NINETY-FOURTH REPORT

OF THE

NORTH CAROLINA

UTILITIES COMMISSION

ORDERS AND DECISIONS

ISSUED FROM
JANUARY 1, 2004 THROUGH DECEMBER 31, 2004

NINETY-FOURTH REPORT
of the
NORTH CAROLINA UTILITIES COMMISSION

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Issued from

January 1, 2004, through December 31, 2004

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
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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, 2004

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, 2004, we hereby present for your consideration the report of the Commission's decisions for the 12-month period beginning January 1, 2004, and ending December 31, 2004.

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

James Y. Kerr, II, Commissioner

Michael S. Wilkins, Commissioner

Geneva S. Thigpen, Chief Clerk

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DOCKET NO. E-100, SUB 56

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Decommissioning Costs for Nuclear Power Plants Owned and Operated by Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc., Duke Power, a Division of Duke Energy Corporation, and Virginia Electric and Power Company, d/b/a Dominion North Carolina Power	)	ORDER REQUIRING TRANSITION OF INTERNAL DECOMMISSIONING FUNDS

BY THE COMMISSION: In 1988, the Commission established this docket to develop a set of guidelines for the determination and reporting of nuclear decommissioning costs. Nuclear decommissioning refers to the dismantlement of a nuclear power plant and the restoration of the site for other uses upon its retirement. Generally speaking, there are two categories into which nuclear plant dismantlement waste (or decommissioned materials) would fall – either contaminated (also referred to as radiological) or non-contaminated (non-radiological). The Nuclear Regulatory Commission (NRC) provides general decommissioning guidance; however, the NRC's decommissioning funding guidelines relate almost exclusively to radiological waste. The NRC does not regulate the disposal or funding for disposal of most of the non-radiological waste. In effect, non-radiological waste disposal and its funding are left under the control of the states.

BACKGROUND

In response to previously filed comments and motions, the Commission issued an Order in this docket dated September 11, 2002, which, in part, required Duke Power, a Division of Duke Energy Corporation (Duke), and Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (Progress), to study and report on the impact of moving their internal decommissioning reserves to external trusts and allowed parties to file comments on these studies and reports. More specifically, Ordering Paragraph Nos. 2 and 3 of the Commission Order dated September 11, 2002 required:

2. That Progress and Duke shall study the impacts of moving internal decommissioning reserves to external trusts and file a report concerning these studies as described herein by March 1, 2003;

3. That any interested party may file appropriate comments addressing these studies and reports within sixty (60) days after the studies and reports are filed by Progress and Duke.

All of the nuclear decommissioning funds of Virginia Electric and Power Company, d/b/a Dominion North Carolina Power (NC Power) are invested externally. As a result, the Commission need not make any determination of the issues addressed in this order with respect to NC Power.

As of December 31, 2002, Duke had approximately $153 million in its internal non-radiological decommissioning fund (North Carolina retail jurisdiction). Duke continues to invest funds internally to decommission the non-radiological portions of each facility. Progress had a total of approximately $131 million as of December 31, 2002, in its internal non-radiological decommissioning reserve (North Carolina retail jurisdiction). Effective January 1, 1994, Progress began depositing its entire annual decommissioning expense to an external fund.

On February 7, 2003, the Commission issued an Order Protecting Decommissioning Funds. Its ordering paragraphs state 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 Progress 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.

The studies and reports, required by the September 11, 2002 Order, were completed and filed by Progress on March 3, 2003, and Duke on March 4, 2003.

The time for filing responsive comments was extended to allow the Public Staff to confer and negotiate with Duke and Progress. Ultimately, in lieu of filing comments about the studies and reports, the Public Staff reached a Settlement Agreement with Duke and Progress and filed this agreement on June 20, 2003. In the Settlement Agreement, the Public Staff abstained from commenting on the studies and reports filed by Duke and Progress and, in exchange, Duke and Progress agreed to transition their internal funds to external funds in the future, subject to some limiting provisions. The main terms of the Settlement Agreement are as follows:

- Beginning January 1, 2008, Progress and Duke will commence the transition of their internal funds to external funds.
- The transition will take 10 years.
- The annual transition level will be a minimum of 10% of the North Carolina internal fund balance as of December 31, 2007.
- As of December 31, 2007, no further funding of the North Carolina internal funds.
- Actual transfer of funds no later than December 31 of each year, starting in 2008.
- If Progress and/or Duke can demonstrate in a filing by June 1, 2007, that their financial strength has not materially changed from the date of the Settlement Agreement, and, if retaining the internal fund will not harm customers, the Commission may determine that the transition need not occur. Intervenors may present evidence that the transfer should occur.
- Progress and/or Duke may file a report by June 1, 2007, supporting changes in the above schedule that would be in customers' interest. The Commission may accept a proposal, or any settlement, or continue with the transition.
- From 2003 through 2007 any party may petition the Commission to begin the transition of Progress or Duke internal funds to external funds if either company's financial position materially changes.

On June 30, 2003, the Attorney General filed Comments on the proposed agreement. Also on June 30, 2003, the Carolina Utility Customers Association, Inc. (CUCA), filed its Comments

regarding the proposed agreement and a motion to disclose the draft comments of the Public Staff and two emails relating to the draft comments, all labeled as confidential by the Public Staff.

The Public Staff filed a letter on July 18, 2003, opposing public disclosure of the draft comments and stating that Progress and Duke agreed with the contents of the letter. On August 25, 2003, the Commission ordered that the motion to disclose filed by CUCA should be allowed.

On August 20, 2003, Progress and Duke filed Reply Comments.

The remainder of this Order summarizes the positions of the parties taken in their comments or reply comments and the conclusions of the Commission with regard to the issue of internal versus external funding of non-radiological nuclear decommissioning costs.

POSITIONS OF PARTIES

CUCA

According to CUCA, the issue of internal versus external funding has been debated and studied for years in North Carolina and the time to resolve the debate and move all internal funds to external funds is now. The notion that internal funds can somehow be protected in the event of a utility bankruptcy is without merit. A utility's internal funding is nothing more than an IOU from the utility to its ratepayers, and the utility will need to raise the funds when the IOU comes due. Since internal funds do not actually exist, there is nothing for a Commission order to protect. If the utility is bankrupt and cannot raise the money to pay the internal funding IOU, captive retail ratepayers will effectively be without a remedy. Continued delay in moving the internal funds to external funds thus puts captive retail ratepayers at an unfair risk of paying hundreds of millions of dollars without realizing any benefits in return.

CUCA stated that the proposed agreement between the Public Staff, Progress, and Duke will delay the transfer from internal funding to external funding until 2008, allow the utilities to spend ten years completing the transfer, and allow the utilities an opportunity to avoid the transfer obligation altogether or modify the transfer schedule by demonstrating their financial strength in 2007. CUCA believes that the proposed agreement thus results in an inappropriate and unnecessary degree of risk for captive retail ratepayers for the foreseeable future. CUCA requests that the proposed agreement be rejected and the transfer of internal funds to external funds for nuclear decommissioning begin immediately and be completed as quickly as possible.

CUCA cites a number of important policy reasons that support the need to move internal funds to external funds in a timely manner, including the following:

- The internal reserve funds represent a relatively high percentage of total funds.
- The internal reserve lacks diversification and is subject to the risks of each utility and the nuclear electric industry.
- The internal reserve can be subject to the risks of the non-regulated entities of each utility.
- The utilities, their internal reserves, and the rates of return thereon are subject to regulatory risk.
- Returns on external trust funds have been for some time periods and may well be in the future equivalent to or within range of the current returns on the internal reserves.
- The point in time at which the internal reserves would be liquidated is so far in the future that it is very speculative to guess how and at what cost the utilities would accomplish this. The capital market environment over the next few years appears to offer ready availability of funds and very low rates.

- An examination of the treatment of internal and external funds for decommissioning in other states demonstrates an overwhelming preference for external trusts for the non-radioactive portions of decommissioning funds.
- NC Power moved its internal funds to an external trust in 1986.
- Given the risks of the external trusts, it would be prudent to transfer the funds in the internal reserves to the external trusts.

CUCA further responded that a May 15, 2003, email by the Public Staff stated that "almost all nuclear decommissioning funding in the country is external." CUCA explained that the Public Staff also indicated that it intended to suggest a four year period for transferring the internal funding to external funds. While a four year transition is definitely preferable to a 10 year transition, CUCA does not believe that a four year transition is sufficiently expeditious. CUCA argued that the time to begin the transition from internal funding to external funding is now at hand, and that further delay may be extremely costly for ratepayers.

ATTORNEY GENERAL

The Attorney General believes it is in the public interest for all decommissioning monies to be held in external funds. While Duke and Progress have submitted studies that support the continued use of internal reserves to hold part of the decommissioning funds, the Attorney General is of the opinion that the studies do not adequately address the fiduciary responsibilities of Duke and Progress concerning the funds. All decommissioning funds are collected from customers and set aside for the purpose of future decommissioning in what the Commission has determined to be a trust relationship between the utilities and their customers. Accordingly, the Attorney General submitted that the fiduciary obligations relating to the funds are best served by the transfer of all decommissioning funds to external trusts.

The Attorney General stated that if the Commission finds that all decommissioning funds should be transferred to external trusts, the question is whether it is reasonable to require an immediate transfer or whether a transition period is needed. Funds that are now held as internal reserves are a source of capital available to Duke and Progress without restriction, and there is likely to be a cost associated with transferring the monies to external funds. The Attorney General noted that the studies submitted by Duke and Progress do not discuss the impact if the Commission determines that all monies should be transferred, nor do they discuss the need for a transition period. The Settlement Agreement submitted by the Public Staff, Duke, and Progress on June 20, 2003, recommends a transition period of sorts, but does not provide a justification or explanation of the time frame. According to the Attorney General, the main effect of the Settlement Agreement would be to postpone any action for at least five years, after which the Commission would likely address the question again of whether internal monies should be transferred at all. In the meantime, the Settlement Agreement would seem to restrict consideration of the issue. The Attorney General recommends that the joint proposal be rejected. Instead, the Attorney General recommends that the Commission provide an opportunity for comment by Duke and Progress on the impact of transferring all funds immediately along with suggestions for a reasonable transition period if one is warranted.

The Attorney General argued that the reports submitted by Duke and Progress focus on the financial returns they anticipate if they continue to hold some monies internally for future decommissioning expenditures, and the potential risks affecting the utilities' financial ability to meet their decommissioning obligations. A fundamental consideration that is lacking in the reports is an analysis of the relative advantages of internal and external funding from a fiduciary standpoint.

The Attorney General further responded that since the Commission has established that a trust relationship exists concerning internal decommissioning funds, it is instructive to consider basic principles about how trust funds should be maintained. Fiduciary responsibilities for managing funds

held in trust — including duties of loyalty, prudent investment, and absence of self-dealing — support the argument that funds earmarked for decommissioning should be transferred to separate external trust funds that are administered by independent trustees.

The Attorney General asserted that where trust assets are held by Duke or Progress in common with other corporate assets, they are managed by officers and employees who owe duties not only to trust beneficiaries but also to shareholders, creditors, and others with whom the utilities transact business. At times, the interests and demands of those parties are likely to conflict. The Attorney General noted that the trustee's duty to make prudent investments is also compromised when general internal funding is used. The prudent investor duty is established in G.S. 36A-161 et seq. Diversification of investments is required unless the trustee reasonably determines that the purposes of the trust are better served without diversification due to special circumstances.

The Attorney General contended that the duty to diversify is not met where funds are held internally by a utility. Simply holding the funds along with other general assets of the utility concentrates the investment in just one participant in a single industry. Without regard to the financial integrity of the utilities involved, this non-diversified investment approach raises concerns.

The Attorney General stated that trust laws concerning restrictions on self dealing by trustees also support the use of external funds. Pursuant to G.S. 36A-62 and 36A-66, a trustee is prohibited from lending or buying or selling trust assets to itself or an affiliate. See also 76 AmJur2d, Trusts §§ 381, 384 regarding the duty to refrain from personal traffic in trust property and from self-dealing. The Attorney General stated that internal funds maintain decommissioning trust assets in common with other utility assets, without restriction on the use of the funds, contrary to the principle that a trustee should not mix trust business with its own business interests.

The Attorney General pointed out that most jurisdictions do not favor the use of internal reserves to hold monies for decommissioning of the non-radiological components of nuclear plants either. Duke's report includes a survey of utilities, not including Duke and Progress, concerning internal versus external funding for decommissioning. It shows that:

- 16 utilities fund the non-contaminated portion of decommissioning. None of them uses internal funds; they all use "all external" funds.
- Four other utilities do not fund the non-contaminated portion of decommissioning. Three of the four still hold some funds internally. However, two of them stated that they are in the process of transferring all monies to external funds.

According to the Attorney General, Progress has fallen in line with this trend to some extent because, since 1994, Progress has deposited its entire annual decommissioning expense in an external fund. The Attorney General noted that Progress has not transitioned all monies to external funds, however, and Duke has continued to hold funds from prior periods internally and to deposit additional monies internally.

The Attorney General noted that Duke and Progress have not commented on the immediate impact of transferring decommissioning money from internal reserves to external funds. The amount involved is large, but it is not a large percentage of Duke's and Progress' total net investment. Duke recently reported that it held $153 million in internal reserves (North Carolina jurisdiction) as of December 31, 2002. By comparison, Duke had a net plant investment (North Carolina jurisdiction) of $6.6 billion for the year ending June 2002. Progress reported that it held $131 million in internal reserves (North Carolina jurisdiction) as of December 31, 2002. By comparison, Progress had a net plant investment (North Carolina jurisdiction) of $4.4 billion for the year ending June 2002.

The Attorney General stated that Duke and Progress should be afforded an opportunity to show what costs they will incur if ordered to transfer all decommissioning monies to external funds

and what will be achieved if a transition period is allowed. If the utilities assert that the cost of compliance is recoverable pursuant to G.S. 62-133.6(e)(1), they should also identify what adjustment or deferral would be required.

The Attorney General does not support the Settlement Agreement proposed June 20, 2003, because it does not state the reasons why decommissioning monies should be transferred and because it is subject to several significant limiting conditions. The Settlement Agreement postpones any change (i.e., additional accumulations are allowed and no monies will be transferred) until 2008 and then allows a ten-year transition period for transfer of the monies. Further, the Settlement Agreement appears to invite further consideration of the main question in this proceeding, i.e., whether monies should be transferred, in four years. In the meantime, between 2003 and 2007, the Settlement Agreement appears to limit review of the issue unless there is evidence that a utility's financial position has materially changed, and even then, the question would be whether or not to trigger the start of a ten-year transfer period before 2008. Thus, according to the Attorney General, a determination that all funds should be transferred immediately would appear to be proscribed until 2008 even in the event of a utility's financial distress or bankruptcy. The Attorney General stated that these conditions are so limiting that they tend to outweigh the intended benefits of the Settlement Agreement.

The Attorney General recommends that the Commission first determine that decommissioning monies should be transferred to external funds and then allow Duke and Progress an opportunity to comment on what process should be used to transfer the monies.

PROGRESS

Progress explained that, fundamentally, the issue presented to the Commission is quite simple. Both Progress and Duke hold approximately one-fourth of their nuclear decommissioning funds in an internal reserve. When the time comes for these utilities to actually begin expending monies in order to decommission their nuclear plants, which is at least 20 years into the future, both utilities will, in all probability, have to borrow all or a portion of the dollars represented by the internal funds in order to pay for the decommissioning of one or more of their nuclear plants. The question, according to Progress, is whether the utilities should borrow the money now, incur interest expense for 20 or more years, deposit the money into their external funds, and forego the higher return earned by the internal fund, all in order to avoid the risk that in 20 or more years when the money is actually needed, the utilities' financial situations may have deteriorated to the point that they are unable to borrow the money in question.

Progress responded that to answer this question, as both the Attorney General and CUCA acknowledge, both Progress and Duke performed studies which quantify the cost to the utilities of incurring this debt now, weighed against the risk that the utilities will be unable to borrow the money when the dollars are actually needed. Both studies demonstrated conclusively that it was in the utilities' and their customers' best interest to wait until the utilities are much closer to actually decommissioning their nuclear plants to borrow the money. Progress noted that no party has performed a study, nor has anyone presented any evidence, that rebuts the veracity of the utilities' studies.

Progress argued that the Attorney General's primary concern seems to be that since the dollars held in the internal reserves are in the nature of a trust, Progress and/or Duke may have difficulty fulfilling their fiduciary obligations as trustees because at times the interests of the utility and the utility's customers may be in conflict. Progress stated that the simple answer to this question is that, given the annual reports the utilities must file and the oversight of the utilities provided by the Public Staff and the Commission, the Commission has ample tools to ensure that in the event such a conflict arises (and Progress is at a loss as to how such a conflict could arise), both Progress and Duke properly perform their duties. Progress argued that the Attorney General has failed to describe

or allege how the utilities' roles as both trustees and utilities would produce conflicts of interest that would impair their ability to fulfill their fiduciary obligations.

Progress further commented that, regarding the issue of diversification, only approximately 25% of the utilities' decommissioning funds are held in internal funds. The remaining 75% is held in various investments totally unrelated to and unaffiliated with the utilities. Thus, to look only at the internal funds and claim that they are not properly diversified is inappropriate; rather, the utilities' total decommissioning funds must be looked at as a whole, and given that only 25% of these funds are held in the internal fund, there is no question that the internal fund strategy contributes to the overall diversification of Progress' nuclear decommissioning investment portfolio.

Furthermore, Progress contended that, pursuant to the stipulation, as of December 31, 2007, neither Progress nor Duke will make any additional contributions to their internal funds; rather, all additional contributions will be made to the external funds. As a result, the percentage of the utilities' total decommissioning funds held in the internal fund will continually decrease.

Progress noted that CUCA asserts that, since it is possible (though not probable) that Progress and/or Duke may become either insolvent or bankrupt in the future, the Commission should force the utilities to immediately fund their internal reserves. However, according to Progress, the unrebutted studies prepared by Progress and Duke conclusively demonstrate that such a risk is so remote and the cost of guarding against it so high, that it is not in the public interest to incur such a high cost at this time.

Progress stated that CUCA asserts that the internal reserves represent a relatively high percentage of the total funds, but that this is simply not true. The internal funds represent only 25% of the utilities' total nuclear decommissioning funds and this percentage will continually decrease over time.

Progress pointed out that CUCA's assertion that the utilities and their internal reserves are subject to "regulatory risk," is a true statement; however, that fact is irrelevant given that the Commission is the very entity that creates, controls or mitigates regulatory risk.

Progress stated that the most interesting point CUCA attempts to make is its claim that the internal reserve should be funded immediately because the time at which the internal reserves will actually be needed is so far into the future. In other words, the utilities should borrow the money now, apparently "while the borrowing is good." Progress argued that the very fact that the earliest either of the utilities will need any of the monies in the internal reserve is over 20 years away demonstrates that it is both premature and speculative to be taking such extreme actions at this time. Progress also noted that each company's balance sheet is of such strength that the incurrence of an additional $130 million to $150 million in debt is almost insignificant.

Progress pointed out that, under the Clean Smokestacks Bill, both utilities' rates are frozen through 2007; thus, requiring them to incur this additional debt at this time and move their internal reserve to the external fund creates an additional and, most importantly, an unnecessary expense that they simply must absorb for the next five years and that the appropriate course of action is the one articulated in the Settlement Agreement; that is, defer for five years the resolution of this issue and at that time afford the utilities an opportunity to demonstrate that their financial situations have not materially changed and therefore there is no need to transfer the internal reserve to an external fund. Progress further noted that, even during the next five years, the Settlement Agreement does provide an opportunity for any interested party to petition the Commission to begin the transition immediately.

DUKE

Duke noted that both CUCA and the Attorney General suggested that the Commission should reject the June 20, 2003 Settlement Agreement executed by Duke, Progress and the Public Staff. Duke stated that neither the Attorney General nor CUCA provided adequate justification for rejecting the Settlement Agreement or for requiring the immediate transfer of all Duke decommissioning monies currently in internal funds to external funds, and that their comments failed to demonstrate that either of these actions is in the public interest. Duke also opposed as unnecessary the Attorney General's proposal that Duke and Progress provide additional comments addressing the impact of an immediate fund transfer.

Duke explained that the earliest present license expiration date for a Duke nuclear plant is June 2021 (McGuire Unit 1) and the latest is February 2026 (Catawba Unit 2). Because Duke has filed for a 20 year license renewal for the McGuire and Catawba nuclear units, these dates will likely move to June 2041 (McGuire Unit 1) and February 2043 (Catawba Unit 2). Duke previously applied for and received renewed NRC operating licenses for its three Oconee units, whose licenses will now expire in 2033 and 2034.

Duke further stated that the Commission has already determined that funds collected by the utilities for purposes of *non-radiological decommissioning* that are held in internal funds shall be considered to be adequately protected and that these internal decommissioning funds are tracked in a separate account, are in the nature of a trust, and would be entitled to administrative priority in the event of bankruptcy.

