand Order*, and the Commission's *Order Addressing Collocation Issues* in this docket.

Verizon noted that the FCC in its *Collocation Remand Order*, in Paragraph 58, stated that "in light of *GTE v. FCC*, we may not require an incumbent LEC to allow competitive LECs to provision cross-connects outside of their immediate physical collocation space at the incumbent's premises." Based on this authority, Verizon stated that the Commission has recognized that ILECs are not required to permit CLPs to provision their own cross-connects inside an ILEC's premises; as the Commission noted in its *Order Addressing Collocation Issues*, the FCC amended its Rule 51.323(h)(1) by removing the requirement that an ILEC "must permit any collocating telecommunications carrier to construct its own connection between the carrier's equipment and that of one or more collocating carriers . . . ." Further, Verizon stated that in the *Order Addressing Collocation Issues*, the Commission concluded as follows:

> Generally, the Standard Offering should be amended to reflect that an ILEC may, but is not required to, allow collocating CLPs to provision their own cross-connects. The Standard Offering should instead reflect that, at the request of a collocating CLP, the ILEC must provide cross-connects between equipment in the collocated space of two or more telecommunications carriers, unless the ILEC allows the CLP to provision its own cross-connects or the cross-connect is not required as established by Rule 51.323(h)(2).

Thus, Verizon contended that the CLPs' attempt to include a provision in Section 5.5.3 that allows a CLP to deploy its own cross-connects must be rejected as inconsistent with the Commission's prior, correct holding on this specific issue in its *Order Addressing Collocation Issues*.

Second, Verizon addressed its assertion that the ILEC, not the CLP, determines how the cross-connect will be provisioned. Verizon stated that there is no legal authority requiring ILECs to provision cross-connects for CLPs in any specific manner or allowing CLPs to control that process. Verizon contended that Paragraph 76 of the FCC's *Collocation Remand Order* does not support the Commission's refusal to permit the ILEC to provision the cross-connect in the manner it sees fit, either by routing circuits through its equipment or by allowing for direct CLP-to-CLP cross-connects. Verizon asserted that the Commission's conclusion that Paragraph 76 of the FCC's *Collocation Remand Order* is not "mandatory" in requiring circuits to be routed through the ILEC's equipment does not mean the Commission can or should adopt language that mandates the opposite result, that is, permitting CLPs to dictate how the ILEC should provision the cross-connect.

Verizon commented that the Commission failed to consider the FCC's general treatment of cross-connects in the *Collocation Remand Order*. In particular, Verizon noted that at Paragraph 60 of the *Collocation Remand Order*, the FCC stated

> When competitive LECs provision their own cross-connects, the competitive LECs own and control the cabling, whereas, when the incumbent provisions the cross-connects, the incumbent owns and controls the cabling. Second, for competitive LECs to provision cross-connects, they typically must access common areas, which may include a racking system, of the incumbent's premises to install and maintain the cross-connects. In contrast, if the incumbent provisions

> the cross-connects, the competitive LECs need not have access to the common areas for the purpose of provisioning the cross-connects. Thus, the latter approach is substantially less invasive of the incumbent's property rights (e.g., in terms of security, safety, and risk to incumbent LEC equipment).

Verizon remarked that the FCC recognized that the provisioning of cross-connects entails the placement of certain facilities (cables, etc.) that traverse beyond the CLP's collocation space and into the common areas within the ILEC's premises. Verizon asserted that the manner in which facilities are placed in common areas has always been left to the discretion of the ILEC; the ILEC owns the central office and space not leased to CLPs remains subject to ILEC control. Further, Verizon noted that the ILEC maintains control of common areas because the placement of facilities within that space could affect other collocators in the ILEC's central office with which the ILEC has contractual commitments. In support of its position, Verizon pointed out that at Paragraph 91 of the *Collocation Remand Order*, consistent with the accepted principle that ILECs retain primary decisionmaking authority over collocation space assignment decisions, the FCC stated

> Allowing requesting carriers to exercise primary decision-making authority over space assignment decisions would give those carriers the ability to usurp an incumbent LEC's right to manage its own property. Such a result would go beyond the limits established by the statute.

In addition, Verizon noted that the FCC held, at Paragraph 67, that the cross-connect requirement will not materially burden the ILEC if the ILEC "maintain[s] control over the provisioning and maintenance" of the cross-connect. Verizon opined that because the adopted language removes the ILEC's control over this process, it could result in the provisioning requirement becoming far more intrusive and burdensome on the ILEC than the FCC anticipated and the Act requires. For example, Verizon warned that the ILEC could be repeatedly required to directly connect CLPs that occupy distant collocation spaces within the central office resulting in an unnecessary accumulation of cabling for which the ILEC could be required to install additional cable racking.

Further, Verizon remarked that the FCC, in Paragraph 76, strongly suggested that the ILEC provision cross-connects efficiently, but recognized that such an efficiency determination must be made in light of the ILEC's own property interests and the ILEC's responsibility to manage collocation space for multiple CLPs. Verizon observed that the FCC stopped short of mandating ILEC provisioning of specific cross-connect arrangements and noted that the FCC clearly envisioned that cross-connect cabling may be configured in different ways. In particular, as noted by Verizon, at Paragraph 58, the FCC stated

> Typically, in a central office, the cabling scheme might run from a piece of equipment up into an overhead racking system, through that system and down from the racks to connect with another piece of equipment. Cross-connects can run through the main distribution frame or an intermediate distribution frame when being used to connect two pieces of equipment or when being used to connect equipment to a transmission facility, such as a loop or trunk. When two pieces of equipment are in close proximity to each other, the cross-connect may

> progress directly from one piece of equipment to the other without entering the racking system.

Verizon asserted that the ILEC's provisioning discretion follows from the premise that the method by which cross-connects are provisioned does not change the quality of interconnection or result in a "material increase" in the CLPs' costs. According to Verizon, the only provisioning requirement was that the cross-connect occur within the ILEC's premises upon reasonable request. In particular, Verizon noted that the FCC in its *Collocation Remand Order*, at Paragraphs 93, 94, and 95, imposed only three conditions on the ILEC's general provisioning of collocation space; that is, the collocation assignments do not: (1) "materially increase" the CLPs' collocation costs or result in a material delay in the CLPs' occupation and use of the ILEC premises, (2) "impair the quality of service or impose other limitations on the service a requesting carrier wishes to offer", or (3) "reduce unreasonably the total space available for physical collocation or preclude unreasonably physical collocation within the incumbent's premises." Verizon stated, in Footnote 17 of its Motion, that, generally, Verizon requires CLPs to order cross-connects through its Dedicated Transit Service (DTS). Verizon explained that the cross-connect is routed through Verizon's existing equipment, following a path that includes an ILEC termination point on a panel or frame, resulting in the most efficient method of cross-connection because it utilizes the existing central office infrastructure and does not require any new construction. Further, Verizon remarked that, because the collocators are already interconnected to Verizon's main distribution frame (MDF) or patch panel, Verizon simply ties together the cross-connecting collocator circuits at the MDF or panel. Verizon asserted that this is efficient since it typically eliminates the need for additional cable to be provisioned between collocator cages, possibly all the way across the central office.

Verizon believes that the Commission's adoption of the CLPs' language, in this regard, fails to recognize the FCC's efficiency concerns, that is, under the language adopted, the requesting CLP could require the ILEC to provision the cross-connect directly between the collocating CLPs without considering how inefficient such an arrangement may be for the ILEC and the other collocators. Verizon contended that only the ILEC can make this determination. Since the FCC determined that "provisioning of cross-connects constitutes physical collocation" and the ILEC "should maintain ultimate responsibility for assigning collocation space within its premises," Verizon concluded that the CLPs' proposed language, allowing them to dictate how the ILEC provisions those arrangements (directly between CLPs as opposed to routing circuits through the ILEC's facilities), must be rejected by the Commission. Verizon noted that if the CLP is not satisfied with a particular arrangement, it may complain to the Commission. In its request to reconsider this issue, Verizon also stated that the Commission must reconsider its decision in its *Order Addressing Unresolved Collocation Rate Issues* insofar as it would require Verizon to restructure its cross-connect rates.

Furthermore, in Footnote 31 of its Motion, Verizon stated that

> Section 5.5 of the Standard Offering does *not* represent Verizon's agreement that CLPs may dictate how a cross-connect is provisioned *by the ILEC*. This particular controversy has always turned on what language should be included in § 5.5.3 of the Standard Offering, or perhaps more appropriately § 5.5.2 -- the

sections addressing ILEC-provisioning of the cross-connect. Since the FCC issued the *Collocation Remand Order*, the CLPs, the Public Staff and the Commission have all been aware of Verizon's position as to how it will provision cross-connects when requested by the CLPs. To the extent § 5.5 mistakenly suggests that Verizon has "agreed" to provision cross-connects differently, it must also be stricken.

INITIAL COMMENTS

AT&T AND WORLDCOM: AT&T and WorldCom filed initial comments only on BellSouth's Motion for Reconsideration, that is, they made no acknowledgement or mention of Verizon's Motion for Reconsideration. AT&T and WorldCom stated in their initial comments that the Commission should deny BellSouth's Motion.

Although the FCC issued its *Order on Reconsideration* on September 4, 2002, requiring ILECs to file tariffs for cross-connects made pursuant to Section 201, AT&T and WorldCom asserted that the *Order on Reconsideration* did not divest this Commission of jurisdiction to regulate terms, conditions, and rates for cross-connects. Rather, AT&T and WorldCom maintained that the FCC affirmed at Paragraph 7 of the *Order on Reconsideration* that state commissions retain jurisdiction to resolve cross-connect disputes that arise in connection with an interconnection proceeding "and we anticipate that the state commission would do so." AT&T and WorldCom noted that the FCC stated that any specific questions about cross-connect disputes at the federal level would be resolved on a "case by case basis." Furthermore, AT&T and WorldCom observed that the FCC gave ILECs the option to include the rates, terms, and conditions for cross-connects in interconnection tariffs, stand-alone tariffs, or other federal tariffs. Consequently, AT&T and WorldCom opined that these provisions demonstrate that state commissions continue to have jurisdiction over cross-connect issues that arise in connection with interconnection disputes. Accordingly, AT&T and WorldCom concluded that state commissions continue to have jurisdiction to set rates, terms, and conditions for cross-connects so long as they do not conflict with FCC mandates for federal tariffs.

REPLY COMMENTS

BELLSOUTH: BellSouth stated in its reply comments that AT&T and WorldCom have responded to BellSouth's Motion in a way that misconstrues the FCC's ruling. BellSouth asserted that the FCC, at Paragraph 9 in its *Order on Reconsideration*, clearly ruled that ILECs "must file tariffs for cross-connect offerings made pursuant to Section 201 at the federal level" and that this federal tariff filing may include "expanded interconnection tariffs, stand-alone tariffs, or other appropriate federal tariffs." Regardless of the form of the tariff, BellSouth maintained that it is a federal tariff. BellSouth remarked that AT&T and WorldCom appear to advance the astounding proposition that this Commission has the authority to determine the content of federal tariffs. BellSouth commented that AT&T and WorldCom's unlikely interpretation of the FCC's decision would not only allow state commissions to, in effect, create federal law, but would allow all state commissions to do so concurrently in a patently unworkable manner. BellSouth noted that AT&T and WorldCom have not addressed how these differing terms would be incorporated into a single federal tariff.

However, BellSouth acknowledged that it is true that the FCC (in ruling on a different portion of the motion before it) also stated that state commissions have jurisdiction to resolve cross-connect disputes that arise in the context of interconnection proceedings before them, but the FCC also retained jurisdiction to resolve cross-connect disputes. BellSouth stated that the two rulings by the FCC in its *Order on Reconsideration* must be read in a way that will make them consistent. BellSouth commented that, under AT&T and WorldCom's interpretation, the states could set the terms for CCXCs, which would not only conflict with the federal tariffing requirement, but would also make that requirement impossible to implement since the content of the tariff would be created by the decisions of 50 different state commissions. Instead, BellSouth asserted that the better interpretation is that the FCC did not intend for states to dictate the terms of the federal tariff for CCXCs, but only that state commissions would have coexistent jurisdiction with the FCC to resolve disputes that arise from the application of the federal tariff. BellSouth maintained that this is the only approach that renders the two related FCC decisions consistent and renders the Order in which they appear internally consistent.

PUBLIC STAFF: **In regard to BellSouth's Motion** concerning its request that Section 5.5.3 should contain a statement that "the rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. § 201 shall be as set forth in the respective ILEC's federal tariff," the Public Staff stated in its reply comments that it had opposed the ILECs' initial proposal, in part, because the issue seemed unsettled and the ILECs had not sufficiently demonstrated that the FCC's *Collocation Remand Order* limited the Commission's jurisdiction over CCXCs. The Public Staff noted, as did BellSouth, that one day after the Commission issued its *Order Addressing Disputed Language*, on September 4, 2002, the FCC issued its *Order on Reconsideration* in response to a petition from CLPs seeking clarification that ILECs must include their cross-connect offerings in the interstate tariffs they file pursuant to Sections 201, 202, and 203 of the Act. The Public Staff pointed out that in its *Order on Reconsideration*, the FCC specifically stated "that incumbent LECs must file tariffs for cross-connect offerings made pursuant to Section 201 at the federal level"; and thus, BellSouth maintained that the FCC's ruling required that CCXCs requested pursuant to 47 U.S.C. Section 201 are appropriately addressed in federal tariffs, rather than the Standard Offering.

The Public Staff noted that in its *Order on Reconsideration* the FCC, at Paragraph 4, stated that it relied on three separate statutory bases in revising its rules on CCXCs. First, an ILEC must make CCXCs available pursuant to Section 201(a) of the Act. Second, an ILEC's refusal to provision cross-connects would be an unjust and unreasonable practice within Section 201(b) of the Act. Third, an ILEC must provision cross-connects pursuant to Section 251(c)(6) as part of its obligation to provide collocation on just, reasonable, and nondiscriminatory terms. Further, in Paragraph 4, the FCC stated that on June 18, 2002, the D.C. Circuit affirmed the *Collocation Remand Order*, including the cross-connect requirement, without reaching the question of whether any or all of the above sections were properly invoked, due to the failure of the parties to properly preserve the issue.

The Public Staff pointed out that, in Paragraph 6 of the *Order on Reconsideration*, the FCC explained that it anticipated that cross-connect disputes, like other interconnection related disputes, could be addressed in the first instance at the state level. Next, the Public Staff referenced Paragraph 7, wherein the FCC continued by noting

> ... the *Collocation Remand Order* acknowledged merely that when a cross-connect dispute arises within the context of an interconnection proceeding before a state commission, the state commission would have the jurisdiction to resolve the dispute and we anticipate that the state commission would do so. To avoid any uncertainty, we clarify that nothing in that prior statement disavows any federal jurisdiction we otherwise have under the Act to resolve cross-connect disputes. Any specific questions would be addressed on a case-by-case basis in the event of a complaint.

The Public Staff also pointed out that, in Paragraph 9, the FCC had clarified that ILECs must file tariffs for cross-connect offerings made pursuant to Section 201 at the federal level, as a result of Section 203(a)'s requirement that all services subject to the FCC's jurisdiction under Section 201 be federally tariffed.

The Public Staff explained that the FCC's *Order on Reconsideration* reaffirms that the FCC retains concurrent jurisdiction with state commissions over disputes involving cross-connects. The Public Staff contended that the FCC's requirement that the ILECs must file federal tariffs for cross-connect offerings pursuant to Section 201 does not diminish the Commission's jurisdiction. Further, the Public Staff acknowledged that, although it has previously resisted efforts to include references to separate tariffs in the Standard Offering, it now believes that the FCC's requirement of a federal filing allows the ILEC to refer to its federal tariff in the Standard Offering. However, the Public Staff asserted that the Standard Offering should also state that disputes concerning cross-connects arising within the context of an interconnection proceeding may properly be heard before the Commission. Accordingly, the Public Staff commented that it did not object to BellSouth's Motion to the extent that Section 5.5.3 includes the following statements: "The rates, terms and conditions for CCXCs requested pursuant to 47 U.S.C. Section 201 shall be as set forth in the respective ILEC's federal tariff. The Commission retains jurisdiction over disputes concerning CCXCs that arise within an interconnection proceeding."

<u>In regard to Verizon's Motion</u> concerning its position that the ILEC, not the CLP, determines who will provision the cross-connect and how it will be provisioned, the Public Staff acknowledged in its reply comments that the Commission had agreed with the CLPs and the Public Staff that Section 5.5.3, in pertinent part, should state, "The CLP may deploy such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment."

The Public Staff stated that it generally agrees with Verizon's argument, that is, if the ILEC does not allow the CLP to provision cross-connects itself, then the ILEC should control the provisioning of CCXCs. Logically, then, the Public Staff stated it follows that the ILEC will determine what is the most efficient method of provisioning CCXCs, taking into account its property interests.

However, the Public Staff stated that it does not fully support Verizon's argument for two reasons.

First, the Public Staff disagreed with Verizon's blanket assertion that its requirement that cross-connects traverse through its equipment is always the most efficient method for provisioning CCXCs. The Public Staff believes that the efficiency determination by the ILEC should be done on a case-by-case basis, and instances may arise where a direct connection between the CLPs is more efficient. The Public Staff stated that Verizon should be guided by what is the most efficient interconnection arrangement pursuant to the CLP's request, not by what its previously established practice might be. Moreover, the Public Staff expressed concern that Verizon's insistence on routing the cross-connect circuit through its existing equipment increases the costs to the CLPs and introduces additional points of failure.

Second, the Public Staff pointed out that Verizon's argument appears to be wholly contrary to Section 5.5 of the Standard Offering, a point Verizon merely raised in a footnote. The Public Staff noted that Section 5.5 of the Standard Offering was submitted as undisputed, under ILEC letterhead, to the Commission on April 8, 2002. The Public Staff observed that Section 5.5 appears to set forth general principles concerning CCXCs and to pertain to both ILECs that allow CLPs to provision their own CCXCs *and* to ILECs that provision CCXCs for CLPs. Significantly, Section 5.5 states, in pertinent part, that, "*At the CLP's option*, the CCXCs may be made using copper, dark fiber, lit fiber, optical or electrical facilities or other transmission medium, and *may be deployed directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment*." (Emphasis added.) The Public Staff commented that, in its footnote, Verizon attempts to bypass this language by stating that this controversy should be resolved solely by the language in Section 5.5.3 or Section 5.5.2. As the Commission noted in its *Order Addressing Disputed Language*, however, the Parties *agreed* on the language in Section 5.5. Additionally, the Public Staff noted that the Commission specifically relied upon Section 5.5 with regard to Verizon's proposed rates on CCXCs, stating that, based on Section 5.5, the Commission had concluded that the "CLP may deploy connections directly between its own facilities and the facilities of other collocators without being routed through the ILEC's equipment. . . ."

Further, the Public Staff remarked that Verizon provides that, should the Commission be unprepared to disregard the plain language of Section 5.5, the section should be stricken to the extent it is inconsistent with Verizon's plan to provision CCXCs. The Public Staff asserted that it has grave concerns about simply ignoring Section 5.5. The Public Staff observed that at the time it filed its initial recommendations in this matter, it believed that the meaning of Section 5.5 was undisputed and plain. Thus, the Public Staff explained that it attempted to maintain consistency with Section 5.5 in its recommendations on the disputed language. Further, the Public Staff noted that there is nothing illegal in giving CLPs the option of directly connecting to each other without being routed through ILEC equipment. However, as noted by the Public Staff, Verizon now argues, Section 5.5 notwithstanding, that CLPs may not exercise that option. The Public Staff acknowledged that, while the law and FCC rules support Verizon's argument, the rest of the undisputed Standard Offering does not. Thus, the Public Staff believes that, in order for the Commission to agree with Verizon's argument, Section 5.5 must be altered. Otherwise, as noted by the Public Staff, these two sections of the Standard Offering are simply in conflict. Unfortunately, the Public Staff was not a party to the negotiations that gave rise to Section 5.5, and thus, the Public Staff stated it cannot speak to how the parties meant to interpret it.

Consequently, the Public Staff believes that the parties should be allowed to address this issue, if they so choose, before the Commission acts on Section 5.5.

In regard to Section 5.5.3, the Public Staff suggested that a simple amendment may address Verizon's concerns. With regard to provisioning cross-connects, the Public Staff commented that the ILEC must make a communications service available upon reasonable request and must engage in just and reasonable practices. Thus, the Public Staff suggested that the objectionable sentence at the conclusion of Section 5.5.3, that reads, "The CLP may deploy such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment" should be deleted and replaced with the following language:

> The CLP may reasonably request the ILEC to deploy such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment. If the CLP believes that the ILEC has refused to provision the cross-connect in the most effective method, the CLP may bring a complaint to the Commission.

MOTION TO FILE RESPONSE AND RESPONSE TO REPLY COMMENTS

VERIZON: In regard to BellSouth's and Verizon's motions for reconsideration, the Commission established filing dates for initial comments on December 4, 2002, and for reply comments on December 18, 2002. On December 20, 2002, Verizon filed a Motion to Respond to the Reply Comments of the Public Staff and attached its Response. Verizon asserted that if the Public Staff had filed its comments on December 4, 2002, as initial comments, then Verizon would have had an opportunity to file reply comments on December 18, 2002. Verizon contended that the Public Staff's only comments, which were filed on December 18, 2002, were untimely, and thus, Verizon requested that it be afforded the opportunity to respond to the Public Staff's grave concerns about how Section 5.5 of the Standard Offering should be interpreted.

In its Response, Verizon addressed the Public Staff's two primary concerns with Verizon's proposal.

First, Verizon observed that, despite acknowledging that the law supports Verizon's position that the ILEC determines the most efficient manner of provisioning CLP-to-CLP cross-connects, the Public Staff expresses discomfort with Verizon making this decision. Verizon asserted that the Public Staff's concern that allowing the ILEC to determine cross-connect provisioning may impose unjustified costs upon CLPs or introduce additional points of failure is unfounded. Verizon contended that it will provision CLP-to-CLP cross-connects in the most efficient manner, whether that means provisioning a direct cross-connection between two contiguous CLPs or some other arrangement. However, Verizon stated that direct cross-connections will be the exception. Generally, as stated by Verizon, the most efficient cross-connect will be provisioned through Verizon's MDF, where it will intersect with the circuit of the other CLP that also is connected through Verizon's MDF. Verizon explained that this allows for multiple CLPs to connect with each other at the MDF or panel without running cables directly between all of their configurations. Further, Verizon asserted that there is no evidence in the record that such connections will increase the cost to CLPs or introduce additional risk of failure.

Second, in regard to the Public Staff's concern about altering Section 5.5 to reflect Verizon's provisioning of CCXCs through its equipment, Verizon stated that its has advocated this approach throughout this proceeding. This dispute, according to Verizon, has always been in the context of discussing the proposed language in Section 5.5.3. However, Verizon remarked that unfortunately the language in Section 5.5, as filed with the Commission, was not designated as disputed, even though it seems to be inconsistent with Verizon's position. Verizon asserted that the language in Section 5.5 cannot be squared with Verizon's position on Section 5.5.3. Verizon contended that the negotiating Parties have been aware of Verizon's position throughout the negotiations and would not in any way be prejudiced by aligning Sections 5.5 and 5.5.3 so that they are consistent. Consequently, Verizon reasoned that, if the Commission ultimately agrees with Verizon and the Public Staff as to the proper interpretation of the law on this issue, then Section 5.5 should be conformed to the law to avoid conflicting provisions. Thus, Verizon requested that the Commission reconsider its rulings with respect to Sections 5.5 and 5.5.3 of the Standard Offering and instead order that the Standard Offering incorporate language reflecting the ILECs' positions on these issues.

DISCUSSION

Based upon the foregoing, there are three issues that need to be addressed. These issues concern (1) CCXCs requested under 47 U.S.C. Section 201, (2) who provisions the cross-connect and how, and (3) the possible conflict between Section 5.5.3 and Section 5.5 of the Standard Offering.

1. CCXCs Requested Under 47 U.S.C. Section 201:

BellSouth has requested that the Commission reconsider its finding which required that Section 5.5.3 of the Standard Offering *exclude* the ILECs' proposed language that "The rates, terms and conditions for a CCXC requested under 47 U.S.C. § 201 shall be negotiated between the Parties under a separate agreement or as provided for in the ILEC's tariffs."

In its Motion for Reconsideration, BellSouth reported that on September 4, 2002, one day after the Commission issued its *Order Addressing Disputed Language*, the FCC addressed this jurisdictional issue more specifically in its *Order on Reconsideration*. In light of this subsequent decision by the FCC, BellSouth is now requesting that the Commission modify its decision and require that language be inserted into Section 5.5.3 of the Standard Offering stating that "the rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. § 201 shall be as set forth in the respective ILEC's federal tariff."

AT&T and WorldCom opposed BellSouth's request. AT&T and WorldCom maintained that the FCC's *Order on Reconsideration*, as stated in Paragraph 7, affirmed that state commissions retain jurisdiction to resolve cross-connect disputes that arise within the context of an interconnection proceeding before a state commission. AT&T and WorldCom asserted that state commissions continue to have jurisdiction to set rates, terms, and conditions for cross-connects so long as they do not conflict with FCC mandates for federal tariffs.

The Public Staff commented that, based upon the FCC's *Order on Reconsideration*, it now believes that the FCC's requirement of a federal filing allows the ILEC to refer to its federal tariff in the Standard Offering. However, the Public Staff asserted that the Standard Offering should also state that disputes concerning cross-connects arising within the context of an interconnection proceeding may properly be heard before the Commission. Accordingly, the Public Staff stated that it did not object to BellSouth's request to the extent that Section 5.5.3 also includes the following statements: "The rates, terms and conditions for CCXCs requested pursuant to 47 U.S.C. Section 201 shall be as set forth in the respective ILEC's federal tariff. The Commission retains jurisdiction over disputes concerning CCXCs that arise within an interconnection proceeding."

Based upon the foregoing and the FCC's *Order on Reconsideration* issued on September 4, 2002, the Commission believes it is entirely appropriate to reconsider our prior decision in this regard. In particular, in pertinent paragraphs, the FCC's *Order on Reconsideration* states the following:

> ... the *Collocation Remand Order* acknowledged merely that when a cross-connect dispute arises within the context of an interconnection proceeding before a state commission, the state commission would have the jurisdiction to resolve the dispute and we anticipate that the state commission would do so. To avoid any uncertainty, we clarify that nothing in that prior statement disavows any federal jurisdiction we otherwise have under the Act to resolve cross-connect disputes. Any specific questions would be addressed on a case-by-case basis in the event of a complaint. (Excerpt from Paragraph 7, footnote omitted.)
>
> We agree that incumbent LECs must file tariffs for cross-connect offerings made pursuant to section 201 at the federal level. This is a necessary result of Section 203(a)'s mandate that all services subject to the Commission's jurisdiction under section 201 be federally tariffed. In order to minimize any unnecessary regulatory burdens, however, we clarify that incumbents shall have the flexibility to include the rates, terms, and conditions under which they provide cross-connects in their expanded interconnection tariffs, stand-alone tariffs, or other appropriate federal tariffs. (Paragraph 9, footnotes omitted.)

The FCC has now made it clear that cross-connect offerings made pursuant to Section 201 must be federally tariffed. Accordingly, the Commission concludes that Section 5.5.3 of the Standard Offering should be modified to include the following statement:

> The rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. Section 201 shall be as set forth in the respective ILEC's federal tariff.

Further, in recognition of the Commission's concurrent jurisdiction with the FCC over cross-connect disputes arising in the context of an interconnection proceeding, the Commission concludes that Section 5.5.3 of the Standard Offering should be further modified to also include the following statement:

> The Commission retains jurisdiction over disputes concerning CCXCs that arise within an interconnection proceeding, subject to the necessity of following the respective ILEC's federal tariff.

2. <u>Who Provisions the Cross-Connect and How</u>:

Verizon has requested that the Commission reconsider its finding which required that Section 5.5.3 of the Standard Offering *include* the CLPs' proposed language that "The CLP may deploy such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment." Verizon objected to this language by stating that there is no legal authority either permitting collocating CLPs to "deploy" their own cross-connects in an ILEC's premises or mandating an ILEC to provision cross-connects in any specific manner.

In support of its position, Verizon stated that the Commission recognized that ILECs are not required to permit CLPs to provision their own cross-connects inside an ILEC's premises; as the Commission noted in its *Order Addressing Collocation Issues*, the FCC amended its Rule 51.323(h)(1) by removing the requirement that an ILEC "must permit any collocating telecommunications carrier to construct its own connection between the carrier's equipment and that of one or more collocating carriers . . . ." Further, Verizon noted that in the *Order Addressing Collocation Issues*, the Commission concluded as follows:

> Generally, the Standard Offering should be amended to reflect that an ILEC may, but is not required, to allow collocating CLPs to provision their own cross-connects. The Standard Offering should instead reflect that, at the request of a collocating CLP, the ILEC must provide cross-connects between equipment in the collocated space of two or more telecommunications carriers, unless the ILEC allows the CLP to provision its own cross-connects or the cross-connect is not required as established by Rule 51.323(h)(2).

Additionally, Verizon maintained that, since the FCC determined that "provisioning of cross-connects constitutes physical collocation" and the ILEC "should maintain ultimate responsibility for assigning collocation space within its premises," then the CLPs' proposed language allowing them to dictate how the ILEC provisions those arrangements (directly between CLPs as opposed to routing circuits through the ILEC's facilities) must be rejected by the Commission.

BellSouth's and AT&T and WorldCom's comments did not include any comments on Verizon's Motion for Reconsideration. And Sprint provided no comments on either BellSouth's or Verizon's Motions. The Commission notes that, as stated in the *Order Addressing Disputed Language*, BellSouth permits the CLPs to self-provision CCXCs, whereas Sprint and Verizon provision CCXCs for the CLPs.

The Public Staff stated that in general it agreed with Verizon's argument, but could not fully support it. The Public Staff asserted that the efficiency determination by the ILEC should be done on a case-by-case basis and also noted that instances may arise where a direct connection between the CLPs is more efficient. The Public Staff expressed concern that Verizon's insistence on routing the cross-connect circuit through its existing equipment increases the costs to the CLPs and introduces additional points of failure. The Public Staff also pointed out that Verizon's argument appears to be wholly contrary to Section 5.5 of the Standard Offering, which is a section that was submitted as *undisputed*. The Public Staff observed that Section 5.5 appears to set forth general principles concerning CCXCs and to pertain to both ILECs that allow CLPs to provision their own CCXCs *and* to ILECs that provision CCXCs for CLPs. In particular, Section 5.5 states, in pertinent part, that, "*At the CLP's option*, the CCXCs may be made using copper, dark fiber, lit fiber, optical or electrical facilities or other transmission medium, and *may be deployed directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment.*" [Emphasis added.]

The Public Staff commented that, while the law and FCC rules support Verizon's argument, the rest of the undisputed Standard Offering does not. The Public Staff recommended that the objectionable sentence at the conclusion of Section 5.5.3 that reads, "<u>The CLP may deploy</u> such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment," be modified such that the beginning phrase, "The CLP may deploy", should be changed to read, "The CLP may reasonably request the ILEC to deploy." Further, the Public Staff suggested that an additional sentence be inserted thereafter, as follows: "If the CLP believes that the ILEC has refused to provision the cross-connect in the most effective method, the CLP may bring a complaint to the Commission."

As previously noted, on December 20, 2002, Verizon filed a Motion to Respond to the Reply Comments of the Public Staff (Motion to Respond) and attached its Response. The Commission believes it is appropriate to grant Verizon's Motion to Respond since the Public Staff filed its only comments on December 18, 2002, and thus, Verizon could not file reply comments on December 18, 2002, concerning comments it had no knowledge of.

In its Response, Verizon asserted that the Public Staff's concern that allowing the ILEC to determine cross-connect provisioning may impose unjustified costs upon CLPs or introduce additional points of failure is unfounded. Verizon contended that it will provision CLP-to-CLP cross-connects in the most efficient manner, whether that means provisioning a direct cross-connection between two contiguous CLPs or some other arrangement. However, Verizon stated that direct cross-connections will be the exception. Generally, as stated by Verizon, the most efficient cross-connect will be provisioned through Verizon's MDF. Verizon contended there is no evidence in the record that such connections will increase the cost to CLPs or introduce additional risk of failure. Consequently, Verizon continued to request that the Commission reconsider its ruling with respect to Section 5.5.3.

The Commission's *Order Addressing Disputed Language* stated in regard to this issue, at Page 54, that the ILECs' position was that the CLPs' proposed language should be rejected because it is inconsistent with the FCC's *Collocation Remand Order*, Paragraph 76, which reveals that the FCC clearly contemplated that CLP circuits must traverse through an ILEC's point in the network when the ILEC is provisioning the CCXC. The Commission notes that, in the *Order Addressing Disputed Language*, the Commission stated as follows:

> Based upon our review of Paragraph 76 of the *Collocation Remand Order*, the Commission disagrees with the ILECs' argument that Paragraph 76 reveals that CLP circuits must traverse through an ILEC's point in the network when the ILEC is provisioning the CCXC. Specifically, that portion of Paragraph 76 referenced by the ILECs is as follows:
>
> > . . . For example, in cases where incumbents interconnect with collocators at equipment that is closer to the collocators' space than the incumbent's main distribution frame, we would expect the cross-connect to be provisioned, where technically feasible, at or near that equipment, rather than at the main distribution frame. This provides competitive LECs with the most efficient interconnection arrangements while minimizing the amount of cable that has to be routed through the incumbent's central office. . . . (Emphasis added.)

Consequently, the Commission adopted the CLPs' proposal to include the following sentence at the end of Section 5.5.3:

> The CLP may deploy such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment.

However, the Commission agrees with Verizon that this decision conflicts with the Commission's prior decision set forth in the *Order Addressing Collocation Issues*. Therein, the Commission explicitly stated that

> . . . an ILEC may, but is not required to, allow collocating CLPs to provision their own cross-connects. The Standard Offering should instead reflect that, at the request of a collocating CLP, the ILEC must provide cross-connects between equipment in the collocated space of two or more telecommunications carriers, unless the ILEC allows the CLP to provision its own cross-connects or the cross-connect is not required as established by Rule 51.323(h)(2).

Accordingly, the Commission now recognizes that its decision in the *Order Addressing Disputed Language*, which allowed Section 5.5.3 to state that "The CLP may deploy such optical or electrical connections. . .," is inconsistent with the Commission's prior decision in the *Order Addressing Collocation Issues*, which stated that the ILEC is not required to allow collocating CLPs to provision their own CCXCs. That is, the CLP may deploy such connections, but only if the ILEC allows the CLP to provision its own CCXCs. Thus, the Commission believes it is appropriate to reconsider its decision in the *Order Addressing Disputed Language* in this regard.

Furthermore, the Commission notes that, at Page 218, the Commission's *Order Addressing Collocation Issues* provides as follows:

> BellSouth and Sprint, the only parties presenting amended language [to reflect the impact of the FCC's *Collocation Remand Order*], have provided differing language which they now propose to be included in the Standard Offering. Rather than choosing either BellSouth's proposal or Sprint's proposal or making modifications thereto, which might also need to include language on rates and/or provisioning intervals, the Commission believes that it would be more appropriate and efficient to require the Parties to negotiate mutually agreeable language for inclusion in the Standard Offering in this regard. Accordingly, the Commission concludes that Sections 1.3, 5.6, 5.6.1., and 5.6.2 should be rewritten in conformity with the *Collocation Remand Order*, recognizing that in said *Order* the FCC eliminated "its previous requirement that an incumbent carrier allow competitive carriers to construct and maintain cross-connects outside of their immediate physical collocation space at the incumbent's premises", found that "an incumbent carrier must provision cross-connects between collocated carriers", and required "an incumbent carrier to provide such cross-connects upon reasonable request."

However, the Commission also notes that in the *Order Addressing Disputed Language*, at Page 36, the *Order* recognized that the Commission had discovered that in Section 5.5 of the Standard Offering, which is titled "Co-Carrier Cross Connect (CCXC)", the ILECs and the CLPs had agreed upon all the language to be included in that section, including the following two sentences:

> At the request of the CLP, <u>the ILEC must provide</u> such co-carrier cross connects (CCXCs), <u>unless the ILEC allows the CLP to provision</u> its own CCXCs or the CCXC is not required as established by 47 C.F.R. §51.323 (h) (2). <u>At the CLP's option</u>, CCXCs may be made using copper, dark fiber, lit fiber, optical or electrical facilities or other transmission medium, and <u>may be deployed</u> directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment. (Emphasis added.)

Due to that agreed-upon language in Section 5.5 regarding what seemed to be general principles concerning CCXCs pertaining to both ILECs that allow CLPs to provision their own CCXCs and to ILECs that provision CCXCs for CLPs, the Commission also considered that this undisputed language further supported the adoption of the CLPs' aforementioned proposal as a last sentence to include in Section 5.5.3.

Based upon the foregoing, the Commission adopts the language offered by the Public Staff. As noted hereinbefore, Verizon has stated that "it will provision CLP-to-CLP cross-connects in the most efficient manner, whether that means provisioning a direct cross-connection between two contiguous CLPs or some other arrangement." Also, as noted hereinbefore, the FCC's *Collocation Remand Order* requires "an incumbent carrier to provide such cross-connects upon reasonable request." Furthermore, Verizon has acknowledged that if the CLP is not satisfied with a particular arrangement, it may complain to the Commission. Accordingly, the Commission concludes that Section 5.5.3 should be further modified to include the following language:

> The CLP may reasonably request the ILEC to deploy such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment. If the CLP believes that the ILEC has refused to provision the cross-connect using the most effective method, the CLP may bring a complaint to the Commission.

3. Conflict Between Section 5.5 and Section 5.5.3:

This issue was initially just briefly mentioned in Footnote 31 of Verizon's Motion for Reconsideration, wherein Verizon stated that, "[t]o the extent § 5.5 mistakenly suggests that Verizon has 'agreed' to provision cross-connects differently, it must also be stricken." This issue was further addressed in the Public Staff's comments, wherein the Public Staff pointed out that Verizon's argument supporting its Motion for Reconsideration of Section 5.5.3 appears to be contrary to Section 5.5 of the Standard Offering.

Section 5.5 sets forth general principles concerning CCXCs and pertains to both ILECs that allow CLPs to provision their own CCXCs and to ILECs that provision CCXCs for CLPs. Section 5.5, as submitted April 8, 2002, by the Parties, including Verizon, reads as follows:

> 5.5 Co-Carrier Cross-Connect (CCXC). In accordance with the FCC's Fourth Report and Order in Docket No. 98-147, the CLP may directly connect to other Interconnectors within the same ILEC Premises (including to its other virtual or physical collocated arrangements). At the request of the CLP, the ILEC must provide such co-carrier cross-connects (CCXCs), unless the ILEC allows the CLP to provision its own CCXCs or the CCXC is not required as established by 47 C.F.R. §51.323 (h) (2). **At the CLP's option, CCXCs may be made using copper, dark fiber, lit fiber, optical or electrical facilities, or other transmission medium, and may be deployed directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment.** The CLP shall be responsible for obtaining written authorization from other Interconnector(s) to which CLP intends to cross-connect. A CCXC may not be installed until the Interconnector with whom the CLP seeks to interconnect has an agreement with the ILEC containing CCXC language. (Emphasis added.)

The Commission understands that the language in Section 5.5 in conflict with Verizon's argument concerning Section 5.5.3 is the above-underlined sentence.

The Public Staff noted that Section 5.5 was submitted as undisputed, under ILEC letterhead, to the Commission on April 8, 2002. However, the Public Staff observed that if the Commission agrees with Verizon's abovementioned argument concerning Section 5.5.3, then Section 5.5 must be altered, otherwise, these two sections will be in conflict. The Public Staff was not a party to the negotiations that gave rise to Section 5.5, and thus, the Public Staff maintained that it could not speak to how the Parties meant to interpret it. Thus, the Public Staff recommended that the Parties be allowed to address this issue, if they so chose, before the Commission acts on Section 5.5.

In Verizon's response to the Public Staff's comments, Verizon stated that unfortunately the language in Section 5.5, as filed with the Commission, was not designated as disputed, even though it cannot be squared with Verizon's position on Section 5.5.3. Verizon contended that the negotiating Parties have been aware of Verizon's position throughout the negotiations and would not in any way be prejudiced by aligning Sections 5.5 and 5.5.3 so that they are consistent. Consequently, Verizon reasoned that if the Commission ultimately agrees with Verizon and the Public Staff as to the proper interpretation of the law on this issue, then Section 5.5 should be conformed to the law to avoid conflicting provisions. Thus, Verizon requested that the Commission reconsider its rulings with respect to Section 5.5 and Section 5.5.3 of the Standard Offering and order that the Standard Offering incorporate language reflecting the ILECs' positions on these issues. However, Verizon provided no specific amended language for Section 5.5.

In the record in this docket, in regard to language in conflict in Section 5.5, the Commission notes the following relevant events:

- On May 19, 2000, the Task Force filed its Third and Final Collocation Report. In its Final Report, the Task Force attached as Exhibit A a form of the Standard Offering agreed to by the CLPs and Sprint (BellSouth and Verizon did not agree to the terms). The Standard Offering filed on May 19, 2000 included four sections (1.3, 5.6, 5.6.1, & 5.6.2) relating to CCXCs, and, in particular, Section 5.6 Co-Carrier Cross-Connect, that stated in part that

  > Such connections to other carriers may be made using either optical or electrical facilities. The CLEC may deploy such optical or electrical connections directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment.

- On January 18, 2001, the CLPs and Sprint jointly filed their revised Composite Standard Offering (BellSouth and Verizon did not agree to the terms). The Standard Offering filed on January 18, 2001 included four sections (1.3, 5.6, 5.6.1, & 5.6.2) relating to CCXCs. Section 5.6 Co-Carrier Cross-Connect, included the two identical sentences as just noted above, except that CLEC was changed to CLP.

- For the Commission's consideration in resolving the outstanding issues that were ultimately addressed in its *Order Addressing Collocation Issues*, the interested parties filed their Proposed Orders and Briefs on February 16, 2001. On February 16, 2001, Verizon filed its Proposed Order and Brief and also filed its "Proposed Standard Offering Modified to Reflect the Positions Advocated by Verizon South Inc.", which included Section 5.6 Co-Carrier Cross-Connect with the same two identical sentences as referenced above in the May 19, 2000 Standard Offering, and in fact both 5.6 sections were worded entirely the same.

- The FCC's *Collocation Remand Order* was released on August 8, 2001.

- For the Commission's consideration in resolving the outstanding issues that were ultimately addressed in its *Order Addressing Collocation Issues*, the interested parties' filed their Comments on the FCC's *Collocation Remand Order* on September 14, 2001.

- BellSouth, the Public Staff, the Southeastern Competitive Carriers Association (SECCA)[1], Sprint, and Verizon all filed comments on the *Collocation Remand Order.* Summaries of these Parties' comments in regard to the terms and conditions for CCXCs were presented on Pages 208-211 in the *Order Addressing Collocation Issues,* issued December 28, 2001, under the Evidence and Conclusions for Finding of Fact No. 45 and they are provided, in part, as follows:

  - **BELLSOUTH** - Based upon the *Collocation Remand Order*, BellSouth's position was that it would provide CCXCs in accordance with the *Collocation Remand Order* and would permit CLPs to self provision CCXCs in accordance with the terms of BellSouth's Standard Offering. In its Amended Proposed Order, BellSouth filed specific language in regard to the terms and conditions for CCXCs, which it proposed for inclusion in the Standard Offering. BellSouth's Proposed Language in its Section 3.7.1 was as follows:

    > 3.7.1 Except as provided herein, the CCXC, may be provisioned through facilities owned by the CLP or through the ILEC's facilities, at the CLP's option. <u>Such connections to other carriers may be made using either optical or electrical facilities. The CLP may deploy such optical or electrical connections directly between its own facilities and the facilities of other interconnector(s) without being routed through the ILEC's equipment.</u> If the ILEC provisions the CCXC, then the connection between both CLPs will be made between the CFA termination points of both arrangements through the ILEC's Distribution Frame, DSX or LGX. The CLP may not self provision CCXC on any ILEC distribution frame, Pot Bay, DSX or LGX. The CLP is responsible for ensuring the integrity of the signal. In the event the CLP determines that signal degradation will occur, the CLP should request a four-wire cross connect arrangement. The four-wire cross connect arrangement will require that the CLP and the cross-connected CLP provide multiplexing equipment within their Collocation Space. (Emphasis added.)

[1] SECCA's members are: ITC^DeltaCom, Inc., ICG Communications, MCI WorldCom, e.spire Communications, Business Telecom, Inc., Competitive Telecommunications Association, Time Warner Telecom, NEXTLINK, Telecommunications Resellers Association, Qwest Communications, AT&T Communications of the Southern States, State Communications, US LEC Corporation, and New South Communications, Corp.

- **PUBLIC STAFF** - Based upon the *Collocation Remand Order*, the Public Staff's position was that the Standard Offering should be amended to reflect that an ILEC may, but is not required to, allow collocating CLPs to provision their own cross-connects. Further, the Public Staff stated that the Standard Offering should instead reflect that, at the request of a collocating CLP, the ILEC must provide cross-connects between equipment in the collocated space of two or more telecommunications carriers, unless the ILEC allows the CLP to provision its own cross-connects or the cross-connect is not required if the connection is requested pursuant to Section 201 of the Act, unless the CLP certifies that more than 10% of the traffic through the cross-connect is interstate. The Public Staff commented that the CLP/Sprint Standard Offering, Sections 1.3 and 5.6, et. seq., should be amended to reflect the new FCC Rule 51.323(h), (1), and (2). Specifically, the Public Staff stated that language that permits a CLP to provision and maintain its own cross-connects should be removed. However, the Public Staff did not provide specific proposed language for inclusion in the Standard Offering.

- **SECCA** - Based upon the *Collocation Remand Order*, SECCA, a member of the CLP Coalition[1], filed very limited comments pertaining to the *Collocation Remand Order*. In its comments, SECCA acknowledged that the *Collocation Remand Order* related to certain provisions of the Standard Offering. SECCA commented that the *Collocation Remand Order* requires ILECs to provision cross-connects between CLPs as unbundled network elements, subject to the provisions of Section 251 of the Act. Further, SECCA stated that "the Standard Offering as revised represents a reasonable, well-balanced compromise that should be adopted as a whole, subject to certain changes and decisions regarding disputed issues not here relevant." However, SECCA did not specifically set forth any suggested changes to the CLP/Sprint Standard Offering.

- **SPRINT** - Based upon the *Collocation Remand Order*, Sprint's position was that CLPs may no longer self-provision cross connects through common areas since their cabling and equipment is considered collocated equipment which does not meet the "necessary" standard. Sprint commented that ILECs should now be required to provide CLPs' connections using copper, dark fiber, lit fiber, or other transmission media as requested by the CLP. Sprint maintained that cross-connects should be provided to any lawfully collocated carrier, such as a connection between a CLP and a competitive transport provider. Sprint stated that the impact of the *Collocation Remand Order* upon the CLP/Sprint Standard Offering, as it pertains to cross-connects, would consist of the deletion of references to CLP provisioned cross-connects. In its Amendment to its Brief, Sprint filed specific language in regard to the terms and conditions for CCXCs, which it proposed for inclusion in the Standard Offering. Sprint's Proposed Language in its Section 5.6 was as follows:

[1] The CLP Coalition entered into a compromise Standard Offering with Sprint, which was submitted to the Commission on May 18, 2000, and was revised on January 18, 2001.

> 5.6 Co-Carrier Cross-connect. In addition to, and not in lieu of, obtaining interconnection with, or access to, the ILEC telecommunications services, unbundled network elements, and facilities, the CLP may directly connect to other Interconnectors within the designated ILEC Premises (including to its other virtual or physical collocated arrangements). Where technically feasible, the incumbent LEC shall provide the connection using copper, dark fiber, lit fiber, or other transmission medium, as requested by the collocating telecommunications carrier. <u>In immediately adjacent collocation arrangements, the CLP may deploy such optical or electrical connections directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment.</u>

- o **VERIZON** - In its filing prior to the issuance of the *Collocation Remand Order*, Verizon had stated that the CLP may directly connect to other interconnectors within the ILEC premises through facilities owned by the CLP or through ILEC facilities designated by the CLP, at the CLP's option, and that provisioning had to be implemented by an ILEC-approved, certified contractor when facilities traverse outside the CLP collocated space. However, Verizon, in its additional comments provided after the *Collocation Remand Order* was issued, briefly remarked that the *Collocation Remand Order* affected its position on this issue and concluded that its Proposed Order should be amended. In its additional comments, Verizon stated that the ILEC should provide dedicated transport service (cross-connections between collocated CLPs' arrangements) for DS0, DS1, DS3, and dark fiber circuits. Additionally, Verizon noted that the ILEC should also provide other technically feasible cross-connection arrangements, including lit fiber, on an individual case basis, as requested by a CLP. In its additional comments provided after the issuance of the *Collocation Remand Order*, Verizon provided no specific proposed language for inclusion in a Standard Offering Agreement in this regard.

- Pursuant to the Commission *Order Addressing Collocation Issues*, on April 8, 2002, the Parties filed a joint negotiated modified Standard Offering[1] which reflected by Section where the ILECs and the CLPs had differing proposals. And, as already noted, the Parties did not indicate there was any disagreement in regard to Section 5.5 <u>Co-Carrier Cross-Connect (CCXC)</u>, which, in pertinent part, stated that

> At the CLP's option, CCXCs may be made using copper, dark fiber, lit fiber, optical or electrical facilities or other transmission medium, and may be deployed directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment.

[1] The Standard Offering sets forth the terms and conditions for physical collocation arrangements furnished or made available by BellSouth, Sprint, and Verizon in the State of North Carolina pursuant to Docket No. P-100, Sub 133j.

Furthermore, pursuant to the Commission's *Order Addressing Disputed Language,* on November 18, 2002, the Parties, including Verizon, filed an ILEC/CLP negotiated Collocation Standard Offering. In that Collocation Standard Offering, Section 5.5 was worded the same as it was in the April 8, 2002 Standard Offering.

At this juncture, the Commission believes that a reasonable resolution to this conflict would be for the Commission to require that Section 5.5 be modified such that the above noted sentence, which is in conflict with the foregoing recommendations on Section 5.5.3, should be deleted and the following language should be inserted in its place:

> At the CLP's option, CCXCs may be made using copper, dark fiber, lit fiber, optical or electrical facilities, or other transmission medium. If the ILEC allows the CLP to provision its own CCXCs, the CLP may deploy such connections directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment pursuant to Section 5.5.1 following. If the ILEC provisions the CCXC for the CLP, the CLP may reasonably request the ILEC to deploy such connections directly between its own facilities and the facilities of other Interconnector(s) without being routed through the ILEC's equipment. If the CLP believes that the ILEC has refused to provision the cross-connect using the most effective method, the CLP may bring a complaint to the Commission.

Furthermore, in the *Order Addressing Disputed Language*, the Commission addressed the matter of the appropriate language to include in Section 5.5.1 which pertains to the CCXC being provisioned by the CLP. No motions for reconsideration were filed in regard to Section 5.5.1, which reads as follows:

> 5.5.1 <u>CCXC Provisioned by the CLP</u>. If the ILEC allows the CLP to provision its own cross-connects, the CLP may connect to other Interconnectors within the same ILEC Premises, using its own facilities, subject only to the same reasonable safety requirements that the ILEC imposes on its own equipment. The CLP must use an ILEC certified contractor to place the CCXC. Except in the case of contiguous caged collocation arrangements the CLP shall use common cable support structure. In the case of contiguous caged collocation arrangements, the CLP has the option of constructing its own dedicated support structure; otherwise, common cable support structure will be used. If common cable support structure is used or to be used by the CLP, there will be a recurring charge per linear foot per cable of common cable support structure used, and the ILEC will not be entitled to charge separately for the construction of such structure. The telecommunications carrier may not self-provision CCXC on any ILEC distribution frame, Pot Bay, DSX, or LGX. The CLP is responsible for ensuring the integrity of the signal.

Thus, the Commission believes it would be appropriate to include in the proposed amended language for Section 5.5, in the sentence pertaining to when the ILEC allows the CLP to self-provision the CCXC, the reference that such arrangement is allowed pursuant to Section 5.5.1.

The Commission's modifications to Section 5.5 represent a change in the language which had been previously agreed to by all Parties. Consequently, the Commission believes that it would also be appropriate to give the Parties the opportunity to file exceptions and comments on this modification to Section 5.5, if they so choose. Such filings should be required to be made at the same time as the interested parties file initial comments on BellSouth's cost study in regard to Issue No. 9, which is addressed hereinbefore.

CONCLUSIONS

The Commission grants Verizon's December 20, 2002 Motion to Respond to the December 18, 2002 Reply Comments of the Public Staff.

The Commission finds it appropriate to reconsider its original decision in regard to the appropriate wording of Section 5.5.3. The Commission concludes that (1) BellSouth's request for reconsideration should be allowed such that Section 5.5.3 should be modified to reflect that the rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. Section 201 shall be as set forth in the respective ILEC's federal tariff, (2) Section 5.5.3 should include a statement that recognizes the Commission's concurrent jurisdiction with the FCC over cross-connect disputes arising in the context of an interconnection proceeding, (3) Section 5.5.3 should be modified such that the CLP may reasonably request an ILEC to deploy the optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through an ILEC's equipment, and (4) Section 5.5.3 should include a statement acknowledging that the CLP may bring a complaint to the Commission if the CLP believes the ILEC has refused to provision the cross-connect using the most effective method. Accordingly, the Commission finds it appropriate to require that Section 5.5.3 be worded as follows:

> 5.5.3 The ILEC is not required to allow or provide a cross-connect between the equipment in the collocated spaces of two or more telecommunication carriers if the connection is requested pursuant to 47 U.S.C. Section 201, unless the CLP submits to the ILEC certification that ten (10) percent of the amount of the traffic to be transmitted through the connection will be interstate. The ILEC shall not refuse to accept the certification, but instead must, where requested by the CLP, provision the service promptly. The ILEC may file a complaint pursuant to 47 U.S.C. Section 208 with the FCC challenging the certification if it believes that the certification is deficient. The ILEC shall not require a certification for connections where such connections are being made under section 251 of the Act, as amended. Such connections to other carriers may be made using either optical or electrical facilities. The rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. Section 201 shall be as set forth in the respective ILEC's federal tariff. The Commission retains jurisdiction over disputes concerning CCXCs that arise within an interconnection proceeding, subject to the necessity of following the respective ILEC's federal tariff. The CLP may reasonably request the ILEC to deploy such optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through the ILEC's equipment. If the CLP believes that the ILEC has refused to provision the cross-connect using the most effective method, the CLP may bring a complaint to the Commission.

Further, due to the foregoing modifications to Section 5.5.3, Section 5.5 as currently written conflicts with Section 5.5.3, therefore, the Commission modifies Section 5.5 such that it should read as follows:

> 5.5 Co-Carrier Cross-Connect (CCXC). In accordance with the FCC's Fourth Report and Order in Docket No. 98-147, the CLP may directly connect to other Interconnectors within the same ILEC Premises (including to its other virtual or physical collocated arrangements). At the request of the CLP, the ILEC must provide such co-carrier cross-connects (CCXCs), unless the ILEC allows the CLP to provision its own CCXCs or the CCXC is not required as established by 47 C.F.R. §51.323 (h) (2). At the CLP's option, CCXCs may be made using copper, dark fiber, lit fiber, optical or electrical facilities, or other transmission medium. If the ILEC allows the CLP to provision its own CCXCs, the CLP may deploy such connections directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment pursuant to Section 5.5.1 following. If the ILEC provisions the CCXC for the CLP, the CLP may reasonably request the ILEC to deploy such connections directly between its own facilities and the facilities of other Interconnector(s) without being routed through the ILEC's equipment. If the CLP believes that the ILEC has refused to provision the cross-connect using the most effective method, the CLP may bring a complaint to the Commission. The CLP shall be responsible for obtaining written authorization from other Interconnector(s) to which CLP intends to cross-connect. A CCXC may not be installed until the Interconnector with whom the CLP seeks to interconnect has an agreement with the ILEC containing CCXC language.

However, since this results in a modification to language which had been previously agreed to by all Parties, the Commission will give the Parties the opportunity to file exceptions and comments on this revised Section 5.5, if they so choose. Such filings will be required to be filed by the interested parties no later than 20 days after the issuance of this Order, and thereafter, the interested parties will be given 10 days to file reply comments if any exceptions and initial comments are filed.

ISSUE NO. 12: Section 6.1.4 – Application for Multiple Methods of Collocation

INITIAL COMMISSION DECISION

The Commission found it appropriate to adopt the language as proposed by the Public Staff for Section 6.1.4 of the Standard Offering, as follows:

> 6.1.4 Multiple Methods. A CLP may submit an application with one Initial Application Fee for collocation of equipment in one location and request that it receive a response with rates and conditions for the collocation in both caged and cageless configurations. If the ILEC responds that the only option is a reduced configuration, i.e., a smaller cage or fewer bays, the CLP will be required to modify its application but will not be required to submit another application fee.

OBJECTIONS

VERIZON: Verizon objected to the Commission's decision on Issue No. 12 where the Commission held that "There is simply no need for CLPs to prioritize their requests for types of collocation, since the Commission ruled that CLPs were allowed to pay a single application fee and to request both caged and cageless collocation on a single application."[1] Essentially, Verizon argued that the failure of the Commission to require the CLPs to prioritize their requests for caged or cageless collocation was inappropriate for two reasons.

First, Verizon argued that the failure to require CLPs to prioritize their requests for collocation may force ILECs to incur unnecessary costs which will never be reimbursed. Verizon explained that the ILECs' proposed Section 6.1.4 would allow a CLP to submit a prioritized request for both caged and cageless collocation with one application fee. If the ILEC could implement the primary request, the secondary request would not be reviewed. However, if the ILEC could not accommodate the preferred arrangement, the ILEC would review the secondary request and respond with rates and conditions. Thus, Verizon submitted the prioritization arrangement would allow ILECs to avoid incurring unnecessary costs. However, Verizon complained that the language adopted by the Commission would always force ILECs to evaluate both a caged and cageless configuration and provide rate quotes and conditions for each configuration. In addition, Verizon noted that the Commission had also previously concluded that many of the infrastructure evaluations that an ILEC would undertake in evaluating applications for caged and cageless collocation of the same equipment in the same central office would be redundant.[2] In response, Verizon stated that it has found that it is sometimes more efficient to segregate caged and cageless configurations rather than to intermingle them. Therefore, Verizon submitted that it may need to perform separate evaluations of the infrastructure requirements for caged and cageless configurations.

Second, Verizon contended that the Commission's rejection of the Parties' agreement that CLPs prioritize their requests for types of collocation is arbitrary and capricious, absent a finding that the Parties' concessions during the negotiation of the Standard Offering somehow offends the public interest. In this regard, Verizon asserted that the CLPs had agreed during negotiations to indicate whether they preferred a caged or cageless configuration on their applications. Therefore, Verizon claimed the only controversy that the Commission may properly resolve is whether ILECs must review and provide rates and conditions for both configurations when the ILEC is able to accommodate the CLP's preferred request.

For these reasons, Verizon requested the Commission to reconsider its ruling with respect to Section 6.1.4 of the Standard Offering and, instead, order that the Standard Offering incorporate language reflecting the ILECs' position on this issue.

INITIAL COMMENTS

AT&T AND WORLDCOM: AT&T and WorldCom did not address this issue.

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[1] *Order Addressing Disputed Language in the Standard Offering*, p. 58.

[2] *Order Addressing Collocation Issues*, p. 54.

REPLY COMMENTS

PUBLIC STAFF: The Public Staff stated in its reply comments that it continues to believe that it is unnecessary for CLPs to prioritize their requests, as the costs of evaluating a request for either caged or cageless collocation should be negligible because much of the ILEC labor involved would be duplicative. The Public Staff also strongly disagreed with Verizon's contention that the Commission acted in an arbitrary and capricious manner and that the Commission may only resolve whether an ILEC must review and provide rates and conditions for both caged and cageless configurations when the ILEC can accommodate the CLP's first choice. The Public Staff noted that Verizon has provided no authority or support for bold statements that appear to attempt to limit the Commission's jurisdiction. The Public Staff maintained that this matter was squarely before the Commission and that the Commission fulfilled its statutory duty of acting in the public interest in making its decision. The Public Staff argued that the Commission is not required to blindly approve any agreement of parties without its own independent evaluation. Furthermore, the Public Staff stated that the Commission would be remiss if it did so. Consequently, the Public Staff urged the Commission to deny Verizon's motion for reconsideration on this issue.

DISCUSSION

In the *Order Addressing Collocation Issues*, the Commission noted that Verizon was willing to allow CLPs to pay a single application fee and to request both caged and cageless collocation on a single application. In this regard, the Commission stated that it believed Verizon's position was reasonable and should be adopted. The Commission further found it appropriate to reject the CLPs' proposal to require ILECs to consider more than caged or cageless collocation methods in a single application.

In the *Order Addressing Disputed Language*, the Commission concluded, among other things, that there is simply no need for CLPs to prioritize their requests for types of collocation, since the Commission had previously ruled that CLPs were allowed to pay a single application fee and to request both caged and cageless collocation on a single application.

Verizon alone now voices objection to the language adopted by the Commission for Section 6.1.4 of the Standard Offering.

The first basis of Verizon's objection is that the Commission's failure to require CLPs to prioritize their requests for caged or cageless collocation could cause Verizon to incur unnecessary costs without recovery because it forces Verizon to always evaluate both a caged and cageless configuration and provide rate quotes and conditions for each configuration. With regard to this argument, the Commission first notes that the Commission's decision was essentially a compromise between the ILECs, who advocated that CLPs should submit separate applications for collocation of the same equipment and the ILEC would then provide only one quote, and the CLPs, who would prioritize the type of collocation requested but could expect several quotes. Verizon fails to acknowledge that the Commission's decision allows CLPs to choose between two types of collocation depending upon differences in price. If Verizon were allowed to give only one quote, CLPs would lose the ability to compare the price of caged and cageless collocation and then decide their preference based upon the price difference. Second, as a practical matter, in a situation where Verizon is unable to accommodate one of these two configurations, Verizon's argument is moot. Finally, despite Verizon's claim that it is sometimes more efficient to segregate caged and cageless collocation which may necessitate separate evaluations for caged and cageless collocation, the Commission continues to believe that the costs of evaluating a request for either caged or cageless collocation should be negligible because much of the ILEC labor involved would be redundant. Therefore, this argument by Verizon is unpersuasive.

The second basis for Verizon's objection is its claim that the Commission has rejected a negotiated agreement and the Commission lacks the authority to do so absent a finding that such an agreement somehow offends the public interest. The Commission believes this argument is baseless for two reasons. First, as evidenced by the very fact that the ILECs and the CLPs submitted disputed language for Section 6.1.4 of the Standard Offering for resolution by the Commission, there was not a negotiated agreement which completely covered Section 6.1.4. Verizon postures as though the CLPs' concession to prioritize their preferred method of collocation is dispositive of the entire issue. However, in the comments of the CLPs filed in this docket on April 15, 2002 (in support of their version of the disputed language for Section 6.1.4), the CLPs complained that the ILECs did not commit to provide rates and other types of information for both caged and cageless collocation despite the CLPs' concession to prioritize their preferred method of collocation. Thus, Verizon's own argument is not even applicable because a negotiated agreement purporting to resolve this issue was never presented to the Commission for approval. Second, even if such a negotiated agreement was presented to the Commission for approval, the Commission is not bound by such an agreement as pointed out by the Public Staff.

CONCLUSIONS

The Commission affirms its original decision with regard to the disputed language in Section 6.1.4 of the Standard Offering.

IT IS, THEREFORE, ORDERED as follows:

1. That Verizon's December 20, 2002 Motion to Respond to the December 18, 2002 Reply Comments of the Public Staff shall be granted.

2. That the last two sentences of Section 1.2 shall be removed and replaced with the following language:

> To the extent this Standard Offering does not include all the necessary rates, terms, and conditions for ILEC Premises other than the ILEC Central Offices or Serving Wire Centers, the Parties will negotiate said rates, terms, and conditions at the request for collocation at other than a Central Office or Serving Wire Center.

3. That the last sentence of Section 3.3.1 shall be amended to read as follows:

> Should the Host or Guest CLP in a shared or subleased arrangement add equipment or augment existing collocation arrangements, the provisions set forth in Section 9 of the Standard Offering governing additions and augments shall apply.

4. That Section 5.5.3 shall be modified to reflect that the rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. Section 201 shall be as set forth in the respective ILEC's federal tariff. Section 5.5.3 shall include a statement that recognizes the Commission's concurrent jurisdiction with the FCC over cross-connect disputes arising in the context of an interconnection proceeding. Section 5.5.3 shall be modified such that the CLP may reasonably request an ILEC to deploy the optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through an ILEC's equipment. Section 5.5.3 shall include a statement acknowledging that the CLP may bring a complaint to the Commission if the CLP believes the ILEC has refused to provision the cross-connect in the most effective method.

5. That, in regard to Section 5.5.1.1, the interested parties are hereby requested to file comments addressing the appropriateness of BellSouth's proposed nonrecurring Subsequent Application Fee of $549.60 per occurrence and the underlying assumptions, including tax and common cost factors, labor hours and associated activities, and labor rates, contained in BellSouth's cost study. The Public Staff and other interested parties shall file initial comments on BellSouth's cost study, and resulting rate and related language modifications to be included in Section 5.5.1.1, by July 8, 2003, and thereafter, the interested parties shall file reply comments by July 18, 2003.

6. That, in regard to Section 5.5, the Commission has recommended certain amendments to the language as discussed herein; however, since the Commission's modifications in the language for Section 5.5 of the Standard Offering result in a modification to language which had been previously agreed to by all Parties, the interested parties are hereby given the opportunity to file exceptions and comments on the revised language for Section 5.5, if they so choose. Such filings shall be filed by the interested parties by July 8, 2003. If any exceptions and initial comments are filed, then thereafter, the interested parties shall file reply comments, by July 18, 2003.

7. That Verizon's Exception to Section 6.1.4 shall be, and is hereby, denied.

8. That, in all other respects, the Commission hereby affirms its *Order Addressing Disputed Language in the Standard Offering.*

9. That, at a time which will be specified by further order of the Commission, the Parties shall jointly file a North Carolina Collocation Standard Offering.

ISSUED BY ORDER OF THE COMMISSION.
This the 18th day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bk061703.01

DOCKET NO. P-100, SUB 133j

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Generic Proceeding on the Provisioning of Collocation Space	))))))	ORDER ADDRESSING VARIOUS ISSUES ON DISPUTED LANGUAGE AND RATES FOR AUGMENTS, ADJACENT, PHYSICAL, AND VIRTUAL COLLOCATION

BY THE COMMISSION: On December 28, 2001, the Commission issued its *Order Addressing Collocation Issues*. Following the issuance of that *Order*, several subsequent orders have been issued by the Commission; and a multitude of compliance filings and motions have been filed by interested parties and entered into evidence in this proceeding.

In order to bring cohesiveness to the matters which have been addressed up to this point and to determine what matters are still outstanding at this time, the Commission has compiled a chronological listing of its major orders and the Parties' related filings in this proceeding since December 28, 2001. Such chronology, consisting of 19 pages, is attached to this *Order* as Appendix A, for supplemental purposes only. At this juncture, based upon our review of this proceeding, the Commission believes that nine issues remain outstanding in this proceeding. However, to the extent there could be other pending issues which have been overlooked, the Commission believes it is appropriate to request that the interested parties inform us of any other unresolved issues not hereinafter mentioned in this *Order*. The unresolved issues identified by the Commission are the following:

1. In the Commission's June 18, 2003 *Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language*, in regard to Section 5.5.1.1 of the Standard Offering, the Commission required that the interested parties file comments addressing the appropriateness of BellSouth Telecommunications, Inc.'s (BellSouth's) proposed nonrecurring Subsequent Application Fee of $549.60 per occurrence and the underlying

assumptions contained in BellSouth's cost study. The Commission also required the Public Staff and other interested parties to file initial comments on any related language modifications to be included in Section 5.5.1.1. Initial comments were to be filed on July 8, 2003, and thereafter, the interested parties were required to file reply comments by July 18, 2003. The comments have now been filed. Consequently, the Commission needs to address these comments and finalize this issue. [**Commission Note:** This issue is addressed in this Order.]

2. In the Commission's June 18, 2003 *Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language,* in regard to Section 5.5 of the Standard Offering, the Commission recommended certain amendments to the language as discussed therein. However, since the Commission's modifications in the language for Section 5.5 of the Standard Offering resulted in a modification to language which had been previously agreed to by all parties, the interested parties were given the opportunity to file exceptions and comments on the revised language for Section 5.5, if they so chose. Such filings were required to be made by the interested parties by July 8, 2003. Further, if any exceptions and initial comments were filed, then thereafter, the interested parties were requested to file reply comments, by July 18, 2003. The comments have now been filed. Consequently, the Commission needs to address these comments and finalize this issue. [**Commission Note:** This issue is addressed in this Order.]

3. BellSouth, Carolina Telephone and Telegraph Company and Central Telephone Company (referred to collectively as Carolina/Central or Sprint), and Verizon South, Inc. (Verizon) will need to be required by the Commission to file their North Carolina Collocation Standard Offering, excluding Section 7 – Rates and Charges, pursuant to the Commission's findings once the outstanding disputed language issues, referenced in Issue Nos. 1 and 2 above, are resolved. [**Commission Note:** This issue is addressed in this Order.]

4. On July 28, 2003, the Public Staff filed its comments on the appropriateness of BellSouth's, Carolina/Central's, and Verizon's cost studies and resulting rates on augments and adjacent collocation rates. Consequently, the Commission needs to determine if such rates, as reflected in the incumbent local exchange companies' (ILECs') filings are appropriate. [**Commission Note:** This issue is addressed in this Order.]

5. On August 11, 2003, the Public Staff filed its comments on the appropriateness of the July 7, 2003 filings by BellSouth and Verizon of their respective cost studies and resulting rates filed in regard to the Commission's June 5, 2003 *Order Establishing Rates for Virtual Collocation, Assembly Points, Physical Collocation in a Remote Terminal, Collocation Cable Records, and Virtual Collocation in a Remote Terminal for BellSouth and Verizon.* Consequently, the Commission needs to determine if such rates, as reflected in BellSouth's and Verizon's respective filings are appropriate. [**Commission Note:** This issue is addressed in this Order.]

6. Once the disputed language issues, referenced in Issue Nos. 1 and 2 above, are resolved, the ILECs will need to be required to file proposed rates for cross-connects and cable installation for physical collocation, as well as rates for cross-connects and cable installation for adjacent collocation arrangements[1] for inclusion in the Standard Offering. Then the interested parties should be given an opportunity to file initial comments and reply comments on such proposals. [**Commission Note:** This issue is addressed in this Order.]

7. On July 8, 2003, Covad filed a letter alleging that there were certain inconsistencies in the nonrecurring charges in BellSouth's Statement of Generally Available Terms (SGAT) concerning cross-connections in the central office. The Commission requested that the interested parties file initial comments on August 4, 2003 and reply comments on August 18, 2003. Consequently, the Commission needs to address these comments and finalize this issue. [**Commission Note:** This issue will be addressed by further order.]

8. BellSouth, Carolina/Central, and Verizon, respectively, will need to be required to file their respective Standard Offering, Section 7 – Rates and Charges once the Commission has finalized all outstanding collocation rate issues. [**Commission Note:** This issue will be addressed by further order.]

9. Once all the collocation rates are finalized and deemed permanent rates for purposes of replacing interim collocation rates, the Commission will need to require that BellSouth, Carolina/Central, and Verizon provide the competing local providers (CLPs) with a final approved list of the collocation rates and allow the CLPs to question and/or dispute the ILECs' calculations of their respective true-ups[2]. The Commission will also need to require BellSouth, Carolina/Central, and Verizon to file written reports with the Commission detailing the true-up procedure no later than 90 days after final collocation rates are adopted by the Commission, as stated in its September 24, 2002 *Order Addressing Unresolved Collocation Rate Issues*, Ordering Paragraph No. 11. [**Commission Note:** This issue will be addressed by further order.]

In this *Order*, the Commission will address the first six of the nine issues listed above. The remaining three issues will be addressed in further orders.

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[1] Due to the uncertainty of the final Commission ruling on certain cross-connect issues and the apparent overlap in the cross-connect rate issue and the cable installation rate issue, the Commission, as reflected in its January 14, 2003 *Order Granting Sprint's Motion for Reconsideration Filed October 17, 2002 and Setting Rates for Augments and Adjacent Collocation*, deferred taking any action on the rates for cross-connects and cable installation for adjacent collocation elements pending resolution of the issues described in the November 14, 2002 *Order Addressing the Public Staff's November 12, 2002 Motion*.

[2] In its September 24, 2002 *Order Addressing Unresolved Collocation Rate Issues*, the Commission adopted BellSouth's, Sprint's, and Verizon's true-up proposals. The Commission found that the true-up mechanism for purposes of this proceeding should work both ways – if the interim rate for an element was higher than the permanent rate adopted by the Commission for that element, then the CLP would be due a refund and if the interim rate for an element was lower than the permanent rate adopted by the Commission for that element, then the CLP would owe money to the ILEC. The Commission also found that it was appropriate to allow the ILECs that proposed to issue bill credits, when possible, to do so.

ISSUE NO. 1 - DISCUSSION

In the Commission's June 18, 2003 *Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language*, in regard to Section 5.5.1.1 of the Standard Offering, the Commission required that the interested parties file comments addressing the appropriateness of BellSouth's proposed nonrecurring Subsequent Application Fee of $549.60 per occurrence and the underlying assumptions, including tax and common cost factors, labor hours and associated activities, and labor rates, contained in BellSouth's cost study. The Commission also required the Public Staff and other interested parties to file comments on any related language modifications to be included in Section 5.5.1.1.

In the *June 18, 2003 Order*, the discussion concerning this issue began with the following narrative:

> The last sentence in Section 5.5.1.1 of the Standard Offering is worded as follows:
>
> > No Subsequent Application Fee is required if there is no construction or installation required of the ILEC.
>
> As noted above, BellSouth is requesting that the Commission reconsider its decision on this issue such that BellSouth would be allowed to charge a Subsequent Application Fee for the CCXC. BellSouth asserted that even when no construction is required by BellSouth in response to a subsequent application for CCXC facilities, it is still necessary for a BellSouth employee to evaluate the application to determine what is required to comply with the CLP's request. At the time of filing its reply comments, BellSouth submitted a cost study to support its request for the imposition of such a fee.
>
> The Commission agrees with AT&T, WorldCom, and the Public Staff that the evidence before the Commission at the time of its initial decision was insufficient to support the imposition of a fee for ILEC labor when no construction or installation was required of the ILEC. However, BellSouth has since filed a cost study in support of its request, and AT&T, WorldCom, and the Public Staff suggested that, if BellSouth filed a cost study, the Commission should reconsider the issue. BellSouth is the only ILEC making such a request; as was noted in the *Order Addressing Disputed Language in the Standard Offering*, "BellSouth permits the CLPs to self-provision the CCXC, while Sprint and Verizon provision the CCXC for the CLP."

On July 8, 2003, initial comments were filed by only Sprint and the Public Staff, respectively, and no reply comments were filed by any party.

In its comments, Sprint stated that its subject matter experts agree with BellSouth that an ILEC would incur additional expense anytime a CLP requests a co-carrier cross-connect (CCXC). Sprint explained that Sprint's policy is to provide the entire cross-connection (labor, materials, engineering, etc.) when the placement of the cross-connect involves the common area in the central office. Further, Sprint asserted that even when two carriers are located next to one another without a common area separating them it is still imperative that the carriers comply with all applicable technical and safety standards by installing a short cable rack between their arrangements. Under these conditions, Sprint observed that additional expenses would be incurred by the ILECs. Sprint requested that the Commission approve the usage of the subsequent application fee as proposed by BellSouth.

In its comments, the Public Staff observed that in the Commission's *January 14, 2003 Order*, the Commission, in regard to BellSouth's nonrecurring rates for minor augments, required BellSouth to modify the number of hours for its Account Team Collocation Coordinator (ATCC), Interexchange Network Access Coordinator (INAC), and the Circuit Capacity Management (CCM) labor functions. Because the amount and type of labor required to perform minor augments should be quite similar to that required to review a subsequent application, the Public Staff stated that the amount of labor necessary to perform these functions in the Subsequent Application Fee should be no greater than that approved by the Commission for minor augments. Therefore, the Public Staff recommended that BellSouth be required to modify its nonrecurring charge for Subsequent Application Fee to reflect the same number of hours for ATCC, INAC, and CCM labor functions approved by the Commission for BellSouth to use in determining the nonrecurring cost for minor augments.

Additionally, the Public Staff stated that BellSouth had used the common cost factor it proposed in the "New UNE Docket" in Docket No. P-100, Sub 133d. However, the Public Staff observed that the Commission has not ruled on the appropriateness of BellSouth's common cost factor in that docket. Furthermore, the Public Staff noted that in the Commission *Order*, issued on May 23, 2003, in this docket, the Commission required BellSouth to revise it cost studies for application fees for adjacent collocation to reflect the common cost factor previously approved in Docket No. P-100, Sub 133d. Consistent with that *Order*, the Public Staff recommended that BellSouth be required to further modify its nonrecurring charge for Subsequent Application Fee to reflect the previously approved common cost factor.

Lastly, in response to the Commission's request for comments on the possible need for any further related language modifications in Section 5.5.1.1 of the Standard Offering, the Public Staff stated that no further changes to the language in Section 5.5.1.1 are necessary.

Based upon the comments, the Commission finds that the matter of allowing the usage of a subsequent application fee, as proposed by BellSouth, is uncontroversial; and, thus, the Commission agrees that the usage of such a fee, as proposed by BellSouth, is reasonable. However, the actual proposed rate of $549.60 per occurrence is in dispute. Based upon the foregoing, the Commission agrees with the Public Staff that BellSouth's proposed rate should be revised. The Commission agrees with the Public Staff that its recommended labor time and common cost modifications are appropriate. The Commission believes it is reasonable to assume that the amount and type of labor required to perform minor augments should be similar to that required to review a subsequent application. The Commission also believes for purposes of developing the rate for a subsequent application fee that BellSouth's common cost factor should be consistent with the factor previously approved in Docket No. P-100, Sub 133d, as other prior orders in Docket No. P-100, Sub 133j, likewise, have required such compliance. Thus, BellSouth should be required to revise its cost study and resulting rate for the Subsequent Application Fee.

Furthermore, since the Commission has accepted that the usage of such a fee, as proposed by BellSouth is reasonable, the Commission believes that Section 5.5.1.1, as previously approved by the Commission in its September 3, 2002 *Order Addressing Disputed Language in the Standard Offering* should be modified by deleting the last sentence, which reads as follows:

> No Subsequent Application Fee is required if there is no construction or installation required of the ILEC.

ISSUE NO. 1 - CONCLUSIONS

The Commission concludes that BellSouth's proposal to charge a nonrecurring Subsequent Application Fee is appropriate. However, BellSouth's proposed amount for the fee should be modified such that the rate should be developed based upon (1) the Commission's previously approved common cost factor and (2) the same number of hours for ATCC, INAC, and CCM labor functions, as previously approved by the Commission for use by BellSouth in determining the nonrecurring cost for minor augments. Accordingly, the Commission finds that it is appropriate to require BellSouth to refile its cost study and resulting rate, in accordance with the foregoing modifications, within 20 days after the issuance of this *Order*. Thereafter, within 15 days, the Public Staff should be requested to file comments as to whether such cost study is in compliance.

In addition, the Commission finds that the wording of Section 5.5.1.1 of the Standard Offering, should be worded as approved by the Commission in its September 3, 2002 *Order*, except that the last sentence should be deleted. Consequently, Section 5.5.1.1 should be worded as follows:

> 5.5.1.1 The telecommunications carrier may order CCXC in its initial Application. In the Application, the telecommunications carrier must include the type of cross-connect facilities to be used, the name of the telecommunications carrier(s) to whom the CCXC is to be routed, and a copy of the authorization from all other telecommunications carriers involved. If the telecommunications carrier, or the telecommunications carrier's Guest(s) in a shared arrangement, desires to order CCXC after the Bona Fide Firm Order, the telecommunications carrier must submit to the ILEC a complete Subsequent Application containing the same CCXC information as required in an initial Application. If the telecommunications carrier submits a Subsequent Application for CCXC only, the Subsequent Application fee for CCXC will be assessed pursuant to Section 7. If the telecommunications carrier submits a Subsequent Application for CCXCs in addition to other modifications to the Collocation Space, a Subsequent Application Fee will be assessed pursuant to Section 7.

ISSUE NO. 2 - DISCUSSION

In the Commission's June 18, 2003 *Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language,* in regard to Section 5.5 of the Standard Offering, the Commission recommended certain amendments to the language as discussed therein. However, since the Commission's modifications in the language for Section 5.5 of the Standard Offering resulted in a modification to language which had been previously agreed to by all parties, the interested parties were given the opportunity to file exceptions and comments on the revised language for Section 5.5, if they so chose.

Initial comments in this regard were filed on July 8, 2003, by only the Public Staff and no reply comments were filed. The Public Staff stated that it found the Commission's modification to Section 5.5 of the Standard Offering to be satisfactory. Accordingly, the Commission considers this matter resolved, such that Section 5.5 of the Standard Offering should be worded as recommended by the Commission in its June 18, 2003 *Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language.*

ISSUE NO. 2 – CONCLUSIONS

Consistent with the Commission's *June 18, 2003 Order,* the Commission concludes that Section 5.5 of the Standard Offering should be worded as follows:

> 5.5 <u>Co-Carrier Cross-Connect (CCXC)</u>. In accordance with the FCC's Fourth Report and Order in Docket No. 98-147, the CLP may directly connect to other Interconnectors within the same ILEC Premises (including to its other virtual or physical collocated arrangements). At the request of the CLP, the ILEC must provide such co-carrier cross-connects (CCXCs), unless the ILEC allows the CLP to provision its own CCXCs or the CCXC is not required as established by 47 C.F.R. §51.323 (h) (2). At the CLP's option, CCXCs may be made using copper, dark fiber, lit fiber, optical or electrical facilities, or other transmission medium. If the ILEC allows the CLP to provision its own CCXCs, the CLP may deploy such connections directly between its own facilities and the facilities of other Interconnector(s) without being routed through ILEC equipment pursuant to Section 5.5.1 following. If the ILEC provisions the CCXC for the CLP, the CLP may reasonably request the ILEC to deploy such connections directly between its own facilities and the facilities of other Interconnector(s) without being routed through the ILEC's equipment. If the CLP believes that the ILEC has refused to provision the cross-connect using the most effective method, the CLP may bring a complaint to the Commission. The CLP shall be responsible for obtaining written authorization from other Interconnector(s) to which CLP intends to cross-connect. A CCXC may not be installed until the Interconnector with whom the CLP seeks to interconnect has an agreement with the ILEC containing CCXC language.

ISSUE NO. 3 – DISCUSSION

Due to the foregoing conclusions by the Commission provided in Issue Nos. 1 and 2 hereinabove, there are no longer any unresolved disputed language issues to be addressed. However, there are still outstanding collocation rate issues that will need to be resolved. Thus, each ILEC's, i.e., BellSouth, Carolina/Central, and Verizon, respective Standard Offering, Section 7 – Rates and Charges cannot be finalized at this time. However, it is the Commission's understanding that all other Sections of the Standard Offering, i.e., Sections 1-6 and Sections 8-20, are to be the same standard language for BellSouth, Sprint, and Verizon. Consequently, the Commission believes it is now an appropriate time to require BellSouth, Sprint, and Verizon to jointly file their North Carolina Collocation Standard Offering, excluding Section 7 – Rates and Charges, pursuant to the Commission's findings in this *Order* and prior applicable *Orders* including the September 3, 2002 *Order Addressing Disputed Language in the Standard Offering* and the June 18, 2003 *Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language.*

ISSUE NO. 3 – CONCLUSIONS

The Commission concludes that it is appropriate to require BellSouth, Sprint, and Verizon to jointly file their North Carolina Collocation Standard Offering, excluding Section 7 – Rates and Charges, pursuant to the Commission's findings in this Order and all prior applicable *Orders*. The Commission also reminds the ILECs that the Standard Offering, as previously required by the Commission, should include a table of contents. Such joint filing by the ILECs of the Standard Offering should be made within 30 days after the issuance of this *Order*.

ISSUE NO. 4 - DISCUSSION

The Commission initially addressed the need for modifications to the ILECs' augments and adjacent collocation rates in its January 14, 2003 *Order Granting Sprint's Motion for Reconsideration Filed October 17, 2002 and Setting Rates for Augments and Adjacent Collocation.*

In regard to rates for augments, in the *January 14, 2003 Order*, the Commission required BellSouth, Carolina/Central, and Verizon to file revised augment collocation cost studies by no later than February 13, 2003. In regard to rates for adjacent collocation, in said *Order*, the Commission required BellSouth and Carolina/Central to file revised cost studies on adjacent collocation - application fees by no later than February 13, 2003.

In regard to Verizon, the Commission found that Verizon "is required to provide rates for AC or DC power to an adjacent collocation space upon request, unless it can show that such a request is technically infeasible." Thus, in accordance with Ordering Paragraph No. 10 of the *January 14, 2003 Order*, "if an ILEC receives a request to provide power to an adjacent collocation space, within 45 days the ILEC and the CLP must either (a) negotiate a mutually agreed-upon price or (b) the ILEC must submit a cost study and proposed generic rates for providing power to adjacent collocation spaces for Commission approval." Further, in regard to Verizon's adjacent collocation rates, the Commission observed in its *January 14, 2003 Order* that "On December 9, 2002, Verizon filed a letter with the Commission stating that it agrees that, as outlined by the Public Staff in its November 26, 2002 comments, the adjacent collocation rates numbered 67-89 in Verizon's cost study should be labeled as monthly recurring charges (and not nonrecurring charges)." Consequently, in regard to adjacent collocation, for Verizon there were no outstanding unaddressed issues and Verizon made no further adjacent collocation cost study filings.

On February 3, 2003, BellSouth filed its cost study for adjacent collocation application fee and its revised cost study for collocation augment rates.

On February 12, 2003, the Commission issued an *Order*, wherein it found that the time for filing adjacent collocation cost studies should be extended until three weeks after the Commission rules on any motions for reconsideration that may be filed in regard to its *January 14, 2003 Order*. In its *February 12, 2003 Order*, the Commission also stated that it found no reason to alter the schedule established in the Commission's *January 14, 2003 Order* for augment rates. Accordingly, the augment cost studies were to be filed on February 13, 2003.

On February 13, 2003, Sprint and Verizon filed their respective cost studies for collocation augment rates.

Subsequently, on May 23, 2003, the Commission issued its *Order Granting, In Part, Sprint's Motion for Reconsideration and Ruling on BellSouth's Rate for Adjacent Collocation - Application Fee*. In said *Order*, the Commission required BellSouth, Sprint, and Verizon to revise their adjacent collocation cost studies in accordance with that *Order* and with the Commission's *January 14, 2003 Order* and to file new cost studies and revised rates by June 23, 2003. However, the *May 23, 2003 Order*, only addressed matters of concern for BellSouth and Sprint in regard to the appropriate number of labor hours to be reflected in the development of their respective rates for adjacent collocation application fees. It was also noted in the *Order* that based upon the Commission's review of the rates proposed by Verizon, as outlined in the Commission's *September 24, 2002 Order*, Pages 22 and 23, it did not appear that Verizon proposed a rate for an application fee for adjacent collocation. The *May 23, 2003 Order* also required the Public Staff to file comments on Sprint's, BellSouth's, and Verizon's revised adjacent collocation cost studies and rates by July 14, 2003. However, by further *Order*, the time for the Public Staff to file comments was extended until July 28, 2003.

On June 23, 2003, BellSouth filed further revisions to its adjacent collocation application fees cost studies filed on February 3, 2003. BellSouth stated that its revisions to its adjacent collocation application fees were in compliance with the Commission's *Order* dated May 23, 2003, which required BellSouth to file a revised cost study using the common and shared cost factor previously approved in Docket No. P-100, Sub 133d.

On June 23, 2003, Sprint filed its revised adjacent collocation cost study.

On July 28, 2003, the Public Staff filed its comments on the appropriateness of BellSouth's, Carolina/Central's, and Verizon's cost studies and resulting rates on augments and adjacent collocation rates.

In regard to augments, the Public Staff stated that it has reviewed the cost studies on augments filed by BellSouth, Carolina/Central, and Verizon and believes the studies comply with the Commission's *January 14, 2002 Order*.

In regard to adjacent collocation application fees, the Public Staff observed that the changes required by the Commission's *January 14, 2003 Order* and the *May 23, 2003 Order* did not appear to affect Verizon's adjacent collocation application fees; and thus, Verizon did not file a revised cost study for adjacent collocation application fees. Further, the Public Staff stated that it has reviewed the cost studies on adjacent collocation application fees filed by BellSouth and Carolina/Central and believes that they comply with the Commission's *January 14, 2003 Order* and the *May 23, 2003 Order*.

Based upon our review of the filings, the Commission agrees with the Public Staff that the cost studies for augments filed by Carolina/Central and Verizon are consistent with the Commission's *January 14, 2002 Order* and that the cost studies on adjacent collocation application fees filed by BellSouth and Carolina/Central are consistent with the Commission's *January 14, 2003 Order* and the *May 23, 2003 Order*. However, the Commission finds that there is a problem with BellSouth's proposed rates for augments in that they do not reflect the common cost factor previously approved by the Commission. Consistent with the Commission's *May 23, 2003 Order*, wherein the Commission required BellSouth to revise its cost study for application fees for adjacent collocation to reflect the common cost factor previously approved in Docket No. P-100, Sub 133d, the Commission considers it to be equally appropriate here that BellSouth's cost studies should have been developed using such previously approved factor. Consistent with that *Order*, the Commission believes that it would be appropriate for BellSouth to be required to revise its nonrecurring rates for augments to reflect the previously approved common cost factor.

The rates that were filed by BellSouth, Carolina/Central, and Verizon, in this regard, are as follows:

BellSouth – Nonrecurring Rates for Augments – Physical Collocation

Augment Existing Space – Simple	$ 272.74
Augment Existing Space – Simple – Disconnect Only	1.16
Augment Existing Space – Minor	498.73
Augment Existing Space – Minor – Disconnect Only	1.16
Augment Existing Space – Intermediate	1,023.00
Augment Existing Space – Intermediate – Disconnect Only	1.16
Augment Existing Space – Major	2,369.00
Augment Existing Space – Major – Disconnect Only	1.16

BellSouth – Nonrecurring Rates for Adjacent Collocation

Adjacent Collocation – Application Cost	$2,266.00
Adjacent Collocation – Application Cost – Disconnect Only	0.5842

Carolina/Central– Nonrecurring Rates for Augments– Physical Collocation

Simple	$ 287.20
Minor	463.45
Intermediate	1,066.54
Major	1,336.60

Carolina/Central – Nonrecurring Rate for Adjacent On-Site Collocation

Application Fee	$2,347.42

Verizon – Nonrecurring Rates for Augments – Physical Collocation

Simple	$ 199.42
Minor	496.79
Intermediate	846.48
Major	1,071.73

ISSUE NO. 4 - CONCLUSIONS

The Commission finds that the cost studies for augments filed by Carolina/Central and Verizon are consistent with the Commission's *January 14, 2002 Order* and that the cost studies on adjacent collocation application fees filed by BellSouth and Carolina/Central are consistent with the Commission's *January 14, 2003 Order* and the *May 23, 2003 Order*. Accordingly, the Commission approves each ILEC's respective resulting rates, as listed above, except that the Commission is not approving BellSouth's proposed rates for augments. In regard to BellSouth's proposed rates for augments, the Commission requires BellSouth to resubmit its nonrecurring rates for augments to reflect the previously approved common cost factor. Such filing should be made within 20 days after the issuance of this *Order*. Thereafter, within 10 days, the Public Staff should be requested to file comments as to whether such cost studies and resulting rates are in compliance.

ISSUE NO. 5 – DISCUSSION

On June 5, 2003, the Commission issued its *Order Establishing Rates for Virtual Collocation, Assembly Points, Physical Collocation in a Remote Terminal, Collocation Cable Records, and Virtual Collocation in a Remote Terminal for BellSouth and Verizon*[1] In said *Order*, the Commission adopted several rates for BellSouth and Verizon in this regard. However, some further compliance filings were required by the Commission. In particular, the Commission required Verizon to alter its Virtual Card Installation cost study to reflect:

[1] On August 7, 2002, the Commission issued its *Order Revising Scheduling Order concerning Order Setting Hearing on Certain Collocation Elements*. The Commission set the hearing in this regard for the restricted purpose of setting permanent rates for virtual collocation, assembly points, physical collocation in a remote terminal, collocation cable records, and virtual collocation in a remote terminal on behalf of BellSouth and any other ILEC to which Docket No. P-100 Sub 133j was applicable which indicated that it wished to participate. On August 14, 2002, Verizon filed a letter advising the Commission that it would participate in the process of setting rates for these collocation elements. Carolina/Central was not a participant in this phase of the proceeding.

(1) 30 minutes of Central Office Equipment Engineering Hours and (2) no more than 15 minutes of travel time per base unit in the Central Office Equipment Installation Tech Hours. The Commission found it appropriate to require Verizon to alter its Virtual Software Upgrades cost study to reflect no more than 15 minutes of travel time per base unit in Labor Hours per Software Upgrade. In regard to BellSouth's proposed rates for physical collocation in a remote terminal and virtual collocation in a remote terminal, the Commission required BellSouth to revise its cost study inputs to reflect the actual percentages of cabinets, huts, and controlled environmental vaults (CEVs) in operation within North Carolina, unless BellSouth could demonstrate to the Commission that there was a reasonable basis for doing otherwise. Accordingly, in its *June 5, 2003 Order*, the Commission required BellSouth and Verizon to file revised cost studies and resulting rates to reflect the foregoing revisions which had been outlined therein, by July 7, 2003. The *Order* also requested the Public Staff to file comments on the compliance of BellSouth's and Verizon's revised cost studies and resulting rates with the *June 5, 2003 Order*. Said comments were to be filed by July 28, 2003. However, by further *Order*, the time for the Public Staff to file comments was extended until August 11, 2003.

On July 7, 2003 BellSouth and Verizon filed their respective cost studies and resulting rates, as required by the *June 5, 2003 Order*.

On August 11, 2003, the Public Staff filed its comments concerning BellSouth's and Verizon's aforesaid filings. The Public Staff observed that the Commission required BellSouth to revise its proposed rates for physical and virtual collocation in a remote terminal to reflect actual percentages of cabinets, huts, and CEVs in operation in North Carolina. The Public Staff also observed that the Commission required Verizon to modify various labor hours in calculating the rate for virtual card installation. The Public Staff stated that it believes that BellSouth's and Verizon's respective cost studies as filed on July 7, 2003, are in compliance with the Commission's *June 5, 2003 Order*.