Duke pointed out that, in response to the Commission's direction, Duke and Progress conducted extensive studies, and reported the results of these studies, relating to the question of continuing internal funding to the Commission in March 2003. The decommissioning funding analysis prepared by Duke's independent consultant concluded that Duke's use of internal funding for its non-contaminated (non-radiological) decommissioning obligations demonstrated that the internal funding mechanism is the least cost alternative for ratepayers at this time. Duke emphasized that its study further showed that the threat of bankruptcy or financial distress related to business operations at Duke Energy or any of its subsidiaries should not imperil the Company's ability in the future to fund these decommissioning obligations.

According to Duke, the Settlement Agreement reflects the utilities' and the Public Staff's concurrence that Progress and Duke will transition their internal funds to external funds for decommissioning. The Settlement Agreement complies in all respects with the Commission's Order.

Duke explained that, through the Settlement Agreement, the utilities propose to transition the internal funds to external trusts over a ten-year period beginning on January 1, 2008; and that after December 31, 2007, there will be no further funding of internal funds by the utilities. However, Duke also observed that if the utilities demonstrate by June 1, 2007 that their existing financial strength has not materially changed and that retaining the internal funds will not harm their customers, then the Commission may determine that the transition need not occur at that time.

Duke noted that the Settlement Agreement achieves the result favored by the Attorney General. In Duke's view, although the Attorney General's real objection to the Settlement Agreement appears to lie in the schedule for the transition of funds, the Attorney General proposes rejection of the entire Agreement.

Duke commented that, although the Attorney General states that it is in the public interest for all decommissioning monies to be held in external funds, this assertion glosses over the important distinction between decommissioning monies collected and held by nuclear utilities for radiological decommissioning and those collected and held for non-radiological decommissioning (*e.g.*, non-radiological dismantlement and site restoration). Duke contended that this exaggerates the scope of

the decommissioning issues under consideration in this proceeding. To clarify, Duke noted that monies collected by Duke for the radiological decommissioning of its nuclear facilities are held in an *external* trust fund, in accordance with NRC regulations, and are not the subject of dispute in this proceeding. Duke stated that, aside from the matter of schedule, the Settlement Agreement will lead to the result favored by both the Attorney General and CUCA. Duke also noted that the Attorney General acknowledged that the transition from internal to external funds will generate additional costs, and that Duke and Progress have agreed to a transition schedule that allows them to assimilate the associated costs in a manner acceptable to the utilities and beneficial to their customers.

Duke further provided that the fact that the NRC requires radiological decommissioning funds to be placed in external trust funds is not relevant because the utilities have previously established external funds for their radiological decommissioning needs, and those external funds are not in dispute in this proceeding. Duke argued that the Attorney General's statement that most jurisdictions do not favor the use of internal reserves is irrelevant since North Carolina has not disfavored the use of internal funds. Under Commission precedent, Duke and Progress have not been precluded from using internal decommissioning funds.

Duke stated that the Commission's Order previously determined that Duke's internal decommissioning funds are adequately protected from claims of its creditors and that these reserves are in the nature of a trust. Accordingly, the issue is not whether the internal funds are trust-like in nature, but whether the Settlement Agreement is proper in the context of the Commission's Order.

Duke pointed out that the Attorney General seized upon the Commission's general finding of a trust relationship in its February 7, 2003, Order to argue that an internal decommissioning fund, by definition, violates the principles of sound trust management. This argument directly contradicts the Commission's findings. Moreover, according to Duke, the Attorney General's comments merely recite broad principles of hornbook trust law with no attempt to integrate those generalized considerations with the expectations and management practices specific to an internal decommissioning fund. Duke also argued that the Attorney General failed to acknowledge that the Commission provides oversight of internal funds for regulated utilities such as Duke and that this oversight provides added assurance of the ongoing soundness of these funds. Duke added that the Attorney General's discussion of a utility's fiduciary duty with respect to decommissioning funds ignores the fact that decommissioning is no different than any other capital-related cost of service item whose cost is currently being recovered in rates.

Duke noted that the Attorney General further recommended that Duke and Progress be required to comment on the immediate impact of transferring decommissioning money from internal reserves to external funds, including the costs to be incurred and the effect of a transition period. Duke alleged that this is a thinly-disguised demand that the utilities provide additional justification for the Settlement Agreement.

Duke observed that CUCA also argued that the utilities should transfer all internal trust funds for nuclear decommissioning to external decommissioning funds, and noted that the Settlement Agreement provides for such transfer. Yet rather than acknowledging the significance of the agreement between Duke, Progress, and the Public Staff to such a transition of funds, Duke commented that CUCA continues to demand that the transfer occur in the timeframe it prefers and concludes that CUCA's position that funds should be transferred immediately, and the arguments proffered to support that position, are without merit and should not be considered further. Duke emphasized that, to the extent CUCA uses the term "nuclear decommissioning" to refer to radiological decommissioning, the process of "nuclear" (radiological) decommissioning will not be affected by the movement of monies currently in internal funds to external funds. Duke's internal fund holds only decommissioning monies that are earmarked to pay for non-radiological dismantlement and site restoration.

Duke stated that its internal reserve funds represent 26% of its total decommissioning funds, and that all funds collected by Duke from its customers for the radiological decommissioning of Duke's nuclear facilities are held in external trust funds. Thus, Duke stated that, contrary to CUCA's assertion, internally funded non-radiological decommissioning costs do not comprise the bulk of the funds required to completely decommission a nuclear plant or plants and that, as indicated by Duke's report, the use of an internal reserve fund does not necessarily suggest an elevated degree of risk.

Duke also commented that CUCA's diversification argument, while correct in regard to a portfolio of stocks, is wrong in this case because the Commission establishes an expected return on Duke's internal funds. This is the return used for establishing Duke's internal fund revenue requirements and rates. It further stated that CUCA ignores the market risk associated with external funds, as explained in Duke's report to the Commission, and that CUCA fails to acknowledge the role that Commission oversight can play in these matters. Duke further noted that CUCA concedes that the return on the internal fund is generally expected to exceed the return on the external fund, a fact established in Duke's report and a major reason why internal funding is less costly for ratepayers than external funding. By agreeing that the return on internal funds is expected to generally exceed the return on external funds, CUCA admits that its diversification argument is without merit.

CONCLUSIONS

In assessing the Settlement Agreement, the Commission generally agrees with the Attorney General and CUCA that the conditions contained therein are so limiting that they tend to outweigh the intended benefits. For example, the Settlement Agreement provides that if either Progress or Duke makes a filing as described therein by June 1, 2007, the Commission will again have to determine if the transition to external funds should proceed. As noted by Progress, this essentially defers for five years the resolution of the internal versus external funding issue. In addition, from 2003 through 2007, the Settlement Agreement states that any party may petition the Commission to begin transition of Progress' or Duke's internal funds if either company's financial position materially changes. These open-ended limitations and contingencies are unacceptable to the Commission and are rejected because they would, if approved, impermissibly and unnecessarily dictate in advance how, when, and on what basis a party may seek reconsideration pursuant to G.S. 62-80 of this order. The issue of internal versus external funding has been pending for years, the issue has been fully debated and explored and commented on in this docket, and the issue is ripe for decision. The Commission concludes that it should establish a firm requirement, without the limiting conditions of the Settlement Agreement, that the utilities shall move their internal funds to external accounts.

Accordingly, the Commission concludes that Progress and Duke shall follow a plan to ensure that all non-radiological decommissioning funds are fully protected through the use of external funding within a reasonable period of time. The Commission has required customers to pay, through their rates, considerable sums to Progress and Duke for the purpose of funding all projected decommissioning expenses for their nuclear facilities, and the Commission concludes that the existing internal funds should be moved to external accounts over a reasonable period of time for the added protection that such external accounts provide. This decision should not be viewed as a negative reflection upon Progress or Duke, but, rather, it should be viewed as consistent with the decisions of virtually every other regulatory agency with responsibility for this issue.

In making this decision, the Commission has given careful consideration to the Clean Smokestacks Act, as well as the fact that the monies in question will not be required for more than 20 years. Given these circumstances, the Commission concludes that it is reasonable to require that (1) as of December 31, 2007, there shall be no further funding of the utilities' internal non-radiological nuclear decommissioning accounts and all future decommissioning requirements, including returns on remaining internal funds, shall be funded externally and (2) Progress and Duke shall begin transferring their existing internal non-radiological decommissioning funds to external

accounts on January 1, 2008. There is no compelling need to begin the transfer prior to that date given the provisions of the Clean Smokestacks Act, and the lengthy period of time before the actual decommissioning process will begin. For these reasons, a gradual transition from internal to external funding is appropriate. The Commission further concludes that the 10-year transfer period and the annual minimum transfer levels as contained in the Settlement Agreement are adequate and acceptable in light of the long-term nature of the funding requirement. Therefore, the Commission hereby orders that (1) the utilities shall move their internal funds to external accounts over a 10-year period commencing January 1, 2008, with the actual transfer of funds no later than December 31 of each year, and (2) the annual level of transfer from internal to external funding shall be a minimum of 10% of the North Carolina internal fund balances for each company as of December 31, 2007. Such a requirement will not pose an economic hardship upon the utilities.

IT IS, THEREFORE, ORDERED as follows:

1. That beginning on January 1, 2008, Progress and Duke shall begin the transition of their internal non-radiological nuclear decommissioning funds to external accounts;

2. That this transition shall cover a ten-year period and the annual transfer level will be a minimum of 10% of the North Carolina internal fund balances for each company as of December 31, 2007, and the actual transfer of funds shall occur no later than December 31 of each calendar year beginning in 2008; and

3. That as of December 31, 2007, there shall be no further funding of the utilities' internal non-radiological nuclear decommissioning accounts and all future decommissioning requirements, including returns on remaining internal funds, shall be fully funded externally.

ISSUED BY ORDER OF THE COMMISSION.
This the 5th day of February, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr020504.01

DOCKET NO. E-100, SUB 98

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Investigation of Integrated Resource Planning in North Carolina - 2003	))	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. Also, 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.

In its March 28, 2002 Order Approving Integrated Resource Plans, in Docket No. E-100, Sub 93, the Commission directed 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.

Finally, in its February 20, 2003 Order Adopting Integrated Resource Plans, in Docket No. E-100, Sub 97, the Commission ordered that all future IRP filings by the utilities should include information on levelized busbar costs for various generation technologies.

On or about September 1, 2003, the current Integrated Resource Plan (IRP) filings were made under the Commission's Rules by 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 North Carolina Electric Membership Corporation (NCEMC). On December 1, 2003, the Public Staff filed its comments on the IRPs submitted by the utilities, including a discussion of reserve margin adequacy. No party formally petitioned to intervene in this proceeding.

A public hearing was held on February 2, 2004, in Raleigh, for the purpose of receiving non-expert public witness testimony. No one appeared to testify at that time. The public hearing was then recessed until February 18, 2004, to allow for a presentation by the North Carolina Sustainable Energy Association (NCSEA) and the receipt of any additional public witness testimony.

The public hearing was reconvened as scheduled on February 18, 2004. At that time, three public witnesses provided testimony and presented material for Commission consideration. Testimony was given by Mr. Richard Harkrader, Policy Chair of NCSEA; Mr. Tim Toben, Chief Executive Officer of Carolina Green Energy, LLC, (CGE); and Mr. Simon Rich, as an interested citizen and an investor in the wind business.

Testimony presented at the February 18, 2004, public hearing promoted a sustainable energy future for North Carolina, as well as the need to encourage more efficiency and demand-side management options. The benefits of a larger role for consumer education was also discussed. In addition, potential government sponsored funding mechanisms to help support these efforts were offered.

Much of the focus of the public hearing was on the topic of wind energy technology and the development and economics of wind resources. Related testimony was presented on the value of establishing a renewable portfolio standard (RPS), whereby utilities are required by law to provide a percentage of their generation mix from renewable energy sources within a certain period of time.

Duke filed reply comments on the public witness testimony on March 11, 2004, and Progress filed comments on March 15, 2004.

The Commission found the information presented at the February 18, 2004 public hearing helpful as it provided a timely update on the operation and economics of certain sustainable energy technologies, especially in relation to wind resources. The Commission also understands the argument presented in regard to RPS. However, as was brought out in Mr. Toben's testimony, this is a legislative issue which is outside the authority of this Commission.

The Commission continues to support the value of having a varied mix of generation resources in North Carolina and notes that the new NC GreenPower Program is a significant step in providing citizens the opportunity to support emerging renewable energy technologies.

On March 8, 2004, NCEMC filed a revised Annual Report. Several material changes made it prudent for NCEMC to update its September 2003 filing. One major change is that four of the 26 Member cooperatives of NCEMC have provided notice that they will be responsible for planning and acquiring all future power supply to meet their load obligations. The information contained in the revised NCEMC filing has been incorporated into this Order.

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 2004-2013 growth rates for the utilities' system peak loads and annual energy sales.

2004 - 2013 Annual Growth Rates

	Summer Peak[1]	Average Summer Peak MW Growth	Winter Peak	Energy Sales
Progress	1.9%	216	1.9%	1.7%
Duke	1.7%	309	1.2%	1.6%
NC Power	1.8%	305	1.5%	1.9%
NCEMC[2]	2.2%	59	2.2%	2.2%

The loss of native wholesale loads, and a decline in the industrial segment, have contributed to somewhat lower energy sales growth forecasts for Progress and Duke. NC Power was the only utility that showed an increase in the growth rate of its summer peak.

DEMAND-SIDE MANAGEMENT (DSM) OPTIONS

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

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. . ."

According to the Public Staff, each 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, however, that only the utility programs designated as DSM resources in the 2002 IRP reports were included in the 2003 IRP annual reports. None of the utilities' filings listed any planned programs, new programs under consideration, or modifications to existing programs.

Projected DSM as Percent of Total System Peak Requirements

	Progress	Duke	NC Power	NCEMC
Summer 2004	3.3%	4.4%	0.2%	8.8%
Winter 2004	4.8%	2.6%	0.2%	7.5%
Summer 2013	2.9%	3.5%	0.2%	7.4%
Winter 2013	4.4%	2.3%	0.2%	6.2%

RESERVE MARGINS

Reserve margins shown in the current IRP filings are comparable to those submitted in the last proceeding. For the planning period 2004 to 2013, the range of summer reserve margins reported by the utilities remains below 20%. For this period, the planned reserves are: Progress, 14% to 17%; Duke, 17%; NC Power, 12.5%; and NCEMC, 0%. NCEMC assumes all capacity purchases will be 100% firm with reserves provided by the supplying entity.

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

[2] Includes the 22 Participating Members

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 1999, 2000, 2001, and 2002, resulting in weekly operating reserve margins that were often near 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 2003 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, indicating that the reserve margin range of 14% to 17% for this period was adequate. Progress found that the industry's widely used Aone 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.

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's operating experience was also factored into the selection of this 17% reserve margin.

3. NC Power reported that its target reserve margin is 12.5%. NC Power's planning reserves in the past were established using a 12-hour loss of load criterion. 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. NCEMC stated that all purchases include reserves, and future purchases will include reserves or NCEMC will acquire them independently.

According to the Public Staff, Progress, Duke, and NC Power appear to meet their projected reserve margin targets for the planning period. The Public Staff recommends that Progress, Duke, and NC Power maintain their reserve margins as filed.

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 recently 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.

NON-UTILITY GENERATION FACILITIES

In its March 2002 and February 2003 Orders Approving Integrated Resource Plans, the Commission requested that 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 2003 reports.

BUSBAR INFORMATION

In its February 20, 2003 Order, the Commission directed Progress, Duke and NC Power to include information on levelized busbar costs for various generation technologies in their September 1, 2003 filings. The Public Staff commented that Progress and Duke complied, including this information in their respective filings, but that NC Power did not. The Public Staff recommended that the Commission direct NC Power to provide this information within 30 days of the Commission's order on this matter.

In fact, NC Power did include a small section titled "Levelized 'Busbar' Costs" in its report. However, the section only covered baseload coal, combined cycle gas, and combustion turbine gas technologies as alternatives. Other alternatives that did not pass NC Power's initial screening criteria were not included in its report.

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 again 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 continues to recognize that the electric power industry remains in the midst of an economic and regulatory transition and that the resulting changes and uncertainty have led to the rethinking of certain long-accepted industry standards. As a result of these changes, as well as the

information contained in the present record, the Commission does not believe that it is appropriate to mandate a particular reserve margin for any jurisdictional electric utility at this time. The Commission concludes that it remains 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 continues to remain 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 ongoing discussions between the companies and Public Staff relating to transmission adequacy. Each utility again provided a copy of their most recently 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 recently completed FERC Form 715, including all attachments and exhibits.

Non-Utility Generation Facilities

The Commission finds that all utilities included a separate list of non-utility electric facilities in their 2003 annual reports, and that each utility should continue to provide this information in future reports.

Busbar Information

The reports of Progress, Duke, and NC Power each included sections addressing levelized busbar costs. Progress had included this type of information in previous annual reports. In its 2003 Annual Resource Plan, Progress examined a large sample of technologies including conventional, advanced, and renewable energy resources. Duke's report also contained an extensive list of technologies. Its analysis divided the various supply-side technologies into groupings of conventional, demonstrated, and emerging. As previously noted, NC Power listed only three busbar alternatives in its report. Other types of generation were not included because they failed to pass NC Power's initial screening process.

The Commission finds value in this type of information as it helps in understanding the screening process used by the utilities. While the Commission does not see an immediate need for NC Power to submit a revised, more detailed response on levelized busbar costs for inclusion in its 2003 Annual Report, the Commission does direct NC Power to expand its analysis of various generation alternatives for inclusion in its 2004 report to include also those that have not passed NC Power's initial screening criteria.

Approval of IRPs

As stated in previous 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 required by the Commission's Rules in its planning process; 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 reiterates its 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 a utility's IRP filing 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 recently 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 conventional, demonstrated, and emerging 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 23rd day of March, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr032204.01

DOCKET NO. P-100, SUB 72b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services"	))))	ORDER CONCERNING COMPLIANCE WITH SENATE BILL 814

BY THE COMMISSION: On May 30, 2003, Senate Bill 814 (5B814) was signed into law by Governor Michael F. Easley, becoming Session Law 2003-91. This law amended G.S. 62-2(b) (deregulation of intraLATA and interLATA long distance services and long distance operator services, subject to certain savings clauses); G.S. 62-133.5(dl) (deregulation as to Commission oversight of returned check charges of price plan local exchange companies); G.S. 62-133.5(f) (liberalization of bundling and promotions requirements pertaining to local exchange companies and competing local providers); and G.S. 62-133.5(c) and (d) (price plan local exchange companies can elect to operate under their existing plans if Commission disapproves proposed modification; past and present earnings or rates of return cannot be considered as to public interest criterion).

On June 17, 2003, the Commission issued an Order Seeking Comments asking parties to identify "any requirements now existing in Commission rules and orders that should be removed or modified in conformity with the amendments enacted in SB814, together with any other useful observations about the reach of the statute." Comments were due on August 15, 2003, with Reply Comments due on September 12, 2003.

On August 28, 2003, the Commission issued an Order allowing certain tariffs relative to SB814 to go into effect that were filed by several companies, with the reservation that these services could be retroactively retariffed if they were found, upon, investigation, that they should be classified as regulated. On September 8, 2003, an Order Modifying Reply Comment Schedule was issued providing for an extension of time to October 3, 2003, for Reply Comments with respect to proposed rule changes, including those relative to promotions, and changes to the body of the price plans, other than those related to services which are to be detariffed. Reply Comments that remained due on September 12, 2003, included tariff services to be deregulated, the tariffs filed or proposed to be filed by the companies and the list of services in the appendices to the price plans that should be deleted from the plans, and price plan documentation information and the effect on North Carolina jurisdictional revenues of the detariffing. All of these filings were later allowed to be made on October 3, 2003.

For the purposes of the summary of comments and discussion, the phrase "long distance" refers to the amendments to G.S. 62-2(b), "check charges" to the amendments to G.S. 62-133.5(d1), "bundling and promotions" to the amendments to G.S. 62-133.5(f), and "price plan procedure" to the amendments to G.S. 62-133.5(c) and (d). "LECs" or "ILECs" refer to local exchange companies or incumbent local exchange companies, respectively. "CLPs" refer to competing local providers, while "IXCs" refers to interexchange carriers.

Initial Comments

Public Staff identified the following areas as having been impacted by SB814:

1. *Ceiling Rate Plan.* This was originally adopted in 1985 and last modified on December 9, 1993, in Docket No. P-100, Sub 72. The Plan has been rendered moot by SB814 and should be repealed.
2. *Pay Telephone Service.* The Public Staff identified portions of Rule R13-7 and Rule R13-9 which limit the charges for toll calls as candidates for repeal. However, the

Public Staff is concerned that charges for some payphones may rise as a result of deregulation, so the Public Staff proposes that the Commission adopt disclosure requirements on intrastate operator-assisted toll calls made from payphones that mirror the requirements of the Federal Communications Commission (FCC).

3. *Shared Tenant Services.* Both Rules R14 and R14A limit the rates that Shared Tenant Service providers may charge end users for MTS and Wide Area Telecommunications Service (WATS). These limitations should be repealed.
4. *Tariffing of IntraLATA and InterLATA long distance and Long Distance Operator Services.* The Public Staff noted that there is a lack of consensus as to what exactly constitutes a deregulated long distance service. The IXCs will probably assert that all long distance services are deregulated, while LECs have indicated that they will only propose to detariff certain long distance services.
5. *Alternative Operator Services.* While SB814 deregulates long distance operator services, it also specifically retains the Commission's authority regarding certification. G.S. 62-110.4 specifically speaks to the circumstances under which the Commission may certify alternative operator service providers. There is nothing in SB814 which evinces a clear intent to repeal or override the provisions of G.S. 62-110.4. Therefore, the Public Staff recommends that the requirement that IXC applicants with a high proportion of monthly traffic coming from transient locations file monthly reports indicating that their AOS-type traffic does not exceed 50% should be retained.
6. *Price Plan References to Services Now Deregulated.* Based upon its review of representative price plans, the Public Staff does not believe that modifications are necessary at this time. However, once it is determined what services should be deleted from the tariffs, the price plan companies should file revised attachments to their plans listing the remaining services in the various plan categories, along with documentation identifying by rate element the services being deleted and the revenue amounts produced by these elements, which should agree with the revenues included in the most recent SPI-affecting filings relative to those rate elements. .
7. *Tariffs Relating to Returned Check Charges.* The Public Staff recommended that the Commission require that any company intending to apply a charge for returned checks should be allowed to maintain a tariff provision explaining the application of the charge and the amount of the charge.
8. *Flow Through Obligations of IXCs.* The Public Staff observed that it seems clear that the Commission no longer has the authority to order IXCs to flow through access charge reductions to their customers or to monitor the extent to which long distance customers receive the benefits of such reductions through lower rates. Theoretically, it might be argued that the Commission retains authority to enforce flow-through requirements existing prior to May 30, 2003, but this would in practice be difficult to enforce. The Public Staff recommended that no further action should be taken in this regard and that the outstanding flow-through requirements in Docket No. P-100, Sub 72 be repealed and Docket No. P-100, Sub 72a be closed.
9. *Customer Deposits and Disconnection, Denial and Billing for Service.* Rule R12 contains several provisions which assume Commission regulation of long distance service. Most of those references to toll service in Rule R12 should be deleted, as should the references to global toll denial with the exceptions of Rules R12-17(d)(3), (4), and (5).
10. *Waivers on Filing of Bundled Service Offerings/Promotions by Competing Local Providers.* The Commission on May 20, 1997, in Docket No. P-100, Sub 133 concluded that, with the exception of the price list requirement for basic local exchange services, CLPs were not required to notify the Commission of promotional offerings or changes in or provision of any service offering. Nevertheless, SB814 provides that CLPs as well as LECs are required to give one-day business notice for promotions and bundled service offerings to residential and business customers involving both regulated and nonregulated services. Thus, the Commission's general

authority under G.S. 62-110(f1) to determine that CLPs should not be required to file promotions and bundles appears to have been circumscribed by this requirement.

The Alliance of North Carolina Independent Telephone Companies (Alliance) supported the comments prepared by the Industry Group, noted that individual Alliance companies were preparing tariff revisions and modifications to price regulation plans separately, and sought clarification regarding jurisdiction over returned check charges. Specifically, the Alliance supported the detariffing of returned check charges for ratebase/rate of return LECs as well as price plan LECs, while noting that the returned check charge amendment in SB814 speaks to the latter and not the former.

The North Carolina Payphone Association and Pay Tel Communications, Inc. (collectively, NCPA) argued that the deregulation of long distance services had implications for references in Rule R13 tying rates to either LEC rates or those of AT&T. Specifically, the NCPA suggested amendments to Rule R13-7(d), and Rule R13-9(c), (d), and (f).

AT&T of the Southern States, LLC, MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc. and MCI WorldCom Network Services, Inc., and Time Warner Telecom of North Carolina, LP (collectively, Competitive Carriers) observed with respect to bundling that the Commission must change its existing practices concerning review of such bundling in the specific and limited circumstance in which a LEC seeks to bundle regulated and unregulated services featuring price discounts that apply exclusively to unregulated services and concerning the requirement that a LEC offering promotions and bundles convert existing customers subscribing to the same or similar services. While the latter is fairly straightforward, the Competitive Carriers recommended with respect to the former that the Commission (1) confirm that the one-day notice provision applies narrowly to the bundling referenced above, (2) adopt rules concerning the showing that the LECs must make in invoking the one-day notice procedure (including a specification of the services and the price of the bundle, the unbundled price of the regulated service, and supporting materials showing that the price discount for the bundle is attributable solely to the nonregulated portion of the bundle), (3) adopt rules prohibiting LECs from cross-subsidizing regulated and nonregulated services in a bundle and establishing accounting procedures to ensure that revenues derived from bundles are apportioned by the LEC for internal accounting purposes so that the regulated service is credited with an amount equal to the undiscounted price of the standalone service, and (4) adopt procedures for giving notice of such one-day filings and considering challenges to such filings, including protections for expedited consideration of requests for interim and preliminary relief by staying the effectiveness of bundled services or promotions upon a specified showing.

The Competitive Carriers argued that these proposals are consistent with the provisions of SB814 and are necessary to prevent ILECs from engaging in anticompetitive behavior. AT&T observed that the Commission's complaint authority under G.S. 62-74 is specifically recognized by SB814.

With respect to other matters, the Competitive Carriers recommended that conforming changes should be made to Rule R12-17(i)(2)(F) to ensure that newly nonregulated charges relating to toll services do not have to appear on a separate page, as would otherwise be the case with nonregulated charges. This would save IXCs from having to implement costly billing format changes. Moreover, Rule R1-32 should be clarified to ensure that the rule does not pertain to interexchange carriers or CLPs.

Lastly, the Competitive Carriers listed certain long distance service tariffs as deemed withdrawn as of September 1, 2003. On September 26, 2003, Time Warner filed a letter stating that it had discovered that the tariffs identified for withdrawal as of September 1, 2003, were incorrectly listed as its Intrastate Toll Price List Number One and its Terms and Conditions of Intrastate Long

Distance Service. Time Warner attached to its filing the correct tariff for withdrawal as North Carolina Tariff No. 3, Resale Long Distance Tariff.

Industry Group (comprised of ALLTEL Carolina, Inc.; ALLTEL Communications, Inc.; BellSouth Telecommunications, Inc.; Carolina Telephone and Telegraph Company; Central Telephone Company; Sprint Communications Company, LP; The Alliance of North Carolina Independent Telephone Companies; Citizens Telephone Company; Concord Telephone Company; Ellerbe Telephone Company; LEXCOM Telephone Company; MEBTEL Communications; North State Communications; Randolph Telephone Company; Verizon South, Inc; Barnardsville Telephone Company; Saluda Mountain Telephone Company; and Service Telephone Company) (collectively, Industry Group) recommended amendments to Rules R1-15 (Investigation and suspension proceedings), R1-16 (Pledging assets, issuing securities, assuming obligations), R1-17 (Filing of increased rates; application for authority to adjust rates), R1-32 (Filing of annual reports by public utilities), R9-2 (Uniform system of accounts), R9-9 (Financial and operating reporting requirements by telephone companies), R12-9 (Uniform billing procedure), R12-14 (Advertising by telephone companies), R12-16 (Bill inserts for telephone companies), R12-17 (Disconnection, denial, and billing telephone service), R13-3 (Charges), R14-11 (Exception group), R14-11 (Charges to end users), and R15-1 (Regulatory fee).

Sprint Communications Company, LP, Carolina Telephone and Telegraph Company, and Central Telephone Company (collectively, Sprint) submitted a list of services for the respective companies of services believed to have been deregulated by SB814, together with suggested modifications for the price plans of the respective LECs. They included the following: Definitions-Long Run Incremental Cost, Section 1 (Applicability of Plan), Section 2 (Changes to Plan), Section 3 (Classification of Services; Non-Basic 2 Services), Section 10 (Commission Oversight), Service Measurements, (A.i Operator "0" answertime, and B.), and various changes to Attachment A to the Price Regulation Plan listing services by category.

ALLTEL Carolina, Inc. (ALLTEL) recommended amendments to its Price Plan regarding Section 1 (Applicability of Plan), Section 2 (Changes to Plan), Section 5.B. (Contract Service Arrangements), Section 6.B.(3), (4), and (6), Section 9.B., C., and D. (Commission Oversight), Section 11 (Expansion of Services; Restructuring of Rates; and Reduction in Revenues), and Section 12 (IntraLATA Presubscription).

Verizon South, Inc. (Verizon) requested approval of one additional tariff change that it argues would be consistent with the removal of long distance service—the toll imputation requirement under the Defined Radius Discount Calling Plan. It also sought amendments to its Price Plan regarding Section 2 (Changes to Plan), Section 4 (Classification of New Services, and Reclassification of Existing Services), Section 5 (Tariff Requirements), Section 6 (Pricing Rules), Section 6.D. (New Services), Section 7 (Financial Impacts of Governmental Actions), Section 8 (Regrouping of Exchanges), and Section 10 (Commission Oversight), as well as various changes to the listing of services by category.

CT Communications (CTC) recommended amendments to its Price Plan Section 1 (Applicability of Plan); Section 2 (Changes to Plan), modifications to be in accord with state law and deleting references to such further orders as may be issued by the Commission; Section 3 (Classification of Services), adding a clause concerning exemption by the Plan or the Commission; Section 9 (Commission Oversight), adding a phrase referring to applicable state law and deleting all subsequent subsections; Section 11 (Simplification of Rate Structure), deleting Section 11.B.6 referring to IntraLATA rates; Attachment A, General Exchange Tariff, Section 4 by deleting subsection 4.5 with reference to check charges; Attachment A, Non-Basic 1 Services, Section 18, Long Distance Message Telecommunications Service, deleting all subsections; and Attachment A, Non-Basic 1 Services, Concurs with BellSouth Tariff, A19, Wide Area Telecommunications Service.

BellSouth Telecommunications, Inc. (BellSouth), upon refilling on August 26, 2003, recommended amendments to its Price Plan regarding I. (Applicability of Plan), II (Definitions-C. Gross Domestic Product Price Index; I. Offset; J. Price Regulation Index; M. Service Price Index), III. (Classification of Services) (A.5., Toll Switched Access Services), IV. (Tariff Requirements), V. (Pricing Rules), IX. (Commission Oversight), XII. (Changes to Plan), and XIII. (Effective Date).

MebTel Communications (MebTel) recommended amendments to its Price Plan regarding Section 1 (Applicability of Plan), Section 2 (Changes to Plan), Section 3 (Classification of Services), Section 9 (Commission Oversight), General Subscriber Services Tariff 7.3.5 (Rates and Charges), 7.3.6 (Charges to PTAS End User), and 4.5.4 (Returned Check Charge). With respect to the tariffs, pending Commission approval, MebTel will make an official filing to revise these tariff pages. Since MebTel concurs in BellSouth's Long Distance Tariff, no revision will be necessary to Section 18 of MebTel's tariff pending appropriate tariff revisions by BellSouth.

On October 21, 2003, MebTel filed revisions to the list of services in its Price Regulation Plan. Specifically, MebTel deleted WATS and indicated that the Returned Check Charge would not be included as a sub-element in its Price Regulation Filing in November 2003.

North State Communications (North State) recommended amendments in its Price Plan to Section 1 (Applicability of Plan), Section 2 (Changes to Plan), Section 3 (Classification of Services), and Section 9 (Commission Oversight) substantially identical to those proposed by CTC. In Attachment A, North State proposed deletion of Section 4.7.1 (Return Check Charge), the deletion of all but subsection 18.4.3, Conference Service—Rates and Charges, of Section 18, Long Distance Message Telecommunications Service, and the deletion of Section 19 (Wide Area Telecommunication Service).

August 28, 2003 Order

On August 28, 2003, the Commission issued an Order Allowing Tariffs To Become Effective Subject to Further Investigation. This concerned tariffs filed by Verizon, BellSouth and Sprint purporting to eliminate language identified as being deregulated by SB814. Noting the uncertainty attaching to the term "long distance services" in some instances, the Commission allowed the proposed tariffs to go into effect as requested, subject to the proviso that given services after investigation might be restored to the list of regulated services and therefore subject to tariffing. The Commission also asked for supporting documentation identifying the rate elements and revenues that the detariffing would remove from the companies' price plans, as well as the likely impact on intrastate jurisdictional revenues.

Reply Comments

I. Public Staff

Public Staff filed comprehensive Reply Comments. A summary of the Public Staff's analysis and recommendations follows:

A. TARIFFS

The Commission requested that parties identify which tariffed services had been deregulated due to passage of SB814. The filings made in response to that request and other filings to modify or withdraw tariffs in connection with the legislation were addressed by the Public Staff as set forth below.

1. Local Exchange Companies

ALLTEL filed comments on August 15, 2003. Since ALLTEL's filing did not include a revised list of services, it is unclear which services ALLTEL proposes to detariff. Based on a review of the ALLTEL tariff, the Public Staff recommended that the following services should be detariffed:

Service	Section
Returned Check Charge	2.4.4
TwoPoint Service	18.3
Conference Service	18.4
IntraLATA Long Distance Verification & Interrupt	18.7
Calling Plans	18.8
WATS	19.5

ALLTEL filed a tariff on August 28, 2003, to remove the Returned Check Charge from the tariff, effective September 1, 2003.

BellSouth filed comments on August 15, 2003, and revised comments on August 26, 2003. BellSouth identified the following services as being deregulated by Senate Bill 814:

Services	Section
Insufficient Funds	2.4.3
MTS Two-point Service	18.3
Conference Service	18.4
IntraLATA Long Distance Verification & Interrupt	18.8
Calling Plans - Saver Service	18.13
Toll Directory Assistance Call Completion	18.14
Easy Calling Plan	18.18
Custom Rate Plan	18.21
WATS	19.5
Obsolete Long Distance MTS	118.1.1
Obsolete WATS	119.5

The Public Staff agreed with BellSouth's proposed list of detariffed services.

Sprint filed comments on August 15, 2003. Sprint identified the following services as being deregulated by Senate Bill 814:

Services	Section
Returned Check Charge	4.5
Two-Point MTS Service	18.3
IntraLATA Long Distance Verification & Interrupt	18.6
800-210 Local Toll Calling Plan	18.7
WATS	19
Local Toll Optional Calling Plans	21
Sprint Solutions - Residence (Toll Portion Only)	44.1
Sprint Solutions - Business (Toll Portion Only)	44.2
Obsolete Long Distance MTS	118
Obsolete WATS (Carolina Only)	119
Obsolete Local Toll Optional Calling Plans	121
Obsolete Sprint Solutions (Toll Portion Only)	144.1

The Public Staff agreed with Sprint's proposed list of detariffed services but suggested that one additional service should be included in the list. Sprint did not propose to detariff Toll Directory Assistance Call Completion (Section 18.8), which the Public Staff believes is a long distance service. The Commission allowed Sprint's filings to become effective on September 1, 2003.

CTC filed comments on August 15, 2003. CTC identified the following services as being deregulated by Senate Bill 814:

Service	Section
Returned Check Charge	4.5
Two-Point Service	18.3
Conference Service	18.4
Long Distance Directory Assistance	18.7
IntraLATA Long Distance Operator Verification & Interrupt	18.8
Toll Director Assistance Call Completion	18.14

MetroPlus	18.15
WATS - Concord concurs with BellSouth	19

The Public Staff disagreed with detariffing Long Distance Directory Assistance. Local exchange company offerings of directory assistance are not included in the services deregulated by the legislation. Otherwise, the Public Staff agreed with Concord's proposed list of detariffed services.

MEBTEL filed comments on August 14, 2003. MEBTEL identified the following services as being deregulated by Senate Bill 814:

Service	Section
Returned Check Charge	4.5.4
(Concurs with BellSouth in Sections 18 and 19.)	

The Public Staff agreed with MEBTEL's proposed list of detariffed services.

North State filed comments on August 15, 2003. North State identified the following services as being deregulated by Senate Bill 814:

Services	Section
Returned Check Charge	4.7.1
Service Between Land Wire Telephones	18.3.1
Long Distance Directory Assistance	18.7
intraLATA Long Distance Verification & Interrupt	18.8.2
Toll Savings Plan	18.13.7
Toll Directory Assistance Call Completion	18.14.6
WATS	19.1

The Public Staff raised two concerns with North State's proposal. First, the Public Staff disagreed with including directory assistance charges in Section 18.7 as deregulated. Local exchange carrier offerings of directory assistance service are not included in the services deregulated by the legislation. Only two other companies, Concord and Verizon, initially proposed to include directory assistance among the services proposed to be detariffed, and Verizon has since deleted this service from its list. Second, North State did not propose to detariff Conference Service (Section 18.4), which the Public Staff believes is a long distance service and should be included in the list of detariffed services.

The TDS Companies filed tariffs on August 29, 2003, with an effective date of September 1, 2003, to remove the provisions of their tariffs in which they concur with the MTS and WATS offerings of BellSouth. The Public Staff concurred.

Verizon made its initial filing on August 15, 2003. Verizon made a subsequent filing on August 29, 2003, with a revised List of Services reflecting several changes. Verizon identified the following services as being deregulated by SB 814.

Services	Section
Returned Check Charge	4.8
Business Line 800	19.5.8
MTS Conference Service	18.4
MTS Verification & Emergency Interrupt	18.7
Residence Line 800	19.5.8
WATS and 800 Services	19, 119
MTS Two-Point Service	18.3
Discount Calling Plans	18.8

In its revised filing, Verizon removed two services that it had initially identified as being deregulated: Long Distance Terminal Service and MTS Directory Assistance. The Public Staff agreed with Verizon's proposed list of detariffed services.

In addition, Verizon filed tariff revisions on August 13, 2003, and August 15, 2003, to delete services deregulated by SB814. These tariffs were presented at the Regular Commission Conference on August 25, 2003. The Commission issued an Order on August 28, 2003, allowing the tariffs to become effective with the exception of Long Distance Terminal Service. These filings removed from the tariff two services that are not included in the services listed above: MTS Directory Assistance and the Defined Radius Discount Calling Plan. The Public Staff argued that SB814 deregulated neither of these services. Verizon, in its revised comments filed August 29, 2003, expressly agreed that MTS Directory Assistance was a regulated service. The Defined Radius Discount Calling Plan provides credits to IXCs when composite switched access charges exceed the average toll rates. Although toll rates have been deregulated, switched access rates continue to be regulated, and these credits should be retariffed in Verizon's Intrastate Access Tariff. In addition, the Public Staff stated that the Price Regulation Plan proscription against anticompetitive practices supports continued Commission oversight of these credits.

Other Local Exchange Companies did not file tariff revisions or comments. The Public Staff recommended that their tariffs should be modified consistent with the changes recommended for ALLTEL and those proposed by BellSouth, as set forth above.

2. Long Distance Carriers

AT&T filed jointly with MCI and Time Warner Telecom on August 15, 2003. AT&T stated that it has withdrawn the following tariffs as of September 1, 2003: AT&T General Services Tariff, AT&T Custom Network Services Tariff, AT&T Private Line Service - Schedule 9 and AT&T Private Line Service - Schedule 11. These four tariffs comprise all of AT&T's intrastate tariffed service offerings. The Public Staff agreed with AT&T's list of withdrawn tariffs.

BellSouth Long Distance, Inc., filed a letter on August 27, 2003, withdrawing its intrastate long distance service tariff. The Public Staff agreed with the withdrawal of this tariff.

MCI filed jointly with AT&T and Time Warner on August 15, 2003. MCI stated that it has withdrawn the following tariffs as of September 1, 2003: MCI WorldCom Communications, Inc. NCUC Tariff No. 1 and MCI WorldCom Network Services, Inc., NCUC No. 1. These two tariffs comprise all of MCI's intrastate tariffed service offerings. The Public Staff agreed with MCI's list of withdrawn tariffs.

Sprint Communications Company, L.P. (Sprint Communications), filed comments on August 15, 2003, along with Carolina and Central. Sprint Communications identified the following services as remaining in the tariff after deregulation of long distance service by Senate Bill 814:

Services/Sections Remaininci in Tariff	Sections
Applications of Tariff	1
Territory	2
Terms and Conditions	3
Service and Rate Description	4
Rates	5

The Public Staff disagreed with Sprint Communications' proposed list of remaining tariffed services. The Public Staff argued that the entire tariff should be withdrawn since services provided by Sprint Communications are, by definition, long distance services.

Time Warner Telecom, L.P., filed jointly with AT&T and MCI on August 15, 2003. Time Warner stated that it has withdrawn the following tariffs as of September 1, 2003: Time Warner Telecom's Intrastate Toll Price List Number One and Time Warner Telecom's Terms and Conditions of Intrastate Long Distance Services. However, the tariffs identified by Time Warner do not agree with what is on file with the Commission. Instead, the tariff on file is Time Warner Telecom North

Carolina Tariff No. 3. It was filed May 10, 1999, with an effective date of May 25, 1999. On September 26, 2003, Time Warner Telecom made a revised filing identifying North Carolina Tariff No. 3, Resale Long Distance Tariff as the tariff that it has withdrawn. The Public Staff agreed with Time Warner's revised list of withdrawn tariffs.

B. PROPOSED CHANGES IN COMMISSION RULES

The Commission requested that parties propose changes to Commission rules required by the amendments to G.S. 62-133.5 resulting from the passage of SB814. Proposed rule changes were filed by the Public Staff and the NCPA. Joint filings were made by the Industry Group and by the Competitive Carriers.