Based upon our review of the filings, the Commission agrees with the Public Staff that the cost studies for physical and virtual collocation in a remote terminal filed by BellSouth and the cost studies for virtual card installation and virtual software upgrades filed by Verizon are consistent with the Commission's *June 5, 2003 Order*. The Commission also notes that in BellSouth's July 7, 2003 filing it noted that it was also revising its other rates for virtual collocation, assembly points, and collocation cable records to reflect the common cost factor previously approved by the Commission in Docket No. P-100, Sub 133d. Consistent with the Commission's *May 23, 2003 Order*, wherein the Commission required BellSouth to revise its cost study for application fee for adjacent collocation to reflect the common cost factor previously approved in Docket No. P-100, Sub 133d, the Commission considers it to be equally appropriate here that BellSouth's cost studies should have been developed using the previously approved common cost factor. The rates that were filed by BellSouth and Verizon, in this regard, are as follows:

BellSouth – Monthly Recurring Rates for Virtual Collocation

Cable Support Structure, per EntranceCable	$13.28
2-Wire Cross-Connects	0.0225
4-Wire Cross-Connects	0.0449
DS1 Cross-Connects	0.4195
DS3 Cross-Connects	4.41
2-Fiber Cross-Connects	1.96
4-Fiber Cross-Connects	3.93

BellSouth – Nonrecurring Rates for Virtual Collocation

Application Cost	$1,195.00
Application Cost – Disconnect Only	1.15

BellSouth – Nonrecurring First and Additional Rates for Virtual Collocation

	First	Additional
Maintenance in the CO – Basic, per ½ hr.	$52.03	$21.22
Maintenance in the CO – Overtime, per ½ hr.	69.48	27.81
Maintenance in the CO – Premium, per ½ hr.	86.94	34.40

BellSouth – Monthly Recurring Rates for Assembly Points

2-Wire Cross-Connects	$0.2758
4-Wire Cross-Connects	0.5516
DS1 Cross-Connects	6.51

BellSouth – Monthly Recurring Rate for Physical Collocation in Remote Terminal

Per Bay/Rack of Space	$218.07

BellSouth – Nonrecurring Rates for Physical Collocation in Remote Terminal

Application Fee	$589.38
Application Fee – Disconnect Only	258.38
Space Availability Report, per Premises Requested	215.55
Remote Site CLLI Code Request, per CLLI Code Requested	70.65

BellSouth – Nonrecurring Initial and Subsequent Rates for Collocation Cable Records

	Initial	Subsequent
Per Request	$1,458.00	$ 937.29
Per Request – Disconnect Only	245.00	245.00
Per VG/DSO Record	622.69	622.69
Per VG/DSO Record - Disconnect Only	346.35	346.35
Per Each 100 Pair VG/DSO	8.77	8.77
Per Each 100 Pair VG/DSO – Disconnect Only	10.32	10.32
DS1, per T1 TIE	4.35	4.35
DS1, per T1 TIE – Disconnect Only	5.11	5.11
DS3, per T3 TIE	15.22	15.22
DS3, per T3 TIE – Disconnect Only	17.90	17.90
Per Each Fiber Record	163.61	163.61
Per Each Fiber Record – Disconnect Only	143.32	143.32

BellSouth – Monthly Recurring Rate for Virtual Collocation in Remote Terminal

Per Bay/Rack of Space	$218.07

BellSouth – Nonrecurring Rates for Virtual Collocation in Remote Terminal

Application Fee	$589.38
Application Fee – Disconnect Only	258.38
Space Availability Report, per Premises Requested	215.55
Remote Site CLLI Code Request, per CLLI Code Requested	70.65

Verizon – Nonrecurring Rates

Virtual Software Upgrades	$ 70.28
Virtual Card Installation	100.32

ISSUE NO. 5 - CONCLUSIONS

The Commission concludes that the cost studies for physical and virtual collocation in a remote terminal filed by BellSouth and the cost studies for virtual card installation and virtual software upgrades filed by Verizon are consistent with the Commission's *June 5, 2003 Order*. The Commission also finds it appropriate to adopt BellSouth's July 7, 2003 revision of its other rates for virtual collocation, assembly points, and collocation cable records to reflect the common cost factor previously approved by the Commission. Accordingly, the Commission approves the resulting rates, as listed above.

ISSUE NO. 6 - DISCUSSION

In the Commission's September 24, 2002 *Order Addressing Unresolved Collocation Rate Issues*, the Commission initially addressed BellSouth's, Sprint's, and Verizon's proposed rates for cross-connects and cable installation for physical collocation. In said *Order*, in this regard, the Commission expressed its disappointment in the lack of negotiating that occurred on these issues and stated that

> The Commission was anticipating receiving Supplemental Briefs which clearly outlined the areas of agreement and the specific areas of disagreement. Instead, the Supplemental Briefs indicate that the CLPs do not entirely understand the rates proposed by the ILECs, and the ILECs do not entirely understand why the CLPs disagree with certain proposed rates. The Commission believes that the Parties should have done a much better job in communicating with one another and made a true attempt at negotiation.

With that being said, and based upon the comments filed at that time, the Commission concluded that it was appropriate to request that the Public Staff file written comments on the disputed cross-connect and cable installation rates proposed by BellSouth, Sprint, and Verizon by November 13, 2002. However, in the Commission's November 14, 2002 *Order Addressing the Public Staff's November 12, 2002 Motion*, the Commission stayed those requirements of the Commission's September 24, 2002 *Order Addressing Unresolved Collocation Rate Issues* until further Commission notice "due to the uncertainty of the final Commission ruling on certain cross-connect issues and the apparent overlap in the cross-connect rate issue and the cable installation rate issue."

Further, in its January 14, 2003 *Order Granting Sprint's Motion for Reconsideration Filed October 17, 2002 and Setting Rates for Augments and Adjacent Collocation*, the Commission noted that the motions for reconsideration on the disputed language in the Standard Offering needed to be resolved before any further action could be taken concerning the disputed rates for cross-connects and cable installation. In particular, in Ordering Paragraph No. 1 of said *Order*, the Commission noted that currently Ordering Paragraphs Nos. 1[1] and 3[2] from the *September 24, 2002 Order* have been suspended and that the Parties will be able to move forward on those Ordering Paragraphs after the Commission issues its order on the Motions for Reconsideration filed in response to the Commission's September 3, 2002 *Order Addressing Disputed Language in the Standard Offering.* Subsequently, on June 18, 2003, the Commission issued its *Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language.*

Due to the foregoing conclusions by the Commission in Issue Nos. 1 and 2 hereinabove, there are no longer any unresolved disputed language issues to be addressed. Thus, the Commission believes it is now time to proceed with establishing a process whereby the outstanding issues relating to rates for cross-connects and cable installation for physical

[1] Ordering Paragraph No. 1 stated "That the Public Staff is requested to file written comments on the disputed cross-connect rates proposed by BellSouth, Sprint, and Verizon by no later than Wednesday, November 13, 2002."

[2] Ordering Paragraph No. 3 stated "That the Public Staff is requested to file written comments on the disputed cable installation rates proposed by BellSouth, Sprint, and Verizon by no later than Wednesday, November 13, 2002."

collocation and rates for cross-connects and cable installation for adjacent collocation arrangements can be addressed by the parties. The Commission is unsure at this point as to how the Commission's ultimate resolutions of the disputed language changes regarding CCXCs may have impacted any prior proposed rates submitted by the ILECs in this regard. The Commission also recognizes that matters concerning fiber cross-connects, as discussed in the *January 14, 2003 Order* may have some impact on the ILECs' initially proposed rates, but they may not. The Commission is also aware that certain aspects of cross-connect rates have been raised in the July 3, 2003 letter filed by Covad alleging that BellSouth intends to change two nonrecurring charges from its SGAT for cross-connections in its central office; and comments have been filed and it is planned that that issue, referenced hereinbefore as Issue No. 7, will be addressed by further order.

In light of the foregoing, in order to proceed toward the resolution of disputed issues relating to rates for cross-connects and cable installation for physical collocation and rates for cross-connects and cable installation for adjacent collocation arrangements, the Commission believes that a reasonable approach would be to first have each respective ILEC, i.e., BellSouth, Carolina/Central, and Verizon, resubmit its proposed rates[1] in this regard; and if rates are being revised since prior filings, such revisions will need to be clearly indicated and the underlying cost studies will need to be submitted. Further, such filings should clearly indicate the rates that the respective ILEC believes to be accepted by the CLPs and those that it believes to be in dispute. Each ILEC also needs to include supporting arguments[2] for each of its proposals with sufficient detail to enable the Public Staff and other interested parties to file initial comments, to be followed up with reply comments.

ISSUE NO. 6 - CONCLUSIONS

The Commission finds it appropriate to require BellSouth, Carolina/Central, and Verizon to resubmit their proposed rates for cross-connects and cable installation for physical collocation and their proposed rates for cross-connects and cable installation for adjacent collocation arrangements. If any such proposed rates have been revised since they were last filed in this proceeding, then the ILEC will also need to provide its underlying cost studies. Such filings should indicate the rates that the respective ILEC believes to be accepted by the CLPs and those that it believes to be in dispute and the ILEC needs to provide supporting arguments for each of its proposals. Such filings should be made by the ILECs within 20 days after the issuance of this *Order*. Thereafter, within 20 days, the Public Staff and other interested parties should file initial comments, and thereafter, within 20 days, reply comments by the interested parties should be filed.

[1] To the extent the cost studies for such proposed rates have been previously provided in this proceeding, the ILEC should reference such studies by the filing date or other information deemed to be helpful in identifying such cost studies. In addition, BellSouth may need to check its proposed rates to be certain that it has used its approved common cost factor in its underlying cost studies.

[2] To the extent the ILEC does not find the need to provide any further supporting arguments for particular rates for which the ILEC has already addressed in a prior filing, then if the ILEC believes such prior discussion to be sufficient, such prior filings should be referenced by an abbreviated description, including date and pertinent page numbers such that the information can be readily retrieved.

IT IS, THEREFORE, ORDERED as follows:

1. That, in regard to BellSouth's proposal to charge a nonrecurring Subsequent Application Fee, BellSouth shall modify its related cost study such that it shall reflect (1) the Commission's previously approved common cost factor and (2) the same number of hours for ATCC, INAC, and CCM labor functions, as previously approved by the Commission for use by BellSouth in determining the nonrecurring cost for minor augments. BellSouth shall resubmit its cost study and resulting rate on or before Tuesday, September 23, 2003. Thereafter, on or before Wednesday, October 8, 2003, the Public Staff is requested to file comments as to whether such cost study is in compliance.

2. That the wording of Section 5.5.1.1 of the Standard Offering, shall be modified to be worded as approved by the Commission in its September 3, 2002 *Order Addressing Disputed Language in the Standard Offering*, except that the last sentence shall be deleted.

3. That the wording of Section 5.5 of the Standard Offering shall be worded as previously proposed by the Commission in its June 18, 2003 *Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language*.

4. That BellSouth, Sprint, and Verizon shall jointly file their North Carolina Collocation Standard Offering, excluding Section 7 – Rates and Charges, pursuant to the Commission's findings in this Order and all prior applicable *Orders*, on or before Friday, October 3, 2003.

5. That the collocation rates for augments filed by Carolina/Central and Verizon and the rates for adjacent collocation application fees filed by BellSouth and Carolina/Central are hereby approved.

6. That BellSouth is hereby required to modify its nonrecurring rates for augments to reflect the previously approved common cost factor. BellSouth shall file its revised cost studies for augments on or before Tuesday, September 23, 2003. Thereafter, on or before Friday, October 3, 2003, the Public Staff is requested to file comments as to whether such cost studies are in compliance.

7. That the rates for physical and virtual collocation in a remote terminal filed by BellSouth and the rates for virtual card installation and virtual software upgrades filed by Verizon are hereby approved. In addition, BellSouth's rates for virtual collocation, assembly points, and collocation cable records, as revised by BellSouth on July 7, 2003, are hereby approved.

8. That BellSouth, Carolina/Central, and Verizon shall each resubmit their proposed rates for cross-connects and cable installation for physical collocation and their proposed rates for cross-connects and cable installation for adjacent collocation arrangements. If any such proposed rates have been revised since they were last filed in this proceeding, then the ILEC shall provide its underlying cost studies in support of such rates. Such filings shall clearly indicate the rates that the respective ILEC believes to be accepted by the CLPs and those that it believes to be in dispute; and the ILEC shall provide supporting arguments for each of its

proposals. Such filings shall be provided by the ILECs on or before Tuesday, September 23, 2003. Thereafter, on or before Monday, October 13, 2003, the Public Staff and other interested parties shall file initial comments. Thereafter, on or before Monday, November 3, 2003, reply comments by the interested parties shall be filed.

9. That the interested parties are requested to inform the Commission of any other unresolved issues not mentioned in this *Order* by filing comments, in this regard, on or before Tuesday, September 23, 2003.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of September, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

bk090203.01

APPENDIX A

CHRONOLOGY OF MAJOR ORDERS AND RELATED FILINGS SINCE 12/28/01 IN DOCKET NO. P-100, SUB 133J

[**Note:** The shaded text herein denotes matters which are outstanding.]

▶ **12/28/01** Order Addressing Collocation Issues

- Ordering Paragraph No. 1 required the filing of a Standard Offering and it required the Standard Offering to include a table of contents. [Commission Note: Revised by 1/22/02 Order, 2/27/02 Order, and subsequently revised by 4/1/02 Order, such that the Standard Offering was to be filed on 4/8/02.]

- Ordering Paragraph No. 2 concerning process of expedited filings of cost studies, required the Public Staff to review filings and submit comments.

- Ordering Paragraph No. 3 required BellSouth, Carolina/Central (Sprint), and Verizon to file their collocation rates as set forth therein. [Commission Note: Revised by 1/22/02 Order and subsequently revised by 2/27/02 Order, such that filing date was to be 4/1/02. BellSouth and Sprint filed on 4/1/02 and Verizon filed on 4/8/02.]

- Ordering Paragraph No. 5 required the Parties to attempt to negotiate appropriate rates for inclusion in the Standard Offering for cross-connects, cable installation, augments, adjacent collocation, and premises space reports by January 28, 2002 and provided that if such rates are not negotiated, the Parties are instructed to file Supplemental Briefs discussing these issues in more depth by February 11, 2002. [Commission Note: Revised by 1/22/02 Order, 2/27/02 Order, and subsequently revised by 4/1/02 Order, such that the Supplemental Briefs were to be filed on 4/22/02.]

- Ordering Paragraph No. 6 stated "that after approval by the Commission, the rates filed pursuant to this Order shall be deemed permanent prices pursuant to Section 252(d) of TA96 for purposes of replacing interim prices adopted in Docket No. P-100, Sub 133d."

- Ordering Paragraph No. 7 stated "that BellSouth, Carolina/Central, and Verizon shall, by February 26, 2002, 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. [Commission Note: Revised by 1/22/02 Order, 2/27/02 Order and subsequently revised by 4/1/02 Order, such that refund proposals were to filed on 5/6/02.]

► **1/17/02** Parties filed Joint Motion for Extension of Time

► **1/22/02** Order Granting Extension of Time

- Commission adopted the following schedule:

    1. Modified Standard Offering to be filed by March 1, 2002.

    2. Cost studies and resulting rates to be filed by March 1, 2002.

    3. Rate negotiations to be completed by March 5, 2002, and if rate negotiations fail, supplemental briefs to be filed by March 15, 2002.

    4. The ILECs' respective proposals for refunding 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 to be filed by March 28, 2002.

► **2/22/02** Parties filed Joint Motion for Extension of Time

► **2/22/02** Verizon filed Motion for Reconsideration and Clarification of December 28, 2001 Order

► **2/25/02** Sprint filed Motion for Reconsideration and Clarification of December 28, 2001 Order

► **2/26/02** BellSouth filed Motion for Reconsideration and Clarification of December 28, 2001 Order

► **2/27/02** Order Granting Joint Motion for Extension of Time

- Commission adopted the following schedule:

  1. Modified Standard Offering to be filed by April 1, 2002.

  2. Cost studies and resulting rates to be filed by April 1, 2002.

  3. Rate negotiations to be completed by April 5, 2002, and if rate negotiations fail, supplemental briefs to be filed by April 15, 2002.

  4. The ILECs' respective proposals for refunding 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 to be filed by April 29, 2002.

▶ **3/12/02** Order Requesting Comments and Reply Comments on Motions for Reconsideration and Clarification

- Initial comments due March 26, 2002.

- Reply Comments due April 9, 2002.

▶ **4/1/02** Filing by Carolina and Central of Confidential Portion of Cost Studies

▶ **4/1/02** Filing by Carolina and Central of Cost Studies

▶ **4/1/02** Filing by BellSouth of Confidential Portion of Cost Study

▶ **4/1/02** Filing by BellSouth of Cost Study

▶ **4/1/02** Filing by BellSouth of Its Rate Sheets

▶ **4/1/02** Order Granting Joint Motion for Extension of Time

- Commission adopted the following schedule:

  1. Modified Standard Offering to be filed by April 8, 2002.

  2. Any briefs or comments discussing the Parties' respective language proposals for disputed provisions to be filed by April 15, 2002. [Commission Note: This is a new area of concern, the matter of disputed language.]

  3. Cost studies and resulting rates to be filed by April 8, 2002.

  4. Rate negotiations to be completed by April 12, 2002, and if rate negotiations fail, supplemental briefs to be filed by April 22, 2002.

5. The ILECs' respective proposals for refunding 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 to be filed by May 6, 2002.

▶ **4/8/02** Order Extending Time for Reply Comments

- Time for filing Reply Comments extended from April 9, 2002, as established in the March 12, 2002 Order, to April 16, 2002.

▶ **4/8/02** Filing by Verizon of Confidential Portion of Cost Study

▶ **4/8/02** Filing by Verizon of Cost Study

▶ **4/8/02** Filing of Modified Standard Offering

▶ **4/15/02** The ILECs and the CLPs filed their respective briefs in support of their proposed language.

▶ **4/22/02** Supplemental Briefs were filed by BellSouth, Carolina/Central, and Verizon, respectively; and WorldCom, AT&T, and Southeastern Competitive Carriers Association jointly filed their Supplemental Brief.

▶ **5/6/02** BellSouth, Sprint, and Verizon filed their respective true-up proposals.

▶ **6/20/02** Order Requesting Public Staff Filing Concerning Disputed Language

- On April 8, 2002, the Parties filed the modified standard offering. However, there was language on which the Parties were unable to agree. On April 15, 2002, the ILECs and the CLPs filed their respective briefs in support of their proposed language. The Commission requested the Public Staff to file comments on the ILECs' and CLPs' proposals which were in dispute by July 18, 2002.

▶ **7/18/02** Public Staff's Recommendations Concerning Disputed Language

▶ **8/7/02** Order Setting Hearing on Certain Collocation Elements

- The Commission scheduled hearings on October 30, 2002, for the restricted purpose of setting permanent rates for virtual collocation, assembly points, physical collocation in a remote terminal, collocation cable records, and virtual collocation in a remote terminal on behalf of BellSouth and any other ILEC to which Docket No. P-100 Sub 133j was applicable which indicates that it wishes to participate. Also, the CLPs were given the opportunity to file and indicate if they wished to have such rates developed by such ILEC. [Commission Note: Subsequently, by Order issued 10/24/02, the hearing was canceled.]

▶ 8/20/02 Order Addressing Motions for Reconsideration and Clarification (on the December 28, 2001 Order)

- Ordering Paragraph No. 1 stated that, at a time which will be specified by further order of the Commission, the Parties will be required to jointly file a Standard Offering modified pursuant to the Commission's conclusions in this Order, the December 28, 2001 Order Addressing Collocation Issues, and the forthcoming order on disputed language; and it noted that the modified Standard Offering will be required to include a table of contents.

- Ordering Paragraph No. 2 stated "that the Parties will be required to file Section 7 – Rates and Charges after the Commission issues its Order addressing the Supplemental Briefs filed concerning rates." [Commission Note: By issuance of this Order the Commission has finalized some, but not all, of the collocation rate issues.]

- Ordering Paragraph No. 3 stated "that, after approval by the Commission, the rates filed pursuant to this Order, the Order Addressing Collocation Issues, and the Order on the Supplemental Briefs shall be deemed permanent prices pursuant to Section 252(d) of TA96 for purposes of replacing interim prices adopted in Docket No. P-100, Sub 133d." [Commission Note: The Supplemental Briefs' reference concerns the request for Briefs if rates are not successfully negotiated as set forth in Ordering Paragraph No. 5 of the 12/28/01 Order Addressing Collocation Issues.]

- Ordering Paragraph No. 4 stated that the Commission will address the Parties' true-up proposals by further order. [Commission Note: Subsequently, in the 9/24/02 Order, the Commission adopted the ILECs' true-up proposals, in Ordering Paragraph No. 10.]

▶ 8/22/02 Order Revising Scheduling Order concerning Order Setting Hearing on Certain Collocation Elements

- The Commission determined that the time for filing of direct, intervenor, and rebuttal testimony should be revised and noted that Verizon would now be a participating ILEC along with BellSouth. [Commission Note: This is in regard to the hearing scheduled for 10/30/02 for the restricted purpose of setting permanent rates for virtual collocation, assembly points, physical collocation in a remote terminal, collocation cable records, and virtual collocation in a remote terminal on behalf of BellSouth and any other ILEC to which Docket No. P-100 Sub 133j was applicable which indicates that it wishes to participate. However, subsequently, by Order issued 10/24/02, the hearing was canceled.]

▶ 9/3/02 Order Addressing Disputed Language in the Standard Offering

- Ordering Paragraph No. 1 stated that "by no later than Thursday, October 3, 2002, the Parties shall jointly file a Standard Offering modified pursuant to the Commission's conclusions in this Order, the December 28, 2001 *Order Addressing Collocation Issues*, and the August 20, 2002 *Order Addressing Motions for Reconsideration and Clarification*"; and it noted that the modified Standard Offering will be required to include a Table of Contents. [Commission Note: The 10/3/02 filing date was revised by 9/20/02 Order and subsequently revised by 10/29/02 Order to a new filing date of 11/18/02.]

- Ordering Paragraph No. 2 stated "that the Parties will be required to file Section 7 – Rates and Charges after the Commission issues its Order addressing the Supplemental Briefs filed concerning rates."

- Ordering Paragraph No. 3 stated that the Commission will address the true-up proposals filed by further order.

► **9/20/02** Order Granting Motion for Extensions of Time

- Extensions of times were granted such that the filing of the modified standard offering pursuant to the September 3, 2002 Order Addressing Disputed Language in the Standard Offering was extended from October 3, 2002 to November 4, 2002; and the time for the ILECs to appeal said Order Addressing Disputed Language was also extended until November 4, 2002. [Commission Note: Filing date revised by 10/29/02 Order to new filing date of 11/18/02.]

► **9/24/02** Order Addressing Unresolved Collocation Rate Issues

- This Order provided discussions and conclusions on the unresolved rate issues and the ILECs' true-up proposals. [Commission Note: This Order addressed the issues that were discussed in the Supplemental Briefs filed on 4/22/02.]

- The Ordering Paragraphs are as follows:

1. That the Public Staff is requested to file written comments on the disputed cross-connect rates proposed by BellSouth, Sprint, and Verizon by no later than Wednesday, November 13, 2002. [Commission Note: Subsequently revised by 11/14/02 Order. This continued to be deferred by subsequent Order issued 1/14/03, in Ordering Paragraph No. 14 of that Order.]

2. That Sprint should file a cost study and proposed rate for lit fiber cross-connects by no later than Thursday, October 24, 2002. The CLPs and the Public Staff will be allowed the opportunity to file written comments on Sprint's proposed rate by no later than Wednesday, November 13, 2002. [Commission Note: Subsequently, this was stayed by 10/22/02 Order and new filing dates were established.]

3. That the Public Staff is requested to file written comments on the disputed cable installation rates proposed by BellSouth, Sprint, and Verizon by no later than Wednesday, November 13, 2002. [Commission Note: Revised by 11/14/02 Order and this continued to be deferred by subsequent Order issued 1/14/03, in Ordering Paragraph No. 14 of that Order.]

4. That Sprint and Verizon should refile by no later than Thursday, October 24, 2002 cost studies and proposed rates for simple, minor, intermediate, and major augments. The CLPs and the Public Staff will be allowed the opportunity to file written comments on the rates proposed by no later than Wednesday, November 13, 2002. [Commission Note: The 11/13/02 filing date was subsequently revised by 11/14/02 Order.]

5. That BellSouth should file cost studies and proposed rates by no later than Thursday, October 24, 2002 for augments using the four categories of simple, minor, intermediate, and major and reflecting the September 3, 2002 decision made by the Commission on the disputed language in the Standard Offering. The CLPs and the Public Staff will be allowed the opportunity to file written comments on the rates proposed by no later than Wednesday, November 13, 2002. [Commission Note: The 11/13/02 filing date was subsequently revised by 11/14/02 Order.]

6. That the Public Staff is requested to file written comments on the disputed adjacent collocation rates proposed by BellSouth by no later than Wednesday, November 13, 2002. [Commission Note: Subsequently revised by 11/14/02 Order and addressed in 1/14/03 Order.]

7. That Sprint should file a cost study and proposed rates for adjacent collocation by no later than Thursday, October 24, 2002. The CLPs and the Public Staff will be allowed the opportunity to file written comments on those proposed rates by no later than Wednesday, November 13, 2002. [Commission Note: Subsequently revised by 11/14/02 Order and addressed in 1/14/03 Order.]

8. That the Public Staff is requested to file written comments on the disputed adjacent collocation rates proposed by Verizon by no later than Wednesday, November 13, 2002. [Commission Note: Revised filing date in 11/14/02 Order.]

9. That, since the CLPs have acceded to the ILECs' proposed rates for Premises Space Report, BellSouth's, Sprint's, and Verizon's proposed Premises Space Report rates are hereby adopted.

10. That BellSouth's, Sprint's, and Verizon's true-up proposals are hereby adopted but the ILECs must provide CLPs with a final approved list of the collocation rates and allow CLPs to question and/or dispute the ILEC's calculation of the true-up.

11. That each ILEC should file a written report with the Commission detailing the true-up procedure no later than 90 days after final collocation rates are adopted by the Commission.

▶ **10/14/02** Order Denying Joint ILEC Motion to File Reply Comments to the Public Staff's Comments

▶ **10/15/02** Verizon's Motion for Reconsideration of September 3, 2002 Order Addressing Disputed Language in the Standard Offering and the September 24, 2002 Order Addressing Unresolved Collocation Rate Issues

GENERAL ORDERS – TELECOMMUNICATIONS

▶ **10/17/02** Sprint's Motion for Reconsideration of the September 2, 2002 Order Addressing Unresolved Collocation Rate Issues and Request for Stay

▶ **10/22/02** Order Granting Sprint's Request for Stay and Requesting Comments on Sprint's Motion on Reconsideration

- The Order granted Sprint's request for a stay in application of Ordering Paragraph No. 2 (relating to lit fiber cross-connects) of the September 24, 2002 *Order Addressing Unresolved Collocation Rate Issues* and any other provisions of that Order which are the subject of Sprint's motion. The Commission also requested the interested Parties to file comments on Sprint's motion as follows:

    1. Initial comments due on November 5, 2002.

    2. Reply comments due on November 19, 2002. [Commission Note: Subsequently revised per 11/14/02 Order, changed to 12/9/02.]

▶ **10/24/02** Verizon's Confidential Expanded Interconnection services Cost Study for Augments

▶ **10/24/02** Verizon's Expanded Interconnection Services Cost Study for Augments

▶ **10/24/02** BellSouth's Cost Study for Collocation Augments

▶ **10/24/02** Sprint's Confidential Pages of Adjacent Collocation Cost Studies for Augments

▶ **10/24/02** Sprint's Collocation Cost Studies for Augments and Adjacent Collocation

▶ **10/24/02** Order Canceling Hearing and Requesting Briefs and Proposed Orders

- The Commission canceled the hearing scheduled for October 30, 2002, and required the Parties, as requested, to submit briefs and/or proposed orders by December 9, 2002. [Commission Note: This is in regard to setting permanent rates for virtual collocation, assembly points, physical collocation in a remote terminal, collocation cable records, and virtual collocation in a remote terminal on behalf of BellSouth and any other ILEC to which Docket No. P-100 Sub 133j was applicable which indicates that it wishes to participate. Subsequently, by Order issued 12/9/02, the time for filing was extended to 12/16/02.]

▶ **10/29/02** Order Granting Extension of Time

- Extension of time was granted such that the filing of the modified standard offering pursuant to the September 3, 2002 Order Addressing Disputed Language in the Standard Offering was extended from November 4, 2002 to November 18, 2002.

► **11/4/02** BellSouth filed Motion for Reconsideration and/or Clarification of the Order Addressing Disputed Language in the Standard Offering.

► **11/5/02** Public Staff filed Initial Comments on Sprint's Motion for Reconsideration concerning fiber cross-connect rates.

► **11/12/02** Public Staff filed Motion to Consolidate Comments, for an Order, and for Extension of Time

► **11/14/02** Order Addressing the Public Staff's November 12, 2002 Motion

- In its *Order*, the Commission:

    1. Required BellSouth and Verizon to make a filing by no later than Friday, November 22, 2002 clarifying their previous filings of fiber cross-connect rates in this docket by specifying whether the rates therein are for cross-connections of dark fiber, lit fiber, or both types; and if they are associated exclusively with dark fiber, to state clearly what pricing procedure they propose to employ if CLPs request cross-connection of lit fiber;

    2. Stayed Ordering Paragraph Nos. 1 and 3 of the Commission's September 24, 2002 Order Addressing Unresolved Collocation Rate Issues until further Commission notice due to the uncertainty of the final Commission ruling on certain cross-connect issues and the apparent overlap in the cross-connect rate issue and the cable installation rate issue; [Commission Note: This continued to be deferred by subsequent Order issued 1/14/03, in Ordering Paragraph No. 14 of that Order.]

    3. Granted all Parties an extension of time from Tuesday, November 19, 2002 to Monday, December 9, 2002 to file reply comments on Sprint's Motion for Reconsideration in order to allow the Parties an opportunity to review the additional information to be filed by BellSouth and Verizon on November 22, 2002;

    4. Granted the Public Staff and the CLPs an extension of time to file written comments on (a) the rates proposed by BellSouth, Sprint, and Verizon for simple, minor, intermediate, and major augments; and (b) the rates proposed by Sprint for adjacent collocation from November 13, 2002 to Tuesday, November 26, 2002; and

    5. Granted the Public Staff an extension of time to file written comments on the disputed adjacent collocation rates proposed by BellSouth and Verizon from November 13, 2002 to Tuesday, November 26, 2002.

► **11/15/02** Order Requesting Initial Comments and Reply Comments on Motions for Reconsideration (Motions for Reconsideration filed by Verizon on October 15, 2002 and by BellSouth on November 4, 2002.)

- The Commission requested the interested Parties to file comments on Verizon's and BellSouth's Motions as follows:

  1. Initial comments due on December 4, 2002.

  2. Reply comments due on December 18, 2002.

► **11/18/02** ILECs and CLPs filed Negotiated Collocation Standard Offering

► **11/20/02** Clarification of Verizon's Fiber Cross-Connect Rates

► **11/20/02** N.C. Court of Appeals Order – Court Allowed Motion for Extension of Time

► **11/22/02** BellSouth filed comments concerning fiber cross-connect rates

► **11/26/02** Public Staff filed Comments on Augments and Adjacent Collocation

► **12/9/02** Order Granting Motion for Extension of Time

- On October 24, 2002, the Commission canceled the hearing scheduled for October 30, 2002, and required the Parties, as requested, to submit briefs and/or proposed orders by December 9, 2002. The Commission granted an extension until December 16, 2002. [Commission Note: This is in regard to setting permanent rates for virtual collocation, assembly points, physical collocation in a remote terminal, collocation cable records, and virtual collocation in a remote terminal on behalf of BellSouth and Verizon.]

► **12/11/02** Order Concerning Sprint's Floor Space Rates

- The Commission reviewed the proposed floor space rates of Carolina and Central filed on April 1, 2002 and found the rates to be consistent with the *December 28, 2001 Order* and the *August 20, 2002 Order* and adopted the proposed floor space rate.

► **12/16/02** BellSouth, Southeastern Competitive Carriers Association, AT&T, Verizon, and the Public Staff filed briefs and/or proposed orders concerning setting permanent rates for virtual collocation, assembly points, physical collocation in a remote terminal, collocation cable records, and virtual collocation in a remote terminal.

► **12/19/02** Sprint filed its Request for Clarification of Order Concerning Sprint's Floor Space Rates

- Sprint sought clarification that when the Commission approved its floor space rates, that it included not only the floor space rate, but rates for items such as Security Card Controllers and Readers, Demolition and Site Work, Dust Partitions, HVAC (minor ductwork), and Environmental Conditioning (Other Rates) as well.

► **1/14/03** Order Granting Sprint's Motion for Reconsideration Filed October 17, 2002 and Setting Rates for Augments and Adjacent Collocation

- The Ordering Paragraphs are as follows:

1. That Sprint's Motion for Reconsideration is hereby granted. Therefore, Ordering Paragraph No. 2 from the Commission's *September 24, 2002 Order* is hereby withdrawn, and Sprint shall be allowed to reflect individual case basis pricing for lit fiber cross-connects. Further, the Commission notes that currently Ordering Paragraphs Nos. 1 and 3 from the *September 24, 2002 Order* have been suspended and that the Parties will be able to move forward on those Ordering Paragraphs after the Commission issues its Order on the Motions for Reconsideration filed in response to the Commission's September 3, 2002 *Order Addressing Disputed Language in the Standard Offering*.

2. That BellSouth is required to limit its ATCC labor allocation to one hour for simple augments and two and a half hours for minor augments.

3. That BellSouth is required to reduce the hours reflected for INAC and CCM by 50% for both simple and minor augments.

4. That Sprint is required to reduce the Application Engineer hours from five and a half hours to one hour for simple augments and from five and a half hours to two hours for minor augments.

5. That Sprint is required to reduce the Network Project Manager hours from two hours to one hour for simple augments.

6. That Sprint is required to reduce the proposed Engineering Cost hours by 50% for both simple and minor augments.

7. That Verizon is required to allocate no more than three hours as the total Building Engineer work time for minor augments.

8. That BellSouth, Sprint, and Verizon shall file revised cost studies and resulting rates to reflect the revisions outlined in Ordering Paragraphs 2-7 above by no later than Thursday, February 13, 2003. [Commission Note: BellSouth filed 2/3/03 and Verizon and Sprint filed 2/13/03.]

9. That BellSouth's proposed fused amp rates are appropriate.

10. That the Commission's December 28, 2001 *Order Addressing Collocation Issues* does not require an ILEC to provide AC and DC power from the central office to adjacent collocation space until a request to provision such power is received. Further, the Commission reiterates that if an ILEC receives a request to provide power to an adjacent collocation space, within 45 days the ILEC and the CLP must either (a) negotiate a mutually agreed-upon price or (b) the ILEC must submit a cost study and proposed generic rates for providing power to adjacent collocation spaces for Commission approval.

11. That BellSouth is required to file a cost study supporting its proposed rate of $2,287 for Adjacent Collocation – Application Cost by no later than Monday, February 3, 2003 and that the Public Staff is requested to file comments on that cost study by no later than 20 days after the cost study is filed. [Commission Note: Subsequently, by 2/21/03 Order, an extension of time was granted to the Public Staff until 2/28/03.]

12. That Sprint is required to prorate the Total Labor and Additional Engineering hours for Adjacent Collocation – Application Fee to reflect a combined total of no more than 24.00 hours.

13. That Verizon is required to provide rates for AC or DC power to an adjacent collocation space upon request, unless it can show that such a request is technically infeasible.

14. That it is appropriate to defer taking any action on the rates for cross-connects and cable installation for adjacent collocation elements pending resolution of the issues described in the Order Addressing the Public Staff's November 12, 2002 Motion.

15. That BellSouth, Sprint, and Verizon are required to file revised cost studies and resulting rates to reflect the revisions outlined in Ordering Paragraphs 9-13 above by no later than Thursday, February 13, 2003. [Commission Note: Subsequently revised by 2/21/03 Order and later revised by 5/23/03 Order, such that studies are to be filed 6/23/03, per Ordering Paragraph No. 3 of that Order.]

► **1/21/03** Order Clarifying the Commission's Order (issued December 11, 2002) Concerning Sprint's Floor Space Rates

- The Commission clarified its Order stating that the Commission only approved Sprint's floor space rate; and did not approve Sprint's rate elements for items such as Security Card Controllers and Readers, Demolition and Site Work, Dust Partitions, HVAC (minor ductwork), and Environmental Conditioning (Other Rates). The Commission stated that Sprint had previously made its request and that the Commission denied Sprint's request in its August 20, 2002 *Order Addressing Motions for Reconsideration and Clarification.* The Commission noted that Sprint's request is actually another Motion for Reconsideration of the December 28, 2001 *Order Addressing Collocation Issues.*

► **2/3/03** BellSouth's Cost Study for Adjacent Collocation Application Fee and Revised Cost Study for Collocation Augment Rates

► **2/10/03** Sprint filed Motion for Extension of Time

► **2/12/03** Order Granting Sprint's Motion for an Extension of Time for all parties to File Motions for Reconsideration and Adjacent Collocation Cost Studies

- The Commission concluded that motions for reconsideration on the *January 14, 2003 Order* will be due on March 5, 2003.

- The Commission found that the time for filing adjacent collocation cost studies should be extended until three weeks after the Commission rules on any motions for reconsideration that may be filed in regard to the January 14, 2003 Order Granting Sprint's Motion for Reconsideration Filed October 17, 2002 and Setting Rates for Augments and Adjacent Collocation. [Commission Note: Similar to requirement in Ordering Paragraph No. 15 of the 1/14/03 Order.]

- The Commission also stated that it found no reason to alter the schedule established in the Commission's *January 14, 2003 Order* for augment rates, so cost studies are to be filed on February 13, 2003.

► **2/13/03** Verizon's Confidential Revised Cost Study and Proposed Rates for Simple, Minor, Intermediate, and Major Augments

► **2/13/03** Sprint's Collocation Cost Studies for Augments

► **2/13/03** Verizon's Revised Cost Study and Proposed Rates for Simple, Minor, Intermediate, and Major Augments

► **2/21/03** Order Granting the Public Staff an Extension of Time to file Comments on BellSouth's Adjacent Collocation – Application Cost

- An extension of time was granted up to and including February 28, 2003.

► **2/27/03** Sprint filed Motion for Reconsideration of January 14, 2003 Order Granting Sprint's Motion for Reconsideration Filed October 17, 2002 and Setting Rates for Augments and Adjacent Collocation.

► **2/28/03** Public Staff filed Comments on BellSouth's proposed rates filed on February 3, 2002 for adjacent collocation and augments.

► **3/6/03** Order Requesting Initial Comments and Reply Comments on Sprint's Motion for Reconsideration

- The Commission requested the interested Parties to file comments on Sprint's Motion for Reconsideration filed February 27, 2003 as follows:

    1. Initial comments due on March 21, 2003.

2. Reply comments due on April 4, 2003. [Commission Note: Subsequently revised by 4/2/03 Order, changed to 4/21/03.]

▶ **4/2/03** Order Granting Sprint's Motion for Extension of Time to file Reply Comments

- By this Order the Commission extended the time for filing reply comments on Sprint's Motion for Reconsideration from April 4, 2003 to April 21, 2003.

▶ **4/21/03** Sprint filed Reply Comments

▶ **5/13/03** BellSouth's Supplemental Cost Study Information Filing [Commission Note: Supplement to 2/2/03 filing, in response to verbal request for additional information.]

▶ **5/23/03** Order Granting, In Part, Sprint's Motion for Reconsideration and Ruling on BellSouth's Rate for Adjacent Collocation – Application Fee

- Ordering Paragraph No. 1 granted Sprint's Motion for Reconsideration and required Sprint to reflect a total of 36 labor hours for processing an application for adjacent collocation.

- Ordering Paragraph No. 2 approved BellSouth's proposal of 35 labor hours for adjacent collocation – application fee. However, BellSouth was required to revise its cost study to use the common and shared cost factor previously approved by the Commission in Docket No. P-100, Sub 133d.

- Ordering Paragraph No. 3 required Sprint, BellSouth, and Verizon to revise their adjacent collocation cost studies in accordance with this Order and with the Commission's *January 14, 2003 Order* and to file the new cost studies and revised rates by no later than June 23, 2003.

- Ordering Paragraph No. 4 required the Public Staff to file comments on Sprint's, BellSouth's, and Verizon's revised adjacent collocation cost studies and rates by July 14, 2003. [Commission Note: By Order dated 7/15/03, extended to 7/28/03.]

▶ **6/4/03** N.C. Court of Appeals Order – Court allowed Motion for Extension of Time

▶ **6/5/03** Order Establishing Rates for Virtual Collocation, Assembly Points, Physical Collocation in a Remote Terminal, Collocation Cable Records, and Virtual Collocation in a Remote Terminal for BellSouth and Verizon.

- The Ordering Paragraphs are as follows:

1. That BellSouth's and Verizon's cost studies are TELRIC-compliant and do not reflect embedded costs and that no imputation test is required.

2. That the issue of whether CLPs should be permitted to place line cards into ILEC remote terminals is beyond the scope of this proceeding.

3. That BellSouth's virtual collocation rates for floor space, DC power, security escorts, cable installation, and nonrecurring components of the cross-connect elements should be the same as the physical collocation rates ultimately adopted by the Commission in Docket No. P-100, Sub 133j. Further, BellSouth's proposed rates for the additional elements necessary for virtual collocation filed by BellSouth witness Shell (Elements H.2.1 through H.2.22) are hereby adopted.

4. That the following rates for virtual collocation proposed by Verizon are hereby adopted:

Virtual Engineering – New (nonrecurring)	$ 734.06
Virtual Equipment Maintenance (recurring)	$ 50.06
Virtual Equipment Engineering and Installation (nonrecurring)	$3,928.23

5. That Verizon is required to alter its Virtual Card Installation cost study to reflect: (1) 30 minutes of Central Office Equipment Engineering Hours; and (2) no more than 15 minutes of travel time per base unit in the Central Office Equipment Installation Tech Hours. The Commission also finds it appropriate to require Verizon to alter its Virtual Software Upgrades cost study to reflect no more than 15 minutes of travel time per base unit in Labor Hours per Software Upgrade.

6. That BellSouth is allowed to provide assembly point collocation at the nonrecurring rates ordered for the physical collocation cross-connect elements. Further Verizon is not required to offer assembly point collocation. The ILECs are reminded that they should not use assembly point offerings to avoid their obligation to combine elements for competitors.

7. That Verizon's proposed rates for physical collocation in a remote terminal are both reasonable and TELRIC-compliant. Therefore, the Commission approves Verizon's proposed rates for physical collocation in a remote terminal. Concerning BellSouth's proposed rates for physical collocation in a remote terminal, the Commission finds it appropriate to require BellSouth to revise its cost study inputs to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise.

8. That BellSouth's proposed nonrecurring rates for collocation cable records are approved. These collocation cable records should be provided to CLPs at their option and should be maintained at the level of detail BellSouth has proposed. However, the Commission finds that the ILECs should not be allowed to charge the CLPs for cable record information that, as a matter of routine, is maintained and shared in the provisioning of services. Further, if a CLP requests similar information in the form of a query of the ILEC's informational database of collocation cable records, the ILEC must provide the information at an ICB rate.

9. That BellSouth's proposed rates for virtual collocation in a remote terminal should be revised to reflect the actual percentages of cabinets, huts, and CEVs in operation within North Carolina, unless BellSouth can demonstrate to the Commission that there is a reasonable basis for doing otherwise. Further, for Verizon, the Commission finds it appropriate to adopt the same rates as approved in Issue No. 3 – Virtual Collocation in the central office for Verizon's rates for virtual collocation in the remote terminal.

10. That BellSouth and Verizon shall file revised cost studies and resulting rates to reflect the revisions outlined in this Order by no later than Monday, July 7, 2003.

11. That the Public Staff is hereby requested to file comments on BellSouth's and Verizon's revised cost studies and resulting rates and file its comments on their compliance with this Order by no later than Monday, July 28, 2003. [Commission Note: By 7/28/03 Order, the time of filing was extended until 8/11/03.]

▶ **6/18/03** Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language

- This Order provided discussions and conclusions on the Motions for Reconsideration and Clarification filed regarding the *Order Addressing Disputed Language in the Standard Offering.*

- The Ordering Paragraphs are as follows:

1. That Verizon's December 20, 2002 Motion to Respond to the December 18, 2002 Reply Comments of the Public Staff shall be granted.

2. That the last two sentences of Section 1.2 shall be removed and replaced with the following language:

   To the extent this Standard Offering does not include all the necessary rates, terms, and conditions for ILEC Premises other than the ILEC Central Offices or Serving Wire Centers, the Parties will negotiate said rates, terms, and conditions at the request for collocation at other than a Central Office or Serving Wire Center.

3. That the last sentence of Section 3.3.1 shall be amended to read as follows:

   Should the Host or Guest CLP in a shared or subleased arrangement add equipment or augment existing collocation arrangements, the provisions set forth in Section 9 of the Standard Offering governing additions and augments shall apply.

4. That Section 5.5.3 shall be modified to reflect that the rates, terms, and conditions for CCXCs requested pursuant to 47 U.S.C. Section 201 shall be as set forth in the respective ILEC's federal tariff. Section 5.5.3 shall include a statement that recognizes the

Commission's concurrent jurisdiction with the FCC over cross-connect disputes arising in the context of an interconnection proceeding. Section 5.5.3 shall be modified such that the CLP may reasonably request an ILEC to deploy the optical or electrical connections directly between its own facilities and the facilities of other Collocator(s) without being routed through an ILEC's equipment. Section 5.5.3 shall include a statement acknowledging that the CLP may bring a complaint to the Commission if the CLP believes the ILEC has refused to provision the cross-connect in the most effective method.

5. That, in regard to Section 5.5.1.1, the interested parties are hereby requested to file comments addressing the appropriateness of BellSouth's proposed nonrecurring Subsequent Application Fee of $549.60 per occurrence and the underlying assumptions, including tax and common cost factors, labor hours and associated activities, and labor rates, contained in BellSouth's cost study. The Public Staff and other interested parties shall file initial comments on BellSouth's cost study, and resulting rate and related language modifications to be included in Section 5.5.1.1, by July 8, 2003, and thereafter, the interested parties shall file reply comments by July 18, 2003. [Commission Note: The Public Staff and Sprint filed initial comments and no reply comments were filed.]

6. That, in regard to Section 5.5, the Commission has recommended certain amendments to the language as discussed herein; however, since the Commission's modifications in the language for Section 5.5 of the Standard Offering result in a modification to language which had been previously agreed to by all Parties, the interested parties are hereby given the opportunity to file exceptions and comments on the revised language for Section 5.5, if they so choose. Such filings shall be filed by the interested parties by July 8, 2003. If any exceptions and initial comments are filed, then thereafter, the interested parties shall file reply comments, by July 18, 2003. [Commission Note: The Public Staff filed initial comments and no reply comments were filed.]

7. That Verizon's Exception to Section 6.1.4 shall be, and is hereby, denied.

8. That, in all other respects, the Commission hereby affirms its *Order Addressing Disputed Language in the Standard Offering*.

9. That, at a time which will be specified by further order of the Commission, the Parties shall jointly file a North Carolina Collocation Standard Offering.

► **6/23/03** Sprint's Collocation Cost Study on Adjacent Collocation Application Fee

► **6/23/03** BellSouth's Revised Pages to Cost Study filed on February 3, 2003

► **7/3/03** Covad's Notification of Inconsistencies in Nonrecurring Charges in BellSouth's SGAT

► **7/7/03** BellSouth's Confidential Portion of Revised Cost Study

► **7/7/03** BellSouth's Revised Cost Study

GENERAL ORDERS – TELECOMMUNICATIONS

▶ 7/7/03 BellSouth's Revision 2 to Shell Exhibit WBS-1 Pertaining to Cost Study

▶ 7/7/03 Verizon's Confidential Version of Revised Cost Study

▶ 7/7/03 Verizon's Public Version of Revised Cost Study

▶ 7/8/03 Sprint's Comments on Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language

▶ 7/8/03 Public's Staff Initial Comments on Order Addressing Motions for Reconsideration and Clarification Regarding Disputed Language

▶ 7/10/03 Order Seeking Comments on Covad Letter

- Covad filed a letter alleging that BellSouth intends to change two nonrecurring charges from its SGAT for cross-connections in its central office.
- The Commission requested the interested Parties to file comments on Covad's allegations as follows:
  - Initial comments due on July 31, 2003. [Commission Note: Subsequently, by Order dated 7/31/03, the time was extended until August 4, 2003.]
  - Reply comments due on August 14, 2003. [Commission Note: Subsequently, by Order dated 7/31/03, the time was extended until 8/18/03.]

▶ 7/15/03 Order Granting Motion for Extension of Time to File Comments

- The time for filing of the Public Staff's comments on Sprint's, BellSouth's, and Verizon's revised adjacent collocation cost studies and rates by July 14, 2003, as required by the *May 23, 2003 Order*, was extended until July 28, 2003.

▶ 7/28/03 Public Staff's Comments on Augments and Adjacent Collocation Cost Studies

▶ 7/28/03 Order Granting Motion for Extension of Time to File Comments

- The time for filing of the Public Staff's comments on BellSouth's, and Verizon's revised cost studies and rates by July 28, 2003, as required by the June 5, 2003 Order, was extended until August 11, 2003. [Commission Note: This concerns Order Establishing Rates for Virtual Collocation, Assembly Points, Physical Collocation in a Remote Terminal, Collocation Cable Records, and Virtual Collocation in a Remote Terminal for BellSouth and Verizon.]

▶ 7/29/03 Comments of Covad, AT&T, and MCI on Covad's July 10, 2003 Letter

▶ 7/31/03 Order Extending Time

- The Commission extended the time for the filing of comments on Covad's July 10, 2003 Letter as follows:
  - Initial comments due on August 4, 2003.
  - Reply comments due on August 18, 2003.

▶ **8/4/03** BellSouth's Initial Comments on Covad's July 10, 2003 Letter

▶ **8/4/03** Public Staff's Initial Comments on Covad's July 10, 2003 Letter

▶ **8/11/03** Public Staff's Comments on July 7, 2003 filings of BellSouth and Verizon of cost studies and rates filed in regard to Order Establishing Rates for Virtual Collocation, Assembly Points, Physical Collocation in a Remote Terminal, Collocation Cable Records, and Virtual Collocation in a Remote Terminal for BellSouth and Verizon

▶ **8/18/03** Reply Comments filed, respectively, by Covad, BellSouth, and the Public Staff

DOCKET NO. P-100, SUB 133j

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	ORDER APPROVING
Generic Proceeding on the	)	SETTLEMENT AGREEMENTS
Provision of Collocation Space	)	

BY THE COMMISSION: On December 28, 2001, the Commission issued its Order Addressing Collocation Issues (Order), in which it established an interval of 60 calendar days for the provision of cageless collocation space (interval issue). The Order also required Carolina Telephone and Telegraph Company, Central Telephone Company, and Sprint Communications, L.P. (collectively, Sprint) to refile its central office floor space rates according to certain guidelines (floor space rate issue).

Sprint refiled its floor space rates on April 1, 2002 in compliance with the Commission's Order and timely noted its appeal of this issue on August 21, 2002. Verizon South Inc. (Verizon) filed its Exception and Notice of Appeal of the interval issue on August 26, 2002. The appeals were joined and the matter was docketed in the North Carolina Court of Appeals (COA – 0390).

Only BellSouth Telecommunications, Inc. (BellSouth) and the Public Staff chose to become parties to the appeal. (BellSouth is an appellee as to the interval issue only.) The parties to the appeal agreed to participate in the North Carolina Court of Appeals voluntary mediation program. Prior to the mediation, the parties to the appeal engaged in extensive negotiations to settle the issues. On October 2, 2003, the appellate parties met with the appointed mediator, North Carolina Court of Appeals Judge Robert C. Hunter. The parties were able to reach agreement on both issues.

On October 3, 2003, Verizon and Sprint filed the Settlement Agreements signed by the parties to the appeal and served them on all parties to Docket No. P-100, Sub 133j. In the cover letters to the filings, Verizon and Sprint both noted that the Public Staff intended to present each Settlement Agreement for Commission approval at the October 13, 2003, Staff Conference. On the interval issue, Verizon, BellSouth, and the Public Staff agreed to an interval for the provisioning of cageless collocation space of 84 calendar days ("Verizon Settlement Agreement"). Implementation of this agreement will require alteration of the Standard Offering, as set out in the Verizon Settlement Agreement. On the floor space rate issue, Sprint and the Public Staff agreed to rates for site preparation (which covers costs for dust partitions, HVAC minor ductwork, and demolition and site work), security card controller and reader, and environmental conditioning ("Sprint Settlement Agreement"). Upon Commission approval of the Settlement Agreements, and after the Commission's order becomes final and not subject to appeal, Verizon and Sprint will file motions to voluntarily dismiss their appeal in the North Carolina Court of Appeals.

At the October 13, 2003, Staff Conference, Verizon, BellSouth, and the Public Staff requested that the Commission act pursuant to G.S. § 62-80 and modify its December 28, 2001, Order Addressing Collocation Issues and its August 20, 2002, Order Addressing Motions for Reconsideration and Clarification as set out by the Verizon Settlement Agreement filed October 3, 2003. Sprint and the Public Staff requested that the Commission approve the additional floor space rates as set out in the Sprint Settlement Agreement filed October 3, 2003.

The Public Staff stated that all parties to the appeal are unanimous in their belief that the evidence in the record supports the Settlement Agreements. The Public Staff additionally stated that both settlements resolve the matters in the dispute in a manner that is fair, just, and reasonable and in the public interest.

On the basis of the Settlement Agreements, the evidence of record, and the entire record of this proceeding, the Commission makes the following:

This matter came before the Regular Commission Conference on October 13, 2003. Mr. James West of the Carolina Utilities Customers Association (CUCA) expressed certain procedural concerns relating to the reopening of a decision under G.S.62-80. He recommended that a comment procedure be used. The Public Staff responded that the consideration of this item at Regular Commission Conference complies with notice requirement under G.S. 62-80. Mr. Robert Kaylor, representing Verizon, supported the procedure for considering this matter at Regular Commission Conference. Mr. Jack Derrick concurred with Verizon but noted that Sprint was not in its settlement asking that a previous decision be amended. Mr. Gray Styers, representing BellSouth, concurred with Verizon.

FINDINGS OF FACT

1. The parties to the appeal, Verizon, BellSouth, Sprint, and the Public Staff, have discussed settlement of the issues on appeal pursuant to voluntary mediation before the North Carolina Court of Appeals. On October 2, 2003, Verizon, BellSouth, and the Public Staff agreed to settlement of the interval issue and Sprint and the Public Staff agreed to settlement of the floor space rate issue.

2. With respect to settlement of the interval issue, Verizon, BellSouth, and the Public Staff agreed that an 84-calendar day interval for the provisioning of cageless collocation space is appropriate and comports with the evidence presented at the hearing of this matter. Both the ILECs and the CLPs produced evidence that cage construction is neither an intensive nor time-consuming task. The ILEC witnesses explained that there was no measurable difference between the provisioning time necessary for preparation of caged and cageless collocation space because construction of a cage can proceed concurrently with the other work necessary to provision collocation space. New Entrants witness Wagoner testified that cage construction added only three to four days to the provisioning interval. He explained that collocation cages were prefabricated, delivered to the site, bolted together, and attached to supports drilled into the floor. Afterward, the grounding of the cage takes place.

3. The Verizon Settlement Agreement would amend § 6.4.4 of the Standard Offering to state as follows[1]:

> 6.4.4 Construction and Provisioning Interval: Cageless Collocation. The ILEC will complete provisioning of cageless Collocation Space within ***eighty-four (84)*** calendar days from the receipt of the Application. If the ILEC is unable to complete provisioning as provided herein, the ILEC and CLP may agree to a mutually acceptable interval or the ILEC may, within thirty (30) calendar days from the date of the BFFO, petition the Commission for an extension of time. There will be increased provisioning intervals when the ILEC receives multiple collocation applications as follows: ***eighty-four (84)*** calendar days for cageless collocation when the ILEC receives one (1) to five (5) applications; ***eighty-nine (89)*** calendar days for cageless collocation when the ILEC receives six (6) to ten (10) applications; ***ninety-four (94)*** calendar days for cageless collocation when the ILEC receives eleven (11) to fifteen (15) applications; ***ninety-nine (99)*** calendar days for cageless collocation when the ILEC receives sixteen (16) to twenty (20) applications; ***one hundred and four (104)*** calendar days for cageless collocation when the ILEC receives twenty-one (21) to twenty-five (25) applications; etc. (increments of five (5) calendar days for every five (5) applications).

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[1] Changes are in bold.

4. With respect to the floor space rate issue, Sprint and the Public Staff agreed to a monthly composite site preparation rate of $16.61 per collocation request, consisting of Dust Partitions, HVAC Minor Ductwork, and Demolition and Site Work. These parties also agreed that rates of $.09 per square foot for Security Card Controller and Reader, and $1.49 per fused ampere for Environmental Conditioning were appropriate. The Commission had previously approved a rate a $3.62 per square foot for unimproved floor space. On April 1, 2002, Sprint filed cost support for rates that exceed these agreed-upon rates. Sprint and the Public Staff have agreed that these additional rates are TELRIC compliant.

5. The Settlement Agreements are the result of extensive negotiations between the parties to the appeal pursuant to the voluntary mediation process conducted by the North Carolina Court of Appeals. The Honorable Judge Robert C. Hunter acted as mediator between the parties at a mediation conference on October 2, 2003. The voluntary mediation process is intended to encourage settlement of the issues on appeal and to reach an agreeable disposition of the appeal.

6. The Settlement Agreements were served on all parties to Docket No. P-100, Sub 133j. By the cover letters to the settlement agreements, all parties to Docket No. P-100, Sub 133j were informed that the Public Staff intended to request Commission approval of the Settlement Agreements at the October 13, 2003 Staff Conference.

7. The Settlement Agreements are supported by the evidence in the record and are just, reasonable, and in the public interest.

CONCLUSIONS

Based upon the entire record of this proceeding, the Commission finds that the Settlement Agreements should be approved. The evidence in the record supports the 84-day provisioning interval for cageless collocation. This provisioning interval is just, reasonable, and in the public interest. The Commission further finds that the additional floor space rates agreed to by Sprint and the Public Staff are TELRIC compliant and are also just, reasonable, and in the public interest.

Regarding procedural concerns raised by CUCA at Regular Commission Conference, the Commission believes that utilizing the Conference procedure is appropriate under G.S. 62-80. To be sure, other procedural avenues could also have been used, such as that proposed by CUCA, but this was not mandatory, although in many cases it may be preferable. Significantly, CUCA raised no substantive concerns at Conference. Given the procedural posture of this case relative to the Court of Appeals, the Commission believes that relatively swift action is warranted in a manner that we believe is consistent with due process.

IT IS, THEREFORE, ORDERED as follows:

1. That the Settlement Agreement signed by Verizon, BellSouth and the Public Staff and filed with the Commission on October 3, 2003, is approved.

2. That the Settlement Agreement signed by Sprint and the Public Staff and filed with the Commission on October 3, 2003, is approved.

3. That the rates set forth in the Settlement Agreement signed by Sprint and the Public Staff are approved and adopted.

4. That § 6.4.4 of the Standard Offering should be amended as shown in Paragraph 3 of the Findings of Fact.

ISSUED BY ORDER OF THE COMMISSION.
This the _14th_ day of October, 2003.

NORTH CAROLINA UTILITES COMMISSION
Gail L. Mount, Deputy Clerk

Ah101303.02

DOCKET NO. P-100, SUB 133j

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Generic Proceeding on the Provisioning of Collocation Space	)	ORDER APPROVING BELLSOUTH'S RATES FOR SUBSEQUENT APPLICATION FEE AND AUGMENTS

BY THE CHAIR: On September 3, 2003, the Commission issued its *Order Addressing Various Issues on Disputed Language and Rates for Augments, Adjacent, Physical, and Virtual Collocation.* Therein, in regard to BellSouth Telecommunications, Inc.'s (BellSouth's) proposal to charge a nonrecurring subsequent application fee, the Commission required BellSouth to modify its related cost study such that it should reflect (1) the Commission's previously approved common cost factor and (2) the same number of hours for Account Team Collocation Coordinator (ATCC), Interexchange Network Access Coordinator (INAC), and the Circuit Capacity Management (CCM) labor functions, as previously approved by the Commission for use by BellSouth in determining the nonrecurring cost for minor augments. In addition, the September 3, 2003 *Order* also required BellSouth to modify its nonrecurring rates for augments to reflect the Commission's previously approved common cost factor. BellSouth was required to submit its revised cost studies and resulting rates for its subsequent application fee and augments.

In this regard, on September 22, 2003, BellSouth filed its amended cost studies. The resulting rates proposed by BellSouth are as follows:

Physical Collocation – Nonrecurring Rate for Subsequent Application for Co-Carrier Cross-Connect, per Occurrence $\underline{\$317.20}$

Physical Collocation – Nonrecurring Rates for Augments

Augment Existing Space – Simple	$ 269.83
Augment Existing Space – Simple – Disconnect Only	1.15
Augment Existing Space – Minor	493.40
Augment Existing Space – Minor – Disconnect Only	1.15
Augment Existing Space – Intermediate	1,012.00
Augment Existing Space – Intermediate – Disconnect Only	1.15
Augment Existing Space – Major	2,343.00
Augment Existing Space – Major – Disconnect Only	1.15

On October 3, 2003, the Public Staff filed comments stating that it had completed its review of BellSouth's cost studies filed in this regard and had found them to be in compliance with the Commission's September 3, 2003 *Order* requiring that BellSouth use its currently approved common cost factor.

Further, in regard to BellSouth's nonrecurring rate for a subsequent application fee, on October 8, 2003, the Public Staff filed additional comments stating that the Commission required BellSouth to modify its related cost study such that it should reflect the same number of hours for ATCC, INAC, and CCM labor functions, as previously approved by the Commission for use by BellSouth in determining the nonrecurring cost for minor augments. However, the Public Staff observed that BellSouth's initial subsequent application cost study did not include the CCM labor function; and consistent with that initial study, BellSouth has not reflected any costs for the CCM labor function in its revised study. The Public Staff stated that it had completed its review and believes that the rates reflected in BellSouth's filing comply with the Commission's *Order* which required the use of the same number of hours for ATCC and INAC labor functions approved for use in BellSouth's cost study to determine the rates for minor augments.

Based upon our review of the filings, the Commission agrees with the Public Staff that the cost studies for subsequent application for co-carrier cross-connect and augments filed by BellSouth are consistent with the Commission's *September 3, 2003 Order* requiring the use of BellSouth's currently approved common cost factor. Further, the Commission finds that the cost study for the subsequent application fee filed by BellSouth properly reflects the appropriate hours for the various labor functions, which includes the following work time adjustments to BellSouth's initial study: (1) ATCC was decreased from 5 hours to 2½ hours, (2) INAC was reduced from 2 hours to 1 hour, and (3) Common Systems Capacity Management (CSCM) was reduced from 3 hours to 2 hours. Accordingly, the Commission concludes that BellSouth's proposed rates, as provided hereinabove, should be approved.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of October, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Bk102803.01

DOCKET NO. P-100, SUB 133k

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Generic Docket to Address Performance Measurements and Enforcement Mechanisms	)))))))	ORDER ADDRESSING WHICH SUBMEASURES TO INCLUDE IN BELLSOUTH'S REMEDY PLAN AND ESTABLISHING AN EFFECTIVE DATE OF AUGUST 1, 2003 FOR BELLSOUTH'S SQM AND REMEDY PLAN

BY THE COMMISSION: On May 22, 2002, the Commission issued its *Order Concerning Performance Measurements and Enforcement Mechanisms.* On June 20, 2002, BellSouth Telecommunications, Inc. (BellSouth) filed its Motion for Reconsideration and/or Clarification of the Commission's *Order*, and on July 19, 2002, MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., and MCI WorldCom Network Services, Inc. (collectively WorldCom) and AT&T Communications of the Southern States, LLC (AT&T) filed their Motion for Reconsideration of the Commission's *Order.*

On November 1, 2002, the Commission issued its *Order Addressing Motions for Reconsideration and/or Clarification and the Joint Report on Correlated and Customer-Impacting Measures.* In one part of its *Order*, the Commission instructed the Parties to negotiate the issue of which submeasures should be included in the remedy plan (used interchangeably with Self-Effectuating Enforcement Mechanism - SEEM Plan) to address BellSouth's concern on the duplication of penalties relating to product disaggregation and to file a Joint Report with the Commission on the negotiation by no later than Monday, December 2, 2002.

On November 19, 2002, BellSouth, on behalf of the Parties to the docket, filed a Motion for Extension of Time. BellSouth noted that the Commission's *November 1, 2002 Order* required a Joint Report on negotiations concerning which submeasures should be included in the remedy plan by no later than December 2, 2002. BellSouth noted that due to the then current workload, principally resulting from preparations for the unbundled network elements (UNE) hearing, the Parties had not yet had an opportunity to begin negotiations. BellSouth maintained that this, coupled with the upcoming holidays, would make it exceedingly difficult to conduct negotiations, reach potential agreement, and formulate a report to the Commission within the allotted time. Therefore, BellSouth stated that the Parties were requesting an extension of time to file the Joint Report until January 17, 2003.

By Order dated November 25, 2002, the Commission approved the request for an extension of time.

On January 8, 2003, the Public Staff filed its Report on Negotiations and Motion for Order Requesting Comments. The Public Staff noted that on January 7, 2003, WorldCom, AT&T, and Covad Communications Company (collectively hereinafter referred to as the competing local providers (CLPs) or the CLP Coalition), BellSouth, and the Public Staff discussed and negotiated the issue for approximately two hours but reached an impasse and were unable to reach a resolution. The Public Staff maintained that the Parties agreed that in order to allow the Commission to have adequate information with which to resolve the issue, a comment cycle would be appropriate.

By Order dated January 15, 2003, the Commission granted the Public Staff's Motion for Order Requesting Comments. Initial Comments along with matrices from BellSouth and the CLPs were to be filed by no later than Wednesday, February 5, 2003, and Reply Comments along with revised matrices, if necessary, from BellSouth, the CLPs, and the Public Staff were to be filed by no later than Wednesday, February 19, 2003.

On February 5, 2003, Initial Comments were filed by BellSouth and the CLP Coalition.

On February 19, 2003, the Commission issued its *Order Granting Oral Motion for Extension of Time*. In its Order, the deadline for filing Reply Comments was extended to February 26, 2003.

On February 26, 2003, BellSouth, the CLP Coalition, and the Public Staff filed Reply Comments.

On March 26, 2003, the CLP Coalition filed its Motion to File Supplemental Reply Comments in Response to BellSouth Comments. The CLP Coalition stated that since the Parties filed Reply Comments on February 26, 2003, the CLPs have obtained additional information which rebuts BellSouth's arguments that the SEEM Plan, as previously ordered by the Commission, contains a level of product disaggregation that results in duplicate penalties.

The CLP Coalition stated that it should have the opportunity to supplement its Reply Comments filed on February 26, 2003. Therefore, the CLP Coalition requested permission to file Supplemental Reply Comments in this docket. By separate cover, the CLP Coalition filed a copy of its Supplemental Reply Comments on March 26, 2003.

By Order dated March 28, 2003, the Commission granted the CLP Coalition's Motion to File Supplemental Reply Comments. Further in the Order, the Commission requested BellSouth and the Public Staff to file Responses to those Supplemental Reply Comments by no later than April 14, 2003.

INITIAL COMMENTS

BELLSOUTH: BellSouth maintained that its Initial Comments set forth a proposal to remedy a problem that all Parties agree exists – that the penalty plan ordered by the Commission could result in the payment of duplicate penalties by BellSouth. BellSouth argued that in some instances, it would pay multiple penalties for a single failure. BellSouth further referenced the Commission's *May 22, 2002 Order* wherein the Commission stated that remedies should not be applied to performance measures that are shown to be duplicative of or correlated with other measurements.

BellSouth noted that the Commission, in its November 1, 2002 *Order Addressing Motions for Reconsideration and/or Clarification and the Joint Report on Correlated and Customer-Impacting Measures*, instructed the Parties to negotiate the issue of which submeasures should be included in the remedy plan. BellSouth stated that the Parties conducted negotiations on January 8, 2003. BellSouth further noted that at the request of the Public Staff, prior to the meeting, BellSouth developed a matrix to demonstrate product-based duplication in some of the measurements of the Service Quality Measurement (SQM) Plan. BellSouth asserted that its matrix identified the duplicate reporting of products in the process areas of ordering, provisioning, maintenance and repair, as well as duplication in retail analogs. BellSouth maintained that the CLPs provided to the Public Staff, shortly before the negotiation meeting, a matrix that set forth their proposed solution to the disaggregation problem. BellSouth noted that at the negotiation, BellSouth proposed its solution, and a fairly extensive discussion followed. BellSouth stated that the Parties were unable to reach an agreement and, therefore, decided to ask the Commission to order a comment cycle on this issue.

BellSouth noted that its proposal is that the Commission adopt the disaggregation that is utilized in the Georgia Plan, which is currently in place in North Carolina on an interim basis. BellSouth argued that aggregating some of the transactions that would be disaggregated in the SEEM Plan ordered by the Commission is the only way to ensure that both the SQM Plan and the SEEM Plan include all relevant transactions. BellSouth maintained that aggregation corrects serious problems that can arise in the application of the SEEM Plan when measures are overly disaggregated into submeasures that have little or no activity. BellSouth argued that the most appropriate way to accomplish the required aggregation is to continue to use the SEEM Plan adopted in Georgia. BellSouth alleged that doing so will avoid the labor, time, and expense that would necessarily be entailed in developing a new, unique approach to aggregation. Further, BellSouth stated that adopting the Georgia Plan would ensure consistency with the plan that is currently in effect on an interim basis, as well as with the plans that have been adopted throughout BellSouth's region.

BellSouth maintained that the current duplication in the SEEM Plan and the prospect of duplicate or redundant penalties have evolved over time. BellSouth noted that originally, it proposed to disaggregate orders into product categories. BellSouth noted that in proceedings in Louisiana, Georgia, and other proceedings, additional disaggregation (beyond the disaggregation proposed by BellSouth for resale orders to be disaggregated by residence and business service) for specific products was either added to the measurement plan (used interchangeably with SQM Plan) by BellSouth to accommodate CLPs' requests or ordered by Commissions. BellSouth asserted that as this occurred, BellSouth incorporated the additional disaggregation into the measurement plan and this approach became part of the proposal in states that subsequently held performance measurement proceedings, including North Carolina.

BellSouth maintained that the result of this process is that there are a number of measures in the SQM Plan that are disaggregated into both submeasures that include only a single product and other submetrics that include this same product as part of a group of products. BellSouth provided the following example: In many measurements involving resale orders, there is a submetric that addresses a product group labeled "Business" and this submetric includes the following products: Business (such as a 1FB line), PBX Non-Design, Centrex/ESSX Non-

Design, and ISDN Basic Rate Business Non-Design. BellSouth noted that transactions involving PBX orders are included both in a submetric that includes only PBX orders and are also included, along with transactions involving other products, in the "business" submetric. BellSouth asserted that this means that, in the current plan, failure to meet the applicable standard for a measurement applied to a PBX product would count twice against BellSouth, once for the PBX-specific submetric and once for the larger group that includes PBX.

BellSouth asserted that this duplication is not necessarily a major problem if it only occurs in the SQM Plan. BellSouth maintained that the real problem arose when the Commission ordered that the same level of disaggregation should be used to determine both compliance and remedy payments. BellSouth argued that this aspect of the Commission's *Order*, in effect, transferred the duplication in the measurement plan to the penalty plan and created the potential for duplicate penalties for a single failure. BellSouth footnoted that this problem is unique to North Carolina, in that no other state commission that ordered a transaction-based plan also ordered the same disaggregation to be used for measurement and remedy purposes.

BellSouth maintained that prior to the negotiation meeting, BellSouth developed a representative matrix/list of products that appear in multiple categories in the SQM. BellSouth asserted that its list was not exhaustive, in that it did not cover every single duplication in the SQM Plan, but instead provided a representative list of the areas in which product-related duplication occurs most frequently. BellSouth noted that the CLPs did not take issue with any of the particular areas of duplication identified by BellSouth. Further, BellSouth argued, although the CLPs declined to state during the negotiation session that they agreed that the duplication identified on BellSouth's list is accurate, they were not able to point out any area in which BellSouth's list is in error. Therefore, BellSouth stated that it believes that the Parties are essentially in agreement as to the product-related duplication that exists, at least in the areas of ordering, provisioning, and maintenance and repair. BellSouth attached to its Initial Comments Exhibit A, which is a matrix of representative product-related duplication. BellSouth also attached as Exhibit B, the CLPs' response to Exhibit A.

BellSouth further asserted that all of the Parties appear to agree to the general solution to the problem of the duplicate reporting of products: it is necessary to eliminate from SEEM some of the levels of disaggregation currently used for measurement reporting. BellSouth submitted that given the particular way in which the product-based disaggregation results in duplication, the only workable remedy is to aggregate transactions from the smaller (i.e., single product) submetrics into those that represent product groupings.

BellSouth stated that for a given measure, assume that there is a grouping of business products that are considered together for the purposes of assessing BellSouth's performance. BellSouth noted that some products, such as PBX service, are both included in this submetric and in another submetric that includes only the single service. At the same time, BellSouth commented, other services, such as the 1FB, are captured only in the "business" submetric that includes that 1FB line, the PBX, and other products. BellSouth asserted that given this, a decision to address the potential penalty duplication related to the PBX product eliminating the "business" submeasure would mean that some products, like the 1FB line, would not be captured anywhere. In other words, BellSouth noted, the products that are currently captured only in the "business" category, i.e., those products that are not currently duplicated, such as the 1FB, would not be considered in the penalty plan in any way. Instead, BellSouth maintained, these products would simply be discarded from the SEEM Plan entirely. BellSouth argued that this would be an inappropriate result for two reasons: (1) the Commission has ordered that both the measurement plan and penalty plan be structured so that the plan applies to certain types of transactions; and (2) this approach would also create a fundamental mismatch between the measurement plan and remedy plan.

BellSouth argued that to deal with the duplication problem by discarding transactions related to all products that are not currently duplicated would fundamentally violate the plan structure approved by the Commission. BellSouth further noted that for measurement purposes, a certain group of transactions would be considered; however, for penalty purposes, some of these transactions would simply be discarded, and only the remaining products would be used in penalty calculations.

BellSouth asserted that given this situation, the only appropriate way to address the duplication problem, and the only way to avoid the additional problems previously discussed, is to aggregate results by retaining the larger, more inclusive submetrics. BellSouth argued that where there is duplication, the product-specific submetric should be removed from the penalty plan in favor of the submetrics that group single products with other like products.

BellSouth maintained that reviewing the CLPs' proposal (Exhibit B) illustrates the reason that aggregation is the only appropriate approach. BellSouth stated that in many instances, when faced with a choice between a submetric that includes a single product and a submetric that includes the single product along with a grouping of other products, the CLPs have chosen the single product submetric. BellSouth argued that this approach leads to precisely the problem that discarding submetrics that reflect product groups will result in discarding all results that do not currently appear in a second, product specific, submetric.

BellSouth noted that in other instances, the CLPs' decisions appear to be more random, and this randomness has the effect of perpetuating the duplication of penalties that all Parties agree should be avoided, at least in theory. BellSouth stated that by using the more inclusive business category for some products, but using product-specific categories for others, the CLPs have proposed a combination of arbitrary selections that perpetuates the exact type of penalty duplication that the Commission has directed the Parties to remove. BellSouth asserted that the only reasonable way to minimize both the problem of duplicate penalties and the problem of the wholesale discarding of transactions that the Commission has ordered to be included is to aggregate up to the more inclusive submetric category in every instance.

BellSouth maintained that all of the Parties agree that duplication exists in the SQM, but they disagree as to how to remedy the problem caused by disaggregating the SEEM measurements in the same way. BellSouth noted that in the related area of retail analogs, the CLPs also appear to agree as to the accuracy of the analysis that BellSouth has performed in order to show how disaggregation results in a mismatch with retail analogs. Nevertheless, BellSouth asserted, the CLPs did not provide any solution in their Response to the duplication related to retail analogs, and they took no position in the negotiations that this problem should not be addressed. BellSouth argued that contrary to the CLPs' position, the retail analog problem is the result of disaggregation, and definitely has the potential to result in duplication of penalties. Therefore, BellSouth stated that this issue should be addressed by the Commission at this juncture as well.

BellSouth stated that the problem is that the degree of disaggregation for products that are to be compared to the retail analog creates the prospect of duplicative penalties, albeit in a somewhat different way than with the product duplication previously described. BellSouth maintained that it is not possible to make a legitimate comparison for parity purposes if the product or group of products that are being compared are different. BellSouth asserted that this is the result of the current disaggregation.

BellSouth provided the following example to support its point. BellSouth noted that the current disaggregation includes submeasurements for six different products (switch ports, SL1, SL1 with INP, SL1 without INP, INP standalone, and LNP standalone.) BellSouth stated that each of these products is compared to the same retail analog ordered by the Commission. BellSouth maintained that under the current disaggregation, however, the retail analog includes a number of different services that are considered together while the wholesale products that are compared to BellSouth's performance are disaggregated into submetrics, each of which includes only a single product. BellSouth argued that the current disaggregation entails a fundamental mismatch between specific products on the one side and a general category that combines a number of products on the other. BellSouth concluded that this mismatch creates the prospect of duplicate penalties.

BellSouth argued that to make a true comparison of like-to-like product groupings, BellSouth business and residential business plain old telephone service (POTS) would be compared to a grouping of the six services listed above. Therefore, BellSouth asserted, if it failed to provide service to CLPs that is equal to it or better than the service that it provides to itself in the analogous group of services, a penalty would be paid. BellSouth maintained that under the current structure, if BellSouth's service to itself is better than the service BellSouth provides to the CLP for one of the products in the comparable grouping of products, then BellSouth would pay a penalty, even if it provided service at parity for the other five products. Also, BellSouth noted, if its performance to itself for the group of retail services is better than service to the CLP for each of the individual services that comprise the comparable group of wholesale services, then BellSouth would pay six separate penalty payments, one for each of the products that comprise the group. BellSouth concluded that the mismatch of a single group of services that is used as a retail analog to a number of submetrics that each include one of the individual products that comprise a comparable group creates the obvious potential for multiple penalties.

BellSouth alleged that the CLPs have argued generally against aggregation in a variety of contexts, and they continued to do so in the negotiations between the Parties. BellSouth noted that the CLPs have argued that aggregation necessarily masks discrimination. BellSouth asserted that to the contrary, the statistical test utilized in the plan was specifically designed to allow performance for dissimilar products to be aggregated to determine whether a penalty should apply, while minimizing the ability of poor performance on one product being masked by good performance on other products. BellSouth maintained that the Commission can safely utilize the aggregation proposed by BellSouth without concern for such masking.

BellSouth further noted that the CLPs' arguments concerning aggregation have been uniformly rejected by all of the state commissions in BellSouth's region. BellSouth stated that every plan that has been adopted in BellSouth's region includes some level of aggregation in the SEEM Plan as compared to measurement reporting.

BellSouth argued that the aggregation of results into more inclusive categories is preferable because the alternative, i.e., excessive disaggregation, will result in submetrics in which there is little or no activity. BellSouth noted that under the Georgia Plan, which is currently in effect in North Carolina on an interim basis and which entails a comparatively greater degree of aggregation, 100% of the 53 submetrics had some activity at the state level in the month of November 2002. However, BellSouth stated, 30% of the metrics at the state level had fewer than 30 transactions. BellSouth argued that this number is significant because 30 transactions is a minimum threshold commonly accepted by statisticians, below which results may not be representative. Thus, BellSouth alleged, nearly one-third of the existing metrics had less than the minimum amount of activity considered to be statistically reliable. BellSouth asserted that, in contrast, applying the disaggregation ordered by the Commission, all CLPs in the State, considered collectively, have activity in only 54% of the submetrics. BellSouth noted that of this 54% of the submetrics, 25% reflect 30 or fewer transactions, and only 29% of the submetrics had more than 30 transactions. BellSouth concluded that under this approach, even when considering all CLP activity in the State, only 29% of the submetrics had sufficient activity to make statistically sound judgments regarding BellSouth's performance.

BellSouth maintained that the result of this level of disaggregation is even more pronounced when results are considered on an individual CLP basis. BellSouth stated that utilizing the disaggregation in the Georgia Plan, at the CLP specific level, there are 12,349 Tier 1 submetrics, i.e., 53 submetrics multiplied by 233 Operating Company Numbers. BellSouth noted that there was no activity whatsoever in 86% of these submetrics. BellSouth stated that the remainder, 14% of the submetrics, had some activity, but 9% of the submetrics had 30 or fewer transactions, which means that only 5% had more than 30 transactions.

BellSouth argued that although it has not implemented the disaggregation ordered by the Commission at the CLP level, it can be inferred from the above that the result would be that almost all of the submetrics would have little or no activity. BellSouth explained that the Georgia approach yields a 100% activity level in submetrics when considering all CLP activity in the State, but has only a 14% activity level when submetrics are considered on an individual CLP basis. BellSouth maintained that the Commission-ordered disaggregation yields only a 54% activity level statewide. Therefore, BellSouth asserted, on an individual CLP basis, the percentage of submetrics with any activity would unquestionably be much less than the 14% yielded by the Georgia approach that contains a greater level of aggregation.

BellSouth asserted that the most theoretically pure solution would be to ascertain every instance in which product-based disaggregation results in a duplicate penalty, and to fix the problem on a submetric-by-submetric basis. However, BellSouth stated, this undertaking would be very laborious, time-consuming, and, ultimately, unnecessary. BellSouth stated that attempting to fix the problem one duplication at a time would require that at least 136 instances of duplication be addressed, and in all likelihood the number would be far greater. BellSouth maintained that no method has been devised to make every one of these selections without resorting to arbitrary decisions, at least in some instances.

BellSouth argued that the more practical solution is to simply utilize the level of disaggregation that exists in the Georgia Plan. BellSouth maintained that this is not a perfect solution, since the Georgia Plan does have the potential for some duplication of penalties. However, BellSouth asserted that it would be willing to accept this potential for duplication since adopting the Georgia Plan is otherwise, by far, the more practical solution. BellSouth noted that adopting the Georgia Plan is an approach that could clearly be put into effect more quickly than any sort of new and more elaborate process to address the duplication problem. BellSouth also maintained that the Georgia disaggregation has been adopted at least on an interim basis by the respective commissions in each of the states in BellSouth's region that have ordered transaction-based plans. BellSouth noted that the only states in BellSouth's region, other than North Carolina, that have not adopted the Georgia disaggregation are Florida and Tennessee, which both utilize an entirely different, measure-based plan. BellSouth stated that in the Florida six-month review, the issues of whether the measure-based plan should continue and the level of disaggregation that should apply will be addressed.

BellSouth asserted that because the Georgia Plan has been utilized a number of times throughout BellSouth's region (including in North Carolina on an interim basis), continuing to utilize this approach in North Carolina on a permanent basis would avoid the expense, labor, and time necessary to develop a new approach. Further, BellSouth noted, since the Georgia Plan is in effect throughout BellSouth's region, it has been demonstrated that the Georgia disaggregation actually works. BellSouth stated that glitches that occur when a new process is first rolled out have already been addressed and remedied under the Georgia Plan and that this provides another reason that continuing to use the Georgia Plan is the better alternative.

BellSouth concluded that the potential duplication of penalties can only be properly addressed by aggregating results into submetrics in a way that will avoid product-related duplication. BellSouth asserted that the most practical way to accomplish this aggregation is to permanently adopt the Georgia Plan that is currently being utilized on an interim basis in North Carolina.

CLP COALITION: The CLP Coalition noted that the Commission, in its May 22, 2002 *Performance Measurement Order*, adopted a level of product disaggregation in the remedy plan that was designed to promote local service competition. The CLP Coalition stated that the disaggregation ensured that BellSouth would pay penalties if it missed a measure that impacted a CLP customer. The CLP Coalition commented that in order to eliminate the possibility that BellSouth would pay duplicative penalties, the Parties complied with the Commission's directive to address this issue through negotiations. The CLP Coalition asserted that at the time the negotiations were ordered, BellSouth had not provided the Parties with details as to which specific products were being erroneously and redundantly distributed to multiple submeasures of the same measure.

The CLP Coalition stated that subsequent to the Commission's *Order*, BellSouth did provide a table that contained some specifics on the distribution of transactions associated with specific product/services to multiple submeasures within the same measure. The CLP Coalition noted that with that information, it proposed an alternative that would eliminate any duplicative penalties and could also address the duplication in the SQM reporting. The CLP Coalition argued that if duplicate product reporting in the SQM reports is corrected, then the issue of duplicative reporting and penalty payments in the remedy plan would also be resolved. The CLP Coalition stated that BellSouth has refused to accept the CLP Alternate Proposal.

The CLP Coalition maintained that its proposal eliminates distribution of a single CLP transaction to multiple submeasures for the same measure. The CLP Coalition noted that its Comments are intended to address the penalty plan. The CLP Coalition stated that, however, if BellSouth's claims of overlapping measures are correct, BellSouth should be ordered to address this performance reporting problem immediately given that BellSouth's claim of submeasure overlap puts the integrity of its SQM Performance Reporting in question.

The CLP Coalition commented that BellSouth provided the CLPs with a table entitled "NC SQM Product Disaggregation – Where a product falls into more than 1 SQM Product Group" (BellSouth Table). The CLP Coalition stated that BellSouth indicated that the table would provide details where an individual product is captured in more than one SQM product disaggregation. The CLP Coalition asserted that the CLP Alternate Proposal eliminates the overlapping transactions between submeasures of the same measures as provided in the BellSouth Table.

The CLP Coalition argued that its Alternate Proposal provides for a single transaction for a designated product/service, which BellSouth is currently distributing to multiple submeasures, to be mapped to a single submeasure. The CLP Coalition noted that, for example, the BellSouth Table reflects that UNE 2W ISDN Loop (Basic Rate) Design is currently being distributed to both the UNE Digital Loop < DS1 submeasure and the UNE ISDN Loop submeasure for provisioning measures. The CLPs noted that their Alternate Proposal distributed the UNE 2W ISDN Loop (Basic Rate) Design transactions solely to UNE ISDN Loop submeasure, not to UNE Digital Loop < DS1 and UNE ISDN Loop submeasures. The CLP Coalition argued that as the example indicates, each product associated with a CLP transaction would be assigned to a unique submeasure within a given category (i.e., ordering, provisioning, or maintenance).

The CLP Coalition argued that its approach eliminates any submeasure overlap and represents a cost-effective approach to correct the SQM reporting problem. The CLP Coalition maintained that this approach would also facilitate a more expeditious implementation of the Commission's *Performance Measurements Order*.

The CLP Coalition argued that BellSouth does not have valid rationale for rejecting the CLP Coalition's Proposal. The CLP Coalition asserted that although the CLP Alternate Proposal provides an accurate, timely, and cost effective alternative to eliminate overlapping CLP transactions among multiple SQM submeasures as well as duplication of penalties, BellSouth rejected the proposal. The CLP Coalition also stated that during negotiations, BellSouth claimed for the first time that there were additional instances of SQM measure overlap not captured in the table.

The CLP Coalition asserted that BellSouth's late revelation only hinders compliance with the Commission's original *Order* which required that the same level of disaggregation should be used to determine both compliance and remedy payments. The CLP Coalition noted that it appears that BellSouth rejected the CLP Alternate Proposal because it would prefer that the Commission adopt the disaggregation BellSouth originally proposed which is closer to the Georgia SEEM Plan. However, the CLP Coalition argued that BellSouth only proposed seven levels of product disaggregation for provisioning measures for the North Carolina penalty plan. The CLP Coalition asserted that this would allow BellSouth to miss several customer impacting submeasures without penalties compared to the 20 levels of SQM product disaggregation for provisioning measures currently specified in the North Carolina *Performance Measurements Order*.

The CLP Coalition maintained that a comparison of the current remedy reporting plan in North Carolina with the Florida remedy report clearly shows that if a lesser level of disaggregation were implemented, BellSouth could miss a submeasure without incurring any penalties. The CLP Coalition noted that both the Florida and North Carolina performance measurements *Orders* specified "Customer Trouble Report Rate - UNE Digital Loop < DS1" and "Customer Trouble Report Rate – UNE Digital Loop ≥ DS1" as levels of disaggregation in the remedy plan. The CLP Coalition stated that the Florida Tier II remedy reports indicate that BellSouth missed the "Customer Trouble Report Rate – UNE Digital Loop DS1" submeasure performance standard for the last four months. The CLP Coalition commented that under the interim Georgia Plan in North Carolina, BellSouth could be noncompliant at the industry level for the same submeasure and not incur any penalties.

The CLP Coalition noted that according to the CLP-specific North Carolina SQM performance reports for Covad, BellSouth missed the submeasure Customer Trouble Report Rate – UNE (Non-Dispatch) Digital Loop ≥ DS1 for the months of August, October, and November 2002. The CLP Coalition opined that similar substandard performance by BellSouth in North Carolina under the interim Georgia Plan would not be evident in the remedy reports and penalties would not be applicable.

The CLP Coalition asserted that the Commission's *Order* addressing product disaggregation is not flawed. The CLP Coalition maintained that the product disaggregation for remedies in the Florida Plan almost mirrors that of the North Carolina *Performance Measurement Order*. The CLP Coalition stated that it strongly believes that the problem lies with BellSouth's current practice of distributing a single CLP transaction for a given product/service to multiple submeasures of the same measure for reporting purposes.

The CLP Coalition maintained that based on BellSouth's own admission in North Carolina, the duplication lies in BellSouth's performance reporting. The CLP Coalition noted that contrary to what BellSouth has conveyed, the CLP Coalition has never requested or supported this type of flawed and inaccurate reporting. The CLP Coalition stated that BellSouth's June 20, 2002 Motion for Reconsideration and/or Clarification notes that there is a duplication of product reports in certain measurements. The CLP Coalition stated that it is evident that the disaggregation ordered by the Commission for the remedy plan does not need to be revised in order to resolve the issue before the Commission. The CLP Coalition asserted that BellSouth's concerns regarding duplicative penalty payments and the CLPs concerns about accurate reporting can be addressed by adopting the CLP Coalition's Alternate Proposal.

The CLP Coalition stated that BellSouth provided an example of its claim that duplication of penalties is based on allowing a single CLP transaction to be distributed to multiple submeasures within the same measure. The CLP Coalition asserted that there should never be a situation in which disaggregation causes duplicative penalties in a transaction-based plan. First, the CLP Coalition argued, for a given submeasure, each CLP transaction should be allocated to no more than one submeasure within a given measure. The CLP Coalition stated that using the Order Completion Interval (OCI) measure as an example, each completed service order for a CLP customer should be distributed to only one of the following levels of product disaggregation:

- Resale Residence
- Resale Business
- Resale Design
- Resale PBX
- Resale Centrex
- Resale ISDN
- LNP (Standalone)
- 2W Analog Loop Design
- 2W Analog Loop Non-Design
- UNE Digital Loop < DS1
- UNE Digital Loop ≥ DS1
- UNE Loop and Port Combination
- UNE Switch Port
- UNE Combo Other
- UNE xDSL (HDSL, ADSL, UCL)
- UNE ISDN
- UNE Other Design
- UNE Other Non-Design
- UNE Line Sharing
- UNE Line Splitting
- Local Transport
- Local Interconnection Trunks

The CLP Coalition noted that if one of the transactions for OCI is for the provisioning of UNE 2W ADSL with Bridge Tap Removal – Loop Modification, then that CLP transaction can be distributed to the UNE xDSL with conditioning submeasure. The CLP Coalition argued that this transaction should not be distributed to both UNE Digital Loop ≥ or < DS1 and UNE xDSL with conditioning submeasures. The CLP Coalition stated that not only would this cause duplicate penalties for the same transaction, but it would also cause the overstatement of the performance report volumes since one transaction is counted multiple times. The CLP Coalition asserted that the only issue for the Commission to address is the flawed performance reporting. The CLP Coalition argued that there is no reason to change the product disaggregation in the penalty plan.

The CLP Coalition requested that the Commission adopt the CLP proposal to address BellSouth's concerns of duplicative penalties. The CLP Coalition asserted that its proposal: (1) is cost-effective for BellSouth; (2) would correct BellSouth's current practice of reporting a single transaction for a product/service to multiple submeasures within the same measures; and (3) eliminate the possibility of duplicate penalties for a single transaction.

REPLY COMMENTS

BELLSOUTH: BellSouth stated in its Reply Comments that on February 5, 2003, BellSouth and the CLP Coalition filed their respective Comments in this matter. BellSouth argued that it proposed a workable solution to address the problem that all Parties agree exists, that the version of the SEEM Plan ordered by the Commission contains a level of product disaggregation that could result in duplicate penalties. In contrast, BellSouth opined, the CLP Coalition's Comments are comprised of three elements: (1) the CLPs devote a great deal of their Comments to gratuitous (and false) attempts to cast blame on BellSouth for the problem; (2) the CLPs briefly discuss (but, in the main, do not explain) their Alternate Proposal for removing duplication from the SQM; and (3) the CLPs also present a patently unworkable proposal to conduct a massive overhaul of both the SEEM Plan and the SQM Plan. BellSouth asserted that the CLPs have provided nothing to support their unworkable and arbitrary proposals. For this reason, BellSouth argued, the CLP Coalition's proposals should be rejected.

BellSouth maintained that in the only part of the CLP Coalition's Comments that addresses what is actually at issue (a way to avoid the current duplication in the SEEM Plan) the CLPs make what they refer to as their Alternate Proposal. BellSouth argued that this proposal, however, is both random and arbitrary. Further, BellSouth noted that the CLPs provide no rationale to support their proposal, and as far as BellSouth can discern, none exists. BellSouth opined that the CLP Coalition's proposal would, in some cases, fail to address the problem, and in other instances, would cause new problems. Moreover, BellSouth asserted that the submetric-by-submetric change process advocated by the CLPs would require a substantial, time-consuming, and ultimately unnecessary undertaking. Instead, BellSouth argued that the far better course of action is to order the continued use of the Georgia disaggregation that is currently in place in North Carolina on an interim basis.

BellSouth noted that the CLP Coalition devoted a fairly limited portion of its Comments to actually addressing the penalty duplication problem. Instead, BellSouth argued that the CLP Coalition expended a great deal of effort casting aspersions on BellSouth, based on the false claim that BellSouth has somehow single-handedly created the problem. BellSouth stated that since the purpose of the comment cycle was to make a reasonable proposal to address the penalty duplication problem, the CLP Coalition's Comments of this sort would scarcely be worth responding to, except for one thing: the CLPs have tried not only to create the false impression that the instant problem is BellSouth's fault, but also that it is only a reporting problem. BellSouth asserted that the CLP Coalition has contended that BellSouth can simply unilaterally fix this problem if it elected to report performance results differently. BellSouth maintained that this contention is completely unstoppable.

BellSouth stated that the penalty duplication problem has developed over time through the proceedings that have taken place throughout BellSouth's region. BellSouth noted that typically, it has proposed plans that include reporting and penalty assessments at a more aggregated level than that normally advocated by the CLPs. BellSouth asserted that the Commission rejected the

CLPs' disaggregation proposal in the main, but it did accept some of the disaggregation proposed by the CLPs. BellSouth stated that other state commissions have previously done the same, and, consequently, the measurement plan has come to be an amalgam of the submeasures proposed by BellSouth and the more disaggregated submeasures advocated by the CLPs. BellSouth noted that when these state commissions accepted the additional disaggregation proposed by the CLPs, with few exceptions, the state commissions gave no specific instructions to modify the submeasures proposed by BellSouth to remove the duplication resulting from the additional CLP disaggregation.

BellSouth opined that this combining of BellSouth's proposal and the CLPs' proposal has resulted in some product-related duplication in the SQM. BellSouth argued that this duplication, however, is not necessarily a problem in the measurement portion of the plan. BellSouth noted that when this duplication is transferred to the enforcement portion of the plan, the result is duplicate penalties, a result that the Commission has specifically stated should not occur. BellSouth asserted that the duplication caused by the degree of disaggregation that was ordered for the SEEM Plan is not simply a reporting problem as the CLPs contend, but rather a direct result of the structure of the SQM Plan at this juncture.

BellSouth stated that the CLPs, nevertheless, ignore the nature of the problem and contend that BellSouth can somehow remedy this problem by reporting results differently. BellSouth asserted that this is simply wrong. BellSouth noted that the CLPs suggest that BellSouth should simply fix the problem by allocating each CLP transaction to no more than one submeasure within a given measure. BellSouth argued that the problem with this suggestion is that BellSouth cannot do this unilaterally without violating the *Order* of the Commission. BellSouth stated that it cannot unilaterally remove any UNE/product from any submetric without creating a substantial change to the plan as ordered by the Commission.

BellSouth maintained that the only way that it could fix the problem would be to remove unilaterally enough transactions from the submetrics to ensure there is no duplication. BellSouth stated that if it were to do so, there is absolutely no doubt that the CLPs would complain that BellSouth is not implementing what the Commission ordered. BellSouth asserted that solving the duplication problem requires more than simply reporting results differently.