Rule R1-15. Investigation and suspension proceedings. The Industry Group and the Competitive Carriers proposed inserting a sentence at the beginning of this rule specifying that the rule is applicable to rate of return regulated public utilities only. The Public Staff opposed this change on the grounds that it is overly broad and not required by SB814. In addition, the Public Staff argued that the proposed change is unnecessary, since much of the rule is based on G.S. 62-1 34 and -135, from which the price plan companies are exempt under G.S. 62-133.5(g).

Rule R1-16. Pledging assets, issuing securities, assuming obligations. This rule prohibits public utilities from pledging their assets to or assuming the liabilities of any person without Commission approval. The proposed change exempts Payphone Service Providers (PSPs), CLPs, and long distance companies from application of this rule. The rule is based on G.S. 62-160. The Public Staff maintained that the Commission has the authority under G.S. 62-110(b) and (c) to exempt long distance companies and PSPs from regulation under G.S. 62-1 60 and recommended that it do so. The Commission's authority to exempt CLPs from such regulation is contained in G.S. 62-2(b). Inasmuch as G.S. 62-160 allows the Commission to exercise some oversight over the CLPs' financial health and ability to provide continuing service, the Public Staff is reluctant to recommend that the CLPs also be exempted at this time.

However, it should be noted that CLPs are already exempt from G.S. 62-Article 8 statutes as well as Rule R1-16 pursuant to the Commission Order dated February 23, 1996, in Docket No. P-100, Sub 133.

Rule R1-17. Filing of increased rates; application for authority to adjust rates. The Industry Group and the Competitive Carriers proposed inserting a sentence at the beginning of the rule specifying that the rule is applicable to rate of return regulated public utilities only. The Public Staff opposed this change on the grounds that it is overly broad and not required by SB814. In addition, the Public Staff argued that the change is unnecessary since much of the rule is based on G.S. 62-1 34 and -135, from which the price plan companies are exempt under G.S. 62.133.5(g).

Rule R1-32. Filing of annual reports by public utilities. The Competitive Carriers proposed inserting a sentence at the beginning of the rule specifying that the rule is not applicable to interexchange carriers and competing local providers. The Public Staff did not believe that SB814 requires this change, and was hesitant to agree to its adoption. However, the Public Staff agreed that the proposed change is a clarification and not inconsistent with the previous Commission rule.

In addition, the Industry Group and the Competitive Carriers proposed revising paragraphs (d) and (e) so that companies operating under price regulation plans may file copies of reports filed at the federal level to comply with this rule, without regard to whether those filings include separate reports showing North Carolina operations. The Public Staff opposed this change on the grounds that it is not required by SB814. The Commission's authority to require the filing of annual reports is contained in G.S. 62-36, which applies to all public utilities, including price plan companies. The Public Staff believed that the reporting of reliable and pertinent financial information on a periodic basis is still required for the Commission to perform its oversight responsibilities with regard to price plan

companies and make informed decisions on price plan modifications. Such information can provide the Commission with valuable insight into a company's jurisdictional operations, such as whether it is reducing its maintenance costs or investment in new facilities, the nature of new facilities being added, the source of declining revenues, and the general financial health of the business. To this end, the Public Staff recommended that the Commission eliminate the TS-1 reporting requirement for price plan companies and replace the current annual report form for these companies with an annual report form that is prescribed by the Commission. The current annual report form filed by the local exchange companies is essentially prescribed by the FCC. It does not provide the Commission with adequate jurisdictional information, such as regulated/nonregulated cost apportionments and the jurisdictional separation of revenues, expenses, and investment. The Public Staff believes that an annual report form that would eliminate some reporting requirements and consolidate into a single report information that is now provided in two separate reports would be desirable in the future. Until such a report form is prescribed, however, the Public Staff recommended that the current reporting requirements be retained.

Rule R9-2. Uniform system of accounts. The Industry Group and the Competitive Carriers proposed inserting a sentence at the beginning of the rule specifying that sections (3), (4) and (5) of this rule are applicable to rate of return regulated public utilities only. The Public Staff opposed this change on the grounds that it is overly broad and not required by SB814. The Commission's authority for this rule comes from G.S. 62-35, and the only part of that statute that does not apply to companies under price regulation plans is paragraph (c), which covers depreciation. The uniform system of accounts (USOA) provides a national standardized manner of reporting financial information; it is familiar to state and federal regulators; and is consistent in application among incumbent local exchange companies. Without this requirement, the companies could develop their own individual accounting systems, which could lead to confusion and inefficiency in reviewing their financial reports. The FCC has conducted several reviews of the USOA and has modified and streamlined the accounting system as a result, but it still requires incumbent local exchange companies to maintain their accounting records in accordance with the USOA. Thus, even if the Commission relieved the pri'e plan companies from the USOA requirements in this rule, the companies would still maintain their records in accordance with the USOA for FCC purposes.

Rule R9-9. Financial and operating reporting requirements for telephone companies. The Industry Group and the Competitive Carriers proposed inserting a sentence at the beginning of the rule specifying that this rule is applicable to rate of return regulated public utilities only. The Public Staff opposed this change on the grounds that it is overly broad and not required by SB814. The Commission's authority for this rule comes from G.S. 62-33 and -36, from which companies under price regulation plans have not been exempted.

Rule R12-9. Uniform billing procedure. The Industry Group and the Competitive Carriers proposed revising paragraph (a) to limit application of this rule to services regulated by the Commission as opposed to companies subject to Commission regulation. The Public Staff did not oppose the intent of this change but was uncomfortable with the proposed language. The Public Staff proposed changing the first sentence to read "for regulated services offered by public utilities subject to the jurisdiction of this Commission."

Rule R12-14. Advertising by telephone companies. The Industry Group and the Competitive Carriers proposed inserting a sentence at the beginning of the rule specifying that subsections (a) and (c) of this rule are applicable to rate of return regulated companies only. The Public Staff did not believe that price plan companies are subject to this rule, since G.S. 62-133.5(g) exempts them from G.S. 62-133. Therefore, this change is unnecessary.

Rule R12-16. Bill inserts for telephone companies. The Industry Group and the Competitive Carriers proposed inserting a sentence at the beginning of the rule specifying that subsections (a), (b), and (c) of this rule are applicable to rate of return regulated public utilities only.

The Public Staff opposed this change on the grounds that it is not required by SB814. In addition, the change is unnecessary, since subsection (b) is based on G.S. 62-133, from which price plan companies are exempt under G.S. 62-133.5(g).

Rule R12-17. Disconnection, denial, and billing of telephone service.

(a)(1) The Industry Group and the Competitive Carriers proposed eliminating language referring to unbundled MTS. The Public Staff agreed with the proposed change.

(a)(2) The Industry Group and the Competitive Carriers proposed inserting language adding long distance services to the list of nonregulated services that are not included in local service. This proposed language, though slightly different, is consistent with the Public Staff's Initial Comments.

(b)(4) The Industry Group and the Competitive Carriers proposed modifying this section to eliminate reference to "regulated" services and "tariffs on file" but essentially left the language on global toll denial intact. Now that intraLATA and interLATA long distance services are no longer regulated, the Public Staff suggested that the rationale for allowing the customer's local service provider to impose global toll denial has become less clear. A local exchange company clearly has the right to restrict the customer's access to its own toll services, but it is not clear that the company can extend that restriction to other providers of toll services. The issue of global toll denial was the subject of a great deal of discussion when Rule R12-17 was being formulated. The belief at that time was that the local service provider could most effectively impose toll denial. While the Public Staff has some concern that imposition of global toll denial conflicts with a customer's right to choose a long distance carrier, especially now that intrastate long distance services are deregulated, on balance the Public Staff still agrees with this rationale. However, if the Commission's rules are going to continue to allow local exchange companies to impose global toll denial, the protections for end users that were written into the rules must also remain. This represented a shift in the Public Staff's position since the filing of its Initial Comments. Consequently, the Public Staff withdrew its proposed changes to the following subsections of Rule R12-17: (b)(4), (b)(8), (d)(1) - (3), and (f) - (i).

(c)(2) The Industry Group and the Competitive Carriers proposed modifying this section to require long distance carriers to allocate partial payments to long distance charges and then to "other" nonregulated service. The Public Staff opposed this change, because all services offered by long distance companies are now nonregulated services. The Commission does not have the authority to determine how a company should allocate payments between various nonregulated services. The Public Staff recommended this section of the rule should be repealed.

(d)(2) and (d)(2)(A) The Industry Group and the Competitive Carriers proposed language revisions specifying that the restriction against imposing global toll denial for failure to pay nonregulated charges does not apply to toll services. The Public Staff agreed with the proposed changes.

(i)(2)(F) The Competitive Carriers proposed inserting language that allows companies to treat long distance services differently from other non-regulated services with respect to the requirement to place non-regulated charges on a separate page of the bill, or in a separate section of the bill, and to notify customers on the same page that they cannot lose their local service for nonpayment of these charges. The Public Staff opposed this change. Intrastate long distance should be treated no differently than other nonregulated services.

Rule R13-5. General requirements - Service and equipment; Rule R13-7. Automated collect capability; and Rule R13-9. Charges. The Public Staff generally agreed with the revisions to Chapter 13 proposed by the NCPA, (along with the PSPs Pay Tel Communications, Inc., and Evercom, Inc.) with three exceptions.

The Public Staff proposed elimination of Rule R13-7(d), because the charges for automated collect calls are already adequately addressed in Rule R13-9. The information in Rule R13-7(d) is redundant and unnecessary. The Public Staff proposed adding a new Rule R13-5(u) to require PSPs to ensure that any operator service provider (OSP) that provides service at its payphones identify itself to an end user making a call and, upon request, provide information on the call charges, how the charges will be collected, and how they may be disputed. The Public Staff also proposed adding a new Rule R13-7(h) that identifies the PSP as the OSP for automated collect calls made from the PSP's payphones and states that the PSP is subject to the rate disclosure requirements of Rule R13-5(u).

Rule R13-5(u) would extend to intrastate, non-access code operator-assisted calls the same basic consumer protections the FCC has adopted for interstate calls of the same types. The customer notice requirements that the Public Staff proposed in this rule would give an end user making an intrastate call from a payphone the opportunity to find out the cost of the call prior to call completion and before he incurs any charges. In the 1980s and 1990s, several OSPs received nationwide attention for billing exorbitant rates for interstate operator-assisted calls, leading the FCC to adopt its interstate rate disclosure requirements. The Public Staff believes the Commission should extend the same protections to intrastate calls in order to safeguard North Carolina payphone customers from similar excessive OSP charges.

The Industry Group recommended essentially the same changes proposed by the NCPA, Pay Tel, and Evercom and also proposed modifications to Rules R13-9(e), *0+ Other Than Automated Collect,* and R13-9(g), *0- Calls.*

Rule R13-9(e) states:
The end user of a PSP instrument may not be charged by the PSP for a 0+, 10xxx-0+, 101xxxx0+, or 950 local or toll call billed to a calling card, to a third number, or to the called party (collect).

The Industry Group proposed removing the terms "10xxx-0+" and "101xxxx0+" and the words "or toll" from this rule, which would effectively free PSPs to charge for all 0+ and 950 toll calls and all 10xxx-0+ and 101xxxx0+ access code calls completed from their payphones.

Rule R13-9(g) states:
All PSP instruments outside of confinement facilities must allow access to the access line provider operator at no charge. The PSP may not impose a charge on the end user for completion of 0- local and toll calls billed to a calling card, a third number, or the called number (collect).

The Industry Group proposed removing the phrase "and toll" from this rule, which would enable PSPs to begin charging for completed 0- toll calls.

Since first adopting rules in CC Docket No. 96-128 to implement the payphone provisions of the Telecommunications Act of 1996, the FCC has diligently attempted to determine the types of calls (both interstate and intrastate) for which PSPs should be compensated and the amounts of compensation to which they were entitled. The Report and Order issued September 20, 1996, and several subsequent orders in this docket established a comprehensive mechanism by which carriers were required to compensate PSPs for access code calls and 0+ calls. PSPs were initially compensated for access code calls at a set rate per phone or per call. Following an initial transition period using these default rates, the FCC anticipated that PSPs and carriers would negotiate mutually acceptable rates. The FCC also concluded that PSPs and their presubscribed carriers should set mutually acceptable compensation rates for 0+ calls in their contracts. In the absence of such contracted rates, the FCC's default per-call rates would apply.

In its November 8, 1996 Order on Reconsideration in CC Docket No. 96-128, the FCC declined to require compensation for calls in which the end user merely dialed "0" to reach the operator and asked the operator for rates or dialing instructions. If the end user dialed "0", reached the operator, and subsequently asked that operator to complete a call, the call should presumably be compensable under the terms of the contract between the PSP and the access line provider who provides the 0- operator service.

The FCC already has adequate arrangements to compensate PSPs for interstate and intrastate operator-assisted calls made from their payphones. There is no need for the Commission to modify Rules R13-9(e) and (g) to further compensate PSPs for these calls, and the NCPA, Pay Tel, and Evercom have not requested such exceptional treatment. Accordingly, the Commission should reject the Industry Group's efforts to modify rules R13-9(e) and (g) as described above.

Rule R14-11. Exception group. The Industry Group and the Competitive Carriers filed identical proposals on the changes to this rule. The only difference between these proposed changes and those recommended by the Public Staff in its Initial Comments is the Public Staff's addition of the conjunction "and" at the end subsection (a).

Rule R14A-11. Charges to end-users. The Industry Group and the Competitive Carriers filed proposed changes to this rule that are identical to those recommended by the Public Staff in its Initial Comments.

Rule R15-1. Regulatory fee. The Industry Group and the Competitive Carriers proposed inserting language into subsection (e) specifying that this section is applicable to rate of return regulated public utilities only. The Public Staff opposed this change. This subsection allows the Commission or the Public Staff to request support data and work papers documenting calculation of a company's Regulatory Fee Report. Authority for this rule comes from G.S. 62-302 and the general authority of the Commission under G.S. 62-30, -31, -33 and -34. The Commission's authority to request support data and work papers associated with the Regulatory Fee has not been modified by passage of SB814.

Rule R- __. Promotions and Bundled Service Offerings Featuring Price Discounts on Unregulated Services. The Competitive Carriers proposed a new rule addressing promotions and bundled service offerings featuring price discounts on nonregulated services. This rule sets out extensive requirements for LECs to follow in order to provide promotions of bundled services on one day's notice. Proposed requirements include support documentation, requirements to establish written accounting procedures for allocating the bundled revenues between regulated and nonregulated services, posting public notice of such bundles on the Commission's website and directions on how complaints should be handled. The Public Staff opposed this rule on the grounds that it is contrary to the intent of the amendment to G.S. 62-133.5(f) regarding promotions and bundled service offerings. Instead of making it easier for companies to offer promotions and bundled services, this rule could make it more difficult and potentially more time-consuming than is presently the case. In addition, the complaint procedures called for in the proposed rule conflict with G.S. 62-133.5(e), which expressly directs that allegations of anticompetitive behavior be raised in complaint proceedings pursuant to G.S. 62-73. However, the Public Staff did not oppose a Commission requirement that the notices include a detailed description of the promotions/bundles, the dates during which the promotions/bundles will be offered, a justification statement for one day's notice eligibility, and confirmation that accounting procedures are in place to comply with the statute.

C. PRICE PLANS

In its Initial Comments filed on August 15, 2003, regarding revisions to price plan language, the Public Staff stated its belief "that no modifications are needed to the plans themselves (as opposed to the list of services attached as appendices to the plans) as a result of certain services having been deregulated." The price plans prescribe a regulatory methodology for controlling a

company's prices for individual services as a substitute for regulating the company's rate of return. The plans themselves do not address specific services; when new services are added or existing services are discontinued or deregulated, only the appendices change.

All of the companies currently under price plan regulation filed initial comments in response to the June 17, 2003 Order and attached proposed price plan revisions. The changes proposed by the companies generally fell into one of four categories: (1) administrative clean up; (2) deletion of obsolete provisions; (3) language changes that appear related to SB814; and (4) language changes specifically required to comport with SB814. The Public Staff did not address proposed changes that fall into either of the first two categories. The Public Staff believed it would be more appropriate to address proposed plan changes that are unrelated to SB814 in individual price plan proceedings rather than attempting to review the price plan language for eight companies in this docket.

The companies proposed a number of changes that appear to be related to passage of SB814 but do not appear strictly necessary to comport with the law. The Public Staff recommended against approval of any changes that are not clearly necessary. Two proposals warrant specific comment, however. First, a number of companies proposed to strike language dealing with the requirement to file TS-1 surveillance reports. This proposal appears to be related to the G.S. 62-133.5(d) which states: "In determining whether a price regulation plan is otherwise consistent with the public interest, the Commission shall not consider the local exchange company's past or present earnings or rates of return." As discussed above regarding proposed rule changes, the Public Staff recommended eliminating the TS-1 reporting requirement for price plan companies and replacing the current annual report form for these companies with an annual report form prescribed by the Commission. Second, all but one price plan company proposed to eliminate language that calls for the Commission to review the operation of the price plan. The Public Staff opposed this change. Each of the companies agreed to such a review as part of a stipulated plan approved by the Commission pursuant to G.S. 62-133.5(a). SB814 amended G.S. 62-133.5(c), which concerns company proposals to modify their price plans, by adding the following provision: "If the Commission disapproves, in whole or in part, a local exchange company's application to modify its existing form of price regulation, the company may elect to continue to operate under its then existing plan previously approved under this subsection or subsection (a) of this section." The Public Staff noted that nothing in this amendment prohibits the Commission from conducting a review in accordance with the plan.

The last category of proposed plan revisions consists of those that the Public Staff believes are required by the change in the law. Although the Public Staff stated in its Initial Comments that it did not believe any changes are required, the companies in their comments identified a small number of specific instances where the current price plan language is in conflict with SB814. The plans of BellSouth, Carolina/Central (Sprint) and North State currently contain sections addressing service measurements. The first service listed is Operator (0) answertime. BellSouth and Sprint propose to insert the word "Local" to reflect deregulation of long distance operator services. The Public Staff agreed with this change and recommended that North State make the same change. CTC proposed to delete paragraph B.6 in Section 11. This paragraph deals with the reduction in the number of intraLATA rate bands that took effect at the time CTC implemented its price plan. The Public Staff agreed with s this change. Lastly, all of the price plan companies will need to file revisions to their List of Services. The Public Staff has reviewed the lists included with the companies proposed plan changes and recommends the following revisions:

ALLTEL - The Public Staff recommended that a revised list should be filed reflecting deregulation of the Returned Check Charge, Two-Point Service, Conference Service, Long Distance Verification and Emergency Interrupt, Saver Service and WATS.

BellSouth - The Public Staff agreed with BellSouth's revised List of Services.

Carolina/Central - The Public Staff proposed that Toll Directory Assistance Call Completion (Toll DACC) should be deleted' Sprint Solutions should be added to reflect those parts of the service that have not been deregulated.

CTC - The Public Staff agreed with CTC's revised List of Services except for Long Distance Directory Assistance, which has not been deregulated.

MEBTEL - The Public Staff commented that a revised list should be filed reflecting elimination of the Returned Check Charge and elimination of WATS (Section 19).

North State - The Public Staff agreed with North State's revised List of Services with the exception of Conference Service, which has been deregulated, and Long Distance Directory Assistance, which has not been deregulated.

Verizon - The Public Staff agreed with Verizon's revised List of Services.

II. Other Parties

Sprint argued that the issues raised by AT&T in the discussion and recommendations concerning bundled services offerings—namely, cross-subsidization and anti-competitive behaviors—are not related to SB814 but significantly predate them. Both the Commission and Public Staff have been diligent in addressing such concerns in the past. Thus, the proposed rule of the Competitive Carriers is unnecessary. It is also unwise because it shifts the burden of proof from a complainant to the party against whom the allegations are being made, and it works to defeat the clear intent of the legislature to encourage competition by slowing down the marketing process, increasing barriers to competitive activities, and impeding pricing flexibility. Sprint asked that the Competitive Carriers' proposal be rejected.

Sprint also addressed certain of the Public Staff's Comments. Specifically, Sprint noted that the Public Staff's proposal to adopt disclosure requirements on intrastate operator-assisted toll calls made from payphones that mirror FCC requirements would impose significant costs on Sprint. Sprint estimated it would take approximately six months to comply with this requirement. Sprint asked that providers of payphone service be given a minimum of six months to comply with this requirement.

Sprint further addressed the Public Staff's statement that it believed no modifications are needed for the price regulation plans themselves. While this statement may be technically true as to the changes to some or all of the plans required by the deregulation of long distance services, which are in the attachments to some or all of the plans, the passage of SB814 will clearly require other changes to Sprint's price plans, as indicated on the revised Central and Carolina price plans filed on August 15, 2003. The most important example is the change to Section 10 (Commission Oversight).

Lastly, Sprint suggested minor changes to Rule R12-17, to make it clear that global toll denial may be applied to both business and residential customers and that global toll denial may be imposed either at the request of the customer or by the local service provider when warranted.