BellSouth noted that during the negotiation session of January 8, 2003, the CLPs did not dispute the duplication that BellSouth has identified, but they did claim to be unaware of the problem until recently. BellSouth stated that in the CLP Coalition's Comments, it claims uncertainty as to whether the duplication problem even exists. BellSouth maintained that the truth is that the CLPs are well aware of the problem, they have been for some time, and they have been perfectly happy to keep the duplication in the measurement plan.

BellSouth stated that all CLPs have access to the Raw Data Users Manual (RDUM) on the Performance Measurement and Analysis Platform (PMAP) website, which contains instructions on manipulating product roll-ups. BellSouth noted that this information details precisely the composition of each submetric, and it clearly shows the assignment of products to more than one submetric. Further, BellSouth asserted that the CLPs have accessed this information continually over the past several years. BellSouth noted that in workshops throughout the region, AT&T has stated that it obtains and utilizes this raw data on a monthly basis. BellSouth opined that the CLPs have long known precisely how the disaggregation in BellSouth's SQM functions.

BellSouth noted that the CLP Coalition's Comments state that the CLP Coalition does not endorse using the existing SQM disaggregation for the SEEM disaggregation. Therefore, BellSouth maintained, despite all their rhetoric, the CLPs acknowledge that it is necessary to devise a different disaggregation from the SQM for penalty calculations. Accordingly, BellSouth noted that the CLPs make a proposal to eliminate certain products/submetrics to avoid duplication. BellSouth stated that the CLPs, however, have provided almost nothing in their Comments to explain this proposal. BellSouth opined that the CLPs have offered as their proposal a seemingly random and arbitrary variety of submetric selections. BellSouth stated that in every instance in which BellSouth has identified a product that is included in two or more submetrics, the CLPs have simply selected a submetric to which they contend the product should be assigned. BellSouth noted that, however, the CLPs provide no explanation of how these particular choices were made. Further, BellSouth asserted that the CLPs make the cursory claim that their choices are accurate, timely, and cost-effective. BellSouth argued that the CLPs, however, fail to provide anything to support the idea that their selections enjoy these attributes.

BellSouth maintained that a review of the CLP Coalition's proposal reveals that it simply does not work. BellSouth asserted that the CLP Coalition's proposal has both the potential to perpetuate the instant problem, in some instances, and to create new problems in other instances.

As BellSouth noted in its Comments, the general problem in the SEEM Plan as ordered by the Commission is that some submetrics are comprised of a group of products, others include only individual products, and some of these latter submetrics have products that are also included in the former group submetrics. BellSouth stated that the problem is complicated by the fact that there are other products in this group of submetrics that are not duplicated in their own, product specific submetric. BellSouth commented that given these facts, the CLPs' approach to the disaggregation issue is wholly inadequate.

BellSouth stated that to provide an example of the problems with the CLP approach, the CLPs propose to deal with resale products that are disaggregated for purposes of maintenance and repair measures by utilizing only single product submetrics. BellSouth maintained that whenever a business product appears in both the submetric for the entire group of business products and in an individual product submetric (i.e., in every instance in which there is duplication) the CLPs have assigned the product to the product-specific submetric. BellSouth argued that this has the result of retaining the product-specific submetrics, while discarding the submetric that currently has the entire group of business products. BellSouth stated that the problem is that the business group also includes products (such as 1FB lines) that are not captured anywhere else. Thus, BellSouth opined, the CLP Coalition's proposal for dealing with maintenance and repair measures involves not only removing duplication but also improperly discarding the transactions that are not currently duplicated. BellSouth commented that the CLPs have proposed the same sort of disaggregation for provisioning measures, with the result that this aspect of their proposal has precisely the same problem.

BellSouth asserted that in the area of ordering measures, however, the CLPs have adopted a different approach, and created an entirely different problem. Specifically, BellSouth noted, when addressing most of the products for which there is duplication, the CLPs have suggested the use of the product-specific submetric rather than the submetric comprised of a group of products. However, BellSouth commented, for one of these product-specific disaggregations in the ordering measures, DID Trunk-Business, the CLPs have not advocated the use of a product-specific submetric, but rather have assigned this product to the submetric that includes the entire group of business services. BellSouth noted that the business submetric includes both the specific service at issue plus all of the other business services (such as PBX, ISDN Residence, and CENTREX-ESSX) that the CLPs have assigned to other, single product submetrics. Thus, BellSouth contended, by choosing the more inclusive submetric for this product, while also choosing submetrics composed only of single products that also fall into the submetric, the CLPs have perpetuated the precise type of duplication that the Commission has instructed the Parties to remove.

BellSouth noted that the CLPs have offered no supporting rationale for the proposal they have made and have not even included an explanation of how they developed this proposal. Instead, BellSouth opined, they appear to have simply gone through each particular product that appears in more than one submetric and randomly picked one submetric or the other. BellSouth argued that the fact that the CLPs have provided no logical support for their submetric selections is, standing alone, enough to mandate that their proposal be rejected.

BellSouth stated that the CLPs contend that BellSouth's proposal hinders compliance with this Commission's original *Order* requiring that the same level of disaggregation should be used to determine both compliance and remedy payments. BellSouth noted that the entire point of its Motion for Reconsideration, however, was the fact that it is impossible to have the same disaggregation for the SQM and SEEM Plans without having the duplication in penalties that the Commission has directed the Parties to endeavor to remove. BellSouth commented that the CLP Coalition expressly states in its Comments that even it is not in favor of having the same disaggregation for the SEEM Plan as for the SQM. Further, BellSouth argued that the CLP Coalition's Alternate Proposal removes some submetrics in the SEEM Plan in favor of keeping others, but consistent with the Commission's *Order* has no effect on the SQM Plan. Thus, BellSouth maintained that the CLP Coalition's proposal does precisely the same thing that the CLPs accuse BellSouth of doing. BellSouth asserted that, at this juncture of the proceedings, there is absolutely nothing wrong with suggesting that the disaggregations of the SEEM Plan and the disaggregations of the SQM Plan should be different. BellSouth noted that, in fact, the Commission has recognized in its *Reconsideration Order* that this result is necessary to resolve the current duplication problem.

BellSouth maintained that the CLPs make the incorrect claim that the fact that the Georgia Plan has seven levels of product disaggregation means that it does not allow for like-to-like comparisons. BellSouth argued that, to the contrary, as the CLPs know quite well through their extensive exposure to the penalty calculations in BellSouth's SEEM Plan, the Georgia Plan does make like-to-like comparisons. BellSouth stated that these comparisons are of specific products/UNEs provided to the CLPs and the respective BellSouth retail analog. BellSouth stated that the cells in which BellSouth's performance fails are then aggregated up to one of the seven levels of disaggregation. Thus, BellSouth noted that penalties are applied, for example, at the UNE loop level, but this occurs only after BellSouth's performance in providing individual loop products is scrutinized at the cell level.

BellSouth commented that beyond this, the CLPs make two other arguments: (1) more disaggregation must necessarily be better than less disaggregation, because it is what has been ordered by the Florida Commission; and (2) more disaggregation will result in more penalties.

BellSouth stated that as to the CLPs' first argument, that this Commission should necessarily do as the Florida Commission has done, this is just the latest example of the CLPs' habitual practice of selectively and misleading citing to the actions of other state commissions.

BellSouth maintained that of the eight other states in BellSouth's region, the six state commissions that have adopted a transaction-based plan have all adopted a version of the Georgia-approved disaggregation. BellSouth noted that the Florida Commission ordered a plan with more disaggregation than the Georgia Plan, but also chose to have a measurement-based plan rather than a transaction-based plan. BellSouth further noted that Tennessee has entered an Order stating that, at least until the end of 2003, its plan will be precisely the same as Florida's plan, even if the Florida plan changes. Given this, BellSouth maintained, the North Carolina Commission's *Order* represents the only instance in BellSouth's region in which a state commission has ordered a transaction-based plan along with a level of disaggregation in the SEEM Plan that is any greater than that ordered by the Georgia Commission. BellSouth argued that the CLPs simply ignore the fact and attempt to rely on a decision made by the Florida Commission in the context of ordering a completely different type of plan. BellSouth noted that what the CLPs also fail to mention is that excessive disaggregation in a measurement-based plan is, all things being equal, substantially less of a problem than it is in a transaction-based plan.

BellSouth asserted that in any plan ordered by any commission, one of the primary goals is to set penalties at an appropriate level to further the goals of the plan, without being needlessly punitive, and without creating an excessive amount of penalty payments that serve only to provide unwarranted enrichment to the CLPs. BellSouth commented that to accomplish this, a Commission must consider how all aspects of a given plan fit together. BellSouth noted that the Florida Commission-ordered plan has 795 submetrics, each of which is subject to a single penalty if BellSouth fails the submeasure. BellSouth commented that in a transaction-based plan, the 795 submetrics would be multiplied by thousands of CLP transactions each month to determine the potential for failure, and penalties, in the aggregate. BellSouth stated that, thus, combining the Florida level of disaggregation with the transaction-based plan and fee schedule adopted by the Commission (as opposed to the measurement-based plan adopted in Florida) has the potential to multiply the aggregate penalty payment exponentially over what would be payable in Florida under comparable circumstances. BellSouth maintained that without a reduction in the current level of disaggregation, the North Carolina-approved plan would prompt penalty payments at a much higher aggregate level than would be assessed under any plan ordered by any other state commission in BellSouth's region for comparable levels of performance.

BellSouth noted that at the same time, the Florida Commission has clearly expressed its intention to move away from a measurement-based plan in favor of a transaction-based plan. BellSouth asserted that this preference has provided much of the focus of the first periodic review in Florida, which is presently ongoing. Further, BellSouth pointed out that in its Comments filed in Florida, it stated that the degree of disaggregation in the Florida plan would become more problematic with the move to a transaction-based plan. BellSouth stated that it has also provided to the Florida Commission reasons that, with the move to a transaction-based plan, it will be necessary to revisit the disaggregation issue. BellSouth noted that although no ruling has been made, the Florida Commission continues to consider this issue as part of the ongoing periodic review. Thus, BellSouth asserted that there is the very strong possibility that the only state in BellSouth's region that has made an independent decision to have the greater level of disaggregation (albeit with a different plan) will be, in the near future, both changing its plan and making concurrent changes to the disaggregation that is currently in the plan.

BellSouth stated that although the CLP Coalition devotes a portion of its Comments to proposing a plan that addresses in some fashion the Commission's *Order*, (i.e., the CLP Coalition's Alternate Proposal), the CLPs also argue that the Commission should undertake a massive restructuring of the entire performance plan, including both the SQM and the SEEM. BellSouth commented that the CLPs state that if BellSouth's claims of overlapping measures are correct, BellSouth should be ordered to address this performance reporting problem immediately given that BellSouth's claim of submeasure overlap puts the integrity of the SQM Performance Reporting in question. BellSouth noted that this comment appears to be a suggestion that the instant problem should be addressed by immediately restructuring both the SEEM and SQM Plans. Clearly, BellSouth argued, the Commission's direction to the Parties is to address only the penalty plan, not the disaggregation in the SQM Plan. Further, BellSouth argued, if the CLPs wish to propose a change to the disaggregation in the SQM, then the appropriate time to do so would be in the next periodic review.

BellSouth commented that, to date, there is nothing in the record of this case that would allow the Commission to make an appropriate decision about restructuring the SQM. BellSouth argued that the CLP Coalition's proposal would require the Commission to conduct another contested proceeding, including testimony, hearing, and briefs by the Parties, before making a decision as to how the SQM Plan should be restructured. BellSouth noted that at the conclusion of this process, it would be necessary to allow BellSouth additional time to implement the restructured plan, whatever it might be.

At the same time, BellSouth maintained, the Commission has ordered that a periodic review will be commenced one year after a final order is entered. Thus, BellSouth argued, what the CLP Coalition's proposal amounts to is a suggestion that the Commission should invest the next year to a year and a half to immediately restructure both the measurement and penalty portion of the plan, with the end result being a final plan that would necessarily be in place for only a year before it would be subject to further changes. BellSouth asserted that the CLPs' suggestion would obviously result in an unnecessary waste of resources, but would accomplish little else.

BellSouth maintained that regardless of what the Commission does at this juncture, the plan will probably change during the first periodic view, which again, is set to commence one year after a

Final Order is entered. Thus, realistically speaking, BellSouth commented that what the Commission does at this juncture will likely have a life span of only about a year, plus whatever time it takes to complete the review process. Given this, BellSouth asserted that there is much to be said for choosing the simplest and most straightforward solution to the penalty problem, as opposed to a complex and more labor extensive solution.

BellSouth noted that it objects to the CLPs' arbitrary proposal to pick and choose submetrics on a random basis. BellSouth argued that there is good reason for the Commission to decline to undertake any effort to do a submetric-by-submetric restructure of the SEEM. BellSouth argued that even the representative lists of duplications that it has provided contains 136 individual instances that would have to be reviewed, and a decision would have to be made as to which submetric should be utilized in each instance. BellSouth noted that doing so would be a time consuming process, and one that would certainly be susceptible to some degree of arbitrary decisions. BellSouth argued that even after this process was completed, implementing the specific changes on a submetric-by-submetric basis would be fairly time-consuming. BellSouth noted that this implementation would require that, in every instance in which the activity associated with one product appears in more than one product category, the product mapping would have to be changed. BellSouth commented that after that occurs, BellSouth would require between two months and six months to define the programming changes required, and to perform the coding and testing necessary to change the performance measurement reports in PMAP. BellSouth noted that the range of two to six months is dependent upon whether changes are required in the PMAP reports only, or in both the PMAP reports and the Monthly State Summary (MSS) reports that were used in the Section 271 Docket in North Carolina. Thus, BellSouth maintained, the result of this approach would be a longer delay in implementation of a permanent plan.

BellSouth argued that the only reasonable alternative to this approach is to utilize the Georgia approach to disaggregation. BellSouth maintained that the Georgia Plan is already in place, on an interim basis, in North Carolina, which would allow for an extremely smooth, and very quick, transition to utilizing the plan on a permanent basis. BellSouth asserted that adopting the Georgia approach on a permanent basis would be the most efficient, and the quickest, means to address the instant duplication problem. BellSouth recommended that the Commission adopt this approach immediately. BellSouth maintained that the best alternative is to simply continue to use, at least until the first periodic review, the Georgia Plan that is currently in place in North Carolina on an interim basis.

CLP COALITION: The CLP Coalition stated in its Reply Comments that although the CLPs disagree with BellSouth's argument that the remedy plan disaggregation ordered by the Commission could possibly result in duplicative penalties, the CLP Coalition proposed a sound, cost-effective solution to address BellSouth's concerns. Yet, the CLP Coalition argued, BellSouth rejected this proposal, and it now appears that duplicative penalties are not the real issue BellSouth wants the Commission to address. The CLP Coalition argued that it is apparent to the CLPs that BellSouth's sole mission is to make an end run around the Commission's *May 22, 2002 Order* in this docket and have the Georgia remedy plan implemented in North Carolina on a permanent basis. The CLP Coalition asserted that because the Georgia remedy plan would mask customer-impacting discrimination, BellSouth's veiled attempt to eviscerate the Commission's *May 22, 2002 Order* must be rejected.

The CLP Coalition argued that flawed SQM reporting, not the penalty plan, is the cause for duplicate penalties which BellSouth alleges. The CLP Coalition asserted that BellSouth has not established that the remedy plan disaggregation ordered by the Commission is flawed. The CLP Coalition stated that even though BellSouth stated that all Parties agree that duplicate penalties could be paid under the penalty plan, the CLPs do not agree that this will occur. The CLP Coalition stated that, in fact, the product disaggregation ordered by the Commission is almost exactly like the product disaggregation implemented in Florida in May 2002. The CLP Coalition presented a chart which shows that the only difference between North Carolina and Florida on product disaggregation is that North Carolina did not order disaggregation on INP standalone. The CLP Coalition noted that the *Florida Order*, which specified the level of disaggregation for the remedy plan, was issued in September 2001 and even though BellSouth filed a Motion for Reconsideration of the *Florida Order*, the Motion did not raise the issue of duplicative penalties. In fact, the CLP Coalition stated, this proceeding is the first time that BellSouth has raised the issue.

The CLP Coalition asserted that based on BellSouth's own admission in this proceeding, the duplication lies in BellSouth's performance reporting, not the disaggregation of the remedy plan. The CLP Coalition maintained that duplicity in SQM reporting does not mean that there are duplicative penalties in the remedy plan. The CLP Coalition provided the following illustrative chart of the current approach – Georgia Remedy Plan:

Product Description	NC SQM Submeasure Overlap	GA SEEM Disaggregation
UNE 2W ADSL without Loop Modification	UNE Digital Loop < DS1 UNE xDSL Loop UNE xDSL Loop w/ Loop Conditioning	UNE xDSL Loop
UNE 2W ISDN Loop (Basic Rate) Design	UNE Digital Loop < DS1 UNE ISDN Loop	UNE Loop

The CLP Coalition stated that although UNE 2W ADSL without Loop Modification is distributed to several SQM submeasures for reporting purposes, the same transaction is only mapped to one SEEM submeasure. The CLP Coalition maintained that the same holds true for UNE 2W ISDN Loop (Basic Rate) Design; it is distributed to two SQM reporting measures but only one SEEM submeasure. The CLP Coalition stated that this means that BellSouth will only consider this transaction once for penalty purposes.

The CLP Coalition asserted that the same: (1) one transaction distributed to three SQM submeasures distributed to one SEEM submeasure (1-to-3-to-1) approach; <u>or</u> (2) one transaction distributed to two SQM submeasures distributed to one SEEM submeasure (1-to-2 to-1) approach should be used with the remedy plan disaggregation ordered by the Commission in North Carolina. The CLP Coalition maintained that the 1-to-3-to-1 approach has not caused duplicate penalties in the Georgia Remedy Plan and would not cause duplicative penalties in the North Carolina-ordered Plan. The CLP Coalition provided the following chart to illustrate that under the "North Carolina Approach" the only difference is the submeasure the transaction would map to in SEEM:

Product Description	NC SQM Submeasure Overlap	GA SEEM Disaggregation
UNE 2W ADSL without Loop Modification	UNE Digital Loop < DS1 UNE xDSL Loop UNE xDSL Loop w/ Loop Conditioning	UNE xDSL Loop
UNE 2W ISDN Loop (Basic Rate) Design	UNE Digital Loop < DS1 UNE ISDN Loop	UNE ISDN

The CLP Coalition stated that based on the foregoing, it is evident that the North Carolina remedy plan disaggregation is not flawed. The CLP Coalition argued that it is BellSouth's flawed SQM reporting that has allowed this red herring issue to delay implementation of the Commission's *November 2002 Order*.

The CLP Coalition further asserted that BellSouth misleadingly stated that the CLPs are in agreement as to the product-related duplication that exists, at least in the areas of ordering, provisioning, and maintenance. The CLP Coalition maintained that until BellSouth presented the CLPs with its representative matrix/list of duplicative products, the CLPs were unaware of how BellSouth erroneously applied a single transaction for a given product/service to multiple SQM submeasures.

The CLP Coalition asserted that BellSouth's implementation of the remedy plan does not have to result in overlapping a transaction among submeasures for the same metric. The CLP Coalition maintained that BellSouth has unilaterally decided how to implement the Commission's *Order*. Furthermore, the CLP Coalition stated that the CLPs have never requested or even discussed overlapping transactions in any proceeding regarding performance measures in the BellSouth region.

The CLP Coalition argued that BellSouth's aggregation masks customer-impacting discrimination. The CLP Coalition stated that contrary to what BellSouth would have the Commission believe, it is not necessary to eliminate some of the levels of disaggregation from the SEEM Plan the Commission has ordered. The CLP Coalition noted that BellSouth can have a single transaction for a given product/service map to two or three SQM submeasures and map that same transaction to only one submeasure in the interim Georgia SEEM. The CLP Coalition argued that this same approach can be used in the permanent SEEM Plan ordered by the Commission.

The CLP Coalition asserted that BellSouth wants the Commission to use only seven submeasures for the entire North Carolina SEEM Plan. However, the CLP Coalition maintained, this solution would mask discrimination by BellSouth and would be a step backwards from the Commission's goal of ensuring parity service for CLP customers. The CLP Coalition provided the following table to illustrate that industry-level noncompliance by BellSouth could go undetected given that the Georgia Plan is currently implemented in North Carolina because the interim Georgia Plan does not provide the levels of disaggregation that would allow certain levels of noncompliant performance to be assessed or remedied:

Florida SEEM Submeasures (Tier II)	November 2002	October 2002	September 2002
Customer Trouble Report Rate – UNE Digital Loop DS1	No	No	No
Customer Trouble Report Rate – UNE ISDN	No	No	No
Customer Trouble Report Rate – UNE Combo Other	No	No	No
Maintenance Average Duration - UNE ISDN	No	No	No
Maintenance Average Duration - UNE 2W Analog Loop Non-Design	No	No	No

The CLP Coalition stated that the interim Georgia Plan that is currently implemented in North Carolina will allow BellSouth to discriminate against CLP customers without any sanctions, but it will not occur if the Commission's *Order* for the SEEM submeasures is implemented. The CLP Coalition asserted that just as BellSouth can ensure that the remedy plan includes all relevant transactions when it maps the transactions to an aggregated number of remedy submeasures in the Georgia SEEM, BellSouth can just as easily map to the remedy submeasures ordered by the Commission without any duplication of penalties.

The CLP Coalition maintained that its arguments concerning aggregation have not been uniformly rejected by all state commissions in BellSouth's region. The CLP Coalition asserted that similar to the Commission, both the Florida Commission and the Tennessee Authority have ordered the same submeasures for both the remedy plan and the SQM. The CLP Coalition noted that the fact that Florida and Tennessee have adopted measure-based remedy plans does not negate the fact that the submeasures and methodology upon which compliance is determined match those ordered by the Commission. The CLP Coalition asserted that it is important to note that the methodology for determining compliance in North Carolina is almost identical to that of Florida and Tennessee. The CLP Coalition stated that the most meaningful difference, which is not really pertinent for determining remedy plan submeasures, is how the dollar amount of the remedy plan is calculated.

The CLP Coalition noted that BellSouth argued for greater aggregation of submetrics because certain metrics have fewer than 30 transactions, and 30 transactions is a minimum threshold commonly accepted by statisticians, below which results may not be representative. The CLP Coalition argued that 30 transactions is not a minimum threshold commonly accepted by statisticians. The CLP Coalition noted that reputable statisticians do not set a general threshold for what constitutes an adequate sample size. The CLP Coalition also maintained that statisticians would agree that a larger sample is more informative than a smaller one taken from the same population.

The CLP Coalition maintained that the North Carolina remedy plan disaggregation will not cause products/services to be discarded from the SEEM Plan. The CLP Coalition stated that its recommendation does not result in discarding any transactions as suggested by BellSouth. The CLP Coalition stated that BellSouth is correct that PBX-related products/services should be mapped to the Resale PBX submeasure. However, the CLP Coalition maintained, ideally the remaining resale transactions for a given product/service unrelated to PBX, Centrex, or ISDN would be allocated to the Resale Business or Resale Residence submeasure. The CLP Coalition noted that it has not indicated or implied that the Resale Business submeasure should or would be eliminated from the remedy plan.

The CLP Coalition stated that it has not opted for using only the single product submetric for the SEEM disaggregation. The CLP Coalition noted that it has eight products mapped to UNE xDSL Loop. The CLP Coalition asserted that it supports grouping like products together; not dissimilar products such as xDSL, ISDN-BRI, ISDN-PRI, and Digital Loop < DS1.

The CLP Coalition argued that contrary to BellSouth's assertions, CLPs would prefer that transactions related to Resale DID Trunks be allocated to the UNE DID submeasure as the Florida Commission has done. However, the CLP Coalition stated, Attachment II of its February 5, 2003 Response was limited to the existing disaggregation levels that were contained in the BellSouth Table.

The CLP Coalition further maintained that there is no problem with the retail analogs ordered by the Commission. The CLP Coalition stated that the only issue before the Commission is to determine which submeasures should be included in the remedy plan that will not result in duplicate remedies. The CLP Coalition asserted that the Commission's *November 1, 2002 Order* responded to BellSouth's Motion for Reconsideration concerning Finding of Fact No. 12 and required the Parties to negotiate the issue of which submeasures should be included in the remedy plan to address BellSouth's concern on the duplication of penalties relating to product disaggregation. The CLP Coalition maintained that the negotiations reached an impasse, and the Parties agreed with the Public Staff that it would be appropriate for the Parties to file Comments with the Commission on that one issue. The CLP Coalition argued that the Comments were not intended to address retail analogs as suggested by BellSouth.

The CLP Coalition maintained that the remedy plan retail analogs ordered by the Commission are not unique to this region or to BellSouth. Rather, the CLP Coalition argued, these remedy plan retail analogs are the same as the SQM retail analogs which are already established and which correspond to the retail analogs in the Florida remedy plan. The CLP Coalition stated that it has in no way expressed agreement as to the accuracy of the analysis that BellSouth states shows how disaggregation results in a mismatch with retail analogs.

The CLP Coalition stated that BellSouth seems to imply that it is acceptable to use the retail analogs for SQM reporting purposes, but unacceptable to use those same retail analogs for remedy purposes. The CLP Coalition asserted that what BellSouth is actually saying, which the Commission should wholeheartedly reject, is that performance reporting does not need to be accurate.

The CLP Coalition asserted that the potential duplication of penalties, alleged by BellSouth, can be addressed without adopting BellSouth's proposed aggregation which masks discrimination. The CLP Coalition argued that given that transactions can be mapped, without overlap, to the appropriate remedy plan submeasure in the Florida Plan for compliance determinations, then BellSouth is equally able to map, without overlap, transactions to the appropriate remedy plan submeasures in the North Carolina Plan. The CLP Coalition stated that its previously filed proposal is: (1) cost-effective for BellSouth; (2) would correct BellSouth's current practice of reporting a single transaction for a product/service to multiple submeasures within the same measure; and (3) eliminates the possibility of duplicate penalties for a single transaction.

PUBLIC STAFF: The Public Staff noted in its Reply Comments that the Commission, in its May 23, 2002 *Order Concerning Performance Measurements and Enforcement Mechanisms*, found that the same level of disaggregation should be used to determine both compliance and remedy payments. The Public Staff stated that BellSouth filed a Motion for Reconsideration on this issue pointing out that if the same level of disaggregation were used for both the remedy plan and the penalty plan, duplicate payment of penalties would result. The Public Staff noted that in its November 1, 2002 *Order Addressing Motions for Reconsideration and/or Clarification and the Joint Report on Correlated and Customer-Impacting Measures*, the Commission ordered the Parties to negotiate and file a joint report on which submeasures should be included in the remedy plan to address BellSouth's concern on the duplication of penalties related to product disaggregation. The Public Staff commented that the Parties were unable to reach agreement on this issue, and subsequently, a comment cycle was established.

The Public Staff noted that BellSouth proposes that the Commission use the Georgia SEEM Plan and that, according to BellSouth, aggregating some of the transactions currently ordered to be disaggregated in the SEEM Plan is the only way to ensure that the SQM and SEEM Plans include all relevant transactions.

The Public Staff commented that prior to the negotiations, BellSouth provided the Parties with a list of products that appear in multiple categories. The Public Staff stated that BellSouth pointed out that its list was not an exhaustive list of every single duplication in the SQM Plan, but rather a representative list. The Public Staff maintained that BellSouth has never identified every measure that it contends is duplicated. The Public Staff noted that the CLP Coalition has made an Alternate Proposal.

The Public Staff reiterated the position it adopted in its Proposed Order in this docket filed on September 19, 2001, that the North Carolina SEEM Plan should mirror the SEEM Plan in Georgia. The Public Staff maintained that it continues to believe that the Georgia SEEM Plan with the alterations adopted by the Commission is the best solution to this problem of duplication in penalties. The Public Staff asserted that adoption of the Georgia SEEM Plan would also eliminate the problem BellSouth identified with the retail analogs. Additionally, the Public Staff stated, BellSouth should be able to implement this SEEM Plan more quickly and without the inevitable glitches that would accompany an untested SEEM Plan.

The Public Staff noted that while the SEEM Plan in Florida is appealing in its level of disaggregation, the fact that it is a measure-based plan, rather than a transaction-based plan as in Georgia and North Carolina, can make a significant difference in the level of penalties calculated. The Public Staff asserted that it should not be the goal of a SEEM Plan to either provide a revenue stream for CLPs or to allow BellSouth to shirk its duty to provide CLPs with satisfactory performance and nondiscriminatory access to its operations support systems (OSS).

The Public Staff opined that while the CLP Coalition's Alternate Proposal would eliminate the duplication that BellSouth has pointed out so far, the Public Staff stated that it agrees with BellSouth that it appears to be rather arbitrary. The Public Staff commented that implementing the CLP Coalition's Alternate Proposal would likely require additional proceedings so each transaction type could be discussed which would delay the adoption of a final plan.

The Public Staff maintained that a more aggregated plan would better match the current level of transactions produced by the CLPs. The Public Staff stated that it is concerned that a remedy plan with the level of disaggregation proposed by the CLPs will result in a plan that does not function as intended because of small sample sizes that do not allow the statistical method to maintain parity.

The Public Staff commented that it understands the CLPs' concerns about the possibility that aggregation will allow masking of disparities to occur. The Public Staff maintained that it would encourage the CLPs to identify any masking problems using actual data in the annual review of BellSouth's Plans.

The Public Staff maintained that it does not agree with the CLPs that the Commission should address the fact that BellSouth reports some transactions in multiple categories. The Public Staff stated that according to BellSouth, this has occurred in part due to the evolution of the SQM as different public utility commissions in its region required BellSouth to report on its performance in additional categories. The Public Staff opined that it may be helpful to the Commission and the Public Staff to review categories where transactions have been reported at different levels of granularity in order to spot problems on both a macro and micro level. The Public Staff maintained that it can be valuable to see the performance results for a general group of products such as business loops, as well as individual parts of that same group.

The Public Staff noted that all of the states in the BellSouth region, except Florida and Tennessee, are operating with transaction-based plans similar to the one adopted by the Commission. The Public Staff opined that North Carolina can benefit from the experience gained in these other states. The Public Staff maintained that BellSouth also stated that Florida was considering changing to a transaction-based plan. The Public Staff requested that the Commission require BellSouth to file with the Commission and the Public Staff all orders from public utility commissions in its region which alter or substantively address their SQM and SEEM Plans.

SUPPLEMENTAL REPLY COMMENTS

CLP COALITION: The CLP Coalition stated in its Supplemental Reply Comments that an audit of the Georgia performance measures plan and SEEM Plan by BearingPoint (formerly known as KPMG) supports the conclusion that although BellSouth may assign a single CLP transaction to more than one submeasure for SQM reporting, BellSouth uses a CLP wholesale transaction only once to determine the applicable SEEM penalty payment. The CLP Coalition maintained that BearingPoint found that all of the cells in SEEM have unique data which would prevent duplicate transactions being included in any of the SEEM submeasures. The CLP Coalition argued that because the SEEM payment structure in Georgia mirrors that of North Carolina, BearingPoint's analysis is also applicable to the North Carolina SEEM Plan. Therefore, the CLP Coalition asserted, based upon BearingPoint's evaluation and contrary to BellSouth's Initial and Reply Comments, the remedy plan disaggregation ordered by the Commission will <u>not</u> result in duplicative penalties.

The CLP Coalition maintained that as a result of queries by CLPs concerning the Georgia SQM and SEEM disaggregation, BearingPoint reviewed the results of its audit and concluded that transaction duplication in the SQM does not translate to BellSouth paying duplicate penalties for a single CLP transaction in SEEM. The CLP Coalition asserted that BearingPoint was able to draw this conclusion because each cell in the SEEM penalty plan has unique data, i.e., a single CLP transaction is assigned to only one cell. The CLP Coalition noted that a cell contains groups of transactions. The CLP Coalition stated that the SEEM submeasure disaggregation impacts how the transactions in each cell will be aggregated for application of the Truncated Z and affected volume determination. The CLP Coalition asserted that because all cells contain only unique CLP transactions, using the level of disaggregation ordered by the Commission in the SEEM Plan would not result in duplicate penalties for a single performance failure.

The CLP Coalition maintained that BearingPoint's findings are applicable to the proposed North Carolina SEEM Plan because of the similarities between the North Carolina and Georgia SEEM payment structures. The CLP Coalition noted that both plans assign CLP transactions to individual cells and a performance evaluation is made at the cell level. The CLP Coalition stated that next, the cell results are aggregated or rolled up into the particular submeasures that are contained in the penalty plan. The CLP Coalition maintained that contrary to BellSouth's assertions, the proposed North Carolina SEEM Plan does <u>not</u> result in a single CLP transaction being considered more than once to determine the applicable SEEM penalty payment. The CLP Coalition argued that the Commission should rely upon the independent analysis by BearingPoint and reject BellSouth's arguments regarding duplicative penalties under the proposed North Carolina SEEM Plan.

The CLP Coalition further asserted that the BearingPoint analysis supports the conclusion that BellSouth has already implemented the capability to assess performance at the level of disaggregation ordered by the Commission. However, the CLP Coalition agued, it appears that BellSouth chooses to calculate SEEM payments at the broader submeasure level. The CLP Coalition maintained that BellSouth has the present ability to comply with the SEEM disaggregation ordered by the Commission.

The CLP Coalition recommended that the Commission reject BellSouth's arguments regarding duplicative penalties in the SEEM Plan and proceed to implement the *May 22, 2002 Order* in this docket. The CLP Coalition maintained that BearingPoint's independent evaluation of the SQM and SEEM Plans in Georgia has determined that there can be overlapping transactions in the SQM submeasures without having overlapping transactions in the SEEM. Additionally, the CLP Coalition stated, BearingPoint has confirmed that BellSouth has already developed the capability to make compliance determinations in SEEM at the levels of disaggregation specified in the Commission's *May 22, 2002 Order*. The CLP Coalition asserted that BellSouth's arguments concerning duplicative penalties should be considered moot.

RESPONSES

BELLSOUTH: BellSouth stated in its Response that the CLPs are attempting to argue precisely the opposite of the only logical conclusions that can be drawn from BearingPoint's analysis. BellSouth maintained that the BearingPoint Audit confirms what BellSouth has stated repeatedly since it first filed its Motion for Reconsideration: the disaggregation in the SQM is such that some transactions are captured in multiple submetrics. BellSouth argued that if this same disaggregation is used in the penalty plan as the Commission has ordered, the result will be that a failure on a single transaction will, in some instances, lead to duplicate penalties.

BellSouth explained that the SQM Plan ordered in Georgia which is currently in place in North Carolina on an interim basis contains duplication in the SQM measurements as a result of the particular disaggregation used in the plan. That is, the disaggregated submetrics overlap in such a way that some transactions will be captured in more than one submetric. BellSouth noted that the SEEM portion of the plan, as ordered in Georgia, utilizes a different disaggregation and as a result, that there is no duplication in the Georgia-ordered SEEM Plan, i.e., each transaction is captured in only one submeasure. BellSouth contended that this is exactly what BearingPoint concluded.

Specifically, BellSouth commented that the document attached to the CLPs' Supplemental Reply Comments (Status Meeting Notes for February 19, 2003, p. 4 of 4) reflects a portion of BearingPoint's analysis of the Georgia-ordered plan. BellSouth noted that this document contains the specific finding by BearingPoint that "for SQM a product can roll up into different product groups for the same measure." In other words, BellSouth commented, a single transaction can "roll up" to, and be counted in, more than one product code within a submetric. BellSouth asserted that BearingPoint, after examining the Georgia Plan, also concluded that in the SEEM "BellSouth will use a whole transaction <u>in only one single disaggregation</u>." (emphasis added) Thus, BellSouth argued, the disaggregation used in the Georgia-ordered SQM is different from the disaggregation used in the Georgia-ordered SEEM Plan. BellSouth commented that the result is that in the Georgia plan, single transactions sometimes appear in multiple submetrics in the SQM, but not in the SEEM. The BearingPoint study confirms precisely what BellSouth has said all along and if the Commission orders the Georgia interim plan on a permanent basis, then there will be no duplication in the SEEM, the prospect of duplicate penalties will be avoided, and the problem will be solved.

BellSouth also maintained that in the plan ordered by the Commission, there is duplication in SEEM. The reason for this duplication is that the Commission ordered that the SQM disaggregation, which BearingPoint has now confirmed includes duplication, also be used for SEEM purposes. BellSouth asserted that since the SQM contains duplication as a result of the particular method of disaggregation employed, and the same disaggregation is applied in the SEEM Plan, then the SEEM will also contain the same duplication (and the consequent likelihood of the payment of duplicate penalties). BellSouth asserted that none of the CLPs' arguments to the contrary have merit.

BellSouth maintained that there is no support for the CLPs' statement that the plan ordered by the Commission "mirrors" the Georgia plan. BellSouth asserted that the CLPs presumably make this argument because they must do so to support their position that the BearingPoint analysis applies equally to the Georgia plan <u>and</u> to the North Carolina plan. However, BellSouth disagreed. First, BellSouth commented, the fact that the Georgia plan does not have duplication in SEEM (since the SEEM disaggregation differs from that in the SQM), while the North Carolina-ordered plan does have duplication in SEEM (since it is the same as the SQM) incontrovertibly rebuts any claim that these two plans "mirror" one another. BellSouth asserted that in their attempt to press the unlikely assertion that the Georgia-ordered SEEM is the same in all relevant respects to the North Carolina SEEM, the CLPs first point to the testimony of BellSouth witness Varner filed in this proceeding. BellSouth maintained that it is difficult to know, however, what the CLPs are asserting as the basis of their claim since they have cited record evidence that does not exist. Specifically, BellSouth noted that the CLPs cite to Exhibit AJV-1, page 46. However, this exhibit (which was attached to witness Varner's testimony and introduced into evidence) has only 43 pages.

BellSouth also argued that the CLP assertion is extremely implausible to the extent that the CLPs' claim that witness Varner's testimony supports their contention that the plan ordered by the Commission is the same plan in that "both plans assign CLP transactions to individual cells." Witness Varner's testimony was filed on April 23, 2001. BellSouth noted that the subject decision by the Commission was contained in the *Order Concerning Performance Issues* that was issued on May 22, 2002, more than one year later. Thus it is clear that witness Varner was not commenting on a North Carolina-ordered SEEM Plan that did not exist until more than a year later.

Further, BellSouth maintained that even if the CLPs are correct that the respective plans both assign CLP transactions to individual cells, this point is of no consequence because the duplication does not occur at the cell level. Instead, BellSouth stated that the duplication in the SQM occurs when transactions are placed (or "rolled up," in BearingPoint's words) into submetrics. BellSouth argued that because the SQM utilizes a product disaggregation that causes submetrics to overlap, some transactions appear in multiple submetrics. BellSouth stated that this is the process by which the duplication occurs, not anything that occurs at the cell level.

BellSouth next discounted the chart the CLP Coalition has included in its Supplemental Reply Comments that purports to demonstrate that there is no duplication in the SEEM Plan ordered by the Commission. BellSouth stated that before turning to the substance of the chart, it is important to understand that the chart is nothing more than the CLPs' argument reformatted into a table. BellSouth asserted that the particular format of the table is exactly like the BearingPoint tables that are reproduced on page 4 of the CLPs' Comments and in the Attachments to their Comments. BellSouth argued that this visual similarity may give one the false impression that this table comes from the BearingPoint study. BellSouth argued that this is not the case. Instead, BellSouth commented, the CLPs have simply attempted to illustrate their argument by putting it in the form of a chart that happens to look precisely like charts developed by BearingPoint.

BellSouth asserted that beyond this, the chart is essentially pointless. BellSouth noted that it has stated repeatedly in its past filings that there is a substantial amount of overlap between submeasurements in the North Carolina-ordered SEEM, in that particular transactions would be counted in two or more submetrics. BellSouth stated that it has never claimed that this is the case with every single transaction or every submetric. In other words, BellSouth commented, only some of the product-based submetrics overlap so as to count some transactions multiple times. In fact, BellSouth noted that it provided as Exhibit A to its Comments filed on February 5, 2003 an exhibit that shows which of the specific product-based submeasures duplicate one another.

BellSouth maintained that the CLPs have not responded to BellSouth's position by addressing any of the combinations of submetrics that BellSouth has identified as duplicating one another. Instead, BellSouth argued, the CLPs' chart includes three product-based submeasures that everyone agrees are mutually exclusive, in other words, that have no duplication. Thus, BellSouth asserted, the CLPs are making the specious argument that there is no duplication anywhere in the North Carolina-ordered SEEM by focusing only on three submetrics that all parties agree do not duplicate one another.

BellSouth argued that a more useful exercise would be to take the table that the CLPs have provided which shows the mapping of transactions to mutually exclusive product categories and to add to that table some of the product-based categories that duplicate both the categories in the CLPs' table and one another. BellSouth stated that based on its analysis, 90 transactions would be duplicated because each of these transactions would be captured in both their individual disaggregations for UNE ISDN and UNE xDSL as well as the more inclusive UNE Digital Loop < DSI category.

BellSouth asserted that every instance in the North Carolina plan in which transactions are placed in multiple submetrics has the potential for duplicate penalties (i.e., if BellSouth's performance on these transactions fails).

Finally, BellSouth commented, the CLPs make the argument that BellSouth has the ability to disaggregate SEEM measurements to a greater level, but that it chooses not to do so. BellSouth noted that in support of this, the CLPs cite to a BearingPoint chart that addresses a completely different issue than the one now before the Commission. Still, BellSouth maintained, an accurate assessment of this aspect of the BearingPoint study reveals yet another flaw in the CLPs' position.

BellSouth noted that the issue that was raised in Georgia, and that has been addressed by BearingPoint, is this: when BellSouth performs a cell level comparison for SEEM purposes, it uses retail analogs as defined by SQM level disaggregation in order to ensure that there is a like-to-like comparison. BellSouth commented that in the Georgia audit, BearingPoint raised a concern over the fact that BellSouth used this more granular level of retail analogs, as opposed to the more aggregated groupings that appear in the Georgia SEEM. BellSouth stated that it answered this concern in the following Response to a Draft Exception Report dated March 24, 2003:

> BellSouth's methodology is to group products as specified by the SEEMs [sic] level of disaggregation in the SQM Manual. When BellSouth begins the like-to-like cell level SEEMs [sic] comparisons at the wire center level for the specified products, BellSouth used the SQM levels of disaggregation as a guide for the more granular groupings of like-to-like comparisons (i.e.: dispatch to dispatch, etc.) The use of the like-to-like comparison in this manner is based on CLEC and BellSouth filings and workshop discussions across the BellSouth's [sic] 9 state region. BellSouth

> is following the SQM Manual of disaggregation for SEEMs [sic] as it uses this methodology for cell level comparisons.

BellSouth argued that the issue raised by BearingPoint has nothing to do with the issue before the Commission. BellSouth asserted that BearingPoint questioned only the retail analogs used by BellSouth for cell level comparisons. The issue before the Commission is how, after the cell level comparison is done, the results should be grouped into SEEM submetrics. BellSouth stated that it supports a level of aggregation that will result in submetrics that do not contain duplicate transactions and the attendant likelihood of duplicate penalties as discussed at greater length in BellSouth's previously filed Comments and Reply Comments.

BellSouth commented that although this part of BearingPoint's analysis is unrelated to the specific issue at hand, it is noteworthy because it demonstrates that an earlier assertion by the CLPs is patently false. BellSouth maintained that in their Comments filed February 5, 2003, the CLPs contended that aggregating submetrics in SEEM as is done by the Georgia-ordered plan prevents like-to-like comparisons. BellSouth disputed this contention and stated that it does make like-to-like comparisons at the cell level as part of the Georgia SEEM. BellSouth noted that the portion of the BearingPoint Audit highlighted by the CLPs confirms that BellSouth does make like-to-like comparisons.

Finally, BellSouth noted in its conclusion the CLP Coalition states that "BearingPoint's independent evaluation of the SQM and SEEM Plan in Georgia has determined that there can be overlapping transactions in the SQM measurement [sic – submeasures] without having overlapping transactions in SEEM." BellSouth argued that this is not only true, this is exactly the result that pertains in the Georgia-ordered plan as BearingPoint has now confirmed. BellSouth maintained that this cannot be the case under the plan ordered by the Commission, however, because of the requirement that the disaggregation be the same in the SQM and in the SEEM. BellSouth stated that this is precisely the reason that BellSouth filed its Motion for Reconsideration. BellSouth commented that this is also precisely the reason that BellSouth's Motion for Reconsideration should be granted.

PUBLIC STAFF: As to the BearingPoint report, the Public Staff noted that it appears that the report does not support the CLP Coalition's position, but rather reinforces the prior recommendations of BellSouth and the Public Staff that the Commission adopt the Georgia SEEM Plan.

The Public Staff commented that the Commission adopted an SQM Plan that is quite similar to the Georgia SQM Plan, but ordered that the SEEM Plan have the same level of disaggregation as the SQM Plan. The Public Staff noted that based on the BearingPoint report, this level of disaggregation would result in duplication of penalties.

Therefore, the Public Staff reiterated its recommendation that the Commission implement the Georgia SEEM Plan with the alterations previously adopted by the Commission in order to avoid the problem of duplication in penalties.

DISCUSSION

The Commission notes that the remaining issue in contention in this docket is how it should resolve the problem of duplicate penalties in BellSouth's North Carolina-ordered SEEM Plan. The Commission understands that this issue resulted when it ordered that the same level of product disaggregation should be used in BellSouth's SQM Plan and SEEM Plan. Product disaggregation refers to the breaking-up of measurements into categories of service (i.e., products) such as resale residence, resale business, LNP, etc...

As background information, the Commission notes that BellSouth filed a Motion for Reconsideration of Finding of Fact No. 12 of the Commission's May 22, 2002 *Order Concerning Performance Measurements and Enforcement Mechanisms.* Finding of Fact No. 12 of the Commission's *May 22, 2002 Order* states:

> The same level of disaggregation should be used to determine both compliance and remedy payments.

BellSouth objected to Finding of Fact No. 12 stating that in two separate instances, the ordered measurement plan contains a duplication of measurements, which also results in a potential and, in fact, likely, duplication of penalties. BellSouth noted that because there is a duplication of products reported in certain measurements, which is largely attributable to disaggregation, using the same disaggregation for measurements and penalties will necessarily result in the duplicate payment of penalties. BellSouth requested that the Commission modify its *Order* in these two instances to avoid duplication of penalties. BellSouth maintained that strictly speaking, BellSouth's request was not a request for reconsideration based on any error, law, or fact; instead, the error in this instance is BellSouth's, in that BellSouth should have removed the duplicate measures from the SQM before filing it with the Commission. BellSouth stated that it believes that it is not the intention of the Commission to order duplicate penalties. BellSouth maintained that this duplication of penalties could be avoided through the negotiation process for determining which measurements should have penalties associated with them.

The Commission issued an *Order* seeking Comments on BellSouth's Motion for Reconsideration. In Initial Comments, WorldCom and AT&T argued that there should not be a situation in which disaggregation causes duplicative penalties in a transaction-based plan. WorldCom and AT&T asserted that to the extent the Commission concludes that there is an overlap of penalties relative to product disaggregation caused by BellSouth's implementation thereof, WorldCom and AT&T recommend that the Commission order BellSouth to correct its implementation of product disaggregation so that overlap does not occur.

The Commission stated in its November 1, 2002 *Order Addressing Motions for Reconsideration and/or Clarification and the Joint Report on Correlated and Customer-Impacting Measures* that BellSouth's objection to the *May 22, 2002 Order* concerns the finding that the same level of disaggregation should be applied for measurement purposes and for remedy purposes. The Commission noted that BellSouth outlined 16 specific measurements which it believes involve an overlapping of product disaggregation. The Commission stated that BellSouth commented that WorldCom and AT&T appear to suggest that the Commission should order BellSouth to make systemic changes necessary to remove the duplication; however, BellSouth maintained that the Commission does not have before it adequate information to order this result. The Commission concluded that it appears that all of the Parties are amenable to negotiating the issue of which submeasures to include in the remedy plan to address BellSouth's concern on the duplication of penalties relating to product disaggregation. The Commission confirmed that it still believes that remedies should not be applied to performance measures that are shown to be duplicative of or correlated with other measures. The Commission instructed the Parties to negotiate the issue of which submeasures should be included in the remedy plan to address BellSouth's concern on the duplication of penalties relating to product disaggregation. The Commission ordered the Parties to file a Joint Report on the negotiation by no later than Monday, December 2, 2002.

The Commission notes that the Parties met to negotiate this issue but were unsuccessful. The Parties then found it appropriate to request the Commission to seek Comments on this issue from the Parties, and the Commission granted the request. Initial and Reply Comments were filed on this issue by the Parties as previously outlined.

The Commission notes that the measurement plan and remedy plan ordered in North Carolina are unique in the BellSouth region because:

(1) the Commission ordered that the same level of disaggregation should be used for the measurement plan and the remedy plan; <u>and</u>

(2) the Commission ordered that the Plan should be transaction-based.

The Commission understands that this uniqueness has resulted in the problem of duplicate penalties.

The Commission agrees with the CLP Coalition that the only issue before the Commission at this point in time is which submeasures should be included in the remedy plan that will not result in duplicate penalties.

BellSouth has argued that, at least until the first annual review, the Commission should adopt the same level of product disaggregation used in the Georgia Remedy Plan in North Carolina. The CLP Coalition has recommended its Alternate Proposal to eliminate the duplicative penalties in the SEEM Plan. The Public Staff has stated that, as it initially proposed in this docket, the Commission should adopt the Georgia SEEM Plan for North Carolina.

The Commission believes that there are two alternatives:

(1) Adopt the CLP Coalition's Alternate Proposal; <u>or</u>

(2) Leave the SQM Plan unchanged and modify the Commission's decision that the same level of disaggregation should be used in the SQM Plan and the SEEM Plan. This alternative would allow BellSouth to remove any product disaggregation from the SEEM Plan which is necessary to avoid duplicate penalties. The

Commission notes that this would result in BellSouth reflecting the same level of product disaggregation used in the Georgia SEEM Plan in the North Carolina SEEM Plan.

The Commission notes that BellSouth provided the following attachments to its Initial Comments:

Exhibit A – BellSouth's Table used for negotiations entitled "NC SQM Product Disaggregation – Where a Product Falls into More than One SQM Product Group".

Exhibit B – A copy of the CLP Coalition's Alternate Proposal entitled "CLP Response to BellSouth's Disaggregation Comments – Where a Product Falls into More than One SQM Product Group".

Exhibit C - BellSouth's proposed solution (adoption of the Georgia Plan) entitled "NC SQM Product Disaggregation – Where a Product Falls into More than One SQM Product Group – BellSouth's Proposed SEEM Category".

Exhibit D – An excerpt of Dr. Edward Mulrow's testimony filed in Florida in which he addresses the issue of small sample size.

The Commission further notes that the CLP Coalition provided the following attachments to its Initial Comments:

Attachment I – A copy of BellSouth's Table used for negotiations entitled "NC SQM Product Disaggregation – Where a Product Falls into More than One SQM Product Group". [**Commission Note:** This is the same as BellSouth's Exhibit A.]

Attachment II – The CLP Coalition's Alternate Proposal entitled "CLP Response to BellSouth's Disaggregation Comments – Where a Product Falls into More than One SQM Product Group". [**Commission Note:** This is the same as BellSouth's Exhibit B.]

Attachment III – The CLP Coalition's Revised Alternate Proposal.

The Commission has reviewed the CLP Coalition's Alternate Proposal and Revised Alternate Proposal as reflected, respectively, in Attachment II and Attachment III to its Initial Comments. The Commission notes that it appears that the CLP Coalition has taken the measurements listed by BellSouth in the BellSouth Table and reflected only one product disaggregation group from the several product disaggregation groups required by the North Carolina-ordered level of disaggregation. The Commission notes that there is no support for the CLPs to have chosen the specific products, and neither BellSouth nor the Public Staff has provided any specific Comments either supporting or not supporting the measurement-by-measurement product disaggregation proposed by the CLP Coalition in its Alternate Proposal.

The Commission agrees with BellSouth that the CLP Coalition has not provided adequate support for its statement that its Alternate Proposal is accurate, timely, and cost-effective.

Further, the Commission agrees with the Public Staff that the CLP Coalition's Alternate Proposal appears to be arbitrary.

Finally, the Commission has reviewed the CLPs' Supplemental Reply Comments and the attached Minutes from the status meetings with BearingPoint concerning the Georgia Audit. The Commission does not find that the information supplied by the CLPs clarifies or resolves the issue in contention in this case. The Commission does not believe that BearingPoint's statements even address the fact that in North Carolina, the Commission ordered the same level of disaggregation in the SQM and SEEM; Georgia did not make the same decision. As the Public Staff noted in its Response, based on the BearingPoint Minutes, requiring the same level of disaggregation in the SQM and SEEM as the Commission has ordered would result in duplication of penalties – the exact problem that is before the Commission now for resolution.

The Commission notes that at the beginning of the process on this issue, the CLPs must have believed that there would indeed be duplication of penalties because the CLPs filed their Alternate Proposal to resolve the problem. If at that point the CLPs did not believe that the plans the Commission ordered would result in duplicate penalties, the CLPs would not have filed and recommended that the Commission adopt an Alternate Proposal. The Commission notes that the CLPs now assert, after reviewing the Minutes from the BearingPoint Audit in Georgia, that transaction duplication in the SQM does not translate into BellSouth paying duplicate penalties for a single CLP transaction in the SEEM. The Commission does not find any reasonable explanation of why the CLPs' assertion that "BearingPoint's independent evaluation of the SQM and SEEM Plan in Georgia has determined that there can be overlapping transactions in the SQM submeasures without having overlapping transactions in the SEEM" changes any of the written filings on this issue.

Based on the foregoing, the Commission finds it appropriate to reject the CLP Coalition's Alternate Proposal and its assertion that duplication does not exist in the Commission-ordered SEEM.

The Commission agrees with BellSouth that there is nothing wrong with altering its prior decision and finding that it is appropriate to have a different level of disaggregation in BellSouth's SQM Plan and SEEM Plan.

The Commission agrees with BellSouth and the Public Staff that the best alternative at this point is to leave the SQM Plan unchanged and change its decision that the same level of disaggregation should be used in the SQM Plan and the SEEM Plan. This alternative would allow BellSouth to remove any product disaggregation from the SEEM Plan which is necessary to avoid duplicate penalties. The Commission notes that this would result in BellSouth reflecting the same level of product disaggregation used in the Georgia SEEM Plan in the North Carolina SEEM Plan.

Furthermore, the Commission notes that we have ordered annual reviews of BellSouth's SQM Plan and SEEM Plan, therefore, this issue can be reviewed in the future. The Commission encourages the CLPs to identify any masking problems using actual data in future reviews.

Additionally, the Commission notes that this issue is the final issue, at this time, in need of resolution in this docket. Therefore, with the issuance of this Order, we can schedule an effective date for the North Carolina SQM Plan and Remedy Plan. The Commission further notes that on February 5, 2003 we issued our *Order Granting BellSouth's Motion for Extension of Time*. In the *Order*, the Commission concluded that the previously established effective date of March 1, 2003 for the North Carolina SQM Plan and SEEM Plan should be extended until the first day of the first month after 60 days have run from the date upon which we issue our order on the remaining disputed submeasures to be included in the penalty plan.

CONCLUSIONS

In order to ensure that BellSouth does not pay duplicate penalties, the Commission finds it appropriate to leave the SQM Plan unchanged, but modify the decision on the SEEM Plan such that the same level of disaggregation will <u>not</u> be used in the SQM Plan and the SEEM Plan. This would allow BellSouth to remove any product disaggregation from the SEEM Plan which is necessary to avoid duplicate penalties. The Commission notes that this would result in BellSouth reflecting the same level of product disaggregation used in the Georgia SEEM Plan in the North Carolina SEEM Plan.

The Commission further finds it appropriate to schedule an effective date for the North Carolina SQM Plan and Remedy Plan. The Commission hereby schedules an effective date for the North Carolina SQM and Remedy Plan of August 1, 2003.

IT IS, THEREFORE, ORDERED as follows:

1. That, in order to avoid duplicate penalties, it is not appropriate for BellSouth to reflect the same level of product disaggregation in the SQM Plan and SEEM Plan.

2. That BellSouth should reflect the same level of product disaggregation used in the Georgia SEEM Plan in the North Carolina SEEM Plan.

3. That BellSouth's North Carolina-ordered SQM Plan and SEEM Plan shall become effective on August 1, 2003.

ISSUED BY ORDER OF THE COMMISSION.
This the <u>29th</u> day of May, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

bp052803.01

DOCKET NO. P-100, SUB 133k

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Generic Docket to Address Performance Measurements and Enforcement Mechanisms	)))	ORDER DENYING MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

BY THE COMMISSION: On May 29, 2003, in the above-captioned docket, the Commission issued its *Order Addressing Which Submeasures to Include in BellSouth's Remedy Plan and Establishing an Effective Date of August 1, 2003 for BellSouth's SQM and Remedy Plan.*

On June 27, 2003, the CLP Coalition consisting of AT&T Communications of the Southern States, LLC (AT&T); MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (WorldCom); and DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) filed its Motion for Reconsideration and/or Clarification of the Commission's *May 29, 2003 Order.*

On July 18, 2003, BellSouth Telecommunications, Inc. (BellSouth) filed its Comments in Response to the CLP Coalition's Motion for Reconsideration and/or Clarification of the Commission's *May 29, 2003 Order.*

MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

The CLP Coalition (AT&T, WorldCom, and Covad) filed a Motion for Reconsideration and/or Clarification of the Commission's *May 29, 2003 Order.*

The CLP Coalition is seeking:

(1) Reconsideration of the Commission's finding that using the same product disaggregation in the Self-Effectuating Enforcement Mechanism (SEEM) Plan that is used in the Service Quality Measurement (SQM) Plan will result in duplicate penalties, on the grounds that the *May 29, 2003 Order* erred in its analysis, revealing a fundamental misunderstanding of this issue; and

(2) In the event the Motion for Reconsideration is denied, clarification regarding the Commission's findings on which Georgia SEEM Plan product disaggregation should be used in the North Carolina SEEM Plan, on grounds that efficiency, economy, and accuracy will be promoted.

DISCUSSION

<u>In regard to the Motion for Reconsideration</u>, the CLP Coalition stated that it agrees with the determination originally made by the Commission in its *May 22, 2002 Order*, wherein, the Commission concluded in the Evidence and Conclusions for Finding of Fact No. 12, at Page 94, that "the same level of disaggregation should be used to determine both compliance and remedy payments." The CLP Coalition stated that it has never advocated that BellSouth should pay duplicate penalties for a single CLP transaction and explained that any such problem that occurred, is, if at all, because of the way BellSouth implemented the Commission ordered SQM disaggregation - in a manner that resulted in the same transaction overlapping various submeasures. The CLP Coalition stated that its "position has always been that BellSouth will not pay duplicate penalties under the previous North Carolina-ordered SEEM disaggregation and that any problem lies with BellSouth's SQM reporting – assigning a transaction to multiple submeasures – not with SEEM."

The CLP Coalition asserted that its Alternate Proposal was submitted to address an SQM reporting problem of BellSouth's practice of taking a single transaction and applying it to multiple submeasures within the same measure. The CLP Coalition suggested that if a product transaction (ex: PBX Order) is part of a product group (ex: Business) and there is also a submeasure specifically for that product (ex: PBX), the logical way to report the transaction is to assign it to the submeasure for that particular product (ex: PBX). The CLP Coalition argued that BellSouth could eliminate the possibility of duplicate penalties, if in fact it exists, by removing certain "individual" products from the more comprehensive product groupings, leaving undisturbed the remaining products in the product grouping.

Additionally, the CLP Coalition asserted that the Commission may not have realized the import of the findings by BearingPoint, formerly KPMG Consulting. The CLP Coalition stated that BearingPoint's findings are applicable to any SEEM. The CLP Coalition again contended that the findings by BearingPoint support its position that duplicate transactions in the SQM reporting will not result in duplicate SEEM penalties.

The CLP Coalition requested that the Commission reconsider its decision not to require BellSouth to implement the SEEM disaggregation as originally ordered. The CLP Coalition suggested that it would be beneficial for the Commission to convene a workshop of the parties, including requesting the appearance of representatives from BearingPoint under the guidance of the Commission Staff, to focus on the following issues: (1) are there duplicative penalties in the SEEM Plan; (2) if so, what is the cause; and (3) what is the appropriate solution.

In its Response, BellSouth stated that the CLP Coalition's Motion for Reconsideration should be summarily rejected because it constitutes nothing more than a restatement of failed arguments that the competing local providers (CLPs) have previously made. BellSouth asserted that the CLPs cannot seem to decide whether the duplication exists, so they alternate between accepting that it does exist and claiming that it does not exist. BellSouth noted that the detection of discrimination, should it occur, is a function of the SQM disaggregation, not the SEEM disaggregation. Further, BellSouth observed that SQM disaggregation was established by the Commission in the *May 22, 2002 Order*, and thus, is not an issue here. BellSouth explained that the issue that was actually before the Commission was how best to address the duplication that exists in the SQM so that it does not exist in the SEEM.

BellSouth contended that the rehashing by the CLP Coalition of arguments that have already been rejected by the Commission provides no basis for further prolonging this proceeding. Further, BellSouth stated that there is no need for the workshops, suggested by the CLP Coalition, which amounts to nothing more than another stalling tactic. BellSouth observed that, at this point, the Parties have had numerous negotiation sessions both in person and by telephone, and after they were unable to reach an agreement, the issues were then briefed and briefed again. Accordingly, BellSouth commented that there is simply no point in reopening this issue to address arguments that the Commission has already rejected and to waste more of the Commission's time and resources, either by having additional workshops or otherwise.

The Commission notes that on May 22, 2002, the Commission issued its *Order Concerning Performance Measurements and Enforcement Mechanisms.* In said *Order*, the Commission adopted a performance measurement plan (SQM) and remedy plan (SEEM) for BellSouth to become effective on June 21, 2002. Motions for Reconsideration of certain findings in that *Order* were filed by BellSouth and the CLPs. However, as a matter pertinent to the issue now before us, the Commission observes that in its *May 22, 2002 Order* the Commission addressed, in detail, the appropriate level of disaggregation in its Evidence and Conclusions for Finding of Fact No. 11 and no exceptions were filed to that part of the *Order.* Accordingly, the Commission believes that the time for reconsideration of the SQM disaggregation has passed and it would be inappropriate otherwise to now reconsider the SQM disaggregation previously established by the Commission. Further, the Commission notes that in the Evidence and Conclusions for Finding of Fact No. 14, the Commission required BellSouth, the CLP Coalition, and the Public Staff to negotiate which customer-impacting measures should be included in BellSouth's remedy plan and in the Evidence and Conclusions for Finding of Fact No. 16, the Commission instructed BellSouth, the CLP Coalition, and the Public Staff to continue to work on the issue of duplicative or correlated measures through the negotiation process. No exceptions were filed on Finding of Fact Nos. 14 and 16.

On November 1, 2002, the Commission issued its *Order Addressing Motions for Reconsideration and/or Clarification and the Joint Report on Correlated and Customer-impacting Measures.* In said *Order*, in regard to BellSouth's request for reconsideration of the Evidence and Conclusions for Finding of Fact No. 12, it was stated that "BellSouth noted, because there is a duplication for products reported in certain measurements, which is largely attributable to disaggregation, using the same disaggregation for measurements and penalties will necessarily result in the duplicate payment of penalties." In this regard, in the discussion section of that *Order*, the Commission stated:

> BellSouth's second objection to the *Order* concerns the Commission's finding that the same level of disaggregation should be applied for measurement purposes and for remedy purposes. BellSouth outlined 16 specific measurements which it believes involve an overlapping of product disaggregation. BellSouth stated that WorldCom and AT&T appear to suggest that the Commission should order BellSouth to make systemic changes necessary to remove the duplication; however, BellSouth maintained that the Commission does not have before it adequate information to order this result. It appears that all of the Parties are amenable to negotiating the issue of which submeasures to include in the remedy

> plan to address BellSouth's concern on the duplication of penalties relating to product disaggregation. The Commission still believes that remedies should not be applied to performance measures that are shown to be duplicative of or correlated with other measures. The Commission finds it appropriate at this point in time to instruct the Parties to negotiate the issue of which submeasures should be included in the remedy plan to address BellSouth's concern on the duplication of penalties relating to product disaggregation. The Commission instructs the Parties to file a Joint Report on the negotiation by no later than Monday, December 2, 2002. (Page 21)

Additionally, that *Order* concluded that the measurement plan and the remedy plan adopted by the Commission would become effective on March 1, 2003. However, by subsequent *Order* issued on February 5, 2003, the Commission granted BellSouth's Motion for Extension of Time such that the March 1, 2003 date was extended until "the first day of the first month after 60 days have run from the date upon which the Commission issues its order on the remaining disputed submeasures to be included in the penalty plan" and "in the interim, BellSouth will remain subject to penalties under the Georgia plan in North Carolina."

On November 25, 2002, the Commission issued an *Order* approving the Parties' request for an extension of time to file the Joint Report on negotiations concerning which submeasures should be included in the remedy plan to address BellSouth's concern on the duplication of penalties relating to product disaggregation until January 17, 2003.

On January 8, 2003, the Public Staff filed its Report on Negotiations and Motion for Order Requesting Comments. The Public Staff noted that on January 7, 2003, the CLP Coalition, BellSouth, and the Public Staff discussed and negotiated the issue for approximately two hours but reached an impasse and were unable to reach a resolution. The Public Staff maintained that the Parties agreed that in order to allow the Commission to have adequate information with which to resolve the issue, a comment cycle would be appropriate.

By *Order* dated January 15, 2003, the Commission granted the Public Staff's Motion for Order Requesting Comments. Initial Comments along with matrices from BellSouth and the CLPs were to be filed by no later than Wednesday, February 5, 2003, and Reply Comments along with revised matrices, if necessary, from BellSouth, the CLPs, and the Public Staff were to be filed by no later than Wednesday, February 19, 2003.

On February 5, 2003, Initial Comments were filed by BellSouth and the CLP Coalition.

On February 19, 2003, the Commission issued its *Order Granting Oral Motion for Extension of Time*. In its *Order*, the deadline for filing Reply Comments was extended to February 26, 2003.

On February 26, 2003, BellSouth, the CLP Coalition, and the Public Staff filed Reply Comments.

On March 26, 2003, the CLP Coalition filed its Motion to File Supplemental Reply Comments in Response to BellSouth Comments. The CLP Coalition stated that since the Parties filed Reply Comments on February 26, 2003, the CLPs have obtained additional information which rebuts BellSouth's arguments that the SEEM Plan, as previously ordered by the Commission, contains a level of product disaggregation that results in duplicate penalties.

The CLP Coalition stated that it should have the opportunity to supplement its Reply Comments filed on February 26, 2003. Therefore, the CLP Coalition requested permission to file Supplemental Reply Comments in this docket. By separate cover, the CLP Coalition filed a copy of its Supplemental Reply Comments on March 26, 2003.

By *Order* dated March 28, 2003, the Commission granted the CLP Coalition's Motion to File Supplemental Reply Comments. Further in that *Order*, the Commission requested BellSouth and the Public Staff to file Responses to those Supplemental Reply Comments by no later than April 14, 2003.

Thus, in making its ruling in its May 29, 2003 *Order*, the Commission reviewed and considered the Initial Comments filed by BellSouth and the CLP Coalition, the Reply Comments filed by BellSouth, the CLP Coalition, and the Public Staff, the Supplemental Reply Comments filed by the CLP Coalition, and the Responses to the Supplemental Reply Comments filed by BellSouth and the Public Staff.

Based upon the foregoing, the Commission believes that the CLP Coalition has certainly had more than ample time and opportunity for a fair negotiation process to have occurred and at this point we do not believe it is justifiable or reasonable to now convene workshops of the parties, including requesting the appearance of representatives from BearingPoint, under the guidance of the Commission Staff, to focus on the issues suggested by the CLP Coalition.

Further, the Commission believes that the arguments raised by the CLP Coalition have already been fully addressed by the Commission in its *May 29, 2003 Order*. In said *Order*, the Commission addressed the issue of the duplication of penalties relating to product disaggregation. The following are a few pertinent excerpts from the Commission's discussion of that issue:

> The Commission understands that this issue has arisen due to the fact that we have ordered that the same level of product disaggregation should be used in BellSouth's SQM Plan and SEEM Plan. Product disaggregation refers to the breaking-up of measurements into categories of service (i.e., products) such as resale residence, resale business, LNP, etc. (Page 32)
>
> The Commission notes that the measurement plan and remedy plan ordered in North Carolina are unique in the BellSouth region because:
>
> > (1) the Commission ordered that the same level of disaggregation should be used for the measurement plan and the remedy plan; <u>and</u>

(2) the Commission ordered that the Plan should be transaction-based. (Page 34)

The Commission understands that this uniqueness has resulted in the problem of duplicate penalties. (Page 34)

The Commission agrees with the CLP Coalition that the only issue before the Commission at this point in time is which submeasures should be included in the remedy plan that will not result in duplicate penalties. (Page 34)

The Commission has reviewed the CLP Coalition's Alternate Proposal and Revised Alternate Proposal as reflected, respectively, in Attachment II and Attachment III to its Initial Comments. The Commission notes that it appears that the CLP Coalition has taken the measurements listed by BellSouth in the BellSouth Table and reflected only one product disaggregation group from the several product disaggregation groups required by the North Carolina-ordered level of disaggregation. The Commission notes that there is no support for the CLPs to have chosen the specific products.... (Page 35)

Finally, the Commission notes that it has reviewed the CLPs' Supplemental Reply Comments and the attached Minutes from the status meetings with BearingPoint concerning the Georgia Audit. The Commission does not find the information supplied by the CLPs to clarify or resolve the issue in contention in this case. The Commission does not believe that BearingPoint's statements resolve or even address the fact that in North Carolina, the Commission ordered the same level of disaggregation in the SQM and SEEM; Georgia did not make the same decision. As the Public Staff noted in its Response, based on the BearingPoint Minutes, requiring the same level of disaggregation in the SQM and SEEM as the Commission has ordered would result in duplication of penalties – the exact problem that is before the Commission now for resolution. (Page 36)

The Commission notes that at the beginning of the process on this issue, the CLPs must have believed that there would indeed be duplication of penalties because the CLPs filed their Alternate Proposal to resolve the problem. If at that point the CLPs did not believe that the plans the Commission ordered would result in duplicate penalties, the CLPs would not have filed and recommended that the Commission adopt an Alternate Proposal. The Commission notes that the CLPs now assert, after reviewing the Minutes from the BearingPoint Audit in Georgia, that transaction duplication in the SQM does not translate into BellSouth paying duplicate penalties for a single CLP transaction in the SEEM. The Commission does not find any reasonable explanation of why the CLPs' assertion that "BearingPoint's independent evaluation of the SQM and SEEM Plan in Georgia has determined that there can be overlapping transactions in the SQM submeasures without having overlapping transactions in the SEEM" changes any of the written filings on this issue. (Page 36)

> The Commission agrees with BellSouth and the Public Staff that the best alternative at this point in time is to leave the SQM Plan unchanged and change our decision that the same level of disaggregation should be used in the SQM Plan and the SEEM Plan. This alternative would allow BellSouth to remove any product disaggregation from the SEEM Plan which is necessary to avoid duplicate penalties. The Commission notes that this would result in BellSouth reflecting the same level of product disaggregation used in the Georgia SEEM Plan in the North Carolina SEEM Plan. (Page 36)
>
> Furthermore, the Commission notes that we have ordered annual reviews of BellSouth's SQM Plan and SEEM Plan, therefore, this issue can be reviewed in the future. (Page 37)
>
> The Commission further finds it appropriate to schedule an effective date for the North Carolina SQM Plan and Remedy Plan. The Commission hereby schedules an effective date for the North Carolina SQM and Remedy Plan of August 1, 2003. (Page 37)

Based upon our review of the comments filed by the CLP Coalition, including its arguments that any duplicate penalty problem lies with BellSouth's SQM reporting and not with SEEM, that its Alternate Proposal was submitted to address the SQM reporting problem, and that the findings of BearingPoint support its position, the Commission cannot now find any new substantive evidence to merit the reconsideration requested by the CLP Coalition on this issue. Accordingly, the Commission finds that it is appropriate to deny the CLP Coalition's Motion for Reconsideration.

<u>In regard to the Motion for Clarification</u>, the CLP Coalition is seeking clarification from the Commission that if its Motion for Reconsideration is denied, then the Commission needs to clarify which Georgia SEEM product disaggregation should be used in the North Carolina SEEM Plan. The CLP Coalition noted that the *May 29, 2003 Order* stated at Page 37 that "BellSouth should reflect the same level of product disaggregation used in the Georgia Seem Plan in the North Carolina SEEM Plan." Consequently, the CLP Coalition asserted that the *Order* did not state which Georgia SEEM Plan should be used. The CLP Coalition contended that presumably the Commission intended that BellSouth should use the most recent SEEM disaggregation ordered by the Georgia Public Service Commission (Georgia Commission). According to the CLP Coalition, on November 18, 2002, the Georgia Commission issued an Order adopting changes to the SQM and SEEM, effective March 1, 2003. Thus, the CLP Coalition requested that the updated SEEM disaggregation from the Georgia Commission Order dated November 18, 2002 should be adopted.

As to the CLP Coalition's request for clarification, BellSouth stated that it does not believe it would be appropriate to order what the CLP Coalition refers to as the most recent Georgia disaggregation. BellSouth explained that at the time of the hearing in North Carolina, BellSouth submitted into evidence, and the Commission considered, the Georgia Plan that was in effect at that time. According to BellSouth this is the only version of the Georgia Plan that was placed into evidence. However, BellSouth acknowledged that it is true that since then, the Georgia Commission has conducted an extensive periodic review, covering 16 months, culminating in changes to its plan. BellSouth explained that these changes came about only after extensive workshops in Georgia, considerations of the various parties' proposals, and ultimately the entry of an Order by the Georgia Commission. BellSouth observed that none of this has occurred in North Carolina, i.e. there has been no periodic review. Thus, BellSouth asserted that the CLP Coalition is proposing that this Commission adopt everything that was ordered in Georgia at the end of that State's periodic review, without actually having a periodic review of its own. BellSouth argued that there is no basis for the Commission to adopt without proper consideration wholesale changes that were made by the Georgia Commission as part of its periodic review. Further, BellSouth pointed out that the Commission's *Order* in this proceeding provides for a periodic annual review, and at that review, the parties can certainly propose whatever changes to the plan that they believe are appropriate. Thus, BellSouth requested that the Commission deny the Motion for Clarification.

The Commission agrees with BellSouth that at the time of the hearing in North Carolina, BellSouth submitted into evidence, and the Commission considered, the Georgia Plan that was in effect at that time. Thus, the Commission considers that when the Commission concluded in its *Order* that its decision "would result in BellSouth reflecting the same level of product disaggregation used in the Georgia SEEM Plan in the North Carolina SEEM Plan", the Commission clearly expected BellSouth to use the Georgia SEEM Plan that was in evidence in this proceeding. Based upon the foregoing, the Commission finds that it is appropriate to deny the CLP Coalition's Motion for Clarification. Furthermore, the Commission reminds the Parties that since the Commission has ordered annual reviews of BellSouth's SQM Plan and SEEM Plan, the matter of changes in aggregation for the SEEM Plan, as well as other issues, which the Parties may choose to bring forward, can be dealt with at the time of our first annual review.

CONCLUSIONS

The Commission denies the CLP Coalition's Motions for Reconsideration and/or Clarification and the Commission affirms and upholds its findings in the *May 29, 2003 Order*. Accordingly, the effective date of BellSouth's North Carolina SQM Plan and Remedy Plan will be August 1, 2003.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 28th day of July, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bk072503.01

DOCKET NO. P-100, SUB 150

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Proposed Assignment of N11 Dialing Code to the North Carolina Department of Transportation	))	ORDER GRANTING N11 ABBREVIATED DIALING

BY THE COMMISSION: On October 28, 2002, the North Carolina Utilities Commission (Commission) received a letter from the North Carolina Department of Transportation (NCDOT) requesting that the Commission consider designating the 511 abbreviated dialing code for use as a North Carolina travel information number.

On January 6, 2003, the Commission replied to the request from NCDOT on the use of 511, raising questions concerning the scope of the project and whether there had been any meetings or conferences with the telecommunications industry and other interested parties. Further, the Commission requested that it be apprised of any meetings that have taken place to discuss the implementation for the 511 services. The Commission questioned the proposed operational structure for the system and what financial mechanisms would be required to implement 511 services.

On February 7, 2003, NCDOT responded to the Commission's earlier inquiry stating that, on August 26, 2002, it had sponsored a workshop with the North Carolina Telephone Industry Association (NCTIA) to gain industry input and support to implement the 511 system. In addition to meeting with the NCTIA, a number of cellular providers, as presented in the response to the Commission, were contacted to discuss the project and gain support for implementation. Network operational and translation issues were discussed in the meeting with the NCTIA and among the cellular providers contacted. In reviewing the NCDOT summary, there appears to be a consensus to use network translation to utilize a toll-free number as the "translated to" for 511 abbreviated dialing to one "call center" for the state. Additionally, NCTIA stated that there should be no additional surcharge for 511 calling, and it is opposed to an additional line charge or tax on local telephone service bills. NCDOT believes that one-time translation charges will be incurred to implement the network changes for both the wireline and wireless companies, but there should be no recurring telecommunications costs for 511.

On March 13, 2003, the Commission issued an Order requesting Comments and Reply Comments on this issue by March 26, 2003 and April 2, 2003, respectively. On April 1, 2003, the Commission issued an Order allowing Carolina Utility Customers Association (CUCA) to intervene in this proceeding and also granting BellSouth Telecommunications, Inc. (BellSouth), an extension to file Comments until April 2, 2003. The Order also granted to all Parties an extension until April 9, 2003, to file Reply Comments.

COMMENTS

AT&T: AT&T stated that it supports the consensus that was reached during the NCTIA meeting on August 26, 2002, to utilize a toll-free number as the "translated to" number for 511 abbreviated dialing that would be routed to one "call center" for the State of North Carolina. As stated, AT&T also is opposed to a surcharge for 511 calling and agrees that there is no need for recurring costs that are implied by a line charge or tax on local telephone service bills. AT&T requested 60 days to implement the network translations necessary to support this service.

BELLSOUTH: BellSouth stated that it supports the implementation of the 511 service as long as BellSouth is allowed to recover its reasonable costs associated with implementation of the dialing requirements. As with the implementation of the 211 dialing code allowed by Order dated November 18, 1999, in Docket No. P-100, Sub 142, all service providers should be permitted to make the 511 service available as a tariffed, local calling area based service. Lastly, if approved, BellSouth requested that it and other service providers be given 90 days to file tariffs with the Commission.

CUCA: CUCA stated that it is not opposed to the designation of the 511 abbreviated dialing code for the North Carolina travel information number. CUCA is opposed to allocating to ratepayers any of the charges and costs associated with implementing 511, including the costs associated with the one-time translation charges that will be incurred to implement the network changes. Furthermore as stated by CUCA, as a program of our federal and state governments, the costs of implementing and managing the 511 system should be borne by those governments.

ELLERBE: Ellerbe is not opposed to the implementation of the proposed 511 abbreviated dialing code for the statewide travel information system. Further, Ellerbe stated that the Commission hold the NCDOT responsible for all one-time translations necessary to implement this program and that the NCDOT reimburse Ellerbe and all other LECs for any and all one-time translation charges incurred due to this program.

LEXCOM: LEXCOM commented that it does not oppose the NCDOT's recommendation to designate 511 for a statewide travel information system. LEXCOM is also in agreement with not creating an additional surcharge for this service. Full compensation is expected for all one-time translation charges and in the event recurring charges are experienced, LEXCOM would expect to be compensated for those expenses as well.

PUBLIC STAFF: The Public Staff reiterated that NCDOT understands that it will be responsible for the costs of one-time translation to implement the 511 statewide travel information system. Additionally, the Public Staff stated that it assumes NCDOT understands that NCDOT will also be responsible for charges by the chosen IXC for the toll-free number. Furthermore, there should be less confusion to implement 511 since the industry will be using a "translated to" toll-free number. The Public Staff recommended that the companies that have filed charges for the implementation of 211 utilize those same charges for the nonrecurring charges applicable for 511. Also, those companies that have not filed charges for 211 should establish nonrecurring charges similar to those that were filed for 211.

REPLY COMMENTS

ALLTEL: ALLTEL mirrored other Parties supporting the 511 travel information system. Additionally, ALLTEL commented that it believes that companies should have the option of charging recurring charges for 511 service. To allow providers to be compensated for providing this service, all providers should be permitted to tariff the terms, conditions and rates associated with providing 511 service. Furthermore, ALLTEL commented that NCDOT should provide sufficient trunks to handle 511 traffic volumes during peak load times.

NCDOT: NCDOT commented that it and all carriers agreed to a six-month implementation period at the August meeting and that it has built this requirement into the deployment schedule. As discussed, entities represented at the August NCTIA meeting agreed that six months was an adequate timeframe for each carrier to implement their respective translation to the 511 number. As further stated by NCDOT, it anticipates a one-time translation charge to implement the network changes for both the wireline and wireless companies and NCDOT will reimburse the companies for this one-time translation. Also, the cost of a call to the 511 system will be absorbed by the NCDOT via its agreement with the carrier and included in the cost/minute rate that is agreed upon between these two entities.

WHEREUPON, the Commission now reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that NCDOT be granted the implementation of the abbreviated dialing code of 511 to support the statewide travel information system. Further, all companies should adopt the 211 charges previously filed with the Commission unless revised cost studies are warranted to reflect current labor rates and work functions. The Commission notes that all Parties have agreed to a six month implementation schedule to complete the necessary network translation. Lastly, any recurring cost to provide 511 abbreviated dialing will be absorbed in the cost/minute rate between NCDOT and various carriers.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 24th day of April 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

db042303.01

DOCKET NO. P-100, SUB 150

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Proposed Assignment of N11 Dialing	)	ORDER DEFERRING N11
Code to the North Carolina Department of	)	ABBREVIATED DIALING
Transportation	)	IMPLEMENTATION

BY THE CHAIR: On October 14, 2003, the North Carolina Utilities Commission (Commission) received a letter from the North Carolina Department of Transportation (NCDOT) requesting that the Commission defer the implementation of the 511 abbreviated dialing code from October 24, 2003 until March 31, 2004. On October 17, 2003, BellSouth Telecommunication, Inc. (BellSouth) filed a letter with the Commission on behalf of the telecommunications industry stating that, because of implementation problems encountered by the NCDOT, the implementation of the 511 abbreviated dialing code be deferred until April 2004.

The Chair is of the opinion that good cause exists to grant the request to defer implementation of the 511 abbreviated dialing code until on or about March 31, 2004, as requested by NCDOT and concurred by the telecommunications industry.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 28th day of October 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

dh102703.01

DOCKET NO. P-100, SUB 151

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Investigation of Duties and Obligations of Telecommunications Carriers with Respect to the Transport and Termination of CMRS Traffic	)))	ORDER GRANTING RELIEF FROM BILLING OBLIGATION

BY THE CHAIR: On December 5, 2003, BellSouth Telecommunications, Inc. (BellSouth) filed a Motion Seeking Relief from Billing Obligation with respect to the billing of CMRS providers on behalf of Independent Telephone Companies (ICOs) for CMRS traffic destined for ICO and users transiting the BellSouth network. BellSouth undertook this obligation pursuant to a February 28, 2003, Order in this docket. BellSouth noted that the parties in this docket had resolved their differences, and therefore, good cause exists to relieve BellSouth of this obligation.

On December 11, 2003, The Alliance of North Carolina Independent Telephone Companies (Alliance) filed comments stating that it does not oppose the relief requested by BellSouth noting that the relief intended by the billing mechanism had been superceded by the settlement and, in any event, the billing mechanism had not worked in practice since the bills rendered by BellSouth to CMRS providers had not been paid.

After careful consideration, the Chair concludes that good cause exists to grant BellSouth's Motion that it be relieved of its billing obligation with respect to CMRS providers on behalf of ICOs for CMRS traffic transiting BellSouth's network

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 12th day of December, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb121103.04

DOCKET NO. WR-100, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition for Rulemaking to Implement North Carolina Session Law 2001-502 (House Bill 1061)	)))	ORDER ADOPTING PERMANENT RULES AND APPROVING FORMS

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 N. Salisbury Street, Raleigh, North Carolina, on October 10, 2002, at 9:00 a.m.

BEFORE: Commissioner Lorinzo L. Joyner, Presiding, Chair Jo Anne Sanford, and Commissioner J. Richard Conder

APPEARANCES:

For the Joint Intervenors, United Dominion Realty Trust, Inc. and the Apartment Association of North Carolina:

Edward S. Finley, Jr., Hunton & Williams, Post Office Box 109, Raleigh, North Carolina 27602

For the North Carolina Justice and Community Development Center:

Robert M. Schofield, Staff Attorney, Post Office Box 28068, Raleigh, North Carolina 27611

For the Using and Consuming Public:

Robert S. Gillam, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

Leonard G. Green, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629

BY THE COMMISSION: By adoption of House Bill 1061 on December 4, 2001, the North Carolina General Assembly enacted substantial changes to both G.S. 62-110(g), governing the resale of water and sewer services, and G.S. 42-3, *et al.*, governing residential rental agreements.

Under the prior version of 62-110(g), landlords were resellers of water and sewer services. The provision of these services was covered by separate charges not related to the rent. Water and sewer charges were billed and collected independent of the rent.

The amendments to 62-110(g) make significant changes to the former approach. The new statute requires landlords to incorporate into the written lease the cost of water and sewer services as a portion of the tenant's rent. In the lease, the variable monthly amount to be paid for water and/or sewer will be designated at the "variable rent component." The regular monthly rent will be designated as the "base rent." Landlords will be "cost allocators" rather than resellers. In addition, landlords will be allowed to use tenants' security deposits to reimburse the landlords for unpaid water and sewer charges.

In Section 1 of House Bill 1061, the Commission is authorized to adopt the guidelines for landlords to allocate to the tenant the costs of providing water and sewer services. On March 8, 2002, the Public Staff filed proposed rules for implementation of the amended statutes. After receiving written comments from interested parties regarding the adoption of proposed rules and application forms, the Commission issued a series of orders.

The first order, issued April 4, 2002, found good cause to initiate the rulemaking proposed by the Public Staff, solicited comments on the proposed rules and application forms, rescinded Commission Rules R18-1 through R18-7, adopted the Public Staff's proposed rules (R18-11 through R18-17) and the application forms on an interim basis so that, pending completion of this proceeding, affected providers might begin the application process.

Because the statutory authorization for operation of water and sewer resale was terminated by the adoption of House Bill 1061, the Commission issued an order on April 4, 2002, granting temporary operating authority as a traditional water and sewer utility to all utilities then certified as water or sewer resale utilities retroactive to the adoption of House Bill 1061, December 19, 2001.

Also on April 4, 2002, the Commission issued an Order of Clarification detailing the disposition of all pending applications for tariff revisions to water and sewer resale utilities and all pending applications for certificates of resale authority for water and sewer resale utilities.

Subsequently, additional parties (Joint Intervenors - Apartment Association of North Carolina (AANC) and United Dominion Realty Trust, Inc. (UDRT), the North Carolina Justice and Community Development Center (NCJCDC), and the North Carolina Attorney General (AG), filed petitions to intervene in the matter. The Commission allowed these interventions.

Following the filing of comments and reply comments by the parties, the Commission issued an order scheduling a hearing in this matter for September, 2002. That order also extended the temporary operating authority previously granted until further order of the Commission. A September 16, 2002, order rescheduled the hearing for October 10, 2002.

On August 28, 2002 the Joint Intervenors filed the testimony of Nancy Hovind, Ken Szymanski, Thomas Spangler and Michael Presto. On that same date, the Attorney General filed the testimony and exhibit of William D. Rowe. On September 13, 2002 the Public Staff filed the testimony of Jay B. Lucas.

The matter came on for hearing as scheduled. Scott Wilkerson appeared as a witness for the Joint Intervenors and adopted the prefiled testimony of Ken Szymanski. Witnesses Hovind, Wilkerson, Spangler and Presto testified as a panel for the Joint Intervenors. Witness Rowe testified on behalf of the Attorney General, and witness Lucas testified on behalf of the Public Staff.

On December 9, 2002, the Joint Intervenors and the Public Staff filed proposed orders and the Attorney General and the North Carolina Justice and Community Development Center (AG&NCJCDC) filed a brief in the matter. The issues to be resolved in this docket, the positions of the parties, and the Commission's conclusions are discussed below:

Should the Commission allow the hot water capture, cold water allocation (HWCCWA) methodology of measuring a tenant's water consumption?

Proposed Rule R18-16(a) states, in part, "Metered consumption of water shall be determined by metered measurement of all water consumed by the tenant, and not by any partial measurement of water consumption." The Joint Intervenors objected to this proposal and insist that cost allocators should be permitted to use the HWCCWA method. They note that in a number of apartment complexes there is more than one water entry point in each apartment and it would be cost prohibitive to install meters at each entry point. Their solution is to estimate the total quantity of water consumed based upon the metered measurement of the hot water consumed.

The Public Staff and the AG&NCJCDC recommend that the Commission reject the HWCCWA method. They rely upon language in the new statute which states that the Commission may "adopt procedures that allow a lessor, pursuant to a written rental agreement, to allocate the costs for providing water and sewer on a metered use basis."

The Commission is of the opinion that it should not allow the HWCCWA method of allocating utility costs. As noted above, the new statute states that cost allocation utilities must provide service based upon metered use. The HWCCWA method is a half metered/half estimated method and, as such, is not the most appropriate method of determining the bills for cost allocation customers.

With respect to the Joint Intervenors' argument related to apartment complexes with multiple water entry points in apartments, the Commission notes that, there are other alternatives available to these service providers. In addition to providing meters to measure all consumed water (as a cost allocator), the utility may charge a Commission-approved flat rate (as a traditional utility) or may include the cost of water and sewer utility service in its rent (and would not need to be Commission regulated).

The analysis that Public Staff witness Lucas performed on the HWCCWA case study supports the Commission's decision to reject the HWCCWA method of allocating utility costs. Witness Lucas testified that he had reviewed UDRT&AANC witness Presto's study and had obtained the underlying data for the portion of the study conducted at the Lake Lynn apartment complex in Raleigh. He found that there were dramatic differences in water usage patterns among the individual tenants in the study. Some tenants consistently used far more cold water than hot; others consistently used only a little more cold than hot, and occasionally even used more hot than cold. The HWCCWA method is based on the assumption that all tenants have the same ratio of cold water usage to hot (since the same multiplier is used for each tenant), and thus it results in major billing inequities. Some tenants are severely overbilled on a continuing basis, while others are substantially underbilled month after month. Witness Lucas pointed to a number of instances in which specific individuals included in witness Presto's study would have received unfairly high or low bills under the HWCCWA method.

Should the cost allocator be allowed to disconnect customers for nonpayment of utility service?

Proposed Rule R18-17(c) provided, "Consistent with this Chapter, disconnection for nonpayment and billing procedure shall be governed by Chapter 12, Rules R12-7 through R12-9, Chapter 7, Rules R7-20 and R7-24, and Chapter 10, Rules R10-15 and R10-16." This is essentially the same as the prior Rule R18-7(b).

The proposed rule would allow disconnection of service for nonpayment. AG&NCJCDC objected to allowing disconnection of service for nonpayment of water or sewer service by a utility that is also the landlord. They object on the grounds that such an action would violate the North Carolina statutes on landlord-tenant relations, which prohibit constructive eviction. UDRT&AANC indicated that they would prefer to have the authority to disconnect service for nonpayment, but also indicated that they would expect to exercise that authority rarely, if ever. The Public Staff took no position on disconnection at the hearing, but in its proposed order it stated that in light of UDRT&AANC's extreme reluctance to pursue disconnection of service, and in deference to the AG&NCJCDC, it was withdrawing its proposal to allow disconnection.

The Commission is of the opinion that, with respect to cost allocators, the Proposed Rules should be modified to prohibit disconnection of service for nonpayment.

UDRT&AANC suggested that a more satisfactory manner to induce payment would be the imposition of late fees for nonpayment. However, Section 4 of House Bill 1061 adds a new subsection to G.S. 42-46, which reads "(d) A lessor shall not charge a late fee to a lessee because of the lessee's failure to pay additional rent for water and sewer services provided pursuant to G.S. 62-110(g)." It thus appears that it would be unlawful to allow imposition of late fees for failure to pay the portion of rent related to the allocation of costs of water and sewer service and the late fees should therefore not be allowed.

What is the proper amount for administrative fees?

Proposed Rule R18-16(a) provides that, "The variable rent component shall not exceed the total of: (1) the cost of purchased water and sewer service, (2) the cost of meter reading, and (3) the cost of billing and collection. No more than $3.75 may be added to the cost of purchased water and sewer service as an administrative fee to compensate the rent allocator for meter reading, billing, and collection."

The AG&NCJCDC objected to the increase in administrative fee from $2.00 to $3.75. They noted that the $2.00 maximum was approved in 1997 and that UDRT&AANC were now requesting an 88% increase without cost of service evidence to support the substantial increase.

The Public Staff noted that UDRT&AANC requested $3.75 because that is the amount generally charged by third-party billing companies.

The Commission is of the opinion that the recommended maximum administrative fee of $3.75 should be adopted. It should be noted that this amount is a maximum. Each cost allocator must request and justify an administrative fee that must ultimately be approved by the Commission. Therefore, there is no guarantee that all cost allocators will be granted the maximum administrative fee permitted by this rule.

<u>Should the administrative fee be taken out of the variable rent component and included in the base rent charged by the apartment owners?</u>

In their initial comments, the AG&NCJCDC proposed that the administrative fee be eliminated and that apartment owners be allowed to recover their administrative costs in the base rent. They argued that this would assist consumers in comparing the rental costs of different apartments, would reduce the variable rent component and make it more affordable, and would avoid the illogical approach of including a fixed monthly fee in the variable rent component. In its reply comments, the Public Staff endorsed the proposal of the AG&NCJCDC and revised its proposed rules accordingly.

UDRT&AANC stated that the administrative fee should continue to be collected together with other water and sewer costs, as a part of the variable rent component, because this is the procedure that was followed under the former version of G.S. 62-110(g). Tenants are used to this procedure and find it understandable, and any change would be contrary to the intent of the General Assembly (see G.S. 62-110(g) which states, "a monthly rent shall be the sum of the base rent plus additional rent at a rate that does not exceed the actual purchase price of the water and sewer service to the provider plus a reasonable administrative fee.").

The Commission is of the opinion that the administrative fee should remain a part of the variable rent for the reasons stated by UDRT&AANC in the paragraph above.

<u>How should standard language regarding the variable component of rent be presented in the lease?</u>

The proposed Rule R18-17(a) provided for standardized language to be used in all leases where rental costs are allocated, informing the tenant that he must pay a variable rent component in addition to the base rent. It required that the standardized language appear at the end of the lease, immediately above the space provided for the parties' signatures, in at least 12-point type.

In their initial comments, UDRT&AANC objected to the requirement that the prescribed language appear at the end of the lease in 12-point or larger type. They noted that the final pages of the lease generally contain boilerplate provisions only and are rarely noticed by the tenant.

In response, the Public Staff proposed in its reply that standard language requirement be moved to the first page of the lease. In order to distinguish this standard language from other large print items on the first page, the Public Staff proposes that the standard language be printed in capital letters of at least 12-point, and shall be enclosed in a box, with at least 1-1/2 inches of blank space between the printed wording and the box in each direction.

UDRT&AANC recommended that the lease contain the recommended language (but without the front page requirement, without the contained in a box requirement, without the surrounding blank space requirement, and without the capital letter requirement). The AG&NCJCDC did not address this matter.

The Commission of the opinion that the standard language should appear on the first page of the lease, in a box, with 1/2 inch of surrounding blank space, and printed in all capital letters of 12 point font). The Commission agrees that the place for the standard language is not at the end of a long lease (by then the lessee is just looking for a place to sign his name).

> THIS LEASE PROVIDES FOR A FIXED BASE RENT AND A VARIABLE COMPONENT OF RENT BASED ON THE COST OF WATER AND SEWER SERVICE.
>
> THIS PROVISION WILL TAKE EFFECT WHEN ALL TENANTS HAVE EXECUTED A LEASE CONTAINING THIS PROVISION AND THE NORTH CAROLINA UTILITIES COMMISSION HAS ISSUED AN ORDER APPROVING THE VARIABLE COMPONENT OF RENT. UNTIL THAT TIME, ALL TENANTS MAY BE CHARGED FOR WATER/SEWER SERVICE IN THE TRADITIONAL MANNER, IF THE LANDLORD HAS OBTAINED TEMPORARY OPERATING AUTHORITY AND APPROVAL OF RATES BY THE COMMISSION.