As to other matters, Sprint provided supporting documentation identifying the rate elements and revenues being removed from Carolina's and Central's price plans.

North State submitted a list of tariff services, with associated revenues, to be deregulated, an impact analysis on North Carolina jurisdictional revenues, and amended tariffs reflecting the deregulatory changes. North State noted that most parties to this docket agree on the services to be deregulated, but observed there is a divergence of views regarding Long Distance Directory Assistance (DA) and Long Distance Directory Assistance Call Completion (DACC) services. North State interprets SB814 to clearly deregulate "long distance operator services." The FCC in 47 CFR

51.5 defines operator services as "any automatic or live assistance to a consumer to arrange for billing or completion of a telephone call. Such services include, but are not limited to, busy line verification, emergency interrupt, and operator directory assistance services." (emphasis added). Thus, DA service falls within the definition of operator services.

MCImetro Access Transmission Services, LLC, MCI WorldCom Network Services, Inc. and MCI WorldCom Communications, Inc. (MCI), individually, concurred with the Competitive Carriers' reply comments but specifically addressed certain initial comments by Verizon. Noting that Verizon had proposed to remove from its tariffs the Defined-Radius Discount Ceiling Plan, which contains a credit provision to IXCs when intrastate access charges exceed average intraLATA toll rates, MCI maintained that SB814 deregulated long distance services but does not affect the Commission's authority over access charges. Moreover, the Plan should not be detariffed. Such action would imply that the burden has shifted to IXCs to demonstrate that anti-competitive activity has occurred.

ALLTEL generally endorsed the Reply Comments of Sprint but expressed particular concern regarding the Public Staff's proposed amendment to Rule R12-17(b) to add a subsection (4), which would require LECs to provide global toll denial free of charge. ALLTEL does not believe that it should have to provide global toll denial free of charge, as to those types of toll denial for which it presently has tariffed rates, other than in conjunction with the Lifeline program. The proposed rule should be modified to provide that companies will offer basic toll denial free of charge, but any LEC with tariffed rates for optional toll denial services will be unaffected. ALLTEL believes that all CLPs should be able to impose global toll denial unilaterally.

With respect to the bundling and promotion rules proposed by the Competitive Carriers, ALLTEL argued that such rules are unwarranted and would work against the purposes of SB814.

NCPA argued that the long distance rate cap provisions of Rules R13-7 and R13-9 should be repealed as a result of 5B814, and it s'pported the revisions to Rules R13-7(d) and R13-9(c), (d), and (f) proposed by the Public Staff. However, the NCPA opposed the new consumer disclosure requirements set out in the Public Staff's proposed amendments to Rules R13-5(u) and Ri 3-7(h), which would adopt disclosure requirements on intrastate operator-assisted and confinement facility toll calls made from payphones that mirror the regulations adopted by the FCC with respect to interstate operator-assisted payphone calls. The NCPA argued that this proposal would require an "immediate and substantial outlay of capital" in order to purchase the equipment necessary to comply with this requirement. For example, the cost of replacing PayTel's legacy equipment would be approximately $940,000. Unlike interstate calls, intrastate rates vary dramatically and consist of many more rate elements. In short, the legacy equipment that exists now to comply with FCC rules as to interstate calls cannot be used to comply with the new rules. Moreover, much of the legacy equipment is deployed at county jails which do not generate the cash flow sufficient to justify the purchase of new equipment. Should the Commission be inclined to impose new requirements, it should grandfather existing deployed equipment for the life of the contract currently in place, an exemption that was recently granted by the Georgia Public Service Commission in a general proceeding regarding long distance rates applicable to confinement facilities. The NCPA doubted that deregulated long distance rates would lead to customer dissatisfaction and observed that payphone rates in North Carolina are relatively low and that the independent payphone industry is facing higher costs generally.

However, on November 13, 2003, the NCPA and Pay Tel submitted a letter stating that, pursuant to discussions with the Public Staff, they were withdrawing their grandfathering proposal. They were now confident that there was a consumer disclosure approach which would both comply with the Public Staff's proposal and address their own concerns. They requested a six-month transition period for implementation as proposed by Sprint.

Competitive Carriers cautioned the Commission not to rely solely on the comments of the parties to determine what changes to the ILEC price plans should be approved. A thorough review of each price plan should be undertaken before determining whether a change is necessitated by SB814. In particular, the Commission should examine closely whether language should be eliminated from the price plans which deals with the Commission's review of those plans. While an ILEC can effectively veto any Commission-proposed changes by choosing to remain with the existing plan, this does not deprive the Commission of the authority to review and order appropriate changes to the plan. The Commission should also not remove the requirement that price plan companies file TS-1 and ARMIS reports. SB814 does indeed say that a price plan ILEC's earnings cannot be considered in determining whether a price plan is consistent with the public interest, but the Commission did not thereby lose its authority under G.S. 62-36 to require these reports. The Competitive Carriers further argued that the Commission should not remove from ALLTEL's price plan the requirement to file contract service arrangements (CSA5). The filing of CSAs is essential to ensure that CLPs have access to information, so they can develop competitive strategies.

As to the Public Staff's Initial Comments, the Competitive Carriers (1) agreed with the Public Staff's statements concerning the Ceiling Rate Plan, (2) disagreed with the proposed disclosure and reporting requirements regarding long distance payphone s'rvice and alternative operator services, (3) agreed with the Public Staff that the Commission no longer has the authority to require flow-through in the rates of interexchange services, (4) generally disagreed with the Public Staff's proposals with regard to Rules R12-8 and R12-17, although the Competitive Carriers accepted the suggestion that applicants for local service not wishing to subscribe to toll service should be provided toll denial free of charge, and (5) disagreed with any "implication" in the Public Staff's comments that SB814 has any application to the CLPs' promotions and bundled service offerings other than in the limited and specific circumstance where such offerings involve both regulated and unregulated services with price discounts on unregulated services.

With specific reference to toll denial, the Competitive Carriers argued that the Public Staff's proposals would create uncertainty as to those circumstances in which global toll denial would apply. While long distance services are no longer regulated, interexchange carriers do remain subject to certification requirements, and both competitive and incumbent local exchange carriers are subject to Rule R12-17(d). SB814 does not prohibit the Commission from continuing to permit global toll denial or from regulating instances in which it may be applied. If the Public Staff intends to limit the ability of a carrier to impose toll denial only to its own toll services, this would have the effect of causing higher uncollectibles, bad debts, higher administrative costs, and, eventually, higher toll rates.

With specific reference to CLPs' promotions and bundled service offerings, the Competitive Carriers pointed out that, pursuant to G.S. 62-110(f1), the Commission had exempted CLPs from notifying the Commission of promotions or changes in service offerings. The Commission had also eliminated the price list requirement. The Public Staff observed that the Commission's general authority under G.S. 62-110(f1) appeared to have been circumscribed by the amendment to G.S. 62-133.5(f) requiring one-day's notice. While the Competitive Carriers agree that SB814 affects the Commission's authority to exempt CLP promotions and bundles as to the specific circumstance specified in the revision, they disagreed with any "suggestion or implication" that the Commission's authority with respect to CLPs has changed in any other manner. The Competitive Carriers further observed that, since CLP services have been "deregulated" under G.S. 62-110(f1), the concept of a price discount on a "nonregulated," but not on a "regulated" service, as part of a bundled service or promotion simply has no application where the underlying services are negotiated with each customer to begin with. However, this does not mean that SB814 is a nullity as applied to CLPs. Because the Commission retains general authority over CLP service offerings, the Commission could potentially adopt regulatory requirements applicable to CLP services that would cause the Commission to regard CLP service offerings as "regulated." The only way to harmonize G.S. 62-133.5(f) and 62-110(f1) is

to read 62-133.5 as applying only to CLP filings "involving both regulated and nonregulated services that feature price discounts that apply exclusively to services not regulated by the Commission."

CTC provided a list 'f tariff services with associated revenue amounts to be deregulated and an impact analysis on North Carolina jurisidictional revenues. CTC also stated its strong belief that Long Distance Directory Assistance and Long Distance Assistance Call Completion services should be deregulated.

BellSouth argued that when the Commission ultimately decides which long distance and long distance operator services are impacted by SB814, this decision should be applied equally to all companies with identical or similar services. BellSouth also argued that it disagreed with the Public Staff's recommendation that certain language in Rule R12-17 concerning the imposition of global toll denial should be stricken as inconsistent with SB814. BellSouth noted that the imposition of global toll denial is a function that can be performed only by a regulated LEC or CLP. While SB814 changed the regulatory classification of long distance and long distance operator services, it did not eliminate the Commission's general supervisory powers over LECs, nor did it impact the Commission's ability to counter the likelihood of consumer fraud perpetrated on other companies, such as interexchange carriers, that remain under the Commission's jurisdiction. The Commission should therefore use its general supervisory powers to allow local carries to retain global toll denial authority as currently authorized.

MebTel submitted documentation of rate elements and revenues being removed from its price plan and a statement of the monetary impact of the detariffing on North Carolina jurisdictional revenues. MebTel stated that it interprets "long distance" to include all toll traffic both interLATA and intraLATA. The only calls that would be excluded from this category would be calls within the ILEC's local calling area, calls made within the ILEC's Extended Local Calling Area, and Local Measured Service calls. MebTel interprets Long Distance Operator Services to be deregulated to include any automated or live assistance to a consumer placing a toll call that alters the billing arrangement or aids in the completion of the call. Long Distance Operator Services should include directory assistance, collect calls, credit card calls, person-to-person calls, busy line verification, and emergency interrupt.

Verizon submitted a schedule containing a summary of the revenues to be removed from its price regulation plan and estimates of the impact of removing deregulated services on North Carolina jurisdictional revenues.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The purpose of this docket, generally speaking, is to conform Commission rules, policies, and practices to those things that are necessarily required under SB814. In addition, there are rules, policies, and practices which it may be convenient or in the public interest to modify in light of the passage of SB814 but which are not, strictly speaking, necessary to conform to SB814. The parties made both types of proposals, and this order addresses both types of revisions. In the former, Commission discretion is relatively limited; while in the latter, Commission discretion is much greater.

For the convenience of the reader, the analysis and recommendations regarding proposals are broken down into four main categories: tariffs, changes to Commission rules, changes to price plans, and miscellaneous.

I. Tariffs

The Public Staff, the ILECs, and the IXCs were in broad agreement as to which services were in fact long distance or long distance operator services and therefore ought to be detariffed. However, there were a few exceptions.

CTC and North State argued that long distance directory assistance was an operator service that ought to be detariffed. Verizon had originally included directory assistance on its list of detariffed services but later withdrew it. The Public Staff opposed the classification of LEC directory assistance as a long distance operator service, noting that SB814 had not explicitly denominated it as such.

Verizon did, however, take the opportunity to propose deletion of the toll imputation requirement under the Defined Radius Discount Calling Plan. The Public Staff opposed this proposal, noting that, although toll rates have been deregulated, switched access rates continue to be regulated; and these credits should therefore be retariffed. The Public Staff also observed that price plan proscriptions against anticompetitive practices support continued Commission oversight of these credits.

CONCLUSIONS

The Commission concludes the following:

1. That ILEC directory assistance should not to be classified as a long distance operator service and therefore should not be detariffed. In addition to LEC directory assistance not having been specified in SB814 as a long distance operator service, it should also be observed that directory assistance databases compiled by the ILECs are derived from local customer lists and are used in important part for local purposes.

2. That the toll imputation requirement under the Defined Radius Discount Calling Plans should to be maintained for the reasons set out by the Public Staff. Accordingly, Verizon should be required to retariff these credits in its Intrastate Access Tariff.

3. That the various recommendations of the Public Staff in its Reply Comments concerning the detariffing, continued detariffing, or retariffing of certain services of the ILECs and IXCs should to be adopted.

II. Rule Changes

A number of rule changes were proposed by various parties and the Public Staff which would impact Rule R1 (Practice and Procedure), Rule R9 (Telephone and Telegraph), Rule R12 (Customer Deposits for Utility Services; Disconnecting of Service), Rule R13 (Provision of Pay Telephone Service), Rule R14 and R14A (Sharing and/or Resale of Telephone Service), and Rule R15 (Regulatory Fees for Public Utilities). In addition, the Competitive Carriers proposed an undenominated rule concerning bundling and promotions.

Few of these rule change proposals were strictly necessary to conform to SB814, the notable exceptions being those relating to toll rate ceilings in Rules R13, R14, and R14A. Other proposals had more or less to recommend them as convenient and in the public interest.

A. Rule R1

The Industry Group and the Competitive Carriers made various recommendations regarding Rule R1-15 (Investigation and suspension proceedings), Rule R1-16 (Pledging assets, issuing securities, assuming obligations), Rule R1-17 (Filing of increased rates; application for authority to adjust rates), and Rule R1-32 (Filing of annual reports by public utilities).

The Public Staff opposed many of these recommendations as unnecessary or counterproductive but acceded to certain recommendations regarding Rule R1-32.

With respect to Rule R1-16, the Public Staff supported an exemption of long distance companies and PSPs from regulation under G.S. 62-1 60 and Rule R1-16, but was reluctant to recommend that CLPs also be exempted at this time. As noted previously herein, CLPs have already been granted such an exemption under a prior Commission order.

Concerning Rule R1-32, the Public Staff was willing to support the insertion of a sentence at the beginning of Rule R1-32 specifying that the rule is not applicable to IXCs or CLPs. However, while opposing the recommendation that price plan companies should be able to file copies of reports filed at the federal level as being in compliance with the rule, the Public Staff did recommend elimination of the TS-1 reporting requirement and modifications to the current annual report form, so that a single report would be provided. However, the Public Staff observed that this will take time to develop; and, until such a report form is prescribed, the current reporting requirements should be retained.

CONCLUSION

The Commission concludes that Rule R1-16 should be amended as proposed by the Industry Group and Competitive Carriers and that long distance companies, CLPs, and PSPs should be, or continue to be, exempt from G.S. 62 — Article 8 requirements.

With respect to Rule R1-32 (Filing of annual reports by public utilities), the Commission concludes that good cause exists to (1) delete the requirement for price plan companies to file TS-1 reports (necessitating modification of Rule R9-9 and elimination of references to TS-1 reporting in the several price plans) and (2) suspend the operation of Rule R1-32(d) and (e) as applied to price plan companies such that they may submit their annual reports to the FCC to the Commission in compliance with this rule. However, this later suspension will be effective only until such point as the Commission has promulgated a satisfactory rule for the content of a single annual report for price plan companies.

The purpose of this last provision is to reduce the reporting burden on the price plan companies while ensuring that the Commission has gathered appropriate financial information for purposes <u>other than</u> assessing the price plan companies' past or present earnings or rates of return as an element in the public interest analysis; for, as the Public Staff has observed, such information is still necessary for the Commission to perform its general oversight responsibilities as, for example, to have insight into maintenance costs or investment in new facilities and their nature, the sources of declining or increasing revenues, and the general financial health of the companies.

It will, of course, be critical to identify what types of information should be gathered in such a report so that the Commission can fulfill its appropriate responsibilities. To that end, the Commission requests that the Public Staff and the price plan companies confer with a view toward submitting a joint proposal by no later than March 1, 2004. If the parties cannot agree, they may submit separate reports on that date.

B. Rule R9

The Industry Group and Competitive Carriers proposed amendments to Rule R9-2 (Uniform system of accounts) and Rule R9-9 (Financial and operating reporting requirements for telephone companies). The Public Staff opposed both of these changes as overly broad and not required by SB814.

CONCLUSION

The Commission concludes that Rule R9 should not be amended, for the reasons as generally set forth by the Public Staff, except that as per the above discussion, Rule R-9 should be amended to exempt price plan companies from the TS-1 reporting requirement.

C. Rule R12

The Industry Group, Competitive Carriers, and the Public Staff all made recommendations for the modification of Rule R12 (Customer Deposits for Utility Services; Disconnecting of Service). The issue that aroused the most concern among the parties was the proposal by the Public Staff to severely limit the availability of global toll denial. However, the Public Staff upon reflection, withdrew its proposed changes concerning global toll denial which would have impacted Rule R12-17(b)(4), (b)(8), (d)(1)-(3) and (f)-(i).

The Public Staff opposed the proposed change to Rule R12-17(i)(2)(F) which would have allowed companies to treat long distance services differently from other nonregulated charges with respect to the requirement to place nonregulated charges in a separate page of the bill, or in a separate section of the bill, and to notify customers on the same page they cannot lose their local service for nonpayment of these charges.

The Public Staff concurred or did not object to the changes proposed by the Industry Group and Competitive Carriers with respect to Rules R12-17(a)(1), (a)(2), (b)(4), (d)(2) and (d)(2)(A). In addition, the Public Staff recommended that Rule R12-17(c)(2) should be repealed, and that the amendment prepared by the Industry Group and Competitive Carriers to Rule R12-9(a) be slightly revised to read "for requested services offered by public utilities subject to the jurisdiction of this Commission."

CONCLUSION

The Commission concludes that Rule R12-17(a)(1), (a)(2), (b)(4), (d)(2), and (d)(2)(A) should be amended as recommended generally by the Competitive Carriers, the Industry Group, and the Public Staff, that Rule R12-17(c)(2) should be repealed as recommended by the Public Staff, and that Rule R12-9(a) should be modified as recommended by the Public Staff. The proposed changes to Rule R12-17(i)(2)(F) should be denied for the reasons set forth by the Public Staff.

D. Rule R13

The proposals made by the Public Staff and the NCPA were substantially identical, but the Public Staff also made certain other recommendations: the elimination of Rule R13-7(d), because charges for automated collect calls are already addressed in Rule R13-9; a new Rule R1-3-5(u), to require intrastate toll rate information according to rules mirroring those of the FCC regarding intrastate calls; and a new Rule R13-7(h), identifying the PSP as the OSP for automated collect calls made from the PSP's payphones and subject to the rate disclosure requirements of Rule R13-5(u). The Industry Group generally tracked the recommendations of the NCPA but also proposed modifications to Rules R13-9(e) and R13-9(g), which the Public Staff opposed.

The issue that excited the most comments was the proposal of the Public Staff in R13-5(u) to require PSPs to provide rate disclosure information for intrastate toll calls according to the FCC rules concerning the same subject with respect to interstate calls. Sprint asked for a six-month grace period for implementation while the NCPA initially argued that such a requirement was unreasonably burdensome and expensive and asked that current equipment be grandfathered. The NCPA, however, later dropped its opposition to the Public Staff proposal and concurred with Sprint's six-month grace period proposal.

CONCLUSION

The Commission concludes that the amendments proposed by the Public Staff should be adopted. The Commission believes strongly that, in light of the deregulation of toll service, the proposed Rule R13-5(u) is in the public interest and should be adopted; provided, however, that the effective date of such rule should be delayed for a period of six-months from the date of issuance of this Order.

E. Rules R14 and R14A

The Industry Group and the Competitive Carriers filed identical proposals, to which the Public Staff was agreeable.

CONCLUSION

The Commission concludes that it should adopt the amendments proposed by the Industry Group and Competitive Carriers except that the conjunction "and" should be added at the end of subsection (a) of Rule R14-11.

F. Rule R15

The Industry Group and Competitive Carriers proposed an amendment to subsection (e) that would limit the ability of the Commission or Public Staff to require support data and workpapers regarding calculation of the regulatory fees from rate of return public utilities only. The Public Staff opposed this recommendation.

CONCLUSION

The Commission concludes that this proposed amendment should not be adopted for the reasons set forth by the Public Staff.

G. Promotions and Bundles (New Rule)

The Competitive Carriers proposed an extensive new rule addressing promotions and bundled service offerings featuring price discounts on nonregulated services. Several ILECs objected that the proposed rules would be unduly burdensome and were contrary to the purposes of the amendment to G.S. 62-133(f). The Public Staff agreed with the ILECs but stated it did not oppose certain Commission requirements.

CONCLUSION

The Commission concludes that the Competitive Carriers' proposed rules on this subject should not be adopted for the reasons as generally set out by various ILECs and the Public Staff. The Commission does, however, believe that it should require that notices of promotions and bundled service offerings featuring price discounts on nonregulated services should include: (1) a detailed description of the promotions/bundles, (2) the dates during which the promotions/bundles will be offered, (3) a justification statement for one-day's notice eligibility, and (4) confirmation that accounting procedures are in place to comply with the statute.

III. Price Plans

The price plan ILECs filed various recommendations regarding price plan amendments. All but one of the companies proposed the elimination of language that calls for the Commission to review the operation of the price plan.

Although the Public Staff stated in its Initial Comments that it did not believe that any changes to the price plans are required, the Public Staff in its Reply Comments concurred in a small

number of specific instances where the companies had identified language that conflicts with SB814. In addition, the Public Staff stated that all the price plan companies will need to file revisions to their List of Services.

CONCLUSION

The Commission concurs with the Public Staff's position that price plan revisions in this docket should be undertaken cautiously and should generally be limited to only those instances that SB814 clearly requires. The Commission specifically recognizes that amendments to G.S. 62-133.5(c) empower the price plan LECs to continue to operate under their existing plans if the Commission disapproves all or part of a petition to modify. Accordingly, the Commission concludes that it should adopt the recommendations of the Public Staff with respect to price plan revisions and the List of Services but deny all others and require the companies to refile the revised price plans. The price plan companies shall also eliminate the TS-1 reporting requirement from their price plans.