<u>Should the former water resellers (presently under temporary operating authority) be required to file new applications when Commission Rules defining cost allocation procedures are approved?</u>

In its original rulemaking petition, the Public Staff proposed that the former water and sewer resellers' TOA as traditional water and sewer utilities should expire on August 1, 2002. UDRT&AANC pointed out in their initial comments that this would not be practical, because apartment owners enter into lease agreements with tenants throughout the year, and it will take a full yearlong cycle for them to incorporate the standardized language of proposed Rule R18-17(a) into all their leases. UDRT&AANC proposed that the former resellers immediately be granted certificates of authority as rent allocators, without the necessity of filing an application, and that they be allowed to incorporate the standardized language into their leases after certification, as the leases come up for renewal.

In its reply comments, the Public Staff objected to granting certificates to the former resellers without an application, or prior to modifying their leases as required by Session Law 2001-502 and the Commission's rules. The Public Staff proposed that the former resellers be required to apply for certification as rent allocators within 12 months after the issuance of the order in this case; that each former reseller's TOA expire upon the issuance of its certificate; and that if a former reseller fails to obtain a certificate as a rent allocator, its TOA should expire 18 months after the order in this case.

UDRT&AANC witnesses testified at the hearing that the transition procedures proposed by the Public Staff are unreasonably burdensome. It would be much simpler for the Commission to issue an order granting certificates to all former resellers, while at the same time ordering them to submit sample lease agreements for review within 30 days. The former resellers should retain their TOA as traditional water and sewer utilities, so that they can operate as rent allocators with respect to tenants who have entered into leases containing the required rent allocation language, while simultaneously operating as traditional utilities with respect to tenants whose leases have not yet come up for renewal.

The Commission is of the opinion that the Public Staff's proposed transition procedures should be adopted as they are more orderly and consistent with the statutory language than those of UDRT&AANC. The requirement that the former resellers apply for certificates is not at all burdensome. The Public Staff has recommended adoption of a new application form to be used by the former resellers; it is short and simple and will not require extensive data gathering or the filing of lengthy documentation. Many of the required attachments have already been filed with the Commission and a note to that effect would suffice. At a minimum, a copy of the new lease should be attached and the applicant should indicate the desired rates for operation under the cost allocation rules (if the rates do not change, they would not be required to file support documentation for rates).

The issuance of an order granting certificates to all the former resellers in the manner UDRT&AANC proposes, would not be consistent with sound regulatory procedure. A business that seeks certification as a public utility should be required to apply for certification and demonstrate in advance that it meets the legal requirements for public utility status. It is true that the Commission issued an order granting TOA as traditional utilities to all the former resellers, but this was an emergency measure to allow them to continue collecting water and sewer charges, and the authority granted was temporary. Issuing certificates to the former resellers and then directing them to file sample leases afterwards, as UDRT&AANC proposes, would be inadequate and ineffective.

<u>Should the permanent rules be phased in?</u>
<u>Must all leases conform to the requirements before allowing cost allocation?</u>

UDRT&AANC propose to allow the cost allocator to convert customers from TOA to cost allocation as new leases are signed. The Public Staff asserts that it would be inappropriate to issue rent allocation certificates to the former resellers and allow them to retain their TOA as traditional utilities at the same time. Such a procedure would likely result in confusion for the Commission, the Public Staff, and any tenants who try to obtain information about their rights and obligations. There is nothing in Session Law 2001-502 that authorizes the former resellers to function in two different capacities simultaneously. Indeed, the testimony of witness Hovind on cross-examination (at pages 92-93 of the transcript) seems to suggest that the Joint

Intervenors tried unsuccessfully to have their preferred transition procedures incorporated into Session Law 2001-502.

The Commission is of the opinion that former water and sewer resellers should be required to apply individually for certification as cost allocators, and that their TOA as traditional water or sewer utilities should expire upon the issuance of their certificates, or 18 months after the date of the order, whichever occurs first. In the meantime, as leases are converted, the leases will contain language (see standard language above) noting that cost allocation will be applicable when all tenants have executed the new leases and the Commission has authorized cost allocation. The rates before and after conversion from TOA to cost allocation will remain the same, therefore the effect on the landlords will be revenue neutral. If a landlord needs a tariff revision before the new cost allocation authorization takes place, a tariff revision can be applied for under the TOA.

IT IS, THEREFORE, ORDERED as follows:

1. That the hot water capture, cold water allocation (HWCCWA) method of allocating utility costs shall not be authorized.

2. That rent allocators shall not be permitted to disconnect water or sewer service to a tenant as a remedy for nonpayment.

3. That the maximum administration fee is increased from $2.00 per month to $3.75 per month.

4. That the administration fee shall continue to be regulated by the Commission, shall constitute an element of the variable rent component, and shall be stated separately.

5. That the standardized language informing the tenant that there will be a variable rent component in addition to the base rent shall appear on the first page of the lease, shall be printed in a font size of at least 12 points, shall be in all capitals, and shall be enclosed in a box containing 1/2 inch of blank space between the printed wording and the box in each direction (see illustration in discussion above).

6. That former water resellers (presently operating under temporarty operating authority) shall apply for certification as rent allocators within 12 months after the issuance of this Order. The Application to Transfer from Temporary Operating Authority to Certificate of Authority for Allocation of Rental Costs for Water and/or Sewer Service and for Approval of Variable Rent Component for Apartment Complexes (attached as Appendix D) is hereby approved and shall be used for this purpose.

7. That the permanent rules shall be phased in as leases are converted. As noted above, former water and sewer resellers are required to apply individually for certification as cost allocators, and their TOA as traditional water or sewer utilities shall expire upon the issuance of their certificates, or 18 months after the date of the order, whichever occurs first. In the meantime, as leases are converted, the leases shall contain language (see standard language

above) noting that cost allocation will be applicable when all tenants have executed the new leases and the Commission has authorized cost allocation.

8. That Commission Rules R18-11 through R18-17 (attached as Appendix A) are hereby promulgated and shall supercede the existing Interim Rules.

9. That Commission forms Application for Certificate of Authority for Allocation of Rental Costs for Water and/or Sewer Service and for Approval of Variable Rent Component for Apartment Complexes (Appendix B) and Application for Transfer of Authority for Allocation of Rental Costs for Water and/or Sewer Service and for Approval of Variable Rent Component for Apartment Complexes (Appendix C) are hereby approved.

ISSUED BY ORDER OF THE COMMISSION.
This the 7th day of March, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rb030503.01

APPENDIX A

Rule R18-11. Application.

This Chapter governs the allocation of rental costs to water and sewer service as authorized by G.S. 62-110(g).

Rule R18-12. Definitions.

(a) *Same contiguous premises.* An apartment complex, comprising one or more buildings under common ownership, located on property that is not separated by property owned by others. Property will be considered contiguous even if intersected by a public thoroughfare if, absent the thoroughfare, the property would be contiguous.

(b) *Rent allocator.* The landlord purchasing water or sewer utility service from a supplier and allocating the costs of such service as a separate component of rental charges pursuant to G.S. 62-110(g). The rent allocator shall be the owner of the premises served.

(c) *Supplier.* A public utility or an agency or organization exempted from regulation from which a rent allocator purchases water or sewer service.

(d) *Tenant.* The lessee of property from the rent allocator, to whom the water or sewer service purchased by the rent allocator from the supplier is provided.

(e) *Base rent.* The component of a tenant's rent that is fixed. This component shall compensate the rent allocator for the tenant's right to occupy the premises.

(f) *Variable rent component.* The component of a tenant's rent that varies from month to month and compensates the rent allocator for the cost of water or sewer service purchased from a supplier and provided to the tenant.

Rule R18-13. Utility status; certificate.

Every rent allocator is a public utility as defined by G.S. 62-3(23)a.2 and shall comply with all applicable provisions of the Public Utilities Act and all applicable rules and regulations of the Commission. No rent allocator shall begin collecting a variable rent component from a tenant prior to applying for and receiving a certificate of authority from the Commission.

Rule R18-14. Compliance with rules..

Every rent allocator shall comply with any applicable rules of local governmental agencies regarding the provision of water and sewer service.

Rule R18-15. Records, reports and fees.

(a) All records shall be kept at the office or offices of the rent allocator in North Carolina and shall be available during regular business hours for examination by the Commission or Public Staff or their duly authorized representatives.

(b) Every rent allocator shall prepare and file an annual report to the Commission as required by Chapter 1, Rule R1-32 of the Rules and Regulations of the North Carolina Utilities Commission and shall pay a regulatory fee and file a regulatory fee report as required by Chapter 15, Rule R15-1. Special reports shall also be made concerning any particular matter upon request by the Commission.

Rule R18-16. Variable rent component.

(a) The variable rent component shall not exceed the total of: (1) the cost of purchased water and sewer service, (2) the cost of meter reading, and (3) the cost of billing and collection. A Commission-approved administrative fee not to exceed $3.75 may be added to the cost of purchased water and sewer service to compensate the rent allocator for meter reading, billing, and collection. All charges other than the administrative fee shall be based on tenants' metered comsumption of water. All sewer service shall be measured based on the amount of water metered. Metered consumption of water shall be determined by metered measurement of all water consumed by the tenant, and not by any partial measurement of water consumption (i.e., ratio utility billing system (RUBS) and hot water capture, cold water allocation (HWCCWA) are not allowed).

(b) No rent allocator shall charge or collect any greater or lesser variable rent component than the amount approved by the Commission.

Rule R18-17. Leases; customer deposits; disconnection; billing procedure; meter reading.

(a) No rent allocator shall collect any variable rent component from any tenant, or bill any tenant for any variable rent component, unless all of the following conditions are satisfied:

(1) The rent allocator and the tenant have entered into a valid written lease agreement which is in force at the time the water or sewer service is provided.

(2) The lease agreement includes the following language: "THIS LEASE AGREEMENT PROVIDES FOR A FIXED BASE RENT AND A VARIABLE COMPONENT OF RENT BASED ON THE COST OF WATER AND SEWER SERVICE" (or ". . . OF WATER SERVICE" or ". . . OF SEWER SERVICE," as applicable).

"THIS PROVISION WILL TAKE EFFECT WHEN ALL TENANTS HAVE EXECUTED A LEASE CONTAINING THIS PROVISION AND THE NORTH CAROLINA UTILITIES COMMISSION HAS ISSUED AN ORDER APPROVING THE VARIABLE COMPONENT OF RENT. UNTIL THAT TIME, ALL TENANTS MAY BE CHARGED FOR WATER/SEWER SERVICE IN THE TRADITIONAL MANNER, IF THE LANDLORD HAS OBTAINED TEMPORARY OPERATING AUTHORITY AND APPROVAL OF RATES BY THE COMMISSION."

(3) The language in subdivision (2) above:

(a) Shall be printed in capital letters with a type size of at least 12 points, and shall be enclosed in a box, with at least ½ inch of blank space between the printed wording and the box in each direction;

(b) Shall appear on the first page of the lease; and

(c) Shall appear in the same language as the rest of the lease, and if different parts of the lease are in different languages, shall appear in each language used in the lease.

(b) No charge for connection or disconnection, charge for late payment, or similar charge in addition to the rate specified in Rule R18-16 shall be allowed. The rent allocator may collect a security deposit pursuant to G.S. 42-51.

(c) No rent allocator may disconnect water or sewer service for nonpayment.

(d) Bills shall be rendered at least monthly.

(e) The date after which a bill for the variable rent component is due, or the past due after date, shall be disclosed on the bill and shall not be less than twenty-five (25) days after the billing date.

(f) A rent allocator shall not bill for or attempt to collect for excess usage resulting from a plumbing malfunction or other condition which is not known to the tenant or which has been reported to the rent allocator.

(g) Every rent allocator shall provide to each customer at the time the lease agreement is signed, and shall maintain in its business office, in public view, near the place where payments are received, the following:

(1) A copy of the rates, rules and regulations of the rent allocator applicable to the premises served from that office.

(2) A copy of these rules and regulations.

(3) A statement advising tenants that they should first contact the rent allocator's office with any questions they may have regarding bills or complaints about service, and that in cases of dispute, they may contact the Commission either by calling the Public Staff – North Carolina Utilities Commission, Consumer Services Division at (919) 733-9277 or by appearing in person or writing the Public Staff – North Carolina Utilities Commission, Consumer Services Division, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326.

(h) Each rent allocator shall adopt some means of informing its tenants as to the method of reading meters. Information on bills shall be governed by Chapter 7, Rule R7-23 and Chapter 10, Rule R10-19. Adjustment of bills for meter error shall be governed by Chapter 7, Rule R7-25. Testing of water meters shall be governed by Chapter 7, Rules R7-28 through R7-33.

APPENDIX B

DOCKET NO. WR-________
FILING FEE RECEIVED______

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
APPLICATION FOR CERTIFICATE OF AUTHORITY FOR ALLOCATION OF RENTAL COSTS FOR WATER AND/OR SEWER SERVICE AND FOR APPROVAL OF VARIABLE RENT COMPONENT FOR APARTMENT COMPLEXES

INSTRUCTIONS

Notes or explanations placed in the margins of the application are acceptable. If additional space is needed, supplementary sheets may be attached. If any section does not apply, write "not applicable" or cross out the section.

APPLICANT

1. Name of apartment complex owner ______________________________
2. Business mailing address of owner ______________________________
   City and state ______________________________ Zip code __________
3. Business street address (if different from mailing address)
   ____
4. Business telephone number ______________ Business fax number ______________
5. Business email address ______________________________
6. If corporation, list the following:
   President ______________ Vice President ______________
   Secretary ______________ Treasurer ______________
   Three (3) largest stockholders and percent of voting shares held by each ______________
   ____
7. If partnership, list the owners and percent of ownership held by each ______________
   ____

PROPOSED UTILITY SERVICE AREA

8. Name of Apartment Complex ______________________________
9. County (or counties) ______________________________
10. Type of Service (Water and/or Sewer) ______________________________
11. Who is the water purchased from? ______________________________
12. Who is the sewerage treatment purchased from? ______________________________
13. Number of customers:
    Water ______________________________
    Sewer ______________________________
14. Number of customers that can be served (including present customers, vacant apartments, etc.):
    Water ______________________________
    Sewer ______________________________

PROPOSED VARIABLE RENT COMPONENTS
(Amount Applicant Proposes to Charge)

15. Metered Residential Service:

Variable Rent Component for Water Usage: ______________________

Variable Rent Component for Sewer Usage: ______________________

Monthly Administrative Fee: ______________________

(Note: NCUC Rule R18-16 specifies that no more than $3.75 may be added to the cost of purchased water and sewer service as an administrative fee to compensate the rent allocator for meter reading, billing, and collection.)

LEASE AGREEMENT

1. Does the Applicant agree to enter into a written lease agreement with each tenant that satisfies all requirements of NCUC Rule R18-17(a) prior to collecting any variable rent component from such tenant? (yes or no) __________

PROPOSED BILLING

2. Bills past due ________ days after billing dates (NCUC Rule R18-17(e) specifies that bills shall not be past due less than twenty-five (25) days after billing date).
3. Will regular billing be by written statement? (yes or no) __________
4. Will the billing statement contain the following? (Indicate yes or no for each item)
   (a) Meter reading at beginning and end of billing period.................................. ________
   (b) Date of meter readings.. ________
   (c) Gallons used, based on meter readings.. ________
   (d) Amount due for current billing period listed as a separate amount................ ________
   (e) Amount due from previous billing period listed as a separate amount............ ________
5. Show how the following will appear on the billing statement:
   (a) Mailing address of company: ______________________
   (b) Address where bill can be paid in person: ______________________
   (c) Name and phone number of alternative persons to contact for emergency service after business hours: ______________________

GENERAL ORDERS – RESALE OF WATER/SEWER

PERSONS TO CONTACT

		NAME	ADDRESS	TELEPHONE
6.	Owner/Management Co.			
7.	Complaints or Billing			
8.	Emergency Service			
9.	Filing of Annual Reports			
10.	Filing and Payment of Regulatory Fees to Utilities Commission			

11. Are the names and phone numbers for items 5 through 7 above provided to customers? If so, how?

____

12. Can customers make phone calls for service without being charged for a long distance phone call? (yes or no)

____

13. Do persons designated to receive phone calls for emergency service, after regular business hours, have authority to provide the needed repairs without first contacting owner? (yes or no) ______________

EXHIBITS

1. If the Applicant is a corporation, LLC, etc., enclose a copy of the Articles of Incorporation, Articles of Organization, or other appropriate documents, on file with the North Carolina Secretary of State. (Not required if previously filed with the Commission.)
2. If the Applicants are doing business as a partnership, enclose a copy of the partnership agreement. (Not required if previously filed with the Commission.)
3. If the apartment complex is operated by a management company, provide a copy of the management agreement.
4. Enclose a vicinity map showing the location of the proposed apartment complexes or service areas in sufficient detail for someone not familiar with the county to locate the apartment complexes. (A county roadmap with the apartment complexes outlined is suggested.)
5. Enclose maps of the apartment complexes in sufficient detail to show the layout of streets, apartment buildings, and meter locations.
6. Enclose an exhibit listing the master meters serving the apartment complex, indicating for each master meter the size of the meter, the number of apartment buildings served by the meter, and the number of apartments in each apartment building.
7. Enclose a copy of the rates that will be charged to the Applicant by the supplier of purchased water.
8. Enclose a copy of the rates that will be charged to the Applicant by the supplier of purchased sewerage treatment.
9. Enclose a copy of any agreements or contracts covering the provision of billing and collection and meter reading services to the apartment complex.
10. Enclose a sample copy of the written lease agreement that each tenant will be required to sign. This lease agreement should satisfy all requirements of NCUC Rule R18-17(a).

FILING INSTRUCTIONS

11. Eight (8) copies of the application and exhibits shall be filed with the **North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325.** One of these copies must have an original signature. (Applicants must also provide any copies to be returned to them.)

12. Enclose a filing fee as required by G. S. §62-300. A Class A company (annual revenues of $1,000,000 or more) requires a $250 filing fee. A Class B company (annual revenues between $200,000 and $1,000,000) requires a $100 filing fee. A Class C company (annual revenues less than $200,000) requires a $25 filing fee. **MAKE CHECK PAYABLE TO NORTH CAROLINA UTILITIES COMMISSION.**

SIGNATURE

13. Application shall be signed and verified by the Applicant.

Signature ______________________

Date ______________________

(Typed or Printed
14. Name) ______________________

personally appearing before me and, being first duly sworn, says that the information contained in this application and in the exhibits attached hereto are true to the best of his/her knowledge and belief.

This the _______ day of _________________, 20____.

____
Notary Public

____
Address

My Commission Expires: ______________________
Date

APPENDIX C

SELLER DOCKET NO. WR-______
PURCHASER DOCKET NO. WR-______
FILING FEE RECEIVED ______

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

APPLICATION FOR TRANSFER OF AUTHORITY FOR ALLOCATION OF RENTAL COSTS FOR WATER AND/OR SEWER SERVICE AND FOR APPROVAL OF VARIABLE RENT COMPONENT FOR APARTMENT COMPLEXES

INSTRUCTIONS

Notes or explanations placed in the margins of the application are acceptable. If additional space is needed, supplementary sheets may be attached. If any section does not apply, write "not applicable" or cross out the section.

SELLER

1. Name of current certified owner ______
2. Mailing address ______
3. Business telephone number ______

PURCHASER

4. Name of new apartment complex owner ______
5. Business mailing address ______
   City and state ______ Zip Code ______
6. Business street address (if different from mailing address)
   ______
7. Business telephone number ______ Business fax number ______
8. Business email address ______
9. If corporation, list the following:
   President ______ Vice President ______
   Secretary ______ Treasurer ______
   Three (3) largest stockholders and percent of voting shares held by each ______
   ______
10. If partnership, list the owners and percent of ownership held by each ______
    ______
11. Is the purchaser acquiring utility assets or stock? ______
    (No filing fee required if stock transfer only.)

UTILITY SERVICE AREA

12. Name of Apartment Complex ______
13. County (or counties) ______
14. Type of Service (Water and/or Sewer) ______
15. Who is the water purchased from? ______
16. Who is the sewerage treatment purchased from? ______
17. Number of customers at end of test year:
    Water ______
    Sewer ______
18. Number of customers that can be served (including present customers, vacant apartments, etc.):
    Water ______
    Sewer ______

PROPOSED AND PRESENT VARIABLE RENT COMPONENTS

	Proposed Rates	Present Rates
1. Metered Residential Service:		
Variable Rent Component for Water Usage:	______	______
Variable Rent Component for Sewer Usage:	______	______
Monthly Administrative Fee:	______	______

(Note: NCUC Rule R18-16 specifies that no more than $3.75 may be added to the cost of purchased water and sewer service as an administrative fee to compensate the rent allocator for meter reading, billing, and collection.)

2. What date are the proposed rates to become effective? ______
3. How long have the present rates been in effect? ______

LEASE AGREEMENT

4. Does the Purchaser agree to enter into a written lease agreement with each tenant that satisfies all requirements of NCUC Rule R18-17(a) prior to collecting any variable rent component from such tenant? (yes or no) ______

PROPOSED BILLING

5. Bills past due ______ days after billing dates (NCUC Rule R18-17(e) specifies that bills shall not be past due less than twenty-five (25) days after billing date).
6. Will regular billing be by written statement? (yes or no) ______
7. Will the billing statement contain the following? (Indicate yes or no for each item)
   (a) Meter reading at beginning and end of billing period.................................. ______
   (b) Date of meter readings.. ______
   (c) Gallons used, based on meter readings... ______

(d) Amount due for current billing period listed as a separate amount................ ______

(e) Amount due from previous billing period listed as a separate amount............ ______

8. Show how the following will appear on the billing statement: ______

(a) Mailing address of company: ______

______

(b) Address where bill can be paid in person: ______

______

(c) Name and phone number of alternative persons to contact for emergency service after business hours:

______

PERSONS TO CONTACT

	NAME	ADDRESS	TELEPHONE
9. Owner/Management Co.	______	______	______
10. Complaints or Billing	______	______	______
11. Emergency Service	______	______	______
12. Filing of Annual Reports	______	______	______
13. Filing and Payment of Regulatory Fees to Utilities Commission	______	______	______

14. Are the names and phone numbers for items 9 through 11 above provided to customers? If so, how?

______

15. Can customers make phone calls for service without being charged for a long distance phone call? (yes or no)

______

16. Do persons designated to receive phone calls for emergency service, after regular business hours, have authority to provide the needed repairs without first contacting owner? (yes or no) ______

EXHIBITS

1. If the Purchaser is a corporation, LLC, etc., enclose a copy of the Articles of Incorporation, Articles of Organization, or other appropriate documents, on file with the North Carolina Secretary of State. (Not required if previously filed with the Commission.)
2. If the Purchasers are doing business as a partnership, enclose a copy of the partnership agreement. (Not required if previously filed with the Commission.)
3. Enclose a copy of (1) exhibits showing the Seller has ownership of all property necessary to operate the utility and (2) a purchase agreement reduced to writing. Any changes in the purchase agreement should be filed immediately with the Commission.
4. If the apartment complex is operated by a management company, provide a copy of the management agreement.

5. Enclose an exhibit listing the master meters serving the apartment complex, indicating for each master meter the size of the meter, the number of apartment buildings served by the meter, and the number of apartments in each apartment building.

6. Enclose a copy of the rates that will be charged to the Purchaser by the supplier of purchased water.

7. Enclose a copy of the rates that will be charged to the Purchaser by the supplier of purchased sewerage treatment.

8. Enclose a copy of any agreements or contracts the Purchaser has covering the provision of billing and collection and meter reading services to the apartment complex.

9. Enclose a sample copy of the written lease agreement that each tenant will be required to sign. This lease agreement should satisfy all requirements of NCUC Rule R18-17(a).

FILING INSTRUCTIONS

10. Nine (9) copies of the application and exhibits shall be filed with the **North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325.** One of these copies must have an original signature. (Applicants must also provide any copies to be returned to them.)

11. Enclose a filing fee as required by G. S. §62-300. A Class A company (annual revenues of $1,000,000 or more) requires a $250 filing fee. A Class B company (annual revenues between $200,000 and $1,000,000) requires a $100 filing fee. A Class C company (annual revenues less than $200,000) requires a $25 filing fee. **MAKE CHECK PAYABLE TO NORTH CAROLINA UTILITIES COMMISSION.**

SIGNATURES

13. Application shall be signed and verified by the Applicants.

Signature ______________________
Purchaser

Date ______________________

Signature ______________________
Seller

Date ______________________

14. (Typed or Printed Name) ______________________ personally appearing before me and, being first duly sworn, says that the information contained in this application and in the exhibits attached hereto are true to the best of his/her knowledge and belief.

This the ______ day of ________________, 20____.

____
Notary Public

____
Address

My Commission Expires: ______________________
Date

APPENDIX D

DOCKET NO. WR-____________

FILING FEE RECEIVED __________

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

APPLICATION TO TRANSFER FROM TEMPORARY OPERATING AUTHORITY TO CERTIFICATE OF AUTHORITY FOR ALLOCATION OF RENTAL COSTS FOR WATER AND/OR SEWER SERVICE AND FOR APPROVAL OF VARIABLE RENT COMPONENT FOR APARTMENT COMPLEXES

INSTRUCTIONS

Notes or explanations placed in the margins of the application are acceptable. If additional space is needed, supplementary sheets may be attached. If any section does not apply, write "not applicable" or cross out the section.

APPLICANT

1. Name of current certified owner ____________________
2. Business mailing address of owner ____________________
   City and state ________________ Zip Code ________
3. Business street address (if different from mailing address)
   ____
4. Business telephone number __________ Business fax number __________
5. Business email address ____________________

UTILITY SERVICE AREA

6. Name of Apartment Complex ____________________
7. Docket No., including Sub No., that apartment complex was originally certified under __________
8. County (or counties) ____________________
9. Type of Service (Water and/or Sewer) ____________________
10. Who is the water purchased from? ____________________
11. Who is the sewerage treatment purchased from? ____________________
12. Number of customers:
    Water ____________________
    Sewer ____________________
13. Number of customers that can be served (including present customers, vacant apartments, etc.):
    Water ____________________
    Sewer ____________________

GENERAL ORDERS – RESALE OF WATER/SEWER

PROPOSED VARIABLE RENT COMPONENTS AND PRESENT RATES

	Proposed Rent Components	Present Rates
14. Metered Residential Service:		
Charge for Water Usage:	______	______
Charge for Sewer Usage:	______	______
Monthly Administrative Fee:	______	______

(Note: NCUC Rule R18-16 specifies that no more than $3.75 may be added to the cost of purchased water and sewer service as an administrative fee to compensate the rent allocator for meter reading, billing, and collection.)

LEASE AGREEMENT

1. Does the Applicant agree to enter into a written lease agreement with each tenant that satisfies all requirements of

NCUC Rule R18-17(a) prior to collecting any variable rent component from such tenant? (yes or no) ______

PROPOSED BILLING

2. Bills past due ______ days after billing dates (NCUC Rule R18-17(e) specifies that bills shall not be past due

less than twenty-five (25) days after billing date).

3. Will regular billing be by written statement? (yes or no) ______

4. Will the billing statement contain the following? (Indicate yes or no for each item)

(a) Meter reading at beginning and end of billing period.......................... ______

(b) Date of meter readings.. ______

(c) Gallons used, based on meter readings... ______

(d) Amount due for current billing period listed as a separate amount............ ______

(e) Amount due from previous billing period listed as a separate amount......... ______

5. Show how the following will appear on the billing statement:

(a) Mailing address of company: ______

______

(b) Address where bill can be paid in person: ______

______

(c) Name and phone number of alternative persons to contact for emergency service after business hours:

______

GENERAL ORDERS – RESALE OF WATER/SEWER

PERSONS TO CONTACT

	NAME	ADDRESS	TELEPHONE
6. Owner/Management Co.			
7. Complaints or Billing			
8. Emergency Service			
9. Filing of Annual Reports			
10. Filing and Payment of Regulatory Fees to Utilities Commission			

11. Are the names and phone numbers for items 5 through 7 above provided to customers? If so, how?

12. Can customers make phone calls for service without being charged for a long distance phone call? (yes or no)

13. Do persons designated to receive phone calls for emergency service, after regular business hours, have authority to provide the needed repairs without first contacting owner? (yes or no)

EXHIBITS

1. If the Applicant is a corporation, LLC, etc., enclose a copy of the Articles of Incorporation, Articles of Organization, or other appropriate documents, on file with the North Carolina Secretary of State. **(Not required if previously filed with the Commission and not subsequently amended.)**
2. If the Applicants are doing business as a partnership, enclose a copy of the partnership agreement. **(Not required if previously filed with the Commission and not subsequently amended.)**
3. If the apartment complex is operated by a management company, provide a copy of the management agreement. **(Not required if the current management agreement has previously been filed with the Commission.)**
4. Enclose an exhibit listing the master meters serving the apartment complex, indicating for each master meter the size of the meter, the number of apartment buildings served by the meter, and the number of apartments in each apartment building.
5. Enclose a copy of the rates currently being charged to the Applicant by the supplier of purchased water.
6. Enclose a copy of the rates currently being charged to the Applicant by the supplier of purchased sewerage treatment.
7. Enclose a copy of the current agreements or contracts covering the provision of billing and collection and meter reading services to the apartment complex.
8. Enclose a sample copy of the written lease agreement that each tenant will be required to sign. This lease agreement should satisfy all requirements of NCUC Rule R18-17(a).

GENERAL ORDERS – RESALE OF WATER/SEWER

FILING INSTRUCTIONS

9. Eight (8) copies of the application and exhibits shall be filed with the **North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325.** One of these copies <u>must</u> have an original signature. (Applicants must also provide any copies to be returned to them.)

10. Enclose a filing fee as required by G. S. §62-300. A Class A company (annual revenues of $1,000,000 or more) requires a $250 filing fee. A Class B company (annual revenues between $200,000 and $1,000,000) requires a $100 filing fee. A Class C company (annual revenues less than $200,000) requires a $25 filing fee. **MAKE CHECK PAYABLE TO NORTH CAROLINA UTILITIES COMMISSION.**

SIGNATURE

11. Application shall be signed and verified by the Applicant.

Signature ______________________

Date ______________________

12. Type or Printed Name ______________________

____

personally appearing before me and, being first duly sworn, says that the information contained in this application and in the exhibits attached hereto are true to the best of his/her knowledge and belief.

This the _______ day of ________________, 20____.

____
Notary Public

____
Address

My Commission Expires: ______________________
Date

DOCKET NO. WR-100, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition for Rulemaking to Implement North Carolina Session Law 2001-502 (House Bill 1061	))	ORDER OF CLARIFICATION REVISING FORMS

BY THE CHAIR: On March 7, 2003, the Commission issued an Order Adopting Permanent Rules and Approving Forms in the above-captioned matter. It has come to the attention of the Commission that the application forms contained some typographical errors, needed some clarifying language, and should contain a revision date. Based upon the foregoing, the Chair is of the opinion that an Order should be issued revising the application forms.

IT IS, THEREFORE, ORDERED as follows:

1. That the application forms (Appendix B, Appendix C, and Appendix D) approved in Commission Order dated March 7, 2003, in this docket, are hereby revised and approved.

2. That, except as amended herein, the Order of March 7, 2003, shall remain in full force and effect.

ISSUED BY ORDER OF THE CHAIR.
This the 13th day of May, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

rb051403.01

APPENDIX B

DOCKET NO. WR-__________

FILING FEE RECEIVED __________

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

APPLICATION FOR CERTIFICATE OF AUTHORITY FOR ALLOCATION OF RENTAL COSTS FOR WATER AND/OR SEWER SERVICE AND FOR APPROVAL OF VARIABLE RENT COMPONENT FOR APARTMENT COMPLEXES

INSTRUCTIONS

Notes or explanations placed in the margins of the application are acceptable. If additional space is needed, supplementary sheets may be attached. If any section does not apply, write "not applicable" or cross out the section.

APPLICANT

1. Name of apartment complex owner __________
2. Business mailing address of owner __________
   City and state __________ Zip code __________
3. Business street address (if different from mailing address) __________
4. Business telephone number __________ Business fax number __________
5. Business email address __________
6. If corporation, list the following:
   President __________ Vice President __________
   Secretary __________ Treasurer __________
   Three (3) largest stockholders and <u>percent</u> of voting shares held by each __________
7. If partnership, list the owners and <u>percent</u> of ownership held by each __________

PROPOSED UTILITY SERVICE AREA

8. Name of Apartment Complex __________
9. County (or counties) __________
10. Type of Service (Water and/or Sewer) __________
11. Who is the water purchased from? __________
12. Who is the sewerage treatment purchased from? __________
13. Number of customers:
    Water __________
    Sewer __________
14. Number of customers that can be served (including present customers, vacant apartments, etc.):
    Water __________
    Sewer __________

PROPOSED VARIABLE RENT COMPONENTS
(Amount Applicant Proposes to Charge)

15. Metered Residential Service:
    Variable Rent Component for Water Usage: ______________________
    Variable Rent Component for Sewer Usage: ______________________
    Monthly Administrative Fee: ______________________

(Note: NCUC Rule R18-16 specifies that no more than $3.75 may be added to the cost of purchased water and sewer service as an administrative fee to compensate the rent allocator for meter reading, billing, and collection.)

LEASE AGREEMENT

1. Has the Applicant entered into a written lease agreement with each tenant that satisfies all requirements of NCUC Rule R18-17(a)? (**NOTE**: All leases shall be in compliance with Rule R18-17(a) before the Commission will grant authority to charge rates)
   (yes or no) __________

PROPOSED BILLING

2. Bills past due ________ days after billing dates (NCUC Rule R18-17(e) specifies that bills shall not be past due less than twenty-five (25) days after billing date).
3. Will regular billing be by written statement? (yes or no) __________
4. Will the billing statement contain the following? (Indicate yes or no for each item)
   (a) Meter reading at beginning and end of billing period.................................... __________
   (b) Date of meter readings.. __________
   (c) Gallons used, based on meter readings.. __________
   (d) Amount due for current billing period listed as a separate amount................ __________
   (e) Amount due from previous billing period listed as a separate amount............ __________
5. Show how the following will appear on the billing statement:
   (a) Mailing address of company: ______________________
   ____
   (b) Address where bill can be paid in person: ______________________
   ____
   (c) Name and phone number of alternative persons to contact for emergency service after business hours:
   ____

GENERAL ORDERS – RESALE OF WATER/SEWER

PERSONS TO CONTACT

		NAME	ADDRESS	TELEPHONE
6.	Owner/Management Co.			
7.	Complaints or Billing	______	______	______
8.	Emergency Service	______	______	______
9.	Filing of Annual Reports	______	______	______
10.	Filing and Payment of Regulatory Fees to Utilities Commission	______	______	______

11. Are the names and phone numbers for items 6 through 8 above provided to customers? If so, how?

____

12. Can customers make phone calls for service without being charged for a long distance phone call? (yes or no)

____

13. Do persons designated to receive phone calls for emergency service, after regular business hours, have authority

to provide the needed repairs without first contacting owner? (yes or no) ______________________

EXHIBITS

1. If the Applicant is a corporation, LLC, etc., enclose a copy of the Articles of Incorporation, Articles of Organization, or other appropriate documents, on file with the North Carolina Secretary of State. . (**Not required if previously filed with the Commission and not subsequently amended.**)
2. If the Applicants are doing business as a partnership, enclose a copy of the partnership agreement . (**Not required if previously filed with the Commission and not subsequently amended.**)
3. If the apartment complex is operated by a management company, provide a copy of the management agreement.
4. Enclose a vicinity map showing the location of the proposed apartment complexes or service areas in sufficient detail for someone not familiar with the county to locate the apartment complexes. (A county roadmap with the apartment complexes outlined is suggested.)
5. Enclose maps of the apartment complexes in sufficient detail to show the layout of streets, apartment buildings, and meter locations.
6. Enclose an exhibit listing the master meters serving the apartment complex, indicating for each master meter the size of the meter, the number of apartment buildings served by the meter, and the number of apartments in each apartment building.
7. Enclose a copy of the rates that will be charged to the Applicant by the supplier of purchased water.
8. Enclose a copy of the rates that will be charged to the Applicant by the supplier of purchased sewerage treatment.
9. Enclose a copy of any agreements or contracts covering the provision of billing and collection and meter reading services to the apartment complex.

10. Enclose a sample copy of the written lease agreement that each tenant will be required to sign. This lease agreement should satisfy all requirements of NCUC Rule R18-17(a).

FILING INSTRUCTIONS

11. Eight (8) copies of the application and exhibits shall be filed with the **North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325.** One of these copies must have an original signature. (Applicants must also provide any copies to be returned to them.)

12. Enclose a filing fee as required by G. S. §62-300. A Class A company (annual revenues of $1,000,000 or more) requires a $250 filing fee. A Class B company (annual revenues between $200,000 and $1,000,000) requires a $100 filing fee. A Class C company (annual revenues less than $200,000) requires a $25 filing fee. **MAKE CHECK PAYABLE TO NORTH CAROLINA UTILITIES COMMISSION.**

SIGNATURE

13. Application shall be signed and verified by the Applicant.

Signature ______________________

Date ______________________

14. (Typed or Printed Name) ______________________

personally appearing before me and, being first duly sworn, says that the information contained in this application and in the exhibits attached hereto are true to the best of his/her knowledge and belief.

This the ______ day of ______________, 20_____.

____
Notary Public

____
Address

My Commission Expires: ______________________
Date

APPENDIX C

SELLER DOCKET NO. WR-________
PURCHASER DOCKET NO. WR-________
FILING FEE RECEIVED ________

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

APPLICATION FOR TRANSFER OF AUTHORITY FOR ALLOCATION OF RENTAL COSTS FOR WATER AND/OR SEWER SERVICE AND FOR APPROVAL OF VARIABLE RENT COMPONENT FOR APARTMENT COMPLEXES

INSTRUCTIONS

Notes or explanations placed in the margins of the application are acceptable. If additional space is needed, supplementary sheets may be attached. If any section does not apply, write "not applicable" or cross out the section.

SELLER

1. Name of current certified owner ________
2. Mailing address ________
3. Business telephone number ________

PURCHASER

4. Name of new apartment complex owner ________
5. Business mailing address ________
   City and state ________ Zip Code ________
6. Business street address (if different from mailing address)
   ____
7. Business telephone number ________ Business fax number ________
8. Business email address ________
9. If corporation, list the following:
   President ________ Vice President ________
   Secretary ________ Treasurer ________
   Three (3) largest stockholders and percent of voting shares held by each ________
   ____
10. If partnership, list the owners and percent of ownership held by each ________
    ____
11. Is the purchaser acquiring utility assets or stock? ________
    (No filing fee required if stock transfer only.)

UTILITY SERVICE AREA

12. Name of Apartment Complex ____________________
13. County (or counties) ____________________
14. Type of Service (Water and/or Sewer) ____________________
15. Who is the water purchased from? ____________________
16. Who is the sewerage treatment purchased from? ____________________
17. Number of customers at end of test year:
    Water ____________________
    Sewer ____________________
18. Number of customers that can be served (including present customers, vacant apartments, etc.):
    Water ____________________
    Sewer ____________________

PROPOSED AND PRESENT VARIABLE RENT COMPONENTS

	Proposed Rates	Present Rates
1. Metered Residential Service:		
Variable Rent Component for Water Usage:	________	________
Variable Rent Component for Sewer Usage:	________	________
Monthly Administrative Fee:	________	________

(Note: NCUC Rule R18-16 specifies that no more than $3.75 may be added to the cost of purchased water and sewer service as an administrative fee to compensate the rent allocator for meter reading, billing, and collection.)

2. What date are the proposed rates to become effective? ____________________
3. How long have the present rates been in effect? ____________________

LEASE AGREEMENT

4. Has the Purchaser entered into a written lease agreement with each tenant that satisfies all requirements of NCUC Rule R18-17(a)? (NOTE: All leases shall be in compliance with Rule R18-17(a) before the Commission will grant authority to charge rates) (yes or no) ________

PROPOSED BILLING

5. Bills past due ________ days after billing dates (NCUC Rule R18-17(e) specifies that bills shall not be past due less than twenty-five (25) days after billing date).
6. Will regular billing be by written statement? (yes or no) ____________________
7. Will the billing statement contain the following? (Indicate yes or no for each item)
   (a) Meter reading at beginning and end of billing period.................................. ________
   (b) Date of meter readings.. ________

(c) Gallons used, based on meter readings.. ____________

(d) Amount due for current billing period listed as a separate amount................. ____________

(e) Amount due from previous billing period listed as a separate amount............ ____________

8. Show how the following will appear on the billing statement: ____________

(a) Mailing address of company: ______________________________

____

(b) Address where bill can be paid in person: ______________________________

____

(c) Name and phone number of alternative persons to contact for emergency service after business hours:

____

PERSONS TO CONTACT

	NAME	ADDRESS	TELEPHONE
9. Owner/Management Co.			
10. Complaints or Billing			
11. Emergency Service			
12. Filing of Annual Reports			
13. Filing and Payment of Regulatory Fees to Utilities Commission			

14. Are the names and phone numbers for items 9 through 11 above provided to customers? If so, how?

____

15. Can customers make phone calls for service without being charged for a long distance phone call? (yes or no)

____

16. Do persons designated to receive phone calls for emergency service, after regular business hours, have authority to provide the needed repairs without first contacting owner? (yes or no) ____________

EXHIBITS

1. If the Purchaser is a corporation, LLC, etc., enclose a copy of the Articles of Incorporation, Articles of Organization, or other appropriate documents, on file with the North Carolina Secretary of State. (Not **required if previously filed with the Commission and not subsequently amended.)**

2. If the Purchasers are doing business as a partnership, enclose a copy of the partnership agreement. (Not **required if previously filed with the Commission and not subsequently amended.)**

3. Enclose a copy of (1) exhibits showing the Seller has ownership of all property necessary to operate the utility and (2) a purchase agreement reduced to writing. Any changes in the purchase agreement should be filed immediately with the Commission.

4. If the apartment complex is operated by a management company, provide a copy of the management agreement.

5. Enclose an exhibit listing the master meters serving the apartment complex, indicating for each master meter the size of the meter, the number of apartment buildings served by the meter, and the number of apartments in each apartment building. **(Not required if previously filed with the Commission and not subsequently amended.)**

6. Enclose a copy of the rates that will be charged to the Purchaser by the supplier of purchased water.

7. Enclose a copy of the rates that will be charged to the Purchaser by the supplier of purchased sewerage treatment.

8. Enclose a copy of any agreements or contracts the Purchaser has covering the provision of billing and collection and meter reading services to the apartment complex.

9. Enclose a sample copy of the written lease agreement that each tenant will be required to sign. This lease agreement should satisfy all requirements of NCUC Rule R18-17(a).

FILING INSTRUCTIONS

10. Nine (9) copies of the application and exhibits shall be filed with the **North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325.** One of these copies must have an original signature. (Applicants must also provide any copies to be returned to them.)

11. Enclose a filing fee as required by G. S. §62-300. A Class A company (annual revenues of $1,000,000 or more) requires a $250 filing fee. A Class B company (annual revenues between $200,000 and $1,000,000) requires a $100 filing fee. A Class C company (annual revenues less than $200,000) requires a $25 filing fee. **MAKE CHECK PAYABLE TO NORTH CAROLINA UTILITIES COMMISSION.**

SIGNATURES

13. Application shall be signed and verified by the Applicants.

Signature ______________________
Purchaser

Date ______________________

Signature ______________________
Seller

Date ______________________

14. (Typed or Printed Name) ______________________

personally appearing before me and, being first duly sworn, says that the information contained in this application and in the exhibits attached hereto are true to the best of his/her knowledge and belief.

This the ______ day of ________________, 20____.

____
Notary Public

____
Address

My Commission Expires: ______________________
Date

APPENDIX D

DOCKET NO. WR-____________

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
APPLICATION TO TRANSFER FROM TEMPORARY OPERATING AUTHORITY TO CERTIFICATE OF AUTHORITY FOR ALLOCATION OF RENTAL COSTS FOR WATER AND/OR SEWER SERVICE AND FOR APPROVAL OF VARIABLE RENT COMPONENT FOR APARTMENT COMPLEXES

INSTRUCTIONS

Notes or explanations placed in the margins of the application are acceptable. If additional space is needed, supplementary sheets may be attached. If any section does not apply, write "not applicable" or cross out the section.

APPLICANT

1. Name of current certified owner ____________
2. Business mailing address of owner ____________
   City and state ____________ Zip Code ____________
3. Business street address (if different from mailing address)
   ____
4. Business telephone number ____________ Business fax number ____________
5. Business email address ____________

UTILITY SERVICE AREA

6. Name of Apartment Complex ____________
7. Docket No., including Sub No., that apartment complex was originally certified under ____________
8. County (or counties) ____________
9. Type of Service (Water and/or Sewer) ____________
10. Who is the water purchased from? ____________
11. Who is the sewerage treatment purchased from? ____________
12. Number of customers:
    Water ____________
    Sewer ____________
13. Number of customers that can be served (including present customers, vacant apartments, etc.):
    Water ____________
    Sewer ____________

PROPOSED VARIABLE RENT COMPONENTS AND PRESENT RATES

	Proposed Rent Components	Present Rates
14. Metered Residential Service:		
Charge for Water Usage:	____________	____________
Charge for Sewer Usage:	____________	____________
Monthly Administrative Fee:	____________	____________

(Note: NCUC Rule R18-16 specifies that no more than $3.75 may be added to the cost of purchased water and sewer service as an administrative fee to compensate the rent allocator for meter reading, billing, and collection.)

GENERAL ORDERS – RESALE OF WATER/SEWER

LEASE AGREEMENT

1. Has the Applicant entered into a written lease agreement with each tenant that satisfies all requirements of NCUC Rule R18-17(a)? (NOTE: All leases shall be in compliance with Rule R18-17(a) before the Commission will grant authority to charge rates) (yes or no) ________

PROPOSED BILLING

2. Bills past due ________ days after billing dates (NCUC Rule R18-17(e) specifies that bills shall not be past due less than twenty-five (25) days after billing date).
3. Will regular billing be by written statement? (yes or no) ________
4. Will the billing statement contain the following? (Indicate yes or no for each item)
   - (a) Meter reading at beginning and end of billing period................................ ________
   - (b) Date of meter readings.. ________
   - (c) Gallons used, based on meter readings.. ________
   - (d) Amount due for current billing period listed as a separate amount................ ________
   - (e) Amount due from previous billing period listed as a separate amount........... ________
5. Show how the following will appear on the billing statement:
   - (a) Mailing address of company: ________
   - (b) Address where bill can be paid in person: ________
   - (c) Name and phone number of alternative persons to contact for emergency service after business hours: ________

PERSONS TO CONTACT

	NAME	ADDRESS	TELEPHONE
6. Owner/Management Co.			
7. Complaints or Billing			
8. Emergency Service			
9. Filing of Annual Reports			
10. Filing and Payment of Regulatory Fees to Utilities Commission			

11. Are the names and phone numbers for items 6 through 8 above provided to customers? If so, how? ________
12. Can customers make phone calls for service without being charged for a long distance phone call? (yes or no) ________
13. Do persons designated to receive phone calls for emergency service, after regular business hours, have authority to provide the needed repairs without first contacting owner? (yes or no) ________

GENERAL ORDERS – RESALE OF WATER/SEWER

EXHIBITS

1. If the Applicant is a corporation, LLC, etc., enclose a copy of the Articles of Incorporation, Articles of Organization, or other appropriate documents, on file with the North Carolina Secretary of State. **(Not required if previously filed with the Commission and not subsequently amended.)**
2. If the Applicants are doing business as a partnership, enclose a copy of the partnership agreement. **(Not required if previously filed with the Commission and not subsequently amended.)**
3. If the apartment complex is operated by a management company, provide a copy of the management agreement. **(Not required if the current management agreement has previously been filed with the Commission.)**
4. Enclose an exhibit listing the master meters serving the apartment complex, indicating for each master meter the size of the meter, the number of apartment buildings served by the meter, and the number of apartments in each apartment building. **(Not required if previously filed with the Commission and not subsequently amended.)**
5. Enclose a copy of the rates currently being charged to the Applicant by the supplier of purchased water.
6. Enclose a copy of the rates currently being charged to the Applicant by the supplier of purchased sewerage treatment.
7. Enclose a copy of the current agreements or contracts covering the provision of billing and collection and meter reading services to the apartment complex.
8. Enclose a sample copy of the written lease agreement that each tenant will be required to sign. This lease agreement should satisfy all requirements of NCUC Rule R18-17(a).

FILING INSTRUCTIONS

9. Eight (8) copies of the application and exhibits shall be filed with the **North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325.** One of these copies must have an original signature. (Applicants must also provide any copies to be returned to them.)

SIGNATURE

10. Application shall be signed and verified by the Applicant.

Signature ______________________________

Date ______________________________

11. (Typed or Printed Name) ______________________________

personally appearing before me and, being first duly sworn, says that the information contained in this application and in the exhibits attached hereto are true to the best of his/her knowledge and belief.

This the ______ day of ________________, 20____.

____

Notary Public

____

Address

My Commission Expires: ____________________

Date

DOCKET NO. WR-100, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Rulemaking to Implement North Carolina Session	)	NOTICE OF PROPOSED
Law 2001-502 (House Bill 1061)	)	DECISION

BY THE COMMISSION: By adoption of House Bill 1061 on December 4, 2001, the North Carolina General Assembly enacted substantial changes to both G.S. 62-110(g), governing the resale of water and sewer services, and G.S. 42-3, *et al.*, governing residential rental agreements. After evidentiary proceeding in this Docket, the Commission repealed the old "water reseller" Rules (Rules R18-1 through R18-7) and adopted new rules (Rules R18-11 through R18-17) relating to "rent allocators." The Commission's Order approving new Rules was issued on March 7, 2003.

On September 9, 2003, counsel for National Water & Power, Viterra Energy Services, United Dominion Realty Trust, Trammel Crow Residential Services Southeast, ISC Management, Donathan Properties, Summit Properties, AUM, Inc., Crosland Properties, Apartment Dynamics, BNP Residential Properties, Stephen D. Bell & Company, and Apartment Association of North Carolina (hereinafter referred to as Joint Petitioners) filed a Statement of Position and requested the Commission issue an Order of Clarification regarding its Order issued on March 7, 2003, in this Docket.

In its Statement of Position the Joint Petitioners addressed two issues and requested clarification regarding these issues:

1. Rule R18-17 requires inclusion of particular language on the first page of the lease. Instead of revising the lease, may the particular language be included in an amendment or addendum to the lease?

2. The Order requires that Applicants for Authority for Allocation of Rental Costs must have all leases in conformance with the requirements of Rule R18-17 before they may charge allocation of rental costs rates. Does this apply to Applicants that have pre-existing apartments full of tenants that are in the midst of a lease that does not conform with Rule R18-17?

DISCUSSION OF QUESTION NO. 1

The Order issued on March 7, 2003, discussed where the standardized language should be located within a lease. There had been objection to the initially proposed location near the signature line at the end of the lease because the final pages of the lease generally contain boilerplate provisions only and are rarely noticed by the tenant. Therefore, in its Order, the Commission concluded that the proper location for the standardized language regarding the variable rent component was on the first page of the lease and included that requirement in Rule R18-17.

The Joint Petitioners have stated their position that the "spirit" of Commission Rule R18-17(a) would be met by allowing existing leases to be amended by attaching an addendum signed by tenant that contains the standardized language. Thus, the tenants would be notified of the change in a one page addendum that contains the notification language on the same page that the tenant signs.

The Commission is of the opinion that an addendum may be used to modify an existing lease. The addendum would be applicable if the tenant holds over on a month-to-month basis after the initial term of the lease expires. Rather than requiring a tenant to sign a revised lease when the initial term expires (and committing the tenant to another one year lease), allowing the addendum to apply to the month-to-month tenancy preserves the tenant's ability to maintain the lease on a month-to-month basis after the initial lease period.

However, leases for new tenants shall be required to conform with the letter of Commission Rule R18-17(a) and not just the "spirit" of the Rule regarding the format of the lease agreement.

DISCUSSION OF QUESTION NO. 2

For the sake of discussing this question, the Joint Petitioners classified Applicants in three categories - Former Water Resellers, New Construction, and Retrofit Property Owners. The Commission will use the same categories for its discussion.

Former Water Resellers. The Order issued on March 7, 2003, discussed how the permanent rules were to be phased in. The Order noted that it would be inappropriate to have some tenants subject to "regular" rates under the temporary operating authority and some tenants under allocation of rental costs rates. Implicit in the Order was the recognition that provision would have to be made for former resellers to revise their leases and that during the interim period, these service providers would elect one or the other method of charging for service. To address this situation, the Commission's March 7, 2003, Order required standardized language to be included on the first page of the lease that notified the tenants that, although they had signed a lease allowing allocation of rental costs rates, they would continue to be charged "for water/sewer service in the traditional manner" until all tenants had signed a lease providing for allocation of rental costs rates. As discussed above, this requirement may also be satisfied by lease addendums.

New Construction. In the case of Applicants with new apartment complexes with no tenants at the time of application, as each new tenant signs a conforming lease, they will join a pool of tenants who have all (100%) signed a conforming lease. Thus, the Applicant would be eligible to charge allocation of rental costs rates.

Retrofit Property Owners. In the case of tenants at a pre-existing apartment complex where there had never been a charge for water/sewer service, it would be equally inappropriate for some tenants to be charged allocation of rental costs rates and for others not to be charged in that manner. The Commission adopted standardized language to appear on the first page of the lease that provided a method for the landlord to convert the leases as they come up for renewal, notifying the tenants that the methodology of paying for water/sewer utility service will be changing, and that the landlord will begin utilizing the allocation of rental costs rates methodology when all leases have been converted. As noted above, the use of addendums to the lease may accelerate the onset of utilizing the allocation of rental costs rates methodology, if all tenants have voluntarily signed addendums.

In its Order issued on March 7, 2003, it was the Commission's intent that all tenants must have signed a conforming lease (or addendum) in order for the Applicant to be eligible to charge allocation of rental costs rates. The Commission, here, reaffirms its original intent.

NOTICE OF PROPOSED DECISION

As noted above, on September 9, 2003, counsel for the Joint Petitioners filed a Statement of Position and requested the Commission issue an Order of Clarification regarding its Order issued on March 7, 2003, in this Docket. No other parties (Public Staff, Attorney General, North Carolina Justice and Community Development Center) to the Order issued on March 7, 2003, have filed any comments regarding the Joint Petitioners' filing. In order to ensure that the parties have not overlooked this matter, the Commission is of the opinion that this Order should be issued in the form of a Notice of Proposed Decision. If the Commission does not receive dissenting comments on or before December 17, 2003, an Order will be issued declaring the Proposed Decision to be the Final Order of the Commission.

IT IS, THEREFORE, ORDERED as follows:

1. That the requirements of Commission Rule R18-17(a) regarding the lease agreement containing certain language may be satisfied by the inclusion of said language in a properly executed lease addendum.

2. That the requirements of Commission Rule R18-17(a) regarding all tenants executing a conforming lease prior to issuance of an Order approving the variable component of rent shall be interpreted to include properly executed addendums to satisfy the conforming lease requirement. However, all tenants must have executed a conforming lease (or addendum) prior to issuance of an Order approving the variable component of rent.

3. That this Notice of Decision shall become the Final Order of the Commission if no dissenting comments are received on or before December 17, 2003.

ISSUED BY ORDER OF THE COMMISSION
This the 3rd day of December, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

rb120303.01

DOCKET NO. WR-100, SUB 3

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Rulemaking to Implement North Carolina Session Law 2003-273 (House Bill 1201)	))	ORDER ADOPTING REVISED COMMISSION RULES

BY THE COMMISSION: On June 21, 1996, the General Assembly ratified Chapter 753 - Senate Bill 1183 - which amended Chapter 62 of the General Statutes by adding subsection G.S. 62-110(g) to authorize the North Carolina Utilities Commission (NCUC or Commission) to adopt procedures to allow resale of water and sewer service provided to persons who occupy the same contiguous premises. On January 30, 1997, the Commission adopted Commission Rules R18-1 through R18-7 to implement the new statute.

By adoption of House Bill 1061 on December 4, 2001, the General Assembly enacted substantial changes to both G.S. 62-110(g), governing the resale of water and sewer services, and G.S. 42-3, *et al.*, governing residential rental agreements. As a result, Commission Rules R18-1 through R18-7 were rescinded and on March 7, 2003, the Commission adopted Commission Rules R18-11 through R18-17.

On June 12, 2003, the General Assembly ratified Session Law 2003-273 - House Bill 1201 - which amended G.S. 62-110(g) to authorize manufactured home parks to be included in the definition of contiguous premises for the purpose of regulating allocation of rental costs.

G.S. 2-110(g) provides in part that:

> The Commission shall issue rules to define contiguous premises and to implement this subsection. In issuing the rule to define contiguous premises, the Commission shall consider contiguous premises where manufactured homes, as defined in G.S. 143-147(5), or spaces for manufactured homes are rented. Notwithstanding any other provision of this Chapter, the Commission shall determine the extent to which the services shall be regulated and, to the extent necessary to protect the public interest, regulate the terms, conditions, and rates that may be allocated for the services.

In order to implement the provisions of House Bill 1201, the Commission has revised its Rules and has created a new application form for use by manufactured home parks desiring to become regulated as a rent allocator.

Based upon the foregoing, the Commission finds good cause to issue an Order adopting revised Commission Rules and adopting a new application form.

IT IS, THEREFORE, ORDERED as follows:

1. That the attached Commission Rules labeled as Appendix A and identified as Chapter 18. Allocation of Rental Costs for Water and Sewer Service, are hereby adopted and shall be effective on and after the date of this Order.

2. That the application form (Application for Certificate of Authority for Allocation of Rental Costs for Water and/or Sewer Service and for Approval of Variable Rent Component for Manufactured Home Parks) attached to this Order as Appendix B is hereby adopted. Copies of said form are available upon request from the North Carolina Utilities Commission - Public Staff Water Division or from the Commission's website at www.ncuc.net.

ISSUED BY ORDER OF THE COMMISSION
This the 6th day of August, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rb080503.03

APPENDIX A

Chapter 18.

Allocation of Rental Costs for Water and Sewer Service.

Rule R18-11. Application.

This Chapter governs the allocation of rental costs for water and sewer utility service as authorized by G.S. 62-110(g).

Rule R18-12. Definitions.

(a) *Same contiguous premises.* An apartment complex or manufactured home park located on property that is not separated by property owned by others. Property will be considered contiguous even if intersected by a public thoroughfare if, absent the thoroughfare, the property would be contiguous.

(b) *Rent allocator.* The landlord purchasing water or sewer utility service from a supplier and allocating the costs of such service as a separate component of rental charges pursuant to G.S. 62-110(g). The rent allocator shall be the owner of the premises served.

(c) *Supplier.* A public utility or an agency or organization exempted from regulation from which a rent allocator purchases water or sewer service.

(d) *Tenant.* The lessee of property from the rent allocator, to whom the water or sewer service purchased by the rent allocator from the supplier is provided.

(e) *Base rent.* The component of a tenant's rent that is fixed. This component shall compensate the rent allocator for the tenant's right to occupy the premises.

(f) *Variable rent component.* The component of a tenant's rent that varies from month to month and compensates the rent allocator for the cost of water or sewer service purchased from a supplier and provided to the tenant.

(g) *Apartment complex.* Premises where one or more buildings under common ownership comprising fifteen (15) or more apartments are available for rental to tenants.

(h) *Manufactured home park.* Premises where a combination of fifteen (15) or more manufactured homes, as defined in G.S. 143-145(7), or spaces for manufactured homes are rented to or are available for rental to tenants.

Rule R18-13. Utility status; certificate.

Every rent allocator is a public utility as defined by G.S. 62-3(23)a.2 and shall comply with all applicable provisions of the Public Utilities Act and all applicable rules and regulations of the Commission. No rent allocator shall begin collecting a variable rent component from a tenant prior to applying for and receiving a certificate of authority from the Commission.

Rule R18-14. Compliance with rules.

Every rent allocator shall comply with any applicable rules of local governmental agencies regarding the provision of water and sewer service.

Rule R18-15. Records, reports and fees.

(a) All records shall be kept at the office or offices of the rent allocator in North Carolina and shall be available during regular business hours for examination by the Commission or Public Staff or their duly authorized representatives.

(b) Every rent allocator shall prepare and file an annual report to the Commission as required by Chapter 1, Rule R1-32 of the Rules and Regulations of the North Carolina Utilities Commission and shall pay a regulatory fee and file a regulatory fee report as required by Chapter 15, Rule R15-1. Special reports shall also be made concerning any particular matter upon request by the Commission.

Rule R18-16. Variable rent component.

(a) The variable rent component shall not exceed the total of: (1) the cost of purchased water and sewer service, (2) the cost of meter reading, and (3) the cost of billing and collection. A Commission-approved administrative fee not to exceed $3.75 may be added to the cost of purchased water and sewer service to compensate the rent allocator for meter reading, billing, and collection. All charges other than the administrative fee shall be based on tenants' metered consumption of water. All sewer service shall be measured based on the amount of water metered. Metered consumption of water shall be determined by metered measurement of all water consumed by the tenant, and not by any partial measurement of water consumption (i.e., ratio utility billing system (RUBS) and hot water capture, cold water allocation (HWCCWA) are not allowed).

(b) No rent allocator shall charge or collect any greater or lesser variable rent component than the amount approved by the Commission.

Rule R18-17. Leases; customer deposits; disconnection; billing procedure; meter reading.

(a) No rent allocator shall collect any variable rent component from any tenant, or bill any tenant for any variable rent component, unless all of the following conditions are satisfied:

(1) The rent allocator and the tenant have entered into a valid written lease agreement which is in force at the time the water or sewer service is provided.

(2) The lease agreement includes the following language: "THIS LEASE AGREEMENT PROVIDES FOR A FIXED BASE RENT AND A VARIABLE COMPONENT OF RENT BASED ON THE COST OF WATER AND SEWER SERVICE" (or ". . . OF WATER SERVICE" or ". . . OF SEWER SERVICE," as applicable).

"THIS PROVISION WILL TAKE EFFECT WHEN ALL TENANTS HAVE EXECUTED A LEASE CONTAINING THIS PROVISION AND THE NORTH CAROLINA UTILITIES COMMISSION HAS ISSUED AN ORDER APPROVING THE VARIABLE COMPONENT OF RENT. UNTIL THAT TIME, ALL TENANTS MAY BE CHARGED FOR WATER/SEWER SERVICE IN THE TRADITIONAL MANNER, IF THE LANDLORD HAS OBTAINED TEMPORARY OPERATING AUTHORITY AND APPROVAL OF RATES BY THE COMMISSION."

(3) The language in subdivision (2) above:

(a) Shall be printed in capital letters with a type size of at least 12 points, and shall be enclosed in a box, with at least ½ inch of blank space between the printed wording and the box in each direction;

(b) Shall appear on the first page of the lease; and

(c) Shall appear in the same language as the rest of the lease, and if different parts of the lease are in different languages, shall appear in each language used in the lease.

(b) No charge for connection or disconnection, charge for late payment, or similar charge in addition to the rate specified in Rule R18-16 shall be allowed. The rent allocator may collect a security deposit pursuant to G.S. 42-51.

(c) No rent allocator may disconnect water or sewer service for nonpayment.

(d) Bills shall be rendered at least monthly.

(e) The date after which a bill for the variable rent component is due, or the past due after date, shall be disclosed on the bill and shall not be less than twenty-five (25) days after the billing date.

(f) A rent allocator shall not bill for or attempt to collect for excess usage resulting from a plumbing malfunction or other condition which is not known to the tenant or which has been reported to the rent allocator.

(g) Every rent allocator shall provide to each customer at the time the lease agreement is signed, and shall maintain in its business office, in public view, near the place where payments are received, the following:

(1) A copy of the rates, rules and regulations of the rent allocator applicable to the premises served from that office.

(2) A copy of these rules and regulations.

(3) A statement advising tenants that they should first contact the rent allocator's office with any questions they may have regarding bills or complaints about service, and that in cases of dispute, they may contact the Commission either by calling the Public Staff - North Carolina Utilities Commission, Consumer Services Division at (919) 733-9277 or by appearing in person or writing the Public Staff - North Carolina Utilities Commission, Consumer Services Division, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326.

(h) Each rent allocator shall adopt some means of informing its tenants as to the method of reading meters. Information on bills shall be governed by Chapter 7, Rule R7-23 and Chapter 10, Rule R10-19. Adjustment of bills for meter error shall be governed by Chapter 7, Rule R7-25. Testing of water meters shall be governed by Chapter 7, Rules R7-28 through R7-33.

APPENDIX B

DOCKET NO. WR-__________

FILING FEE RECEIVED __________

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

APPLICATION FOR CERTIFICATE OF AUTHORITY FOR ALLOCATION OF RENTAL COSTS FOR WATER AND/OR SEWER SERVICE AND FOR APPROVAL OF VARIABLE RENT COMPONENT FOR APARTMENT COMPLEXES

INSTRUCTIONS

Notes or explanations placed in the margins of the application are acceptable. If additional space is needed, supplementary sheets may be attached. If any section does not apply, write "not applicable" or cross out the section.

APPLICANT

1. Name of apartment complex owner __________
2. Business mailing address of owner __________
   City and state __________ Zip code __________
3. Business street address (if different from mailing address) __________
4. Business telephone number __________ Business fax number __________
5. Business email address __________
6. If corporation, list the following:
   President __________ Vice President __________
   Secretary __________ Treasurer __________
   Three (3) largest stockholders and percent of voting shares held by each __________
7. If partnership, list the owners and percent of ownership held by each __________

PROPOSED UTILITY SERVICE AREA

8. Name of Apartment Complex __________
9. County (or counties) __________
10. Type of Service (Water and/or Sewer) __________
11. Who is the water purchased from? __________
12. Who is the sewerage treatment purchased from? __________
13. Number of customers:
    Water __________
    Sewer __________
14. Number of customers that can be served (including present customers, vacant apartments, etc.):
    Water __________
    Sewer __________

PROPOSED VARIABLE RENT COMPONENTS
(Amount Applicant Proposes to Charge)

15. Metered Residential Service:
Variable Rent Component for Water Usage: ______________________
Variable Rent Component for Sewer Usage: ______________________
Monthly Administrative Fee: ______________________

(Note: NCUC Rule R18-16 specifies that no more than $3.75 may be added to the cost of purchased water and sewer service as an administrative fee to compensate the rent allocator for meter reading, billing, and collection.)

LEASE AGREEMENT

1. Has the Applicant entered into a written lease agreement with each tenant that satisfies all requirements of NCUC Rule R18-17(a)? (NOTE: All leases shall be in compliance with Rule R18-17(a) before the Commission will grant authority to charge rates) (yes or no) __________

PROPOSED BILLING

2. Bills past due ______ days after billing dates (NCUC Rule R18-17(e) specifies that bills shall not be past due less than twenty-five (25) days after billing date).
3. Will regular billing be by written statement? (yes or no) ______________________
4. Will the billing statement contain the following? (Indicate yes or no for each item)
   (a) Meter reading at beginning and end of billing period.............................. __________
   (b) Date of meter readings.. __________
   (c) Gallons used, based on meter readings... __________
   (d) Amount due for current billing period listed as a separate amount................ __________
   (e) Amount due from previous billing period listed as a separate amount............ __________
5. Show how the following will appear on the billing statement:
   (a) Mailing address of company: ______________________
   ____
   (b) Address where bill can be paid in person: ______________________
   ____
   (c) Name and phone number of alternative persons to contact for emergency service after business hours:
   ____

GENERAL ORDERS – RESALE OF WATER/SEWER

PERSONS TO CONTACT

		NAME	ADDRESS	TELEPHONE
6.	Owner/Management Co.			
7.	Complaints or Billing			
8.	Emergency Service			
9.	Filing of Annual Reports			
10.	Filing and Payment of Regulatory Fees to Utilities Commission			

11. Are the names and phone numbers for items 6 through 8 above provided to customers? If so, how?

12. Can customers make phone calls for service without being charged for a long distance phone call? (yes or no)

13. Do persons designated to receive phone calls for emergency service, after regular business hours, have authority to provide the needed repairs without first contacting owner? (yes or no)

EXHIBITS

1. If the Applicant is a corporation, LLC, etc., enclose a copy of the Articles of Incorporation, Articles of Organization, or other appropriate documents, on file with the North Carolina Secretary of State. . (Not required if previously filed with the Commission and not subsequently amended.)
2. If the Applicants are doing business as a partnership, enclose a copy of the partnership agreement. . (Not required if previously filed with the Commission and not subsequently amended.)
3. If the apartment complex is operated by a management company, provide a copy of the management agreement.
4. Enclose a vicinity map showing the location of the proposed apartment complexes or service areas in sufficient detail for someone not familiar with the county to locate the apartment complexes. (A county roadmap with the apartment complexes outlined is suggested.)
5. Enclose maps of the apartment complexes in sufficient detail to show the layout of streets, apartment buildings, and meter locations.
6. Enclose an exhibit listing the master meters serving the apartment complex, indicating for each master meter the size of the meter, the number of apartment buildings served by the meter, and the number of apartments in each apartment building.
7. Enclose a copy of the rates that will be charged to the Applicant by the supplier of purchased water.
8. Enclose a copy of the rates that will be charged to the Applicant by the supplier of purchased sewerage treatment.
9. Enclose a copy of any agreements or contracts covering the provision of billing and collection and meter reading services to the apartment complex.
10. Enclose a sample copy of the written lease agreement that each tenant will be required to sign. This lease agreement should satisfy all requirements of NCUC Rule R18-17(a).

FILING INSTRUCTIONS

11. Eight (8) copies of the application and exhibits shall be filed with the North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325. One of these copies must have an original signature. (Applicants must also provide any copies to be returned to them.)

12. Enclose a filing fee as required by G. S. §62-300. A Class A company (annual revenues of $1,000,000 or more) requires a $250 filing fee. A Class B company (annual revenues between $200,000 and $1,000,000) requires a $100 filing fee. A Class C company (annual revenues less than $200,000) requires a $25 filing fee. MAKE CHECK PAYABLE TO NORTH CAROLINA UTILITIES COMMISSION.

SIGNATURE

13. Application shall be signed and verified by the Applicant.

Signature ______________________________

Date ______________________________

14. (Typed or Printed Name) ______________________________

personally appearing before me and, being first duly sworn, says that the information contained in this application and in the exhibits attached hereto are true to the best of his/her knowledge and belief.

This the _______ day of __________________, 20____.

____

Notary Public

____

Address

My Commission Expires: ______________________________

Date

DOCKET NO. E-2, SUB 823

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Cogentrix of North Carolina, Inc., and Cogentrix of North Carolina Holdings, Complainants v. Carolina Power & Light Company, Respondent	ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION: This docket involves the Commission's implementation of the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA requires electric utilities to purchase electricity from qualifying facilities (QFs) at the utilities' avoided cost as determined by state regulatory commissions. This Commission implements PURPA by holding biennial proceedings and issuing orders which establish monetary values for long-term energy and capacity credits and variable energy and capacity credits and establish availability of the various credits.[1] Following issuance of these orders, the utilities file their avoided cost tariffs. The Commission's last PURPA order was in Docket No. E-100, Sub 87 (the Sub 87 Order). A new proceeding is now pending in Docket No. E-100, Sub 96.

Cogentrix of North Carolina, Inc., and Cogentrix of North Carolina Holdings (together, Cogentrix) filed a complaint against Carolina Power & Light Company (CP&L) (now d/b/a Progress Energy Carolinas, Inc.) on December 3, 2002. In summary, the complaint asks the Commission to declare that Cogentrix is entitled to one-year contracts as of December 16, 2002, to sell QF power to CP&L for the sum of <u>both</u> the variable energy credit and the variable capacity credit contained in CP&L's avoided cost tariff, Schedule CSP-20B (CSP-20B). CP&L argues that Cogentrix is entitled to <u>only</u> the variable energy credit in CSP-20B, not both the variable energy and variable capacity credits. Cogentrix relies upon language in CSP-20B while CP&L relies upon language in the Sub 87 Order.

<u>Summary Judgment Order</u>

Both Cogentrix and CP&L moved for summary judgment, and the Commission issued a summary judgment order on March 7, 2003. The Commission's summary judgment order addressed two issues: (1) whether Cogentrix is entitled to both the variable energy and variable capacity credits in CSP-20B and (2) whether Cogentrix can "lock in" the variable credits by signing one-year contracts.

[1] This order uses the terms "credits" and "rates" interchangeably in referring to the amounts that utilities must pay QFs pursuant to PURPA.

The Commission decided the second issue in favor of CP&L. The Commission ruled that variable credits may not be "locked in" for any fixed term and that if Cogentrix signs a one-year contract at the variable credits in CSP-20B, those credits will be subject to change when they are updated in the Sub 96 PURPA proceeding now pending before the Commission. Cogentrix has not appealed or sought reconsideration as to this issue.

As to the first issue, the Commission ruled in favor of Cogentrix. In doing so, the summary judgment order relied upon two rationales. First, the order cites the filed rate doctrine and "the primacy of the tariff." The order states this line of reasoning as follows:

> The provisions of CSP-20B support Cogentrix' claim to both energy and capacity variable rates. The Availability section of the tariff provides, "<u>This Schedule is available for electrical energy and capacity supplied by Seller to Company if Seller is a Qualifying Facility</u>.... This Schedule is not available ... for Seller who has negotiated rate credits or conditions which are different from those below." <u>CP&L concedes that the Cogentrix plants are QFs</u> under FERC regulations and that negotiations have been unsuccessful. In its December 13 filing, CP&L asserts, "CP&L's CSP-20B tariff does not apply to QFs such as Cogentrix," but there is no language in the tariff to support this statement. To the contrary, the tariff states flatly that it is available if seller is a QF, and CP&L concedes that the Cogentrix plants are QFs under FERC regulations. The Monthly Rate-Payment section of CSP-20B provides that <u>for QFs classified as new capacity, "Company will pay Seller a monthly credit equal to the sum of the Energy and Capacity Credits reduced by both the Seller Charge and any applicable Interconnection Cost</u>." <u>CP&L concedes that the two Cogentrix QFs are "new capacity"</u> under FERC regulations, and thus this language obligates CP&L to pay Cogentrix both energy and capacity variable rates. CP&L argues that the language in the Commission's Sub 87 Order allows QFs such as Cogentrix only three options and that Cogentrix is seeking a fourth option, but the problem with this argument is that the language in CP&L's tariff simply does not support it. The language of CSP-20B supports Cogentrix' claim to both energy and capacity variable rates, and CP&L is presumed to know and intend the effect of its tariffs. (footnote omitted and emphasis added)

The second rationale in the summary judgment order is based on equity. The order states, "This language has been in CP&L's avoided cost tariffs for years and it would be inequitable for CP&L to publish such terms to the public and then deny them." CP&L has moved for reconsideration as to the Commission's decision on this issue.

CP&L filed its Motion for Reconsideration on March 21, 2003. The motion included several arguments and requested oral argument. Cogentrix and the Public Staff filed responses on March 31 and April 2, 2003, respectively. The Commission scheduled oral argument by order of April 9, 2003, and oral argument was held as scheduled on April 30, 2003. CP&L, Cogentrix, and the Public Staff presented argument and responded to questions from the Commission. At the end of the argument, the Commission allowed parties an opportunity to file additional citations of authorities. Such additional authorities were filed by CP&L and Cogentrix on May 9, 2003.

Denial of Reconsideration

The Commission has thoroughly and carefully considered all of the arguments presented by CP&L. For the following reasons, the Commission concludes that the law, equity, and policy all support the March 7 summary judgment order and that reconsideration should be denied.

In seeking reconsideration, CP&L argues that the filed rate doctrine does not support the Commission's decision. Citing G.S. 62-132, CP&L reasons that it is the Commission's order that elevates a rate to the status of a lawful rate and, therefore, that "if any rate is entitled to the protection of the 'filed rate doctrine,' ... it is the Commission's [Sub 87 Order], not a tariff that supposedly produces the opposite result." Several responses are in order.

First, the argument that the Commission's order, not the utility's tariff, is entitled to the protection of the filed rate doctrine effectively turns the filed rate doctrine on its head. The filed rate doctrine is a broad doctrine that serves to give a filed tariff the effect of law governing the relationship between a regulated utility and its customers. The doctrine has several aspects, and the Commission reviewed some of these in the summary judgment order. The Commission concluded that the doctrine was helpful in resolving this complaint, stating that "the tariff is the means by which the utility communicates its rates, terms and obligations to the public, and the public is entitled to rely upon the tariff." The Commission continues to believe that the policy considerations embedded in the filed rate doctrine support the summary judgment order.

The central purpose of the doctrine is to enable those dealing with a regulated utility to know the consequences of their decisions in advance. It is a simplification, but a helpful one, to think of a Commission order as the means by which the Commission communicates its decisions in a proceeding to the parties before it and to any reviewing court, and to think of a tariff as the means by which the utility communicates its rates and offerings to the public. The public should not have to go behind the tariff and study various Commission orders to know what the utility charges or offers. The public should be able to rely upon the terms set forth in the utility's tariffs; thus, it follows that the utility should not be allowed to publish rates and terms to the public in its tariffs and then disclaim the clear terms of the tariffs after the public has accepted them. "The tariff is not a cloak to be worn or discarded as carrier may elect. Both carrier and passenger are bound by its terms." Neece v. Greyhound Lines, 246 NC 547, 555, 99 SE2d 756 (1957). As Cogentrix put it, the tariff is "an offer to the world that if you fall within its terms where it's available, you can accept it and that makes the contract." The oral argument often delved into legal arguments about ambiguities and rules of construction. These arguments are important and they will be discussed herein, but it is more important to remember up front the ultimate matter at stake here – the utility's word, published as an offer to the public.

Second, one of CP&L's own arguments illustrates the contradiction in its position. In the course of oral argument, CP&L stated that the Commission had restricted the availability of variable capacity rates long before the Sub 87 Order. CP&L reviewed the history of PURPA implementation in North Carolina and stated that the Commission's 1985 avoided cost order in

Docket No. E-100, Sub 41A made two changes in the avoided cost options that were available under previous orders. According to CP&L, the 1985 order restricted the availability of long-term rates to only hydroelectric QFs and small non-hydro QFs. The Commission agrees that this is true. According to CP&L, the 1985 order also restricted the availability of variable capacity rates to only hydroelectric QFs and small non-hydro QFs. The Commission does not agree with this contention,[1] but accepts it for present purposes in order to show the contradiction in CP&L's position. The contradiction is this: Although CP&L contends that the 1985 order restricted the availability of both long-term rates and variable capacity rates, CP&L followed up on that order by filing a tariff that reflected only restrictions on the availability of long-term rates.[2] CP&L did not reword its tariff at that time -- nor has it at any time since -- in order to reflect restrictions on the availability of variable capacity rates; yet, CP&L would now have the Commission enforce such restrictions. If the Commission were to enforce both the terms that CP&L wrote into its tariff and terms that CP&L never wrote into its tariff, the tariff would be rendered meaningless.

Third, CP&L argues that its tariff could not lawfully alter the rates and options established by the Sub 87 Order, but this is not necessarily true as to avoided cost rates. The argument misses a crucial distinction. In conducting the biennial PURPA proceedings and setting avoided cost credits and availability, the Commission is acting pursuant to federal law. The FERC regulations implementing PURPA provide that a utility may offer QFs options beyond the minimum options required by the Commission's PURPA orders.[3] This Commission's very first PURPA order stated, "Each utility should offer the standard rates approved...but should be encouraged to enter into contracts with other terms as long as such contracts are beneficial to the ratepayer." 71st Report of the North Carolina Utilities Commission Orders and Decisions, p. 120 (1981). When questioned about this, CP&L's counsel admitted at oral argument that the Commission's orders do not prohibit more generous terms than those established by the Commission. Thus, in the context of PURPA, tariffs that offer more expansive options than the minimum required by the Commission's orders are not, ipso facto, improper.[4]

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[1] Although not necessary to decision herein, the Commission notes that the 1985 Order contains no discussion of restricting the availability of variable capacity rates, and the Commission does not make fundamental changes in rates without any acknowledgement or discussion. CP&L cites a few isolated words in the Commission's 1995 and 1997 avoided cost orders to interpret the 1985 order as limiting the availability of variable capacity rates to only hydro and small non-hydro QFs, but there are other explanations for use of the words cited by CP&L. If the Commission had intended to limit the availability of variable capacity rates in 1985, it would have said so in the 1985 order and given its reasons for taking such an action. The Commission would not have left such an important decision to be divined only by a few words here and there, ten years later.

[2] Compare the Availability section of Rate Schedule CSP-9A filed on February 1, 1985, in Docket No. E-100, Sub 41A with CP&L's previous avoided cost tariffs.

[3] The FERC regulations state, "Nothing in this subpart...limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required ..." 18 CFR 292.301(b)(1).

[4] The same is not true, of course, for decisions made by the Commission pursuant to Chapter 62 of the General Statutes where there is nothing comparable to the FERC regulation cited above.

Next, CP&L cites State ex rel. Utilities Comm. v. Norfolk Southern Railway, 249 NC 477, 106 SE2d 681 (1959), for the proposition that a Commission order establishing a rate controls over a subsequently-filed tariff that is erroneous and leads to a result inconsistent with the order. Norfolk Southern Railway involved a railroad tariff in which the rate was based upon mileage, and the tariff distance table filed with the Commission incorrectly stated the mileage between two cities. The error was discovered and corrected. A shipper was then allowed to recover overpayments he had made because of the error in the tariff distance table. The North Carolina Supreme Court held, "The defendants should not be permitted to change the rate by the act of making a mistake in the distance reported in their tariff schedule." 249 NC, at 481. The present situation is distinguishable from Norfolk Southern Railway because there is no factual error in the CSP-20B tariff and, according to CP&L, there is no error of any kind in the tariff. CP&L has never taken the position that it made a mistake in the wording of the tariff. CP&L denies any mistake on its part and instead argues that the Commission is simply misinterpreting the tariff.[1] Norfolk Southern Railway does not support reconsideration because it dealt with a mistake in a tariff and, in this case, there is no evidence of mistake and CP&L denies that it made any mistake.

Finally, CP&L argues in its motion for reconsideration that G.S. 62-310 "suggests that orders are entitled to greater respect and deference" than tariffs. G.S. 62-310 provides for an enforcement action in Wake County Superior Court to recover penalties when a utility violates a regulatory statute or refuses to obey a Commission order. The Commission believes that G.S. 62-310 could also be used to impose penalties when a utility violates a provision of an approved tariff. Thus, the statute does not support CP&L's argument that orders are to be favored over tariffs.

Given the filed rate doctrine and the policies favoring enforcement of tariffs, CP&L faced a predicament on reconsideration – how could it re-focus the case onto the Sub 87 Order and enforce restrictive terms that are simply not to be found anywhere in the language of the CSP-20B tariff? CP&L tried to do this by (1) arguing the Commission's intent and (2) arguing that CSP-20B should be "interpreted" in light of the Sub 87 Order. Neither argument is persuasive.

First, CP&L argued the intent of the Sub 87 Order. CP&L argued that the Sub 87 Order intended to give large non-hydro QFs such as Cogentrix only three options – selling at the variable energy rate only, negotiating rates, and participating in a competitive bidding for additional capacity. CP&L argued that Cogentrix wants a fourth option – selling at both variable energy and variable capacity rates – and that the Sub 87 Order does not make such an option

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[1] CP&L never alleged or alluded to mistake in its December 13, 2002 answer to Cogentrix's complaint. CP&L's counsel stated at oral argument, "we're not negligent." Another time, CP&L's counsel was asked, "do you concede...that the plain language of this tariff is inconsistent with our orders?" He answered, "No, m'am."

available to QFs like Cogentrix.[1] From time to time at oral argument, CP&L's counsel said, "So we're back to what was the intent." In contrast to CP&L's argument, counsel for Cogentrix displayed an enlargement of the CSP-20B language at oral argument and stated, "That is their intent." The Commission agrees. A utility is presumed to know and intend the reasonable effect of its tariff, 64 AmJur2d, Public Utilities §§ 61, 62 and 171 (2001), and the reasonable effect of the tariff supports Cogentrix. CP&L's present emphasis on the intent expressed in the Sub 87 Order begs the question – why did CP&L never put its interpretation of the Commission's intent in the wording of its tariff? There is simply no language in the tariff that expresses CP&L's interpretation of the Sub 87 Order. Instead, the language of the tariff is quite contrary to CP&L's interpretation of the Sub 87 Order.

CP&L's only explanation for the wording of its tariff was given in its December 13, 2002 answer and motion for summary judgment as follows: "CP&L's CSP-20B tariff does not apply to QFs such as Cogentrix." At oral argument, CP&L's counsel gave a similar explanation when he said, "The tariff was designed for the little QFs." This answer does not avail CP&L, however, because CSP-20B is CP&L's only avoided cost tariff and the Availability section of the tariff clearly covers all QFs except those who have negotiated different rates. By its terms, CSP-20B applies to large QFs like Cogentrix.

Second, CP&L argued that CSP-20B must be "interpreted" in light of the Sub 87 Order. In its Motion for Reconsideration, CP&L argued that the summary judgment order had found CSP-20B to be ambiguous and that the Commission should have looked to the Sub 87 Order to resolve the ambiguity. Both Cogentrix and the Public Staff correctly pointed out that the summary judgment order found no ambiguity in the tariff and, instead, specifically stated that the tariff supports Cogentrix and contains no language that supports CP&L. At oral argument, CP&L argued that the Commission should always consider its orders in interpreting tariffs, whether the tariffs are ambiguous or not.

CP&L cited North Carolina cases on statutory construction at oral argument. CP&L cited State v Buckner, 351 NC 401, 408, 527 SE2d 307 (2000), for the proposition that "when interpreting a statute, courts must look to the intent of the legislature," and CP&L cited Velez v. Keffer Pontiac GMC Truck, Inc., 144 NCApp 589, 593, 551 SE2d 873 (2001), for the proposition that the strict letter of a statute shall be disregarded when it contravenes the manifest purpose of the legislature. While these cases stand for the propositions cited, there are also numerous North Carolina cases holding that clear and unambiguous statutory language must be given its plain meaning and that courts cannot interpolate or superimpose provisions and limitations that are not contained therein. See cases collected at 27 North Carolina Index 4th, Statutes § 28 (1994). More to the point, the Commission concludes that there are better authorities for decision herein than the cases on statutory construction.

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[1] It should be noted that the Public Staff does not accept this interpretation of the Sub 87 Order. The Public Staff believes that the three options set forth in the Sub 87 Order only apply when a utility has an active competitive bidding for capacity underway (which CP&L did not as of December 2002) and that the Sub 87 Order, when interpreted in the proper context, actually supports Cogentrix's claim to both variable capacity and variable energy rates. The Commission finds it unnecessary to resolve this dispute. In deciding this complaint, the Commission relied upon the policies favoring enforcement of tariffs and equity, and the Commission believes that these would favor Cogentrix even if CP&L's interpretation of the Sub 87 Order were accepted.

The Commission believes that the most helpful authority for this case is State ex rel. Utilities Comm. v. Thrifty Call, 154 NCApp 58, 571 SE2d 622 (2002), dis. rev. denied, 357 NC 66, 579 SE2d 575 (2003). Thrifty Call is a recent decision, it is North Carolina law, it deals with interpretation of a public utility tariff[1], and it examines the matter in some detail because it was an issue of first impression. The relevant language is as follows:

> This Court finds no authority governing the interpretation or construction of tariffs and must choose a method for analyzing and interpreting the tariff. We believe utility tariffs are sufficiently similar to contracts to avail themselves to the rules of contractual interpretation.
>
>> If the language of a contract "is clear and only one reasonable interpretation exists, the courts must enforce the contract as written" and cannot, under the guise of interpretation, "rewrite the contract or impose [terms] on the parties not bargained for and found" within the contract. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). If the contract is ambiguous, however, interpretation is a question of fact, *Barrett Kays & Assoc., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C.App. 525, 528, 500 S.E.2d 108, 111 (1998), and resort to extrinsic evidence is necessary, *Holshouser v. Shaner Hotel Grp. Props. One*, 134 N.C.App. 391, 397, 518 S.E.2d 17, 23, *disc. review denied*, 351 N.C. 104, 540 S.E.2d 362 (1999), *aff'd per curiam*, 351 N.C. 330, 524 S.E.2d 568 (2000). "An ambiguity exists in a contract if the 'language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.'" *Barrett*, 129 N.C.App. at 528, 500 S.E.2d at 111 (citations omitted). Thus, if there is any uncertainty as to what the agreement is between the parties, a contract is ambiguous. *Id.* This Court's "review of a trial court's determination of whether a contract is ambiguous is *de novo*." *Id.*
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> *Crider v. Jones Island Club, Inc.*, 147 N.C.App. 262, 266-67, 554 S.E.2d 863, 866-67 (2001).

154 NCApp, at 63.

The Commission finds the following principles in Thrifty Call: (1) language in a tariff will be regarded as ambiguous if it is fairly and reasonably susceptible to either of two interpretations; (2) if the tariff language is ambiguous, extrinsic evidence may be considered to determine what was intended; (3) if the tariff language is not ambiguous, i.e., if it is fairly and reasonably susceptible to only one interpretation, the tariff language must be enforced as written and cannot be rewritten under the guise of interpretation. Thrifty Call is binding on this Commission. Given Thrifty Call, CP&L's argument that CSP-20B should be interpreted in light

[1] From the outset, this Commission has chosen to implement PURPA by way of approving public utility tariffs for the State's regulated electric utilities, as authorized by Section 292.401(a) of the FERC regulations.

of the Sub 87 Order fails on two counts: (1) it is not proper to consider extrinsic evidence when, as here, the tariff is unambiguous and (2) even if it were proper to consider extrinsic evidence, the extrinsic evidence may only be used to determine a meaning to which the tariff language is reasonably susceptible; extrinsic evidence may not be used to rewrite a tariff, and CP&L's argument rewrites CSP-20B.

The language of CSP-20B is unambiguous. As stated in the summary judgment order and quoted at the beginning of this order, the language of CSP-20B is clear and it supports Cogentrix. At oral argument, CP&L could not point to any language or interpretation in the tariff to support its position. When asked to do so, CP&L's counsel always turned back to the language of the Sub 87 Order. He argued that "even applying the literal language of [the tariff], you have to apply it in the context of the orders that adopted it." When pressed to consider only the tariff, CP&L's counsel conceded, "I can see how it can be read that way [i.e., to support Cogentrix]." CP&L has not shown the existence of any ambiguity arising from the language of the tariff. The tariff language is fairly and reasonably susceptible to only one interpretation, and this precludes resort to extrinsic evidence under Thrifty Call.

CP&L cited Pennzoil Co. v. FERC, 645 F2d 360 (5th Cir. 1981), for the proposition that it is proper to consider the regulatory and commercial setting of a contract, even though the contract is not ambiguous on its face. The Commission knows of no comparable holding in North Carolina case law, but even if the Commission were to apply Pennzoil herein, it would still not help CP&L. The Court in Pennzoil held that extrinsic evidence of the regulatory and commercial setting may be considered in order "to prove a meaning to which the language of the instrument is reasonably susceptible." 645 F2d, at 388. Here, the language of CSP-20B is not reasonably susceptible to CP&L's interpretation. The Availability section of CSP-20B says that the tariff is available for electrical energy and capacity supplied by seller "if Seller is a Qualifying Facility...," and there are no other limitations applicable to this case. The Monthly Rate – Payment section says that CP&L will pay Seller "a monthly credit equal to the sum of the Energy and Capacity Credits...," and no other applicable limitations are stated. Together, these sections make both variable energy and variable capacity credits available to all QFs. CP&L's position is that it is obligated to pay variable capacity credits only to hydro and certain small non-hydro QFs.[1] There is no language in the tariff reasonably susceptible to such a restriction. CP&L's position disregards the language of CSP-20B and attempts to substitute other, contrary, limiting language from the Sub 87 Order. This is not interpretation. This is rewriting the tariff in the guise of interpretation, and the law does not allow this even with the use of extrinsic evidence. The language of CP&L's tariff can be changed prospectively in the pending Sub 96 PURPA proceeding (and CP&L has proposed to do so), but the CSP-20B tariff may not be rewritten retroactively.

A few other points are worth noting:

First, the issue in this case has simply not been raised before. CP&L argued that "everyone must have believed that CP&L's Availability section in the tariff was consistent with the Commission's order, otherwise we'd have a tariff sitting out there that is totally at odds with

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[1] See, e.g., paragraph 7 of CP&L's December 13, 2002 pleading.

the Commission's orders and yet no one is bringing it to anybody's attention...." From later argument, it appears that no large non-hydro QF ever requested CP&L's variable rates before Cogentrix. In the past, large non-hydro QFs favored the long-term rate options, and many of those early long-term contracts are still in effect. Thus, the present issue has not come up before, and past silence cannot be regarded as agreement with CP&L's argument.

Second, Cogentrix is only seeking avoided cost rates, no more. At one point in oral argument, CP&L accused Cogentrix of trying to "force us to pay a higher rate than our avoided cost to help their bottom line...." At another point, CP&L compared this situation to an issue that arose in a North Carolina Power rate case several years ago. In that case, the Virginia State Corporation Commission required Virginia Power to contract with a QF at a rate that this Commission found to be above its avoided cost. This Commission disallowed these additional costs in setting rates for the company to charge in North Carolina, and the North Carolina Supreme Court upheld this Commission's decision. State ex rel. Utilities Comm. v. N.C.Power, 338 NC 412, 419, 450 SE2d 896 (1994), reh'g denied, 339 NC 621, 454 SE2d 269 (1995), cert. denied, 516 US 1092, 116 SCt 813, 133 LEd2d 758 (1996) ("we conclude that the Commission's disallowance...does not violate PURPA to the extent it only excludes the amount above avoided costs.") In the present situation, the rates set forth in CSP-20B are the appropriate avoided cost rates for CP&L as of December 2002. The monetary values for the long-term and variable rates were established by the Commission in the Sub 87 proceeding to remain in effect until they are replaced by the new values to be set in the pending PURPA proceeding. The rates set forth in CSP-20B are not higher than avoided cost; they are CP&L's avoided cost as of December 2002, when Cogentrix invoked them.

Third, CP&L's rates will not be adversely impacted by the one-year contract that Cogentrix seeks. CP&L argued, "Cogentrix wants a higher rate forced on us by the Commission which forces our ratepayers to pay more for power than they should." However, CP&L's counsel later conceded that the impact on ratepayers is theoretical only. "I don't have a rate case planned this year so I can't stick that additional dollars into rates...."

In conclusion, the Commission believes that summary judgment was properly granted to Cogentrix. CP&L moved for summary judgment on the basis of the Sub 87 Order and the CSP-20B tariff. CP&L essentially took the position that the order "trumps" the tariff, asserting that it is not necessary to study the words of the tariff because the Sub 87 Order "clearly interprets and explains the rate schedule for us all." Cogentrix moved for summary judgment, specifically alleging that Cogentrix comes within the availability provisions of CSP-20B, that Cogentrix accepted the variable energy and capacity rates made available by the tariff, and that the Sub 87 Order upon which CP&L relies establishes minimum obligations under PURPA but CP&L may offer more favorable terms than the minimum. CP&L presented no response to Cogentrix's summary judgment motion beyond case citations and arguments about rules of construction and the proper interpretation of the order and tariff. CP&L cited no supporting authority for the proposition that the Sub 87 Order "trumps" the tariff, despite being given opportunities to do so. CP&L would have the Commission disregard the tariff language and retroactively substitute different, limiting language from the Sub 87 Order. CP&L would have the Commission enforce CP&L's interpretation of the Sub 87 Order even though this interpretation was not written into the tariff and even though the tariff language is not reasonably susceptible to it. The law does not allow such a result.

The present case has presented a unique and difficult fact situation, and many cases and legal theories have been argued and analyzed. In the end, the Commission simply must conclude that no result other than that reached herein is legally correct.

IT IS, THEREFORE, ORDERED that the Motion for Reconsideration filed by CP&L herein should be, and the same hereby is, denied.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of August, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

sk082903.01

Commissioners J. Richard Conder and Michael S. Wilkins dissent.
Commissioner Robert V. Owens, Jr., did not participate in this decision.

DOCKET NO. E-2, SUB 823

COMMISSIONERS J. RICHARD CONDER AND MICHAEL S. WILKINS, DISSENTING: Every two years the Commission engages in a comprehensive proceeding under the Public Utility Regulatory Policies Act of 1978 (PURPA) to establish avoided cost rates for utilities under its jurisdiction. In the course of these proceedings, proposed rates and tariffs are filed by the utilities, which are then subjected to intense scrutiny by the Public Staff and other intervenors. Ultimately, final tariffs are filed which purport to implement the Commission's Order.

The last such avoided cost proceeding was begun in July 2000, and concluded with the issuance of an Order Establishing Standard Contract Terms for Qualifying Facilities on April 16, 2001. In that Order, the Commission made, among others, the following two findings of fact:

> 1. CP&L should offer long-term levelized capacity payments and energy payments for 5-year, 10-year and 15-year periods as standard options to (a) hydroelectric qualifying facilities owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell 5 MW [megawatts] or less capacity and (b) non-hydroelectric qualifying facilities fueled by trash or methane derived from landfills or hog waste contracting to sell 5 MW or less capacity. ... CP&L shall offer its standard 5-year levelized rate option to all other qualifying facilities contracting to sell 3 MW or less capacity.

4. CP&L, Duke and NC Power should offer qualifying facilities not eligible for the standard long-term levelized rates the options of contracts to sell energy only at the variable rates established by the Commission or, as appropriate, contracts and rates derived by free and open negotiations with the utility or participation in the utility's competitive bidding process for obtaining additional capacity.

Correspondingly, the Commission entered the following two ordering paragraphs:

1. That CP&L shall offer long-term levelized capacity payments and energy payments for 5-year, 10-year and 15-year periods as standard options to (a) hydroelectric qualifying facilities owned or operated by small power producers as defined in G.S. 62-3(27a) contracting to sell 5 MW or less capacity and (b) non-hydroelectric qualifying facilities fueled by trash or methane derived from landfills or hog waste contracting to sell 5 MW or less capacity. ... CP&L shall offer its standard 5-year levelized rate option to all other qualifying facilities contracting to sell 3 MW or less capacity.

4. That CP&L, Duke and NC Power shall offer qualifying facilities not eligible for the standard long-term levelized rates the options of contracts to sell energy only at the variable rates established by the Commission or, as appropriate, contracts and rates derived by free and open negotiations with the utility or participation in the utility's competitive bidding process for obtaining additional capacity.

As Progress (formerly CP&L) stated in its arguments to the Commission in this complaint proceeding, Finding of Fact No. 1 and Ordering Paragraph No. 1 in the Commission's April 16, 2001 avoided cost Order clearly delineate which qualifying facilities (QFs) are eligible for energy <u>and</u> capacity payments: certain hydroelectric QFs contracting to sell 5 MW or less capacity, certain non-hydroelectric QFs contracting to sell 5 MW or less capacity, and certain other QFs contracting to sell 3 MW or less capacity. The Cogentrix facilities at issue in this complaint proceeding, which are larger than 5 MW, do not fall within any of these three categories of QFs eligible to receive energy <u>and</u> capacity payments. Rather, Finding of Fact No. 4 and Ordering Paragraph No. 4 in the Commission's April 16, 2001 avoided cost Order require Progress to pay larger QFs such as Cogentrix "energy only at the variable rates established by the Commission" in the absence of negotiated rates or a competitive bidding process.

The issue in this complaint proceeding, then, appears to be whether a Commission Order takes precedence over a utility tariff. It is our opinion that the Commission's Order entered in this biennial proceeding under PURPA stands on its own and supercedes the tariff as written which was in effect prior to the date of the Order. Moreover, any contrary tariff provisions which purport to implement the Commission's Order are unenforceable.[1] The Commission's April 16, 2001 avoided cost Order clearly states that QFs of 5 MW or less receive both capacity and energy payments and that QFs larger than 5 MW receive energy payments only as determined by the Commission or rates determined through negotiations or a competitive bidding process. We firmly believe that, were the shoe to be on the other foot – as, for example, where the utility tariff only purported to pay energy payments and the Commission's Order clearly required payment for both energy and capacity – the majority would have no problem finding the company's tariff to be in error and requiring compliance with the Commission's Order. We do not believe the Commission would allow a utility to underpay or overcharge a customer in contravention of a Commission Order simply because it was allowed by the language of the utility's tariff. Similarly, we do not believe Progress should be required to overpay Cogentrix according to a reading of the utility's tariff which directly contradicts the Commission's ordering paragraphs in its April 16, 2001 avoided cost Order. Thus, believing that the Commission's Order should take precedence over a utility tariff, we respectfully dissent from the majority in this proceeding.

/s/ J. Richard Conder
Commissioner J. Richard Conder

/s/ Michael S. Wilkins
Commissioner Michael S. Wilkins

[1] Alternatively, it could be argued that Progress's current tariff is not inconsistent with the Commission's April 16, 2001 avoided cost Order and not reach the issue decided by the majority in this case. The Commission's Orders in the 1996 and 1998 avoided cost proceedings contain language identical to that in the April 16, 2001 Order limiting payments to QFs not eligible for the long-term levelized rates to energy payments only. See Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 81 (July 16, 1999); Order Establishing Standard Rates, Docket No. E-100, Sub 79 (June 19, 1997). Despite intense biennial scrutiny by interested parties, no one has before raised the possibility that the tariffs filed by Progress implementing the Commission's Orders in those proceedings were inconsistent with the findings of fact or ordering paragraphs in those Orders.

DOCKET NO. E-7, SUB 713

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Kyle Y. Michael, 1602 Stokes Street, Greensboro, NC 27407 Complainant v. Duke Power, a Division of Duke Energy Corporation Respondent	)))))))))	RECOMMENDED ORDER

HEARD: Wednesday, October 2, 2002, at 10:00 a.m., in the Commission Hearing Room, Dobbs Building, 430 N. Salisbury Street, Raleigh, North Carolina

BEFORE: Sammy R. Kirby, Hearing Examiner

APPEARANCES:

For Duke Energy Corporation:

Lara S. Nichols, Assistant General Counsel, Duke Power, P.O. Box 1244, Charlotte, NC 28201-1244

For the Complainant:

Kyle Y. Michael, pro se, 1602 Stokes Street, Greensboro, NC 27407

BY THE HEARING EXAMINER: On June 4, 2002, Kyle Michael filed a formal complaint with the Utilities Commission against Duke Power, a division of Duke Energy Corporation (Duke), alleging that Duke had overbilled her for electric service at her residence. The Commission served the complaint on Duke by order of June 5, 2002. On July 16, 2002, Complainant filed a letter supplementing her complaint.

Duke filed an answer to the complaint on July 25, 2002, and the Commission served Duke's answer upon Complainant by Commission order of July 29, 2002.

On August 13, 2002, Complainant made a filing to the effect that the answer was not satisfactory, and she requested a hearing. Complainant attached a letter to this filing in which she complained that Duke had sent a disconnect notice based upon the disputed amount. The Commission treated this letter as a reply and served it upon Duke by order of August 14, 2002.

Duke filed a response on August 21, 2002. Duke made no mention of the disconnect notice in its response. The Commission served the response and scheduled a hearing on the complaint by order of August 23, 2002.

On August 28, 2002, complainant filed a letter to the effect that Duke had disconnected her service on August 26, 2002. Duke filed a response on September 9, 2002, acknowledging that complainant had paid all non-disputed amounts due and that Duke had disconnected complainant's service by mistake.

The hearing was held on October 2, 2002. Complainant presented her testimony, and Duke presented testimony and exhibits of witnesses Barbara G. Yarbrough and Jerry Jobe.

At the conclusion of the hearing, the Hearing Examiner requested that Duke file a calculation as a late-filed exhibit, and Duke did so on October 9, 2002. On the same date, Duke filed a motion to submit an additional late-filed exhibit. On October 21, 2002, complainant filed a letter agreeing to Duke's proposed late-filed exhibit and, in addition, setting forth information as to her kwh usage in prior years. On February 10, 2003, Duke filed a letter addressing Complainant's kwh usage in prior years. Late-filed exhibits are allowed in evidence as hereinafter provided.

Based upon the testimony and exhibits received into evidence and the record as a whole, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Respondent Duke is a public utility providing electric utility service to customers in North Carolina subject to the jurisdiction of the Commission.

2. Complainant resides at 1602 Stokes Street in Greensboro, North Carolina, and is a customer of Duke.

3. Complainant's residence is a one-story "shoebox" house of 1000 to 1100 square feet. Complainant uses electricity for lighting, television, hot water, and a fan on an oil-fired heater. Complainant seldom cooks and does not have a washer-dryer.

4: A Duke representative read Complainant's electric meter on November 16, 2001, and got a reading of 3111. This resulted in a November 2001 bill for $48.14 plus tax. On December 17, 2001, a Duke representative read the meter as 5934. This reflected a substantial increase in usage from the previous month, and Duke's computer system sorted the account for review. An account services representative believed that the meter had been misread and manually adjusted the December 17 reading downward for billing. She assumed that the reader had picked up a wrong number, and she adjusted the reading downward from 5934 to 3934. The adjusted reading resulted in a December 2001 bill for $65.02 plus tax.

5. On January 21, 2002, a Duke representative read the meter as 9753. The computer system again sorted the account for review because it showed unusually high usage,

and an account services representative again adjusted the reading downward for billing. This time, she assumed that the reader had put numbers in the wrong order and she adjusted the reading from 9753 to 5379. This adjusted reading resulted in a January 2002 bill for $110.11 plus tax. Duke took an out-of-cycle meter reading on January 28, 2002, as 406, but no action was taken as a result.

6. On February 19, 2002, a Duke representative read the meter as 2421. At this point, Duke decided that the original December 2001 and January 2002 readings had been accurate after all and that the meter had "turned over" (i.e., reached a reading of 9999 and started over at 0000) sometime after the January 21, 2002 reading. Duke backed out the downward adjustments that it had made to the original December 2001 and January 2002 readings and added in a back-billing adjustment of $314.99 for December 2001 and January 2002. Duke mailed the February 2002 bill with the back-billing adjustment on March 7, 2002. The bill totaled $712.91, which included $198.76 plus tax for current usage through February 19, 2002; the back-billing adjustment of $314.99 including tax; and a past due amount.

7. In addition, Duke took meter readings on February 27, 2002, as 3104; on March 20, 2002, as 4914; on April 17, 2002, as 6398; on April 22, 2002, as 6592; on April 24, 2002, as 6656; and on May 8, 2002, as 7103.

8. On May 8, 2002, Duke tested Complainant's meter and found it to be within the accuracy standards established by the Commission.

9. Duke billed Complainant for total usage of 13877 kwh for the six-month period of her November through April bills in 2001-02. For the comparable period in 1998-99, Complainant used 5360 kwh; in 1999-2000, 5940 kwh; and in 2000-01, 6463 kwh.

10. On June 4, 2002, Complainant filed her formal complaint against Duke, alleging that Duke had overbilled her for electric service at her residence.

11. On August 26, 2002, Duke disconnected Complainant's electric service by mistake due to a computer error. Complainant was home and immediately objected. Duke discovered its error and re-connected service. Duke filed a response in this docket on September 9, 2002, acknowledging that it had disconnected Complainant's service by mistake.

12. In the course of disconnecting service on August 26, 2002, Duke removed Complainant's meter from the side of her house and broke a shingle. Duke was not able to re-attach the meter as tightly as before due to rotten wood behind it.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

The evidence in support of the findings of fact is found in the testimony of Complainant Michaels and Duke witnesses Yarbrough and Jobe and in the exhibits presented by them.

Complainant contends that Duke overbilled her for electric service to her home during the winter of 2001-2002. Complainant testified that she lives in a small, concrete slab "shoebox" house of 1000 to 1100 square feet and that her monthly electric bills are generally $100 or less.

Complainant testified that the weather was wonderful, a "record warm winter," during the disputed period. Complainant has an oil heater in the middle of the house with an electric fan on it; she did not use it enough to order any heating oil in 2002. Complainant did not use space heaters. She cuts the heater off when she leaves home. Complainant and her husband were out of state on a trip during Thanksgiving. They have electric water heating and a refrigerator, and they use electricity for lights and television. They have no washer-dryer, and they never cook. She testified that her bills for electric service remained consistent over many years and that the bills during the disputed time frame increased dramatically for no apparent reason. Complainant's husband called Duke and the Duke representative told him that an adjustment on the bill should have been a credit and that they would fix it. Complainant called later and was told, "We cannot get the billing department to change it." Complainant agreed to have her meter checked and the meter checker gave her a copy of her meter records showing "six or seven changes" to the readings. The meter tester told Complainant, "We have had nothing but problems since they been contracting the work out, having these contract meter readers." Complainant concedes that the meter was functioning accurately, but contends that Duke misread the meter and that the meter did not turn over during the disputed period. She testified that "the bill's been changed over and over and over again. I don't think anybody knows what the bill is supposed to be...Different amounts just pop up and I don't know what they go to because the meter readings have changed so many times." Complainant indicated that Duke had offered to forgive half of the December through April bills, but she refused. Complainant proposed to start with the November 2001 reading (because she had not had any problem before then), to accept the reading when the meter was checked, and to pay for the usage calculated from these two readings. Complainant also testified that Duke mistakenly disconnected her electric service on August 26, 2002, due to a computer error. Duke reconnected service but, in the process, Duke tore the meter from the house, broke a shingle, and left the meter loose with a hole in the house. Complainant testified, "I believe the disputed amount is $788.40, plus whatever it costs to patch the house."

Duke witness Yarbrough, Duke's Manager of Regulatory Interface, investigated the adjustments made to Complainant's account. She testified that a Duke representative took an in-cycle meter reading of 5934 at Complainant's home on December 17, 2001. Duke's computer system sorted the bill for review because it reflected a substantial increase in usage from the previous month's reading as compared to historic usage. A representative believed that the meter had been misread and manually removed 2,000 kwh from the bill. On January 21, 2002, a Duke representative obtained an in-cycle reading of 9753. The computer system again sorted the bill because of high usage and, again, a representative adjusted the reading downward. On February 19, 2002, a Duke representative made an in-cycle reading of 2421. Although the representatives who made the manual billing adjustments had believed them to be appropriate at the time, Duke subsequently decided that the meter readings had been correct and that they had incorrectly reduced the readings and reduced Complainant's December 2001 and January 2002 bills. Duke added in an amount of $314.99 for these months to Complainant's February 2002 bill. Yarbrough testified that Duke took out-of-cycle meter readings on January 28, 2002, February 27, 2002, April 22, 2002, April 24, 3003, and May 8, 2002; and that these readings tend to support the original in-cycle readings as correct. Witness Yarbrough testified that "improper procedures were followed" in making adjustments to the December 2001 and January 2002 meter readings and that the representatives who manually adjusted the bills had not conducted an appropriate investigation. She noted that in late July 2001 Duke converted its billing system from the system that had been in place since the mid-1960s to an entirely new system. Implementation of the new system necessitated both a learning curve for the representatives using the new system and adjustments to the system itself. Yarbrough explained that "we had people who were also trying to learn and understand the new system so that they could convey the information to her correctly. And we're getting better." Yarbrough admitted that the meter readings at Complainant's residence increased significantly from historic usage patterns. Duke offered to send a representative to the Complainant's home to investigate, but Complainant declined. Duke analyzed Complainant's usage history and made a kwh usage and degree day comparison. From this, Yarbrough concluded that the increase was due to a weather-responsive load. Yarbrough testified that the increased usage corrected itself or something happened to cause Complainant's usage to decline in the April-May 2002 time frame. Duke contends that Complainant has an unpaid balance of $870.36. (Complainant testified to a payment of $81.96 after September 28, 2002, that was not yet reflected in Duke's records, leaving $788.40.) Yarbrough apologized for the frustration that Complainant had experienced and admitted that Duke had offered to compensate her. As to the damage to Complainant's home when the meter was pulled, Yarbrough testified that Duke had tried to re-secure the meter to the house with longer screws and toggle bolts but found rotten wood behind the meter base. She testified that the meter base was made safe, but not completely tightened. Yarbrough testified that Duke would "be glad to look into that issue further" since Duke would be pulling the meter again soon to change it to a remote-read meter.

Duke witness Jerry Jobe is a Meter Technician with 31 years of experience in Duke's metering department. His responsibilities include meter testing, and he has experience working with all types of meters used on the Duke system. Jobe tested Complainant's meter May 8, 2002, and he testified that the meter was functioning accurately. Complainant asked Jobe if he thought Duke's contract meter readers were trustworthy, and he answered, "I would be afraid to say on that." Witness Jobe testified that he had experienced difficulty in removing the meter because the meter base was loose from the wall on which it was mounted. He believed that water had gotten behind the meter base and loosened it over time.

The Hearing Examiner asked Duke to prepare a calculation based upon Complainant's contention that the meter did not turn over during the disputed period. Duke filed this calculation as Duke Exhibit 6 on October 9, 2002, and it is accepted as a late-filed exhibit. It supports billing of $320 – as opposed to actual billing of $1044.79 – for the period of November 16, 2001, through May 8, 2002, based upon the assumption that the meter did not turn over. Duke moved for admission of another late-filed exhibit – a billing history of Complainant's account for the period December 18, 2000, through April 19, 2001. The Hearing Examiner allows the motion and accepts Duke Exhibit 7 into evidence. Complainant then produced her kwh usage for November through April of prior years, and the Hearing Examiner accepts the Complainant's kwh usage for November through April of 1998-1999, 1999-2000, and 2000-2001 as another late-filed exhibit.

The complainant has the burden of proof in complaint cases before the Commission. G.S. 62-75. In this case, Complainant contends that Duke misread her meter and that her meter did not turn over during the disputed period. If we assume that the meter did not turn over, Complainant's usage was somewhat less than her usage for the comparable period in prior years, but still much closer to her past usage than the usage billed by Duke. Duke contends that the high usage in fact occurred, and that it was weather-related. This argument largely ignores the fact that the disputed period was, overall, warmer than the previous year and that Complainant does not have electric heating. Duke's own witness admitted past problems with the utility's contract meter readers. Still, it is hard to believe that Complainant's meter was misread repeatedly in the disputed time frame, and that would have to be the case if the meter did not turn over. On the other hand, Duke's testimony reveals a series of mistakes in the handling of Complainant's account, and these many errors weigh in favor of granting some relief to Complainant. Complainant was clearly put at a disadvantage when her bill was adjusted downward in December 2001 and January 2002. Duke changed its own meter readings for billing purposes, without any real investigation as to whether it was appropriate to do so. Duke made an out-of-cycle reading in late January 2002 that contradicted the downward adjustments, but Duke took no action to correct them at that time. Duke's adjustments hid the high meter readings of December 2001 and January 2002 from Complainant and set up the shock of the February bill when a back-billing of $314.99 was added in. Duke witness Yarbrough admitted that the adjustments were erroneous and further admitted that Duke should have corrected the errors earlier than it did. Complainant testified that when her husband called about the February bill, he was told that the back-billing should have been a credit and that it would be fixed. Follow-up calls produced no such fix. Adding insult to injury, Duke disconnected Complainant's service while this complaint was pending before the Commission. Duke admits that this disconnection should not have occurred. Yarbrough testified that Duke wanted to compensate Complainant for the billing errors, and Complainant indicated that Duke had offered to forgive half of the December through April bills. By that point, Complainant was frustrated with Duke and not inclined to settle.

Ultimately, it is the Hearing Examiner's responsibility to render a decision that is fair to both Complainant and Duke. The Hearing Examiner finds that Complainant has carried the burden of proof to the effect that she was treated inappropriately and prejudiced thereby. The Hearing Examiner further finds that this complaint is best decided on equitable grounds, rather than by strict evaluation of the facts and tariffs. The Hearing Examiner concludes that an equitable resolution of this complaint is for Complainant to be forgiven $500 of the disputed billings. The Hearing Examiner believes that this decision is a fair to both Complainant and Duke and that it does not unreasonably favor Complainant over other Duke customers in light of the several mistakes made in handling her account.

The Complainant has also made a claim for monetary damages to her home which she claims occurred when the Duke representative removed the meter from its base. Complainant presented Complainant Exhibits 1 and 2, photographs of the area of her home where the meter base is attached. Witness Yarbrough testified that the meter was pulled loose at the top a couple of inches and that Duke had tried to re-secure it with longer screws and toggle bolts. Duke made the meter safe but could not completely tightened it, due to rotten wood behind the meter base. Yarbrough also testified that Duke would "be glad to look into that issue further" since Duke would be pulling the meter again soon in order to change it to a remote-read meter. The Commission does not have authority to award compensatory damages. See, e.g., Order Dismissing Complaint Due to Lack of Jurisdiction and Closing Docket, Docket No. E-7, Sub 675

(March 12, 2002) and State ex. rel. Corporation Commission v. Southern Railway, 147 N.C. 483, 61 S.E. 271 (1908). The Hearing Examiner can order no monetary relief as to Complainant's claim for damages to her home, but the Hearing Examiner does order that Duke follow up on witness Yarbrough's commitment to look into the matter further when the meter is changed to see if a more secure attachment can be achieved.

IT IS, THEREFORE, ORDERED that the complaint filed in this docket should be, and the same hereby, is decided as hereinabove provided and that Duke shall credit Complainant's account in the amount of $500.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of March, 2003.

NORTH CAROLINA UTILITIES COMMISISON
Gail L. Mount, Deputy Clerk

ak032503.02

DOCKET NO. E-7, SUB 713

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Kyle Y. Michael, 1602 Stokes Street, Greensboro, NC 27407 Complainant v. Duke Power, a Division of Duke Energy Corporation Respondent	)	RECOMMENDED ORDER ON RECONSIDERATION

BY THE HEARING EXAMINER: This docket involves a complaint filed with the Commission by Kyle Michael against Duke Power, a division of Duke Energy Corporation (Duke), alleging that Duke overbilled her for electric service at her residence. The Commission, acting through the Hearing Examiner, issued a Recommended Order on March 26, 2003, that found a series of mistakes in the handling of Complainant's account and concluded that these mistakes weighed in favor of granting some relief to Complainant. The Recommended Order found that Complainant had carried the burden of proof to the effect that she had been treated inappropriately and further concluded that the complaint was best decided on equitable grounds, rather than by strict evaluation of the facts and tariffs. The Hearing Examiner concluded that an equitable resolution of the complaint was for Complainant to be forgiven $500 of the disputed billings.

ELECTRICITY – COMPLAINT

On April 1, 2003, Complainant Michael made a filing designated as an exception. In this filing, Complainant asked that she be given additional credit of $76.36 for late charges, plus future late charges until the Recommended Order is final. Complainant argued that the Recommended Order did not address the issue of late charges on the disputed amounts and that Duke should not be allowed to make money on late charges when they had delayed the proceeding by seeking extensions of time for their benefit.

Duke filed a response on April 10, 2003. Duke did not file any exception and does not contest the Recommended Order. As to Complainant's exception, Duke responded that it waived late charges for December 2001 through April 2002, that the evidence of record does not support the $76.36 amount alleged by Complainant, and that Complainant testified at the hearing that she routinely pays her bills late, thus accumulating late charges on non-disputed portions of her bills. Duke stated that the extensions of time that it sought were for good cause and noted that Complainant herself sought one extension of time. Finally, Duke stated that it has not enforced its right to discontinue service for Complainant's failure to pay non-disputed amounts.

The Recommended Order did not directly address the issue of late charges, and the Hearing Examiner will therefore treat Complainant's filing as a request for reconsideration and/or clarification of the Recommended Order. The Hearing Examiner was aware that late charges were added to some of Complainant's bills[1] and that Complainant objected to paying late charges on the disputed amounts. However, the Recommended Order states that the $500 relief was intended as an equitable resolution of all outstanding claims. This relief was intended to include the claim for refund of late charges attributed to disputed amounts. The Hearing Examiner believes that the relief as ordered was clearly fair to Complainant on the evidence presented, and the Hearing Examiner will not increase the dollar amount of the relief.

IT IS, THEREFORE, ORDERED that Complainant's filing of April 1, 2003, should be, and the same hereby is, treated as a motion for reconsideration and/or clarification and, as such, is denied as hereinabove provided.

ISSUED BY ORDER OF THE COMMISSION.
This the 16th day of April, 2003.

NORTH CAROLINA UTILITIES COMMISISON
Gail L. Mount, Deputy Clerk

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[1] The billing history shown on Duke Direct Examination Exhibit 2 reflects late charges on various bills, including a late charge on Complainant's October 2001 bill which was before the bills in dispute. Complainant testified, "I always have a past due balance. For 20 years I keep a past due balance."

DOCKET NO. E-7, SUB 713

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Kyle Y. Michael, 1602 Stokes Street, Greensboro, North Carolina 27407, Complainant v. Duke Power, a Division of Duke Energy Corporation, Respondent	)))))))))	FINAL ORDER AFFIRMING RECOMMENDED ORDERS AND DENYING EXCEPTIONS

BY THE COMMISSION: This docket involves a complaint filed with the Commission by Kyle Michael (Complainant) against Duke Power, a division of Duke Energy Corporation (Duke), alleging that Duke overbilled her for electric service at her residence. The Commission, acting through the Hearing Examiner, issued a Recommended Order on March 26, 2003, that found a series of mistakes in the handling of Complainant's account and concluded that these mistakes weighed in favor of granting some relief to Complainant. The Recommended Order found that Complainant had carried the burden of proof to the effect that she had been treated inappropriately and further concluded that the complaint was best decided on equitable grounds, rather than by strict evaluation of the facts and tariffs. The Hearing Examiner concluded that an equitable resolution of the complaint was for Complainant to be forgiven $500 of the disputed billings.

On April 1, 2003, Complainant Michael made a filing designated as an exception. In this filing, Complainant asked that she be given additional credit of $76.36 for late charges, plus future late charges until the Recommended Order is final. Complainant argued that the Recommended Order did not address the issue of late charges on the disputed amounts and that Duke should not be allowed to make money on late charges when they had delayed the proceeding by seeking extensions of time for their benefit.

Duke filed a response on April 10, 2003. Duke did not file any exception and did not contest the March 26, 2003 Recommended Order. As to Complainant's exception, Duke responded that it waived late charges for December 2001 through April 2002, that the evidence of record does not support the $76.36 amount alleged by Complainant, and that Complainant testified at the hearing that she routinely pays her bills late, thus accumulating late charges on non-disputed portions of her bills. Duke stated that the extensions of time that it sought were for good cause and noted that Complainant herself sought one extension of time. Finally, Duke stated that it has not enforced its right to discontinue service for Complainant's failure to pay non-disputed amounts.

Because the March 26, 2003 Recommended Order did not directly address the issue of late charges, the Hearing Examiner treated Complainant's April 29, 2003 filing as a request for reconsideration and/or clarification of the Recommended Order. On April 16, 2003, the Hearing Examiner entered a Recommended Order on Reconsideration wherein the Hearing Examiner stated that he was aware that late charges were added to some of Complainant's bills and that Complainant objected to paying late charges on the disputed amounts; that the $500 relief allowed by the March 26, 2003 Recommended Order was intended as an equitable resolution of all outstanding claims; that such relief was intended to include the claim for refund of late charges attributed to disputed amounts; that the relief as ordered was clearly fair to Complainant on the evidence presented; and that the Hearing Examiner would not increase the dollar amount of the relief.

On April 29 and May 5, 2003, the Complainant filed exceptions to the April 16, 2003 Recommended Order on Reconsideration. In this filing, the Complainant asserts that Duke agreed that billing errors were made and overbilling resulted to her account when the Company accepted payment in full as noted on her Check No. 1501 dated April 24, 2002, in the amount of $121.80 for meter readings 2421-4914. The Complainant also continues to object to paying any late fees.

On May 12, 2003, Duke filed a response to the Complainant's exceptions to the Recommended Order on Reconsideration. Duke stated that the Complainant's first "exception" is a new argument asserting that Duke agreed to a compromise and settlement of the disputed billing amounts by accepting a check that stated "in full" on the memorandum line. Duke noted that Commission Rule 1-26 provides for the filing of exceptions to Recommended Orders and requires that such exceptions shall state the precise matter in the Recommended Order to which exception is taken. As a threshold issue, the Recommended Order on Reconsideration does not address this argument and indeed could not have addressed this argument because the Complainant did not present any evidence to support it at the hearing of this matter. Therefore, this issue is not properly before the Commission and should be disregarded. Duke further asserted that even if the Commission were to consider the argument set forth in paragraph 1 of Complainant's Exceptions, the Commission should deny that Duke agreed to Complainant's calculation of the disputed amount by accepting her check dated April 24, 2002. The doctrine of compromise and settlement applies where the amount of a debt is in dispute. G.S. 1-540. Absent an agreement to settle the disputed amount, acceptance of a check in partial payment of the debt that includes a statement such as "payment in full" does not bar the creditor from seeking to collect the remainder of the debt. *Baillie Lumber Co., Inc. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969). Further, the issue of whether a settlement agreement has been reached is a factual issue that must based upon the evidence of the parties' intentions, acts and statements. *Allgood v. The Wilmington Savings & Trust Co.*, 242 N.C. 506, 515, 88 S.E.2d 825, 831 (1955). The evidence in the record in this docket is clear that the amount Complainant owed Duke for electric service was in dispute and that the parties never reached a settlement as to the amount Complainant would pay and Duke would accept in satisfaction of the debt. The Complainant did not tender her check dated April 24, 2002 until after Duke recognized it had been underbilling the Complainant and sent her a corrected bill with which she disagreed. Although Duke subsequently offered to settle this matter, at no time after Duke corrected the billing error did Duke and the Complainant ever reach a settlement agreement. Therefore, acceptance of Complainant's check which stated "in full" does not bar Duke from seeking collection of the full amount owed.

Complainant's second exception is to the recommendation that her request for additional relief be denied. The Complainant reiterates many of the same arguments she made in her filing dated April 1, 2003. In response, Duke incorporated by reference its Response to Complainant's Exceptions filed on April 10, 2003. Duke further stated that, in addition to the arguments set forth in its April 10, 2003 Response, the evidence presented at the hearing of this matter (Duke Direct Examination Exhibit 2) reveals that Duke waived and did not assess late fees on bills for service between November 2001 and April 2002. Duke also noted that in a subsequent filing dated May 1, 2003, the Complainant corrected her claim that Duke charged 10% late fees and stated that her account is accruing late fees in the amount of 1%. Therefore, Duke did not address this issue. Duke also stated that Complainant did not set forth the basis for her calculation of the late fees on the disputed amount and there is no evidence in the record that supports this calculation.

Duke asserted that, because the Recommended Order granting the $500 relief is based on equitable resolution of this matter and not on "strict evaluation of the facts and tariffs," the Hearing Examiner correctly concluded on reconsideration that the $500 credit was intended as an equitable resolution of all outstanding claims and "intended to include the claim for refund of late charges attributable to disputed amounts." Duke stated that it is entitled to collect late charges on non-disputed unpaid amounts, and that the conclusions of the Recommended Order and Recommended Order on Reconsideration more than adequately compensate Complainant for late-payment charges on disputed amounts. As a matter of clarification, Duke further stated that it has never threatened Complainant in any respect regarding the outcome of this matter.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission finds good cause to affirm the Recommended Orders entered in this docket on March 26 and April 16, 2003, and to deny the exceptions filed by the Complainant. The relief ordered by the Hearing Examiner is entirely fair, equitable, and justified under the facts and circumstances of this case. Duke is not contesting the relief ordered by the Hearing Examiner and its responses in opposition to the Complainant's exceptions are convincing. No further relief is warranted.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 4th day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bb053003.01

DOCKET NO. E-2, SUB 820

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Carolina Power & Light Company's 20-Day	)	
Notice That It May Enter Into a Wholesale	)	ORDER ON 20-DAY NOTICE
Sales Contract with Native Load Priority	)	

BY THE COMMISSION: By Order entered in Docket No. E-2, Sub 760 on August 22, 2000, the Commission approved Regulatory Condition 21 for Carolina Power & Light Company (CP&L). That regulatory condition provides as follows:

> 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.

By Orders entered in various dockets on January 29, 2002, and September 11, 2002, the Commission adopted procedures to be followed by CP&L in conjunction with its regulatory condition filings. Among other things, these procedures provide that if the Public Staff or any other party files an objection to a proposed contract with native load priority, CP&L shall not proceed until the Commission issues an order. The Public Staff was directed to place the matter on a Commission Staff Conference agenda as soon as possible, but in no event later than two weeks after an objection is filed.

CP&L's 20-Day Notice

On November 6, 2002, CP&L filed a 20-Day Notice pursuant to Regulatory Condition 21 stating that it may enter into a wholesale contract for the sale of electricity at native load priority. The proposed wholesale contract is with the North Carolina Eastern Municipal Power Agency (NCEMPA) for load currently located in CP&L's service territory and served by CP&L pursuant to an existing contract. CP&L filed specific information regarding this proposed wholesale contract subject to a claim of confidentiality pursuant to G.S. 132-1.2.

Protests of CUCA and CIGFUR

On November 25, 2002, both the Carolina Utility Customers Association, Inc. (CUCA), and the Carolina Industrial Group for Fair Utility Rates (CIGFUR) filed petitions to intervene and objections to the proposed wholesale contract. Their petitions to intervene are allowed.

CUCA stated that the proposed contract does not adequately protect retail ratepayers from the risks of increased fuel costs, higher marginal energy RTP (real time pricing) rates, and greater interruptions. CUCA stated that it was not seeking to prevent CP&L from selling capacity and energy to NCEMPA under reasonable terms, but CUCA asked the Commission to schedule a hearing, to investigate the risks presented to retail ratepayers by the proposed wholesale contract, and to identify and order conditions that would provide appropriate protections to retail ratepayers.

CIGFUR objected that CP&L's entering the proposed wholesale contract could have potential harmful impacts on retail ratepayers, including adverse effects upon reserve margins, increased retail rates, increased interruptions under interruptible rate schedules, increased RTP rates, and subsidization of wholesale customers by retail customers. CIGFUR noted that CP&L's current Annual Plan shows the need for new capacity throughout the planning horizon. This new capacity would almost certainly be natural gas-fired, and the need for the new capacity is driven by this proposed wholesale contract and could be avoided by not entering into the contract. CIGFUR noted that if this new capacity is unavailable and CP&L's demand forecast is accurate, reserve and capacity margins could fall to unacceptable levels. CIGFUR further asserted that the proposed sale would result in higher rates for CP&L's retail customers because new gas-fired generation has higher fuel costs than existing coal and nuclear plants and, in addition, retail customers could be required to bear the capacity costs in a future general rate case. CIGFUR therefore requested that a hearing be scheduled and that CP&L not be allowed to enter into the proposed wholesale contract until the outstanding issues have been resolved.

CP&L Response

On November 26, 2002, CP&L filed a response to the objections of CUCA and CIGFUR. CP&L stated that the protests should be rejected because (1) CP&L has complied with the applicable regulatory condition, (2) CP&L has always planned and maintained its generation resource system in a manner that assures adequate and reliable electric service to both its retail and wholesale customers, (3) the load in question has been included in CP&L's resource plan for many years and is presently in CP&L's resource plan, and (4) this sale will have no impact on CP&L's current retail electricity prices. Specifically, CP&L asserted that all of the fuel costs associated with serving the customer in question are allocated to this customer and CP&L's annual fuel clause proceedings provide the forum in which to address this issue. In addition, CP&L stated that it has planned its system to serve this wholesale customer and that the utility plant in question was built to serve not only CP&L's retail customers but also its wholesale obligations. CP&L asserted that this wholesale customer should not be treated differently from CP&L's retail customers.

Objection of the Public Staff

The Public Staff filed an objection on November 26, 2002, and subsequently presented a confidential agenda item at the Commission Staff Conference of December 9, 2002. The Public Staff argued that the grant of native load priority to NCEMPA raises reliability and other service quality issues and various cost allocation and retail rate increase issues. The Commission has rejected CP&L's assertion that wholesale customers must be treated the same as CP&L's captive retail customers. The Commission has stated that the 20-day notice requirement is designed to help enforce the Commission's requirement that CP&L's retail customers receive priority with respect to CP&L's existing generation and that CP&L's wholesale activities not disadvantage its retail customers from either a quality of service or rate perspective. The Public Staff argued that

CP&L is voluntarily committing itself to provide native load priority service to NCEMPA without appropriate notice requirements as to termination of the contract and without stranded cost recovery or other provisions to protect itself from the risks and that CP&L should not be permitted to use its captive retail ratepayers to absorb the risks inherent in the grant of native load priority to NCEMPA.

NCEMPA's peak load purchases from CP&L for 2001 and 2002 were 686 MW and 717 MW, respectively. NCEMPA's purchases from CP&L are expected to grow to over 900 MW by 2009. Under the terms of the proposed contract, CP&L would be responsible for all normal growth in peak load. If capacity is built to serve wholesale loads that subsequently leave, retail ratepayers bear the risk of paying for capacity made excess by the departure of wholesale customers. Recent wholesale contracts do not provide for stranded cost liability, and they tend to be for relatively short terms and have very limited or no provisions for notice of termination. The wholesale customers are free to replace their current suppliers at the end of the contracts without any responsibility for the capacity they caused to be acquired or for the pre-existing capacity that was dedicated to them for the term of the contract on equal terms with retail customers. Because NCEMPA is not assuming the responsibilities associated with native load priority, the Public Staff urged the Commission to take steps to protect CP&L's captive retail customers.

The Public Staff urged the Commission to consider the issues raised by reliance solely upon additional natural gas-fired generation to meet future capacity needs. According to CP&L's own plan, natural gas-fired capacity in excess of 800 MW will have to be added during 2007, 2008 and 2009, the years of the proposed contract extension. The Public Staff also urged the Commission to consider the rate impact issues. Prior to the addition of new capacity, these wholesale sales will decrease reserve margins and cause more costly generating units to be dispatched, which is likely to increase average fuel costs and retail rates. The addition of new capacity from natural gas-fired plants is also likely to cause fuel costs to increase. RTP pricing is likely to be affected in similar ways. After the current electric utility rate freeze ends, the costs of added capacity might be passed directly onto retail customers in general rate cases. The Public Staff also noted that an immediate loss of wholesale load, without offsetting growth in retail load, could lead to reserve margins in excess of the level considered reasonable and, possibly, to less than optimal use of existing generating units and the allocation of increased costs to retail customers.

The Public Staff argued that the Commission's ability to protect retail customers after a wholesale contract is signed is at risk because of potential federal preemption. The Public Staff argued that the Commission should either rule on the issues in advance or preserve its ability to protect CP&L's retail ratepayers in the future. Given the complexity of the issues, the Public Staff recommended an oral argument.

Proposed Conditions and Oral Argument

The Commission issued an Order on December 11, 2002, allowing parties an opportunity to file proposed conditions for the Commission to consider if CP&L is allowed to enter into the proposed wholesale contract. Proposed conditions were filed by CP&L, the Public Staff, CUCA, and CIGFUR on December 12 and 13, 2002. The Attorney General joined in the Public Staff's proposed conditions.

CP&L proposed that the Commission use the same language that it used in a prior 20-day notice order in Docket E-2, Sub 798. The language provides that the Commission retains the right to make pro-forma adjustments to the revenues and costs associated with CP&L's wholesale contracts in order to protect retail customers, but CP&L proposed to clarify the language to make clear that CP&L can challenge any such adjustments as allowed by law.

In its filing, the Public Staff argued that if the Commission allows CP&L to proceed with the proposed contract with NCEMPA, it must impose adequate "protection from preemption" conditions and other necessary conditions to preserve the Commission's ability to protect retail ratepayers. The Public Staff proposed six conditions and stated that the overriding purpose of the conditions is to hold retail ratepayers harmless from the impacts of the grant of native load priority to NCEMPA. The Public Staff also urged the Commission to monitor infrastructure issues and the potential effects of the contract on reliability, and to issue whatever orders are appropriate to secure reliability of service.

In addition, both CUCA and CIGFUR filed proposed conditions designed to protect retail ratepayers from harm stemming from the wholesale contract with NCEMPA.

On December 13, 2002, the Commission scheduled an oral argument on the proposed conditions. Oral argument was held as scheduled on December 16, 2002, and the parties who filed proposed conditions participated. The Attorney General participated and emphasized the importance of the concerns raised by the Public Staff.

Meanwhile, on December 10, 2002, NCEMPA filed a petition to intervene which is allowed.

Notice of Decision

In its December 12, 2002 filing, CP&L stated that it needs a decision by December 20, 2002, because the proposed wholesale contract is part of a much larger agreement which includes other interrelated contracts that the parties have agreed to implement January 1, 2003. In order to expedite proceedings in this docket, the Commission found good cause to issue a Notice of Decision.

The Commission issued a Notice of Decision on December 23, 2002, to the effect that an Order would be issued which will allow CP&L to enter into the proposed wholesale contract described in its 20-Day Notice of November 6, 2002, subject to six conditions. The Notice stated that a full Order would be issued soon.

Conclusions of the Commission

Several parties have urged the Commission to hold an evidentiary hearing. The Commission acknowledges the issues raised by these parties, but believes that there is a better way to address them. An evidentiary hearing would tend to focus on future events that cannot be known, even with the help of sworn testimony. The Commission does not believe that such a hearing would be productive. The Commission believes that the better approach is the one suggested by the Public Staff, which is to impose conditions now that are designed to assert the authority of the Commission to protect retail ratepayers as future events unfold.

The Commission concludes that CP&L should be allowed to enter into the proposed wholesale contract with NCEMPA subject to conditions that will protect the Commission's authority and the interests of CP&L's retail ratepayers. The conditions are as follows:

(1) CP&L shall ensure that its retail electric customers will not be disadvantaged in any manner, either from a quality of service or rate perspective, as a result of its participation in the wholesale power market.

(2) The Commission retains the right to assign, allocate, and make pro-forma adjustments to the revenues and costs associated with CP&L's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes.

(3) CP&L, Progress Energy, and any affiliates thereof shall bear the full risks of any preemptive effects of federal law as a result of CP&L's entry into this wholesale contract, including, but not limited to, agreement by CP&L, Progress Energy and their affiliates to take all such actions as may be reasonably necessary and appropriate to hold CP&L's North Carolina retail ratepayers harmless from rate increases, foregone opportunities for rate decreases, and other effects of any such preemption.

(4) Entry into this wholesale contract with its grant of native load priority without adequate notice and/or stranded cost recovery provisions constitutes acceptance by CP&L, Progress Energy, and any affiliates thereof of the risks that its investments in generating facilities and/or commitments to purchase capacity and energy to meet this contractual commitment and maintain an adequate reserve margin through 2009 may become uneconomic sunk costs that are not recoverable from its retail ratepayers. CP&L agrees that, in a future proceeding in which cost recovery is at issue, (1) it will not claim that it does not bear this risk and (2) the Commission retains full authority under Chapter 62 to disallow such costs as not used and useful or unreasonable and/or to allocate and/or assign costs away from retail customers if necessary to protect CP&L's retail customers from being disadvantaged, from being denied priority to and the benefits from CP&L's existing generation, or treated unreasonably for ratemaking purposes or to fulfill the intended purposes of Conditions (1) and (2) above.

(5) Real time pricing customers on CP&L's RTP Rate Schedule shall not pay higher rates as a result of CP&L's entry into this wholesale contract. The parties shall meet to discuss how this principle shall be implemented and shall file a proposal within 30 days from the date of the full order herein. The Commission will proceed as appropriate upon receipt of

the proposal. The Commission will hold such proceedings as necessary to implement this principle if the parties cannot agree upon a satisfactory proposal.

(6) The load served pursuant to this wholesale contract will not be treated as retail native load for purposes of Conditions 19 and 20 imposed in Docket No. E-2, Sub 760, because to do so might be inconsistent with, and might thwart, Conditions (1) through (5) above.

Conditions (1) and (2) above are matters that CP&L has agreed to in prior dockets. Conditions (3) through (6) are refinements of the first two conditions for purposes of the specific wholesale contract presented in this docket. The Commission requires these conditions for the following reasons.

Condition (1) comes from Docket No. E-2, Sub 733. By an order of November 2, 1999, in that docket, the Commission granted CP&L a certificate of public convenience and necessity for construction of new natural gas-fired combustion turbine generating capacity. The evidence tended to show that the new capacity was needed in part to serve contractual commitments made by CP&L to sell wholesale power at native load priority. The Public Staff, the Attorney General, and CUCA all proposed that conditions be imposed to protect retail ratepayers, and CP&L agreed to some of these conditions. In its proposed order, CP&L specifically committed that it would not allow its retail electric customers to be disadvantaged in any manner, either from a quality of service or rate perspective, as a result of its participation in the wholesale power market. The Commission adopted this commitment in its November 2, 1999 order.

Condition (2) was agreed to by CP&L in Docket No. E-2, Sub 798. Sub 798 was a 20-day notice proceeding under Regulatory Condition 21 in which CP&L proposed to enter two wholesale contracts at native load priority. The Public Staff did not object. Instead, the Public Staff stated its position that "the proposed wholesale contracts will not disadvantage CP&L's retail customers, inasmuch as the Commission retains the right to assign, allocate, and make pro-forma adjustments to the revenues and costs associated with these contracts for both retail ratemaking and regulatory accounting and reporting purposes." CP&L authorized the Public Staff to state that CP&L "concurs with this understanding of the Commission's jurisdiction and authority." Citing the Public Staff's filing, the Commission allowed CP&L to proceed with the Sub 798 contracts by order of February 26, 2002.

The Commission's adoption of the "no disadvantage to retail" condition in Sub 733 was a policy decision by the Commission as to CP&L's responsibility to its retail customers vis-a-vis its wholesale operations. This policy decision was not limited to the Sub 733 docket; it is as important in the present docket as it was in Sub 733; and it remains the appropriate policy of the Commission in this and similar circumstances. Therefore, the Commission specifically repeats and emphasizes this policy as Condition (1) in this order. The Commission views the making of pro-forma adjustments, such as mentioned in Sub 798, as a means of enforcing the "no disadvantage to retail" policy. The Commission therefore reasserts that authority as Condition (2) in this order.

The statement of policy embodied in Conditions (1) and (2) is unambiguous, and there should be no need for clarification or further discussion of it. However, the Commission acknowledges that parties have sought interpretations or exceptions as to previously ordered conditions and agreements. Based upon that experience, and lest there be any doubt as to the Commission's intent, the Commission finds good cause to adopt the remaining Conditions (3) through (6) in order to flesh out the scope and intent of the Commission's policy in the context of this proposed contract. These remaining conditions focus on certain specific risks posed by the proposed contract in this docket and reaffirm the application of the "no disadvantage to retail" policy as to these risks.

Condition (3) is prompted by concern that some of the Commission's authority could be preempted. As suggested above, the Commission might order ratemaking disallowances or other adjustments in order to protect retail ratepayers from the costs and risks arising from this proposed contract. Such adjustments might be challenged on grounds of federal preemption. The Public Staff stated that the Commission's authority should survive such a challenge but recognized that there is uncertainty as to how federal law will develop in the future. The Public Staff therefore proposed, and the Commission adopts, Condition (3) which requires in broad terms that CP&L and its shareholders shall bear the risks of federal preemption and shall "take all such actions as may be reasonably necessary and appropriate to hold CP&L's North Carolina retail ratepayers harmless from rate increases, forgone opportunities for rate decreases, and other effects of any such preemption." The Public Staff proposed two additional conditions relating to federal preemption which the Commission does not adopt. The Public Staff proposed that CP&L give up its right to challenge any Commission adjustments on grounds of federal preemption; CP&L opposed these conditions. The Commission does not believe that CP&L should be required to give up constitutional claims or legal rights that it might have as a condition of entering this contract. Further, the Commission does not believe that these two additional conditions are needed since the Commission has already required CP&L (and by proceeding with the contract, CP&L agrees) to "bear the full risk" of any federal preemption and to hold its retail customers "harmless" from any effects of preemption. This effectively serves as an indemnity to retail customers. The Commission believes that condition (3), if honored in good faith and enforced, will adequately protect retail ratepayers even in the event of federal preemption in connection with this contract. The Commission will monitor future developments in federal law and policy and will require CP&L to take action under Condition (3) as the need may arise.

Condition (4) addresses the risks of the new capacity that CP&L may have to construct or purchase to serve this contract. CP&L's 2002 resource plan shows that it needs to construct 867 MW in 2007 through 2009 to maintain adequate reserve margins, assuming the contractual obligation to provide native load priority to NCEMPA. The proposed contract allows NCEMPA to terminate the contract at the end of 2009 without significant notice requirements and without liability for stranded cost. The Commission believes that CP&L should bear the risks associated with any excess capacity and/or stranded costs that might result, and CP&L's grant of native load priority to NCEMPA should be conditioned upon acceptance of those risks by CP&L. While a utility always bears a risk of disallowance as to excess capacity, the grant of native load priority in the proposed contract creates additional risks that CP&L should be required to bear explicitly. Condition (4) is imposed to prevent any inappropriate shifting of costs to CP&L's retail ratepayers related to acquisition of new capacity and energy prompted by this contract.

Condition (5) recognizes that the proposed wholesale contract creates unique risks for RTP customers and affirms that the "no disadvantage to retail" policy applies to these risks. CP&L's RTP rate was designed to reflect the variability of generation costs depending upon time of use. It tends to encourage greater off-peak use by industrial customers. The proposed grant of native load priority to NCEMPA would tend to increase the RTP rates since hourly real time rates are calculated based upon the total hourly system load CP&L expects to occur the next day, and the total next-day hourly system load will include the growth in NCEMPA's load. The Public Staff originally proposed that CP&L modify its unit dispatch model to remove the pricing effect of NCEMPA's increased demand; however, at oral argument, the Public Staff acknowledged that there may be advantages in the broader approach proposed by CUCA and CIGFUR. The Commission agrees that the better approach is to state as a principle that RTP customers "shall not pay higher rates as a result of CP&L's entry into this wholesale contract" and to require the parties to confer and propose a way to implement this principle. The Commission will hold a hearing if need be.

Finally, Condition (6) is prompted by some prior conditions ordered by the Commission in Docket No. E-2, Sub 760 (the Florida Progress merger). Condition 20a ordered by the Commission in Sub 760 provides that unless the Commission affirmatively stops CP&L from entering into a proposed native load priority contract with NCEMPA, the retail loads of NCEMPA shall be treated as CP&L's retail native load for purposes of Conditions 19 and 20 adopted in Sub 760. Conditions 19 and 20 guarantee certain advantages to CP&L's retail native load. Therefore, Condition 20a could, in some circumstances, stymie the "no disadvantage to retail" policy. For example, should the present wholesale contract increase average fuel costs in a future annual fuel cost proceeding, and should the Commission want to protect retail ratepayers by reallocating fuel costs between retail and wholesale and reducing the amount recovered from retail, CP&L might argue that Conditions 19 and 20 preclude the Commission from doing so. Therefore, in order to preserve the "no disadvantage to retail" policy, the proposed contract with NCEMPA must be excepted from Conditions 19 and 20. Condition (6) does this. Condition (6) preserves the Commission's ability to protect retail ratepayers; it does not impact the contract rates or actual reliability, and it will not disadvantage NCEMPA in any way.

The Commission has considered all of the proposed conditions offered by the parties. The Commission believes that the conditions ordered herein are adequate and appropriate and that the other proposed conditions are either unnecessary or ill-advised. In summary, the Commission concludes that CP&L should be allowed to enter into the proposed wholesale contract with NCEMPA subject to the six conditions set forth above. CP&L's decision to go forward and to enter into the contract will be regarded as its agreement to these conditions. The contract to be signed by the parties should be subject to, and shall in no way be inconsistent with, the terms represented herein.

IT IS, THEREFORE, ORDERED that the Commission will allow CP&L to enter into the proposed wholesale contract described in the 20-Day Notice herein subject to the following conditions:

(1) CP&L shall ensure that its retail electric customers will not be disadvantaged in any manner, either from a quality of service or rate perspective, as a result of its participation in the wholesale power market.

(2) The Commission retains the right to assign, allocate, and make pro-forma adjustments to the revenues and costs associated with CP&L's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes.

(3) CP&L, Progress Energy, and any affiliates thereof shall bear the full risks of any preemptive effects of federal law as a result of CP&L's entry into this wholesale contract, including, but not limited to, agreement by CP&L, Progress Energy and their affiliates to take all such actions as may be reasonably necessary and appropriate to hold CP&L's North Carolina retail ratepayers harmless from rate increases, foregone opportunities for rate decreases, and other effects of any such preemption.

(4) Entry into this wholesale contract with its grant of native load priority without adequate notice and/or stranded cost recovery provisions constitutes acceptance by CP&L, Progress Energy, and any affiliates thereof of the risks that its investments in generating facilities and/or commitments to purchase capacity and energy to meet this contractual commitment and maintain an adequate reserve margin through 2009 may become uneconomic sunk costs that are not recoverable from its retail ratepayers. CP&L agrees that, in a future proceeding in which cost recovery is at issue, (1) it will not claim that it does not bear this risk and (2) the Commission retains full authority under Chapter 62 to disallow such costs as not used and useful or unreasonable and/or to allocate and/or assign costs away from retail customers if necessary to protect CP&L's retail customers from being disadvantaged, from being denied priority to and the benefits from CP&L's existing generation, or treated unreasonably for ratemaking purposes or to fulfill the intended purposes of Conditions (1) and (2) above.

(5) Real time pricing customers on CP&L's RTP Rate Schedule shall not pay higher rates as a result of CP&L's entry into this wholesale contract. The parties shall meet to discuss how this principle shall be implemented and shall file a proposal within 30 days from the date of the full order herein. The Commission will proceed as appropriate upon receipt of the proposal. The Commission will hold such proceedings as necessary to implement this principle if the parties cannot agree upon a satisfactory proposal.

(6) The load served pursuant to this wholesale contract will not be treated as retail native load for purposes of Conditions 19 and 20 imposed in Docket No. E-2, Sub 760, because to do so might be inconsistent with, and might thwart, Conditions (1) through (5) above.

ISSUED BY ORDER OF THE COMMISSION.
This the 14th day of February, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

ak021403.01

Chairman Jo Anne Sanford and Commissioners Sam J. Ervin, IV and Lorinzo L. Joyner dissent.

DOCKET NO. E-2, SUB 820

CHAIR JO ANNE SANFORD, COMMISSIONER SAM J. ERVIN, IV, AND COMMISSIONER LORINZO L. JOYNER, DISSENTING: We strongly dissent from the majority's refusal to require the two additional anti-preemption conditions urged by the Public Staff.[1] The majority's decision totally ignores the changed nature of the wholesale market following the enactment of the Energy Policy Act of 1992 and the adoption of Order 888 by the Federal Energy Regulatory Commission. The majority gives no legitimate legal or policy justification for refusing to impose these specific anti-preemption conditions as a prerequisite for allowing CP&L to provide wholesale service to NCEMPA at native load priority. The twin claims which are the primary support for the decision are inherently inconsistent. First, the majority asserts that it has adequately protected North Carolina retail ratepayers from the risks of preemption, yet counters itself by contending that the imposition of conditions requiring CP&L to waive the right to assert preemption at a later time would somehow be inappropriate. Secondly, there is an irreconcilable conflict between the majority's open invitation to federal preemption of the Commission's retail ratemaking authority inherent in this decision and the vehemence of the Commission's public opposition to federal preemption in the pending proceedings involving FERC's Standard Market Design proposal. As a result, the majority has needlessly exposed CP&L's North Carolina retail ratepayers to an enhanced risk of more expensive and less reliable service. Since we are unable to countenance such a result, we vigorously dissent from the majority's decision.

The potential risks to retail ratepayers from wholesale contracts entered into at native load priority do not appear to be in serious dispute. The retention or addition of wholesale load entitled to native load priority may cause CP&L to construct additional generating capacity or to operate more expensive generating plants, thereby putting upward pressure on both base rates and fuel costs eligible for recoupment through the fuel adjustment mechanism established by G.S. 62-133.2. More particularly, CP&L's resource plan indicates that the Company needs to add 290 megawatts of combustion turbine capacity at its Richmond County facility before the summer of 2007, 145 megawatts of undesignated capacity by the summer of 2008, and 432 megawatts of undesignated capacity by the summer of 2009, for a total of 867 megawatts, in order to maintain its target reserve margin. As a number of parties pointed out during the course of this proceeding, the amount of new capacity CP&L expects to add to its system during the

[1] The two additional conditions advocated by the Public Staff are that (1) "[n]either CP&L, Progress Energy, nor any of its affiliates and subsidiaries shall assert in any forum, with respect to the disallowance, assignment, allocation or other adjustments to the costs of service associated with, or related to, this grant of native load priority wholesale contract, that the filed rate doctrine and/or the Supremacy Clause of the United States Constitution in any way preempts the Commission from exercising any lawful authority it may have with respect to CP&L's costs of service as they relate to the benefits and costs associated with, or related to, the grant of native load priority in the proposed contract or that the Commission is precluded from setting rates or requiring accounting and reporting for regulatory purposes based on such disallowances, assignments, allocations and other adjustments" and that (2) "CP&L will not argue in future proceedings or on appeal that the Commission's enforcement of CP&L's stipulations and the Commission-imposed conditions in Docket No. E-2, Subs 733, 763, and 760, and other dockets by disallowing, assigning, allocating or otherwise adjusting CP&L's costs of service for ratemaking and reporting purposes places an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution." In essence, these two proposed preemptions preclude CP&L from asserting certain protections arising under various provisions of federal law, including provisions of the federal constitution, as a condition of being allowed to enter into the proposed sale of wholesale power at native load priority to NCEMPA.

relevant time period is roughly equivalent to the amount of capacity CP&L has agreed to provide to NCEMPA. The capital costs associated with this additional capacity, which might not be needed in the absence of this native load priority contract and which will persist after the contract has expired, must be recouped from someone. Similarly, the operating costs of this additional capacity are likely to be higher than the bulk of CP&L's existing generation. Wholly aside from the impact of this new capacity, adding additional load to CP&L's system will require the operation of more expensive generating facilities than would have otherwise been necessary, effectively increasing the fuel costs the Company is entitled to recoup from its ratepayers under the fuel adjustment mechanism. Although this may have been an acceptable outcome in an era when wholesale customers lacked competitive alternatives and all customers were equally obligated to bear the utility's capital and operating costs on a long-term basis, the implementation of open access transmission at the federal level has made a plethora of other alternatives available to wholesale customers such as NCEMPA that are not available to CP&L's North Carolina retail customers. Under the proposed agreement, NCEMPA is free to terminate all relations with CP&L at the end of the contract period with no obligation to stand good for any of the costs that CP&L incurred on its behalf beyond that time. As a result, CP&L may attempt to force retail customers to hold it harmless for costs originally incurred to serve NCEMPA or try to "get by" with relatively tight reserve margins or similar operating practices during the contract period in an effort to control costs, either of which would put retail customers at risk. Under this set of circumstances, the Commission has an obligation to take whatever steps are reasonably necessary to protect retail ratepayers from all risks associated with this contract.

The majority implicitly rejects CP&L's argument that the Commission should not adopt any explicit protections for retail ratepayers as a precondition for allowing the Company to enter into this wholesale contract. G.S. 62-113(a) clearly gives the Commission the power to attach appropriate conditions to the exercise of a utility franchise, so we undoubtedly have the requisite authority, in the exercise of our discretion, to impose any condition that we reasonably believe to be necessary for the protection of the using and consuming public. None of CP&L's arguments to the effect that we should not exercise our conditioning authority in this instance have any merit at all. The mere fact that CP&L provided the notice required by the applicable regulatory condition does not, in spite of the Company's repeated claims to the contrary, end all regulatory controversy related to wholesale contracts at native load priority. Instead, as should be obvious, the entire purpose of this condition was to give the Commission notice of the Company's intentions so that the Commission could exercise such jurisdiction as it may independently have over such contracts. Order Regarding Jurisdiction, Docket No. E-100, Sub 85A (July 10, 2002); Order Denying Reconsideration, Docket No. E-100, Sub 85A (August 20, 2002).[1] It is correct that CP&L has always planned and maintained its generating system in such a manner as to assure adequate and reliable electric service to both wholesale and retail customers and that CP&L has included NCEMPA's load in its integrated resource planning process. However, we

[1] The Commission's decisions in these orders dispose of CP&L's contention that the Commission cannot create subject matter jurisdiction where none otherwise exists. Although we agree that the Commission is a creation of the General Assembly and has only the authority granted to it by that body, the Commission has unanimously concluded that it has the power to preclude jurisdictional utilities from entering into contracts at native load priority to the extent necessary to protect retail customers. If the Commission has the statutory authority to act in this manner, it necessarily has the authority to allow a jurisdictional utility to enter into a wholesale contract at native load priority subject to appropriate conditions. As a result, the Commission would not be creating subject matter jurisdiction where none exists were it to act in the manner we believe to be appropriate.

cannot ignore the dramatically different nature of wholesale service in the aftermath of EPACT and Order 888. In this new environment, blind adherence to traditional business practices does not adequately protect captive retail customers from an unacceptably high risk of increased rates, inadequate service, or both. CP&L's complaint about "condition creep" ignores this Commission's duty to take appropriate steps to protect North Carolina retail ratepayers from the risks associated with the changing environment in which the Company operates. Finally, the fact that the present contract will have no immediate impact on CP&L's North Carolina retail rates totally overlooks the fact that it may have an effect on retail rates in the future. This could happen either through the annual fuel adjustment mechanism of G.S. 62-133.2; a general rate case held after the lifting of the rate freeze mandated by the "Clean Smokestacks" legislation, G.S. 62-133.6(e); or a proceeding conducted pursuant to one of the exceptions to the rate freeze set out in G.S. 62-133.6(e)(1). As a result, the majority correctly rejects CP&L's argument that the Commission should take no action to protect retail ratepayers from the potentially adverse impact of this contract.

Although we disagree with the Commission's decision concerning the conditions that should be imposed in this proceeding, we agree with the majority's decision to refrain from holding an evidentiary hearing of the type requested by CUCA. The contract at issue in this proceeding will be in effect from 2007 until 2009. The essential argument advanced in support of CUCA's request for an evidentiary hearing was that the Commission should determine the exact nature of the steps that ought to be taken to protect retail ratepayers now. As we understand this proposal, CUCA would have the Commission determine the exact fuel cost and other adjustments that should be made in light of the proposed contract based on the facts as they are currently known. Aside from the fact that the relevant provisions of the Public Utilities Act require that all ratemaking adjustments be based on actual and not projected figures, we are completely uncomfortable with the proposition that we can put ourselves in a position to make appropriate ratemaking adjustments for the period from 2007 until 2009 at the present time. Any evidentiary hearing that the Commission might hold in response to CUCA's request would amount to a contest of experts attempting to predict the potential impact of the proposed contract on conditions some five to seven years in the future. Any such expert testimony would amount to little more than rank speculation about the impact of this contract on fuel costs, capital costs, and other ratemaking issues. As a result, we concur in the majority's decision to reject CUCA's request for an evidentiary hearing.

We further agree that the conditions which the majority has adopted are appropriate and that CP&L should be required to accept them before entering into an agreement to provide wholesale service to NCEMPA at native load priority. Each of these conditions addresses a concern that may arise in the future as a result of CP&L's decision to enter into this contract. The essential justification that the majority offers for imposing these conditions is that they represent "matters that CP&L has agreed to in prior dockets" or "are refinements of [conditions to which CP&L has previously agreed] for purposes of the specific wholesale contract presented in this docket." Although the conditions adopted by the majority are certainly appropriate as far as they go, they do not provide CP&L's retail customers with optimum protection against all of the risks associated with the proposed contract because they do not prevent CP&L from attempting to avoid the impact of these conditions on federal preemption grounds. The only way to protect CP&L's retail ratepayers from that particular risk would be to adopt the two additional anti-preemption conditions proposed by the Public Staff, but the majority has inexplicably declined to do so.

The majority pays little attention to the issue of whether the two additional anti-preemption conditions advocated by the Public Staff should be adopted. The majority's virtual silence on this question, which is the most hotly disputed issue in this proceeding, can only be explained by the absence of any logical support for the result which the majority has deemed appropriate. The only argument advanced in support of the majority's incongruous decision to adopt six substantive conditions ostensibly intended to protect CP&L's ratepayers from the risks associated with the proposed contract without also adopting the additional anti-preemption conditions proposed by the Public Staff is the unexplained assertion that "the Commission does not believe that CP&L should be required to give up constitutional or legal rights that it might have as a condition of entering this contract" and the baffling claim that "the Commission does not believe that these two additional conditions are needed since the Commission has already required CP&L (and by proceeding with the contract, CP&L agrees) to 'bear the full risk' of any federal preemption and to hold its retail customers 'harmless' from any effects of preemption." The majority's logic exposes CP&L's retail ratepayers to federal preemption claims that the Company has essentially announced that it intends to assert, is internally inconsistent, conflicts with long-standing Commission precedent, lacks any support in law or policy, and undercuts this Commission's staunch opposition to the federal preemption of its jurisdiction in a range of federal proceedings, such as FERC's pending Standard Market Design rulemaking.

The fundamental problem with the majority's reliance on a set of substantive conditions that purport to protect the Commission's authority to make ratemaking adjustments to protect the interests of retail ratepayers is that those conditions do absolutely nothing to prevent CP&L from arguing that the conditions are, themselves, preempted by various provisions of federal law. In the absence of additional conditions barring CP&L from asserting that the conditions that the majority has deemed appropriate are preempted by federal law, the majority has provided CP&L's retail customers with no protection from the very real possibility that the protective conditions that the majority has adopted will be deemed to be void and of no effect. This Commission, of all regulatory agencies in the United States, should be cognizant of the risks posed to retail ratepayers by federal preemption. In Nantahala Power & Light Company v. Thornburg, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986), the United States Supreme Court held that the Supremacy Clause of the United States Constitution and the filed rate doctrine barred this Commission from setting retail rates so as to protect North Carolina citizens from the impact of a FERC-approved wholesale agreement that the Commission believed to have adversely impacted the retail customers of a North Carolina utility. The Supreme Court made clear that the FERC-approved agreement was binding on this Commission. Similarly, the United States Supreme Court held in Mississippi Power & Light Company v. Mississippi, 487 U.S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988), that the same provisions of federal law precluded the Mississippi Public Service Commission from examining the prudence of a utility's decision to purchase a certain percentage of the output of an expensive nuclear plant because the purchase percentage had been approved by FERC. The United States Supreme Court has been willing to entertain preemption claims under the Commerce Clause as well as the Supremacy Clause. Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983). State commissions continue to retain certain aspects of their traditional ratemaking authority in dealing with costs incurred in connection with wholesale transactions. State ex rel. Utilities Commission v. North Carolina Power, 338 N.C. 412, 450 S. E. 2d 412 (1994), cert. den. 516 U.S. 1092, 116 S. Ct. 813, 133 L. Ed. 2d 758 (1996); Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission, 837 F.2d 600 (3d Cir. 1988); Pike County Light & Power Company v. Pennsylvania Public Utility Commission, 465 A.2d 735 (1983). Nevertheless, the simple fact of the matter is that federal preemption is an extremely complex area of the law and that the increasing involvement of utilities subject to the jurisdiction of this Commission in wholesale market activities only heightens the risk that this Commission's jurisdiction will be preempted. Although it is impossible at this time to delineate a precise way in which a specific aspect of the Commission's jurisdiction could be preempted several years in the future as a result of the proposed contract, one does not have to be clairvoyant to recognize that the FERC is currently engaged in an unprecedented attempt to expand the scope of its authority over segments of the electric power industry that have been previously thought to be subject to state regulation as part of the pending Standard Market Design proceeding and other initiatives. As part of its effort to dramatically restructure the nation's electric industry in order to create what it characterizes as a seamless, vibrant, competitive wholesale market, the FERC does not seem to have any hesitation about attempting to shift costs from the wholesale market to retail customers or to take other actions that could impair the quality of service or increase the price paid by retail customers. This Commission, in conjunction with the Attorney General and the Public Staff, has vigorously protested this unprecedented assertion of federal authority as posing grave risks to the economic well-being of the retail customers of North Carolina's investor owned utilities. The actions of the FERC in the past 18 months clearly indicate that further extension of federal jurisdiction, and the concomitant preemption of this Commission's jurisdiction over retail rates and the terms and conditions of retail service, is a very real risk associated with increased utility entanglement in the wholesale market. Under this set of circumstances, it is only prudent for the Commission to take appropriate precautions to minimize the risk of federal preemption before allowing a jurisdictional utility to engage in wholesale transactions at native load priority.

The majority claims that the two additional anti-preemption conditions proposed by the Public Staff are not needed to protect retail ratepayers from the risks of federal preemption because such protections are subsumed within the conditions adopted by the Commission's order, but this claim is fundamentally flawed. The condition upon which the majority relies in making this claim requires CP&L to hold ratepayers harmless from the effects of federal preemption. Under the Supremacy Clause, a provision of federal law entitled to preemptive effect overrides any inconsistent provision of state law. Similarly, a regulatory condition that is unenforceable under the Commerce Clause is void and of no effect. Nothing in the conditions adopted by the majority precludes CP&L from arguing that the conditions adopted by the majority are themselves preempted. Given that CP&L reserved the right to assert federal preemption in its comments before the Commission in this proceeding, the Commission has been given fair and ample notice of CP&L's intentions. Despite its claim to the contrary, the majority does not provide retail ratepayers with adequate protection against all possible risks arising from the proposed wholesale contract, including those stemming from CP&L's assertion of the doctrine of federal preemption.

In addition to arguing that it has provided ratepayers with adequate protection against all reasonably foreseeable risks, including federal preemption, the majority further seems to contend that there is somehow something inherently wrong with requiring CP&L to waive its right to assert federal preemption as a prerequisite for entering into the proposed contract with NCEMPA. This aspect of the majority's argument fundamentally undercuts its claim to have adequately protected retail ratepayers from the risks associated with federal preemption. According to the majority, its decision to require CP&L to hold retail ratepayers harmless from the effects of federal preemption is sufficient to protect customers from the effects of federal preemption.[1] In order for such a condition to have any meaning, it must force CP&L to absorb any increased costs associated with the wholesale contract in question despite the existence of a valid and enforceable argument that a proper application of federal law would call for a contrary result. The ultimate impact of such a condition would be indistinguishable from the result that the majority rejects as improper. For that reason, the majority's position is totally self-contradictory. It is either proper to fully protect CP&L's ratepayers from the potential impact of federal preemption or it isn't; both prongs of the majority's argument simply cannot be valid. The fact that the majority is willing to make such an obviously inconsistent argument suggests the absence of logical support for its position.

The more serious deficiency in the majority's position, however, is its implicit conclusion that there is some unstated problem with requiring CP&L to waive the right to assert federal preemption as a precondition for being allowed to sell wholesale power to NCEMPA at native load priority. The argument lacks any coherent legal or policy justification. In fact, the majority has failed to provide any defense of its assertion at all, a fact which may render it subject to appellate reversal pursuant to G.S. 62-79(a)(1) and G.S. 62-94(b)(4). State ex rel. Utilities Commission v. Carolina Utility Customers Association, Inc., 348 N.C. 452, 500 S.E. 2d 693 (1998). While this argument may have some emotional appeal, it is inconsistent with well-established law, with numerous previous decisions of this body, with the practices of virtually every branch of state government, and with considerations of sound regulatory policy. In fact, were the self-denying ordinance adopted by the majority to become standard practice, state government would grind to a virtual halt. As a result, we completely and utterly reject the majority's unsupported and erroneous assertion that there is somehow something wrong with requiring CP&L to waive the right to assert a federal preemption defense to a future exercise of this Commission's regulatory jurisdiction as a prerequisite to being allowed to sell wholesale power to NCEMPA at native load priority.

The first possible justification for the majority's position could be the existence of some sort of legal obstacle to a Commission decision to request a utility to waive the right to assert federal preemption in return for Commission permission to enter into a wholesale contract at native load priority. Although the majority has cited no legal authority in support of this outlandish proposition, CP&L attempted to do so by pointing to that portion of G.S. 62-11 that requires members of the Commission to take an oath prior to "entering upon the duties of his [or her] office" "to support the Constitution and laws of the United States and the Constitution and laws of the State of North Carolina." From this rather shaky foundation, CP&L drew the illogical inference that it was unlawful for members of the Commission to require a regulated

[1] For the reasons set forth in the immediately preceding paragraph, we do not agree that the condition actually adopted by the majority adequately protects retail customers from the risks of federal preemption.

utility to agree to waive a right guaranteed under the federal constitution because such an action would constitute a failure "to support the Constitution and laws of the United States." With all due deference, this argument borders on the absurd. Under the logic advanced by CP&L, the Attorney General of North Carolina, who takes an oath of office to support the United States Constitution, could never settle a civil action with an individual in federal court because such a settlement would result in a waiver of that litigant's Seventh Amendment right to a trial by jury. Similarly, all local and state law enforcement officers take an oath to support the United States Constitution. Acceptance of CP&L's logic would mean that they could not lawfully ask suspects to confess to criminal activity because doing so would involve a request for a waiver of the suspect's Fifth and Fourteenth Amendment right to be free from compulsory self-incrimination. Similarly, law enforcement officers could not properly ask a suspect to consent to a search of his or her person, automobile, or residence because such a request would involve a waiver of the suspect's right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments. Prosecutors and members of the judiciary also take oaths to support the federal constitution. Under the logic advanced by CP&L, such officials could never participate in offering a negotiated plea to a criminal defendant in which the defendant agreed to enter a guilty plea in return for a lesser sentence or the dismissal of other charges because such arrangements involve a waiver of the defendant's Sixth and Fourteenth Amendment rights to a trial by jury, to confront the State's witnesses, and to compulsory process for the procurement of defense witnesses. Needless to say, all of these outcomes are repugnant to considerations of common sense and have been rejected by the courts.

According to well-established principles of North Carolina law, "[a] person sui juris may waive practically any right he has unless forbidden by law or public policy." Clement v. Clement, 230 N.C. 636, 639, 55 S.E. 2d 459 (1949). See also: Carow v. Weston, 247 N.C. 735, 102 S.E. 2d 134 (1958). Both federal constitutional and statutory protections are presumptively waivable. United States v. Mezzanatto, 513 U.S. 196, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995). As the United States Supreme Court stated very clearly in Newton v. Rumery, 480 U.S. 386, 393-394, 107 S. Ct. 1187, 1192, 94 L. Ed. 2d 405, ___ (1987) (internal quotations and citations omitted), "[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow;" "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." Putting it bluntly, the majority is simply wrong to the extent that it believes that there is some legal basis for insulating CP&L from having to make a hard choice between waiving federal preemption or foregoing the ability to sell wholesale power to NCEMPA at native load priority. As a result, there is absolutely nothing in either state or federal law that in any way suggests the existence of any impropriety in a Commission decision requiring CP&L to choose between preserving the right to advance federal preemption arguments or foregoing the right to sell power at wholesale to NCEMPA at native load priority.

The only other possible basis upon which the majority could have reached the conclusion that it should not require CP&L to choose between waiving the right to assert federal preemption or refraining from selling wholesale power at native load priority to NCEMPA is that there is some policy justification for reaching this conclusion. We argue respectfully that the exact opposite is true. In analyzing this policy issue, we believe that it is helpful to review a number of fundamental propositions, none of which should be subject to serious dispute. First, as has been previously demonstrated, a utility's decision to enter into a contract to provide wholesale electric service at native load priority, particularly one of this magnitude, has the potential to affect the rates paid by and quality of service rendered to retail customers. Second, this Commission has unanimously agreed that it has the authority to prohibit a utility from entering into a contract to provide wholesale service at native load priority in the event that the contract in question could adversely affect service to retail customers. Presumably, this authority includes the existence of jurisdiction to order the utility to refrain from entering into such a contract without accepting certain conditions intended to protect retail ratepayers from the risks that could arise from the utility's decision to enter into the contract in question.[1] Third, the ultimate purpose of the Commission's evaluation of utility proposals to enter into wholesale contracts at native load priority is to ensure that such contracts, which may well benefit retail customers, will not harm those customers who have no alternative under North Carolina law except to buy power from a utility subject to this Commission's jurisdiction. Under this set of circumstances, it seems to us that considerations of sound public policy call for the imposition of all conditions necessary to protect the retail ratepayers of the selling utility from any potential adverse consequences that may arise from the existence of the contract, including those stemming from the doctrine of federal preemption. As a result, it seems to us that sound regulatory policy requires this Commission to refrain from allowing utilities subject to its jurisdiction to sell wholesale power at native load priority without imposing sufficient conditions to protect retail ratepayers from all reasonably foreseeable adverse consequences, one of which is obviously the set of risks associated with federal preemption.

In the past, the Commission has repeatedly adopted anti-preemption conditions that are virtually identical to those that the majority finds inappropriate here. For example, the Commission adopted conditions intended to forestall the risks of preemption under the Public Utility Holding Company Act in the Order Approving Merger entered in Docket No. E-22, Sub 380, Eighty-Ninth Report of the North Carolina Utilities Commission: Orders and Decisions 306, 320 (1999) ("Neither the Company, DRI, or any Affiliates thereof shall assert in any forum, with respect to any transaction to which the Company is a party and which is subject to Section 13 of the 1935 Act, that the 1935 Act in any way preempts the NCUC from reviewing the reasonableness of any commitment entered into by the Company and from disallowing costs of or imputing revenues to NC Power. Should any other entity so assert, the Company, DRI, or an Affiliate 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."); in the Order Approving Merger and Issuance of Securities entered in Docket No. G-5, Sub 400 and G-43, Eighty-Ninth Report of the North Carolina Utilities Commission: Orders and Decisions 384, 407 (1999) ("Neither PSNC, SCANA, nor any affiliate thereof shall assert in any forum, with respect to any transaction to which PSNC 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 PSNC and from disallowing costs of or imputing revenues to PSNC. Should any other entity so assert, PSNC, SCANA, or other affiliates shall not support any such assertion and

[1] In the event that the alternative discussed in the text is not available to the Commission, we would have no choice except to render an up or down decision on the utility's ability to enter into the contract. Such a result would not be in the best interests of either retail or wholesale customers, and we do not understand the majority to dispute the existence of the more moderate option discussed in the text.

shall, upon learning of such assertion, so advise and consult with the NCUC and the Public Staff regarding such assertion."); and in the Order Approving Application entered in Docket Nos. E-2, Sub 753, P-708, Sub 5, and G-21, Sub 387, Ninetieth Report of the North Carolina Utilities Commission: Orders and Decisions 259, 271 (2000) ("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, Holdings, 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."). Similarly, the Commission included a plethora of conditions intended to prevent preemption under the Federal Power Act in the Order Approving Application entered in Docket No. E-2, Sub 760, Ninetieth Report of the North Carolina Utilities Commission: Orders and Decisions 187, 200-202 (2000). Finally, the Commission imposed an anti-preemption condition that is virtually indistinguishable from one of those that it deems inappropriate here in approving Duke Energy's request to transfer the employees responsible for operating Duke Power's generating units to a subsidiary in the Order Approving Affiliate Agreements With Conditions entered in Docket No. E-7, Sub 694, on September 26, 2002 ("Neither Duke nor any of its affiliates thereof shall assert in any forum, with respect to any transaction to which Duke Power is involved, that the Commission is preempted under federal law from reviewing the reasonableness of any commitment entered into by Duke Power and from disallowing costs or imputing revenues, relating to such commitment, to Duke Power. Should any other entity so assert, Duke and any of its affiliates 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."). Thus, as the Commission noted in the Order On Affiliate Contracts entered in Docket No. E-7, Sub 694, on February 5, 2002, the Commission has a "long-standing" practice of "resist[ing] federal preemption of its regulatory authority" which it has consistently maintained until the issuance of the decision in this proceeding. This consistent Commission practice is fully consistent with our notion of sound regulatory policy.

The majority offers absolutely no explanation whatsoever for this sudden and baffling reversal of our long-standing policy of staunch and adamant resistance to federal preemption of our regulatory jurisdiction. The majority's silence suggests, once again, the lack of justification for this swift and drastic abandonment of well-established Commission policy. CP&L argued that the Commission's previous decisions all involved the approval of stipulations between the affected utility and the Public Staff and that the Commission had never approved an anti-preemption condition in the absence of such an agreement, but this argument ignores the Order Approving Affiliate Agreements With Conditions which the Commission entered in Docket No. E-7, Sub 694, on September 26, 2002, in which the Commission on its own motion imposed an anti-preemption condition virtually identical to that at issue here. Although the Commission is not obligated to follow principles of res judicata or stare decisis in the exercise of its regulatory authority, considerations of sound decisionmaking suggest that such a consistent line of Commission precedent should not be abandoned without some justification. However, that is exactly what the majority has done here.

Although the majority has not identified any case-specific considerations in support of its decision, CP&L advanced a number of such arguments and they are worth at least some passing mention. First, the fact that the residents of the towns served by NCEMPA are North Carolina residents does not change the fact that this Commission's principal responsibility is to protect the retail ratepayers of the entities defined as "public utilities" in G. S. 62-3(23)a. In addition, nothing in the outcome we believe the Commission should reach in this proceeding would have any adverse impact on the residents of the municipalities served by NCEMPA; instead, we simply believe that any additional risks that result from CP&L's decision to enter into the proposed contract should fall on someone other than CP&L's retail ratepayers. Second, the fact that NCEMPA is a long-standing CP&L wholesale customer and has paid average cost rates to CP&L for many years does not justify lowering the Commission's guard with respect to preemption issues in this instance for the simple reason that, as we have already noted, NCEMPA is no longer tied to CP&L's system or obligated to pay average cost rates. Third, a decision to impose appropriate anti-preemption conditions should not adversely and inappropriately impact CP&L's efforts to compete in the wholesale market; instead, such conditions merely assure that its efforts to do so stand on their own economic merits. This Commission has not set rates for CP&L in an unfair manner in the past, and the Company has no reason to fear unreasonable treatment in this area from the Commission in the future. As a result, there has been no case-specific policy justification advanced in this proceeding that would tend to indicate that there is anything inappropriate about requiring CP&L to forego the right to argue federal preemption of the Commission's regulatory jurisdiction as a precondition to being allowed to enter into the proposed contract to sell wholesale power to NCEMPA at native load priority.

Finally, the inconsistency between the Commission's decision in this case and the attitude that the Commission has taken in recent proceedings before the FERC is nothing less than astounding. The Commission has repeatedly and vociferously objected to FERC proposals that we have asserted would interfere with regulatory prerogatives traditionally possessed by the States. Over and over again, the Commission has informed the FERC that actions it proposes to take impermissibly intrude upon matters properly committed to state control. Over and over again, we have informed the FERC that jurisdiction is a basic part of the regulatory compact between the states and the federal government and that this Commission intends to be vigilant in defending its jurisdictional prerogatives. In spite of this vigorous defense of state prerogatives, in which the three of us have fully joined, the majority is unwilling here to take every possible step to defend its authority against future federal preemption. We find it equally necessary to stick to our guns at home and before the FERC. We do not see how the Commission can credibly resist federal preemption of its regulatory authority in Washington while simultaneously opening the door to preemption in the manner condoned by the majority in the present order. The Public Staff's proposed anti-preemption conditions provide the Commission with an opportunity to buttress its authority against the impact of federal policies that are contrary to the interests of North Carolina retail ratepayers. The majority's failure to avail itself of this opportunity, without providing any meaningful explanation for its decision not to act, undermines the credibility of this Commission's opposition to the FERC's recent attempts to subordinate the regulated retail market to the wholesale market.

We trust that this decision is a one-time aberration that does not reflect a long-term change in the Commission's perception of its regulatory responsibilities. This decision, standing alone, is injurious enough to the interests of those whom we are obligated to protect. The Commission's statutory charge is to protect the retail customers of North Carolina public utilities from inadequate service and excessive rates. We are convinced that the majority's decision unnecessarily and inappropriately exposes CP&L's North Carolina retail ratepayers to serious risks and that the majority has failed to articulate any explanation for this unjustifiable decision. We vigorously dissent from the majority's failure to require CP&L to agree to the additional anti-preemption conditions proposed by the Public Staff as a prerequisite for allowing CP&L to provide wholesale power to NCEMPA at native load priority.

\s\ Jo Anne Sanford
Chair Jo Anne Sanford

\s\ Sam J. Ervin, IV
Commissioner Sam J. Ervin, IV

\s\ Lorinzo L. Joyner
Commissioner Lorinzo L. Joyner

DOCKET NO. E-2, SUB 822

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Carolina Power & Light Company's 20-Day Notice That It May Enter Into a Wholesale Sales Contract with Native Load Priority	)))	ORDER ON 20-DAY NOTICE

BY THE COMMISSION: On December 4, 2002, Carolina Power & Light Company (CP&L) filed a 20-Day Notice pursuant to Regulatory Condition 21 stating that it may enter into a wholesale contract for the sale of electricity at native load priority.[1] The proposed wholesale contract is with the North Carolina Electric Membership Corporation (NCEMC) for load located within CP&L's control area and served by CP&L pursuant to an existing contract. CP&L filed specific information regarding this proposed wholesale contract subject to a claim of confidentiality pursuant to G.S. 132-1.2. The issues in this docket are similar in significant respects to those recently decided by the Commission in Docket No. E-2, Sub 820, in which, after receiving the required 20-day notice, the Commission conditionally allowed CP&L to execute a wholesale contract with the North Carolina Eastern Municipal Power Agency (NCEMPA) providing native load priority.

Protests of the Public Staff, CUCA and CIGFUR

On December 23, 2002, both the Carolina Utility Customers Association, Inc. (CUCA), and the Carolina Industrial Group for Fair Utility Rates II (CIGFUR) filed petitions to intervene and objections to the proposed wholesale contract. Their petitions to intervene are allowed.

CUCA stated its concern that the proposed contract could burden retail ratepayers with higher fuel costs, higher RTP (real time pricing) rates for marginal energy purchases, and increased interruptions for interruptible customers. CUCA, therefore, requested the Commission to allow parties adequate time to investigate the impact on retail ratepayers to determine whether a hearing may be necessary and appropriate.

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[1] By Order entered in Docket No. E-2, Sub 760 on August 22, 2000, the Commission approved Regulatory Condition 21 for CP&L, which provides as follows:

> 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.

By Orders entered in various dockets on January 29, 2002, and September 11, 2002, the Commission adopted procedures to be followed by CP&L in conjunction with its regulatory condition filings. Among other things, these procedures provide that if the Public Staff or any other party files an objection to a proposed contract with native load priority, CP&L shall not proceed until the Commission issues an order. The to Public Staff was directed place the matter on a Commission Staff Conference agenda as soon as possible, but in no event later than two weeks after an objection is filed.

CIGFUR objected that CP&L's entering the proposed wholesale contract could have potential harmful impacts on retail ratepayers, including adverse effects upon reserve margins, increased retail rates, increased interruptions under interruptible rate schedules, increased RTP rates, and subsidization of wholesale customers by retail customers. CIGFUR noted that CP&L's current Annual Plan shows the need for new capacity throughout the planning horizon. This new capacity would almost certainly be natural gas-fired, and the need for the new capacity is driven, at least in part, by this proposed wholesale contract and could be avoided by not entering into the contract. CIGFUR noted that if this new capacity is unavailable and CP&L's demand forecast is accurate, reserve and capacity margins could fall to unacceptable levels. CIGFUR further asserts that the proposed sale would result in higher rates for CP&L's retail customers because new gas-fired generation has higher fuel costs than existing coal and nuclear plants and, in addition, retail customers could be required to bear the capacity costs in a future general rate case. CIGFUR, therefore, requested that a hearing be scheduled and that CP&L not be allowed to enter into the proposed wholesale contract until the outstanding issues have been resolved.

The Public Staff filed an Objection and Request for Extension of Deadline on December 27, 2002. Noting that the 20-day notice in this docket raises many of the same issues and concerns recently discussed in Sub 820 and that only a Notice of Decision had been issued in Sub 820 at that time, the Public Staff moved for an extension of time within which to place this docket on the Commission Staff Conference until a full order had been issued in Sub 820. CP&L and NCEMC filed a response opposing the motion on January 6, 2003. The motion was denied by Commission order of January 8, 2003.

CP&L Response

On December 27, 2002, CP&L filed a response to the objections of CUCA, CIGFUR, and the Public Staff. CP&L stated that the protests should be rejected because (1) CP&L has complied with the applicable regulatory condition, (2) CP&L has always planned and maintained its generation resource system in a manner that assures adequate and reliable electric service to both its retail and wholesale customers, (3) the load in question has been included in CP&L's resource plan for many years and is presently in CP&L's resource plan, (4) this sale will not harm any retail customer because all of the costs associated with serving this customer are allocated to this customer, and (5) the Commission has ordered that parties file a proposal to implement the principle that RTP customers shall not pay higher rates as a result of CP&L's entry into the wholesale contract at issue in Sub 820.

Commission Staff Conference

The Public Staff subsequently presented a confidential agenda item at the Commission Staff Conference of January 13, 2003. All parties stipulated at Staff Conference that Commissioners who were not present could read the transcript and participate in decision making.

In its agenda item the Public Staff reiterated the similarity between the facts in this case and those in Sub 820 and argued that, at a minimum, the six conditions imposed by the Commission in Sub 820 should also be imposed in this docket. The Public Staff further argued, however, that the risk of federal preemption is greater in this docket than in Sub 820 because the contract at issue in this docket is an explicit amendment to a Federal Energy Regulatory Commission (FERC) Rate Schedule. The Commission, therefore, should impose the two conditions proposed by the Public Staff in Sub 820 but not adopted by the Commission to protect CP&L's retail ratepayers from the risk of such preemption.

Conclusions of the Commission

All parties agree that the facts and issues presented in this docket are nearly identical to those recently addressed by the Commission in Sub 820. In Sub 820, the Commission allowed CP&L to enter into a proposed wholesale contract subject to six conditions, the first two of which reiterated commitments made by CP&L in earlier dockets. The remaining four conditions are refinements of the first two conditions for purposes of the specific wholesale contract presented in that docket.

The Commission has considered the facts of the present case, the arguments of the parties, and the additional conditions proposed in this docket. The Commission continues to believe that, in the present case, the identical conditions ordered in Sub 820 are adequate and appropriate to protect the Commission's authority and the interests of CP&L's retail ratepayers and that the other proposed conditions are either unnecessary or ill-advised. The Commission, therefore, finds good cause to reach the same decision in this docket as in Sub 820.

The Commission remains insistent that CP&L's wholesale activities not disadvantage its retail ratepayers in any way. The Commission's adoption of the "no disadvantage to retail" condition in Subs 733 and 820 was a policy decision by the Commission as to CP&L's responsibility to its retail customers vis-a-vis its wholesale operations. This policy decision was not limited to the those dockets; it is as important in the present docket as it was in Sub 733, and it remains the appropriate policy of the Commission in this and similar circumstances. The Commission views the making of pro-forma adjustments, such as mentioned in Sub 798 and imposed as Condition (2) in Sub 820, as a means of enforcing the "no disadvantage to retail" policy.

The Public Staff again expresses concern about the risk of federal preemption and urges the Commission to adopt the two additional conditions proposed but rejected in Sub 820. The Commission, however, continues to believe that Condition (3), which requires in broad terms that CP&L and its shareholders shall bear the risks of federal preemption and shall "take all such actions as may be reasonably necessary and appropriate to hold CP&L's North Carolina retail ratepayers harmless from rate increases, forgone opportunities for rate decreases, and other effects of any such preemption," effectively serves as an indemnity to retail customers and will adequately protect retail ratepayers even in the event of federal preemption in connection with this contract. Accordingly, the Commission believes that, in the present case, the additional conditions proposed by the Public Staff are unnecessary and inappropriate to adequately protect retail ratepayers.

Lastly, as in Sub 820, the Commission does not believe that an evidentiary hearing would be productive. The Commission believes that the better approach is to impose conditions now that are designed to assert the authority of the Commission to protect retail ratepayers as future events unfold.

In summary, the Commission concludes that CP&L should be allowed to enter into the proposed wholesale contract with NCEMC subject to the six conditions set forth below. CP&L's decision to go forward and to enter into the contract will be regarded as its agreement to these conditions. The contract to be signed by the parties should be subject to, and shall in no way be inconsistent with, the terms represented herein.

IT IS, THEREFORE, ORDERED that the Commission will allow CP&L to enter into the proposed wholesale contract described in the 20-Day Notice in this docket subject to the following conditions:

(1) CP&L shall ensure that its retail electric customers will not be disadvantaged in any manner, either from a quality of service or rate perspective, as a result of its participation in the wholesale power market.

(2) The Commission retains the right to assign, allocate, and make pro-forma adjustments to the revenues and costs associated with CP&L's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes.

(3) CP&L, Progress Energy, and any affiliates thereof shall bear the full risks of any preemptive effects of federal law as a result of CP&L's entry into this wholesale contract, including, but not limited to, agreement by CP&L, Progress Energy and their affiliates to take all such actions as may be reasonably necessary and appropriate to hold CP&L's North Carolina retail ratepayers harmless from rate increases, foregone opportunities for rate decreases, and other effects of any such preemption.

(4) Entry into this wholesale contract with its grant of native load priority without adequate notice and/or stranded cost recovery provisions constitutes acceptance by CP&L, Progress Energy, and any affiliates thereof of the risks that its investments in generating facilities and/or commitments to purchase capacity and energy to meet this contractual commitment and maintain an adequate reserve margin through 2016 may become uneconomic sunk costs that are not recoverable from its retail ratepayers. CP&L agrees that, in a future proceeding in which cost recovery is at issue, (1) it will not claim that it does not bear this risk and (2) the Commission retains full authority under Chapter 62 to disallow such costs as not used and useful or unreasonable and/or to allocate and/or assign costs away from retail customers if necessary to protect CP&L's retail customers from being disadvantaged, from being denied priority to and the benefits from CP&L's existing generation, or treated unreasonably for ratemaking purposes or to fulfill the intended purposes of Conditions (1) and (2) above.

(5) Real time pricing customers on CP&L's RTP Rate Schedule shall not pay higher rates as a result of CP&L's entry into this wholesale contract. The parties were ordered in Docket No. E-2, Sub 820 to meet to discuss how this principle shall be implemented and to file a proposal with the Commission. The Commission will proceed as appropriate upon receipt of the proposal. The Commission will hold such proceedings as necessary to implement this principle if the parties cannot agree upon a satisfactory proposal.

(6) The load served pursuant to this wholesale contract will not be treated as retail native load for purposes of Conditions 19 and 20 imposed in Docket No. E-2, Sub 760, because to do so might be inconsistent with, and might thwart, Conditions (1) through (5) above.

ISSUED BY ORDER OF THE COMMISSION.
This the 14th day of February, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

sw012803.01

Chairman Jo Anne Sanford and Commissioners Sam J. Ervin, IV and Lorinzo L. Joyner dissent.

DOCKET NO. E-2, SUB 822

CHAIR JO ANNE SANFORD, COMMISSIONER SAM J. ERVIN, IV, AND COMMISSIONER LORINZO L. JOYNER, DISSENTING: The present docket presents the same issues that were considered by the Commission in Docket No. E-2, Sub 820. We dissented in that docket and discussed our reasons at length in that dissent. We will not repeat our reasoning here. Suffice it to say that we hold fast to our views and adopt our earlier dissent for present purposes. We write now to address two matters unique to this docket.

First, the facts in this docket differ from those in Sub 820 in one significant way. The proposed wholesale contract in this docket is an amendment to an existing rate schedule already on file with FERC, whereas the proposed contract in Sub 820 was new and had not been filed with FERC at the time the Commission considered it. We believe that the risk of federal preemption is therefore greater as to this contract and that it is even more important to take every reasonable step to prevent preemption.

Second, we address the Public Staff's procedural position when it presented this docket at the Commission Staff Conference. At that time, the Commission had issued a Notice of Decision in Sub 820, but not a full order. In order to preserve the credibility and consistency of its position in this separate docket, the Public Staff stated, without argument, that it recommended the same conditions that it had supported in Sub 820. Other parties also took the same positions that they had taken in Sub 820, again, to preserve their positions. We feel that the Public Staff's position at the Commission Staff Conference reflects its proper role. Nothing is more fundamental to the statutory framework for the regulation of public utilities in North Carolina than the independence of the advocate for the interests of the millions of individuals and businesses who purchase service from those utilities. The General Assembly created the Public Staff in 1977 and charged it with representing the interests of the using and consuming public in all Commission proceedings. The General Assembly assigned numerous responsibilities to the Public Staff, including the duty to "make appropriate recommendations to the Commission" as to public utilities' rates and services. G.S. 62-15(d). To insure its independence, the General Assembly created the position of Executive Director to hire and supervise Public Staff personnel. The General Assembly specifically provided, "The public staff shall not be subject to the supervision, direction, or control of the Commission, the chairman, or members of the Commission." G.S. 62-15(b). All parties -- industry and customer advocates alike -- are allowed by statute to seek review and reconsideration of Commission decisions as part of a fundamental, lawful system of checks and balances. This is as it should be.