IV. Miscellaneous

In addition to revisions to tariffs, Commission rules, and price plans, there are several miscellaneous issues to be addressed, as follows:

1. Alternative Operator Services (AOS). In its Initial Comments, the Public Staff argued that SB814 did not impair the Commission's ability to require certain IXC applicants with a high proportion of traffic likely to come from transient venues to file monthly reports indicating that their percentage of AOS-type traffic does not exceed 50% of their total. The Public Staff also cited to G.S. 62-110.4 which specifically addresses AOS certification. No other party commented on this issue.

2. Flow-Throucih Obliciations of IXCs. In its Initial Comments, the Public Staff argued that the Commission no longer has the authority to order IXCs to flow through access charges to customers. While arguably such preemption only became effective after May 30, 2003, it would be extremely difficult to fully enforce such obligations. Accordingly, the Public Staff recommended that no further action be taken in this regard, that the outstanding flow-through requirements in Docket No. P-100, Sub 72 be repealed, and that Docket No. P-100, Sub 72a be closed. No party objected to this recommendation.

3. Ceiling Rate Plan. The Public Staff argued that issues relating to the Ceiling Rate Plan, adopted in 1985 and last modified on December 9, 1993, in Docket No. P-100, Sub 72, are now moot. The Public Staff recommended that the Ceiling Rate Plan be repealed. No other party objected.

4. Returned Check Charges. Amendments to G.S. 62-133.5(d1) provided that returned check fees charged by price plan LECs would not be tariffed or otherwise regulated by the Commission. The Public Staff in its Initial Comments recommended that "any company that intends to apply a charge for returned checks" be allowed to maintain a tariff provision explaining this charge. The Alliance argued that G.S. 62-133.5(dl) should be extended to rate base/rate of return LECs as well as price plan LECs.

5. Mergers and Transfers. In practice, long distance companies and PSPs which propose to merge or transfer assets and customers have been required to file an application and obtain prior Commission approval pursuant to G.S. 62-111(a). In light of the level of competition in the North Carolina interexchange and payphone markets, the Commission believes that utilities providing only intraLATA long distance service, interLATA long distance service, and/or long distance operator service, and payphone service providers should be granted an exemption from G.S. 62-111(a) pursuant to the second paragraph of G.S. 62-110(b). Therefore, such companies will no longer be required to file an application seeking Commission approval of mergers and the transfer of assets and customer bases. However, it should be noted that no company may offer such services without first

obtaining a certificate of public convenience and necessity and that companies should continue to abide by Rule R20-1, concerning slamming, which remains in effect. Although no party filed comments on this subject, the Commission believes that this exemption from G.S. 62-111(a) is both convenient and in the public interest and should be approved in this docket.

CONCLUSION

The Commission concludes that the Public Staff's recommendations for Items 1-3 above should be adopted. As to Item 4 (returned check charges), the Commission believes any further tariffing requirement as to returned check charges imposed by price plan companies is inconsistent with the statutory language providing that such charges "shall not be tariffed or otherwise regulated by the Commission." Similarly, the Commission believes the Alliance has provided no compelling reason to go beyond the statutory restriction on this provision, which is limited to price plan companies.

With respect to Item 5, the Commission concludes that utilities providing only intraLATA long distance service, interLATA long distance service, and/or long distance operator service, and PSPs should be granted an exemption from G.S. 62-111(a).

IT IS, THEREFORE, ORDERED as follows:

1. That, with respect to tariffs:

a. ILEC directory assistance shall not be classified as a long distance operator service, and any ILEC that has detariffed this service shall retariff same.
b. The toll imputation requirement under the Defined Radius Discount Calling Plans shall be maintained. Verizon shall therefore retariff these credits in its Intrastate Access Tariff.
c. The various recommendations of the Public Staff in its Reply Comments concerning detariffing, continued tariffing, or retariffing of certain services of the ILECs and IXCs shall be adopted, and the ILECs and IXCs shall take the necessary steps to comply with same.

2. That the Commission rules and regulations be amended as set out in Appendix B. Rule R13-5(u) shall become effective six months from the date of issuance of this Order. All other rules shall become effective upon the date of issuance of this Order. The Public Staff and price plan companies shall confer with a view toward submitting a joint proposal by no later than March 1, 2004, for a single annual report to be required under Rule R1-32 for price plan companies. If the parties cannot agree, they may submit separate reports on that date. Until such time as the new annual report requirement for price plan companies is promulgated, such companies need submit to the Commission only the FCC report.

3. That LECs and CLPs offering promotions or bundles in connection with G.S. 62-133(f) shall include, when such are filed, a notice including the following:

a. additional description of the promotions/bundles;
b. the dates during which the promotions/bundles will be offered;
c. a justification statement for one-day's eligibility; and
d. confirmation that accounting procedures are in place to comply with the statute.

4. That, with respect to Price Plan revisions, the ILECs shall make only such revisions as are in conformity with the conclusions set forth above.

5. That, with respect to miscellaneous matters:

a. AOS certification requirements shall remain as they are currently;
b. outstanding flow-through requirements upon IXCs in Docket No. P-100, Sub 72 shall be repealed and no further action in this regard shall be taken and that Docket No. P-100, Sub 72a be closed;
c. the Ceiling Rate Plan is repealed;
d. the detariffing of returned check charges shall not be extended to non-price plan LECs; and
e. utilities providing only intraLATA long distance service, interLATA long distance service, and/or long distance operator service, and PSPs shall be exempt from G.S. 62-111(a).

ISSUED BY ORDER OF THE COMMISSION.
This the 2' day of January, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb121603.01

Commissioner Robert V. Owens, Jr. dissents.

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

SESSION LAW 2003-91
SENATE BILL 814

AN ACT TO CLARIFY THE LAW REGARDING COMPETITIVE AND DEREGULATED OFFERINGS OF TELECOMMUNICATIONS SERVICES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 62-2 reads as rewritten:
"§ 62-2. Declaration of Policy.
(a) Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:
(1) To provide fair regulation of public utilities in the interest of the public;
(2) To promote the inherent advantage of regulated public utilities,-
(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;
(3a) To 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, including but not limited to conservation, load management and efficiency programs, as additional sources of energy supply and/or energy demand reductions. To 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 which is achievable, including consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills;
(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;
(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and

existing investors of such utilities; and to that end to authorize fixing of rates in such a manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the rate-making process for the investment of public utilities in plants under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development;

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(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply; and

(9) To facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of expansion funds for natural gas local distribution companies or gas districts to be administered under the supervision of the North Carolina Utilities Commission.

(b) To these ends, therefore, authority shall be vested in the North Carolina Utilities commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this chapter shall be construed to -imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph company, competitive offerings of certain types of telephone and telecommunications services may be in the public interest. Consequently, authority shall be vested in the North Carolina utilities Commission to allow competitive offerings of local exchange, exchange access, and long distance services by public utilities defined in G.S. 62- 3(23)a.6. and certified in accordance with the provisions of G.S. 62-110, and the Commission is further authorized after notice to affected parties and hearing to deregulate or to exempt from regulation under any or all provisions of this Chapter: (i) a service provided by any public utility as defined in G.S. 62-3(23)a.6. upon a finding that such service is competitive and that such deregulation or exemption from regulation is in the public interest; or (ii) a public utility as defined in G.S. 62-3(23)a.6., or a portion of the business of such public utility, upon a finding that the service or business of such public utility is competitive and that such deregulation or exemption from regulation is in the public interest.

~~The policy and authority stated in this section shall be applicable to common carriers of passengers by motor vehicle and their regulation by the North Carolina Utilities Commission only to the extent that they are consistent with the provisions of the Bus Regulatory Reform Act of 1995.~~ Notwithstanding the provisions of G.S. 62-110(b) and G.S. 62-134(h), the following services provided by public utilities defined in G.S. 62-(23)a.6.-are sufficiently competitive and shall no longer be regulated by the Commission: (i) intraLATA long distance service; (ii) interLATA long distance service; and (iii) long distance operator services. A public utility providing such services shall be permitted, at its own election, to file and maintain tariffs for such services with the Commission up to and including September 1, 2003. Nothing in this subsection shall limit the Commission's authority regarding certification of providers of such services or its authority to hear and resolve complaints against providers of such services alleged to have made changes to the services of customers or imposed charges without appropriate authorization. For purposes of this subsection, and notwithstanding G.S. 62-110(b), "long distance services" shall not include existing or future extended area service, local measured service, or other local calling arrangements, and any future extended area service shall be implemented consistent with Commission rules governing extended area service existing as of May 1, 2003.

The North Carolina Utilities Commission may develop regulatory policies to govern the provision of telecommunications services to the public which promote efficiency, technological innovation, economic growth, and permit telecommunications utilities a reasonable opportunity to compete in an emerging

competitive environment, giving due regard to consumers, stockholders, and maintenance of reasonably affordable local exchange service and long distance service.

(c) The policy and authority stated in this section shall be applicable to common carriers of passengers by motor vehicle and their regulation by the North Carolina Utilities Commission only to the extent that they are consistent with the provisions of the Bus Regulatory Reform Act of 1985."

SECTION 2. G.S. 62-133,5 reads as rewritten:

"**§ 62-133.5. Alternative regulation, tariffing, and deregulation of telecommunications utilities.**

(a) Any local exchange company, subject to the provisions of G.S. 62-110(f1), that is subject to rate of return regulation pursuant to G.S. 62-133 or a form of alternative regulation authorized by subsection (b) of this section may elect to have the rates, terms, and conditions of its services determined pursuant to a form of price regulation, rather than rate of return or other form of earnings regulation. Under this form of price regulation, the Commission shall, among other things, permit the local exchange company to determine and set its own depreciation rates, to rebalance its rates, and to adjust its prices in the aggregate, or to adjust its prices for various aggregated categories of services, based upon changes in generally accepted indices of prices. Upon application, the Commission shall, after notice and an opportunity for interested parties to be heard, approve such price regulation, which may differ between local exchange companies, upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards that the Commission may adopt; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest. Upon approval, and except as provided in subsection (c) of this section, price regulation shall thereafter be the sole form of regulation imposed upon the electing local exchange company, and the Commission shall thenceforth regulate the electing local exchange company's prices, rather than its earnings. The Commission shall issue an order denying or approving the proposed plan for price regulation, with or without modification, not more than 90 days from the filing of the application. However, the Commission may extend the time period for an additional 90 days at the discretion of the Commission. If the Commission approves the application with modifications, the local exchange company subject to such approval may accept the modifications and implement the proposed plan as modified, or may, at its option, (i) withdraw its application and continue to be regulated under the form of regulation that existed immediately prior to the filing of the application; (ii) file another proposed plan for price regulation; or (iii) file an application for a form of alternative regulation under subsection (b) of this section. If the initial price regulation plan is approved with modifications and the local exchange company files another plan pursuant to part (ii) of the previous sentence, the Commission shall issue an order denying or approving the proposed plan for price regulation, with or without modifications, not more than 90 days from that filing by the local exchange company.

(b) Any local exchange company that is subject to rate of return regulation pursuant to G.S. 62-1 33 and which elects not to file for price regulation under the provisions of subsection (a) above may file an application with the Commission for forms of alternative regulation, which may differ between companies and may include, but are not limited to, ranges of authorized returns, categories of services, and price indexing. Upon application, the Commission shall approve such alternative regulatory plan upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards established by the Commission; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest. The Commission shall issue an order denying or approving the proposed plan with or without modification, not more than 90 days from the filing of the application. However, the Commission may extend the time period for an additional 90 days at the discretion of the Commission. If the Commission approves the application with modifications, the local exchange company subject to such approval may, at its option, accept the modifications and implement the proposed plan as modified or may, at its option, (i) withdraw its application and continue to be

regulated under the form of regulation that existed at the time of filing the application; or (ii) file an application for another form of alternative regulation. If the initial plan is approved with modifications and the local exchange company files another plan pursuant to part (ii) of the previous sentence, the Commission shall

issue an order denying or approving the proposed plan, with or without modifications, not more than 90 days from that filing by the local exchange company.

(c) Any local exchange company subject to price regulation under the provisions of subsection (a) of this section may file an application with the Commission to modify such form of price regulation or for other forms of regulation. Any local exchange company subject to a form of alternative regulation under subsection (b) of this section may file an application with the Commission to modify such form of alternative regulation. Upon application, the Commission shall approve such other form of regulation upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards established by the Commission, (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest. If the Commission disapproves, in whole or in part, a local exchange company's application to modify its existing form of price regulation, the company may elect to continue to operate under its then existing plan previously approved under this subsection or subsection (a) of this section.

(d.) In determining whether a price regulation plan is otherwise consistent with the public interest, the Commission shall not consider the local exchange company's past or present earnings or rates of return.

(d1) ~~(d)~~ Any local exchange company subject to price regulation under the provisions of subsection (a) of this section, or other alternative regulation under subsection (b) of this section, or other form of regulation under subsection (c) of this section shall file tariffs for basic local exchange service and toll switched access services stating the terms and conditions of the services and the applicable rates. However, fees charged by such local exchange companies applicable to charges for returned checks shall not be tariffed or otherwise regulated by Commission. The filing of any tariff changing the terms and conditions of such services or increasing the rates for such services shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, 14 days after filing. Any tariff reducing rates for basic local exchange service or toll switched access service shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, seven days after filing. Any local exchange company subject to price regulation under the provisions of subsection (a) of this section, or other alternative regulation under subsection (b) of this section, or other form of regulation under subsection (c) of this section may file tariffs for services other than basic local exchange services and toll switched access services. Any tariff changing the terms and conditions of such services or increasing the rates for an existing service or establishing the terms, conditions, or rates for a new service shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, 14 days after filing. Any tariff reducing the rates for such services shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, seven days after filing. In the event of a complaint with regard to a tariff filing under this subsection, the Commission may take such steps as it deems appropriate to assure that such tariff filing is consistent with the plan previously adopted pursuant to subsection (a) of this section, subsection (b) of this section, or subsection (c) of this section.

(e) Any allegation of anticompetitive activity by a competing local provider or a local exchange company shall be raised in a complaint proceeding pursuant to G.S. 62-73.

(f) Notwithstanding the provisions of G.S. 62-140, or any Commission rule or regulation, the Commission shall permit a local exchange company or a competing local provider to offer competitive services with flexible pricing arrangements to business customers pursuant to contract and shall permit

other flexible pricing options. Local exchange companies and competing local providers shall be required to give the Commission one business day's notice but need not seek Commission approval for any promotion or bundled service offering for residence or business customers involving both regulated and nonregulated services that feature price discounts that apply exclusively to services not regulated by the Commission. Furthermore, local exchange companies and competing local providers may offer special promotions and bundles of new or existing service or products without the obligation to identify or convert existing customers who subscribe to the same or similar services or products. The Commission's complaint authority under G.S. 62-73 and subsection (e) of this section is applicable to any promotion or bundled service offering filed or offered under this subsection.

(g) The following sections of Chapter 62 of the General Statutes shall not apply to local exchange companies subject to price regulation under the terms of subsection (a) of this section: G.S. 62-35(c), 62-45,

62-51, 62-81, 62-111, 62-130, 62-131, 62-132, 62-133, 62-134, 62-135, 62-136, 62-137, 62-139, 62-142, and 62-153."

SECTION 3. This act is effective when it becomes law.
In the General Assembly read three times and ratified this the 19th day of May, 2003.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Richard T. Morgan
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 4:55 p.m. this 30th day of May, 2003

APPENDIX B
Page 1 of 5

Amendments to Commission Rules

Rule R1

1. Rule R1-16(a) is amended to read as follows:

"(a) o public utility except Payphone Service Providers, Competing Local Providers, and utilities providing only intraLATA long distance service, interLATA long distance service and/or long distance operator service, shall pledge its assets, issue securities, or assume liabilities of the character specified in G.S. 62-161, except after application to and approval by the Commission. Such applications shall be made under oath, filed with the Commission with twenty (20) copies, and shall contain the following specific information:"

2. Rule R1-32 is amended by inserting the following before subsection (a):

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"(This rule is not applicable to interexchange carriers, pursuant to *Order Modifying Ceiling Rate Plan and Financial Reporting Requirements,* Docket No. P-100, Sub 72, December 9, 1993, and to competing local providers, pursuant to Rule R1 7-2(j).)"

Rule R9

1. The first clause of Rule R9-9(A) is amended to read as follows:

"All local exchange companies except for these under price plans, shall file the following financial and operating information with the Public Staff and Commission Staff:"

Rule R12

1. Rule R12-9(a) is amended to read as follows:

"(a) Declaration of Policy. -- No 'penalties,' 'discounts' or 'net-and-gross' rate differentials shall be imposed upon North Carolina consumers for regulated services offered by public utilities subject to the jurisdiction of this Commission, for the reason that those rate differentials are confusing and misleading, and the monthly rates of 5% or 10% heretofore charged are arbitrary and unreasonable. This Commission recognizes, however, that there are interest, finance, or service costs directly attributable to customers who excessively delay payment of utility bills, and considers that it is appropriate for a utility to attempt to recoup a

portion of thosecosts by applying such interest, finance or service charges as may be reasonable and lawful."

2. Rule R12-17(a)(1) is amended to read as follows:

"(1) For purposes of this rule, 'Local service' includes basic local exchange service (including extended area service [expanded local calling (ELCA), and any other NCUC-regulated telephone service offered by a single corporate entity within a single LATA.

3. Rule R12-17(a)(2) is amended to read as follows:

"(2) 'Charges for local service' include charges for local service, as defined in Rule R12-17(a)(1), the state sales tax and federal excise tax associated with local service, the subscriber line charge (SLC), the primary interexchange carrier charge (PICC) applied by and on behalf of the local carrier, the local number portability (LNP) charge, and state and federal universal service surcharges applied by and on behalf of the local carrier. 'Charges for local service' do not include charges applied by the local carrier on behalf of another carrier or entity, the E911 and telecommunications relay service surcharges or other nonregulated charges, e.g., charges for intraLATA toll service, interLATA toll service, or operator service, charges for voicemail, Internet service, inside wiring, customer premises equipment, and wireless service."

4. Rule R12-17(b)(4) is amended to read as follows:

"(4) If the regulated past due balance owed for local service or the surrogate amount has been paid in full or is sufficiently current, the telephone utility will continue to provide the customer with the customer's current local service. If toll service charges remain unpaid, global toll denial may be imposed, after appropriate notice under Commission

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rules. The notice of global toll denial will also advise the customer that they may subscribe to any local services, as defined in Rule R12-17(a)(1), offered by the utility."

5. Rule R12-17(c)(2) is deleted.

6. Rule R1-17(d)(2) and R1-17(d)(2)(A) are amended to read as follows:

"(2) A local service provider may not impose global toll denial for failure to pay charges for:

(A) Calls to 900 numbers and nonregulated charges other than toll services; or"

<u>Rule R13</u>

1. Rule R13-5 is amended by adding a new subsection (u) to read as follows:

"(u) Each PSP must ensure that all operator service providers that provide service at its payphones satisfy the following requirements for each and every non-access code operator-assisted call made from the PSP's payphones. The operator service provider must:

(1) Identify itself, audibly and distinctly, to the consumer (the party who will be billed for the telephone call) at the beginning of each call and before the consumer incurs any charge for the call;

(2) Permit the consumer to terminate the telephone call at no charge before the call is connected;

(3) Disclose immediately to the consumer, upon request and at no charge before the call is connected:

(i) A quotation of its rates or charges for the call;
(ii) The methods by which such rates or charges will be collected; and
(iii) The methods by which complaints concerning such rates, charges, or collection practices will be resolved; and

(4) Disclose, audibly and distinctly to the consumer, at no charge and before connecting any intrastate non-access code operator service call, how to obtain the total cost of the call, before providing further oral advice to the consumer on how to proceed to make the call. The oral disclosure required in this subsection shall instruct consumers that they may obtain applicable rate and surcharge quotations either, at the option of the provider of operator services, by dialing no more than two digits or by remaining on the line. The phrase 'total cost of the call' as used in this paragraph means both the variable (duration-based) charges for the call and the total per-call charges, exclusive of taxes, that the PSP or carrier, or its billing agent, may collect from the consumer for the call."

2. Rule 13-7 is amended to read as follows:

"PSP instruments may be arranged or programmed to provide automated collect calling and the PSP may bill called parties who agree to pay for calls, provided:

(a) The PSP has secured the authority to furnish such service as specified by Rule R13-3(c);
(b) The PSP instrument is arranged or programmed to require a positive response from the called party indicating willingness to pay for the call before completing the call, and to terminate the call without charge in the absence of a positive response;
(c) Except in the case of a call originated from a confinement facility, if the recipient of an automated collect call does not act to either accept or reject the call, the call must be terminated and a call must be initiated to an operator of a certified carrier, or instructions must be provided on how to complete the call using an operator of a certified carrier. In the case of a call originated from a confinement facility, the call must be terminated;
(d) The PSP must use a local or certified interexchange carrier to transmit all communications involved in the call;
(e) The PSP shall block or arrange for blocking of automated collect calls to 900, 976, 950, 700, 10xxx; and 101xxxx codes;
(f) The billing authority granted by this rule may be exercised only in connection with automated collect calls;
(g) Authorization to employ automated collect capability must not be taken to allow restriction of the end user's ability to make other types of calls, such as customer-dialed credit card or sent-paid coin caller (see Rules R13-5(i) and (j)); and
(h) The PSP shall be considered the operator service provider for all automated collect calls, and automated collect service provided by PSPs shall be subject to all of the operator service provider disclosure requirements set forth in Rule R13-5(u)."

3. Rule R13-9 is amended to read as follows:

"The PSP is responsible for ensuring that calls originated or terminated at his PSP access line or trunk are rated in accordance with the following:

(a) *Local Sent-paid.* Pursuant to Federal Communications Commission preemption of state authority over local coin rates, PSPs are permitted to charge market-based rates for local coin calls.
(b) *Directory Assistance.* Pursuant to Federal Communications Commission preemption of state authority over intrastate directory assistance charges, PSPs are permitted to charge market-based rates for intrastate directory assistance calls.
(c) *0+ Other Than Automated Collect.* The end user of a PSP instrument may not be charged by the PSP for a 0+, 10xxx-0+, 101xxxx0+, or 950 local or toll call billed to a calling card, to a third number, or to the called party (collect).

(d) *0+ Local Automated Collect Station-to-Station.* The recipient of a local automated collect station-to-station call may not be charged more for the call than would have been charged by the local exchange company for a local collect station-to-station call.

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(e) *0- Calls.* All PSP instruments outside of confinement facilities must allow access to the access line provider operator at no charge. The PSP may not impose a charge on the end user for completion of 0- local and toll calls billed to a calling card, a third number, or the called number (collect).
(f) *8XX (Toll Free Number) Calls.* The end user of a PSP instrument may not be charged for the carriage and completion of any 8XX (toll free number) call."

4. Rule R14-11 is amended to read as follows:

"Providers may share local service and resell MTS and WATS to end-users within the exception group defined in Rule R14-2(e) subject to the following conditions:

(a) All end-users must occupy the same contiguous premises; and
(b) No separate charge is made for local service."

5. Rule R14A-11 is amended to read as follows:

"Providers shall, for so long as they receive flat rate local service from the serving local exchange company, only charge flat monthly rates as opposed to measured or message rates for local exchange service."

(Note: Rule R13-5(u) becomes effective six months from the date of issuance of this Order. All other rules become effective upon the date of issuance of this Order.)

DOCKET NO. P-100, SUB 72b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Implementation of Session Law 2003-91, Senate Bill 814)
Titled "An Act to Clarify the Law Regarding Competitive and) ERRATA ORDER
Deregulated Offerings of Telecommunications Services")

BY THE CHAIR: At the bottom of page 2 of 5 of Appendix B of the January 2, 2004, Order Concerning Compliance with Senate Bill 814, reference was made in numbered paragraph 6: "Rule R1-17(d)(2) and Rule R1-17(d)(2)(A) are amended to read as follows:". This sentence should read: "Rule R12-17(d)(2) and Rule R12-17(d)(2)(A) are amended to read as follows:".

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 5th day of January 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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DOCKET NO. P-100, SUB 72b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services"	)))))	ORDER CONCERNING CLASSIFICATION AND DISMISSING BELLSOUTH'S NOTICE OF REMOVAL OF SERVICES FROM TARIFF

BEFORE: Chairman Jo Anne Sanford and Commissioners J. Richard Conder, Robert V. Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II, and Michael S. Wilkins

BY THE COMMISSION: The Commission is authorized by G.S. 62-110(b) to issue certificates of public convenience and necessity to persons applying to offer long distance services as a public utility The only statutory definition of the term "long distance services" is in the third paragraph of G.S. 62-110(b), which reads:

> For purposes of this section, long distance services shall include the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement.

The Commission is also authorized to issue certificates for local service under G.S. 62-110(f1). Rule R17-1(h), adopted to implement this provision, defines local exchange service as " service offered by a CLP [local provider] or LEC [exchange company], without the payment of long distance charges; or dedicated service connecting two or more points within an exchange as defined on an exchange service area map of a LEC or CLP."

When the Commission granted AT&T Communications of the Southern States, Inc. (AT&T) interLATA authority in 1983, the authority of Southern Bell Telephone and Telegraph Company (later to become BellSouth Telecommunications, Inc. (BellSouth)) to provide interLATA service was cancelled. In 1996, AT&T's certificate was amended to allow it to provide local exchange service as a competing local provider (CLP). In 1997, the Commission granted a BellSouth affiliate, BellSouth Long Distance, Inc. (BSLD), a certificate to offer long distance telecommunications service as a switchless reseller. This certificate was later amended in 2002 to permit BSLD to operate as a facilities-based carrier. On June 15, 1999, BellSouth, the incumbent local exchange company (ILEC), was also granted CLP authority in all areas of North Carolina except its franchised area. On July 22, 1998, BellSouth BSE, Inc. (BSE) was granted a certificate to provide local exchange and exchange access telecommunications service as a CLP. On June 11, 2004, BSLD and BSE filed a petition for authority to merge BSE and BSLD and for authority for BSLD to operate as a CLP. The petition was approved at Regular Commission Conference on September 20, 2004.

In 2003, Senate Bill 814 (5B814) was enacted into law. It amended G.S. 62-2(b) to provide in pertinent part that:

> ...the following services provided by public utilities defined in G.S. 62-3(23)a.6. are sufficiently competitive and shall no longer be regulated by the Commission: (i) intraLATA long distance service; (ii) interLATA long distance service; and (iii) long distance operator services....

The Commission sought and received comments from parties and, with respect to long distance and long distance operator services, the parties were requested "to list and identify the

specific service offerings they deem affected and the specific tariffs to be withdrawn and cancelled." Noting in its reply comments that several parties had identified services which were not listed by other parties, BellSouth at that time expressed the view that when the Commission ultimately decided which long distance services were impacted by SB814, the decision should be ultimately applied to all companies with similar or identical services.

In its original deregulatory request, BellSouth asked to withdraw tariffs for the following services: Insufficient Funds, MTS Two-Point Service, Conference Service, IntraLATA Long Distance Verification & Interrupt, Calling Plans—Saver Service, Toll Directory Assistance Call Completion, Easy Calling Plan, Custom Rate Plan, WATS, Obsolete Long Distance MTS, and Obsolete WATS. In a joint filing with others, AT&T stated that it had withdrawn the following tariffs: AT&T General Services Tariff, AT&T Customer Network Services Tariff, AT&T Private Line Service—Schedule 9, and AT&T Private Line Service—Schedule 11. These tariffs constituted all of AT&T's tariffed intrastate offerings. BSLD made a filing withdrawing its entire intrastate long distance tariff as well. On January 2, 2004, the Commission approved BellSouth's list of withdrawn tariffs, as well as AT&T's and BSLD's withdrawal of their intrastate tariffs.

On June 11, 2004, BellSouth filed a Notice informing the Commission that it was withdrawing the following tariffs as of August 1, 2004: MegaLink, MegaLink ISDN Service, SynchroNet, MegaLink Channel Service, MegaLink Plus, MegaLink Light, LightGate Service, SmartRing, Telecommunications Priority Service, Interoffice Channels, Frame Relay Service, Voice Grade Channels, Data Transport Access Channel Service, and Due Date Changes and Expedited Charge. BellSouth explained that it had reviewed the AT&T tariffs and found that a number of the services allowed to be withdrawn were "functionally equivalent to BellSouth services that remained tariffed." BellSouth argued that removing the services listed above would place it on equal regulatory footing with AT&T.

On July 29, 2004, the Commission suspended the deregulation of the services listed in BellSouth's Notice and scheduled an oral argument for August 11, 2004. At the conclusion of the oral argument, parties were asked to file proposed orders and briefs.

Positions of Parties

BellSouth noting that the services for which it sought deregulation were private line and frame relay services, argued that the Commission cannot deny BellSouth's request on the grounds that it offers those services as an ILEC rather than a long distance carrier. Because they are functionally equivalent, if the Commission has deregulated AT&T's private line services as "long distance," it must do the same for BellSouth. The General Assembly did not limit deregulatory relief by class of carrier, and BellSouth observed that even as an ILEC before receiving Section 271 clearance it has exercised long distance authority.

BellSouth further cited a letter from Senator David W. Hoyle, the legislative sponsor of SB814, to the Commission dated August 11, 2004, expressing his view that the term "long distance services" in the bill encompassed functionally equivalent services offered by other public utilities, and deregulatory relief was not restricted to long distance carriers. BellSouth stated that Senator Hoyle's expression of his understanding was admissible as to legislative intent, and it argued that the Commission's proceeding herein is not judicial in nature. Even if it were, the Commission can allow such a statement in the record, as it has, for example, in allowing the testimony of legislators in Docket No. G-21, Sub 373, without objection.

BellSouth argued that the Commission had properly characterized AT&T's IntraLATA private line services as long distance services. Like BellSouth's services, AT&T was providing private line services in a manner that connected locations "four blocks away or 40 miles away." Circuits that appear local in nature today can be considered long distance tomorrow. Private line/data-type services have never been categorized as purely "local" or "long distance" in nature. Clearly,

BellSouth private line services are functionally equivalent to those deregulated for AT&T, a point that has never been disputed by the Public Staff or any other party.

BellSouth also responded to the arguments put forth by the Public Staff and other parties. BellSouth denied that adopting its functional equivalence argument would open up a Pandora's Box with respect to other services, such as seven-digit calls from Raleigh to Cary, because such calls are explicitly local under statute. BellSouth also argued that no finding of competition by the Commission is necessary for deregulation under the third paragraph G.S. 62-2. The General Assembly has already found long distance services to be competitive, and the Commission need make no further finding in this respect. Similarly, whether BellSouth is a carrier of last resort is irrelevant as a factor in whether a given service is long distance or not. In any event, BellSouth has many competitors for private line services.

Public Staff put forth several arguments. First, the Public Staff stated that functional equivalence may be a factor to be considered in assessing whether a service is a long distance service, but it is not dispositive. Local and long distance services may be, and often are, functionally equivalent, as, for example, local service and intraLATA MTS, which are both circuit-switched calls connecting points within a LATA. But one is local and one is long distance, depending on the location of the connecting points. Private line services have not traditionally been classified as local or long distance. They present harder cases administratively because of the number of points set aside for use. In fact, many private line services are jurisdictionally mixed, having elements of both local and long distance service. Nevertheless, they too can be classified administratively as local or long distance depending upon the locations of the points connected. The Public Staff noted that BellSouth appears to have acknowledged this in the proposed notification and marketing message provided by BSLD and BSE in their merger application, where it spoke of the "local component" of the frame relay service being provided by BSE prior to BSLD's CLP certification. The Public Staff further observed that in certain areas of the state some private line and packet services are not competitive at all since the ILEC is the only authorized provider.

The Public Staff speculated that, with respect to the way AT&T was providing private line services, it may be doing so under the two kinds of authority it possesses, the long distance and the local—or it may be operating under a theory that assigns it to the broader jurisdiction if any link falls under that jurisdiction. This latter theory seems to be BellSouth's approach. Regardless of this, the Commission may not allow the detariffing of a service that is clearly local in nature on the grounds of functional equivalence. The appropriate test for assessing whether a service is long distance for the purposes of G.S. the third paragraph of 62-2(b) is whether the service has the characteristics of a long distance service as that term has traditionally been understood.

This led to the second point of the Public Staff—that the Commission should consider several factors in determining whether a service has the characteristics of a long distance service as that term has traditionally been understood. A traditional understanding would mean that a service provided by a LEC or a CLP within an exchange or as extended area service, local measured service, or other local calling arrangements between exchanges is not a long distance service. But the Commission should also consider whether the services are those that a LEC is obligated to provide as a carrier of last resort. Only when a service is one that a long distance carrier may offer—that is, a long distance service, not a local service—may the Commission allow detariffing of a service under SB814. To the extent that it is unclear whether a service falls into the category of services that the General Assembly intended to deregulate, the Commission should determine the degree to which the service is competitive as the term "sufficiently competitive" is described in the statute.

The Public Staff's third point was that fairness and regulatory parity do not require detariffing of services that can be provided on both a long distance and local basis. Disparate regulatory treatment of long distance carriers and ILECs has existed since 1983. While it is true that the third paragraph of G.S. 62-2(b) speaks of deregulating services rather than providers, it also expressly

preserves the Commission's authority to grant and revoke certificates and hear complaints. The Commission retains the authority to regulate providers of both local and long distance services, and the amendment itself contains an implicit distinction between classes of providers of long distance services.

The Public Staff's fourth point was that BellSouth and its affiliates, such as the recently merged BSE and BSLD, may offer the same types of services as AT&T and its affiliates. The Public Staff said it is shortsighted to consider the authority of BellSouth alone. It is more reasonable to consider the authority of both BellSouth and its affiliates, which mirrors the authority granted to AT&T.

The Public Staff's fifth point was that BellSouth may request deregulation of services that are competitive either under the second paragraph of G.S. 62-2(b) or through reclassification under its price plan.

The Public Staff's sixth point was that BellSouth may amend its private line tariffs to include only non-long distance private line services. BellSouth has presented the Commission with an "all-or-nothing" approach. But this is not the only approach. As noted above, the points connected can be classified according to their location. This may be administratively tedious, but it can be done. It would simply mean that BellSouth would have to study each of the affected accounts, separate the accounts into long distance and local categories, and establish and apply separate service codes to each existing rate element that would apply to both categories. This would imply that the Commission would need to draw the line between local and long distance as those terms pertain to private line and frame relay services in the context of mixed services. Another rule would be needed to clearly categorize the local channel portions of long distance circuits. This is the approach that comports with the statute.

Time Warner Telecom of North Carolina LP (TWT) argued that BellSouth has not alleged a sufficient basis for deregulation under SB814, inasmuch as the statute does not include the term "functionally equivalent" but rather uses the term "long distance." Thus, the question comes down to whether the services are long distance as that term has been traditionally understood. The courts have long held that the words in statutes are to be given their ordinary and natural meanings. In the instant case, the plain language of SB814 does not deregulate private line or frame relay services as such. The General Assembly certainly has knowledge of private line service, as evidenced by references in G.S. 105-164.4C and G.S.105-164-4C(h)(7) concerning taxation, but it chose not to specify deregulation for these services in 5B814. Such definitions as exist, as in G.S. 62-110(b) and Newton's Telecom Dictionary, do not support private line services as falling within the definition of long distance. It is settled doctrine that the General Assembly is assumed to enact legislation with full knowledge of existing law and its construction by the courts. This is consistent with the Commission's own usage in general and of private lines in particular. For example, the Commission rules expressly contemplate that some private line services qualify as local exchange service. See, Rule R17-1(h) (local exchange service defined to include "dedicated service connecting two or more points within an exchange as defined on an exchange service area map.")

The fact of the matter is that the tariffs in question include services that are fundamentally local in nature, since it is apparent that such services can be provisioned on a wholly intraexchange basis. These services are traditional "last-mile" type facilities that the Commission has historically regarded as local. It is significant that, although BellSouth sought to avoid directly answering the question, it was forced to concede that the tariffs involved include local circuits. It is also significant that, when BellSouth first filed its list of services with the Commission to be deregulated as long distance, it did not include private line or frame relay services. The Commission is simply without statutory authority to grant BellSouth's request.

The Commission's treatment of AT&T's services is irrelevant to the appropriate treatment of BellSouth's services under SB814. Different types of carriers are subject to different regulatory regimes. BellSouth is a former monopolist whose local services are still subject to regulation. AT&T as a CLP is one of the competitors to BellSouth, and, under existing rules, it has no authority to have local tariffs. Lastly, TWT argued that BellSouth had failed to make a showing required for deregulation under G.S. 62-134(h).

Carolina Utility Customers Association, Inc (CUCA) stated that all of the parties to this proceeding apparently agree that frame relay service generally involves elements of local service and long distance service. CUCA therefore interpreted the Commission's January 2, 2004 Order as permitting only the long distance portion of the frame relay service to be deregulated pursuant to SB814. The local service portion of frame relay service that is provided by a CLP is not subject to price regulation by the Commission because CLP services were detariffed beginning in November 2000. By contrast, the local telecommunications services offered by an ILEC such as BellSouth remain subject to price regulation and to tariffing. Unless BellSouth creates telecommunications services that are available exclusively for intraLATA long distance, BellSouth cannot avail itself of the "me too" argument presented in its Notice filing. BellSouth's counsel represented that BellSouth cannot segregate its services as local or long distance. CUCA therefore argued that BellSouth's frame relay service is not in fact functionally equivalent to the IXC telecommunications services that were deregulated by the Commission's Order.

KMC III, LLC, KMC Data LLC and KMC Telecom V and Nuvox Communications Inc. (collectively, KMC) echoed the arguments of other intervenors that functional equivalence is not the appropriate test for determining whether a service is long distance. Withdrawal of AT&T's private line tariffs is not dispositive of BellSouth's claim, because the entity that withdrew the AT&T private line tariffs is certificated as a long distance carrier and that certificate is limited to AT&T offering long distance services. Senator Hoyle's letter regarding legislative intent is not a valid basis upon which the Commission should construe a statute. The North Carolina Supreme Court has held that "[t]estimony, even by members of the Legislature which adopted the statute, as to its purpose and construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make a determination as to the meaning of the statutory provision." *Milk Commission v. Food Stores*, 270 N.C. 323 (1967). The appropriate test is whether the service to be detariffed has one of the traditional characteristics of a long distance service. It is appropriate for the Commission to look at G.S. 62-110(b) for its definition of long distance service. This provision was not repealed by SB814. The services that BellSouth seek to detariff include intraexchange private line services, which are, by definition, local services. To permit BellSouth to withdraw these tariffs would be in excess of the Commission's authority. It should also be noted that the Notice includes interexchange private line services provided over routes that only ILECs are permitted to serve. SB814 states that long distance services are "sufficiently competitive." To permit detariffing of services which are, by definition, not competitive would make a mockery of the stated intent of SB814.

Additional Comments of BellSouth

On October 1, 2004, BellSouth filed a Motion for Leave to File Additional Comments, together with such comments. The Commission granted BellSouth's Motion, and sought replies from interested parties.

The gist of BellSouth's comments consisted of the presentation of an alternative by which services would be identified as administrative only or predominantly intraexchange or as predominantly interexchange. BellSouth characterized its previous position as "all or nothing" only in the sense that it should receive the same treatment as AT&T from the Commission, and it conceded that it is reasonable for the Commission to find that some of its services are more clearly interexchange long distance services and some more clearly intraexchange. BellSouth reiterated its view that separate identification and classification of rate elements as interexchange or intraexchange

would be unduly complex, would result in the incurring of considerable cost, and is not administratively reasonable.

BellSouth stated that services that are administrative only, which the Commission deregulated for AT&T and are functionally equivalent to services offered by BellSouth, are "Due Date Change and Expedite Charges" and "Telecommunications Priority Service." They are similar to the type of service that would typically be found in BellSouth General Subscribers Tariff (GSST), Section A4, under the services charges section. BellSouth's Telecommunications Priority Service is found in Section A13 of the GSST. These services should not be deregulated.

BellSouth identified a number of services, notably the vast majority of Voice Grade (Analog) Private Line Services (whose nature is more likely to be intraexchange point-to-point) as predominately intraexchange. They include Series 1000 (Supervisory Control and Misc. Signaling, Types 1001, 1101, 1102, 1204, and 1205); Series 100 (Voice Grade and Data Services, Types 2001, 2012, 2014, 2015, 2020, 2021, 2022, 2040, 2041, 2180, 2181, 2230, 2231, 2260, 2261, 2432, 2434, 2435, 2462, 2463, and 2464); Series 5000 (Voice telephotograph, facsimile, Types 5500, 5600, and 5800); and Series 6000 (Audio, Load Speakers and Recoding (Types 6101(6210), 6105(6214). These services should not be deregulated.

Lastly, BellSouth identified services it believes are predominantly used for interexchange traffic and should therefore be deregulated. Into this classification would fall Frame Relay and ATM services. They use packet or cell 'based technology and allow customers to reconfigure their networks.

Other digital telecommunications private line services that are typically used by customers as part of a larger interexchange network and should be deregulated include MegaLink (inclusive of MegaLink, MegaLink Plus, and MegaLink Light, MegaLink Channel Service, MegaLink ISDN, SynchroNet and LightGate). BellSouth conceded that most of these services preceded packet and cell technologies before digital private line was available—indeed, the frame relay illustration that BellSouth provided during oral argument likely consisted of dedicated private line circuits like MegaLink, MegaLink Channel Service, MegaLink ISDN, SynchroNet, and LightGate services prior to being converted to frame relay technology. These services are clearly more traditional private line services in that a customer orders a dedicated connection between two or more locations. However, jurisdiction cannot be determined for these services solely by looking at the local channel or access line rate element that most of these services have. The local channel rate element merely provides a means by which the serving office and the customer's premises connect. The services should be looked at in their totality, with all but MegaLink Channel Service offering interoffice mileage rate elements providing the capability to interconnect interexchange pints.

The remaining services that should clearly be deregulated include SmartRing, Native Mode LAN interconnection (NMLI), and Data Transport Access Channel Service.