\s\ Jo Anne Sanford
Chair Jo Anne Sanford

\s\ Sam J Ervin
Commissioner Sam J. Ervin, IV

\s\ Lorinzo L Joyner
Commissioner Lorinzo L. Joyner

DOCKET NO. E-2, SUB 833

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Carolina Power & Light	)	
Company d/b/a Progress Energy Carolinas,	)	ORDER APPROVING
Inc., for Authority to Adjust Its Electric Rates	)	FUEL CHARGE
and Charges Pursuant to G.S. 62-133.2 and	)	ADJUSTMENT
NCUC Rule R8-55	)	

HEARD: Tuesday, August 5, 2003, at 10:00 a.m., and Wednesday, August 13, 2003, at 9:00 a.m., in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Commissioners J. Richard Conder and Michael S. Wilkins

APPEARANCES:

For Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.:

Len S. Anthony, Manager-Regulatory Affairs, and Kendal Bowman, Associate General Counsel, Progress Energy Service Company, Post Office Box 1551, Raleigh, North Carolina 27602-1551

For the Carolina Industrial Group for Fair Utility Rates II:

Ralph McDonald, Bailey & Dixon, Post Office Box 1351, Raleigh, North Carolina 27602-1351

For the Carolina Utility Customers Association, Inc.:

James P. West, West Law Offices, PC, Suite 1735, Two Hanover Square, 434 Fayetteville Street Mall, Raleigh, North Carolina 27601

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 Attorney General:

Len Green, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629

BY THE COMMISSION: Pursuant to G.S. 62-133.2 and Commission Rule R8-55(e), Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. (PEC, 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 June 6, 2003, PEC filed its Application along with the testimony and exhibits of Company witness Bruce P. Barkley. In its Application, the Company requested an increment of 0.202 cents/kWh (0.209 cents/kWh including gross receipts tax) to the base fuel factor of 1.276 cents/kWh approved in PEC's last general rate case, Docket No. E-2, Sub 537, or a recommended fuel factor of 1.478 cents/kWh. The Company also requested an increment of 0.156 cents/kWh (0.161 cents/kWh including gross receipts tax) for the Experience Modification Factor (EMF) to collect approximately $54.5 million of underrecovered fuel expense incurred during the test period and the amounts deferred in Docket No. E-2, Subs 765 and 784, eligible for recovery in this fuel case. The Company proposed that the EMF rider be in effect for a fixed 12-month period.

On June 13, 2003, the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II) filed a petition to intervene. The Commission granted CIGFUR II's petition on June 17, 2003.

On June 17, 2003, the Commission issued its Order Scheduling Hearing, Requiring Filing of Testimony and Requiring Public Notice. The Commission scheduled the hearing for August 5, 2003.

On June 24, 2003, the Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene in the proceeding. The Commission granted CUCA's petition on June 27, 2003.

On July 10, 2003, PEC filed a revised Application along with additional direct testimony of Mr. Barkley. In the revised Application, PEC changed the requested increment to the base factor established in Docket No. E-2, Sub 537, to 0.123 cents/kWh (0.127 cents/kWh including gross receipts tax) for a new requested fuel factor of 1.399 cents/kWh.

On July 18, 2003, the Attorney General filed a notice of intervention pursuant to G.S. 62-20. The intervention of the Public Staff is also noted pursuant to Commission Rule R1-19(e).

On July 21, 2003, CUCA filed the testimony of Kevin W. O'Donnell.

On July 22, 2003, the Public Staff filed the affidavits of John R. Hinton and Thomas S. Lam and the testimony and exhibits of Darlene P. Peedin in accordance with Commission Rule R8-55(h), which requires the filing of Public Staff and other intervenor testimony at least 15 days prior to the hearing date.

On July 23, 2003, PEC filed a motion in which it sought the Commission's authorization to file rebuttal testimony. The Commission allowed PEC's request on July 24, 2003.

On July 29, 2003, PEC filed Mr. Barkley's rebuttal testimony.

On July 30, 2003, the Commission entered an Order Rescheduling Hearing in which the Commission rescheduled the evidentiary hearing in this proceeding for August 13, 2003. However, this Order provided that a hearing would be held as scheduled on August 5, 2003, for the sole purpose of receiving the testimony of public witnesses.

On August 5, 2003, the Commission held the public hearing as scheduled. No public witnessed appeared.

On August 7, 2003, the Public Staff filed the supplemental direct testimony of Ms. Peedin.

On August 11, 2003, PEC filed affidavits of publication showing that public notice had been provided as required by Commission Rule R8-55(f) and in accordance with the Commission's procedural order.

The docket came on for hearing as ordered on August 13, 2003. At the beginning of the hearing, Public Staff counsel requested that the Commission take judicial notice of certain documents, and without objection, the Commission ruled that the request to take judicial notice of the documents was allowed. During the hearing, PEC presented witness Bruce P. Barkley for cross-examination. CUCA and the Public Staff cross-examined Mr. Barkley. CUCA presented Kevin O'Donnell for cross-examination. PEC cross-examined Mr. O'Donnell. The Public Staff presented John R. Hinton, Thomas S. Lam, and Darlene P. Peedin as a panel for cross-examination. CUCA and PEC cross-examined the panel. All affidavits, testimony and exhibits were entered into the record. At the close of the hearing, the Commission requested that proposed orders or briefs be filed by September 8, 2003.

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 now makes the following:

FINDINGS OF FACT

1. Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc., 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. PEC is engaged in the business of generating, transmitting, and selling electric power to the public in North Carolina. PEC 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 March 31, 2003.

3. PEC's fuel procurement and power purchasing practices were reasonable and prudent during the test period.

4. The new maximum dependable capacity (MDC) value for Brunswick Unit No. 1 is 872 MWs and the new MDC for Robinson Unit No. 2 is 710 MWs.

5. The performance of PEC's nuclear units during the test period was reasonable and prudent.

6. The proper fuel factor for this proceeding is 1.399 cents/kWh.

7. PEC should be allowed to recover $5,000,000 of the $55.46 million prior fuel expense underrecovery deferred from Docket No. E-2, Sub 784, as adjusted in Docket No. E-2, Sub 806, and eligible for recovery in this case per the Stipulation agreed to by the Parties and approved by the Commission.

8. PEC should collect $13,220,355 of prior fuel expense underrecovery in this case, which is one-third of the amount deferred from Docket No. E-2, Sub 765, and is the last installment eligible for recovery.

9. It is appropriate to remove from PEC's test year fuel underrecovery calculation in this proceeding cogeneration expenses in the amount of $3,789,327.

10. It is appropriate to remove from PEC's test year fuel underrecovery calculation in this proceeding purchased power expenses related to Cogentrix Eastern Carolina in the amount of $362,374.

11. It is appropriate to reduce the fuel underrecovery for purposes of this proceeding by $954,363 to reflect the impact of using a higher freight rate for the off-system sales fuel credit.

12. It is appropriate to utilize a ratio of 61% to be applied to purchases from power marketers and to purchases from other sellers that do not provide the Company with actual fuel costs.

13. The test period North Carolina retail fuel expense underrecovery for purposes of this proceeding is $31,207,675, which includes an adjustment for certain gas transportation costs associated with the Sandhills pipeline project. The total amount of fuel expense underrecovery which PEC should be allowed to recover for purposes of this proceeding is $49,428,030.

14. The appropriate EMF increment to use in this proceeding is 0.141 cents/kWh (0.146 cents/kWh with 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 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 an historical 12-month period. In Commission Rule R8-55(b), the Commission has prescribed the twelve months ending March 31 as the test period for PEC. All pre-filed exhibits and direct testimony submitted by the Company in support of its Application utilized the twelve months ended March 31, 2003, 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, 2003.

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 Practices 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 fuel procurement were filed in its Fuel Procurement Practices Report, which was updated in March 2000. In addition, the Company files monthly reports of its fuel costs pursuant to Commission Rule R8-52(a). These reports were filed in Docket No. E-2, Sub 800, for calendar year 2002, and in Docket No. E-2, Sub 827, for calendar year 2003. No party elicited any evidence contesting the Company's fuel procurement and power purchasing practices.

The Commission finds and concludes that PEC's fuel procurement procedures and power purchasing practices 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 direct testimony and exhibits of PEC witness Barkley.

The Company proposed increasing the MDC rating for Brunswick Unit No. 1 from 820 MWs to 872 MWs and the rating for Robinson Unit No. 2 from 683 MWs to 710 MWs. The MDC rating change was effective January 1, 2003. No party elicited any evidence challenging this change; therefore, the Commission accepts the MDC changes as proposed by the Company.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

The evidence supporting this finding can be found in the Company's Application, the direct testimony and exhibits of PEC witness Barkley, and the Affidavit of Public Staff witness Lam.

The Company files with this Commission monthly Fuel Reports pursuant to Commission Rule R8-52 and Base Load Power Plant Performance Reports pursuant to Commission Rule R8-53. These reports were filed in Docket No. E-2, Sub 800, for calendar year 2002, and Docket No. E-2, Sub 827, for calendar year 2003. Witness Barkley 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 97.6% exceeding the latest NERC five-year average of 80.4%. The Company's Boiling Water Reactors (BWRs) at Brunswick Unit Nos. 1 and 2 experienced capacity factors of 101.9% and 92.6%, respectively. The Pressurized Water Reactor (PWRs) at Robinson Unit No. 2 and Harris Unit No. 1 experienced capacity factors of 94.1% and 101.0%, respectively. Brunswick Unit No. 2 and Robinson Unit No. 2 each experienced refueling outages that impacted their test period performance. Public Staff witness Lam verified the Company's test year average capacity factor calculation. No other party elicited evidence concerning 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. 6

The evidence supporting this finding can be found in the testimony and exhibits of Company witness Barkley and the affidavit of Public Staff witness Lam.

In Barkley Exhibit No. 3, the Company calculated a fuel factor of 1.548 cents/kWh based on normalized capacity factors for its nuclear units in accordance with Commission Rule R8-55(c)(1), by using the most recent North American Electric Reliability Council (NERC) Equipment Availability Report five-year (1998-2002) weighted average for BWRs and PWRs. The workpapers included in Barkley Exhibit No. 7 show that kWh normalization for customer growth and weather at both meter and generation levels was performed in a manner consistent with 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 most recent NERC five-year capacity factors for Brunswick Unit Nos. 1 and 2, both BWRs, were normalized at 77.92%, and the capacity factors of the Robinson and Harris Units, both PWRs, were normalized at 82.93%. The Company's NERC normalized calculations resulted in a system nuclear capacity factor of 80.4% using this data.

Public Staff witness Hinton testified on the weather data used to compute the normal weather adjustments. PEC utilized weather data published by the National Oceanic and Atmospheric Administration (NOAA) for the 30 year period 1961-1990 because it did not have the 1971-2000 data available. Witness Hinton advocated the use of more current data and recommended use of the 1971-2000 NOAA data in future fuel cases. PEC agreed to utilize the more recent data in future cases.

Witness Barkley explained in his pre-filed testimony that he could not recommend the 1.548 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. He instead recommended that the Commission adopt a 1.478 cents/kWh base fuel factor based on a projected nuclear capacity factor of 97.4% and expected fuel costs for the 12 months ended September 30, 2004. On July 10, 2003, the Company filed additional direct testimony, wherein Company witness Barkley recommended adoption of a base fuel factor of 1.399 cents/kWh, based on a projected nuclear capacity factor of 97.4% and expected cost data during the time period October 1, 2003, through September 30, 2004. This calculation is shown on Revised Barkley Exhibit No. 3A, which was included with his revised testimony. The computation of the 1.399 cents/kWh fuel factor is summarized below:

Generation Type	MWhs	Fuel Cost
Nuclear	28,169,705	$127,492,400
Purchase – Cogen	1,494,201	34,568,000
Purchase – AEP	1,712,200	18,423,300
Purchase – Broad River	241,999	15,202,000
Purchase – SEPA	181,699	0
Purchase – Other	769,117	12,792,800
Hydro	742,032	0
Coal	27,174,021	523,829,000
IC & CC	1,849,045	106,763,000
Sales	(1,830,500)	(50,512,500)
Total Adjusted	60,503,519	$788,558,000
Less NCEMPA:		
PA Nuclear		$ 17,271,300
PA Buy-Back		(2,020,100)
PA Coal		20,132,700
System Projected Fuel Expense		$753,174,100
Projected MWh meter sales		53,851,060
Projected Fuel Factor (cents/kWh)		1.399

After review of the Company's revised fuel factor proposal, Public Staff witness Lam recommended that the Commission approve PEC's requested fuel factor of 1.399 cents/kWh. Mr. Lam stated in his Affidavit that a nuclear capacity factor of 97.4% was more representative of the expected operation of the Company's nuclear units during the time period when the fuel factor will be in effect than the most recent NERC five-year average of 80.4% or the actual test year average capacity factor. No other party elicited any evidence to challenge the Company's request in this case.

Based on the evidence of record, the Commission finds and concludes that the proper fuel factor to adopt in this case is 1.399 cents/kWh based on a nuclear capacity factor of 97.4% as proposed by the Company and agreed to by the Public Staff. This factor is an increase of 0.123 cents/kWh (0.127 cents with gross receipts tax) over the base fuel factor of 1.276 cents/kWh approved in PEC's last general rate case, Docket No. E-2, Sub 537.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 7-14

The evidence supporting these findings can be found in the testimony and exhibits of Company witness Barkley, CUCA witness O'Donnell, Public Staff witness Peedin, and the following documents of which the Commission took judicial notice: PEC's March 1987 Monthly Fuel Report, filed as Nevil Exhibit I in Docket No. E-2, Sub 533; PEC's Annual Report concerning the Status of Cogeneration and Small Power Production Activities, filed in Docket No. E-100, Sub 41B, on August 30, 2002; the Commission's Order in Docket No. E-2, Sub 658, including the Joint Stipulation of the Parties; and the Commission's Order in Docket No. E-2, Sub 537.

G.S. 62-133.2(d) provides:

> The Commission shall incorporate in its fuel cost determination under this subsection the experienced over-recovery or underrecovery 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 . . .

In the prefiled direct testimony and exhibits submitted by Company witness Barkley, he requested recovery of $54,534,094 of underrecovered fuel expense consisting of three components. One component is the underrecovery of $36,313,739 of test period fuel costs resulting from using the fuel factors approved by the Commission in Docket No. E-2, Subs 784 and 806. The second component is $13,220,355 of underrecovery, which is the final one-third installment of the underrecovered amount that was deferred from PEC's 2000 fuel case, Docket No. E-2, Sub 765. The third component is $5,000,000 of the $55.46 million of underrecovered fuel costs deferred in Docket No. E-2, Sub 784, and as adjusted in Docket No. E-2, Sub 806. The Company requested an EMF increment of 0.156 cents/kWh (0.161 cents/kWh with gross receipts tax) to recover the total $54,534,094 underrecovered amount. The EMF was determined by dividing the underrecovery by 35,036,680,393 kWh of adjusted North Carolina retail sales, as set forth on Barkley Exhibit No. 4.

During the test year, the Company determined that it had not expensed all of the appropriate gas transportation costs associated with the Sandhills pipeline and made a system true-up adjustment to fuel expense of $17.2 million in August 2002. Because of the magnitude of this adjustment, the Public Staff proposed, and the Company agreed, to recover one-half of the adjustment in this proceeding and the remaining portion in the next fuel case. The test period underrecovery for the North Carolina retail customers was therefore reduced by $5,629,012 and is incorporated in the $36,313,739 underrecovery set forth in the discussion above.

As stated in her testimony, Public Staff witness Peedin reviewed the Company's requested EMF and the fuel and purchased power expense records for the test period. Witness Peedin also reviewed calculations presented in the Company's filing as well as the Company's monthly fuel reports. As a result, witness Peedin proposed several adjustments to the amounts requested by the Company. After taking into account all of witness Peedin's adjustments, the Public Staff recommended that the total underrecovered fuel costs be set at $49,428,030. This resulted in an EMF increment of 0.141 cents/kWh (0.146 cents/kWh with gross receipts tax) when divided by 35,036,680,393 kWh of adjusted North Carolina retail kWh sales per Barkley Exhibit No. 4.

In witness Peedin's direct testimony, she recommended that the Commission remove $3,789,327 in fuel costs related to cogeneration plants E, F and G, as shown in Barkley Exhibit No. 7, from fuel expenses. Witness Peedin stated that the total costs of purchases (energy and capacity) from cogeneration plants E, F, and G were included in non-fuel base rates in PEC's most recent general rate case, Docket No. E-2, Sub 537. Cogeneration plants E, F, and G were identified in Company witness Barkley's rebuttal testimony as the Elizabethtown, Lumberton, and Kenansville facilities.

Witness Peedin stated that a similar issue arose in a prior fuel case, Docket No. E-2, Sub 658, regarding the proper level of fuel cost to include for Stone Container, a cogenerator. She stated that the non-fuel portion of the rates set in the Sub 537 general rate case provided for the recovery of an annual payment to Stone, including a portion of the payment that represented actual burned fuel costs. Therefore, at the time of the Sub 658 fuel case, there was already a level of purchases being recovered in non-fuel rates based on capacity available from the cogenerator at the time of the Sub 537 general rate case. Due to a change in the contract with the cogenerator, an increased amount of capacity was available to PEC. As a result, PEC proposed to include fuel costs associated with the total capacity available to it from the cogenerator in fuel rates. The Public Staff concluded in that case that it would not be appropriate to include in fuel rates the amount that was already being recovered in the non-fuel portion of base rates set in the last general rate case. PEC eventually agreed with the Public Staff's conclusion and the two parties filed a joint stipulation to commit to working together to determine the appropriate methodology to calculate the appropriate amount to be included in fuel rates. The methodology used since that case effectively excludes from fuel costs any expenses associated with the level of Stone Container capacity included in the Sub 537 general rate case.

As with the case cited above, witness Peedin testified that the Public Staff still concludes that it is not appropriate to include in fuel rates amounts for cogeneration facilities that are already being recovered in the non-fuel portion of base rates. Witness Peedin indicated that the Public Staff considers it reasonable to remove the North Carolina retail portion of the fuel costs associated with cogenerators Lumberton, Elizabethtown, and Kenansville, because there is already a level of capacity and energy costs included in non-fuel base rates in the Company's last general rate case related to the total capacity of these facilities. Witness Peedin testified that it would be inappropriate to also provide recovery of these costs in fuel rates.

With regard to this issue, CUCA presented testimony by witness O'Donnell that essentially agreed with the adjustment made by the Public Staff, stating that the costs of cogenerators Elizabethtown, Lumberton, and Kenansville are being recovered in non-fuel base rates and that it would be inappropriate to also include these costs in the fuel clause proceeding.

Company witness Barkley presented rebuttal testimony stating that he understood the theory upon which the Public Staff and CUCA relied in taking their positions of disallowing these costs from the fuel clause was that these costs are included in PEC's base rates. Witness Barkley testified that the initial 15-year agreements between the cogenerators and PEC had expired. Upon expiration of the agreements, the cogenerators abandoned their status as Qualifying Facilities (QFs) under PURPA and chose to sell their output into the wholesale market. These facilities were then resold and their owners decided to return to QF status and eventually signed new contracts with PEC. Witness Barkley testified that because the original contracts with the QFs expired, PEC signed new contracts with the same QFs and that they represent new cogenerators whose fuel costs should be recovered through the fuel clause. In his rebuttal testimony, witness Barkley presented an analogy that assumed that the Company purchased all of its cogeneration needs (capacity and energy) from a certain cogenerator and that after a few years the cogenerator ceased doing business and closed. Later, the Company negotiated a purchased power agreement with another cogenerator that would sell the same amount of energy and capacity to the Company as the previous cogenerator. Witness Barkley testified that no one would argue that the fuel cost of the second cogenerator should not be recovered through the fuel clause.

Under cross-examination, witness Barkley testified that "all the payments to the owner of these three [cogeneration] facilities were included in base rates even though the [specific] amount of fuel in those payments is unknown... Everything was included in the base rates; the entire avoided cost payments." (Transcript, Vol. 1, pp. 109-110). Witness Barkley also testified under cross-examination that during the test period ended March 31, 1987, there were approximately $60 to $70 million of cogeneration costs, and now during the test year in this proceeding, as shown on Barkley Exhibit No. 6, the Company is facing over $140 million of annual cogeneration costs. (Transcript, Vol. 1, pp. 110-111)

Witness Barkley agreed under cross-examination that the difference between the Company and the Public Staff on this issue is the Public Staff's position that these fuel costs are already included in non-fuel base rates from the last general rate case. Counsel for the Public Staff stated that the Public Staff was not taking issue with the prudence of the costs. (Transcript, Vol. 1, p. 128)

Based on the evidence, the Commission finds and concludes that it is appropriate to remove cogeneration expenses in the amount of $3,789,327 for Elizabethtown, Lumberton, and Kenansville from PEC's test year fuel expense underrecovery calculation in this proceeding for the following reasons. First, the Commission concludes that at the time of the last rate case, Docket No. E-2, Sub 537, the total costs of purchases (energy and capacity) from Lumberton, Elizabethtown, and Kenansville were included in non-fuel base rates. Witness Peedin's testimony is unrefuted on this point. Furthermore, witness Barkley testified under cross-examination that all of the avoided cost payments associated with these facilities were included in base rates, although the exact fuel dollars were unknown at the time. Public Staff Barkley Cross-examination Exhibit I is also very persuasive evidence in this regard. This cross-examination exhibit was identified by witness Barkley as PEC's response to a Public Staff data request. The response to certain inquiries therein indicates that all three facilities were included in non-fuel base rates during PEC's last general rate case, Docket No. E-2, Sub 537.

Second, the Commission is of the opinion that the circumstances of this issue are similar to those presented in Docket No. E-2, Sub 658, regarding cogenerator Stone Container. In that Order, with regard to Stone Container, the Commission stated as follows:

> Since recovery of all of CP&L's Stone Container related cogeneration expenses related to the 29 MW of capacity, including compensation for actual burned fuel costs, was provided for in the nonfuel portion of base rates set in the Sub 537 general rate case, it would not be appropriate to also provide recovery in fuel rates of the actual burned fuel costs related to the 29 MW of capacity by including said costs in subsequent fuel case underrecovery calculations.

Furthermore, in the Sub 658 Order, the Commission approved the result embodied in a Joint Stipulation that was signed by the Public Staff, CP&L, CUCA, CIGFUR, and the Attorney General. In this Stipulation, it is noted:

> The Public Staff also questioned the inclusion in the calculation of CP&L's fuel cost underrecovery of certain fuel costs associated with the Company's power purchases from Stone Container Corporation's cogeneration facility. The Public Staff asserted that the Company was inappropriately attempting to recover certain of these purchased power costs through the fuel factor. The Public Staff calculated this amount to be approximately $2.5 million for the test period. The Company agrees that certain of these costs were inappropriately included as test year fuel costs, but believes that the dollar amount in question is approximately $2.1 million.

Thus, even though there was a relatively minor difference in the dollar amounts set forth by the Company and the Public Staff in the Sub 658 Joint Stipulation, it strongly appears that at that time, the Company agreed in principle that cogeneration costs included in the non-fuel portion of base rates should not be included in subsequent fuel adjustment case underrecovery calculations and that the Commission's Order adopted that position as well.

Witness Barkley asserted in his rebuttal testimony that PEC is treating Stone Container differently than the Lumberton, Elizabethtown, and Kenansville cogeneration facilities because PEC is still purchasing power from Stone Container under the original purchased power agreement that preceded the last general rate case. However, the Commission does not believe that the fact that the cogeneration facilities at issue in this case have changed ownership and/or entered into new contracts with PEC distinguishes them from the Commission's prior decision with respect to the Stone Container costs, or is otherwise determinative of whether their fuel costs should be included in the calculation of PEC's fuel underrecovery. The Commission instead considers the fact that the fuel costs at issue in this proceeding are associated with the same facilities that PEC's applicable purchased power costs were associated with in the last general rate case, and that those purchased power costs were included in their entirety in non-fuel base rates, to be the more important factors in determining the appropriate treatment of the fuel costs of such purchases in this proceeding. The owners of the facilities may change, and the contracts under which PEC pays for power from the facilities may have changed, but the underlying essential factors – that the facilities themselves are the same facilities, and that PEC is still purchasing power from them – have not changed.

Third, it appears from the documents filed in this case and from those that the Commission has been requested to judicially notice that the MW capacities of the plants have not materially changed and that the Company has actually purchased less energy from the facilities in the test year in this proceeding than was purchased from them in the test year used in the Sub 37 general rate case. The capacities of the Lumberton, Elizabethtown, and Kenansville facilities per PEC's March 1987 fuel report were 33.335 MW, 31.920 MW, and 32.152 MW, respectively. According to PEC's filing of August 30, 2002, in Docket No. E-100, Sub 41B, the current contract capacities are 32 MW, 32 MW, and 32.4 MW, respectively. More importantly, the MWh purchased from the Lumberton, Elizabethtown, and Kenansville facilities for the twelve months ended March 1987 per the March 1987 fuel report, were 230,167 MWh, 254,195 MWh, and 242,670 MWh, respectively. The MWh purchased for the twelve months ended March 2003, per PEC's March 2003 fuel report, were 110,337 MWh, 88,667 MWh, and 31,415 MWh, respectively. The Commission therefore concludes that there has been no significant increase in the capacity and a decrease in the amount of energy purchased by PEC from these facilities as compared to the level incorporated into the Sub 537 general rate case. All of the costs paid for energy from the three facilities should continue to be considered as being recovered in the non-fuel base rates.

Finally, the Commission concludes that it has the authority and discretion to exclude the fuel costs of these facilities from fuel expense even if prudently incurred. G.S. 62-133(d) states in part that, "in reaching its decision, the Commission shall consider all evidence required under subsection (c) of this section as well as any and all other competent evidence that may assist the Commission in reaching its decision . . . " Included in the information that the Commission may require the utility to submit pursuant to subsection (c) and consider in reaching its decision are the "[s]ources and fuel cost component of purchased power used." Furthermore, Commission Rule R8-55(c)(2) states in part that "The EMF rider will reflect the difference between reasonable and prudently incurred fuel cost and the fuel related revenues that were actually realized during the test period under the fuel cost components of rates then in effect." (Emphasis added) The Commission concludes that the language of the statute and Commission Rule provide the Commission with the authority and discretion to determine that it is not reasonable to include the fuel costs for cogeneration facilities in fuel rates when the total costs of purchases from such facilities have already been included in non-fuel base rates in the utility's most recent general rate case and that CP&L has not met its burden of proving that the amounts in question represent underrecovered fuel costs.

It is undisputed that the total amounts paid by PEC for power from the Lumberton, Elizabethtown, and Kenansville facilities were included in the non-fuel base rates set in the Sub 537 general rate case. Thus, all amounts paid by PEC to reimburse these cogenerators for their actual fuel costs were included in non-fuel base rates. Therefore, it cannot be disputed that a portion of the fuel cost of purchased power was set for recovery through the non-fuel component of the rates approved by the Commission in Sub 537. It would be eminently unfair to PEC's ratepayers for the Commission to ignore its actions in PEC's general rate case by including 100% of PEC's fuel cost of purchased power in the fuel component of rates, as if its actions in Sub 537 had never taken place. The Commission concludes that the EMF set in this fuel proceeding should reflect the Commission's decision in Sub 537, and that the most appropriate way to do so is to continue to presume, as it has for many years, that the ongoing actual fuel costs of the Kenansville, Elizabethtown, and Lumberton facilities are being recovered in PEC's non-fuel base rates.

The Commission is not persuaded by witness Barkley's hypothetical analogy regarding the recoverability of fuel costs if PEC ceased purchasing power from one cogenerator and began purchasing power from a new cogenerator. The Commission is aware that contracts expire and the Company might negotiate new contracts with either an existing or a new cogenerator. While it might prove true that the Company could include prudently incurred fuel costs from a new facility in its fuel expenses in this hypothetical scenario, the fact of the situation in this case is that the energy is being purchased from the same physical facilities as in the last general rate case, and the Commission must determine the reasonable treatment of fuel costs in light of that fact.

With regard to the testimony by witness Barkley that PEC's cogeneration costs have increased since the last general rate case, the Commission cannot base its determination of reasonable test year fuel costs on whether or not the Company's total cogeneration costs have generally increased or decreased over time. That is a general rate case issue. The Commission must instead base its determination solely on evidence regarding reasonable fuel expenses prudently incurred. The question in this case is whether it is reasonable to include costs related to the Lumberton, Elizabethtown, and Kenansville facilities in fuel expenses for purposes of this proceeding when the total costs associated with these facilities were included in non-fuel base rates in the Company's most recent general rate case and when the record does not establish that those costs were underrecovered. (Commission review of the Company's filing in this case does reveal that approximately $30 million of cogeneration fuel cost related to Plants A, B, C and D, detailed on Barkley Exhibit No. 7, page 83 of 87, have been included by the Company in its fuel underrecovery calculation and are not being disputed by the Public Staff, presumably because the cost associated with the facilities were not included in non-fuel base rates in the Company's last general rate case. The Commission also notes that PEC's North Carolina retail operating revenues, excluding off-system sales revenues, have grown from approximately $1.6 billion per the Commission's Order in Docket No. E-2, Sub 537, to approximately $2.4 billion for calendar year 2002 per PEC's ES-1 filing with the Commission, an increase of approximately $800 million.)

During the Public Staff's review of purchased power expenses in this proceeding, it determined that PEC purchased power from Cogentrix Eastern Carolina. As stated in

Ms. Peedin's prefiled testimony, the Public Staff inquired of the Company regarding a description of the seller. The Company responded that Cogentrix Eastern Carolina is a cogeneration facility that became commercial in April 1986. Mr. Barkley's rebuttal testimony identified this cogenerator as the Kenansville facility. The total costs of purchases (capacity and energy) from the Kenansville facility were included in non-fuel base rates in the Company's last general rate case. Witness Peedin testified that the Public Staff believes that it is inappropriate to include these costs in fuel rates in this case since the costs are already being recovered. As a result, witness Peedin made an adjustment to reduce the test year underrecovery by $362,374.

Witness Barkley's rebuttal testimony indicated that PEC believed these purchases were market purchases like purchases from other wholesale market participants and the fuel cost should be included in the fuel clause.

Based on the evidence presented by the witnesses on this issue, the Commission concludes that the recommendation of the Public Staff is reasonable because the total costs of purchases from this facility were included in non-fuel base rates in the Company's last general rate case as discussed above. Therefore, the Commission finds and concludes that the expenses included in fuel costs for Cogentrix Eastern Carolina should be reduced by $362,374 as recommended by the Public Staff.

As mentioned above, CUCA witness O'Donnell testimony agreed with the Public Staff's position on the fuel costs associated with the three cogeneration plants. However, witness O'Donnell recommended two additional adjustments to PEC's fuel costs. First, witness O'Donnell claimed that coal freight detention charges were imprudently incurred and were not the type of costs recoverable through the fuel adjustment mechanism. Second, witness O'Donnell also questioned the accuracy of the fuel cost associated with Southport, another cogeneration facility.

CUCA witness O'Donnell's request for denial of recovery of detention charges (all parties agreed that detention and demurrage charges would be collectively called detention charges) was challenged by both the Company and Public Staff. Witness O'Donnell identified charges totaling $80,725 on a system basis that were incurred due to delays experienced by PEC unloading coal trains at PEC's Roxboro and Mayo plants. Witness O'Donnell claimed the charges were primarily the result of inadequate staffing at those locations and these amounts were labor costs that should not be recoverable through the fuel adjustment mechanism, even if those costs were prudently incurred.

PEC witness Barkley testified that the recovery of detention charges via the fuel adjustment mechanism is proper and consistent with the accounting rules established by the Federal Energy Regulatory Commission ("FERC") for electric utilities and followed by this Commission pursuant to Commission Rule R8-27. According to his testimony, FERC Account 151 specifies that freight as well as detention charges are considered part of the delivered cost of fuel. Witness Barkley further explained that the Company, in negotiating rail contracts, agrees to the detention charge provisions in return for lower freight rates. He then testified that the incurrence of detention charges is not a sign of imprudent operation. Rather, they are expected. Witness Barkley pointed out numerous factors beyond the Company's control that he believed can result in detention charges. These factors included new safety procedures, an increase in number of cars to unload, equipment failures and weather-related obstacles. Witness Barkley rebutted allegations of understaffing by pointing out that additional staff does not necessarily avoid detention charges given equipment and track limitations. Witness Barkley further testified that he personally observed the unloading operation of 25 cars at the Roxboro plant and discussed unloading procedures with plant personnel. He explained that based upon his review of all the relevant data and his firsthand observation of the coal unloading process at the Roxboro plant, he found the incurrence of the detention charges in question to be prudent. When asked about the rate impact of an $80,725 system adjustment, or approximately $55,000 North Carolina retail, witness Barkley explained such an adjustment would not change the requested EMF factor in this case.

Public Staff witness Lam testified that he had investigated the detention charges in question and believed they were prudently incurred. He further testified that he had personally observed unloading operations at the Roxboro plant and more recently at the Mayo plant location. Mr. Lam testified that the detention charges incurred by PEC were prudently incurred and were not caused by inadequate staffing.

The Commission is not persuaded by witness O'Donnell's arguments that detention charges are not fuel costs and should be excluded from the case. To the contrary, detention charges are as much a fuel cost as is freight. Clearly the FERC system of accounts and the Commission's Rules provide that detention costs are properly included in fuel costs. Regarding the allegation of understaffing, unlike Witnesses Barkley and Lam, witness O'Donnell admitted that he had not visited either the Mayo or Roxboro plants to observe their coal unloading processes, nor had he discussed this issue with any personnel at either plant. Rather, witness O'Donnell's position was based upon PEC's responses to data requests. In addition, when asked by the Commission whether his position was that PEC should attempt to minimize the overall costs of unloading coal by balancing labor costs against detention charges or whether PEC should just minimize fuel costs, he testified that, given that G.S. 62-133.6 prohibits PEC from raising its rates before 2008, his position was based upon only minimizing fuel costs because the fuel factor is the only rate PEC can raise in the near term. The Commission must reject such a narrow position. A prudent utility strives to minimize its total cost of service and the Commission finds no credible evidence that PEC has not done that in this case. Instead, the record reflects that the understaffing of which the CUCA complains is the result of prudent utility cost-minimization practices. Finally, the amount of detention charges at issue in this proceeding is de minimus, since making the adjustment proposed by witness O'Donnell would not alter the EMF in this proceeding. For these reasons, the Commission finds that the de minimus amount of detention charges are an allowable part of fuel cost and were prudently incurred.

CUCA witness O'Donnell also questioned the accuracy and reliability of the fuel cost reported by the Southport cogeneration facility to PEC. To support his assertions, witness O'Donnell compared the ratio of actual burned fuel cost to PEC's energy payments to Southport and concluded that the ratio was out of line. Company witness Barkley testified that there is no relationship between the payments PEC must make to a cogeneration facility, which are based on a utility's avoided costs, and the amount of fuel cost incurred by a cogenerator in the production of electricity. One is based on PEC's average system marginal energy cost, and the other is based on the cogenerator's actual fuel costs. Furthermore, witness Barkley explained that PEC is not responsible for procuring fuel for Southport and has not observed anything unusual in its fuel reporting which would cause PEC to question the validity of its reported burned fuel cost.

The Commission finds that there is no reasonable basis to disallow the fuel cost associated with the Southport facility. The actual fuel cost incurred by the Southport facility is not related in any manner to the energy cost paid to Southport by PEC for cogeneration deliveries. Ratios developed on the basis of such analysis are an "apples and oranges" comparison as mentioned by Company witness Barkley. Company witness Barkley testified that the average fuel cost values relied upon by witness O'Donnell are an estimate based upon assumed heat rate values. Mr. O'Donnell assumed that the profitability of a cogenerator is based solely on energy payments when capacity payments accounted for two-thirds of the total cogeneration payments to this customer during the test period. Witness Barkley reviewed the cost per ton as reported by Southport in their letters and did not see any cost fluctuations that caused any concerns. Therefore, the Commission concludes the fuel costs as reported by the Southport cogeneration facility are reasonable, prudently incurred, and recoverable in this proceeding.

In Public Staff witness Peedin's direct testimony filed on July 22, 2003, and in her supplemental testimony filed on August 7, 2003, she testified that PEC is currently involved in a proceeding with Norfolk Southern before the Surface Transportation Board (STB). She indicated that the issue at hand is that the current freight rate in dispute before the STB is included in fuel expenses. Based on inquiries of the Company, the Public Staff discovered that the Company had not included the same freight rate as a credit against fuel expense associated with off-system sales. Witness Peedin testified that the Public Staff believes that if the disputed freight rate is currently charged to the ratepayers as fuel expense, then the ratepayers should also receive a corresponding credit to fuel expense when PEC makes off-system sales using that fuel. As a result, PEC prepared an analysis to determine the estimated impact of using the higher freight rate to price the off-system sales fuel credit during the test year, and based on this information the Company determined that the credit would have been larger by $1,440,330 on a system basis, which equates to $954,363 on a North Carolina retail basis. Witness Peedin testified that the Public Staff recognizes that this adjustment is an estimate that will be subject to a more precise calculation when the outcome of the STB proceeding is known.

Counsel for the Company indicated that the Company had reviewed the supplemental testimony filed by witness Peedin and concurred with the Public Staff's position on the wholesale freight cost allocation issue. As a result, the Company filed Revised Barkley Exhibit No. 4, which set forth the Company's revised total underrecovery as $53,579,731. This revised underrecovery accepted and included the Public Staff's adjustment in the amount of $954,363 for the off-system sales fuel credit. The revised total underrecovery also produced the Company's revised EMF increment of 0.153 cents/kWh (0.158 cents/kWh with gross receipts tax).

No other party elicited evidence to the contrary on the wholesale freight cost issue. The Commission agrees with the reasoning of the Public Staff as accepted by PEC; therefore, the Commission concludes that it is appropriate to reduce the fuel underrecovery by $954,363 on a

North Carolina retail basis to reflect the impact of using a higher freight rate for the off-system sales fuel credit for purposes of this proceeding.

For purposes of this proceeding, witness Peedin also recommended that the Commission accept the application of a 61% fuel ratio to the total energy cost of purchases from power marketers as well as other suppliers that are unwilling or unable to provide PEC with actual fuel costs. Witness Peedin indicated that to determine the 61% ratio, the Public Staff had performed a review of off-system sales made by PEC, Duke Power, and Dominion North Carolina Power for the twelve months ended December 31, 2002. According to Ms. Peedin, this analysis was similar to those performed by the Public Staff in support of the stipulations (Marketer Stipulations) entered into in 1997 and 1999 covering these types of purchases. Ms. Peedin stated that this analysis resulted in fuel ratios ranging from 57.21% to 64.90%, leading the Public Staff to conclude that the ratio to be applied currently to purchased energy costs to determine allowable fuel costs should be 61%. Witness Peedin noted that both the methodology underlying the analysis and the 61% ratio had been accepted by the Commission as reasonable in each fuel case since the beginning of 1997, including those held in 2002. Ms. Peedin acknowledged that PEC had used the 61% ratio in its determination of recoverable test year fuel costs in this proceeding.

Witness Peedin stated that the Public Staff continues to consider it reasonable to use the utilities' off-system sales as a basis for determining the fuel cost proxy for purchases from marketers and from other sellers that refuse to provide fuel costs to the purchasing utility. The Public Staff believes this methodology for determining a proxy fuel cost meets the criteria set forth in the Commission's 1996 Duke fuel case Order.

The Commission notes that recovery of fuel cost from marketer purchases is an important part of the Company's overall fuel cost. The use of a ratio to determine marketer fuel costs evolved with the emergence of an active wholesale bulk power market, which prompted this Commission to address the issue in the 1996 Duke Power Company fuel case. In its Order in that proceeding, the Commission stated, "When faced with a utility's reliance upon some such form of proof 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." Recognizing that an active wholesale bulk power market continues to evolve and applying this standard to the evidence presented herein, the Commission concludes, as it has in past proceedings, that the methodology recommended and used by the Public Staff to determine the fuel cost component of purchases from power marketers and other suppliers (1) satisfies the requirements set forth in the 1996 Duke fuel case order, and (2) is reasonable and will be accepted in this proceeding. The Commission approved the use of the 61% ratio in the most recent Duke Power fuel proceeding, Docket No. E-7, Sub 725. The Commission also accepts the use of the 61% ratio in this proceeding as recommended by Public Staff witness Peedin and adopted by PEC. No party elicited evidence in this proceeding to suggest that the Commission's reliance on the Public Staff's recommended methodology and ratio would be unreasonable.

Based upon the evidence of record, the Commission hereby approves the total underrecovery of fuel expenses in the amount of $49,428,030 as recommended by the Public

Staff. Incorporated in this total underrecovery amount is $31,207,675 of underrecovery during the test year, which includes the Sandhills pipeline true-up adjustment in the amount of $5,629,012; recovery of $5,000,000 of prior fuel expense underrecovery deferred from Docket No. E-2, Sub 784; and recovery of $13,220,355 of prior fuel expense underrecovery, which is the last installment of the amount deferred from Docket No. E-2, Sub 765. When the total underrecovered amount of $49,428,030 is divided by the uncontroverted adjusted NC retail sales of 35,036,680,393 kWh, this calculation produces an EMF increment of 0.141 cents/kWh (0.146 cents/kWh with gross receipts tax) as recommended by the Public Staff. This EMF increment should remain in rates for a period of time not to exceed one year from the effective date of this Order.

Finally, CUCA witness O'Donnell made a recommendation to remedy what he believed to be a significant shortcoming in the manner in which undercollections and overcollections of fuel costs are handled by CP&L. In his testimony, witness O'Donnell explained that CP&L's EMF is calculated by dividing the dollar amount of fuel cost under-recovery or over-recovery during the test period (adjusting for deferrals from previous cases) by a forecast of the utility's kWh sales in the coming period. If a utility's forecasted sales are different from the actual sales made during the following test period, the EMF will recover more or less money than it was designed to collect. To remedy this concern, witness O'Donnell recommended tracking the EMF true-up and placing any under-recovery or over-recovery that is experienced in a deferred fuel account. Then, the under-recovery or over-recovery could be incorporated into the following year's EMF. Witness O'Donnell stated that such a mechanism would eliminate risk to all parties.

In his rebuttal testimony, PEC witness Barkley testified that, based upon the wording of the fuel statute and Commission Rule R-88, PEC believes that the current procedures for EMF recoveries are appropriate. He also characterized witness O'Donnell's recommendation on this issue as a "true-up of a true-up." However, witness Barkley also testified that PEC has no objection to the adoption of this proposal if the Commission finds that witness O'Donnell's recommendation on this issue is lawful.

The Commission will not rule on the merits or legality of witness O'Donnell's recommendation on this issue herein for the following reasons. First, the procedure used by CP&L to position itself to recover the under-recovered fuel expense has been used for several years by CP&L, Duke Energy, and Dominion North Carolina Power and is consistent with Commission Rule R8-55 and G.S. 62-133.2. In addition, witness O'Donnell's recommendation lacks other necessary details to permit its full implementation. Finally, the Commission believes that such a ruling could be made more appropriately in a generic proceeding wherein all affected parties would be afforded the opportunity to participate and the Commission could receive the benefit of input by all such affected parties.

IT IS, THEREFORE, ORDERED as follows:

1. That, effective for service rendered on and after October 1, 2003, PEC shall adjust the base fuel component in its North Carolina retail sales by an increment of 0.123 cents/kWh (0.127cents/kWh including gross receipts tax) above the base fuel component approved in

Docket No. E-2, Sub 537. Said increment shall remain in effect until changed by a subsequent Order of this Commission in a general rate case or fuel case.

2. That PEC shall establish an EMF rider as described herein to reflect an increment of 0.141 cents/kWh (0.146 cents/kWh including gross receipts tax) for retail rate schedules and applicable riders. This rider is to remain in effect for a 12-month period beginning October 1, 2003, and expiring September 30, 2004.

3. That PEC 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.

4. That PEC 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.

ISSUED BY ORDER OF THE COMMISSION.
This the 25th day of September 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

mr091603.02

APPENDIX A

PEC BILL MESSAGE

The N. C. Utilities Commission issued an Order on September 25, 2003, after public hearings and review, approving a fuel charge increase of approximately $19.6 million in the rates and charges paid by North Carolina retail customers of PEC. The rate increase will be effective for service rendered on and after October 1, 2003, and will result in a monthly rate increase of $.56 for a typical customer using 1,000 kWh per month.

DOCKET NO. E-7, SUB 725

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Corporation Pursuant to G.S. 62-133.2 and NCUC Rule R8-55 Relating to Fuel Charge Adjustments for Electric Utilities – 2003	))))	ORDER APPROVING FUEL CHARGE ADJUSTMENT

HEARD: Tuesday, May 6, 2003, 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; Commissioner Lorinzo L. Joyner, and Commissioner Michael S. Wilkins

APPEARANCES:

For Duke Power, a division of Duke Energy Corporation:

Lara S. Nichols, Assistant General 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:

Gina C. Holt, Staff Attorney, Public Staff - North Carolina Utilities Commission 4326 Mail Service Center Raleigh, North Carolina 27699-4326

For the Attorney General:

Len Green, Associate General Counsel, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629

For the 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 10, 2003, Duke Power, a division of Duke Energy Corporation (Duke 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 13, 2003, the Commission issued an Order Scheduling Hearing, Requiring Filing of Testimony, Discovery Guidelines and Requiring Public Notice.

On April 4, 2003, Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene which was allowed by the Commission on April 8, 2003. The intervention of the Public Staff is noted pursuant to Commission Rule R1-19(e). On April 15, 2003, Roy Cooper, Attorney General, filed a notice of intervention. The intervention of the Attorney General is recognized pursuant to G.S. 62-20.

On April 22, 2003, the Public Staff filed a notice of affidavits and the affidavits of Thomas S. Lam, Utilities Engineer, Electric Division; Darlene P. Peedin, Staff Accountant, Accounting Division; and Mary Ellen Shearon, Staff Accountant, Accounting Division. On May 2, 2003, Duke filed the supplemental testimony of Steven K. Young.

The case came on for hearing as ordered on May 6, 2003. Marion Elliott Batson, Manager, Coal and Bulk Material Procurement, and Steven K. Young, Senior Vice President and Chief Financial Officer of Duke, presented direct testimony for the Company. Darlene P. Peedin, Staff Accountant, Accounting Division; Mary Ellen Shearon, Staff Accountant, Accounting Division; and Thomas C. Lam, Utilities 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. After the hearing, the parties filed briefs and proposed orders on June 4, 2003.

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 Energy Corporation is a duly organized corporation existing under the laws of the State of North Carolina. Duke is engaged in the business of developing, generating, transmitting, distributing, and selling electric power to the public in North Carolina and is subject to the jurisdiction of the North Carolina Utilities Commission as a public utility. Duke 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, 2002.

3. Duke's fuel procurement and power purchasing practices during the test period were reasonable and prudent.

4. The test period per book system sales are 76,118,047 MWH.

5. The test period per book system generation is 88,862,092 MWH and is categorized as follows:

Generation Type	MWH
Coal	43,560,548
Oil and Gas	98,244
Light Off	-
Nuclear	41,155,179
Hydro	825,724
Net Pumped Storage	(853,096)
Purchased Power	2,171,987
Catawba Contract Purchases	-
Catawba Interconnection Agreements	1,732,100
Interchange	171,406
Total Generation	88,862,092

6. The nuclear capacity factor appropriate for use in this proceeding is 90%.

7. The adjusted test period system sales for use in this proceeding are 74,646,720 MWH.

8. The adjusted test period system generation for use in this proceeding is 87,032,454 MWH and is categorized as follows:

Generation Type	MWH
Coal	44,116,315
Oil and Gas	118,708
Light Off	-
Nuclear	39,688,090
Hydro	1,730,200
Net Pumped Storage	(792,846)
Purchased Power	2,171,987
Total Generation	87,032,454

9. The appropriate fuel prices and fuel expenses for use in this proceeding are as follows:

A. The coal fuel price is $16.90/MWH.
B. The oil and gas fuel price is $71.86/MWH.
C. The appropriate Light Off fuel expense is $4,146,000.
D. The total nuclear fuel price is $4.17/MWH.
E. The nuclear fuel price for Catawba generation is $4.08 MWH.
F. The purchased power fuel price is $18.66/MWH.

10. Setting fuel costs associated with purchases from power marketers and certain other sellers at a level equal to 61% of the energy portion of the purchase price is reasonable for use in this proceeding.

11. The adjusted test period system fuel expense for use in this proceeding is $842,837,000.

12. The proper fuel factor for purposes of this proceeding is 1.1291¢/kWh, excluding gross receipts tax.

13. The Company's North Carolina test period jurisdictional fuel expense under-recovery is $6,264,000. However, pursuant to the Settlement Agreement approved by the Commission in Docket No. E-7, Sub 722, the under-recovery is adjusted by $18,750,000. Therefore, the appropriate amount of the over-recovery for use in this proceeding is $12,489,000.

14. The Company's Experience Modification Factor (EMF) is a decrement of .0241¢/kWh, excluding gross receipts tax.

15. Interest expenses associated with the over-collection of test period fuel revenues amount to $1,873,000, based upon a 10% annual interest rate.

16. The EMF interest decrement is .0036¢/kWh, excluding gross receipts tax.

17. The final fuel factor is 1.1014¢/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 a 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. The Company's filing was based on the 12 months ended December 31, 2002.

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, 2002. In addition, the Company files monthly reports of its fuel costs pursuant to Commission Rule R8-52(a).

Duke witness Batson described the Company's fuel procurement practices. These practices include estimating fuel requirements, establishing appropriate inventory requirements, monitoring on-going fuel requirements, developing qualified supplier lists, bid evaluation, balancing long term contracts and spot purchases, expediting/monitoring purchases, and on-going quality control.

No party elicited testimony contesting the Company's fuel procurement and power purchasing practices. Based upon the fuel procurement practices report, the evidence in the record and in the absence of any evidence 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 and the affidavit of Public Staff witness Lam.

Company witness Young testified that the test period per book system sales were 76,118,047 MWH and test period per book system generation was 88,862,092 MWH. The test period per book generation is categorized as follows:

Generation Type	MWH
Coal	43,560,548
Oil and Gas	98,244
Light Off	-
Nuclear	41,155,179
Hydro	825,724
Net Pumped Storage	(853,096)
Purchased Power	2,171,987
Catawba Interconnection Agreements	1,732,100
Interchange	171,406
Total Generation	88,862,092

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 achieved a system average nuclear capacity factor of 95.21% for the test period and that the most recent (1997-2001) NERC five-year average nuclear capacity factor for all pressurized water reactor units is 82.91%. The affidavit of Public Staff witness Lam also included this information.

Based upon the agreement of the Company and the Public Staff as to the appropriate levels of per book MWH generation and sales, and noting the absence of evidence to the contrary, the Commission concludes that the levels of per book sales of 76,118,047 MWH and of per book generation of 88,862,092 MWH are 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 system, the agreement of the Company and the Public Staff, and the absence of evidence to the contrary, the Commission concludes that the 90% nuclear capacity factor and its associated generation of 39,688,090 MWH are reasonable and appropriate for determining the appropriate fuel costs in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 7-8

The evidence for this finding of fact is found in the testimony of Company witness Young.

Witness Young made an adjustment of a negative 1,471,327 MWH and a negative 1,829,638 MWH to per book sales and generation, respectively, for adjustments relating to normalization for weather, customer growth, the Catawba Interconnection Agreement, and line losses/Company use, based on a 90% normalized system nuclear capacity factor. He, therefore, calculated an adjusted sales level of 74,646,720 MWH and an adjusted generation level of 87,032,454 MWH.

Public Staff witness Lam reviewed and accepted witness Young's adjusted sales and generation levels of 74,646,720 MWH and 87,032,454 MWH, respectively. 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 90% reasonable and appropriate in Finding of Fact No. 6, that the adjustment to per book system generation of a negative 1,829,638 MWH and the resulting adjusted test period generation level of 87,032,454 MWH are both reasonable and appropriate for use in this proceeding. Total generation is categorized as follows:

Generation Type	MWH
Coal	44,116,315
Oil and Gas	118,708
Light Off	-
Nuclear	39,688,090
Hydro	1,730,200
Net Pumped Storage	(792,846)
Purchased Power	2,171,987
Total Generation	87,032,454

The Commission also finds the adjusted sales level of 74,646,720 MWH to be reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for these findings of fact is found in the testimony and exhibits of Company witnesses Batson and Young and the testimony and exhibits of Public Staff witnesses Peedin, Shearon, and Lam.

Company witness Batson testified regarding Duke's fossil fuel costs during the test year and changes expected in 2003. Mr. Batson described the market conditions in the spot and contract coal markets during the test year and the increasing cost of coal in the current market due to numerous financial, operational, and regulatory conditions affecting the mining industry. Duke had in place several coal contracts with favorable prices that are expiring and must be replaced under current market conditions.

In response to cross-examination, witness Batson explained that Duke is currently involved in litigation with the Norfolk Southern Railway and CSX Transportation before the Surface Transportation Board (STB) regarding the freight rates it must pay to deliver coal to seven of its coal-fired stations. The purpose of this litigation is to seek a ruling from the STB mitigating proposed increases in Norfolk Southern and CSX's rates. During the pendency of the litigation, the Company must pay higher tariff rates. In its brief, CUCA requested the Commission to require that all rail transportation refunds be credited against Duke's retail native load fuel costs. On cross-examination by counsel for CUCA, witness Batson testified that if the outcome of the litigation is favorable, Duke will receive a refund with interest, which would be credited to Duke's fuel expense account; however, at this time, the result and timing of the final decision is uncertain. As a result, it appears that Duke has committed to make an appropriate credit to fuel costs to reflect any refunds received as a result of the STB litigation, so that CUCA's proposal has been rendered moot.

Counsel for CUCA also asked witness Batson about detention charges assessed by its rail carriers. Witness Batson explained that Duke must pay a charge if it exceeds the allotted time period to unload coal from the train. Duke's fossil stations communicate regularly with the railroads regarding anticipated delivery times; however, situations occur where trains arrive late or unexpectedly. In the normal course of business, Duke routinely seeks the elimination or reduction of detention charges from the railroads where it can demonstrate that the delay in unloading was due to the railroad. In its brief, CUCA requests the Commission to exclude detention charges from fuel costs. However, there is insufficient evidence in the record in this proceeding to establish whether any detention charges were included in the fuel costs Duke seeks to recover or whether any such charges included in Duke's fuel costs would have a material impact on the rates established in this proceeding. Further, there is insufficient evidence upon which to conclude that any such charges were imprudently incurred. As a result, the Commission concludes that the adjustment proposed by CUCA is not appropriate for purposes of this proceeding. The Commission expressly reserves decision on the issue of whether detention charges are properly considered fuel costs for purposes of G.S. 62-133.2.

Duke witness Young testified that during the test year the fossil steam generating plants provided approximately 50% of the Company's total generation and that the heat rate for these units was 9,368 BTU/MWH. Achievement of this heat rate continues Duke's consistent track record of operating the most efficient fossil-fired units in the country.

Witness Young recommended fuel prices as follows:

A. The coal fuel price is $16.90 / MWH.
B. The oil and gas fuel price is $71.86 / MWH.
C. The appropriate Light Off fuel expense is $4,146,000.
D. The total nuclear fuel price is $4.17 / MWH.
E. The nuclear fuel price for Catawba generation is $4.08 / MWH.
F. The purchased power fuel price is $18.66 / MWH.

On cross-examination, counsel for CUCA asked witness Young numerous questions regarding the methods used by Duke to subtract fuel expenses related to off-system sales from fuel costs related to native load and adjustments thereto. Witness Young explained the production cost modeling and accounting principles used to track and account for various cost components and to assign costs to transactions. Witness Young explained that, in determining the level of fuel costs to be assigned to intersystem sales, Duke knows on an hourly basis its native load consumption, the level of intersystem sales, and the generating units dispatched to satisfy each of these. He also stated that Duke analyzes and periodically updates such factors as the cost of fuel for each unit, heat rates, freight rates, and non-fuel O&M costs. Witness Young stated that it is necessary to make some assessments of these items, but that it would not be reasonable to do so on a real-time hourly basis.

In its brief, CUCA requests that the Commission order Duke to use the most specific data that can be derived in the computation of intersystem sales fuel costs and to identify all of the estimated data used in the computation of intersystem sales fuel costs, the source of such estimates, and the reasons more specific or actual data is unavailable. The Commission does not find it unreasonable in concept that Duke and other utilities analyze and update certain factors on a periodic basis, rather than tracking them on an hourly basis, as long as the methods produce appropriate and reasonable results. The methods chosen by utilities under this Commission's jurisdiction, including Duke, are of course subject to review by the Commission to ensure that their results are reasonable and the Commission does expect that Duke will use the most accurate data reasonably available for computing intersystem fuel costs. While the cross-examination of Duke witness Young introduces facts regarding Duke's methods into the record, the Commission finds that no basis has been established in this proceeding to demonstrate that those methods as currently implemented and applied during the test period are inappropriate or unreasonable.

Witness Young also testified about the calculation of fuel costs as related to Duke's Fixed Payment Plan (FPP) approved by the Commission on July 17, 2002, in Docket No. E-7, Sub 710. Under the FPP program, participating residential customers are billed a fixed monthly amount based upon their predicted kilowatt hour consumption. In response to cross-examination questions from counsel for CUCA, witness Young testified that there are numerous Duke rate schedules and programs that result in increased kilowatt hour consumption and may affect the system average fuel costs for all customers. Witness Young explained that while growth in any customer group will increase generation, all native load customers' rates reflect system average fuel costs. Duke does not allocate incremental fuel costs among retail customer classes.

In its brief, CUCA cites a report filed by Duke on January 27, 2003, in Docket No. E-7, Sub 710, which shows that during calendar year 2002, which is the 12-month test period for this fuel charge proceeding, actual usage by FPP customers exceeded estimated usage by approximately 3.5 million kWh. CUCA then posits that if the recovery of fuel costs from FPP customers is not enough because the estimated FPP usage is too low, the remaining non-FPP customers will be asked to subsidize the FPP program, or Duke, by paying all of the remaining fuel costs. To prevent any such subsidization, CUCA asks the Commission to order Duke to compute the dollar amount of fuel costs estimated to be charged to FPP customers and the cost of fuel associated with the actual usage by FPP customers during the test year and to remove that difference from the fuel costs that all non-FPP customers are charged. Based upon the record in this proceeding, as well as the FPP tariff on file with the Commission, the Commission concludes that such an adjustment is not warranted for several reasons. First, the evidence in this case does not support such an adjustment. For example, witness Young responded "no" to a question from counsel for CUCA on whether customers who do not participate in Duke's FPP program are being asked to bear the fuel costs for FPP customers to the extent that the actual fuel costs associated with serving FPP customers exceed the estimated fuel costs used to determine the fixed payment for those customers. Witness Young also noted that the actual kWh usage, as opposed to predicted kWh usage, is used in the calculation of the fuel rate. Second, the Commission is not convinced at this time that the problem which CUCA seeks to address even exists, particularly on a long-term basis. The FPP program was only recently introduced and the tariff became effective September 1, 2002. The number of participants has grown rapidly to date, but will probably stabilize. Further, and more importantly, under the provisions of the FPP tariff, which the Commission judicially notices, Duke determines the fixed payment amount based on a customer's applicable rate schedule, which includes the then current fuel charge, including any EMF in effect at that time. In other words, the fixed payment amount is recalculated at the end of each 12-month period for FPP customers and will include the effect of any fuel charge adjustment in effect at that time to be recovered from the FPP customers for the next 12 months. In addition, while the FPP tariff allows customers to actually use more kWhs than the estimated usage within specified guidelines for a fixed payment during a 12-month period, the fixed payment for the ensuing 12-month period will be estimated based on the customer's previous historical metered usage. Therefore, the observed difference between the actual and estimated usage by first year FPP participants may be a short-term phenomenon and could actually be reversed to CUCA's benefit under its own theory. Finally, the Commission notes that it has not to date approved customer-specific fuel rates in proceeding conducted pursuant to G.S. 62-133.2 and is not inclined to depart from this practice in the absence of a compelling justification for doing so. In summary, the Commission concludes that the adjustment requested by CUCA is not warranted based upon the evidence in this proceeding and for the reasons discussed above.

Based upon the evidence in the record as to the appropriate prices, the Commission concludes that the fuel prices recommended by witness Young and accepted by the Public Staff are reasonable and appropriate for this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence for this finding of fact is contained in the affidavit of Public Staff witness Peedin and the testimony of Company witness Young.

The affidavit of Public Staff witness Peedin stated that, during the test year, Duke purchased power from sellers that did not provide the Company with actual fuel costs. The underlying analysis used in prior cases for these types of purchases is the basis for the Public Staff's recommendation. The Public Staff has performed a review of the fuel component of off-system sales for Duke, Dominion N.C. Power, and Carolina Power & Light Company (CP&L), which are set forth in the utilities' Monthly Fuel Reports, for the twelve months ended December 31, 2002. This analysis is similar to that performed by the Public Staff for the 1997 Marketer Stipulation (which was applicable to the 1997 and 1998 fuel proceedings) and the 1999 Marketer Stipulation (which was filed by CP&L on June 4, 1999, in Docket No. E-2, Sub 748, and intended by the parties to be applicable to the 1999, 2000, and 2001 fuel cost proceedings). The methodology used for each of the above mentioned Stipulations has been accepted by this Commission as reasonable in each fuel case since the beginning of 1997, including those held in 2002, after the 1999 Stipulation had expired.

G.S. 62-133.2 requires that only the fuel cost component of purchased power be recovered through fuel proceedings. However, in its Order in Duke'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."

Public Staff witness Peedin's affidavit stated 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 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, 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 used in the past Stipulations and in the analysis for this proceeding meets the criteria set forth in the 1996 Duke Order. As part of its current review, the Public Staff analyzed the off-system information in several different ways. The Public Staff's analyses resulted in fuel percentages ranging from 57.21% to 64.90%, as set forth on Peedin Exhibit 1. After evaluating all of the data and calculations, the Public Staff concluded that the off-system sales fuel ratio should be 61%.

Witness Young agreed with the Public Staff's recommendation to adjust Duke's filing to reflect 61% of energy charges associated with certain purchases as fuel expenses.

The Commission concludes, as it has in past dockets, that the methodology underlying the 1997 and 1999 Marketer Stipulations, 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 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 Public Staff witness Peedin stated in her affidavit, 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 for purposes of this proceeding that the fuel-to-energy cost ratio exhibited by the utilities' sales is similar to the ratio inherent in the sales made to Duke from the same types of generating resources. Second, the Commission concludes that the information used by parties to derive the fuel ratio is reasonably reliable. According to Public Staff witness Peedin's affidavit, 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 has historically been 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 elicited 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 or opposed the Public Staff's recommendation. Therefore, the Commission concludes that the methodology underlying the 1997 and 1999 Stipulations used in prior cases meets the criteria set forth in the 1996 Duke fuel case Order and is reasonable for purposes of this proceeding as the method of determining the proxy fuel cost.

Given the fact that the Commission has concluded that the methodology underlying the 1997 and 1999 Stipulations is reasonable for purposes of this proceeding, the question remains as to the appropriate fuel ratio to be used in this case. As part of its current review, the Public Staff analyzed the off-system sales information in different ways. The Public Staff's analyses resulted in percentages ranging from 57.21% to 64.90% and, based on its analyses, the Public Staff concluded that 61% is an appropriate and reasonable fuel proxy ratio for purposes of this proceeding. The Company indicated that it agreed with the Public Staff's fuel proxy ratio to be applied to purchases from entities that do not provide actual fuel costs as set forth above.

The evidence clearly indicates that for the 12 months ended December 31, 2002, the range of fuel percentages for off system sales was 57.21% to 64.90%, based on the analyses of the Public Staff. The Public Staff recommended and the Company has agreed that a 61% ratio is reasonable to use in this proceeding. No other party elicited evidence supporting the use of a different ratio. In view of the agreement between the Public Staff and the Company and in the absence of evidence to the contrary, the Commission concludes that it is reasonable, for purposes of this proceeding, to use the 61% fuel ratio 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. 11-17

Based upon the agreement between the Company and the Public Staff as to the appropriate levels of sales, generation, and unit fuel costs, as discussed in the Evidence and

Conclusions for Findings of Fact Nos. 4-9, the Commission concludes that adjusted test period fuel expenses of $842,837,000 and a base fuel factor of 1.1291¢/kWh ($842,837,000 divided by 74,646,720 MWH), excluding gross receipts tax, are reasonable and appropriate for use in this proceeding. This approved base fuel factor is 0.0259¢/kWh higher than the base fuel factor of 1.1032¢/kWh set in the Company's last general rate case, Docket No. E-7, Sub 487.

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."

In his pre-filed direct testimony, Duke witness Young submitted that the Company's North Carolina test period jurisdictional fuel expense under-recovery was $7,402,000. However, he explained that Duke had adjusted this amount by $18,750,000 in accordance with a Settlement Agreement approved by the Commission in Docket No. E-7, Sub 722, to calculate an over-recovery of $11,348,000.

Public Staff witness Shearon's affidavit discussed the results of the Public Staff's investigation of the EMF, which included review of the Company's filing in this docket, monthly fuel reports, and the Company's responses to the Public Staff's data requests. As a result of this investigation, witness Shearon recommended three adjustments which cumulatively adjusted the over-recovery filed by the Company from $11,348,000 to $12,486,000, as set forth on Shearon Exhibit 1.

Witness Shearon's first two adjustments related to purchased power costs resulting in a reduction in the actual fuel costs for Duke's North Carolina retail jurisdiction in the amounts of $310,000 and $136,000 respectively. Witness Shearon made a third adjustment for fuel expense credits related to loss compensation resulting in a reduction in actual fuel costs for Duke's North Carolina retail jurisdiction in the amount of $692,000. Duke made an adjustment to its test year fuel cost to correct fuel expense credits for loss compensation for the years 2000 through 2002. Witness Shearon made an adjustment to extend this correction to all years after 1996, when Duke Power first began to record loss compensation, and included interest to reflect the passage of time between the years when the credits occurred and the test period. The Company accepted these adjustments and agreed that, because the Public Staff's loss compensation adjustment was calculated based on an estimate, it will make a more precise calculation and any further adjustment will be reflected in fuel cost in the 2003 test year.

During his cross-examination of witnesses, counsel for CUCA asked questions regarding power purchases during 2002 from two suppliers, Dynegy/Rockingham and Progress Ventures, as set forth on Young Exhibit 2, Schedule 3, Page 3 of 4. In the case of Dynegy/Rockingham, fuel costs recorded for 2002 exceeded the total cost of the transactions for the year ($625,743) by $2,052, or 0.03%. In the case of Progress Ventures, fuel costs ($43,742) were slightly less than the total cost of the transactions for the year ($45,746). (The Commission notes that total fuel costs related to purchased and interchanged power for the twelve months ended December 31, 2002, as set forth on the schedule, were approximately $47,000,000.) However, no party elicited evidence of any specific inaccuracy in the fuel costs recorded for purchases from these two suppliers; or proposed any adjustment based on this information; the Commission thus finds no basis to conclude that an adjustment to fuel costs in this regard is appropriate or reasonable.

At the hearing in this proceeding, Duke witness Young presented Revised Young Exhibit 6 setting forth Duke's revised recommended EMF and EMF interest decrements. Witness Young testified that he had reflected Ms. Shearon's recommended adjustments in this exhibit. However, the total over-recovery set forth on Revised Young Exhibit 6, is $12,489,000, as opposed to the $12,486,000 over-recovery set forth on Shearon Exhibit 1. No party commented on this difference during the course of the hearing; however, the Commission notes that the difference is minor ($3,000), and does not cause the EMF riders recommended by Duke and the Public Staff to differ. In the Joint Proposed Order submitted by Duke and the Public Staff, those parties recommended that the over-recovery be determined to be $12,489,000. Given the facts cited above, the Commission concludes that the appropriate amount of over-recovery for use in this proceeding is $12,489,000.

Young Exhibit 5 and Young Revised Exhibit 6 set forth 51,907,059 MWH as the level of test year adjusted North Carolina retail sales to be used to calculate the EMF and EMF interest decrement riders. No party disagreed with this level of MWH sales, and the Commission finds it reasonable.

Duke witness Young calculated the EMF decrement and EMF interest decrement by dividing the $12,489,000 over-recovery by the adjusted North Carolina jurisdictional sales of 51,907,059 MWH to arrive at an EMF decrement of .0241¢/kWh, excluding gross receipts tax. He likewise divided the associated interest of $1,873,000, producing an EMF interest decrement of .0036¢/kWh. Public Staff witness Shearon recommended the same EMF and EMF interest decrements. The Commission concludes that the EMF decrement of .0241¢/kWh, excluding gross receipts tax, and the EMF interest decrement of .0036¢/kWh are reasonable and appropriate for use in this proceeding.

Accordingly, the overall fuel calculation, incorporating the conclusions reached herein, results in a final net fuel factor of 1.1014¢/kWh, excluding gross receipts tax.

IT IS, THEREFORE, ORDERED, as follows:

1. That, effective for service rendered on and after July 1, 2003, Duke 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 .0259¢/kWh increase (excluding gross receipts tax) and further that Duke Power shall adjust the resultant approved fuel cost by decrements of .0241¢/kWh and .0036¢/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, 2004.

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 _25th_ day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr061603.01

APPENDIX A

DOCKET NO. E-7, SUB 725

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	)	NOTICE TO CUSTOMERS
and NCUC Rule R8-55 Relating to Fuel Charge	)	OF CHANGE IN RATES
Adjustments for Electric Utilities - 2003	)	

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission entered an Order on June __, 2003, after public hearings, approving a fuel charge net rate increase of approximately $60,713,000 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, 2003, through June 30, 2004. The rate increase was ordered by the Commission after review of Duke Power's fuel expense during the 12-month period ended December 31, 2002, 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 $1.17¢ for each 1,000 kWh of usage per month.

ISSUED BY ORDER OF THE COMMISSION.
This the _25th_ day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

DOCKET NO. E-7, SUB 725

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	)	ERRATA
NCUC Rule R8-55 Relating to Fuel Charge	)	ORDER
Adjustments For Electric Utilities – 2003	)	

BY THE PRESIDING COMMISSIONER: On June 25, 2003, the Commission issued an Order Approving Fuel Charge Adjustment in this proceeding with an attached Appendix A, Notice to Customers of Change in Rates. Said Appendix A should be revised as attached.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr062603.01

REVISED
APPENDIX A

DOCKET NO. E-7, SUB 725

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Duke Power, a Division of Duke	)	NOTICE TO CUSTOMERS
Energy Corporation, Pursuant to G.S. 62-133.2	)	OF CHANGE IN RATES
and NCUC Rule R8-55 Relating to Fuel Charge	)	
Adjustments for Electric Utilities - 2003	)	

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission entered an Order on June 25, 2003, after public hearings, approving a fuel charge net rate increase of approximately $60,713,000 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, 2003, through June 30, 2004. The rate increase was ordered by the Commission after review of Duke Power's fuel expense during the 12-month period ended December 31, 2002, 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 $1.17 for each 1,000 kWh of usage per month.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

DOCKET NO. E-22, SUB 409

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: Wednesday, November 12, 2003, at 9:00 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 J. Richard Conder and Lorinzo L. Joyner

APPEARANCES:

For Dominion North Carolina Power:

Robert W. Kaylor, 225 Hillsborough Place, Suite 480, Raleigh, North Carolina 27603

For Nucor Steel – Hertford:

Joseph W. Eason, Nelson, Mullins, Riley & Scarborough, LLP, 4140 Parklake Ave., GlenLake One, Ste. 200, Raleigh, North Carolina 27612

For Carolina Industrial Group for Fair Utility Rates:

Ralph McDonald, Bailey & Dixon, LLP, P. O. Box 1351, Raleigh, North Carolina 27002-1351

For the Public Staff:

Vickie L. Moir, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

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 utility's 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 underrecovery of reasonable fuel expenses prudently incurred during the test year. The last general rate case order for Dominion North Carolina Power (Dominion NC 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 20, 2002, in Docket No. E-22, Sub 402.

On September 12, 2003, Dominion NC Power filed its Application and supporting testimony and exhibits pursuant to G.S. 62-133.2 and Commission Rule R8-55 relating to fuel charge adjustments for electric utilities. Dominion NC Power filed the testimony and exhibits of the following witnesses: A. Brian Cassada, Charles A. Stadelmeier and Jack E. Streightiff. The Company also filed information and workpapers required by Commission Rule R8-55(d).

On September 17, 2003, the Commission issued an Order Scheduling Hearing and Requiring Public Notice.

Carolina Industrial Group for Fair Utility Rates 1 (CIGFUR) filed a Petition to Intervene on September 25, 2003. The Commission allowed CIGFUR's Petition by Order issued September 29, 2003.

The Attorney General filed Notice of Intervention pursuant to G.S. 62-20 on October 14, 2003.

On October 15, 2003, Dominion NC Power filed corrected prefiled testimony and exhibits of Messrs. Cassada and Streightiff. On October 23, 2003, the Company filed Second Revised testimony and exhibits of Messrs. Cassada and Streightiff. On October 23, 2003, Dominion NC Power also filed Affidavits and 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.

On October 24, 2003, Nucor Steel – Hertford (Nucor) filed its Petition to Intervene and Motion for Admission pro hac vice. On November 3, 2003, the Commission issued Orders granting Nucor's Petition and Motion.

On October 28, 2003, the Public Staff filed the Affidavits of Thomas S. Lam, Electric Engineer in the Public Staff's Electric Division, and Randy T. Edwards, Staff Accountant in the Public Staff's Accounting Division. The Public Staff also filed Notice that the Affidavits would be used in evidence in lieu of oral testimony in the absence of a request to cross examine the affiants.

On November 12, 2003, the Company filed its Affidavit of Publication in this proceeding.

The evidentiary hearing was held on November 12, 2003, at the time and place shown above. The prefiled testimony of the Company's witnesses and the prefiled affidavit of Mr. Edwards were admitted into evidence. Mr. Lam testified and presented revisions to his affidavit. On November 12, 2003, after the hearing, Mr. Lam's affidavit with revisions was filed with the Commission.

On November 24, 2003, Dominion NC Power filed revised exhibits reflecting the use of the test year average price of fuel for combustion turbines as recommended by Mr. Lam. In the letter transmitting the revised exhibits, the Company stated that it did not oppose this recommendation for purposes of this proceeding.

Based upon the verified Application, the evidence adduced at the hearing, and the entire record in this matter, the Commission makes the following:

FINDINGS OF FACT

1. Dominion NC 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. Dominion NC Power is lawfully before this Commission based on its Application filed pursuant to G.S. 62-133.2.

2. The test period for purposes of this proceeding is the twelve months ended June 30, 2003.

3. The Company's fuel procurement and purchasing practices during the test period were reasonable and prudent.

4. The fuel proceeding test period per books system sales are 76,344,019 MWh.

5. The fuel proceeding test period per books system generation is 85,638,195 MWh, which includes various generation as follows:

Generation Type	MWh
Coal	36,106,658
Combustion Turbine	2,474,295
Heavy Oil	3,712,895
Natural Gas	0
Nuclear	23,956,224
Hydro	3,224,258
Pumped Storage (Pumping)	(2,897,111)
Power Transactions	
NUG	12,192,910
Other	7,771,635
Sales for Resale	(903,569)

6. The nuclear capacity factor which is appropriate for use in this proceeding is 91.3%, which is the estimated nuclear capacity factor for the rate year ending December 31, 2004.

7. The adjusted test period system sales for use in this proceeding are 76,080,060 MWh.

8. The adjusted test period system generation for use in this proceeding is 85,349,379 MWh, and is categorized as follows:

Generation Type	MWh
Coal	33,747,800
Combustion Turbine	2,312,630
Heavy Oil	3,470,341
Natural Gas	0
Nuclear	27,734,722
Hydro	3,224,258
Pumped Storage (Pumping)	(2,897,111)
Power Transactions	
NUG	11,396,374
Other	7,263,934
Sales for Resale	(903,569)

9. The appropriate fuel prices and fuel expenses for use in this proceeding are as follows:

A. The coal fuel price is \$15.06/MWh.
B. The nuclear fuel price is \$3.98/MWh.
C. The heavy oil fuel price is \$55.08/MWh.
D. The natural gas fuel price is \$0/MWH.
E. The internal combustion turbine fuel price is \$57.87/MWh.

F. The fuel price of other power transactions is \$19.11/MWh.

G. Hydro and pumped storage have a zero fuel price.

10. The adjusted test period system fuel expense for use in this proceeding is \$1,063,623,299.

11. The proper fuel factor for purposes of this proceeding is 1.398¢/kWh, excluding gross receipts tax, or 1.445¢/kWh, including gross receipts tax.

12. Setting fuel costs associated with purchases from power marketers and certain other sellers at a level equal to 61% of the energy portion of the purchase price is reasonable for use in this proceeding.

13. The appropriate North Carolina test period jurisdictional fuel expense undercollection is \$8,442,703. The adjusted North Carolina jurisdictional test year sales are 3,975,932 MWh.

14. The appropriate Experience Modification Factor (EMF) for this proceeding is an increment of 0.212¢/kWh, excluding gross receipts tax, or 0.219¢/kWh, including gross receipts tax.

15. The final fuel factor is 1.610¢/kWh, excluding gross receipts tax, or 1.664¢/kWh, including gross receipts tax.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, jurisdictional, and procedural 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 that each electric utility is required to furnish 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 June 30th as the test period for Dominion NC Power. The Company's filing was based on the 12 months ended June 30, 2003.

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 fuel procurement practices were filed with the Commission in Docket No. E-22, Sub 335. In addition, the Company files monthly reports of its fuel costs pursuant to Rule R8-52(a).

No party offered testimony contesting the Company's fuel procurement and power purchasing practices. Based on the fuel procurement practices report and in the absence of evidence 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 contained in the testimony of Company witnesses Streightiff and Stadelmeier and the affidavit of Public Staff witness Lam.

Witness Streightiff indicated that the Company's test period per books system sales for the twelve months ended June 30, 2003, were 76,344,019 MWh. Witness Stadelmeier indicated that test period system generation was 85,638,195 MWh. The test period per books system generation is categorized as follows:

Generation Type	MWh
Coal	36,106,658
Combustion Turbine	2,474,295
Heavy Oil	3,712,895
Natural Gas	0
Nuclear	23,956,224
Hydro	3,224,258
Pumped Storage (Pumping)	(2,897,111)
Power Transactions	
NUG	12,192,910
Other	7,771,635
Sales for Resale	(903,569)

The 36,106,658 MWh of per books system coal generation includes 3,254,294 MWh of ODEC generation. The 23,956,224 MWh of per books system nuclear generation includes 1,302,685 MWh of ODEC generation.

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.

Company witness Stadelmeier indicated that the Company achieved a system nuclear capacity factor of 78.9% for the July 1, 2002, to June 30, 2003, test period. Public Staff witness Lam stated that the most recent (1997-2001) NERC five-year average nuclear capacity factor for pressurized water reactor units is 82.0%. Witness Stadelmeier normalized the system nuclear capacity factor to a level of 91.3% for the twelve months ending December 2004. Witness Lam agreed that the nuclear capacity factor of 78.9% as achieved by the Company should be normalized to the proposed 91.3% factor.

In the absence of evidence to the contrary, the Commission concludes that the July 1, 2002, to June 30, 2003, test period levels of sales and generation are reasonable and appropriate for use in this proceeding. The Commission further concludes that the 91.3% 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 Streightiff.

Witness Streightiff indicated that the Company's system sales data for the twelve months ended June 30, 2003, was adjusted for weather normalization, customer growth, and increased usage in accordance with Commission Rule R8-55(d)(2). Witness Streightiff adjusted total Company sales by (263,960) MWh. This adjustment is the sum of adjustments for increased usage, weather normalization, and customer growth of 784,731 MWh, (1,308,945) MWh, and 249,109 MWh, respectively, and an adjustment of 11,145 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 increased usage, weather normalization, and customer growth of 784,731 MWh, (1,308,945) MWh, and 249,109 MWh, respectively, and an adjustment of 11,145 MWh from the restatement of nonjurisdictional ODEC sales from production level to sales level are reasonable and appropriate adjustments for use in this proceeding. After these adjustments the Company's system sales for the twelve months ended June 30, 2003, were 76,080,060 MWh.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

Company witness Streightiff presented an adjustment to per book MWh generation for the 12-month period ended June 30, 2003, due to weather normalization, customer growth, and increased usage of (288,816) MWh, to arrive at witness Stadelmeier's adjusted generation level of 85,349,379 MWh. Witness Lam reviewed and accepted witness Streightiff's adjustment to per books MWh generation for the twelve months ended June 30, 2003, due to weather normalization, customer growth, and increased usage. Witness Lam also accepted witness Stadelmeier's adjusted generation level of 85,349,379 MWh, categorized as follows:

Generation Type	MWh
Coal	33,747,800
Combustion Turbine	2,312,630
Heavy Oil	3,470,341
Natural Gas	0
Nuclear	27,734,722
Hydro	3,224,258
Pumped Storage (Pumping)	(2,897,111)

Power Transactions	
NUG	11,396,374
Other	7,263,934
Sales for Resale	(903,569)

The 33,747,800 MWh of adjusted test period coal generation includes 3,041,690 of ODEC generation. The 27,734,722 MWh of adjusted test period nuclear generation includes 1,709,297 MWh of ODEC generation.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 9-11

The evidence for these findings of fact is contained in the testimony of Company witnesses Stadelmeier and Streightiff and the affidavit of Public Staff witness Lam.

Witness Stadelmeier indicated that the fuel factor proposed by the Company in its original filing was based on June 2003 fuel prices as follows: 1) coal price of $15.06/MWh; 2) nuclear fuel price of $3.98/MWh; 3) heavy oil price of $55.08/MWh; 4) natural gas price of $0/MWh; 5) internal combustion turbine price of $79.94/MWh; 6) other power transactions price of $19.11/MWh; and hydro and pumped storage at a zero price. At the hearing Public Staff witness Lam revised his affidavit to recommend the use of a different price for fuel for combustion turbines. Mr. Lam stated that though the other June prices appeared reasonable, the June fuel price for combustion turbines was significantly above the test year average and that he therefore recommended using the test year average of $57.87/MWh. The Company did not oppose Mr. Lam's recommendation and filed revised exhibits subsequent to the hearing reflecting the $57.87/MWh fuel cost for combustion turbines.

Based upon the foregoing, the Commission concludes that in calculating the fuel factor it is reasonable to use the June 2003 fuel prices for fuels other than combustion turbines and that for combustion turbines the use of the average price during the test year of $57.87/MWh is reasonable.

Company witness Stadelmeier stated in his prefiled testimony that he calculated the level of normalized fuel expenses by multiplying the normalized generation amounts for the Company's generating units by actual June 2003 fuel prices. The Company's Exhibit CAS-1, Revised Schedule 4, filed subsequent to the hearing, reflected the normalized fuel expenses using the average price during the test year for combustion turbines and the June 2003 fuel prices for other fuels multiplied by the normalized generation amounts. This exhibit showed the level of test year normalized fuel expense resulting from this calculation is $1,063,623,299.

On Exhibit No. JES-1, Third Revised Schedule 3, witness Streightiff calculated a proposed fuel factor for the twelve months ended December 31, 2003, by dividing the normalized system fuel expense of $1,063,623,299 by the adjusted test year system MWh sales of 76,080,060 MWh. This calculation results in a proposed fuel factor of 1.398¢/kWh (excluding gross receipts tax). As reflected on Exhibit No. JES-1, Third Revised Schedule 3, when this fuel factor is reduced by the base fuel component approved in the Company's most recent general rate case (1.091¢/kWh, excluding gross receipts tax), the resulting fuel cost (Rider A) is 0.307¢/kWh (excluding gross receipts tax) and 0.318¢/kWh (including gross receipts tax).

The Commission concludes that the adjusted fuel test period expenses of $1,063,623,299 and the fuel cost rider (Rider A) increment of 0.307¢/kWh, excluding gross receipts tax, or a 0.318¢/kWh increment, including gross receipts tax, are reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

The evidence for this finding of fact is contained in the affidavit of Public Staff witness Edwards. Mr. Edwards stated that during the test year Dominion NC Power purchased power from a number of power marketers and other suppliers that did not provide it with the actual fuel costs associated with those purchases. He stated that a similar situation has occurred in each of the fuel proceedings for CP&L, Duke Power and Dominion NC Power since 1996.

For purposes of determining Dominion NC Power's EMF in this proceeding, he recommended that the Commission adopt the application of a 61% ratio to the total energy cost of purchases from power marketers and to purchases from other sellers who do not provide Dominion NC Power with actual fuel costs. To determine this ratio, the Public Staff performed a review of the fuel component of off-system sales made by Duke, Dominion NC Power and CP&L, which are set forth in each of the utilities' Monthly Fuel Reports, for the twelve months ended December 31, 2002. Mr. Edwards indicated that this analysis is similar to that performed by the Public Staff for purposes of implementing both the Marketer Stipulation entered into in 1997 covering these types of purchases (applicable to the 1997 and 1998 fuel proceedings) and a subsequent Marketer Stipulation entered into in 1999 (applicable to the 1999, 2000, and 2001 fuel cost proceedings). The methodology used for each of the above mentioned Marketer Stipulations has been accepted by this Commission as reasonable in each fuel case since the beginning of 1997, including those held in 2002, after the 1999 Marketer Stipulation had expired.

As part of the current review, the Public Staff analyzed the off-system sales information in several different ways. The Public Staff's analyses resulted in fuel percentages ranging from 57.21% to 64.90%, as set forth on Edwards Exhibit I. After evaluating all of the data and calculations, the Public Staff concluded that the off-system sales fuel ratio should be 61%.

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'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."

In his affidavit, Public Staff witness Edwards stated 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 above. He stated that 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. Witness Edwards stated that in the opinion of the Public Staff this information is reasonably reliable. Finally, Mr. Edwards stated that the Public Staff is unaware of any alternative information currently available concerning the fuel component of the marketers' sales made to utilities. Therefore, according to Mr. Edwards, the Public Staff believes that the methodology used in past Marketer Stipulations and in the analysis for this proceeding meets the criteria set forth in the 1996 Duke Order. In his testimony, Company witness Cassada stated that purchased power expenses were recorded consistent with the methodology established in the 1999 Marketer Stipulation.

The Commission concludes, as it has in past dockets, that the methodology underlying the 1997 and 1999 Marketer Stipulations, 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 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 Public Staff witness Edwards stated in his affidavit, 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 therefore finds it reasonable to assume for purposes of this proceeding that the fuel-to-energy cost ratio exhibited by the utilities' sales is similar to the ratio inherent in the sales made to Dominion NC 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 reasonably reliable. According to the affidavit of Mr. Edwards, the data was derived from the Monthly Fuel Reports filed by the utilities with the Commission. Therefore, the Commission concludes that the methodology underlying the 1997 and 1999 Marketer Stipulations used in prior cases meets the criteria set forth in the 1996 Duke fuel case Order, and is reasonable for purposes of this proceeding as the method of determining the proxy fuel cost.

Given the fact that the Commission has concluded that the methodology underlying the 1997 and 1999 Marketer Stipulations is reasonable for purposes of this proceeding, the question remains as to the appropriate fuel ratio to be used in this case.

As part of the most recent review, the Public Staff analyses of off-system sales information resulted in fuel percentages ranging from 57.21% to 64.90% and, based on the analyses, the Public Staff concluded that 61% is an appropriate and reasonable fuel proxy ratio for purposes of this proceeding.

Based on the foregoing, the Commission concludes that it is reasonable, for purposes of this proceeding, to use a 61% fuel ratio 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. 13 & 14

The evidence supporting these findings of fact is contained in the testimony and exhibits of Company witnesses Cassada and Streightiff and the affidavits of Public Staff witnesses Edwards and Lam.

Company witness Cassada indicated that the Company under-collected its fuel expenses by $8,442,703 during the test year ending June 30, 2003. Company witness Streightiff indicated that the adjusted North Carolina jurisdictional fuel clause test year sales are 3,975,932 MWh.

Public Staff witness Edwards testified regarding the results of the Public Staff's investigation of the Experience Modification Factor (EMF). In his affidavit he stated that, based on his review, the revised EMF calculation in Dominion NC Power's October 23, 2003, filing is correct and should be approved as filed.

N.C.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."

Company witness Streightiff indicated that the appropriate and reasonable level of adjusted N.C. retail sales for the test year is 3,975,932 MWh. No party disagreed with this level of sales and the Commission finds it reasonable. The $8,442,703 under-recovered fuel expense can thus be divided by the adjusted N.C. retail sales of 3,975,932 MWh to arrive at an EMF increment of 0.212¢/kWh, excluding gross receipts tax, or 0.219¢/kWh, including gross receipts tax.

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 Cassada and Streightiff and the affidavits of Public Staff witnesses Edwards 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 usage in this case is 1.664¢/kWh.

The fuel factor is determined as follows:

Normalized System Fuel Expense	$1,063,623,299
System kWh Sales	76,080,059,585
Test Year North Carolina Retail Fuel Under-recovery	$8,442,703
North Carolina Retail kWh Sales	3,975,931,716
Base Fuel Component Approved in Docket No. E-22, Sub 333 (cents per kWh)	1.091
Gross Receipts Tax Factor	1.03327

Fuel Cost Rider A (excluding gross receipts tax)=
[($1,063,623,299 x 100)/76,080,059,585]-1.091 = .307¢/kWh

Fuel Cost Rider A (including gross receipts tax) = .318¢/Kwh

Fuel Cost Rider B (excluding gross receipts tax) =
[$8,442,703 x 100)/3,975,931,716] = 0.212¢/kWh

Fuel Cost Rider B (including gross receipts tax) = 0.219¢/kWh

	Effective 1/1/2004 (Including Gross Receipts Tax)
Base Fuel Factor	1.127
EMF/Rider B	0.219
Fuel Cost Rider A	0.318
FINAL FUEL FACTOR	1.664

IT IS, THEREFORE, ORDERED as follows:

1. That effective beginning with usage on and after January 1, 2004, Dominion NC Power shall adjust the base fuel component in its North Carolina retail rates approved in Docket No. E-22, Sub 333 and 335, by an increment Rider A of 0.307¢/kWh, excluding gross receipts tax, or 0.318¢/kWh, including gross receipts tax;

2. That an EMF Rider increment (Rider B) of 0.212¢/kWh, excluding gross receipts tax, or 0.219¢/kWh, including gross receipts tax, shall be instituted and remain in effect for usage from January 1, 2004, until December 31, 2004;

3. That Dominion NC 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 NC 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 23rd day of December, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr121203.01

APPENDIX A

DOCKET NO. E-22, SUB 409

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Dominion North Carolina	)	
Power for Authority to Adjust its Electric Rates	)	NOTICE TO CUSTOMERS
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 23, 2003, after public hearing, approving a $10,416,942 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, 2004. The rate increase was approved by the Commission after review of Dominion North Carolina Power's fuel expenses during the 12-month test period ended June 30, 2003, and represents changes experienced by the Company with respect to its reasonable costs of fuel and fuel component of purchased power.

The change in the approved fuel charge will result in a monthly net increase of approximately $2.62 for each 1,000 kWh of usage per month.

ISSUED BY ORDER OF THE COMMISSION.
This the 23rd day of December, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

DOCKET NO. G-44, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Proceeding to Determine Whether	)	
Eastern North Carolina Natural Gas	)	ORDER ON
Company Is Providing Adequate	)	FORFEITURE
Service to Each County in Its	)	PROCEEDING
Franchise Territory	)	

BY THE COMMISSION: G.S. 62-36A(b) provides for the Utilities Commission to adopt rules which

> ...shall provide for expansion of service by each franchised natural gas local distribution company to all areas of its franchise territory by July 1, 1998 or within three years of the time the franchise territory is awarded, whichever is later, and shall 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 by July 1, 1998 or within three years of the time the franchise territory is awarded, whichever is later, shall forfeit its exclusive franchise rights to that portion of its territory not being served.

This statute is commonly referred to as the "use-it-or-lose-it" legislation. The Commission adopted Commission Rule R6-63 to implement the forfeiture provisions of this statute. The Rule provides for a review proceeding to be held following the applicable date for forfeiture. Rule R6-63(d) provides that even if a natural gas utility has not actually begun providing service as of the forfeiture date, the utility will be allowed a two-year grace period if it has met certain conditions by the forfeiture date. If these conditions are met, the utility will be given two years from the forfeiture date to provide service.

On July 7, 2003, the Utilities Commission initiated a review proceeding in this docket as to Eastern North Carolina Natural Gas Company (Eastern) pursuant to G.S. 62-36A(b) and Commission Rule R6-63. The proceeding applies to the counties of Currituck, Camden, Pasquotank, Gates, Perquimans, Chowan, Washington, Tyrrell, Dare, Hyde, Pamlico, Jones, Carteret, and Pender, and the purpose of the proceeding was to determine whether Eastern was providing adequate service to at least some portion of each of these counties as of June 15, 2003. A public hearing was scheduled and public notice was given which included a provision that the hearing may be canceled and the proceeding decided on the basis of the utility's testimony, unless intervenor testimony or written statements from the public filed one week in advance of the hearing raise issues with respect to this proceeding.

Piedmont Natural Gas Company, Inc., filed a petition to intervene in this docket on July 18, 2003, based upon its recent acquisition of a 50% ownership interest in Eastern. The intervention was allowed by order of July 22, 2003.

Eastern filed testimony on August 18, 2003, to the effect that it was providing adequate service to each designated county and that Eastern was not subject to forfeiture of its franchise for these counties. The Public Staff filed testimony on September 19, 2003, which did not raise any issues with respect to Eastern's testimony. No public comments have been received. Affidavits of publication have been filed. On October 15, 2003, the Commission issued an order in this docket canceling the public hearing.

Based upon the prefiled testimony and the records of the Commission, the Commission makes the following:

FINDINGS OF FACT

1. Eastern 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 a certificate of public convenience and necessity granted by this Commission.

2. By Commission orders of June 15, 2000, and June 7, 2001, Eastern was granted a certificate of public convenience and necessity for 14 counties and awarded a total of \$188.3 million in natural gas bond funds pursuant to G.S. 62-159 to help it provide service to these counties. Eastern's franchise territory includes Currituck, Camden, Pasquotank, Gates, Perquimans, Chowan, Washington, Tyrrell, Dare, Hyde, Pamlico, Jones, Carteret, and Pender Counties. The applicable date by which Eastern had to be providing adequate service to at least some portion of these counties to avoid the loss of its exclusive franchise rights for these counties is June 15, 2003.

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.

If these conditions are met, no forfeiture will be ordered and the natural gas utility will be given two years to complete construction and begin providing service. If construction is not substantially completed at the end of this two-year period, the Commission will issue an order requiring the utility to show cause why the Commission should not order forfeiture of the utility's exclusive franchise rights to any county in which the proposed facilities are not completed and in service.

Gates, Chowan, Perquimans, Pasquotank, Camden, and Currituck Counties

4. As of June 15, 2003, Eastern had natural gas facilities in place and in operation in Gates, Chowan, Perquimans, Pasquotank, Camden, and Currituck Counties and was serving customers.

Carteret, Dare, Hyde, Jones, Pamlico, Pender, Tyrrell, and Washington Counties

5. Eastern has spent approximately $1.29 million for pre-construction activities related to the extension of service into Carteret County, including the purchase of transmission pipe. Eastern has (1) completed development of a landbase for mapping purposes, geotechnical investigations, environmental and cultural resource investigations, detailed engineering studies related to portions of the transmission pipeline that will be constructed by horizontal directional drilling, and detailed pipeline alignment studies; (2) identified preliminary valve site locations; and (3) applied for required railroad encroachment permits. Eastern has held discussions with State and Federal environmental permitting agencies and with the U.S. Forest Service and has selected a transmission pipeline route and alignment intended to have minimal impact on the Croatan National Forest. Eastern will file permit applications with the U.S. Army Corps of Engineers (COE) and with the North Carolina Division of Coastal Management (CAMA). Eastern has begun right-of-way acquisition for a portion of the transmission pipeline route that will not be constructed within NCDOT right-of-way and has begun preliminary design work for the distribution system for Morehead City. Eastern expects gas service to be available by the fall of 2004.

6. Gas service to Dare County will be by a pipeline across the Currituck Sound. Eastern has completed geotechnical studies and begun sea grass research for the sound crossing, and Eastern has completed preliminary route selection for the sound crossing and the distribution main alignment on the Outer Banks in Dare County. Eastern has met with State and Federal agencies regarding potential environmental permitting issues related to the sound crossing and authorized its environmental services contractor to proceed with environmental studies. Eastern has spent approximately $25,000 for Dare County pre-construction activities. Dare County is intended to be the last county to receive gas service. Eastern expects to submit environmental permit applications to COE and CAMA in the spring of 2004 and to begin construction in the fall of 2004. Eastern expects to have gas service available in Dare County by the spring of 2005.

7. Eastern has spent approximately $915,000 for pre-construction activities related to the extension of its system into Hyde County, including the purchase of transmission pipe. The pipeline to Hyde County will cross portions of the Pungo Lakes National Wildlife Reserve and the Pocosin Lakes National Wildlife Reserve, both of which are under the jurisdiction of the U.S. Fish and Wildlife Service. Eastern has identified a route that is acceptable to the U.S. Fish and Wildlife Service. Eastern has applied for a Special Use Agreement for the pipeline route. Eastern expects to begin the environmental fieldwork for its permit applications in late 2003, to begin survey work in December 2003, and to apply for permits in the spring of 2004. Eastern expects construction to begin in mid-2004 and gas service to be available in Hyde County by the end of 2004.

8. All necessary environmental permits have been received and engineering design work has been completed for Jones County. Eastern has obtained franchises to provide gas service in the towns of Trenton, Pollocksville, and Maysville. Distribution mains to and within Trenton have been completed, and gas service is expected to be available in late 2003, after completion of the transmission pipeline that will supply Trenton.

9. All required environmental permits have been received and engineering design work has been completed for Pamlico County. Eastern has obtained franchises to provide gas service in the towns of Bayboro, Grantsboro, and Alliance. Distribution facilities in and around the three towns have been installed, and gas service is expected to be available in Pamlico County by April 2004.

10. All necessary permits have been received and pipeline facilities have been installed for Pender County. The town of Burgaw has accepted a franchise agreement. Natural gas service will be available upon completion of the pipeline crossing of the Northeast Cape Fear River.

11. Eastern has spent approximately $910,000 for pre-construction activities related to the extension of its system into Tyrrell County, including the purchase of transmission pipe. Eastern has completed preliminary pipeline route selection, identified valve site locations, begun right-of-way acquisition for portions of the pipeline route in which the alignment of the pipeline has been finalized, completed geotechnical studies of the Scuppernong River crossing, completed environmental and cultural resource investigations of the pipeline extension and related distribution work, obtained a municipal franchise from the town of Columbia, and contacted potential customers within the town. Eastern has negotiated with the U.S. Fish and Wildlife Service for an easement for installation of the pipeline within the Pocosin Lakes National Wildlife Reserve in the vicinity of the Scuppernong River and a city gate station site for Columbia. Detailed engineering work and permit applications are in process for stations, valves and segments of the pipeline that will be constructed by horizontal directional drilling. Gas service is expected to be available in Columbia in April 2004.

12. All necessary permits have been received, engineering design work has been completed, and rights-of-way have been acquired for Washington County. Eastern has installed a considerable amount of pipe in the county and obtained franchises to serve the towns of Plymouth, Roper, and Creswell. Gas service is expected to be available in Washington County by late 2003.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

Based upon the testimony of the Eastern and Public Staff witnesses, it appears that Eastern was providing actual service to six of its franchised counties (Gates, Chowan, Perquimans, Pasquotank, Camden, and Currituck) as of June 15, 2003, and that, as to its eight other franchised counties (Carteret, Dare, Hyde, Jones, Pamlico, Pender, Tyrrell, and Washington), Eastern met the requirements of Commission Rule R6-63(d). The witnesses reviewed each of these eight counties in their testimony and set forth a detailed analysis of Eastern's plans and accomplishments for each county. The Public Staff witnesses stated,

> Of the eight counties without service, four (Jones, Pamlico, Pender and Washington) have a considerable amount of gas facilities installed (though not yet in service) and another (Tyrrell) is expected to have pipe installed very shortly and gas service available by April 2004. With regard to the remaining three counties (Carteret, Dare and Hyde), Eastern has installed extensive gas facilities upstream of the counties, completed special environmental studies, performed substantial design work, and expended a considerable amount of time and financial resources toward providing gas service to the counties.

Although Rule R6-63(d)(iii) is written in terms of use of expansion funds, the Public Staff witnesses stated that natural gas bond funds, which Eastern is using, should receive similar consideration for purposes of Rule R6-63(d). The Public Staff witnesses concluded that Eastern met the requirements of Commission Rule R6-63(d)(i) and (iv) for each of these eight counties, the requirements of Commission Rule R6-63(d)(ii) for some of them, and the requirements of Commission Rule R6-63(d)(iii) for the project as a whole. Further, they concluded that it is likely that Eastern will be able to complete construction and make gas service available in all of its counties within two years, and they recommended that Eastern be granted a two-year grace period and be allowed to retain the franchise to provide natural gas service in all its counties.

On the basis of the testimony filed herein, the Commission concludes that Eastern was providing adequate service -- in the sense of Commission Rule R6-63(d) -- to Currituck, Camden, Pasquotank, Gates, Perquimans, Chowan, Washington, Tyrrell, Dare, Hyde, Pamlico, Jones, Carteret, and Pender Counties as of June 15, 2003, and that Eastern is not subject to forfeiture of its franchise for any of these counties at this time. As to the eight counties presently without actual gas service (Carteret, Dare, Hyde, Jones, Pamlico, Pender, Tyrrell, and Washington), the Commission concludes that Eastern should be granted a two-year grace period within which to complete construction of its proposed projects 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 by Rule R6-63(d).

IT IS, THEREFORE, ORDERED as follows:

1. That Eastern is not subject to forfeiture of its franchise for any of its counties at this time, and

2. That as to Carteret, Dare, Hyde, Jones, Pamlico, Pender, Tyrrell, and Washington Counties, Eastern is hereby given until June 15, 2005, within which to complete construction of its proposed projects for these counties and to begin actually 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 13th day of November, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Ah111303.03

DOCKET NO. G-21, SUB 442

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of North Carolina Natural Gas	)	
Corporation for a General Increase in Its Rates and	)	ORDER APPROVING PARTIAL
Charges and for Approval of Certain Changes to Its	)	RATE INCREASE
Rate Schedules, Classifications, and Practices	)	

HEARD IN: Judicial Building, Wilmington, North Carolina, on July 22, 2003; Kinston City Hall, Kinston, North Carolina, on July 23, 2003; Cumberland County Courthouse, Fayetteville, North Carolina, on July 24, 2003; and the Commission Hearing Room, Dobbs Building, Raleigh, North Carolina, on September 2, 2003.

BEFORE: Commissioner Lorinzo L. Joyner, Presiding; Chair Jo Anne Sanford; Commissioner J. Richard Conder; Commissioner Robert V. Owens, Jr.; Commissioner Sam J. Ervin, IV; Commissioner James Y. Kerr, II; and Commissioner Michael S. Wilkins.

APPEARANCES:

For North Carolina Natural Gas Corporation:

Len S. Anthony, Post Office Box 1551, Raleigh, North Carolina 27602

For Piedmont Natural Gas Company, Inc.:

Jerry W. Amos and James H. Jeffries IV, Nelson Mullins Riley & Scarborough, L.L.P., Bank of America Corporate Center, 100 North Tryon Street, Suite 2400, Charlotte, North Carolina 28202-4000

For the Using and Consuming Public:

Antoinette R. Wike, Chief Counsel, and Gina Holt, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

Margaret A. Force, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602

For Carolina Utility Customers Association, Inc.:

James P. West, West Law Offices, PC, 434 Fayetteville Street Mall, Suite 1735, Raleigh, North Carolina 27601

For the Greenville Utilities Commission and the Cities of Rocky Mount, Wilson and Monroe, North Carolina:

M. Gray Styers, Jr., Kilpatrick Stockton, LLP, 3737 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612

For the Public Works Commission of the City of Fayetteville:

M. Gray Styers, Kilpatrick Stockton, LLP, 3737 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612

For the United States Department of Defense:

Robert A. Ganton, Regulatory Law Office, Office of the Judge Advocate General, Department of the Army, 901 N. Stuart Street, Suite 525, Arlington, Virginia 22203-1837

BY THE COMMISSION. On February 28, 2003, North Carolina Natural Gas Corporation (NCNG 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 7, 2003, the Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene. On March 11, 2003, the Greenville Utilities Commission and the Cities of Rocky Mount, Wilson and Monroe (the Gas Cities) filed a petition to intervene. On March 17, 2003, the Public Works Commission (PWC) filed a petition to intervene. On April 11, 2003, the Commission issued an order granting the petitions to intervene of CUCA, the Gas Cities, and PWC. On April 21, 2003, the United States Department of Defense (DOD) filed a petition to intervene, which the Commission granted on April 23, 2003. On April 22, the Attorney General filed its notice of intervention.

On March 31, 2003, NCNG filed an application in Docket No. G-21, Sub 442, requesting a general increase in its rates and charges for natural gas service, certain changes to the cost allocation and rate design underlying its rates, and changes to its service regulations and tariffs. With its Petition, NCNG also filed the information required by the Commission's April 3, 1985 Order in Docket No. G-100, Sub 44, including exhibits to the Petition and the direct testimony of Company witnesses Terrance D. Davis, Senior Vice President of Operations of NCNG; Fredrick W. Hering, Manager of Rates and Gas Accounting for NCNG; Mark D. Lubas, Controller for NCNG; Robert P. Evans, Financial Specialist of Progress Energy Service Company; Donald A. Murry, Ph.D., Vice President and Economist with C.H. Guernsey & Company and Professor Emeritus at the University of Oklahoma; and Barry L. Guy, Vice President and Controller of Piedmont Natural Gas Company, Inc. (Piedmont).

By Order issued May 1, 2003, the Commission declared NCNG'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 and after April 30, 2003. In that Order, the Commission also set the matter for hearing, required NCNG to give notice of the hearing, established discovery guidelines, and established dates for interventions and for the prefiling of direct testimony by intervenors and for the prefiling of rebuttal testimony by the Company.

On May 7, 2003, Piedmont filed a petition to intervene, and the Commission entered an order granting Piedmont's intervention on May 13, 2003.

On July 22, 2003, the matter came on for hearing in Wilmington as scheduled. At the hearing in Wilmington, no person appeared to testify as a public witness. On July 23, 2003, the hearing was continued in Kinston, at which time the following public witness appeared and gave testimony: Jimmy Barlow, Engineering Associate, DuPont Textiles and Interiors.

Also on July 23, 2003, NCNG and Piedmont filed a joint motion to reschedule the evidentiary hearing then scheduled for August 26, 2003 to September 2, 2003. The Commission issued its order granting the motion on July 28, 2003.

On July 24, 2003, the hearing of this matter was continued in Fayetteville, at which time the following public witnesses appeared and gave testimony: Jim Kanneker, Plant Manager, Goodyear Tire & Rubber; Buddy Hopkins, Utility Supervisor, Fresenius Kabi; Pat DeCourcy, Vice President – Finance, AllVac Company; and Teresa Lemmond, One-Hour Cleaners.

On August 12, 2003, the Company, Piedmont, and the Public Staff of the North Carolina Utilities Commission (the Public Staff) filed a stipulation (the Initial Stipulation) resolving certain issues in this proceeding as between the Company, Piedmont and the Public Staff.

Also on August 12, 2003, various intervenors prefiled direct testimony of the following witnesses: <u>Public Staff</u> – Jan A. Larsen, Utilities Engineer, Natural Gas Division; Sami M. Salib, Utilities Engineer, Natural Gas Division; James G. Hoard, Assistant Director, Accounting Division; and Robert Hinton, Financial Analyst, Economic Research Division; <u>CUCA</u> – Kevin W. O'Donnell, President, Nova Energy Consultants, Inc.; <u>Gas Cities</u> – Donald D. Mitchell; Director of Energy Services, City of Monroe; L.W. Loos, Director, Black & Veatch Corporation; Thomas J. Sullivan, Principal Consultant, Black & Veatch Corporation; and Anthony Miller, Director of Gas Systems, Greenville Utilities Commission; <u>DOD</u> – Kenneth L. Kincel, President, Decision Analysis Corporation of Virginia.

On August 26, 2003, the hearing of this matter continued in Raleigh as previously noticed, at which time no public witness appeared to testify.

On August 29, 2003, the Company filed a Supplemental Stipulation between the Company, Piedmont, and the Public Staff (Supplemental Stipulation) addressing certain rate design issues that these parties had previously indicated were the subject of ongoing negotiations. The Company also filed on that date the supplemental direct testimony of Company witnesses Fredrick W. Hering and Robert P. Evans and the rebuttal testimony of Company witnesses Donald A. Murry, Ph.D., Chuck Fleenor, Robert P. Evans, and Barry L. Guy.

On September 2, 2003, NCNG, Piedmont, the Public Staff, CUCA, the Gas Cities, and the DOD (Stipulating Parties), following additional negotiations, filed a Further Substitute and

Supplemental Stipulation (Final Stipulation). On September 2, 2003, the Company also filed further supplemental direct testimony of Fredrick W. Hering supporting the Final Stipulation.

Also on September 2, 2003, the case in chief came on for hearing as scheduled in Raleigh. No public witnesses appeared. At the hearing, the Company reported, and the Stipulating Parties confirmed, that following substantial negotiations a comprehensive agreement had been reached between the Company, Piedmont, the Public Staff, CUCA, the Gas Cities, and DOD, that this agreement resolved all issues in the case as between these parties, and that this agreement was reflected in the Final Stipulation. The Attorney General indicated that it did not oppose the settlement reflected in the Final Stipulation, and counsel for the PWC indicated that PWC had no objection to the settlement as reflected in the Final Stipulation. At the hearing, the aforementioned prefiled direct, supplemental, and rebuttal testimonies and exhibits of the various witnesses were offered and accepted into evidence.

On September 30, 2003, and consistent with paragraph 11 of the Final Stipulation, the Stipulating Parties submitted late-filed Exhibit I to the Final Stipulation reflecting the stipulated R values and heat factors to be used in the Company's Weather Normalization Adjustment.

Based upon the verified application, the testimony and exhibits received into evidence at the hearings, the Final Stipulation, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. The Company is a corporation organized and existing under the laws of the state of Delaware and duly authorized to do business in North Carolina and engaged in the business of transporting, distributing, and selling natural gas within the state of North Carolina.

2. In its application in this docket, the Company is seeking a general increase in its rates and charges for natural gas service, certain changes to its rate design, and changes to its service regulations and tariffs.

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 of public utilities, including the Company.

5. 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 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 levels used a test period of the twelve months ended September 30, 2002, adjusted for certain known and measurable changes through June 30, 2003, and the Final Stipulation was based upon the same test period.

7. The appropriate test period for use in this proceeding is the twelve months ended September 30, 2002, updated for certain known and measurable changes through June 30, 2003.

8. The Final Stipulation executed by NCNG, Piedmont, the Public Staff, CUCA, the Gas Cities, and the DOD is supported by all parties that filed testimony in this docket and is not opposed by any other party. The Final Stipulation settles all matters in this docket.

9. The Final Stipulation provides for an increase in annual revenues of $29,443,997; however, after giving effect to adoption of the Piedmont depreciation rates for NCNG and implementation of the Industrial Rate Tracker mechanism, as set forth in Findings of Fact Nos. 6-18, the Final Stipulation provides for an annual increase in rates of $21,007,697.

10. As required by G.S. 62-133(b)(1), the Commission has reviewed the 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 described and set forth in paragraph 6 and Exhibit A-1 of the Final Stipulation and reflected on Schedule1A hereto. 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 reviewed the Company's end-of-period pro forma revenues under the present and proposed rates, and these amounts, as set forth in paragraph 7 and Exhibit A-1 of the Final Stipulation and reflected on Schedule 1A hereto, are reasonable for use in this docket.

12. As required by G.S. 62-133(b)(3), the Commission has reviewed the Company's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation, and these amounts, as set forth in Exhibit A-1 of the Final Stipulation and reflected on Schedule 1A hereto, 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 that will enable 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 fair to its customers and to its existing investors. This amount is set forth on Exhibit A-1 of the Final Stipulation and is reflected on Schedules 1A and 2A hereto. 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 7 of the Final Stipulation. Such capital structure and costs of short-term debt, long-term debt, and common equity are appropriate, and 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 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 fair to its customers and to its existing investors.

14. For the purpose of this proceeding the appropriate level of adjusted sales and transportation volumes is 67,205,639 dekatherms (dts), which is composed of 44,851,176 dts of sales quantities and 22,354,463 dts of transportation quantities. The appropriate level for lost and unaccounted for gas is 966,701 dts, the appropriate level of company use gas is 128,659 dts, and the appropriate level of purchased gas supply is 45,946,536 dts, consisting of sales volumes, company use gas, and lost and unaccounted for gas.

15. 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 November 1, 2003, in proceedings under Rule R1-17(k) are those derived from the fixed gas cost allocation percentages set forth in Exhibit C to the Final Stipulation.

16. The appropriate depreciation rates for use in this proceeding are those approved for Piedmont in Docket No. G-9, Sub 461, and reflected on Exhibit D to the Final Stipulation.

17. The rate design and Industrial Rate Tracker mechanism incorporated into the Final Stipulation in paragraphs 8 and 9 and reflected in Exhibit H attached thereto are just and reasonable and should be approved.

18. For the purpose of designing rates and in conjunction with the Industrial Rate Tracker mechanism incorporated into the Final Stipulation and attached thereto as Exhibit H, the Commission finds:

(a) That it is appropriate to use the rate base, accumulated depreciation, end-of-period pro forma revenues, operating expenses, and cost of capital reflected on Exhibit A-2;

(b) That the appropriate level of adjusted sales and transportation quantities is 71,734,551 dts, comprised of 44,851,176 dts of sales quantities and 26,883,375 of transportation quantities;

(c) That it is appropriate that all residential customers be placed in the "Value" service category until November 1, 2005, when they will be classified as either Value or Standard rate customers in accordance with the Company's tariff; and

(d) That it is appropriate that all commercial customers qualifying for rate schedules 7 or 8 will be placed in the "Value" service category until November 1, 2005, when they will be classified as either Value or Standard rate customers in accordance with the Company's tariff.

19. The rate schedules reflecting new volumetric rates, facilities charges and demand charges as shown in the column entitled "Proposed Rate" on Exhibit B to the Final Stipulation (as the same may be adjusted for any changes in the Company's Benchmark Cost of Gas, changes in Demand and Storage Charges prior to the effective date of the revised rates, or changes resulting from the operation of the Industrial Rate Tracker mechanism) should be

established by the Commission as just and reasonable in this case. Such rates are just and reasonable to all customer classes.

20. The "R" values and heat factors that should be used in the Company's Weather Normalization Adjustment (the WNA) for periods subsequent to November 1, 2003, are those "R" values and heat factors set forth on late-filed Exhibit I to the Final Stipulation.

21. The proposed treatment of integration costs, as set forth in paragraph 13.A. of the Final Stipulation, is fair and reasonable and should be approved.

22. The proposed treatment of pension and other post employment benefit (OPEB) expenses, as set forth in paragraph 13.B. of the Final Stipulation, is fair and reasonable and should be approved.

23. The proposed treatment of the manufactured gas plant (MGP) expenses, as set forth in paragraph 13.C. of the Final Stipulation, is fair and reasonable and should be approved for purposes of this proceeding. The Commission takes no position on the relative rights of Piedmont, NCNG, or Progress Energy under the Stock Purchase Agreement with respect to such costs or related insurance proceeds.

24. For purposes of this proceeding, the method for calculating uncollectible expense, as set forth in paragraph 14 of the Final Stipulation, is fair and reasonable and should be approved.

25. The tariffs attached to the Final Stipulation as Exhibit E and the service regulations attached to the Final Stipulation as Exhibit F are fair and reasonable and should be approved.

26. The provisions of the Stipulation are fair and reasonable under the circumstances of this proceeding and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-5

These findings of fact 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 Form G-1 that was filed with the application.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6-7

The Company filed its application and exhibits using a test period consisting of the twelve months ended September 30, 2002. In its order of May 1, 2003, the Commission ordered the parties to use a test period consisting of the twelve months ended September 30, 2002, with appropriate adjustments. The Final Stipulation is based upon the test period ordered by the Commission, and this test period was not contested by any party. In the Final Stipulation, the Stipulating Parties agreed to make appropriate adjustments to the test period data for circumstances occurring or becoming known through June 30, 2003. These adjustments were not contested by any party.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

This finding is supported by the Final Stipulation as well as the representations of counsel for the Stipulating Parties and the Attorney General at the hearing of this matter. The Final Stipulation recites that it is filed on behalf of the Company, Piedmont, the Public Staff, CUCA, the Gas Cities, and the DOD. The record of this matter reflects that these are all of the parties that filed testimony in this docket. At the hearing of this matter, counsel for each of these parties indicated that they support the Final Stipulation. At the hearing, counsel for the Attorney General and PWC, the only other parties of record to this docket, indicated that they had no objection to the Final Stipulation. This finding is not contested by any party.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

This finding is supported by paragraph 7.F. of the Final Stipulation and is not contested by any party. Schedules 1A and 2A attached hereto reflect the net operating income for return, rate base, capitalization and rate of return approved in this Order. Schedules 1B and 2B attached hereto reflect adjustments to the approved net operating income for return, rate base, capitalization and rate of return resulting from the implementation of the depreciation adjustment and Industrial Rate Tracker mechanism approved in this Order.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 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 described and set forth in paragraph 6 and Exhibit A-1 to the Final Stipulation. The amounts shown on Exhibit A-1 to the Final Stipulation are the result of negotiations among all of the parties filing testimony in this docket, as described in the Final Stipulation and the Supplemental and Further Supplemental Testimony of Company witness Hering. The stipulated 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 service to the public, less depreciation expense is not contested by any party. The Commission has carefully reviewed these amounts and concludes that they are appropriate for use in this docket.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The end of test period pro forma revenues under the Company's present and stipulated proposed rates are set forth in paragraph 7 and Exhibit A-1 to the Final Stipulation. The amounts shown on Exhibit A-1 to the Stipulation are the result of negotiations among all of the parties filing testimony in this docket, as described in the Final Stipulation and the Supplemental and Further Supplemental Testimony of Company witness Hering and are not contested by any party. The Commission has carefully reviewed these amounts, as well as the evidence in the record relating to pro forma revenues, and concludes that the stipulated pro forma revenues are reasonable and appropriate for use in this docket.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

The Company's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation, is set forth in Exhibit A-1 to the Stipulation. The amounts shown on Exhibit A-1 to the Stipulation are the result of negotiations among all of the parties filing testimony in this docket, as described in the Final Stipulation and the Supplemental and Further Supplemental Testimony of Company witness Hering and are not contested by any party. The Commission has carefully reviewed these amounts, as well as the evidence in the record relating to these amounts, and concludes that the stipulated reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation are appropriate for use in this docket.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

The rate of return on the cost of the Company's used and useful property is set forth on Exhibit A-1 to the Final Stipulation. The capital structure and the costs of short-term debt, long-term debt and common equity are set forth in paragraph 7 of the Final Stipulation. This rate of return, capital structure and the costs of short-term debt, long-term debt and common equity are the result of negotiations among the parties, as described in the Final Stipulation and the Supplemental and Further Supplemental Testimony of Company witness Hering and are not contested by any party. The Commission has carefully reviewed the stipulated return, the stipulated capital structure and stipulated costs of short-term debt, long-term debt and common equity, and has further reviewed the evidence supporting the litigation position of the parties on these matters. Based on that review, the Commission concludes that the stipulated rate of return, stipulated capital structure and stipulated costs of short-term debt, long-term debt and common equity 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 14

The level of adjusted sales and transportation volumes used in the Final Stipulation is 67,205,639 dts and the level of purchased gas supply is 45,946,536. The throughput volume level is derived as follows:

Sales	44,851,176
Transportation	22,354,463
Total Throughput	67,205,639

The level of purchased gas supply is 45,946,536 dts derived as follows:

Sales	44,851,176
Lost & Unaccounted for	966,701
Company Use	128,659
Purchased Gas Supply	45,946,536

This throughput level and level of purchased gas supply are the result of negotiations among the parties, as described in the Final Stipulation and the Supplemental and Further Supplemental Testimony of Company witness Hering, and are 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 15

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 Final Stipulation, the Stipulating Parties agree that for the purpose of this proceeding and future proceedings under Rule R1-17(k), the appropriate amount of fixed costs to be allocated to each rate schedule is the amount set forth in Exhibit C to the Final Stipulation. No party contests this. The Commission has carefully examined these amounts and concludes that they are just and reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

In paragraph 16 of the Final Stipulation, the Stipulating Parties propose to utilize the depreciation rates approved by this Commission for Piedmont in its most recent rate case in Docket No. G-9, Sub 461, as reflected in Exhibit D to the Final Stipulation. No party contests this proposal. The Commission has carefully reviewed this proposal. Based on this review, the Commission concludes that use of Piedmont's approved depreciation rates in this proceeding is supported by the fact that the Commission has previously approved Piedmont's acquisition of NCNG and the fact that this acquisition closed on September 30, 2003. It is further supported by the fact that Piedmont's legacy facilities comprise the largest percentage of the combined Piedmont/NCNG system and that it is somewhat logically problematic to apply differing sets of depreciation rates to different parts of a unified system operated on a integrated basis. Finally, adoption of Piedmont's approved depreciation rates for use in this proceeding will have a beneficial impact on NCNG's customers because it will effectively reduce the overall rate increase they would otherwise experience in this docket. For the foregoing reasons, the Commission concludes that the use of Piedmont's approved depreciation rates in this proceeding, as reflected on Exhibit D to the Final Stipulation, is fair and reasonable and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 17-18

In paragraph 8 and 9 of the Final Stipulation and Exhibit H thereto, the Stipulating Parties propose to use an alternate rate design in conjunction with an Industrial Rate Tracker mechanism to mitigate the impact of the stipulated rate increase in this proceeding on a revenue neutral basis. Under this mechanism, industrial throughput is calculated based on the projected maximum possible usage by NCNG's industrial customers (which is substantially larger than the adjusted test period usage) and rates are then recalculated on that basis. The net effect of this mechanism, in combination with the adoption of Piedmont's depreciation rates for NCNG's facilities discussed below, is a reduction in the overall rate increases that would otherwise be experienced by NCNG's customers and an effective phase-in of the rate increases that are necessary in this case. This mechanism also permits the Company to recover the same margin it would have recovered under a more traditional rate design based on the stipulated rate increase. The proposed Industrial Rate Tracker mechanism operates by deferring, subject to several protective caps, any margin under-recovery that may result if industrial throughput is less than the maximum usage upon which rates were calculated. Under the proposal, these deferred margin losses will earn interest at a rate equal to the Company's allowed overall rate of return net of taxes (7.83%) and may be collected from customers upon terms approved by the Commission in a subsequent proceeding.

Because of the alternative nature of the rate design proposed in the Final Stipulation and the manner in which it is proposed to be implemented, a number of aspects of the stipulated case require adjustment or restatement in order to implement this rate design. These adjustments or restatements, for rate design purposes only, are reflected on Exhibit A-2 to the Final Stipulation. These adjustments are also reflected in the proposed rates set forth on Exhibit B and contained in Exhibit E to the Final Stipulation.

No parties contest the rate design proposals set forth in paragraphs 8 and 9 of the Final Stipulation or the Industrial Rate Tracker mechanism reflected in Exhibit H to the Final Stipulation.

The Final Stipulation also provides that residential and commercial customers will initially be placed on "Value" rates for service under those restructured categories of service. This designation will provide residential and commercial customers with the benefit of the lower rates associated with a "Value" rate designation until November 1, 2005, at which time customers will be classified to the appropriate "Value" or "Standard" designation in accordance with the Company's tariffs. The Commission concludes that this mechanism is a benefit to residential and commercial customers and helps to mitigate the impact of the rate increase approved herein.

The Commission has carefully reviewed and considered the rate design proposals set forth in the Final Stipulation, including the Industrial Rate Tracker mechanism contained in Exhibit H thereto. Based upon this review and consideration, the Commission concludes that the rate design proposals contained in the Final Stipulation represent a creative and beneficial mechanism to mitigate the impact of the rate increase on customers in this proceeding while simultaneously protecting the Company's legitimate right to recover its approved margins. The

Commission concludes that all aspects of the proposed rate design and Industrial Rate Tracker mechanism set forth in the Final Stipulation are fair and reasonable and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 19

The computation of revenues under the proposed rates (based on the $5.75 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 Final Stipulation. These computations show that the proposed rates will produce the revenues calculated under the rate design approved for use in this proceeding in conjunction with the Industrial Rate Tracker mechanism. Company witness Hering testified in his Supplemental and Further Supplemental Testimony that the proposed rates and underlying rate design reflected in Exhibit B to the Final Stipulation, as approved above, are somewhat different than those originally proposed by the Company but that they were just and reasonable and fair to consumers and the Company in the context of the Final Stipulation as a whole. The Final Stipulation itself reflects the agreement of all parties filing testimony that these rates are proper, just and reasonable. Witness Hering's conclusions and the similar conclusion set forth in the Final Stipulation in this regard are uncontested. The rates reflected on Exhibit B to the Final Stipulation are the result of negotiations among all of the parties filing testimony in this docket 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 20

Under the Company's WNA, it is necessary and appropriate to determine the "R" values and heat factors that will be used in the WNA. In the Final Stipulation, the Stipulating Parties agree that the "R" values and heat factors that should be used in the WNA are those "R" values and heat factors set forth in late-filed Exhibit I to the Final Stipulation. No party contests this assertion. 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 21

In paragraph 13.A. of the Final Stipulation, the Stipulating Parties agreed that the level of integration costs associated with Piedmont's integration of NCNG's operations appropriate for regulatory asset treatment in this proceeding is $3,063,628 and that a three-year amortization and recovery of these costs was appropriate. No party contests this proposal. The Commission has carefully reviewed the proposed amount of integration costs to be given regulatory asset treatment and the proposed amortization and recovery period for these costs. Based on this review, the Commission concludes that the amount and mechanism for recovering Piedmont's integration costs proposed by the Stipulating Parties in this regard are fair and reasonable under all the circumstances of this case and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

In paragraph 13.B. of the Final Stipulation, the Stipulating Parties agreed that the proper level of Pension and OPEB expense appropriate for regulatory asset treatment in this proceeding is $12,000,000 and that the Company should be permitted to amortize and recover this expense over a fifteen-year period. No party contests this proposal. The Commission has carefully reviewed both the proposed amount of Pension and OPEB expense appropriate for regulatory asset treatment and the proposed amortization period for recovery of such costs. Based on this review, the Commission concludes that both the stipulated amount of Pension and OPEB expense and the proposed amortization and recovery period proposed in the Final Stipulation are fair and reasonable under all the circumstances of this case and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 23

In paragraph 13.C. of the Final Stipulation, the Stipulating Parties agreed that for purposes of this rate case, a balance of $3,470,954 (remaining after subtracting $1,867,949 of deferred MGP expense from an insurance payment of $5,338,903) should be credited to NCNG customers over a three-year period. The Final Stipulation also provides that "[n]othing in this Stipulation is intended to waive any rights of Piedmont, NCNG or Progress under the Stock Purchase Agreement or otherwise with respect to the appropriate treatment of the insurance proceeds or the effect of such treatment on the purchase price, including any adjustment relating to working capital." No party contests these provisions. The Commission has carefully reviewed this proposed credit to customers and the reservation of rights of the parties. Based on this review, the Commission concludes that both the stipulated credit and the reservation of rights are fair and reasonable under all the circumstances of this case and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 24

In calculating the Company's pro forma cost of service, it is necessary to calculate uncollectible accounts. In the Final Stipulation, the Stipulating Parties agreed that these amounts should be based on a five-year average of actual uncollectible accounts for the period ended September 30, 2002. This methodology is supported by the testimony of Public Staff witness Hoard. No party contests this method for calculating uncollectible accounts for purposes of this proceeding. The Commission has carefully reviewed the stipulated method for calculating uncollectible accounts and concludes that it is fair and reasonable and appropriate for use in this docket.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 25

Various Company witnesses testified to proposed changes in the Company's tariffs and service regulations and the reasons underlying those changes. In general, they testified that these changes were necessary and appropriate to reflect the new rates and rate design proposed by the Company and to reflect changes in market, usage, and regulatory conditions. The Stipulating Parties agreed in the Final Stipulation that some but not all of the proposed changes to the Company's tariffs and service regulations were appropriate. The proposed changes to the Company's tariffs and service regulations which were agreed to among the Stipulating Parties are reflected in Exhibits E and F to the Final Stipulation. No party objects to these changes. The Commission has carefully reviewed these changes to the Company's service regulations and tariffs and concludes that they are fair and reasonable and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 26

For the reasons set forth in the foregoing paragraphs, the Commission concludes that the Final 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. Therefore, the Commission finds and concludes that all of the provisions of the Final 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 NCNG is hereby authorized to adjust its rates and charges in accordance with the Final Stipulation in this proceeding (as such rates may be adjusted for any changes in the Benchmark Cost of Gas and changes in Demand and Storage Charges prior to the effective date of the revised rates) effective for service rendered on and after November 1, 2003;

2. That NCNG is authorized to implement the tariffs attached to the Final Stipulation as Exhibits E and H effective November 1, 2003;

3. That all residential customers shall be placed in the "Value" service category until November 1, 2005, when they will be classified as either "Value" or "Standard" rate customers in accordance with NCNG's tariff;

4. That all commercial customers qualifying for rate schedules 7 or 8 shall be placed in the "Value" service category until November 1, 2005, when they will be classified as either "Value" or "Standard" rate customers in accordance with NCNG's tariff;

5. That NCNG is authorized to implement the service regulations attached to the Final Stipulation as Exhibit F effective November 1, 2003;

6. That NCNG shall file tariffs and service regulations to comply with paragraphs 1 through 5 of this order within five (5) days from the date of this order;

7. That in the true-up of fixed gas costs for periods subsequent to October 31, 2003, in proceedings under Rule R1-17(k), NCNG shall use the fixed gas costs set forth in Exhibit C to the Final Stipulation;

8. That for periods subsequent to October 31, 2003, NCNG shall use the "R" values and heat factors set forth in Exhibit I to the Final Stipulation;

9. That NCNG is permitted to defer and collect from its customers, over a three-year period beginning November 1, 2003, $3,063,628 of integration costs associated with Piedmont's integration of NCNG's operations;

10. That NCNG is permitted to defer and collect from its customers, over a fifteen-year period beginning November 1, 2003, $12,000,000 of Pension and OPEB expenses;

11. That NCNG is required to credit to its customers, without prejudice to the rights of NCNG, Piedmont, or Progress Energy, over a three-year period beginning November 1, 2003, a credit of $3,470,954 derived from subtracting deferred MGP costs from a prior payment made to NCNG by its insurers; and

12. That NCNG shall send the notice attached hereto as Attachment A 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 30th day of October, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

db102903.01

Attachment A

DOCKET NO. G-21, SUB 442

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Application of North Carolina Natural Gas	)	
Corporation for a General Increase in Its Rates	)	**PUBLIC NOTICE**
and Charges and for Approval of Certain	)	
Changes to Its Rate Schedules, Classifications,	)	
and Practices	)	

The North Carolina Utilities Commission issued an Order authorizing North Carolina Natural Gas Corporation (NCNG) to increase its annual revenues by $29,443,997; however, after adoption of lower depreciation rates currently being utilized by Piedmont Natural Gas Company, Inc., who recently purchased NCNG, and an industrial tracker mechanism, the rates and charges increase by $21,007,697 annually, or 5.41% overall, effective November 1, 2003.

NCNG'S application for a rate increase was filed with the Commission on March 31, 2003. In its application, NCNG requested an increase of approximately $47 million annually.

In its application, NCNG stated that the rate increase was needed because it has been adding customers and making capital improvements in its utility properties. The reasons cited by NCNG 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 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.

As part of its Order approving NCNG's rate increase, the Commission also approved a redesign of NCNG's residential and commercial rate structures. This redesign incorporates two categories for residential and commercial customers, which are designated "Standard" and "Value" service. "Standard" service includes customers who typically use natural gas for space heating only and/or have minimal consumption during the non-heating season. "Value" service includes customers who utilize natural gas for non-heating appliances to a significant level in lieu of or in addition to space heating. However, all residential and commercial customers will initially be placed on and receive the benefit of the "Value" rate designation until November 1, 2005. At that time, a determination will be made as to the proper reclassification of the residential and commercial customers based on the previous two years of consumption history, including seasonal gas consumption patterns. This redesign will result in residential and commercial customers seeing changes in their gas bills separate and apart from any rate increase granted by the Commission.

Overall, the Commission has approved a residential rate increase for NCNG of 9.99%. Individual residential customers may experience a significantly larger or smaller percentage increase due to their individual usage patterns and the rate design described above after November 1, 2005.

ISSUED BY ORDER OF THE COMMISSION.
This the 30th day of October, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

SCHEDULE 1A
NORTH CAROLINA NATURAL GAS CORPORATION
DOCKET NO. G-21, SUB 442
STATEMENT OF APPROVED NET OPERATING INCOME FOR RETURN, RATE BASE AND RATE OF RETURN
FOR THE TWELVE MONTHS ENDED SEPTEMBER 30, 2002

DESCRIPTION	PRESENT RATES	REVENUE INCREASE	APPROVED RATES
NET OPERATING INCOME FOR RETURN:			
OPERATING REVENUES	382,052,492	$28,827,138	$410,879,630
MISCELLANEOUS REVENUES	808,787	616,859	1,425,646
TOTAL OPERATING REVENUES	382,861,279	29,443,997	412,305,276
OPERATING EXPENSES AND TAXES			
COST OF GAS	295,668,490	0	295,668,490
OPERATING AND MAINTENANCE EXPENSES	39,489,624	111,939	39,601,563
DEPRECIATION	21,261,037	0	21,261,037
OTHER GENERAL TAXES	4,610,779	0	4,610,779
INTEREST ON CUSTOMER DEPOSITS	194,070	0	194,070
INCOME TAXES			
FEDERAL	2,375,294	9,557,851	11,933,145
STATE	502,977	2,023,912	2,526,889
TOTAL OPERATING EXPENSES AND TAXES	364,102,271	11,693,702	375,795,973
NET OPERATING INCOME FOR RETURN	$18,759,008	$17,750,295	$ 36,509,303
RATE BASE:			
PLANT AND PROPERTIES IN SERIACE	$ 573,070,710	$0	$ 573,070,710
LESS - ACCUMULATED DEPRECIATION	(191,645,247)	0	(191,645,247)
NET INVESTMENT IN GAS PLANT	381,425,463	0	381,425,463
WORKING CAPITAL ALLOWANCE			
GAS IN STORAGE	15,016,363	0	15,016,363
MATERIALS AND SUPPLIES	3,177,736	0	3,177,736
ALL OTHER INCLUDE. CUSTOMER DEPOSITS & PENSION	(4,787,919)	0	(4,787,919)
TOTAL WORKING CAPITAL ALLOWANCE	13,406,180	0	13,406,180
COST-FREE CAPITAL			
ACCUMULATED DEFERRED INCOME TAXES	(876,358)	0	(876,358)
RATE BASE	$393,955,285	$0	$393,955,285
RATE OF RETURN ON RATE BASE	4.76%		9.27%

SCHEDULE 2A
NORTH CAROLINA NATURAL GAS CORPORATION
DOCKET NO. G-21, SUB 442
APPROVED CAPITALIZATION AND RATE OF RETURN ON COMMON EQUITY
FOR THE TWELVE MONTHS ENDED SEPTEMBER 30, 2002
AFTER APPROVED RATE INCREASE

DESCRIPTION	RATIO %	RATEBASE	COST/ RATE OF RETURN %	WEIGHTED COST %	NET OPERATING INCOME
LONG-TERM DEBT	47.93%	$188,822,768	7.57%	3.63%	$14,293,884
SHORT-TERM DEBT	0.93%	3,663,784	1.47%	0.01%	53,858
COMMON EQUITY	51.14%	201,468,733	11.00%	5.63%	22,161,562
TOTAL	100.00%	$393,955,285		9.27%	$36,509,303

SCHEDULE 1B
NORTH CAROLINA NATURAL GAS CORPORATION
DOCKET NO. G.21, SUB 442
OPERATING INCOME FOR RETURN, RATE BASE AND RATE OF RETURN AFTER RATE DESIGN CHANGES
FOR THE TWELVE MONTHS ENDED SEPTEMBER 30, 2002

DESCRIPTION	PRESENT RATES	REVENUE INCREASE	APPROVED RATES
NET OPERATING INCOME FOR RETURN:			
OPERATING REVENUES	$387,812,251	$20,390,838	$408,203,089
MISCELLANEOUS REVENUES	808,787	616,859	1,425,646
TOTAL OPERATING REVENUES	388,621,038	21,007,697	409,628,735
OPERATING EXPENSES AND TAXES			
COST OF GAS	295,668,490	0	295,668,490
OPERATING AND MAINTENANCE EXPENSES	39,496,536	79,862	39,576,398
DEPRECIATION	18,215,646	0	18,215,646
OTHER GENERAL TAXES	4,610,779	0	4,610,779
INTEREST ON CUSTOMER DEPOSITS	194,070	0	194,070
INCOME TAXES			
FEDERAL	5,206,061	6,819,336	12,025,397
STATE	1,102,403	1,444,021	2,546,424
TOTAL OPERATING EXPENSES AND TAXES	364,493,985	8,343,219	372,837,204
NET OPERATING INCOME FOR RETURN	$ 24,127,053	$12,664,478	$ 36,791,531
RATE BASE:			
PLANT AND PROPERTIES IN SERVICE	$573,070,710	$0	$573,070,710
LESS - ACCUMULATED DEPRECIATION	(188,599,856)	0	(188,599,856)
NET INVESTMENT IN GAS PLANT	384,470,854	0	384,470,854
WORKING CAPITAL ALLOWANCE			
GAS IN STORAGE	15,016,363	0	15,016,363
MATERIALS AND SUPPLIES	3,177,736	0	3,177,736
ALL OTHER INCLUDE. CUSTOMER DEPOSIT & PENSION	(4,787,919)	0	(4,787,919)
TOTAL WORIGNG CAPITAL ALLOWANCE	13,406,180	0	13,406,180
COST-FREE CAPITAL			
ACCUMULATED DEFERRED INCOME TAXES	(876,358)	0	(876,358)
RATE BASE	$397,000,676	$0	$397,000,676
RATE OF RETURN ON RATE BASE	6.08%		9.27%

SCHEDULE 2B
NORTH CAROLINA NATURAL GAS CORPORATION
DOCKET NO. G-21, SUB 442
CAPITALIZATION AND RATE OF RETURN ON COMMON EQUITY
FOR THE TWELVE MONTHS ENDED SEPTEMBER 30, 2002
AFTER APPROVED RATE INCREASE AND RATE DESIGN CHANGES

DESCRIPTION	RATIO %	RATE BASE	COST/ RATE OF RETURN %	WEIGHTED COST %	NET OPERATING INCOME
LONG-TERM DEBT	47.93%	$190,282,424	7.57%	3.63%	$14,404,379
SHORT-TERM DEBT	0.93%	3,692,106	1.47%	0.01%	54,274
COMMON EQUITY	51.14%	203,026,146	11.00%	5.63%	22,332,878
TOTAL	100.00%	$397,000,676		9.27%	$36,791,531

DOCKET NO. G-39, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Cardinal Pipeline Company, LLC for an Adjustment In Its Rates and Charges	)))	ORDER APPROVING RATE DECREASE

HEARD IN: Commission Hearing Room, Dobbs Building, 430 N. Salisbury Street, Raleigh, North Carolina, on Wednesday, May 21, 2003

BEFORE: Commissioner Lorinzo L. Joyner, Presiding, Commissioner J. Richard Condor and Commissioner Michael S. Wilkins

APPEARANCES:

For Cardinal Pipeline Company, LLC:

Robert W. Kaylor, P.A., 225 Hillsborough Street, Suite 480, Raleigh, North Carolina 27603

For the Using and Consuming Public:

Gina C. Holt, 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, PC, 434 Fayetteville Street Mall, Suite 1735, Raleigh, North Carolina 27601

BY THE COMMISSION: On December 13, 2002, Cardinal Pipeline Company, LLC (Cardinal), gave notice of its intent to file a general rate case with the North Carolina Utilities Commission (Commission). On January 6, 2003, Cardinal filed a Motion for Waivers, requesting waiver of the requirements to file Item 25 – Accounts Payable and Item 26 – Lead/Lag Study as required by the Commission's Form G-1.

On January 15, 2003, Cardinal filed an application seeking a general increase in its rates and charges. The test year used in the application was the twelve months ended September 30, 2002. Included with the filing was certain information and data required by Form G-1, the direct testimony and exhibits of Charlotte Hutson, Manager of Cost of Service and Rate Design for Cardinal Operating Company, and the testimony and exhibits of Donald A. Murry, PhD, an economist and Vice President with C.H. Guernsey & Company.

On January 10, 2003, the Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene. On January 29, 2003, Piedmont Natural Gas Company, Inc. (Piedmont), filed a petition to intervene. On January 31, 2003, the Commission issued its order granting CUCA's and Piedmont's petitions to intervene. On February 3, 2003, the Commission issued an errata order granting these petitions to intervene. On February 7, 2003, Public Service Company of North Carolina, Inc. (PSNC), filed a petition to intervene, which was allowed by order of February 12, 2003.

On February 12, 2003, the Commission issued its Order Setting Investigation and Hearing, Granting Waivers, Suspending Proposed Rates, Establishing Intervention and Testimony Due Dates and Discovery Guidelines, and Requiring Public Notice. This order allowed the Motion for Waivers filed on January 6. A hearing was scheduled for May 21, 2003.

On February 13, 2003, North Carolina Natural Gas Corporation (NCNG) filed a petition to intervene, which was allowed by order of March 3, 2003.

On May 1, 2003, the Public Staff filed the testimony and exhibits of Marvin R. Miller, Staff Accountant with its Accounting Division, Jan A. Larsen, Utilities Engineer with its Natural Gas Division, and John R. Hinton, Financial Analyst with its Economic Research Division. Also on this date, CUCA filed the testimony and exhibits of Kevin W. O'Donnell, President of Nova Energy Consultants, Inc. On May 20, 2003, Cardinal filed Supplemental Testimony of Charlotte Hutson.

On May 21, 2003, Cardinal, the Public Staff, and CUCA filed a joint Stipulation in settlement of all aspects of Cardinal's application. On that same date, the case came on for hearing as scheduled in Raleigh. No public witnesses appeared. At the hearing, Cardinal, the Public Staff, and CUCA jointly presented the Stipulation. Cardinal represented that the other parties to this proceeding – Piedmont, PSNC, and NCNG – have no objection to the Stipulation or to the Commission's entering an order based on the Stipulation.

On June 27, 2003, the three stipulating parties filed a joint proposed order and a jointly-signed letter clarifying one aspect of the joint Stipulation.

Based upon the application, the testimony and exhibits received into evidence, the Stipulation, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Cardinal is a limited liability company formed under the North Carolina Limited Liability Company Act. The members of Cardinal are PSNC, Cardinal Pipeline Company, Piedmont Intrastate, NCNG Energy Corporation, and TransCardinal Company. Cardinal's principal place of business is located at the offices of its operator, Cardinal Operating Company, at 2800 Post Oak Boulevard, Houston, Texas.

2. Cardinal is a public utility within the meaning of G.S. 62-3(23).

3. The Commission has jurisdiction over the rates and charges, rate schedules, classifications, and practices of public utilities operating in North Carolina, including Cardinal, under Chapter 62 of the General Statutes of North Carolina.

4. By its application in this docket, Cardinal seeks a general increase in its rates and charges.

5. The Commission finds that Cardinal is properly before the Commission for a determination of the justness and reasonableness of its proposed rates and charges, rate schedules, classifications, and practices.

6. The only parties submitting evidence in this case with respect to revenue, expenses, and rate base levels used a test period of the twelve months ended September 30, 2002, and the Stipulation was based upon the same test period.

7. The Commission finds that the appropriate test period for use in this proceeding is the twelve months ended September 30, 2002.

8. The Stipulation executed by Cardinal, the Public Staff, and CUCA is unopposed by any party and the Stipulation settles all matters in this docket.

9. The Stipulation provides for a decrease in annual revenues of $1,600,027.

10. As required by G.S. 62-133(b)(1), the Commission has reviewed the reasonable original cost of Cardinal'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 previous use recovered by depreciation expense, all as described and set forth in paragraph 2 and Exhibit A of the Stipulation. The Commission finds that these amounts are appropriate for use in this proceeding.

11. As required by G.S. 62-133(b)(2), the Commission has reviewed Cardinal's pro forma revenues under the present rates and the proposed rates in the Stipulation. The Commission finds that the revenues under the proposed rates, as set forth in paragraph 4 and Exhibit A of the Stipulation, are reasonable for use in this docket.

12. As required by G.S. 62-133(b)(3), the Commission has reviewed Cardinal's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation. The Commission finds that these amounts, as set forth in Exhibit A of the Stipulation, are reasonable for use in this docket.

13. As required by G.S. 62-133(b)(4), the Commission has reviewed Cardinal's rate of return allowance on the cost of the property ascertained pursuant to paragraph 10 above that will enable Cardinal by sound management the opportunity to produce a fair return for its shareholders, considering changing economic conditions and other factors, 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 fair to its customers and to its existing investors.

14. The Commission finds that Cardinal's original cost rate base used and useful in providing service in North Carolina is $86,340,805, consisting of gas plant-in-service of $105,615,436 and working capital of $224,616 reduced by accumulated depreciation of $10,723,676 and accumulated deferred income taxes of $8,775,571.

15. The parties to the Stipulation agreed to a change in the zonal allocation factor from gross plant to rate base, the classification of all costs to the demand component of rates, and the use of Straight Fixed Variable rate design. The Commission finds these aspects of the Stipulation to be just and reasonable.

16. The Commission finds that a total annual cost of service and revenue requirement of $15,523,685, representing a $1,600,027 decrease compared to Cardinal's total annual revenues for the twelve months ending September 30, 2002, is just and reasonable.

17. The Commission finds that the schedule of rates as shown in Exhibit B to the Stipulation are just and reasonable to all customer classes and should be approved.

18. Cardinal has agreed to provide the Public Staff and CUCA, on a quarterly basis, with copies of quarterly financial statements provided to Cardinal's member companies, subject to CUCA's executing a reasonable confidentiality agreement, and Cardinal has agreed to provide the Public Staff and CUCA with quarterly information related to fuel use/retention on Cardinal's system.

19. Cardinal has agreed to file its next general rate case no later than March 15, 2007, and to provide the Public Staff and CUCA with a rough outline of the rate case, including the period selected as the test year for the rate case, by February 15, 2007.

20. The Commission finds that all of the provisions of the Stipulation are fair and reasonable under the circumstances of this proceeding and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-5

The evidence supporting these findings of fact is contained in the verified application of Cardinal, the testimony and exhibits of the witnesses, and the record in this docket.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6-7

Cardinal filed its application and exhibits using a test period of the twelve months ended September 30, 2002. In its order of February 12, 2003, the Commission ordered the parties to use a test period of the twelve months ended September 30, 2002, 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 8

This finding is supported by the Stipulation as well as representations by Cardinal, the Public Staff, and CUCA at the hearing of this matter, and this finding is not contested by any party.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

This finding is supported by the Stipulation, as clarified by the letter filed by Cardinal, the Public Staff, and CUCA on June 27, 2003, and this finding is not contested by any party.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The reasonable original cost of Cardinal'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 previous use recovered by depreciation expense, is described and set forth in paragraph 2 and Exhibit A to the Stipulation. The amounts shown on Exhibit A to the Stipulation, which is attached hereto, 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The pro forma revenues under Cardinal's proposed rates are set forth in paragraph 4 and Exhibit A to the Stipulation. The amounts shown on Exhibit A to the Stipulation, which is attached hereto, 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 12

Cardinal's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation, are set forth in Exhibit A to the Stipulation. The amounts shown on Exhibit A to the Stipulation, which is attached hereto, 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 13

The rate of return on the cost of Cardinal's used and useful property is the result of negotiations among the parties and is not opposed by any party. The Commission concludes that it is fair and reasonable and will allow Cardinal by sound management the opportunity to produce a fair return for its shareholders, considering changing economic conditions and other factors, 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 AND CONCLUSIONS FOR FINDING OF FACT NO. 14

Cardinal's original cost rate base used and useful in providing service in North Carolina of $86,340,805, consisting of gas plant-in-service of $105,615,436 and working capital of $224,616 reduced by accumulated depreciation of $10,723,676 and accumulated deferred income taxes of $8,775,571, is the result of negotiations among the parties and is not opposed by any party. The Commission has carefully reviewed the above amounts and concludes that they are reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

The change in the zonal allocation factor from gross plant to rate base, the classification of all costs to the demand component of rates, and the use of the Straight Fixed Variable rate design are the result of negotiations among the parties to this proceeding and are not opposed by any party. The Commission has carefully reviewed these factors and concludes that they are just and reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

The total annual cost of service and revenue requirement for Cardinal is $15,523,685, representing a $1,600,027 decrease compared to Cardinal's total annual revenues for the twelve months ending September 30, 2002, the end of the test period. This figure is the result of negotiations among the parties to this proceeding and is not opposed by any party. The Commission has carefully reviewed this amount and concludes that it is just and reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

The rates reflected on Exhibit B to the Stipulation, which is attached hereto, are the result of negotiations among all of the parties to this proceeding 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 AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 18-20

As part of the Stipulation, Cardinal agreed (1) to provide the Public Staff and CUCA, on a quarterly basis, with copies of quarterly financial statements provided to Cardinal's member companies, subject to CUCA's executing a reasonable confidentiality agreement, (2) to provide the Public Staff and CUCA with quarterly information related to fuel use/retention on Cardinal's system; and (3) to file its next general rate case no later than March 15, 2007, and to provide the Public Staff and CUCA with a rough outline of the rate case, including the period selected as the test year for the rate case, by February 15, 2007. The Commission will so order.

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 Cardinal 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 reasonable under the circumstances of this proceeding and should be implemented.

IT IS, THEREFORE, ORDERED as follows:

1. That Cardinal is hereby authorized to adjust its rates and charges in accordance with this Order and Exhibit B attached hereto, effective for service rendered on and after August 1, 2003;

2. That Cardinal shall file rate schedules to comply with ordering paragraph 1 of this order within ten (10) days from the date of this order;

3. That Cardinal shall provide the Public Staff and CUCA, on a quarterly basis, with copies of quarterly financial statements provided to Cardinal's member companies, subject to CUCA's executing a reasonable confidentiality agreement;

4. That Cardinal shall provide the Public Staff and CUCA with quarterly information related to fuel use/retention on Cardinal's system; and

5. That Cardinal shall file its next general rate case no later than March 15, 2007, and to provide the Public Staff and CUCA with a rough outline of the rate case, including the period selected as the test year for the rate case, by February 15, 2007.

ISSUED BY ORDER OF THE COMMISSION
This the 24th day of July, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

Ab072403.01

Exhibit A

Cardinal Pipeline Company, LLC
Docket No. G-39, Sub 4
Cost of Service by Zone

Item		Zn 1 Demand	Zn 2 Demand	Total
Zonal Costs Allococated by Rate Base	[1]	2,833,894	10,031,023	12,864,917
Depreciation Expense	[2]	704,593	1,954,175	2,658,768
Costs of Service by Zone		$ 3,538,487	$11,985,198	$15,523,685

[1]Cost allocated using the Rate Base Allocation Factor include: Rate of Return on Rate Base, O&M Expenses, General Taxes and Income Taxes. The Rate Base Allocation Factor is:

Zone 1 Rate Base	$19,019,217	22.0281%
Zone 2 Rate Base	$67,321,588	77.9719%
Total	86,340,805	100.0000%

[2] Directly Assigned

Exhibit B

Cardinal Pipeline Company, LLC
Docket No. G-39, Sub 4
Schedules of Rates

Item	Zone 1A Demand	Zone 1A Commodity	Zone 1B Demand	Zone 1B Commodity	Zone2 Demand	Zone2 Commodity	Total
Settlement Cost of Service	$1,259,478	$0	$2,279,009	$0	$11,985,198	$0	$15,523,685
Annual Billing Determinants							
Demand (mcf)	$720,000		840,000		1,680,000		
Commodity (dt)		595,355		5,541,348		20,852,678	
Rates							
Demand (mcf)	$1.7493		$2.7131		$7.1340		
Commodity (dt)		$0.0000		$0.0000		$0.0000	

Excess CFT 100% Load Factor (dt)	
Zone 1A	$0.0556
Zone 1B	$0.0862
Zone 2	$0.2266

Zone 1 COS Split	
Zone 1A	35.5937%
Zone 1B	64.4063%

DOCKET NO. G-9, SUB 470
DOCKET NO. G-21, SUB 439
DOCKET NO. E-2, SUB 825

In the Matter of		
Joint Application of Carolina Power & Light Company, North Carolina Natural Gas Corporation, Piedmont Natural Gas Company, Inc., and Progress Energy, Inc., To Engage in Business Transactions	)	ORDER APPROVING APPLICATION

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on April 29, 2003

BEFORE: Commissioner Lorinzo L. Joyner, Presiding, Chair Jo Anne Sanford and Commissioners J. Richard Conder, Robert V. Owens, Jr., Sam J. Ervin, IV, James Y. Kerr, II, and Michael S. Wilkins.

APPEARANCES:

For Piedmont Natural Gas Company, Inc.:

Jerry W. Amos and James H. Jeffries IV, Nelson Mullins Riley & Scarborough, L.L.P., Bank of America Corporate Center, 100 N. Tryon Street, Suite 2400, Charlotte, North Carolina 28202-4000

For Progress Energy, Inc.:

Len S. Anthony, Manager, Regulatory Affairs, Progress Energy, Inc., Post Office Box 1551, PEB 17A4, Raleigh, North Carolina 27602-1551

For North Carolina Natural Gas Corporation:

Len S. Anthony, Manager, Regulatory Affairs, Progress Energy, Inc., Post Office Box 1551, PEB 17A4, Raleigh, North Carolina 27602-1551

For Eastern North Carolina Natural Gas Company:

Len S. Anthony, Manager, Regulatory Affairs, Progress Energy, Inc., Post Office Box 1551, PEB 17A4, 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 Albemarle Pamlico Economic Development Corporation:

Thomas P. Nash, IV, Trimpi, Nash & Harman, L.L.P., 200 N. Water Street, Suite 2A, Elizabeth City, North Carolina 27909

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 the Using and Consuming Public:

Margaret A. Force and Leonard G. Green, Assistant Attorneys General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602

BY THE COMMISSION: On December 23, 2002, Piedmont Natural Gas Company, Inc. (Piedmont), North Carolina Natural Gas Corporation (NCNG), Carolina Power & Light Company (CP&L), and Progress Energy, Inc. (Progress) (collectively referred to as the Applicants), filed an application seeking (1) approval of a Stock Purchase Agreement (SPA) between Piedmont and Progress dated October 16, 2002, pursuant to which Piedmont will purchase all the capital stock of NCNG; (2) approval of the merger of NCNG into Piedmont; (3) authorization to transfer to Piedmont all of NCNG's rights and obligations under all certificates of public convenience and necessity heretofore issued by the Commission to NCNG and/or its predecessors; (4) authorization for Piedmont to commence natural gas service in all areas of North Carolina previously certificated to NCNG under the terms and conditions of service, including rates, approved for NCNG; (5) authorization for NCNG to discontinue natural gas service in North Carolina upon the effective date of the merger; (6) authorization for Piedmont to purchase from Progress the Eastern North Carolina Natural Gas Company shares and the Eastern North Carolina Natural Gas Company Rights and Obligations as defined in the SPA; (7) authorization for Piedmont to issue up to $500,000,000 in debt securities; (8) authorization for Piedmont to make appropriate changes in its policies and procedures, including its Gas Cost Recovery Mechanism, that are necessary or appropriate to effect the merger; (9) authorization for Piedmont to do business under the assumed name "North Carolina Natural Gas Corporation" and/or "NCNG"; (10) approval to modify CP&L's Code of Conduct and Regulatory Conditions previously approved by the Commission; and (11) approval for any additional authorization and/or waiver as may be necessary or appropriate to effect these transactions. Exhibits supporting the application, including a Market Power Study and Cost-Benefit Analysis, were filed with the Applicants' application. On January 16, 2003, the Applicants filed Exhibit J to the application which was omitted from the December 23, 2002 filing.

On January 10, 2003, Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene in this proceeding, which was allowed by Commission order dated January 16, 2003. On January 21, 2003, the Public Works Commission of the City of Fayetteville filed a petition to intervene, which was allowed by order of the Commission dated

January 27, 2003. On January 24, 2003, petitions to intervene were filed by the Cities of Greenville, Rocky Mount, Wilson, and Monroe and by the Carolina Industrial Group For Fair Utility Rates (CIGFUR II); these were allowed by an order of the Commission dated January 28, 2003.

Also on January 24, 2003, the Commission issued its Order Scheduling Hearing, Establishing Testimony Due Dates, and Requiring Public Notice (Scheduling Order). The Scheduling Order scheduled a hearing for April 29, 2003, established discovery procedures, set dates for prefiled testimony, and required the Applicants to give notice to their customers. The Commission also determined in the Scheduling Order that the proposed changes to CP&L's Code of Conduct would not be addressed in this proceeding, but instead would be considered in a separate proceeding.

On January 27, 2003, the Applicants prefiled the direct testimony of witnesses Thomas E. Skains and David J. Dzuricky.

On February 18, 2003, a petition to intervene was filed by Public Service Company of North Carolina, Inc. (PSNC), which was allowed by Commission order dated March 3, 2003. Also on February 18, 2003, the Attorney General filed Notice of Intervention in this proceeding pursuant to G.S. 62-20. On March 3, 2003, a petition to intervene was filed by the Albemarle Pamlico Economic Development Corporation (APEC), which was allowed by Commission order dated March 6, 2003. On March 6, 2003, a petition to intervene was filed by Enline Energy; it was allowed by Commission order of April 23, 2003.

The joint testimony and exhibits of Public Staff witnesses Jeffrey L. Davis, Thomas W. Farmer, and James G. Hoard was filed on April 8, 2003. Also, on April 8, 2003, CUCA filed the testimony of Kevin W. O'Donnell, APEC filed the testimony of Jimmie Dixon, and Eastern North Carolina Natural Gas Company (Eastern NC) filed the testimony of John F. Hughes.

On April 22, 2003, CP&L filed a letter with the Commission addressing certain conditions proposed in the testimony of the witnesses for the Public Staff and Eastern NC.

The Applicants' witness David J. Dzuricky prefiled rebuttal testimony on April 22, 2003, in order to address issues raised in the prefiled testimony of Public Staff witnesses Davis, Farmer, and Hoard, CUCA witness O'Donnell, APEC witness Dixon, and Eastern NC witness Hughes.

On April 24, 2003, Eastern NC filed its petition to intervene, which was allowed by Commission order of April 28, 2003.

On April 24, 2003, APEC filed a letter with the Commission in order to clarify that APEC had declined to exercise its right of first refusal to purchase the Eastern NC shares to be sold to Piedmont as part of this transaction.

On April 29, 2003, the hearing was held as scheduled. No public witnesses appeared. Testimony was presented by the following witnesses:

For the Applicants: Thomas E. Skains, President and Chief Executive Officer of Piedmont and David J. Dzuricky, Chief Financial Officer and Senior Vice President of Piedmont.

For the Public Staff: Jeffrey L. Davis, Director, Natural Gas Division; Thomas W. Farmer, Director, Economic Research Division; and James G. Hoard, Assistant Director, Accounting Division.

For CUCA: Kevin W. O'Donnell, President, Nova Energy Consultants, Inc.

For APEC: Jimmie Dixon, Chairman of the Board, APEC.

For Eastern NC: John F. Hughes, Chairman and Chief Executive Officer of Eastern NC.

On May 5, 2003, Applicants filed a late-filed exhibit consisting of a copy of the agreement evidencing APEC's consent to the assignment of the Construction, Operating and Maintenance Agreement (CO&M Agreement) for Eastern NC from CP&L to Piedmont.

Based on the testimony and exhibits received into evidence, the record in this proceeding, and Commission records, the Commission makes the following:

FINDINGS OF FACT

1. NCNG is a Delaware corporation, duly registered to do business within the state of North Carolina, and authorized by its Articles of Incorporation to engage in the business of transporting, distributing, and selling natural gas.

2. NCNG is a certificated North Carolina public utility within the meaning of G.S. 62-3(23), and its public utility operations within the state of North Carolina are subject to the jurisdiction of this Commission. NCNG currently provides natural gas service to approximately 176,000 customers in south central and eastern North Carolina.

3. Progress is a corporation organized and existing under the laws of the state of North Carolina and is the owner of all of the issued and outstanding capital stock of NCNG.

4. CP&L is a corporation organized and existing under the laws of the state of North Carolina, a wholly owned subsidiary of Progress, and a public utility engaged in the business of generating, transmitting, distributing, and selling electric power in North and South Carolina.

5. Piedmont is a corporation organized and existing under the laws of the state of North Carolina, authorized by its Articles of Incorporation to engage in the business of transporting, distributing, and selling natural gas, and currently engaged in providing such services to approximately 462,000 customers in North Carolina, pursuant to certificates of public convenience and necessity previously granted by this Commission.

6. Piedmont is a public utility within the meaning of G.S. 62-3(23) and its North Carolina operations are subject to the jurisdiction of this Commission.

7. Eastern NC is a corporation organized and existing under the laws of the state of North Carolina. Eastern NC is a public utility authorized to provide natural gas service to fourteen counties in eastern North Carolina pursuant to authority granted by this Commission in an order dated June 15, 2000.

8. The capital voting stock of Eastern NC is owned fifty percent (50%) by Progress and fifty percent (50%) by APEC. Pursuant to various agreements between Progress and APEC, Progress also owns 174 shares of Series A Preferred Stock of Eastern NC, and Progress has the right and obligation to purchase an additional 326 shares of Eastern NC's Series A Preferred Stock (hereinafter referred to as the Eastern NC Rights and Obligations).

9. The Applicants are lawfully before the Commission pursuant to G.S. 62-111 and 62-161 with respect to the relief sought in their application.

10. The Applicants' application, testimony, exhibits, affidavits of publication, and public notices are in compliance with the procedural requirements of the General Statutes and the Rules and Regulations of the Commission.

11. In this proceeding, the Applicants seek (1) approval of a Stock Purchase Agreement between Piedmont and Progress dated October 16, 2002, pursuant to which Piedmont will purchase all the capital stock of NCNG; (2) approval of the merger of NCNG into Piedmont; (3) authorization to transfer to Piedmont all of NCNG's rights and obligations under all certificates of public convenience and necessity heretofore issued by the Commission to NCNG and/or its predecessors; (4) authorization for Piedmont to commence natural gas service in all areas of North Carolina previously certificated to NCNG under the terms and conditions of service, including rates, approved for NCNG; (5) authorization for NCNG to discontinue natural gas service in North Carolina upon the effective date of the merger; (6) authorization for Piedmont to purchase from Progress the Eastern North Carolina Natural Gas Company shares and Eastern North Carolina Natural Gas Company Rights and Obligations as defined in the SPA; (7) authorization for Piedmont to issue up to $500,000,000 in debt securities; (8) authorization for Piedmont to make appropriate changes in its policies and procedures, including its Gas Cost Recovery Mechanism, that are necessary or appropriate to effect the merger; (9) authorization for Piedmont to do business under the assumed name "North Carolina Natural Gas Corporation" and/or "NCNG"; (10) approval to modify CP&L's Code of Conduct and Regulatory Conditions previously approved by the Commission; and (11) approval for any additional authorization and/or waiver as may be necessary or appropriate to effect the transactions.

12. In order to obtain Commission approval of the acquisition by Piedmont of the capital voting stock of NCNG, the merger of NCNG into Piedmont, the acquisition by Piedmont of Progress' interests in Eastern NC, the acquisition by Piedmont of all requisite certificate authority needed for Piedmont to serve NCNG's customers, and all of the associated relief sought in the application, the Applicants must demonstrate that the proposed business

transactions among Piedmont, Progress, NCNG, Eastern NC, and CP&L are justified by the public convenience and necessity.

13. Upon the closing of the transactions set forth in the SPA, Piedmont will acquire ownership of, and operational control over, NCNG and will acquire a fifty percent (50%) ownership interest in, and operational control over, Eastern NC.

14. Piedmont is an experienced and capable natural gas local distribution company that is prepared to assume the certificate and service obligations of NCNG.

15. Piedmont's acquisition of NCNG and a fifty percent (50%) interest in Eastern NC will not materially increase Piedmont's market power or reduce competition within the natural gas sales and transportation markets in North Carolina.

16. Piedmont's acquisition of NCNG and a fifty percent (50%) interest in Eastern NC and the merger of NCNG into Piedmont will provide multiple economic and non-economic benefits to Piedmont and its current and future ratepayers, including the ratepayers of NCNG and Eastern NC.

17. Piedmont's acquisition of NCNG and a fifty percent (50%) interest in Eastern NC and the merger of NCNG into Piedmont will have no adverse net effect on NCNG or Eastern NC ratepayers.

18. Piedmont's acquisition of NCNG and a fifty percent (50%) interest in Eastern NC and the merger of NCNG into Piedmont will have no adverse net effect on Piedmont ratepayers.

19. The demonstrated benefits of Piedmont's acquisition of NCNG and a fifty percent (50%) interest in Eastern NC and the merger of NCNG into Piedmont outweigh the potential harms and risks associated with these transactions.

20. Piedmont's acquisition of NCNG and a fifty percent (50%) interest in Eastern NC and the merger of NCNG into Piedmont are justified by the public convenience and necessity.

21. In order for Piedmont to obtain Commission approval for the issuance of debt in order to fund the initial financing of its purchase of NCNG and a fifty percent (50%) ownership interest in Eastern NC, Piedmont must demonstrate that such issuance is consistent with the requirements of G.S. 62-161(b).

22. The financing proposed by Piedmont for its acquisition of NCNG and a fifty percent (50%) ownership interest in Eastern NC is consistent with the requirements of G.S. 62-161(b).

23. Piedmont should be permitted to make and utilize an election pursuant to Section 338(h)(10) of the Internal Revenue Code, as anticipated by the SPA, in acquiring NCNG and a fifty percent (50%) ownership interest in Eastern NC.

24. Piedmont shall not be permitted to recover from its ratepayers the goodwill or acquisition premium associated with its acquisition of NCNG and a fifty percent (50%) ownership interest in Eastern NC.

25. Piedmont is not precluded from seeking future regulatory asset treatment or recovery of such part of the total purchase price paid by Piedmont as may be allocable to Progress' assumption of all investigation and remediation liability associated with and ownership of NCNG's manufactured gas plant (MGP) sites.

26. CP&L has previously been precluded from recovering from ratepayers the goodwill or acquisition premium associated with its 1999 acquisition of NCNG; however, decision regarding the treatment of Progress' costs related to the MGP clean-up will not be made at this time.

27. No party is precluded from seeking or challenging the establishment of any regulatory assets relating to NCNG's pension and other post-employment benefit (OPEB) costs and Piedmont's integration costs in either the pending NCNG rate case or a future rate case.

28. Nothing in this Order should be construed to deprive the Commission of its regulatory authority under North Carolina law, including its right to review and adjust, if appropriate, Piedmont's cost of capital or expense levels for ratemaking purposes for the effect of the securities issued as the financing for the acquisition.

29. Piedmont shall promptly notify the Commission in the event that Piedmont determines (or is otherwise informed) prior to the closing of the transactions anticipated herein that Piedmont will become a registered holding company within the meaning of the Public Utility Holding Company Act of 1935 (PUHCA) as a consequence of such closing.

30. It is assumed, based on representations made by Piedmont, that the merger will not cause Piedmont to become a registered holding company under PUCHA. If Piedmont or its affiliates engage in acquisitions or other actions (such as, but not limited to, the creation of a parent of Piedmont) after the merger that create the possibility of Piedmont (or a parent) becoming a registered holding company under PUHCA, Piedmont will notify the Commission at least 30 days prior to filing with the Securities and Exchange Commission (SEC) any application necessary to obtain authorization to take such actions or, where no such application is necessary, at least 60 days prior to taking such actions. Piedmont will bear the full risk of any preemptive effects of PUCHA and will take all such actions as the Commission finds necessary and appropriate to hold North Carolina retail ratepayers harmless from such preemption.

31. Following the merger, Progress shall continue to provide members of the Commission, Commission Staff, and Public Staff full access to books and records of NCNG and entities that, prior to the merger, have been affiliated with NCNG, where such records relate either directly or indirectly to the provision of intrastate service by NCNG.

32. NCNG shall be fully accountable for any action or inaction by NCNG affecting rates or services, and the merger and resulting change in ownership will not be an excuse or defense.

33. It is the intent of the conditions herein that the affected utilities' ratepayers shall be held harmless from any adverse effects of the merger, including actions by other regulatory jurisdictions relating to the merger, and that ratepayers shall receive benefits from the merger that are at least commensurate with the potential adverse effects of the merger.

34. It is the Commission's intention to enforce all of the conditions approved herein consistently with their intended goals. In addition, the Commission has inherent authority, consistent with the appropriate procedural mechanisms, to amend the conditions should circumstances warrant. To the extent that a party has a concern or complaint with respect to the actions of the affected utilities or with the Commission's interpretation of the conditions, that party may seek relief from the Commission.

35. Additional conditions were proposed by parties, but the Commission concludes that these conditions either have been sufficiently satisfied or are not appropriate. No such further conditions will be ordered in this proceeding.

36. Upon consummation of the transactions called for in the SPA, Piedmont shall provide service to customers located within the certificated service territories previously assigned to NCNG and Eastern NC based on NCNG's and Eastern NC's respective approved rates, terms, and conditions of service.

37. Piedmont shall synchronize and consolidate the commodity gas cost component of its rates for all its North Carolina customers, including former NCNG customers, on the effective date of the next change in its benchmark commodity cost of gas after the closing.

38. Piedmont shall prepare and file, as soon as practicable following the closing of the merger between Piedmont and NCNG, a rate transition plan to permit Piedmont to charge all of its North Carolina customers (including former NCNG customers) the same rate components to recover its wholesale demand gas costs.

39. Piedmont shall file in its next general rate case following the closing of the merger between Piedmont and NCNG, any additional proposed changes to its rates, tariffs, and service regulations.

40. The review period for NCNG's next annual gas cost prudence review shall end on the last day of the month of the closing of the merger between Piedmont and NCNG, even if the closing is on the last day of the month, and the review will be based on actual, rather than estimated, deferred account balances. Going forward, the Commission will conduct a unified gas cost prudence review for all Piedmont customers, on the schedule prescribed for Piedmont by Commission Rule, recognizing that for some time it will be necessary to consider separate accounting and rates for the former NCNG customers in the context of that unified hearing.

41. The additional relief requested by the Applicants, except for the modification of CP&L's Code of Conduct, is necessary and appropriate for consummation of the transactions set forth in the SPA and is approved.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-8

These findings are jurisdictional, informational, and procedural in nature and are not contested by any party. They are supported by the application and the exhibits thereto, the testimony and exhibits of the various witnesses, and the records of the Commission in this and other proceedings.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 9-10

The basis for these findings of fact is found in the provisions of G.S. 62-111(a) and G.S. 62-161, in the Commission's Rules and Regulations, and in the Scheduling Order in this proceeding. These findings recognize the Applicants' compliance with the Commission's procedural requirements with respect to the request for Commission approval of the various business transactions proposed in the application.

G.S. 62-111(a) provides in part as follows:

> No franchise now existing or hereafter issued under the provisions of this Chapter . . . shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, . . . nor shall any merger or combination affecting any public utility be made through acquisition of 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.

The application seeks, among other things, approval of the SPA through which Piedmont will obtain direct ownership of NCNG and a fifty percent (50%) ownership interest in Eastern NC, both of which are regulated public utilities subject to the jurisdiction of the Commission. G.S. 62-161 requires that Piedmont obtain Commission approval of its proposed issuance of debt securities to finance the purchase of NCNG and the Eastern NC shares and that such approval be granted only upon making the findings required by that statute.

The Commission's Rules and Regulations and the Scheduling Order in this proceeding establish a variety of procedural requirements for this proceeding, including the provision of notice to the public. The record indicates that the Rules and Regulations and the Scheduling Order have been complied with in all material respects, and no party contended otherwise.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The authorizations and approvals sought by the Applicants in this docket are set forth in the application as well as the testimony and exhibits of the Applicants' witnesses Dzuricky and Skains.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

The evidence for this finding is found in Chapter 62 of the General Statutes.

As noted above, G.S. 62-111(a) requires the Applicants to demonstrate and the Commission to find that the business transactions proposed in the application are justified by the public convenience and necessity. In prior decisions, the Commission has stated that G.S. 62-111(a) sets forth a broad public interest standard, that the Commission has authority to review all aspects of a proposed merger and to balance all potential benefits and costs, and that approval of a merger should be given only if sufficient conditions are imposed to ensure that the merger will have no known adverse impact on the rates and services of ratepayers, that ratepayers are protected as much as possible from potential harm, and that ratepayers will receive sufficient benefits to offset any potential costs, risks, and harms. In applying this test to the application herein, it is appropriate for the Commission to consider a number of factors, including (a) whether or not rates and services will be adversely affected by the proposed transaction, (b) whether expected benefits will exceed known and expected costs, (c) the expected impact on service quality, (d) the extent to which costs can be lowered and/or rates maintained or reduced, (e) the effectiveness of continuing state regulation, (f) increased ability to provide stable and reliable natural gas service, (g) the ability to rely on a more diverse gas supply, (h) the creation/availability of a more geographically diverse natural gas system, (i) the provision of a more diverse staff with greater experience in the natural gas industry, (j) the elimination of concerns over gas and electricity being provided by the same family of companies, and (k) the preservation of a strong corporate presence in North Carolina for the utility succeeding to the certificate authority. See State ex rel. Utilities Comm. v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967); Order Approving Merger and Issuance of Securities in Docket No. G-5, Sub 400 (December 7, 1999); Order Approving Stock Transfer in Docket No. E-7, Sub 427 (August 29, 1988); Order Approving Merger and Issuance of Securities in Docket No. E-7, Sub 596 (April 22, 1997).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO.13

The evidence for this finding of fact is found in the testimony of the Applicants' witnesses Dzuricky and Skains.

The application recites that

> Under the terms of the Stock Purchase Agreement, Piedmont will purchase from Progress the NCNG Shares, the [Eastern NC] Shares and the [Eastern NC] Rights and Obligations. Immediately following the Closing (as defined in the Stock Purchase Agreement), Piedmont will cause NCNG to be merged into and with Piedmont, with Piedmont being the surviving corporation. . . . Upon the effective date of the Merger, Piedmont will become responsible for providing natural gas service to all natural gas customers in the North Carolina service area previously certificated to NCNG and its predecessors, and will acquire all of the rights and obligations of Progress, CP&L and NCNG with respect to the [Eastern NC] Shares, the [Eastern NC] Rights and Obligations and the CO&M Agreement.

This summarizes the substantive terms of the SPA, which establishes the parties' legal obligations with respect to the proposed business transactions. The scope of the proposed acquisition was further explained in the testimony of the Applicants' witnesses Skains and Dzuricky and is undisputed.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

The evidence supporting this finding of fact is found in the testimony of the Applicants' witnesses Skains and Dzuricky and in the Commission's records.

The application indicates that

> Piedmont is an experienced and capable natural gas local distribution company [that has] . . . previously shown that it is ready, willing and able to assume all of the regulatory responsibilities imposed upon natural gas utilities by the North Carolina General Statutes and by the rules and regulations of the Commission with respect to its existing utility operations in North Carolina, and [that] it is ready, willing and able to do so with respect to the NCNG natural gas distribution company operations.

The Applicants' witness Dzuricky repeated this assertion in his testimony. The Applicants' witness Skains testified that Piedmont is engaged in the provision of natural gas distribution services to more than 740,000 customers in three states and that Piedmont provides such service to more than 100 towns and communities in North Carolina.

Based on this uncontested evidence, the Commission concludes that Piedmont is capable of assuming the certificate and service obligations of NCNG upon consummation of the transactions proposed in this proceeding. The Commission takes judicial notice of a similar conclusion regarding Piedmont's capabilities that was recently made by the Commission in the Order Approving Merger in Docket Nos. G-9, Sub 466 and G-3, Sub 251 (October 8, 2002).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

The evidence for this finding of fact is contained in the Market Power Study attached as an exhibit to the application and in the testimony of the Public Staff witnesses.

Applicants filed a Market Power Study with the application in the proceeding. In this study, Dr. Jay Lukens of the Lukens Energy Group concluded, "Piedmont's acquisition of NCNG will not have an adverse effect on competition for natural gas sales and transportation services in the relevant geographic markets." Dr. Lukens' conclusion was supported by an analysis of the relevant geographic and service markets and a more formal Herfindahl-Hirschman Index (HHI) calculation applied to U.S. Department of Justice (USDOJ) indices. Dr. Lukens calculated the HHI value of Piedmont's acquisition of NCNG using several variables. In all but two scenarios, the post-acquisition value calculated was below 1000, indicating an unconcentrated market and no expectation of an adverse effect on competition under USDOJ guidelines. In the two instances where Dr. Lukens' analysis resulted in a post-merger HHI value above 1000, those values were only 1004 and 1007 respectively.[1] Dr. Lukens also identified several mitigating factors that supported his conclusion that Piedmont's acquisition of NCNG would have no adverse effects on competition. These included (1) the ability of Transco to sell Interruptible Transportation service using Piedmont's unutilized capacity in the event Piedmont attempted to withhold capacity from the market, (2) the ability of downstream shippers in Transco's Zone 6 to make deliveries into Zone 5 at levels in excess of historic levels in the event Piedmont attempted to withhold capacity, and (3) the ongoing development of two pipelines (Patriot and Greenbrier) and one liquefied natural gas project (Cove Point) which will collectively add approximately 2 million dekatherms per day of deliverability into Transco's Zone 5. No other party submitted a market power study.

On cross-examination by counsel for CUCA, Public Staff witnesses Davis, Farmer, and Hoard indicated that they had reviewed Dr. Lukens' analysis and that they were satisfied with it. Witness Davis also indicated that natural gas and electricity compete with respect to certain energy applications, that the same company currently controls both electric and natural gas service within NCNG's service territory, and that that will no longer be true after the closing of the transactions proposed in this proceeding.

In its brief, CUCA states its concern that the merger of three of North Carolina's four largest natural gas LDCs during the past year and the resulting consolidation of interstate transportation capacity rights within Transco's Zone 5 may permit Piedmont to exercise periodic market power when releasing capacity to third parties such as industrial transportation customers. While weather and other demand conditions will undoubtedly limit, to some extent, the amount of transportation capacity that Piedmont can release into the secondary market at any given time, CUCA states that after this merger Piedmont will control such a significant portion of Zone 5 interstate transportation capacity that the exercise of market power appears to be a potentially viable concern. CUCA believes that the Commission should condition approval of the merger upon the retention of sufficient jurisdiction to address any anti-competitive conduct by Piedmont associated with the consolidation of Transco Zone 5 capacity through the merger with NCNG.

Based on the Market Power Study and the testimony of the Public Staff witnesses, the Commission concludes that Piedmont's acquisition of NCNG will not materially increase Piedmont's market power or adversely affect competition within the natural gas sales and transportation markets in North Carolina. Having reached this conclusion, the Commission concludes that it is unnecessary to condition approval of the acquisition as proposed by CUCA. Further, approval of the acquisition will not affect whatever jurisdiction the Commission has to police Piedmont's conduct in the secondary market.

[1] Dr. Lukens stated that these two instances were based on assumptions that only Piedmont and NCNG make off-system sales and that these are "extreme assumptions" which "tend to overstate the degree of concentration in the market and the effect of the acquisition."

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 16-20

The evidence for these findings of fact is found in the Cost-Benefit Analysis attached to the application and in the testimony of the witnesses for the Applicants, the Public Staff, and CUCA.

The Cost-Benefit Analysis attached to the application identified a variety of economic and non-economic benefits that will accrue as a result of the business transactions proposed in the SPA. The non-economic benefits include increased financial strength for Piedmont resulting from the growth inherent in the acquisition of NCNG, reduced market risk arising from a customer mix that is more resistant to economic downturns, physical system benefits arising from the contiguous nature of Piedmont's and NCNG's distribution systems, and the continuation of Piedmont's primary focus in North Carolina. Economic benefits identified in the analysis include elimination or reduction of utility governance costs, reduction of direct service costs, and savings resulting from integration and optimization of NCNG's business with Piedmont's business. The analysis estimated that the minimum economic benefit that will be derived from Piedmont's acquisition of NCNG will be an operation and maintenance (O&M) cost savings of $5 million annually.

Witness Skains testified that the acquisitions anticipated by the SPA will yield many benefits and savings including those arising from (1) the integration of corporate functions, (2) the integration of corporate programs, (3) purchasing economies, and (4) business optimization. Witness Skains also testified that the transactions will benefit Piedmont and its customers through the addition of customers and facilities and by improving Piedmont's access to capital markets, increasing its ability to hire and retain qualified employees, and generating new opportunities to control expenses through the integration of its operations and the spreading of fixed costs over a greater number of customers.

Witness Dzuricky testified that the acquisition of NCNG will serve the public interest by providing the following benefits: (1) strengthening investor confidence and facilitating Piedmont's ability to attract investor capital on reasonable terms, (2) strengthening Piedmont's business and providing greater protection for Piedmont's and NCNG's customers as a result of a more diverse customer mix better able to withstand economic downturns, (3) reduction of future capital expenditures as a result of the contiguous nature of NCNG's and Piedmont's distribution facilities, (4) maintenance of a North Carolina headquarters for NCNG, (5) savings obtained through elimination of NCNG's separate corporate governance functions, (6) savings obtained through integration of direct service functions, and (7) best practices savings.

In terms of costs, the Cost-Benefit Analysis projects three categories of one-time costs associated with the transactions contemplated by the SPA. These are transaction fees of approximately $17 million, integration costs of approximately $1 million, and an acquisition premium of approximately $17 million. The Cost-Benefit Analysis indicates that the transaction fees include substantial costs related to the proposed securities issuances associated with financing these transactions. Witness Dzuricky provided some elaboration of these amounts. He indicated that the $1 million in integration costs had risen to slightly less than $4 million by the time of hearing. Witness Dzuricky also identified costs associated with Piedmont's Section 338(h)(10) election as reflected on CUCA Dzuricky Cross-Examination Exhibit No. 1.

On cross-examination by CUCA's counsel, witness Dzuricky reiterated the savings and net benefits from Piedmont's acquisition of NCNG. As reflected in CUCA Dzuricky Cross-Examination Exhibit No. 1, at the time of hearing and based on updated information, Piedmont calculated an O&M savings from the merger in excess of $8 million annually and a positive net present value (NPV) of total savings to ratepayers from the acquisition (taking into consideration each category of costs identified above) of more than $34 million.

These various categories of costs and savings were also considered in multiple analyses conducted by the Public Staff witnesses, the results of which are reflected on CUCA Public Staff Cross-Examination Exhibit No. 2. This exhibit indicates that the Public Staff witnesses identified the same categories of costs as Piedmont, although they calculated these costs differently. The Public Staff witnesses then undertook an NPV analysis of the proposed transactions utilizing eight different scenarios. In each case, the witnesses concluded that the NPV of the long term benefits to ratepayers from the proposed transactions was a savings of between $42 million and $59 million.

Witness Dzuricky and the Public Staff witnesses were cross examined about their calculations of the net benefits to ratepayers, but no other party submitted testimony on this issue. All parties filing testimony in this proceeding support approval of the business transactions proposed by the Applicants, although some parties propose conditions and make other recommendations with respect to such approval. Finally, as discussed in other parts of this Order, no changes to the rates, terms, and conditions of service for Piedmont's existing ratepayers are proposed in this proceeding. Any future change in such rates, terms, and conditions will require Commission approval, and the same is true with respect NCNG's rates, terms, and conditions of service.

Based upon all of the foregoing, and applying the factors previously identified as appropriate for consideration in connection with business transactions as proposed in this proceeding, the Commission concludes that the transactions anticipated by the SPA will have significant economic and non-economic net benefits for Piedmont, NCNG, and their respective ratepayers. More specifically, there will be no net adverse impact on rates and services by the acquisitions, expected benefits from the transactions will exceed expected costs, no negative impact on service quality is expected, certain costs to provide service will be lower after the transactions, this Commission will continue to have effective regulatory control over Piedmont, Piedmont's gas system will be strengthened and more geographically diverse as a result of the transactions, competitive concerns based on gas and electricity being provided by the same entity will be eliminated, and the headquarters of NCNG will remain in North Carolina. The Commission concludes that the business transactions proposed in this proceeding are justified by the public convenience and necessity and should be approved.

With respect to the impact on rates, the Commission notes that NCNG has a general rate case pending in Docket No. G-21, Sub 442, which is scheduled for hearing in August 2003. Part of the rate increase being sought in that rate case is related to the costs of the acquisition proposed in these dockets. There is some evidence in this record that certain costs of the acquisition may tend to increase rates for NCNG's customers in the first years after the acquisition, but there is also evidence that long-term savings will more than offset any such increase over time. Projections of costs and savings to be achieved by the acquisition indicate an overall impact on NCNG's ratepayers in the first year of $2.8 million in potential costs, but potential savings of $34 million in the long-term, based on NPV using a 10% discount rate. CUCA Dzuricky Cross Examination Exhibit No. 1. The Public Staff's analysis of the potential impact of the acquisition on NCNG's costs indicates that costs may increase for four years or more, but that the acquisition will achieve savings in the long run. To illustrate the impact of merger costs and savings on NCNG's rates, the Public Staff analyzed potential costs and savings in eight cases using different assumptions for the revenue requirement factor, amortization periods, and depreciation periods. The results of that analysis indicate the first year impact of the merger could range from a savings of $0.3 million to a cost of $2.4 million. The impact in the first four years could range from a savings of $3.7 million to a cost of $4.0 million. The impact in the long term could produce savings ranging from $42 to $59 million. CUCA Public Staff Cross Examination Exhibit No. 2.

In his brief, the Attorney General proposes that the order in these dockets include a condition to the effect that "merger-related costs recovered in the pending NCNG general rate case shall be fully offset by quantified merger-related savings, and the burden of proof will be on the applicant to demonstrate that this condition is met." The Attorney General proposes this condition to provide assurance that NCNG's rates will not be adversely affected by acquisition-related costs in the first years after the merger. The Attorney General argues that "if the Commission conditions approval in this case on a demonstration that merger-related costs and savings offset one another, a clear record will be established that merger approval was granted based on the expectation that the balance will be struck in the rate case."

The Commission believes that the proposed condition would inappropriately link the present proceeding with the general rate case proceeding in Docket No. G-21, Sub 442. The Commission believes that it must decide the present proceeding based upon the evidence presented in these dockets and must decide the rate case based upon the evidence and arguments presented in the rate case docket. Further, although there is some evidence that certain costs of the acquisition may tend to increase rates for NCNG's customers in the first years after the acquisition, there is also evidence that long-term savings will more than offset any such increase. The Commission concludes that the evidence tends to show that there will be no net adverse impact on rates overall and that the condition proposed by the Attorney General should be rejected.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 21-22

The evidence for these findings of fact is contained in Chapter 62 of the General Statutes and in the testimony of the Applicants' witnesses Skains and Dzuricky and Public Staff witnesses Davis, Farmer, and Hoard.

In order for Piedmont to obtain Commission approval for the issuance of debt to fund the initial financing of its purchase of NCNG and Eastern NC, Piedmont must demonstrate that such issuance (1) is for some lawful object within Piedmont's corporate purposes, (2) is compatible with the public interest, (3) is necessary or appropriate for or consistent with proper performance of Piedmont's service to the public and will not impair its ability to perform such service, and (4) is reasonably necessary and appropriate for such purpose. G.S. 62-161(b).

The application indicates that Piedmont will initially fund the purchase of NCNG, a fifty percent (50%) ownership interest in Eastern NC, and the Eastern NC Rights and Obligations through issuance of short-term debt instruments and that such instruments will be subsequently replaced by permanent financing consisting of a mixture of long-term debt and common equity in a ratio consistent with Piedmont's historical debt/equity percentages. This plan was reiterated by the Applicants' witness Skains in his testimony. Applicants' witness Dzuricky explained that the initial short-term financing is necessary as a result of the relatively uncomplicated process utilized to issue short-term debt, compared to the complicated and extensive process needed to secure long-term debt and issue common equity.

No other party submitted testimony or presented evidence on this subject, except for a related recommendation made by Public Staff witnesses Davis, Farmer, and Hoard concerning the Commission's authority to adjust capital cost or expense levels for securities issued to finance this acquisition, which recommendation is addressed elsewhere in this Order.

The Commission has carefully reviewed the application and the testimony of witnesses Skains and Dzuricky, and the Commission concludes that the requirements of G.S. 62-161(b) are satisfied. First, there is no question that Piedmont's acquisition of NCNG and a fifty percent (50%) ownership interest in Eastern NC pursuant to the SPA constitutes a legitimate object consistent with Piedmont's corporate purposes. Such acquisitions constitute the legitimate exercise of a corporation's business judgment and are common in the industry and the marketplace in general. Further, the SPA contains representations and warranties by Piedmont indicating that its acquisition of NCNG is within its corporate power, duly authorized, and will not cause any material violation of law or breach of obligation on its part. Further, the Commission concludes that Piedmont's initial financing of the acquisition proposed in this docket is compatible with the public interest and necessary and appropriate for Piedmont to perform its service to the public. This conclusion is supported both by the Commission's prior conclusion that the underlying acquisitions are in the public interest and by witness Dzuricky's testimony regarding the need for initial short-term debt financing in the amount of $500 million. Piedmont will not be able to close the transactions set forth in the SPA without financing, and the plan proposed by Piedmont is reasonable and will have no adverse impact on ratepayers or the public. This is particularly true in light of the Commission's finding of fact elsewhere in this Order regarding its authority to adjust capital cost and expense levels for ratemaking purposes for securities issued to finance this acquisition. Finally, for the reasons discussed above, the Commission is convinced that the initial financing proposed by Piedmont is reasonably necessary to complete the acquisitions proposed in this proceeding.

Based on the foregoing discussion, the Commission concludes that the requirements of G.S. 62-161(b) are satisfied and that Piedmont's request to issue up to $500 million in short-term debt securities with which to finance the initial purchase of NCNG, a fifty percent (50%) ownership in Eastern NC, and the Eastern NC Rights and Obligations should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 23

The evidence for this finding of fact is set forth in the SPA and in the testimony of the Applicants' witness Dzuricky and Public Staff witness Hoard.

In Article 8.2(b) of the SPA, the Applicants agree to make an election pursuant to Section 338(h)(10) of the Internal Revenue Code relating to the assets acquired in this transaction. In his direct testimony, the Applicants' witness Dzuricky indicated that the purchase price which Piedmont agreed to pay was based upon the assumption that Piedmont would be able to take advantage of a Section 338(h)(10) election and that if the Commission denied, or raised serious doubts about, Piedmont's ability to take that election, he could not recommend to management or Piedmont's Board of Directors that Piedmont go through with the acquisition. Both witnesses Dzuricky and Hoard testified that if Piedmont were permitted to take advantage of the Section 338(h)(10) election by this Commission but historical balances of accumulated deferred income taxes (ADIT) were used for ratemaking purposes, Piedmont would lose the right to utilize accelerated depreciation with respect to all of its properties in all three states in which Piedmont operates. Both witnesses provided testimony that any initial "costs" associated with the Section 338(h)(10) election are more than offset by other savings to ratepayers resulting from this transaction. Specifically, witness Dzuricky testified that Piedmont had conservatively estimated the NPV of the savings to ratepayers resulting from this transaction to be approximately $34 million. The Public Staff made several calculations of the NPV of the net benefit from this transaction using various amortization periods and discount rates, and derived projected savings of between $42 million and $59 million. CUCA Public Staff Cross-Examination Exhibit No. 2. Finally, witness Hoard testified that, in his view, the transaction, including use of a Section 338(h)(10) election, was a positive deal for ratepayers. Both witnesses Dzuricky and Hoard were questioned about various aspects of the Section 338(h)(10) election by counsel for CUCA and the Attorney General.

CUCA states in its brief that the tax treatment upon which Piedmont has conditioned the merger will, according to Piedmont's own estimates, cost ratepayers more than $4.7 million in the first year after the merger and more than $13.2 million over the life of the merger, in NPV terms. Thus, CUCA argues that the proposed tax treatment is detrimental to the interests of retail ratepayers since the elimination of ADIT will contribute to an increase in the cost of service for NCNG customers. If the Commission accepts the tax treatment sought by Piedmont, CUCA believes that the merger would be justified by the public convenience and necessity only if the Commission eliminates the non-recurring O&M cost associated with merger integration and pension and post-employment obligations that Piedmont has indicated it may seek to treat as regulatory assets and amortize. Witness Dzuricky acknowledged on cross-examination that the treatment of such costs as regulatory assets was subject to a decision by the Commission. According to the CUCA Dzuricky Cross-Examination Exhibit No. 1, the merger integration and pension and post-employment obligations, as amortized over the periods selected by Piedmont, are expected to cost ratepayers approximately $3.7 million in the first year after the merger and almost $13.3 million over the long term on an NPV basis, and thus elimination of the non-recurring O&M costs will save retail ratepayers an amount similar in magnitude to the Section 338(h)(10) costs that Piedmont wants ratepayers to bear.

In his brief, the Attorney General urges that the costs of the tax election be considered along with other merger-related costs in the pending NCNG rate case.

In light of the uniformity of the evidence supporting Piedmont's ability to make a Section 338(h)(10) election with respect to this transaction, the benefits that will accrue to ratepayers from this transaction, and the indications that this transaction might very well not close if Piedmont's ability to make such an election were impaired by this Commission, the Commission concludes that Piedmont should be permitted to make and utilize such an election in the context of its acquisition of NCNG and a fifty percent (50%) ownership interest in Eastern NC. CUCA's proposed offset is rejected. The Attorney General's recommendation to consider merger-related costs in the NCNG rate case has been discussed above.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 24 - 25

The evidence for these findings of fact is contained in the testimony of the Public Staff witnesses and Applicants' witness Dzuricky.

Public Staff witnesses Davis, Farmer, and Hoard described "goodwill" as "the amount by which the purchase price exceeds the value assigned to the specifically identifiable assets acquired." They equated this term to the regulatory term "acquisition premium." The Public Staff witnesses recommended that the Commission preclude Piedmont from recovering from ratepayers in any future proceeding the goodwill or acquisition premium associated with this transaction, arguing that such a ruling would be consistent with the Commission's rulings in other recent acquisition proceedings, such as Docket Nos. G-9, Sub 466 and G-3, Sub 251 (the Piedmont-NUI merger).

Piedmont agreed to the Public Staff's recommendation with one provision. Piedmont argued that $5 million was included in the purchase price paid to Progress in exchange for Progress' agreement to assume ownership of and full responsibility for investigation and remediation of NCNG's MGP sites and that Piedmont should not be precluded from seeking recovery of this amount in a future proceeding. Piedmont stated that previous Commission orders permit NCNG and Piedmont to treat environmental clean-up costs as a regulatory asset and to seek recovery in future rate cases and that their proposed provision is needed to preserve Piedmont's right to seek such recovery.

In response, the Public Staff witnesses argued that Piedmont paid $425 million with $19 million being goodwill, and that the Public Staff does not view $5 million of the goodwill as being better than the rest. While the SPA contains several references to the MGP facilities and specifically addresses Progress' agreement to accept responsibility for all remediation obligations associated with them, the Public Staff witnesses noted that the SPA places no value on the assumption of this obligation. The Attorney General and CUCA support the Public Staff's position.

In the past, the Commission has generally disallowed any recovery of acquisition premiums at the time of merger approvals. See the discussion and cases cited in the Order Approving Petition in Docket Nos. G-9, Sub 466 and G-3, Sub 251 (October 8, 2002). Piedmont agrees to such treatment in this proceeding, but seeks an exception as to the amount that

Piedmont paid Progress in return for Progress' assumption of responsibility as to NCNG's MGP sites. The Commission agrees with Piedmont that there is a valid distinction between the usual acquisition premium and a payment made to secure a valuable commitment such as that alleged as to the MPG clean-up. The Commission accepts the Public Staff's recommendation as to treatment of the goodwill or acquisition premium associated with this acquisition with the following proviso. The Commission will defer consideration as to the recoverability of any payment made for Progress' assumption of responsibility for NCNG's MGP sites, as well as any arguments that may be raised against such recovery, until such time, if ever, as Piedmont files a proposal to recover these costs from ratepayers or to establish a regulatory asset with respect to these costs. The Commission does not at this time decide whether such a payment was made or the amount of any such payment or the future ratemaking treatment that may be appropriate for such a payment. All that is decided now is that Piedmont is not precluded from filing an application, if it chooses, requesting some ratemaking treatment of such a payment and the Commission will decide all related issues of fact and law at such time as an application is filed.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 26

The evidence for this finding of fact is contained in the testimony of the Public Staff witnesses and the records of the Commission.

At the time CP&L acquired NCNG in 1999, CP&L agreed not to seek recovery of the goodwill associated with the acquisition, and the Commission accepted this agreement, as reflected in its order. See Condition 15 of the Order Approving Merger and Issuance of Securities in Docket Nos. E-2, Sub 740 and G-21, Sub 377 (July 13, 1999). Condition 15 specifically states, "Any acquisition adjustment that results from the business combination of CP&L and NCNG shall be treated for accounting and ratemaking purposes so that it does not affect CP&L's retail electric rates and charges...." The Public Staff witnesses in this proceeding recommended that the order in the present dockets state that Progress is prohibited from recovering from ratepayers the goodwill associated with the 1999 purchase of NCNG. The Public Staff witnesses also recommended that Progress should be foreclosed from seeking the recovery of "any costs related to the manufactured gas plants." They argued that Progress has presented no evidence as to how these plants or the assumption of liability for them benefits CP&L's ratepayers and that this matter should not be left as a lingering, potential cost that ratepayers may be asked to assume in the future.

Progress responds that the Public Staff's recommendation is premature since the issue has not been presented to the Commission for consideration. At this time, there has been no request to recover any of these costs and no hearing has been held to address the evidence for the recovery of such costs that might be presented in the future.

The Public Staff's recommendation presents two issues: treatment of the acquisition premium from the 1999 CP&L-NCNG merger and treatment of Progress' costs related to the MGP clean-up. The appropriate treatment of the acquisition premium associated with the 1999 CP&L-NCNG merger has already been decided by Condition 15 in the July 13, 1999 Order approving the CP&L-NCNG merger in Docket Nos. E-2, Sub 740 and G-21, Sub 377. The condition specifically states that any such acquisition premium "shall be treated for accounting and ratemaking purposes so that it does not affect CP&L's retail electric rates and charges…." This issue has been decided, and no further action is needed in the present dockets. To the extent Progress should be understood as seeking reconsideration of that decision, such is denied. As to the second issue, the treatment of Progress' costs related to the MGP clean-up, the Commission agrees with Progress and no decision will be made until and unless an application for ratemaking treatment thereof is filed.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 27

The evidence supporting this finding is contained in the testimony of the Public Staff witnesses and the Applicants' witness Dzuricky.

Public Staff witnesses Davis, Farmer, and Hoard recommended that the Commission rule that "parties not be precluded from challenging in a general rate case proceeding the appropriateness of the regulatory assets presented to the Commission in this docket." Subsequently, the Public Staff witnesses identified two regulatory assets presented in this case: (1) NCNG's pension and OPEB costs and (2) one-time integration costs associated with the acquisition. The Applicants' witness Dzuricky clarified that Piedmont is not seeking approval of any particular regulatory assets in this proceeding. Dzuricky further stated his belief that any issues relating to the establishment of regulatory assets associated with the proposed acquisition should be addressed in either the pending NCNG rate case or some future rate case. He did not object to the Public Staff's recommendation in this regard.

In light of the agreement of the Public Staff and the Applicants that no regulatory assets are being presented for approval in this proceeding and their further agreement that any such regulatory assets should be dealt with in either the NCNG rate case or a future rate case, the Commission concludes that it is appropriate to preserve the parties' rights in this regard.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 28

The evidence supporting this finding of fact is contained in the testimony of the Public Staff witnesses and the Applicants' witness Dzuricky.

Public Staff witnesses Davis, Farmer, and Hoard recommended that the Commission specifically find that "nothing in the order shall be construed to deprive the Commission of its regulatory authority under the law, including its right to review and adjust, if deemed appropriate, Piedmont's cost of capital or expense levels for ratemaking purposes for the effect of the securities issued as the Initial Financing for this transaction." The Applicants' witness Dzuricky testified that Piedmont is not in any way seeking to deprive the Commission of its regulatory authority under law with respect to appropriate cost of capital or expense levels and is not conceptually opposed to the proposal of the Public Staff. Dzuricky went on to clarify Piedmont's position by emphasizing that Piedmont intends to replace the initial financing for this transaction with permanent financing in short order. He requested that the Commission make clear that the Commission's ruling on this point does not preclude any party, including Piedmont, from proposing or challenging any capital structure in a future rate case.

Based on the agreement of the parties and the clarification requested by witness Dzuricky, the Commission concludes it is appropriate to adopt the recommendation of the Public Staff except for elimination of the word "Initial" before "Financing."

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 29 - 30

The evidence supporting this finding of fact is set forth in the testimony of the Applicants' witnesses Skains and Dzuricky.

There is the potential that Piedmont's acquisition of an interest in Eastern NC will result in Piedmont's becoming a registered holding company under the terms of PUHCA, which would adversely impact this Commission's jurisdiction vis-à-vis federal agencies. The Applicant's witnesses testified that Piedmont had filed an application with the SEC seeking a waiver from PUHCA relative to the acquisition of the interest in Eastern NC, on grounds that the interest in Eastern NC will be de minimis in the context of the larger company. If this waiver is granted, Piedmont would become an exempt holding company, and Piedmont anticipates that the waiver will be granted. On cross-examination by the Attorney General, witness Skains was asked several questions regarding the possible impact of PUHCA on Piedmont if the waiver is not granted. Witness Skains testified that the SPA gives Piedmont the right not to proceed if the waiver is denied. He testified that if the waiver is not granted, "I don't know...whether we would go forward with the acquisition or not. That is an issue we would consult our lawyers as to, as well as discuss with our board...." Witness Skains volunteered that Piedmont would notify the Commission before proceeding with the acquisition of the interest in Eastern NC if that acquisition would result in Piedmont's becoming a registered holding company. Piedmont agreed to the following:

> Piedmont shall promptly notify the Commission in the event that Piedmont determines (or is otherwise informed) prior to the closing of the transactions anticipated herein that Piedmont will become a Public Utility Holding Company within the meaning of PUHCA as a consequence of such closing.

In his brief, the Attorney General proposed that the Commission's approval in these dockets be subject to a condition as follows:

> It is assumed, based on representations made by Piedmont, that the merger will not cause Piedmont to become a registered holding company under PUHCA. If Piedmont or its affiliates engage in acquisitions or other actions (such as, but not limited to, the creation of a parent of Piedmont) after the merger that create the possibility of Piedmont (or a parent) becoming a registered holding company under PUHCA, Piedmont will notify the Commission at least 30 days prior to filing with the SEC any application necessary to obtain authorization to take such actions or, where no such application is necessary, at least 60 days prior to taking such actions.

This language comes from prior Commission orders approving other mergers which presented the potential for the utility to become a registered holding company.

Based on witness Skains' commitment, the Commission finds it appropriate to direct Piedmont to provide it with prior notice if Piedmont determines or is otherwise informed prior to the closing of the transactions anticipated by the SPA that Piedmont will become a registered holding company as a consequence of such closing.

The Attorney General's proposed condition is broader than Piedmont's commitment. It would require advance notice before Piedmont undertakes future "acquisitions or other actions" that might result in Piedmont becoming a registered holding company. Both the Duke-PanEnergy merger (Docket No. E-7, Sub 596) and the CP&L-NCNG merger (Docket Nos. E-2, Sub 740 and G-21, Sub 377) presented the potential that those utilities would become registered holding companies, resulting in significant loss of this Commission's jurisdiction. In both of those proceedings, the Commission approved the mergers upon conditions which provided for advance notice and, further, provided that the utility would bear the full risk of any preemptive effects of PUCHA and take all such actions as the Commission might find necessary and appropriate to hold North Carolina retail ratepayers harmless from such preemption. The Attorney General's proposed condition provides for advance notice, but the purpose of such advance notice is to allow the Commission to act. The Commission has heard claims in other dockets that advance notice is for informational purposes only and does not allow the Commission to take any action in response. The Commission concludes that it should order anti-preemption language as a condition in this proceeding for three reasons. First, it clarifies the intent of the advance notice. Second, it serves the purpose of consistency since similar anti-preemption conditions were imposed as to Duke and CP&L in past proceedings that presented the prospect of the utility's becoming a registered holding company. Third, the Commission recognizes that Piedmont does not intend to become subject to PUCHA and that Piedmont does not have to proceed with the acquisition if its request for a waiver is denied. However, witness Skains testified that the ultimate decision would be made by others if the request is denied, and his testimony did not completely rule out the possibility that Piedmont would become a registered holding company.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 31

In his brief, the Attorney General proposes that Progress should be required to continue to provide full access to books and records relating to NCNG and Eastern NC. The Attorney General states that G.S. 62-51 authorizes members of the Commission, Commission Staff, and Public Staff to inspect the books and records of corporations affiliated with public utilities. After Progress transfers its NCNG stock and its interest in Eastern NC to Piedmont, the legal affiliation between Progress and NCNG and Progress and Eastern NC will end. However, the need to inspect books and records of NCNG and its former affiliates will continue, for example, in connection with NCNG's next annual gas cost prudence review. The Attorney General argues that while the G.S. 62-51 authority may reasonably be interpreted to extend to former affiliates and although the Commission's broad powers may also provide such authority, it would be appropriate to clarify the extent of the Commission's authority through a condition in this order. The Attorney General proposes the following condition:

> Following the merger, Progress will continue to provide the members of the Commission, Commission Staff, and Public Staff full access to books and

records of NCNG and entities that, prior to the merger, have been affiliated with NCNG, where such records relate either directly or indirectly to the provision of intrastate service by NCNG.

The Commission concludes that such a condition is appropriate as a part of the approval granted herein.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 32

In his brief, the Attorney General notes that some actions and decisions that were taken while NCNG was owned by Progress will not be reviewed by the Commission until after the acquisition by Piedmont. For example, NCNG's next annual gas costs prudence review will occur after the acquisition. In order to ensure that any disagreement about responsibility as between Piedmont and Progress does not affect ratepayers or the Commission's ability to perform adequate review of NCNG, the Attorney General proposed the following condition:

> NCNG will be fully accountable for any action or inaction by NCNG affecting rates or services, and the merger and resulting change in ownership will not be an excuse or defense. For example, NCNG's next annual prudence review of gas costs will occur after the merger, and NCNG will be fully accountable for the prudence of such costs.

The Commission agrees with the proposition that it must retain authority to order any adjustments to NCNG's rates that might be found appropriate in the gas cost prudence review covering the time before NCNG was acquired by Piedmont, or in any similar situation. To the extent the Attorney General's proposed condition seeks to clarify such, the Commission finds it appropriate to hereby assert such authority.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 33 AND 34

The Attorney General notes that in orders approving other mergers based upon conditions, the Commission has made the following statement concerning the intent of the conditions:

> It is the intent of the foregoing Regulatory Conditions that the affected utilities' ratepayers shall be held harmless from any adverse effects of the merger, including actions by other regulatory jurisdictions relating to the merger, and that ratepayers shall receive benefits from the merger that are at least commensurate with the potential adverse effects of the merger.

The Attorney General recommends that this expression of intent be incorporated into the order in this proceeding.

The Commission has also made the following statement in other merger orders concerning its authority to amend regulatory conditions should the need arise:

> It is the Commission's intention to enforce all of the Regulatory Conditions approved herein consistently with their intended goals. In addition, the Commission has inherent authority, consistent with the appropriate procedural mechanisms, to amend the Regulatory Conditions should circumstances warrant. To the extent that a party has a concern or complaint with respect to the actions of the affected utilities or with the Commission's interpretation of the Regulatory Conditions, that party may seek relief from the Commission.

The Attorney General recommends that this statement be incorporated into the order in this proceeding.

These statements have been made in other merger orders, and the Commission finds that they accurately state the Commission's intent in these proceedings.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 35

The evidence supporting this finding is contained in the testimony of the Public Staff witnesses, CUCA witness O'Donnell, and APEC witness Hughes, in the rebuttal testimony of the Applicants' witness Dzuricky, in letters filed in these dockets by Progress and APEC, and in Piedmont's late-filed exhibit.

Public Staff witnesses Davis, Farmer, and Hoard testified that the Commission should approve the transactions proposed herein subject to two conditions: (1) that APEC formally provide an acknowledgment that it is not exercising its right of first refusal with respect to the Eastern NC shares to be purchased by Piedmont and (2) that Eastern NC and APEC provide their consent to the assignment of the CO&M Agreement to Piedmont.

As to the first condition proposed by the Public Staff, APEC witness Dixon testified, "APEC was given notice of the sale and did not exercise its right of first refusal to purchase the shares of Eastern NC being sold to Piedmont." Piedmont witness Dzuricky cited this language in his rebuttal testimony as evidence that APEC had declined to exercise this right. In a letter filed with the Commission by APEC's President and Chairman Jimmie Dixon on April 24, 2003, APEC again expressly indicated that it had "declined to exercise its right of first refusal to purchase Progress Energy, Inc.'s shares at the price at which Progress Energy . . . agreed to sell such shares to Piedmont Natural Gas Company." Given this testimony and correspondence, the Commission concludes that APEC has acknowledged that it is not exercising its right of first refusal with respect to the Eastern NC shares being sold to Piedmont. Accordingly, the Public Staff's first proposed condition has been satisfied.

As to the Public Staff's second proposed condition, witness Dixon indicated that APEC generally supports the proposed transactions described in the SPA and is inclined to consent to the assignment of the CO&M Agreement provided that (1) Piedmont continues to honor the legal and contractual obligations of Progress and CP&L with regards to Eastern NC, (2) Piedmont honors the service agreement between APEC and Eastern NC, (3) Piedmont recognizes and continues to allow active participation of APEC in the management of Eastern NC, and (4) Piedmont completes the construction of the Eastern NC gas system as currently designed. In his rebuttal testimony, witness Dzuricky agreed that APEC should provide its consent to the assignment of the CO&M Agreement to Piedmont. With respect to the specific concerns listed by witness Dixon, Dzuricky indicated that Piedmont would assume all obligations of NCNG to Eastern NC as a result of the acquisition, that neither NCNG nor Piedmont is a party to the service agreement referenced by Dixon, that Piedmont has no intention of changing APEC's participation in Eastern NC, and that Piedmont intends to complete construction of the Eastern NC gas system based on the design budget and schedule approved by the Commission. In his supplemental testimony, witness Dixon indicated that Piedmont and APEC had agreed to the assignment of the CO&M Agreement to Piedmont and to resolution of other concerns pursuant to an agreement of April 29, 2003, and that APEC was satisfied with the agreement. A copy of this agreement was filed by Piedmont as a late-filed exhibit. Based on the testimony and late-filed exhibit, the Commission concludes that APEC has formally consented to the assignment of the CO&M Agreement to Piedmont and that its other concerns have been satisfied. With respect to the Public Staff's request that Eastern NC also consent, the Commission notes that Eastern NC is currently owned in its entirety by APEC and CP&L and after the transactions proposed herein will be owned by APEC and Piedmont. Thus, ownership of Eastern NC resides with APEC, which has expressly consented to the assignment of the agreement, and with CP&L and Piedmont, both of whom have requested approval of the assignment of the agreement. The Public Staff's second proposed condition has been satisfied.

CUCA witness O'Donnell testified that CUCA supports the proposed transactions subject to conditions (1) that Piedmont's existing sales and transportation services (and rates) are not rendered less desirable as a result of the acquisition and (2) that Piedmont completes the transition of NCNG's rates, terms, and conditions of service to those of Piedmont within a three-year period. Witness Dzuricky indicated that Piedmont was not proposing to change the rates, terms, or conditions of Piedmont's service to its existing customers in either this proceeding or the pending NCNG rate case, but that Piedmont continuously reviews its non-rate terms of service and recommends changes as economic and other conditions change. Dzuricky also testified that while Piedmont believes that it will be able to complete the integration of NCNG into Piedmont within three years, Piedmont is uncomfortable giving a guarantee.

The Commission understands CUCA's concern regarding the potential impact of the acquisition on existing Piedmont customers; however, the Commission notes that it has previously found in this Order that the proposed acquisition will have no detrimental impact to existing Piedmont customers. Further, while neither Piedmont nor the Commission can guarantee that Piedmont's rates will not change at some point in the future, any such change will be subject to Commission scrutiny and approval. There is no proposal to change the rates, terms, or conditions of service of Piedmont's existing customers in either this proceeding or the NCNG rate case. Substantial changes to NCNG's terms and conditions of service have been proposed in NCNG's rate case which, if approved, would move NCNG in the direction of Piedmont's service structure. The Commission also appreciates CUCA's desire for prompt consolidation of the NCNG operations into Piedmont. While Piedmont has not provided a guarantee that it will complete the consolidation of NCNG into Piedmont within three years, it has proposed and the Commission is concurrently approving a three-step mechanism to "roll-in" NCNG's rate structure into that of Piedmont. This roll-in and the related service integration process will be subject to the continuing jurisdiction of the Commission. Based on the foregoing, the

Commission concludes that Piedmont's proposed acquisition of NCNG will not make the rates, terms, or conditions of service for Piedmont's existing customers any less desirable, thereby satisfying CUCA's first proposed condition. The Commission further concludes it will not impose a mandatory three-year integration deadline. This conclusion is based, in part, on the fact that full integration of NCNG into Piedmont will require the active participation of multiple parties, including the Commission, and various subsequent proceedings. Because Piedmont cannot control these parties or proceedings, a deadline for integration is not appropriate. The Commission will, however, monitor the progress of this integration through the rate case and rate transition plan.

Eastern NC witness Hughes testified that Eastern NC generally supports the acquisition by Piedmont of the shares of Eastern NC and Commission approval thereof, provided that such approval is made contingent upon CP&L's issuance of certain encroachment permits to Eastern NC. Witness Dzuricky observed that Piedmont does not have the ability to satisfy this condition because it does not own and will not come to own the rights-of-way in question, but that it does not oppose this request. In a letter from its counsel filed with the Commission on April 22, 2003, Progress committed to the Commission that it would "allow such facilities to be installed, consistent with the current design and construction plans for the Eastern NC system . . . [and that Progress] anticipates finalizing the necessary encroachment permits shortly."

Based on the April 22, 2003 commitment by Progress, the Commission finds it unnecessary to condition its approval in this proceeding upon the execution of the requested encroachment agreements. To the extent that problems arise in the future with respect to this matter which cannot be resolved by the parties, the Commission is available for dispute resolution.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 36-39

The evidence for these findings of fact is contained in the application and in the testimony of the Applicants' witness Dzuricky and Public Staff witnesses Davis, Farmer, and Hoard.

In the application, Piedmont makes several requests regarding the rate provisions to be applicable to its service to former NCNG customers following NCNG's merger into Piedmont. In the first, Piedmont seeks authorization for Piedmont "to commence natural gas service in all areas of North Carolina previously certificated to NCNG under the terms and conditions of service, including rates, approved for NCNG, as the same may be amended from time to time. . ." In the second, Piedmont requests authorization to make appropriate changes in its policies and procedures, including its gas cost recovery mechanism, that are necessary or appropriate to effect the merger. Piedmont intends to initially charge NCNG customers rates based on the approved NCNG rates in effect at the time of closing, as these may be amended from time to time, provided, however, that Piedmont also intends to combine all of its wholesale gas costs for NCNG and Piedmont customers following the merger to ensure that all of its customers will pay the same amount for gas provided by Piedmont.

Applicants' witness Dzuricky testified that it is Piedmont's goal to integrate NCNG's customers into Piedmont's existing customer base as soon as practical and that Piedmont will utilize several steps to accomplish this goal. The first step will be to roll-in the commodity costs of all gas purchased by Piedmont (for its historic customers and for the former NCNG customers) into a single pool to be allocated to all of its North Carolina customers. This step will be taken on the effective date of Piedmont's first benchmark change following closing. The second step will be for Piedmont to file a rate transition plan with the Commission seeking approval of specific mechanisms to, among other things, transition NCNG's customers to Piedmont's demand gas cost rate components. The third step will be to complete any remaining integration of rates and terms of service in Piedmont's next general rate case following closing. Witness Dzuricky indicated that this transition will be facilitated by certain actions being proposed in the NCNG rate case, such as movement towards Piedmont service structure and utilization of a margin rate structure which recognizes Piedmont's pending acquisition of NCNG. Finally, witness Dzuricky indicated that Piedmont will charge NCNG's customers NCNG's approved base rates following the merger until changed by further Commission action.

The Commission approves Piedmont's proposal to transition NCNG's customers to Piedmont's rates. The Commission notes that this approach is substantially similar to that being utilized with respect to Piedmont's previous acquisition of the assets and certificate authority of NUI Corporation in North Carolina and that it allows for a gradual transition to Piedmont's rate structure under the continuing supervision and authority of the Commission.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 40

The evidence for this finding of fact is contained in the testimony of the Applicants' witness Dzuricky, Public Staff witnesses Davis, Farmer, and Hoard, and CUCA witness O'Donnell.

With respect to the Commission's annual prudence review of NCNG's gas costs, witness Dzuricky recommended that NCNG's gas cost review period be extended until May 31, 2004, to coincide with Piedmont's next review period following the acquisition. The Public Staff witnesses recommended that NCNG's next gas cost review period end on the last day of the month of closing of the merger. CUCA witness O'Donnell recommended that Piedmont and NCNG continue to have separate annual gas cost review proceedings for the next year and then that NCNG's proceeding be moved up five months to coincide with Piedmont's. In his rebuttal testimony, witness Dzuricky agreed with the proposal of the Public Staff, provided that it would apply even if the transaction closed on the last day of a month and with the understanding that NCNG's next gas cost review will be based on actual, rather than estimated, balances in the various deferred accounts. At the hearing, witness O'Donnell accepted the Public Staff's proposal as long as there are separate hearings for Piedmont and NCNG.

The Commission finds advantage and logic in the Public Staff's proposal to end the review period for NCNG's next annual gas cost prudence review concurrent with the change in ownership. This will simplify that review by clearly separating the period of Progress management from the new period of management by Piedmont. The Commission adopts the Public Staff's proposal in this regard with the clarifications added by Piedmont. After the change in ownership, there will be only one company and the decisions relevant to gas supply and gas costs for all customers will be made by the same management, although the former NCNG customers will admittedly have separate rates and deferred accounts for some time until full integration and rate transition can be achieved. On a going forward basis (after NCNG's next annual prudence review), the Commission concludes that it will conduct a unified gas cost prudence review for all Piedmont customers, on the schedule prescribed for Piedmont by Commission Rule. The Commission concludes that there should be one hearing for all Piedmont customers, but recognizes that for some time it will be necessary to consider separate accounting and rates for the former NCNG customers in the context of that unified hearing.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 41

The evidence for this finding of fact is found in the application and in the testimony of the Applicants' witnesses Skains and Dzuricky and Public Staff witnesses Davis, Farmer, and Hoard.

In addition to approval of the acquisition by Piedmont of NCNG, a fifty percent (50%) interest in Eastern NC and the Eastern NC Rights and Obligations, the merger of NCNG into Piedmont, and the issuance of $500 million in short-term debt, the Applicants also seek certain related authority involving the transfer of certificate authority from NCNG to Piedmont, the respective initiation and termination of service within NCNG's service territory by Piedmont and NCNG, modification of Piedmont's policies and procedures, authorization for Piedmont to do business under the NCNG name, and certain other necessary and appropriate adjustments.

The Commission finds all of the requested authorizations to be appropriate and necessary to effect the business transactions previously approved herein, except the Applicants' request to modify CP&L's Code of Conduct. In the Scheduling Order, the Commission decided to address CP&L's request for modification of its Code of Conduct in a separate docket, and the Commission reiterates that decision. Based upon its previous findings and conclusions, and except for the proposed modification of CP&L's Code of Conduct, the Commission grants each of the additional authorizations sought by Applicants, to be exercised in a manner consistent with the provisions of this Order, Chapter 62 of the General Statutes, and the Commission's Rules and Regulations.

IT IS, THEREFORE, ORDERED as follows:

1. That the proposed acquisition by Piedmont of all of the capital stock of NCNG and a fifty percent (50%) interest in Eastern NC and the Eastern NC Rights and Obligations, as set forth in the October 16, 2002 SPA is hereby approved;

2. That the proposed merger of NCNG into Piedmont is approved;

3. That as of the effective date of the acquisition, all of NCNG's rights and obligations under all certificates of public convenience and necessity heretofore issued by the Commission to NCNG and/or its predecessors shall be transferred to and vested in Piedmont;

4. That as of the effective date of the acquisition, Piedmont is authorized to commence, and NCNG is authorized to cease, providing service to NCNG's existing customers;

5. That following the closing of the transactions, Piedmont is authorized to do business as NCNG;

6. That Piedmont is authorized to issue up to $500 million in short-term debt securities to fund its purchase of NCNG and a fifty percent (50%) interest in Eastern NC and the Eastern NC Rights and Obligations;

7. That on and after the effective date of the acquisition, Piedmont is authorized to make appropriate changes in its policies and procedures, including its Gas Cost Recovery Mechanism, consistent with this Order, Chapter 62 of the General Statutes, and the Commission's Rules and Regulations;

8. That Piedmont shall synchronize and consolidate the commodity gas cost component of its rates for all its North Carolina customers (including former NCNG customers) on the effective date of the next change in its benchmark commodity cost of gas after the closing;

9. That Piedmont shall prepare and file, as soon as practicable following the closing of the merger between Piedmont and NCNG, a rate transition plan to permit Piedmont to charge all of its North Carolina customers (including former NCNG customers) the same rate components to recover its wholesale demand gas costs;

10. That Piedmont shall file in its next general rate case following the closing of the merger between Piedmont and NCNG, any additional proposed changes to its rates, tariffs, and service regulations;

11. That the review period for NCNG's next annual gas cost prudence review shall end on the last day of the month of the closing of the merger between Piedmont and NCNG, even if the closing is on the last day of the month, and the review will be based on actual, rather than estimated, deferred account balances; and that thereafter the Commission will conduct a unified gas cost prudence review for all Piedmont customers, on the schedule prescribed for Piedmont by Commission Rule;

12. That no party shall be precluded from seeking or challenging the establishment of any regulatory assets relating to NCNG's pension and OPEB costs and Piedmont's integration costs in either the pending NCNG rate case or another future rate case;

13. That nothing in this Order shall be construed to deprive the Commission of its regulatory authority under North Carolina law, including its right to review and adjust, if appropriate, Piedmont's cost of capital or expense levels for ratemaking purposes for the effect of the securities issued as the financing for the acquisition;

14. That Piedmont shall promptly notify the Commission in the event that Piedmont determines (or is otherwise informed) prior to the closing of the transactions anticipated herein

that Piedmont will become a registered holding company within the meaning of PUHCA as a consequence of such closing;

15. That if Piedmont or its affiliates engage in acquisitions or other actions (such as, but not limited to, the creation of a parent of Piedmont) after the merger that create the possibility of Piedmont (or a parent) becoming a registered holding company under PUHCA, Piedmont will notify the Commission at least 30 days prior to filing with the SEC any application necessary to obtain authorization to take such actions or, where no such application is necessary, at least 60 days prior to taking such actions; and that Piedmont will bear the full risk of any preemptive effects of PUCHA and will take all such actions as the Commission finds necessary and appropriate to hold North Carolina retail ratepayers harmless from such preemption;

16. That Piedmont shall not be permitted to recover from its ratepayers the goodwill or acquisition premium associated with its acquisition of NCNG and a fifty percent (50%) ownership interest in Eastern NC;

17. That Piedmont is not precluded from seeking future regulatory asset treatment or recovery of such part of the total purchase price paid by Piedmont as may be allocable to Progress' assumption of all investigation and remediation liability associated with and ownership of NCNG's MGP sites;

18. That CP&L shall not be permitted in any future proceeding to seek recovery of the goodwill related to its 1999 purchase of NCNG;

19. That Progress is not precluded from seeking future ratemaking treatment or recovery of Progress' costs related to the MGP clean-up;

20. That, following the merger, Progress shall continue to provide members of the Commission, Commission Staff, and Public Staff full access to books and records of NCNG and entities that, prior to the merger, have been affiliated with NCNG, where such records relate either directly or indirectly to the provision of intrastate service by NCNG;

21. That the Applicants shall file a written notice in this docket within thirty (30) days after consummation of the business transactions approved herein; and

22. That this docket shall remain open for the purpose of filing such notice.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of June, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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DOCKET NO. P-7, SUB 825
DOCKET NO. P-10, SUB 479

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of Carolina Telephone and Telegraph Company and Central Telephone Company for Approval of Price Regulation Plans Pursuant to G.S. 62-133.5	))))	ORDER RULING ON REQUEST FOR WAIVER

BY THE COMMISSION: On May 16, 2003, Carolina Telephone and Telegraph Company, and Central Telephone Company (collectively, Sprint) filed a Petition for Waiver of Self-Effectuating Penalties Related to Service Objectives for December 2002 due to special circumstances – namely, the ice storm of early December 2002. Sprint stated that it was unable to meet the standard established in Section 13 of its price regulation plan to clear out 90% of its out-of-service troubles within 24 hours of receipt. Due to the exigencies of the weather, Central Telephone Company was only able to resolve 62.5% of its out-of-service problems, while Carolina Telephone resolved 61.2%.

On May 21, 2003, the Commission issued an *Order Seeking Comments* concerning Sprint's Petition for Waiver of Self-Effectuating Penalties Related to Service Objectives for December 2002 due to special circumstances. In this *Order*, the Commission ruled: (1) that comments from parties other than Sprint should be filed no later than June 2, 2003; and (2) that reply comments from Sprint should be filed no later than June 9, 2003.

On June 2, 2003, BellSouth filed comments regarding Sprint's Petition for Waiver of Self-Effectuating Penalties for December 2002, as did the Public Staff on June 3, 2003.

On June 16, 2003, BellSouth and Sprint filed reply comments to the Public Staff's comments regarding Sprint's Petition for Waiver of Self-Effectuating Penalties for December 2002.

Sprint's Petition for Waiver of Self-Effectuating Penalties

In its Petition, Sprint stated that under its Price Regulation Plan, it may request a waiver from the Commission of self-effectuating penalties for any service objective during any month in which Sprint was prevented by special circumstances from meeting the same. Sprint stated that because of the severe winter weather experienced in December of 2002, specifically the ice-storm of December 4, 2002, Sprint was unable to meet the standard established in Section 13 of the Price Regulation Plan for out-of-service troubles. Sprint noted that this objective specifically requires Sprint to resolve or "clear-out" ninety percent (90%) of out-of-service troubles within twenty-four (24) hours of their receipt. Sprint stated that Attachment A of its Petition demonstrates that for a period of more than two (2) years from January 2001, to February 2003, Sprint was usually able to meet or exceed this standard; but that it was unable to meet the established criteria for December 2002. Specifically, Sprint showed that Central managed to resolve sixty-two and one-half percent (62.5%) of the out-of-service troubles within the required twenty-four (24) hours. Carolina was able to resolve sixty-one and two tenths percent (61.2%) of the out-of-service troubles within the required time. Sprint claimed that this performance was directly related to commercial power outages and other effects of the December 4th ice storm.

Sprint noted that there were many instances in which storm-related power outages lasted for extended periods of time and were spread over a large geographic area within Sprint's service territory and throughout the State as a whole. Sprint stated that during the storm and the restoration period that followed, Sprint and its work crews were not able to meet the out-of-service trouble criteria. Sprint claimed that despite its possessing battery back-ups and portable generators, on the day of the storm and the week that followed, 494 carrier systems (remote units providing dial tone and serving over 85,000 customers) became inoperable as a direct result of commercial power outages. The commercial power outages caused by this storm were of such a duration that, even with the back-ups to Sprint's carrier systems, such back-ups could not protect against this severe outage. In addition to the loss of dial tone from 494 Sprint carriers resulting from the loss of commercial power, Sprint noted that its work crews were unable to obtain access to many areas in which power lines and other facilities were down. This denial of access resulted from unsafe conditions that existed for non-electric utility work crews to enter areas where power lines had been downed. Sprint commented that it very much regrets that it was unable to meet the Commission's criteria for out-of-service troubles under Rule R9-8 and the penalty threshold set forth in Section 13 of the Price Regulation Plan. However, Sprint stated that this failure was created by circumstances far beyond its control.

Comments by BellSouth and Public Staff

BellSouth supported Sprint's Petition for Waiver of Self-Effectuating Penalties Related to Service Objectives for December 2002. BellSouth pointed out that on January 29, 2003, it notified the Commission that it would be seeking the same relief sought by Sprint through its Petition should BellSouth's December 2002 performance for the out-of-service objective cause BellSouth to miss its yearly average statewide result and thus generate a penalty under BellSouth's price regulation plan. Section XI(D) of BellSouth's price plan allows BellSouth to "ask the Commission to waive the penalty for any objective for any month it believes that a special circumstance (typically severe weather-related, but could be other significantly service-affecting circumstances, unforeseen, or beyond the Company's control) has prevented it from meeting one or more service objectives." BellSouth stated that it considers the severe ice storm that hit North Carolina in December 2002 as a "special circumstance" warranting an exclusion of that month from calculation of the yearly average. BellSouth noted that, like Sprint, it missed the 90% benchmark for December 2002 due to the severe weather and should it miss its yearly statewide average for this measurement and be subject to penalties, BellSouth, like Sprint, will present proof of the significant, service affecting circumstances caused by this ice storm to justify its waiver request.

The Public Staff conceded that the ice storm of December 4, 2002 was an unpredictable, rare event that caused widespread power and telephone service outages throughout North Carolina, and that out-of-service trouble repairs in many of Sprint's exchanges were significantly delayed by the circumstances cited in Sprint's Petition. However, the Public Staff requested that further data-gathering and analysis be conducted before Sprint's Petition is granted.

Reply Comments by BellSouth and Sprint

BellSouth argued that from both a common sense perspective and from the items mentioned in Sprint's Petition (such as widespread failure of electric power), Sprint was prevented from clearing out-of-service trouble reports within the objective period. BellSouth emphasized that Sprint was able to confine the recovery period for the disastrous weather conditions to only one month and was able to meet the objective the very next month.

Although Sprint stated that the Commission should be able to conclude that Sprint's request for a waiver is necessary and should be granted without the need for further information, Sprint responded to the Public Staff's requests. Sprint listed its North Carolina exchanges where one or more carrier units failed and the number of carrier units and lines in each exchange out of service. Sprint also provided general information on the engineering of carrier units for backup power, routine maintenance of portable generators, and preparation of generators for emergency use prior to a winter storm. Sprint argued that the severity of the December 4, 2002 ice storm and the catastrophic loss of commercial power over such an expansive geographic area (the majority of Sprint's service territory) for such an extended period of time simply overwhelmed the utilities providing commercial power and telephone service to North Carolina consumers. Sprint commented that the storm of December 4, 2002 was not typical, nor were the aftereffects readily manageable. Because of the nature of the storm itself, and its effects on commercial power, Sprint stated that it performed as well as could be expected.

Public Staff's Response to Sprint's Reply

On June 30, the Public Staff filed a Motion to File Response to Sprint's reply comments, which was granted by the Commission on July 1, 2003. On July 11, 2003, the Public Staff's response suggested that the Commission should require more detailed information than Sprint provided before ruling on the waiver request, and provided a list of additional specific questions that it believed should be answered. Finally, the Public Staff opined that it is unnecessary and unadvisable for the Commission to rule on Sprint's waiver request until the end of the penalty period under the Company's price plan (i.e. after October 31, 2003). The Public Staff believed that the scope of the requested waiver may be too broad, since Sprint's reply comments suggest that only 25% of its North Carolina exchanges were impacted by the December 4, 2002 storm, and suggested that it should be limited to the exchanges and dates affected by the storm.

Sprint's Reply Comments to Public Staff's Response

On August 7, 2003, Sprint filed a Motion to File Reply Comments to the response of the Public Staff pursuant to Commission Rule R1-7(a)(5). Sprint stated that it had provided information responsive to the inquiries raised by the Public Staff. Sprint commented that it provided this information despite the fact that the Commission had not at that time, and to Sprint's knowledge still has not, issued an order seeking additional information. Sprint stated that there is nothing in Sprint's Price Regulation Plan requiring provision of this information. Section 13D of Sprint's Price Regulation Plan provides as follows:

> The Companies may ask the Commission to waive the penalty for any objective for any month they believe that a special circumstance (typically severe weather-related, but could be other significant service-affecting circumstances, unforeseen, or beyond the Company's control) has prevented them from meeting one or more service objectives.

Sprint also argued that nothing in its Price Regulation Plan requires production of the burdensome amounts of information sought by the Public Staff for a waiver to be granted by the Commission. Sprint stated that the Public Staff's need for information appears insatiable and further information is not required to act favorably on Sprint's waiver request. Additionally, Sprint emphasized that its Price Regulation Plan does not provide that waivers will be granted only at the end of the penalty period. As Sprint discussed in its comments, 95% of its exchanges were unable to meet the Commission's objective for Out-of-Service Troubles Cleared Within 24 Hours during December 2002. Sprint stated that the Public Staff's calculation of 25% apparently includes only those exchanges where carrier systems failed to furnish dial tone as a result of commercial power outages as detailed in Sprint's reply comments. However, Sprint argued that the severity and widespread nature of the December storm adversely impacted virtually all of Sprint's exchanges.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concurs with Sprint and considers the severe ice storm that hit North Carolina in December 2002 as a "special circumstance" that warrants an exclusion of that month from calculation of its yearly statewide average. As stated in its comments, the Public Staff acknowledged that the ice storm of December 4, 2002 was an unpredictable, rare event that caused widespread power and telephone service outages throughout North Carolina, and that out-of-service trouble repairs in many of Sprint's exchanges were significantly delayed by the circumstances cited in Sprint's Petition. Sprint stated that 95% of its exchanges were impacted system-wide. Sprint does not believe that the standard for a waiver should be contingent on the percentage of exchanges that lost power, but it appears that the Public Staff is seeking such a standard. The Commission believes that Sprint adequately supports its request for an exemption. Therefore, the Commission finds it appropriate to deny the Public Staff's request for additional information and concludes that good cause exists to grant Sprint's Petition for Waiver filed on May 16, 2003.

The Commission further recommends that the ILECs with self-effectuating penalties in their Price Plans and the Public Staff initiate discussions to systematize the quantum of proof that should be required when a waiver due to exigent weather conditions is requested. The instant case is one of first impression. The only pre-existing guidance in Sprint's Price Plan as to waiver of penalties is that the companies may request such a waiver should a "special circumstance" (typically severe weather-related) arise. The Commission hopes that the parties can work together to reach an agreement as to what information should be provided to support such a request in the future.

Finally, all companies should utilize the lessons learned from the ice storm to further improve their strategies to respond to future emergency situations.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 9th day of September, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Chair Jo Anne Sanford and Commissioners Conder and Kerr did not participate in this decision.

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DOCKET NO. W-787, SUB 17
DOCKET NO. W-1032, SUB 4
DOCKET NO. W-989, SUB 4
DOCKET NO. W-899, SUB 28
DOCKET NO. W-981, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Application by AquaSource Utility, Inc., and Philadelphia Suburban Corporation, for Authority to Transfer the Stock and Franchises to Provide Water and Sewer Utility Service of Fairways, Utilities Inc., Glynnwood Water Systems, Inc., Mountain Point Utilities, Inc., Rayco Utilities, Inc., and Willowbrook Utility Company, Inc.	)	ORDER APPROVING ACQUISITION OF STOCK AND REQUIRING CUSTOMER NOTICE

BY THE COMMISSION: On October 11, 2002, AquaSource Utility, Inc. (AquaSource), and Philadelphia Suburban Corporation (PSC) (hereinafter referred to collectively as "the Applicants") filed an application with the Commission seeking approval of the acquisition of the stock of AquaSource by PSC, pursuant to G.S. 62-111, in accordance with the Purchase Agreement filed as an exhibit to the application.

AquaSource, duly organized and existing under the laws of the State of Texas, is a subsidiary of AquaSource, Inc., which, in turn, is a subsidiary of DQE, a Pennsylvania-based energy service company. AquaSource is the owner of the stock of five water and wastewater operating subsidiaries in North Carolina subject to the Commission's jurisdiction. These are: Fairways Utilities, Inc. (Fairways), Glynnwood Water Systems, Inc. (Glynnwood), Mountain Point Utilities, Inc. (Mountain Point), Rayco Utilities, Inc. (Rayco), and Willowbrook Utility Company, Inc. (Willowbrook). These companies provide water or water and sewer utility service to approximately 2,300 water customers and 1,800 sewer customers in various service areas throughout North Carolina.

According to the application and Purchase Agreement, PSC will acquire all of the issued and outstanding shares of common stock and 90 of the 100 outstanding shares of preferred stock of AquaSource Utility; all of the issued and outstanding shares of common stock of AquaSource Development Company[1], and all of the issued and outstanding shares of common stock of the

[1] AquaSource Development Company is a Texas corporation that does not conduct business in North Carolina.

Reynolds Group, Inc.[1] After this stock acquisition, ultimate ownership of Fairways, Glynnwood, Mountain Point, Rayco, and Willowbrook will rest with PSC.

PSC, duly organized and existing under the laws of the Commonwealth of Pennsylvania, is the second largest investor-owned water utility holding company in the United States. It serves approximately two million residents in six states. In North Carolina, PSC currently serves approximately 9,200 water and wastewater customers through its wholly-owned subsidiary, Hydraulics, Ltd. In 2001, PSC had a net income of approximately $60,000,000 on revenues of approximately $307,000,000.

The Purchase Agreement provides for a target cash purchase price of approximately $205 million. The final purchase price may be increased by up to $10 million or decreased by up to $25 million as various purchase price adjustments are applied. Such adjustments relate to the achievement of certain operating metrics, involving revenue, rate base, and projected customer connections.

By Order issued November 26, 2002, the Commission required public notice of the application and indicated that the matter could be determined without public hearing if no significant protests were received and the Public Staff's investigation revealed that the transfer was justified by the public convenience and necessity.

On December 3, 2002, and January 29, 2003, the Public Staff served data requests on the Applicants to determine whether the proposed stock transfer would be justified by the public convenience and necessity. The Applicants responded to the data requests.

On December 31, 2002, AquaSource filed the Certificate of Service, indicating that notice had been given as required by the Commission.

On January 6, 2003, the Cape Homeowners Association contacted the Public Staff to protest the transfer and to request a public hearing. Fairways provides water and sewer services within the Cape Subdivision, located in Carolina Beach, North Carolina. Fairways and the Cape Homeowners Association had entered into an agreement in 1996 ("Fairways Agreement") that provided, *inter alia*, that Fairways would maintain sufficient capacity in its sewage treatment facilities to serve all of the platted and unplatted lots in the Cape. The Cape Homeowners Association sought assurances from the Public Staff that PSC would honor the Fairways Agreement. On February 5, 2003, PSC informed the Cape Homeowners Association by letter that PSC recognized that Fairways would continue to be legally bound to the obligations set forth in the Fairways Agreement. The Cape Homeowners Association advised the parties that it was satisfied by PSC's commitment to honor the Fairways Agreement and withdrew its protest and its request for a public hearing.

No other customers have protested the proposed stock transfer or requested a hearing from the Commission.

[1] The Reynolds Group is an Indiana water utility holding company. Neither it nor any of its subsidiaries conduct business in North Carolina.

On February 27, 2003, the Public Staff and the Applicants submitted a stipulation that settled the issues between them and requested that the transfer be approved immediately, subject to the following provisions and conditions:

a. PSC will not seek to recover from AquaSource's North Carolina customers any portion of the acquisition premium associated with this transaction.

b. Since PSC proposes to acquire the stock of AquaSource, which owns the stock of the North Carolina subsidiaries, rather than the North Carolina subsidiaries themselves, there will be no journal entries made on the books of the North Carolina subsidiaries to reflect the acquisition of the AquaSource stock by PSC.

c. PSC is aware of and intends to honor the obligations imposed pursuant to the joint stipulations with the Public Staff and orders of the Commission in connection with AquaSource's acquisition of the stock of Fairways, Glynnwood, Mountain Point, Rayco, and Willowbrook. Furthermore, PSC agrees that it is legally bound to honor the Fairways Agreement discussed above.

d. The Public Staff and PSC agree that the proposed stock acquisition will have no adverse impact on the cost of service for Hydraulics, Ltd.

e. PSC proposes to finance this transaction through 50% debt and 50% equity.

f. The Public Staff and the Applicants agree that this stipulation shall have no ratemaking implications, other than those discussed in paragraphs a-d. In addition, the Public Staff and the Applicants agree that tax implications and transaction costs related to the proposed transfer may be at issue in future ratemaking proceedings. The Public Staff and the Applicants further agree that either party may assert any position in ratemaking or other regulatory proceedings with regard to these tax implications and costs.

g. The Public Staff and the Applicants agree that the existing bond of $520,000 previously posted for AquaSource and its North Carolina subsidiaries will remain in effect. PSC is responsible for any changes in the bond amount for AquaSource and its North Carolina subsidiaries immediately upon the effective date of the transfer.

h. The Applicants and the Public Staff agree that the Applicants shall file a report of the action taken pursuant to the Commission's approval of this transfer within ten (10) days of the transfer. Within thirty (30) days of the transfer, the Applicants shall file an additional report that shall include the actual price paid by PSC for the stock of AquaSource.

i. The Public Staff and PSC agree that PSC will continue to be responsive to customer inquiries regarding service and billing and to further its commitment to provide superior service to its North Carolina water and sewer customers.

j. The Applicants and the Public Staff agree to waive the right to file testimony in this docket, subject to the Commission's approval of this stipulation.

k. The Applicants and the Public Staff agree that neither the stipulation among the parties to this proceeding nor the Commission's Order shall be treated or cited as precedent or have any precedential value for the Applicants or any other water or sewer utility in North Carolina.

On the basis of the application, the stipulation, the records of the Commission and the evidence of record, the Commission makes the following:

FINDINGS OF FACT

1. On January 23, 2001, PSC acquired ownership of Hydraulics, Ltd., which operates pursuant to the Commission's jurisdiction. Through its ownership of Hydraulics, Ltd., the Public Staff and the Commission have gained experience with PSC. PSC, through Hydraulics, Ltd., has demonstrated that it is responsive to customer complaints and committed to improving the service and operation of the water and wastewater utility systems it operates.

2. The acquisition of the stock of AquaSource by PSC will not cause any immediate adverse rate or service impact on the approximately 2,300 water customers and 1,800 sewer customers currently served by AquaSource in North Carolina. The substitution of shareholders should not have a significant direct influence on AquaSource's operations.

3. Unlike DQE, AquaSource's current parent company, PSC's sole focus is the provision of water and wastewater utility service. Because of PSC's size, access to capital, and management, this transfer may offset the ongoing rise in providing water and wastewater service and thereby moderate the magnitude of future rate increase requests. Further, the greater resources that PSC makes available to the North Carolina subsidiaries should ensure that they are better positioned to meet future demands. There is no indication that there are any financial problems that could filter down to the North Carolina subsidiaries.

4. The stipulation between the Applicants and the Public Staff submitted in this action is reasonable and appropriate.

5. PSC has the technical, managerial, and financial capacity to provide adequate water or water and sewer utility service in the service areas served by AquaSource and its North Carolina subsidiaries.

6. The transfer of stock in AquaSource to PSC is justified by the public convenience and necessity.

CONCLUSIONS

Based upon the foregoing, the Commission is of the opinion that the application for transfer of the stock of AquaSource to PSC should be approved and that the stipulation among the Applicants and the Public Staff should be approved. In addition, the Commission will make the conditions jointly proposed by the Public Staff and the Applicants express conditions of this transfer.

IT IS, THEREFORE, ORDERED as follows:

1. That the application for transfer of the stock of AquaSource to PSC is approved.

2. That the Joint Stipulation of the Applicants and the Public Staff, signed and filed with the Commission on February 27, 2003, is hereby approved.

3. That the $520,000 bond posted for AquaSource and its North Carolina Utilities shall remain in effect, however, PSC is responsible for any changes in the bond amount for AquaSource and its North Carolina subsidiaries immediately upon the effective date of the transfer.

4. That PSC shall provide written notification to the Commission within 10 days of completion of the transfer including the date the acquisition took place. Within thirty (30) days of the transfer, the Applicants shall file an additional report that shall include the actual price paid by PSC for the stock of AquaSource.

5. That neither the stipulation among the parties to this proceeding nor this Order shall be treated or cited as a precedent or have any precedential value for the Applicants or any other water or sewer utility in North Carolina.

6. That the Notice to Customers, attached as Appendix A, shall be mailed with sufficient postage to all customers of AquaSource and its North Carolina subsidiaries within ten days of the date of this Order, and that the Applicants must submit to the Commission the attached Certificate of Service properly signed and notarized not later than 20 days after the date of this Order.

ISSUED BY ORDER OF THE COMMISSION,
This the 13th day of March, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

rb030303.07

APPENDIX A
PAGE 1 OF 2

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

NOTICE TO CUSTOMERS

DOCKET NO. W-787, SUB 17
DOCKET NO. W-1032, SUB 4
DOCKET NO. W-989, SUB 4
DOCKET NO. W-899, SUB 28
DOCKET NO. W-981, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Notice is given that the North Carolina Utilities Commission has approved the application of AquaSource Utility, Inc. (AquaSource), and Philadelphia Suburban Corporation (PSC) to transfer the stock of AquaSource and franchises for water and sewer utility service currently held by Fairways Utilities, Inc., Glynnwood Water Systems, Inc., Mountain Point Utilities, Inc., Rayco Utilities, Inc., and Willowbrook Utility Company, Inc., from AquaSource to PSC.

Customers should see no changes in the service currently provided by any of the subsidiary companies given above. There are no changes in rates occurring as a result of this transfer. There is no change in the mailing addresses or telephone numbers of the subsidiary companies given above. Should there be any future changes in these telephone numbers or mailing addresses, customers will be notified.

This the 13th day of March, 2003.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

WATER/SEWER – SALE/TRANSFER

CERTIFICATE OF SERVICE

I, ________________________________, mailed with sufficient postage or hand delivered to all affected customers the attached Notice to Customers issued by the North Carolina Utilities Commission in Docket Nos. W-787, Sub 17, W-1032, Sub 4, W-989, Sub 4, W-899, Sub 28, and W-981, Sub 5, and the Notice was mailed or hand delivered by the date specified in the Order.

This the _____ day of __________________ 2003.

By: ______________________________
Signature

____
Name of Utility Company

The above named Applicant, ______________________________, personally appeared before me this day and, being first duly sworn, says that the required Notice to Customers was mailed or hand delivered to all affected customers, as required by the Commission Order dated ________________ in Docket Nos. W-787, Sub 17, W-1032, Sub 4, W-989, Sub 4, W-899, Sub 28, and W-981, Sub 5.

Witness my hand and notarial seal, this the ________ day of ________________ 2003.

____
Notary Public

____
Address

(SEAL) My Commission Expires: ______________________________
Date

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Roanoke Valley Telephone Company; Russell Grant and Donald B. Ray, d/b/a - Order Canceling PSP Certificate
SC-1226, SUB 2 (01/10/2003)

Sandhills Telephone Systems; Tony McNeill, d/b/a - Order Canceling PSP Certificate
SC-907, SUB 2 (07/11/2003)

Seabolt; Richard S. – Order Affirming Previous Commission Order Canceling Certificate
SC-1000, SUB 9; SC-1695, SUB 1 (06/30/2003)

Skyway Lanes, Inc. - Order Canceling PSP Certificate
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Sloppee's, Inc. - Order Canceling PSP Certificate
SC-1339, SUB 1 (08/07/2003)

Snyder; Hal K. - Order Canceling PSP Certificate
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Southeastern Center for Contemporary Art - Order Canceling PSP Certificate
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The Sun Company Telecommunications; Joseph J. & Kay N. Scharnow, d/b/a - Order Canceling PSP Certificate
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The Word of Faith Fellowship - Order Canceling PSP Certificate
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Time Saver Phones - Order Canceling PSP Certificate
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Unique Merchandise; Michael L. McLean, d/b/a - Order Canceling PSP Certificate
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University of North Carolina at Charlotte - Order Canceling PSP Certificate
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Vending Tymes; Dennis E. Meeks d/b/a - Order Canceling PSP Certificate
SC-1654, SUB 2 (09/18/2003)

Webster Communications; Elmer A. Webster, d/b/a - Order Canceling PSP Certificate
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Woodard; Robin L. - Order Canceling PSP Certificate
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Cen-Tex Pay Telephone Co.; Scott Ferguson, d/b/a	SC-1720, SUB 0	(07/22/2003)
Dalia, Inc	SC-1706, SUB 0	(02/19/2003)
David's Alignment PTC; David Hightower, d/b/a	SC-1722, SUB 0	(08/15/2003)
Del Laboratories, Inc.	SC-1716, SUB 0	(06/14/2003)
England; Phillip Ray	SC-1709, SUB 0	(03/28/2003)
Food N' Fun, Inc.	SC-1719, SUB 0	(07/16/2003)
Fryer; James Kenneth	SC-1718, SUB 0	(07/08/2003)
Glenoit, LLC	SC-1731, SUB 0	(10/29/2003)
Inmate Calling Solutions, LLC	SC-1727, SUB 0	(10/02/2003)
Innerarity; Chantha	SC-1707, SUB 0	(02/25/2003)
ITI Inmate Telephone, Inc	SC-1715, SUB 0	(06/05/2003)
Jackson; Marvin	SC-1723, SUB 0	(08/21/2003)
McCombs; Mildred K.	SC-1729, SUB 0	(10/17/2003)

Moffitt; Renee	SC-1724, SUB 0	(09/29/2003)
Oh! Brian's; OB Triangle, Inc., d/b/a	SC-1728, SUB 0	(10/03/2003)
Paragon Communications Services, LLC	SC-1732, SUB 0	(12/05/2003)
Patel; Neha	SC-1712, SUB 0	(05/09/2003)
S & W Phones, Inc.	SC-1717, SUB 0	(06/26/2003)
Snyder; Hal K.	SC-245, SUB 6	(11/26/2003)
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Southeast Pay Telephone, Inc.	SC-1710, SUB 0	(04/11/2003)
St. Mark AME Zion Church	SC-1730, SUB 0	(10/20/2003)
Straight Talk Communications; Tony Wayne Evans, d/b/a	SC-1721, SUB 0	(07/28/2003)
Town of Carrboro	SC-1713, SUB 0	(05/16/2003)
Whitesides; Travis E.	SC-1725, SUB 0	(09/11/2003)
Whitsett Mini Mart; Zef Dar Sandidge, d/b/a	SC-1726, SUB 0	(09/18/2003)

SPECIAL CERTIFICATE/PSP – Miscellaneous

Allied Communications, Inc. - Order Reissuing Special Certificate Due to Address and Telephone Number Changes
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Clark Telecommunications, Inc. - Order Reissuing Special Certificate Due to Address Change
SC-1664, SUB 1 (12/15/2003)

Equity Pay Telephone Company, Inc. - Order Reissuing Special Certificate Due to Address and Telephone Number Changes
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Hughes Tele-Com; Edward and Joanne Hughes, d/b/a - Order Reissuing Special Certificate Due to Address Change
SC-1697, SUB 1 (10/24/2003)

Intellicom; Allen Lamont Scott, d/b/a - Order Reissuing Special Certificate Due to Address and Telephone Number Changes
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LSAA, Inc. - Order Reissuing Special Certificate Due to Address Change
SC-1612, SUB 1 (10/21/2003)

Mount Mitchell Lands, Inc. - Order Reissuing Special Certificate Due to Address Change
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National Telecom, Inc. - Order Reissuing Special Certificate Due to Address Change
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Sprint Payphone Services, Inc. - Order Reissuing Special Certificate Due to Address Change
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T-NETIX, Inc. - Order Reissuing Special Certificate Due to Address Change
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Evercom Systems, Inc. - Order Approving Transfer of Control
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TELECOMMUNICATIONS

TELECOMMUNICATIONS - Cancellation of Certificate

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Actel Integrated Communications, Inc. – Order Affirming Previous Commission Order Canceling Certificate
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Advanced Telecommunications Network, Inc. – Order Affirming Previous Commission Order Canceling Certificate
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America's Tele-Network Corporation - Order Canceling Certificate
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Americom Communications, Inc. – Order Affirming Previous Commission Order Canceling Certificate
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American Fiber Systems, Inc. - Order Canceling Certificates
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Avana Communications Corporation – Order Affirming Previous Commission Order Canceling Certificate
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Cable & Wireless Global Card Services, Inc. - Order Canceling Certificate
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Cash Back Rebates LD.com, Inc. - Order Canceling Certificate
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CenturyTel Long Distance, Inc. - Order Canceling Certificate
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Choctaw Communications, Inc., d/b/a Smoke Signal Communications - Order Canceling Certificate
P-763, SUB 4 (08/21/2003)

CCCNC, Inc. - Order Canceling Certificate
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CityNet Telecom, Inc. - Order Canceling Certificates
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ConnectSouth Communications – Order Affirming Previous Commission Order Canceling Certificate
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Eagle Communications, Inc., d/b/a Eagle Communications of NC, Inc. Order Canceling Certificate
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Eastern Telecommunications, Inc. - Order Canceling Certificate
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Essex Communications, Inc., d/b/a eLEC Communications - Order Canceling Certificates
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Easton Telecom Services, L.L.C. - Order Canceling Certificates
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Ecocom USA Limited – Order Affirming Previous Commission Order Canceling Certificate
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Fiberworks, Inc. – Order Affirming Previous Commission Order Canceling Certificate
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Fuzion Wireless – Order Affirming Previous Commission Order Canceling Certificate
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Group Long Distance, Inc. - Order Canceling Certificates
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IdealDial Corporation – Order Affirming Previous Commission Order Canceling Certificate
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InterStar Communications, Inc. - Order Canceling Certificate
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Intetech, L.C. - Order Canceling Certificates
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Intrex Telecom, Inc. - Order Canceling Certificate
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IP Voice Communications, Inc. – Order Affirming Previous Commission Order Canceling Certificate
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LD Exchange.com, Inc - Order Canceling Certificate
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Local Telcom Holdings, LLC - Order Canceling Certificate
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Lockheed Martin Global Telecommunications Services, Inc. - Order Canceling Certificate
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NorthStar Communications, Inc. - Order Canceling Certificate
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Ntegrity Telecontent Services, Inc. – Order Affirming Previous Commission Order Canceling Certificate
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NXLD Company, d/b/a Nextel Long Distance - Order Canceling Certificate
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Promise-Net International, Ltd. - Order Canceling Certificate
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P.F. Net Network Services Corporation. - Order Canceling Certificate
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Reflex Communications, Inc. – Order Affirming Previous Commission Order Canceling Certificate
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SBR, Inc. - Order Canceling Certificate
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Southnet Telecomm – Order Affirming Previous Commission Order Canceling Certificate
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T-NETIX Internet Services, Inc. - Order Canceling Certificate
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Telcam Telecommunications Co. of the Americas, Inc. – Order Affirming Previous Commission Order Canceling Certificate
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Telco Partners, Inc. - Order Canceling Certificate
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Telecommunications Cooperative Network, Inc. - Order Canceling Certificate
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LecStar Telecom, Inc. - Order Extending Provisional Authority
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Town of Pineville, d/b/a Pineville Telephone Company - Order Granting Certificate
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France Telecom Corporate Solutions, LLC	P-1246, SUB 1	(12/10/2003)
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North State Communications Advanced Services, Inc.	P-1210, SUB 0	(04/01/2003)
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Randolph Telephone Telecommunications, Inc.	P-810, SUB 1	(11/12/2003)
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School Link, Inc.	P-1250, SUB 1	(03/21/2003)
Spectrotel, Inc.	P-1284, SUB 1	(11/20/2003)
Tier II Technologies, Inc.	P-1266, SUB 1	(07/08/2003)
TSI Telecommunication Network Services, Inc.	P-1290, SUB 0	(11/18/2003)
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Cinergy Communications Company	P-1286, SUB 1	(11/20/2003)
Cognigen Networks, Inc.	P-1254, SUB 0	(03/19/2003)
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France Telecom Corporate Solutions, LLC	P-1246, SUB 0	(01/31/2003)
Globcom Incorporated	P-1264, SUB 0	(11/24/2003)
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MGEN Services Corp.	P-1249, SUB 0	(02/07/2003)
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National Access Long Distance, Inc.	P-1234, SUB 0	(01/16/2003)
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NorVergence, Inc.	P-1269, SUB 0	(07/01/2003)
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Orion Telecommunications Corp.	P-1261, SUB 0	(05/16/2003)
Powercom Corporation	P-1279, SUB 0	(09/12/2003)
Quasar Communications Corporation	P-1288, SUB 0	(10/03/2003)
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Red River Networks LLC	P-1267, SUB 0	(06/17/2003)
Ridley Telephone Company, LLC	P-1200, SUB 0	(06/18/2003)
Sail Networks, Inc.	P-1289, SUB 0	(10/06/2003)
School Link, Inc.	P-1250, SUB 0	(02/24/2003)
Spectrotel, Inc.	P-1284, SUB 0	(09/30/2003)
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TCPB Marketing Company, Ltd.	P-1304, SUB 0	(12/23/2003)
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The Dodson Group, Inc.	P-1252, SUB 0	(03/26/2003)
Tier II Technologies, Inc.	P-1266, SUB 0	(06/12/2003)
Tralee Telephone Company, LLC	P-1199, SUB 0	(06/18/2003)
Transcom Communications, Inc.	P-1247, SUB 0	(02/07/2003)
Unified Messaging Services, Inc., d/b/a Single Source, Inc.	P-1245, SUB 0	(01/31/2003)
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Via One Technologies, Inc.	P-1240, SUB 0	(01/07/2003)
Volo Communications of North Carolina, Inc.	P-1297, SUB 0	(11/20/2003)
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Alltel Carolina, Inc. - Order Approving Interconnection Agreement with Flatel, Inc.
P-118, SUB 126 (07/25/2003)

Alltel Carolina, Inc. - Order Approving Interconnection Agreement with Metro Teleconnect Companies, d/b/a Metro Teleconnect
P-118, SUB 127 (07/25/2003)

Alltel Carolina, Inc. - Order Approving Interconnection Agreement with NewSouth Communications Corp.
P-118, SUB 129 (09/25/2003); Order Approving Amendment (11/20/2003)

ALLTEL Communications, Inc. - Order Approving Interconnection Amendment with BellSouth Telecommunications, Inc.
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AT&T Communications of the Southern States, LLC - Order Approving Interconnection Amendments with BellSouth Telecommunications, Inc.
P-140, SUB 73 (12/11/2003)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with ITC^DeltaCom Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendments with Birch Telecom of the South, Inc.
P-55, SUB 1228 (02/21/2003); Order Approving Amendment (05/15/2003)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendments with Xspedius Corporation
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with IDS Telcom, LLC
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P-55, SUB 1277 (05/22/2003)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with Z-Tel Communications, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with Access Point, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendments with NewSouth Communications Corporation
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendments with US LEC of North Carolina, Inc.
P-55, SUB 1311 (02/21/2003); Order Approving Amendments (05/22/2003)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendments with Access Integrated Networks, Inc.
P-55, SUB 1312 (05/15/2003)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with Adelphia Business Solutions Operations, Inc.
P-55, SUB 1314 (02/21/2003); Order Approving Amendment (05/22/2003)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendments with Network Telephone Corporation
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with Cbeyond Communications, LLC
P-55, SUB 1324 (08/07/2003); Order Approving Amendment (10/30/2003); Order Approving Amendment (12/11/2003)

BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with Sprint Communications Company, L.P.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with OneStar Communications, LLC
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with VarTec Telecom, Inc.
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with DukeNet Communications, LLC
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BellSouth Telecommunications, Inc. - Order Approving Interconnection Amendment with MCI WorldCom Communications, Inc.
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Carolina Water Service, Inc. of North Carolina - Order on Complaints (Ocean Club Ventures, L.L.C. & Gary W. Smith and James A. Stewart)
W-354, SUB 236; W-354, SUB 262 (09/03/2003); Further Order on Complaints (12/05/2003)

Carolina Water Service, Inc. of North Carolina - Order Holding Complaints in Abeyance (Jeff Verlander, Elisabeth Underwood, Mr. and Mrs. Dave Bertocci, & Patricia Kulikauski)
W-354, SUB 264 (07/17/2003)

Carolina Water Service, Inc. of North Carolina - Order Closing Docket (Complaint of Stan Wise-Resident in the Bear Paw Community)
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Dan River Water, Inc. - Order Approving Resolution, Declaring Exemption From Regulation and Closing Docket (Complaint of Certain Members of the Board of Directors of Dan River, Inc.)
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Carolina Blythe Utility Co. - Order Recognizing Contiguous Extension and Approving Rates (Crow Creek Golf Club & Plantation)
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Carolina Blythe Utility Co. - Order Recognizing Contiguous Extension and Approving Rates (Shingletree Links Subdivision, Phase 1)
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Carolina Water Service, Inc. of North Carolina - Order Recognizing Contiguous Extension and Approving Rates (Crane Point Subdivision)
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Carolina Water Service, Inc. of North Carolina - Order Recognizing Contiguous Extension and Approving Rates (Emerald Ridge Subdivision)
W-354, SUB 228 (07/23/2003)

Carolina Water Service, Inc. of North Carolina - Order Recognizing Contiguous Extension and Approving Rates (Bent Tree Subdivision)
W-354, SUB 229 (07/23/2003)

Carolina Water Service, Inc. of North Carolina - Order Granting Franchise and Approving Rates (Eagle Crossing Subdivision, Phase 1)
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Carolina Water Service, Inc. of North Carolina - Order Recognizing Contiguous Extension and Approving Rates (Amber Ridge Subdivision, Phases 6, 7 & 8)
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Carolina Water Service, Inc. of North Carolina - Order Recognizing Contiguous Extension and Approving Rates (Bishop Pointe Subdivision, Phase 1)
W-354, SUB 261 (03/17/2003)

Chatham Water Reclamation Company, LLC - Order Recognizing Contiguous Extension and Approving Rates (Governors Village Townhomes, Governors Village Offices & Governors Forest Subdivision)
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CWS Systems, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Register Place Estates Subdivision)
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CWS Systems, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Amber Ridge Subdivision, Phases 6, 7 & 8)
W-778, SUB 54 (03/17/2003)

CWS Systems, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Bishop Pointe Subdivision, Phase 1)
W-778, SUB 55 (03/17/2003); Errata Order (04/28/2003); Errata Order (04/30/2003)

Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Watson's Mill Subdivision)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Stoney Creek Subdivision, Phase 3)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (The Registry at Bailey Farms Subdivision, Phase 1)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Stonemoor Subdivision)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Carol Ann Woods II Subdivision, Phase 1)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Watermark Shopping Center)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Catalina Alcove Business Park and Williamson Road Business Park)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Rustic Mills Subdivision)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Magnolia Place Subdivision, Phase 2)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Plantation Pointe Subdivision, Phase 3)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (The Registry at Bailey Farm Subdivision, Phase 2)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Fair Oaks Subdivision, Phase 2)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Cottonfield Village Subdivision, Phase 3)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Merion Subdivision, Phase 2)
W-274, SUB 435 (05/08/2003)

Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Henson Forest Subdivision, Phase B)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Linville Subdivision)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Estates at Oakridge Subdivision, Phases 4 & 5)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Westbury Subdivision)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Kendall Hills Subdivision, Phase 2, and Meadow Stream Hill Subdivision)
W-274, SUB 445 (09/22/2003)

Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Woodbridge Subdivision, Sections 6 & 7)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Britt Estates Subdivision)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Grissom Farms Subdivision, Phase 2)
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Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Faircroft Subdivision, Phase III)
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Outer Banks/Kinnakeet Associates, LLC - Order Approving Joint Stipulation, Recognizing Contiguous Extension, and Approving Rates (Kinnakeet Shores Subdivision, Phases 16-22)
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Water Quality Services, Inc. - Order Granting Franchise and Approving Rates (Echota Development)
W-1099, SUB 7 (03/26/2003)

904 Georgetown Treatment Plant, LLC - Order Recognizing Contiguous Extension and Approving Rates (Phase III of Sandpiper Bay Golf Plantation)
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<u>**WATER/SEWER - Contracts/Agreements**</u>

Bald Head Island Utilities, Inc. - Order Authorizing Change in Fees
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W-717, SUB 3 (06/12/2003)

Corriher Water Service - Order Approving Transfer and Requiring Customer Notice (Mt. Hope Estates)
W-233, SUB 19 (01/22/2003)

Corriher Water Service - Order Approving Transfer and Requiring Customer Notice (Westfield Subdivision)
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Corriher Water Service - Order Approving Transfer and Requiring Customer Notice (Sleca-Wa Subdivision)
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Hydraulics, Ltd. - Order Authorizing Discontinuance of Water Utility Service and Requiring Customer Notice (Colonial Heights Subdivision)
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LaGrange Waterworks Corporation - Order Authorizing Discontinuance of Water Utility Service and Canceling Franchise (Tranquil Acres Subdivision)
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Marshall Inc. - Order Authorizing Discontinuance of Water Utility Service (Green Meadows Subdivision)
W-1056, SUB 1 (06/27/2003)

Riverview Water System - Order Authorizing Discontinuance of Water Utility Service (Riverview Acres Subdivision)
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WATER/SEWER - Emergency Operator

Glen Ray Heights Subdivision - Order Terminating Appointment of Emergency Operator, Canceling Franchise, and Requiring Notice
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Mullis; Giles E. - Order Discharging Emergency Operator, Canceling Temporary Operator, and Closing Dockets
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Pied Piper Water System - Order Granting Customer Assessment and Requiring Customer Notice
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Ross; Sanford E. - Order Granting Authority to Discontinue Water Utility Service and Requiring Customer Notice (Hidden Valley Estates Subdivision)
W-618, SUB 6 (10/20/2003)

WATER/SEWER – Miscellaneous

Cricket-Millers Creek Water Association - Order Granting Application for Deregulation
W-1186, SUB 0 (01/30/2003)

EnergyUnited Water Corporation - Order Granting Application for Deregulation
W-1198, SUB 0 (05/14/2003)

Heater Utilities, Inc. - Order Recognizing Contiguous Extension and Approving Rates (Stephens Pointe Subdivision)
W-274, SUB 449 (11/14/2003)

Hillcrest-Shurlock Water System, Inc. - Order Granting Application for Deregulation
W-1190, SUB 0 (01/13/2003)

Icard Township Water Corporation - Order Granting Application for Deregulation
W-1187, SUB 0 (01/30/2003)

Jason Water Corporation - Order Granting Application for Deregulation
W-1185, SUB 0 (02/24/2003)

Moravian Falls Water Works, Inc, - Order Granting Application for Deregulation
W-1194, SUB 0 (05/08/2003)

North Lenoir Water Corporation - Order Granting Application for Deregulation
W-1196, SUB 0 (05/08/2003)

South Greene Water Corporation - Order Granting Application for Deregulation
W-1184, SUB 0 (02/24/2003)

Willow Creek Builders, Inc. - Order Closing Docket
W-387, SUB 3 (10/08/2003)

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WATER/SEWER - Rates

C & P Enterprises, Inc. - Recommended Order Granting Rate Increase and Requiring Customer Notice (Ocean Bay Villas and Ocean Glen Condominiums)
W-1063, SUB 2 (04/08/2003)

Coral Park Community Well - Order Canceling Hearing, Approving Rate Increase, and Requiring Customer Notice (Coral Park Subdivision)
W-717, SUB 4 (09/24/2003)

Corriher Water Service - Recommended Order Approving Rates and Holding Docket Open (All its Service Areas in North Carolina)
W-233, SUB 23 (10/21/2003)

Cogdill; Greg S. - Order Granting Partial Rate Increase, Canceling Hearing, and Requiring Customer Notice (Erwin Hills Mobile Home Park)
W-1171, SUB 1 (10/14/2003)

Fearrington Utilities; Fitch Creations, Inc. d/b/a - Order Accepting Bond, Approving Partial Rate Increase and Requiring Customer Notice (All its Service Areas in Chatham County)
W-661, SUB 5 (02/27/2003)

Grandfather Golf and Country Club - Order Granting Certificate, Approving Rates and Requiring Notice
W-755, SUB 4 (12/01/2003)

Grove Supply Company, Inc. - Order Granting Rate Increase and Requiring Customer Notice (West Haven Mobile Home Park)
W-587, SUB 6 (02/10/2003)

Holiday Island Property Owners Assoc. - Recommended Order Granting Rate Increase (Holiday Island)
W-386, SUB 14 (06/18/2003)

Honeycutt; Wayne M. - Order Accepting and Approving Corporate Surety Bond and Closing Docket
W-472, SUB 12 (09/02/2003)

Jones Dairy Farm Utility, Inc. - Order Canceling Hearing and Closing Docket
W-898, SUB 3 (01/21/2003)

Maxwell Water Company - Recommended Order Granting Partial Rate Increase and Requiring Customer Notice (Blawell Subdivision)
W-339, SUB 5 (12/05/2003)

McMahan; Harold - Order Canceling Hearing, Granting Rate Increase, and Requiring Customer Notice (Beard Acres Mobile Home Park)
W-791, SUB 5 (11/10/2003)

Simpson & Simpson Utilities; Simpson & Simpson, d/b/a - Order Granting Partial Rate Increase and Requiring Customer Notice (Thornwood Village Mobile Home Park)
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Woods Waterworks, Inc. - Order Granting Rate Increase, Requiring Customer Notice, and Canceling Public Hearing (All Service Areas in Surry County)
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WATER/SEWER - Sale/Transfer

Carolina Water Service, Inc. of North Carolina – Order Canceling Franchise and Closing Docket
W-354, SUB 258; W-198, SUB 36; (10/21/2003)

Coastal Plains - Order Approving Transfer and Requiring Customer Notice
W-215, SUB 23 (09/30/2003)

Crabtree Water Systems - Order Approving Transfer and Canceling Franchise
W-967, SUB 5 (12/19/2003)

Crabtree Water Systems - Order Approving Transfer and Canceling Franchise
W-967, SUB 6 (12/19/2003)

Cogdill; Greg S. - Order Closing Docket
W-1171, SUB 0; W-1108, SUB 4 (02/11/2003)

CWS Systems, Inc. - Order Approving Transfer and Requiring Customer Notice
W-778, SUB 56 (07/25/2003)

Davis; Roy and Virginia - Order Canceling Franchise and Closing Docket
W-631, SUB 4 (06/04/2003)

EMC Rural Services, Inc.; Edgecombe-Martin Cty. EMC d/b/a - Order Canceling Franchise and Closing Docket
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Enviro-Tech of North Carolina, Inc. - Order Canceling Franchise and Closing Docket
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Heater Utilities, Inc. - Recommended Order Approving Transfer, Approving Partial Rate Increase, and Requiring Customer Notice
W-274, SUB 399; W-1140, SUB 2 (03/03/2003); Order Releasing Bond and Surety, Canceling Franchises, and Closing Dockets (10/13/2003)

Heater Utilities, Inc. – Order Canceling Franchises, Releasing Bond, and Closing Docket
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Heater Utilities, Inc. – Order Canceling Franchise, Releasing Bond, and Closing Docket
W-274, SUB 429 (07/17/2003)

Heater Utilities, Inc. – Order Canceling Franchise, Releasing Bond, and Closing Docket
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Honey Hill Dev. Corp. - Order Approving Transfer and Canceling Franchise
W-420, SUB 2 (08/19/2003)

Hydraulics, Ltd. - Order Approving Transfer and Requiring Customer Notice
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K C Realty Investments, LLC - Order Granting Transfer, Approving Rates, and Requiring Customer Notice
W-1199, SUB 0; W-1161, SUB 1 (08/19/2003)

Scotsdale Water & Sewer, Inc. - Order Approving Transfer and Requiring Customer Notice
W-883, SUB 32; W-883, SUB 33 (09/25/2003)

Shamrock Water Corporation - Order Approving Transfer and Requiring Customer Notice
W-432, SUB 4 (06/30/2003)

South Mountain Water Works - Order Approving Transfer and Canceling Franchise
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West Wilson Water Corporation - Order Canceling Franchise and Closing Docket
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West Wilson Water Corporation - Order Canceling Franchise and Closing Docket
W-781, SUB 32 (07/24/2003)

West Wilson Water Corporation - Order Canceling Franchise and Closing Docket
W-781, SUB 33 (07/24/2003)

West Wilson Water Corporation - Order Approving Transfer and Requiring Customer Notice
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Willow Creek Holdings, LLC - Order Granting Transfer and Approving Rates
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WATER/SEWER – Tariff

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WATER/SEWER – Tariff Revision for Pass-Through

Coral Park Community Well - Order Approving Tariff Revision and Requiring Customer Notice
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Crestview, LLC - Order Approving Tariff Revision (Crestview Estates Mobile Home Park)
W-1096, SUB 1 (03/25/2003)

Greenfield Heights Development Company, Inc. - Order Approving Tariff Revision
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Graves Evans Enterprises, Inc.; Spring Valley County Estates, d/b/a - Order Approving Tariff Revision (Sprint Valley Convenient Homes)
W-1144, SUB 2 (11/21/2003)

Heater Utilities, Inc. - Order Approving Tariff Revision (Windsor Oaks Subdivision)
W-274, SUB 418 (02/28/2003)

Heater Utilities, Inc. - Order Approving Tariff Revision (Windsor Oaks Subdivision)
W-274, SUB 443 (09/02/2003)

Metro Water Systems, Inc. - Order Approving Tariff Revision (Whispering Pines Mobile Home Park)
W-1109, SUB 5 (04/01/2003)

Scientific Water and Sewerage - Order Approving Tariff Revision and Requiring Customer Notice
W-176, SUB 31 (08/20/2003)

Tradition at Mallard Creek; The Tradition at Mallard Creek LLC, d/b/a - Order Approving Tariff Revision
W-1117, SUB 2 (02/18/2003)

Watercrest Estates - Order Approving Tariff Revision and Requiring Customer Notice
W-1021, SUB 5 (08/15/2003)

Wellington Mobile Home Park, Inc. - Order Approving Tariff Revision
W-1011, SUB 9 (03/24/2003)

RESALE OF WATER/SEWER

RESALE OF WATER/SEWER - Cancellation of Certificate

BRH Eastlake, LLC - Order Affirming Previous Commission Order Canceling Operating Authority
WR-51, SUB 1; WR-100, SUB 2 (04/11/2003)

BRNA, LLC - Order Affirming Previous Commission Order Canceling Operating Authority
WR-75, SUB 1; WR-100, SUB 4 (10/03/2003)

Carolina Oaks Corporation - Order Affirming Previous Commission Order Canceling Operating Authority
WR-4, SUB 2; WR-100, SUB 2 (04/11/2003)

Lakeside Village, LP - Order Affirming Previous Commission Order Canceling Operating Authority
WR-121, SUB 1; WR-100, SUB 4 (09/30/2003)

Northstone Investment Properties, LLC - Order Affirming Previous Commission Order Canceling Operating Authority
WR-54, SUB 2; WR-100, SUB 4 (09/30/2003)

Sterling Bay Apartments - Order Affirming Previous Commission Order Canceling Operating Authority
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Sedgewood Green Apartments, LLC - Order Affirming Previous Commission Order Canceling Operating Authority
WR-107, SUB 1; WR-100, SUB 4 (09/30/2003)

The Reserve at Waterford, Inc. - Order Affirming Previous Commission Order Canceling Operating Authority
WR-102, SUB 2; WR-100, SUB 2 (04/11/2003)

Windsor at Thornhill, L.L.C. - Order Affirming Previous Commission Order Canceling Operating Authority
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RESALE OF WATER/SEWER – Certificate

Autumn Woods Associates, LLC - Order Granting Certificate of Authority and Approving Rates (Autumn Woods Apartments)
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Arbor Trace Apartments, LLC - Order Granting Certificate of Authority and Approving Rates (Arbor Trace Apartments, LLC)
WR-222, SUB 0 (11/21/2003)

Battleground Oaks Limited Partnership - Order Granting Certificate of Authority and Approving Rates (Battleground Oaks Apartments)
WR-191, SUB 0 (12/12/2003)

Brentmoor Apartments, LLC - Order Granting Certificate of Authority and Approving Rates (Brentmoor Apartments)
WR-224, SUB 0 (12/01/2003)

CG Cary Limited Partnership - Order Granting Certificate of Authority and Approving Rates (The Grove at Cary Park Apartments)
WR-210, SUB 0 (12/17/2003)

Davidson Gateway Apartments, LLC - Order Granting Certificate of Authority and Approving Rates (Davidson Gateway Apartments)
WR-190, SUB 0 (11/17/2003)

Dekalb Street Apartments, LLC - Order Granting Certificate of Authority and Approving Rates (Crown Ridge Apartments)
WR-195, SUB 0 (11/14/2003)

FGR Dilworth, LLC - Order Granting Certificate of Authority and Approving Rates (Sterling Dilworth Apartments)
WR-184, SUB 0 (11/18/2003)

Fifth and Poplar Associates, LLC - Order Granting Certificate of Authority and Approving Rates (Fifth and Poplar Apartments)
WR-193, SUB 0 (08/20/2003)

Hampstead Investors, LLC - Order Granting Certificate of Authority and Approving Rates (Hampstead Place Apartments)
WR-208, SUB 0 (12/23/2003)

Holly Hill Properties, LLC - Order Granting Certificate of Authority and Approving Rates (Holly Hill Apartments)
WR-192, SUB 0 (11/20/2003)

Rosedale Commons, LLC - Order Approving Tariff Revision (Alta Braden Apartments)
WR-101, SUB 2 (06/05/2003)

Shopton-Beam Road Associates, LLC - Order Granting Certificate of Authority and Approving Rates (Carrington Place at Tyvola)
WR-197, SUB 0 (09/02/2003)

RESALE OF WATER/SEWER - Sale/Transfer

Northstone Investment Properties, LLC - Order Closing Docket
WR-214, SUB 0; WR-54, SUB 1 (10/03/2003)

RESALE OF WATER/SEWER – Tariff

Autumn Woods Associates, LLC - Order Approving Tariff Revision (Autumn Woods Apartments)
WR-28, SUB 2 (03/27/2003)

BNP Realty, LLC - Order Approving Tariff Revision (Oakbrook Apartments, Harris Hill Apartments, & Paces Commons Apartments)
WR-59, SUB 9 (08/18/2003)

BNP Realty, LLC - Order Approving Tariff Revision (Madison Hall Apartments)
WR-59, SUB 10 (08/18/2003)

BNP Realty, LLC - Order Approving Tariff Revision (Allerton Place Apartments and Paces Village Apartments)
WR-59, SUB 11 (09/19/2003)

BNP Realty, LLC - Order Approving Tariff Revision (Summerlyn Place Apartments)
WR-59, SUB 12 (09/02/2003)

BNP/Chason Ridge LLC - Order Approving Tariff Revision (Chason Ridge Apartments)
WR-64, SUB 1 (09/02/2003)

BNP/Chrysson Phase I, LLC - Order Approving Tariff Revision (Abbington Place Apartments, Pepperstone Apartments, & Waterford Place Apartments)
WR-62, SUB 6 (08/18/2003)

BNP/Chrysson Phase I, LLC - Order Approving Tariff Revision (Savannah Place Apartments)
WR-62, SUB 7 (08/18/2003)

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Sterling Green at Preston; RCG Preston, LLC, d/b/a - Order Approving Tariff Revision (Sterling Green at Preston)
WR-16, SUB 1 (05/02/2003)

Sterling Apartments, LLC - Order Approving Tariff Revision (Sterling Park Apartments, Sterling Bluff Apartments, Sterling Square Apartments, & Sterling Brook Apartments)
WR-90, SUB 5 (04/02/2003)

RESALE OF WATER/SEWER - Tariff Revision for Pass-Through

Alta Crest; Alta Crest Limited Partnership, d/b/a - Order Approving Tariff Revision (Alta Crest Apartments)
WR-21, SUB 1 (11/03/2003)

Autumn Park Associates, LLC - Order Approving Tariff Revision (Autumn Park Apartments)
WR-26, SUB 2 (11/20/2003)

Acquiport Woodway, Inc. - Order Approving Tariff Revision (Woodway at Silverton Apartments)
WR-60, SUB 2 (06/02/2003)

AIMCO/Shadow Lake, LP - Order Approving Tariff Revision (Shadow Lake Apartments)
WR-147, SUB 1 (03/27/2003)

Alexander Development, LLC - Order Approving Tariff Revision (Alexander Pointe Apartments)
WR-136, SUB 1 (06/05/2003)

Atlantis Partners, LLC - Order Approving Tariff Revision (Abbotts Run Apartments)
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Brown Investment Properties - Order Approving Tariff Revision (Palmer House Apartments)
WR-46, SUB 3 (07/29/2003)

Bridgewood Title Partnership - Order Approving Tariff Revision (Bridgewood Apartments)
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Carroll Investment Properties, Inc. - Order Approving Tariff Revision (Broadstone Village Apartments)
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Carroll Investment Properties, Inc. - Order Approving Tariff Revision (Treybrooke Village Apartments)
WR-45, SUB 4 (03/25/2003)

California State Teachers Retirement System - Order Approving Tariff Revision (Waterford Hills Apartments)
WR-66, SUB 2 (04/17/2003)

California State Teachers Retirement System - Order Approving Tariff Revision (Waterford Forest Apartments)
WR-66, SUB 3 (04/17/2003)

Carriage Club at Bluefield Downs, LLC - Order Approving Tariff Revision (Carriage Club Apartment Homes)
WR-69, SUB 1 (08/29/2003)

CDC Pineville, LLC - Order Approving Tariff Revision (Ashford Place Apartment Homes)
WR-86, SUB 2 (01/22/2003)

CEG Jacksonville, LLC - Order Approving Tariff Revision (The Reserve at Jacksonville Commons Apartments)
WR-50, SUB 2 (06/05/2003)

Crosland Radbourne, LLC - Order Approving Tariff Revision (The Apartments at Radbourne Lake)
WR-134, SUB 1 (03/27/2003)

Crosland Radbourne, LLC - Order Approving Tariff Revision (The Apartments at Radbourne Lake)
WR-134, SUB 2 (11/18/2003)

Equity Residential Properties - Order Approving Tariff Revision (Berkshire Place, The Cedars, Creekwood, Cross Creek, East Pointe, English Hill, Hunt Club, Kimmerly Glen, Lake Point, McAlpine Ridge, The Oaks, The Point, The Regency, and Winterwood Apartments)
WR-18, SUB 36 (06/05/2003)

Equity Residential Properties - Order Approving Tariff Revision (Sommerset Place Apartments)
WR-18, SUB 37 (08/19/2003); Errata Order (08/25/2003)

Forest Hill Apartments, LLC - Order Approving Tariff Revision (The Reserve at Forest Hills Apartments)
WR-34, SUB 1 (01/13/2003); Errata Order (01/17/2003)

G&I II University LLC - Order Approving Tariff Revision (Chancellor Park Apartments)
WR-57, SUB 4 (11/20/2003)

Hudson Landings Limited - Order Approving Tariff Revision (The Landings I Apartments)
WR-84, SUB 1 (11/20/2003)

Hunt Management Company - Order Approving Tariff Revision (Quail Forest Apartments)
WR-123, SUB 4 (05/22/2003)

Jefferson Creekside, L.P. - Order Approving Tariff Revision (Jefferson Creekside Apartments)
WR-63, SUB 2 (11/17/2003)

Jefferson at Cary Towne, LP - Order Approving Tariff Revision (Jefferson at Cary Towne Apartments)
WR-118, SUB 1 (11/17/2003)

Mid-America Capital Partners, L.P. - Order Approving Tariff Revision (Woodstream Apartments)
WR-22, SUB 6 (06/02/2003)

Meadowmount Apartments Associates, LLC - Order Approving Tariff Revision (The Apartments at Meadowmont)
WR-91, SUB 1 (09/16/2003)

New Brookstone, LLC - Order Approving Tariff Revision (Brookstone Apartments)
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Northwestern Mutual Life Insurance Company - Order Approving Tariff Revision (Olde Towne Apartments at Carpenter Village)
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Plantation Park Apartments, Ltd., A Limited Partnership - Order Approving Tariff Revision (Plantation Park at Ballentyne Apartments)
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Post Apartment Homes, L.P. - Order Approving Tariff Revision (Post Gateway Place I Apartments)
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Petit Five, LLC - Order Approving Tariff Revision (Morehead Apartments)
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Redcliffe at Kenton Place, LLC - Order Approving Tariff Revision (The Radcliffe at Kenton Place Apartments)
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Redcliffe at Kenton Place, LLC - Order Approving Tariff Revision (The Radcliffe at Kenton Place Apartments)
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Summit Properties Partnership, L.P.; Summit Properties, Inc., d/b/a - Order Approving Tariff Revision (Summit Ballentyne, Summit Creek, Summit Crossing, Summit Fairview, Summit Foxcroft, Summit Grandview, Summit Green, Summit Norcroft, Summit Sedgebrook, Summit Simsbury, and Summit Touchstone Apartments)
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Summit Properties Partnership, L.P.; Summit Properties, Inc., d/b/a - Order Approving Tariff Revision (Summit Lake and Reunion Park by Summit Apartments)
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Summit Properties Partnership, L.P.; Summit Properties, Inc. d/b/a - Order Approving Tariff Revision (Summit Square & Summit Hill Apartments)
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Summit Properties Partnership, L.P.; Summit Properties, Inc. d/b/a - Order Approving Tariff Revision (Summit Westwood Apartments)
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Summit Properties Partnership, L.P.; Summit Properties, Inc. d/b/a - Order Approving Tariff Revision (Summit Crest Apartments & Summit Overlook Apartments)
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Summit Properties Partnership, L.P.; Summit Properties, Inc. d/b/a - Order Approving Tariff Revision (Summit Governor's Village Apartments)
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SCA-North Carolina Limited Partnership - Order Approving Tariff Revision (Cameron Matthews Apartments & Tyvola Centere Apartments)
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SCA-North Carolina Limited Partnership - Order Approving Tariff Revision (Archstone Preston Apartments)
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SG Brassfield Park-Greensboro, L.L.C. - Order Approving Tariff Revision (Brassfield Park Apartments)
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Socal-Thornberry, Inc. - Order Approving Tariff Revision (Thornberry Apartments)
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Sterling Apartments, LLC - Order Approving Tariff Revision (Sterling Park Apartments)
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Sterling Apartments, LLC - Order Approving Tariff Revision (Sterling Square Apartments)
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Tower Place, LLC - Order Approving Tariff Revision (Tower Place Apartments)
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UDRT of North Carolina, LLC - Order Approving Tariff Revision (Providence Court Apartments & Colony Village Apartments)
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UDRT of North Carolina, LLC - Order Consolidating Service Areas, Increasing Rates, and Requiring Customer Notice (Harbour Pointe and Lake Lynn Apartments)
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Village Green Apartments, LLC - Order Approving Tariff Revision (Village Green Apartments at Concord Mills)
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Village Green Apartments, LLC - Order Approving Tariff Revision (Village Green Apartments at Concord Mills)
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Vanstory Apartments, LLC - Order Approving Tariff Revision (Ashbrook Pointe Apartments)
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WP River, L.L.C. - Order Approving Tariff Revision (Autumn River Apartments)
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