BellSouth urged that the Commission has a sufficient record to determine which services should be deregulated as predominantly interexchange services and which should be remain regulated because they are either administrative only services or services that are predominantly used for intraexchange communications. The Commission should apply the same conclusions to analogous services offered by AT&T.

<u>Comments Regarding BellSouth's Additional Comments</u>

<u>Verizon</u> stated that it had reviewed its private line services and determined those which fall within BellSouth's classifications, which it supported. The services listed by Verizon as predominantly interexchange employ technologies used to provide network connectivity for long distance services and compete directly with rival service offerings from CLP5, cable companies, and

internet providers. Since the Commission has already deregulated AT&T's private line services, the services Verizon has listed as functionally equivalent to such services should also be deregulated.

CUCA reiterated that SB814 only permits the deregulation of long distance telecommunications services. In the case of a CLP, the local service portion of telecommunications services was detariffed in 2000. Consequently, when a telecommunications service provider holding certificates as both an IXC and a CLP offers telecommunications services, all of the local and long distance service components of such services are deregulated as to price. By contrast, the local services offered by BellSouth as an ILEC have not been deregulated as to price and, thus, if BellSouth offers a telecommunications service that includes an intraexchange component, then BellSouth's service must remain subject to price regulation as a local service rather than a long distance service. BellSouth has missed the essential point— i.e., that, unless a service offered by BellSouth as an ILEC subject to price regulation is clearly and exclusively long distance, the service must remain regulated as to price.

Public Staff pointed out that BellSouth has chosen to focus on a criterion for deregulation other than whether a service is "long distance" as the term is used in the statute. However, "interexchange" is not synonymous with "long distance." All long distance services are interexchange but not all interexchange services are long distance. As the Public Staff has stated previously, none of the services BellSouth proposes to deregulate are long distance by nature. Even within a frame relay with multiple points, some of the links will be local because they connect points either within the same exchange or within an extended area or an expanded area service arrangement. BellSouth has presented no evidence that the majority of multi-point arrangements it serves are in fact predominantly interexchange or even any evidence that the majority of multi-point arrangements it serves include at least one link that is long distance from the other points. In fact, it is not at all clear that Frame Relay and ATM—a late arrival to the group of services that BellSouth asserts should be deregulated—are predominantly interexchange services. Each individual frame relay or ATM arrangement can be classified according to the customer points to which the traffic may be routed.

BellSouth in reply, stated that the Public Staff is urging the Commission to substitute its judgment for that of the General Assembly. SB814 makes no distinction between long distance offered by an IXC and long distance offered by an ILEC. They must be treated the same if the services are functionally equivalent. Private lines cannot be long distance for one and not long distance for the other. In any event, BellSouth has been long authorized to be a carrier of intraLATA long distance service in North Carolina. BellSouth repeated its view that it is impossible to jurisdictionally classify piece parts of services. The entire service was deregulated for AT&T and it should also be the case for BellSouth.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

In this matter, BellSouth seeks relief under the statutory standard set out in the third paragraph of G.S. 62-2(b) for the deregulation of long distance services. While there are other options available to reach its apparent goal, which are discussed below, given the path chosen by BellSouth, the Commission must apply the long distance deregulation language of G.S. 62-2(b) as adopted by the General Assembly. We must avoid the temptation to substitute our judgment for that of the General Assembly as to how the provision might have been written or intended in order to achieve the result sought by BellSouth herein. This simply is not a luxury afforded us. As written, it is clear that the third paragraph of G.S. 62-2(b) deregulates long distance services, but it is equally clear that this provision gives this Commission no legal authority to deregulate local services. Immediately after its adoption, and in an efficient and cooperative fashion, the Commission and the parties completed a proceeding, thinking that the clear purpose of this statute had been carried out. The present matter presents a much more complicated question to the Commission about the appropriate application of this law, but it does not make the plain meaning of the law itself more complicated in its plain

meaning or expand our legal authority to allow for the complete deregulation of local services under its terms.

The statutory standard set out in the third paragraph of G.S. 62-2(b) indicates that the General Assembly intended to deregulate long distance services and to leave local services subject to the provisions of Chapter 62 — provisions of which might provide for their deregulation under certain circumstances upon an effective showing that such services are indeed competitive (as discussed more fully below). BellSouth is correct in arguing that the relevant statutory language makes no distinction between ILECs and IXCs and that the extent of the long distance deregulation worked by the third paragraph of G.S. 62-2(b) must be determined on the basis of a service-by-service analysis rather than on the basis of whether the entity providing the service is an ILEC or an IXC. As a result, all services that are properly categorized as long distance are deregulated, regardless of the identity of the entity providing that service. On the other hand, all services properly categorized as local remain regulated to the same degree that they were regulated prior to the enactment of SB814. Thus, the key to whether the services listed in BellSouth's notice were deregulated by the third paragraph of G.S. 62-2(b) is whether those services are long distance. Any claim that the Commission has used some other test, such as whether a particular service is provided by an ILEC or an IXC, would be a mischaracterization of the Commission's decision.

SB814 did not define the term "long distance," as that expression is used in the third paragraph of G.S. 62-2(b). In addition, there is no definition of "long distance" found in G.S. 62-3. Although the General Assembly could have included such a definition in the Public Utilities Act in SB814, it did not do so. The third paragraph of G.S. 62-2(b) does, however, exempt from the deregulation of "long distance services" worked by that subsection "existing or future extended area service, local measured service, or other local calling arrangements." As a result, subject to the clarifying language noted in the preceding sentence, the term "long distance" as used in the third paragraph of G.S. 62-2(b) must be defined in accordance with its ordinary and customary meaning in the world of telecommunications. See, e.g., Sutherland Stat. Const. §47.28 (Ed.) The only definition of "long distance" contained in the Public Utilities Act is found in G.S. 62-110(b). Although this definition is only directly applicable to G.S. 62-110, it provides that "long distance" service consists of "the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement." In a similar vein, Newton's Telecom Dictionary defines "long distance" as "any telephone call outside the local calling area." Thus, the essential characteristic of the "long distance" service deregulated by the amendment to G.S. 62-2(b) worked by SB814 is that it is not local. Put another way, whatever else the third paragraph of G.S. 62-2(b) may allow, it absolutely precludes the deregulation of local telephone service.

After the enactment of SB814, the Commission conducted a proceeding intended to bring its rules and orders into compliance with the provisions of the new set of statutory provisions contained in that legislation. As part of that process, BellSouth provided a list of services that it believed to have been deregulated as the result of the amendment to G.S. 62-2(b) worked by SB814. Each of the services contained in BellSouth's list involved the transmission of messages between rather than within local calling areas. After reviewing BellSouth's filing, the Commission deregulated every single service contained in the list submitted by BellSouth. As a result, BellSouth has already obtained all of the relief to which it initially thought itself entitled by virtue of the enactment of SB814. Although the Commission's earlier determinations in the aftermath of the enactment of SB814 certainly do not constitute the last word on the subject, the nature of BellSouth's filing in that proceeding and the nature of the Commission's actions in response to that filing suggest that both BellSouth and the Commission understood the long distance deregulatory provisions of G.S. 62-2(b) to be limited to services involving the transmission of messages between local calling areas.

The traditional definition of "long distance," as described above, rests on the extent to which the endpoints of the call lie in two different local calling areas. This is essentially the approach taken

in Rule R17-1(h), which applies to both switched and dedicated services. According to the notice BellSouth filed in this matter, the Company proposes to completely withdraw certain tariffs, so that there would be no regulatory control or jurisdiction over any component of the services previously provided under those tariffs. The arguments advanced by BellSouth concede that the services proposed to be deregulated do, at least in part, include the transmission of messages between end points located within the same local calling area. The extent to which this is the case may well vary from service to service, since many, if not all, of these services appear to be jurisdictionally mixed when viewed in the aggregate. At an absolute minimum, however, approving the deregulation proposed by BellSouth would appear to permit the deregulation of local service, which is something that SB814 simply does not allow. As a result, simply allowing BellSouth to proceed in accordance with its notice would contravene the third paragraph of G.S. 62-2(b).

The Commission acknowledges that, to the extent that BellSouth provides service under any of the tariffs at issue in this proceeding that involves the transmission of messages from one local calling area to another, the transmission of those messages is no longer subject to Commission regulation as a result of the enactment of SB814. Thus, to the extent that BellSouth can separate those transmissions that are long distance from those that are local, the Commission agrees with BellSouth that those transmissions are no longer subject to Commission oversight. According to BellSouth, it is practically impossible for the Company to separate out the "local-like" component of these services from the "long distance-like" component of these services. Unfortunately, the relevant statutory provisions do not allow the Commission to deregulate what is clearly local service in order to ensure the deregulation of long distance service. Although the Commission stands ready, willing, and able to deregulate the "long distance-like" component of the services listed in BellSouth's notice, it simply lacks the statutory authority to deregulate the "local-like" component of those services. As a result of the fact that the Commission is prohibited from deregulating local service by the amendment to G.S. 62-2(b) contained in SB814, it would not be lawful for us to grant the specific relief requested by BellSouth here, which is the *complete* detariffing of *all* of these services regardless of the extent to which they involve the transmission of messages between points within the same local calling area.

BellSouth attempts to avoid this fundamental defect in its position by arguing that complete deregulation of all components of each service is appropriate because the Commission approved the deregulation of functionally equivalent services offered by AT&T. The fundamental problem with this argument is that it begs the question of what "functional equivalence" means.[1] As used in this proceeding, the term could mean at least two things. First, the term "functional equivalence" could mean the use of similar technologies and provisioning techniques to transmit messages or data regardless of the endpoints of the transmission in question. The adoption of that interpretation, however, would reach farther than the express legislative content. For example, the same technology and provisioning techniques are utilized to facilitate both local and long distance voice calls. Taken to its logical extreme, this understanding of "functional equivalence" would eviscerate the clear distinction between local and long distance service that is inherent in the existing statutory language. As a result, "functional equivalence" cannot be a proper basis for interpreting the third paragraph of G.S. 62-2(b) in the event that it has this meaning.

The other possible meaning of "functional equivalence" is that it involves the same essential service provided by two different providers. Although there may be some relatively minor differences between the technologies used by the two providers, such "functionally equivalent" calls would involve the transmission of the same sorts of information over the same essential distances to the same essential locations. Assuming that this is what BellSouth means by "functional equivalence," the Commission cannot argue with the proposition that functionally equivalent services should be

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[1] The Commission appreciates the letter of Senator David W. Hoyle on August 11, 2004, attempting to shed some light on legislative intent in this matter. However, according to canons of statutory construction, the Commission is limited in its ability to consider such evidence.

treated identically under the long distance deregulation provision of G.S. 62-2(b). If this is what BellSouth means by "functional equivalence," such "functional equivalence" represents an adequate test for gauging whether specific services should be deregulated.

At this point, however, the record does not suggest that the services that BellSouth seeks to completely detariff are functionally equivalent to the AT&T services that the Commission deregulated earlier in this proceeding, assuming that BellSouth uses the term "functional equivalence" in this second sense. After all, the exact action taken by the Commission was to allow AT&T (and certain other providers, including BSLD) to withdraw certain specific tariffs. As a result, the only services that the Commission deregulated for AT&T pursuant to the third paragraph of G.S. 62-2(b) were the services AT&T provided under the withdrawn tariffs. The only services that AT&T was authorized to tariff prior to the enactment of SB814 were those provided on a long distance basis. As a result, the only services appropriately deregulated by the Commission's order were long distance services. Although AT&T may have been providing data transmission services using equivalent technologies on a local basis through its CLP operation, those local services were not deregulated by SB814. On the contrary, these CLP services remain subject to Commission regulation to the same extent that they were subject to the Commission's regulatory jurisdiction prior to the enactment of SB814. Although the Commission has required the detariffing of those local data transmission services by order, it retains regulatory control over those services as authorized by G.S. 62-110(f1). Thus, the services that BellSouth seeks to detariff in this proceeding are not functionally equivalent to the services that the Commission allowed AT&T to deregulate. On the contrary, the relief that BellSouth seeks in this proceeding appears to be broader than that afforded to AT&T.

The record does not contain any evidence concerning the exact nature of the services that AT&T was providing under the withdrawn tariffs. That fact, however, does not change the outcome here. Either AT&T was providing only long distance service under the long distance tariffs or it was not. If AT&T was providing exclusively long distance service under the withdrawn tariffs, then the services deregulated for AT&T are not functionally equivalent to the services that BellSouth seeks to have deregulated here. If AT&T was inappropriately providing local data transmission service under the withdrawn tariffs, the appropriate remedy for that problem would be to reregulate AT&T's services rather than to deregulate BellSouth's. The Commission stands ready, willing, and able to entertain a request to reregulate some or all of the withdrawn AT&T services in the event that any party believes that the Commission should act in that manner.

At a fairly late stage in the proceeding, BellSouth advanced an alternative proposal that essentially categorized some of the services in question as predominantly interexchange and the remainder as predominantly intraexchange and advocated deregulation of those services characterized as predominantly interexchange. Although the Commission appreciates BellSouth's attempt to devise a test that deals with the categorization of these mixed services, the Commission cannot adopt this approach on the basis of the present record. Aside from the fact that the relevant statutory language speaks in terms of local and long distance rather than interexchange and intraexchange and the fact that these expressions are not synonymous, there are at least two other problems with BellSouth's alternative approach. First, the record contains no evidence supporting BellSouth's characterization of these services as either predominantly interexchange or predominantly intraexchange. Secondly, nothing in the amendment to G.S. 62-2(b) enacted by SB814 suggests that the Commission has any authority to deregulate any local service, even if that service is provided under a tariff that encompasses a great deal of long distance traffic. Thus, the Commission is unable to adopt BellSouth's alternative proposal at this time, although we remain willing to consider this argument further in the event that BellSouth wishes to further address the legal issues identified by the Commission and to present evidence tending to show that a particular service is predominantly long distance rather than local in composition.

The ultimate relief sought by BellSouth is the elimination of Commission oversight concerning the services listed in its notice, including the local component of those services. There are

a number of ways that BellSouth, acting as an ILEC, can obtain that result under current law. As a practical matter, the services in question here are not subject to the Commission's current service quality rules, so that the only regulatory controls applicable to these services are the restrictions on pricing changes contained in BellSouth's current price regulation plan. These pricing constraints can be lifted in at least three different ways for an ILEC such as BellSouth. First, BellSouth can persuade the Commission in the pending price regulation proceeding to put these services in a basket lacks any pricing constraints. This exact relief has been requested and will be considered in Docket No. P-55, Sub 1013. Secondly, BellSouth could propose that some or all of these services be reclassified to the Non-Basic 2 basket under its current price regulation plan. The Commission has been willing to effectively deregulate services in this manner upon a proper showing, as can be seen in the Commission's decisions with respect to MTS and PRI service. Thirdly, BellSouth can seek deregulation of these services under the second paragraph of G.S. 62-2(b), which authorizes the Commission to deregulate certain services upon a finding that those services are competitive and that deregulation of the affected services would be in the public interest. Although BellSouth has suggested in this proceeding that the Commission deregulate the services listed in its notice on that basis, no evidence (as compared to unverified argumentation) tending to show that these services are competitive has been proffered at this time in this proceeding. As a result, there are a number of ways that BellSouth, acting as an ILEC, can obtain the essential relief that it seems to want (the complete detariffing of these services) without running afoul of the limitations upon the deregulation of long distance service contained in G.S. 62-2(b).

Finally, BellSouth's argument overlooks the fact that there is complete regulatory parity between the degree of regulatory oversight to which AT&T and BellSouth are subject on an overall corporate basis. In other words, BellSouth as an overall corporate entity is in the exact same position as AT&T, so that there is no difference in the regulatory treatment afforded these two overall corporate entities. AT&T functions as a CLP and an IXC. BellSouth has within its overall corporate structure an ILEC, an IXC, and a CLP. The Commission order upon which BellSouth places such emphasis allowed AT&T to withdraw its IXC tariffs. At the same time, all of the tariffs under which the BellSouth IXC, BSLD, operated, and certain BellSouth ILEC tariffs, were withdrawn as well. AT&T as a CLP is subject to minimal Commission oversight; the same is true of BellSouth's CLP operations. As a result, to the extent that it wished to do so, BellSouth could provide the exact same services as AT&T with exactly the same level of Commission oversight as AT&T. For example, if BellSouth wished to provide the services at issue in this proceeding on an essentially unregulated basis through its CLP and IXC operations, it could do so without any significant Commission oversight right now. If AT&T had an ILEC operation, it would be subject to essentially the same degree of regulatory control as BellSouth the ILEC. That the degree of local service regulation applicable to BellSouth as an ILEC and AT&T as a CLP is different stems from aspects of the Public Utilities Act that antedated and were unaffected by the enactment of SB814. Thus, there is, in fact, regulatory parity between the treatment afforded to AT&T and BellSouth on an overall corporate basis, rendering any claim to the contrary inaccurate.

What, then, is the solution? As indicated above, there are several possibilities which BellSouth may pursue as an ILEC under present law. In addition, BellSouth could approach the General Assembly and seek an amendment to the third paragraph of G.S. 62-2(b) to state with particularity that the services to which BellSouth refers are, as a matter of law, long distance. Unfortunately, what the Commission cannot do is depart from the ordinary and traditional meaning of the term "long distance" as used in the statute and authorize deregulation of services based solely on "functional equivalence" or, without empirical evidence, determine that such services are "predominantly interexchange."

Accordingly, for all of the reasons set forth above, BellSouth's notice of reclassification of services as deregulated is denied and dismissed. BellSouth may, of course, proceed as it deems appropriate under the alternatives which are available to it.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 24th day of November, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

DI110404.01

Commissioners J. Richard Conder and Robert V. Owens, Jr. dissent.
Chair Jo Anne Sanford concurs.

DOCKET NO. P-100, SUB 72b

CHAIR JO ANNE SANFORD, CONCURRING: In this docket the Commission has sought to interpret and apply the General Assembly's 2003 instructions to deregulate long-distance services. These instructions were contained in Senate Bill 814 (SB814), amending G. S. 62-2(b). In the initial proceedings to interpret this statute, parties filed Motions to deregulate various services and the Commission responded by Order. For a period of time there was clarity and agreement about those deregulatory instructions, as reflected in our January 2004 Order. However, by June 2004, and upon further reflection, BellSouth expanded its interpretation of the meaning of the statute with its "functional equivalence" argument.[1] Confident that various frame relay and private line services were additionally covered by the deregulatory mandate, the Company simply filed a Notice of its intent to withdraw certain tariffs. Confident that the Commission needed to participate in this decision, we suspended the tariff and, so, we revisit the issue. I mention this revision of position not at all as a criticism of further reflection, but as an observation. BellSouth's expanded, more subtle, and more complex interpretation likely came later in time precisely because it does not appear to spring so readily from the straightforward, "plain meaning" reading of the statute that was employed earlier this year. The entry of these new arguments makes for a more difficult decision. We have examined thoroughly and carefully the novel arguments presented by BellSouth. BellSouth's interpretations are ingenious, and the Company has made a capable and spirited argument in support of its position. That said, however, I join with the Majority in failing to find the degree of clarity in the law required to support the interpretation and the result sought by BellSouth.

It was clear to the Commission and the Company that the tariffs allowed to be withdrawn in January dealt with long-distance services, which the General Assembly directed us to deregulate. It is, however, not clear that the General Assembly conferred upon us the authority to deregulate the services which are in question today. Though the "functionally equivalent" and "predominantly interexchange" analyses are resourceful and useful, they do not bridge the gap between the relief requested and the Commission's statutory authority. We are directed by statute to deregulate long-distance services but requested by BellSouth to deregulate services that are mixed in nature between local and long-distance. BellSouth has simply not presented to us a practical means by which the local or long distance components in such services can be separated.

This is a significant decision. The premise for the legislative deregulation of long distance services was that adequate competition exists in the long-distance arena. Adequate competition eliminates the need for regulation, and clearly there is robust and ubiquitous competition statewide for long distance services. However, local service presents a different proposition--both legally and factually.

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[1] BellSouth later offered an alternative argument based upon whether a service was "predominantly interexchange" or "predominantly intraexchange."

First, the General Assembly has not authorized us to deregulate local service-- business or residential--in the absence of proof of sufficient competition. The issue of whether these services--mixtures of local and long-distance--are competitive is not before us here. BellSouth could argue under another statute that the services are competitive and thus should be deregulated, but it did not. The services in question have the characteristics of both local and long-distance. They do not lend themselves to bright-line categorization for purposes of this analysis, and neither the "functional equivalence" test nor the "predominantly interexchange" test suffice to place them squarely in the long-distance camp.

Secondly, the General Assembly has not itself made a blanket determination that local service is sufficiently competitive to require deregulation across the board. The law currently is premised on the conclusion that North Carolina consumers--rural and urban alike--require some regulatory oversight of local service *unless this Commission finds that the service is competitive,* in which case we can and should promptly deregulate it.

In sum, the Company's argument is essentially that these are long-distance services and thus the issue of competition has already been resolved by the General Assembly. This argument is engaging but ultimately not convincing, due to the mixed nature of the services. Fortunately, there is a range of regulatory options open to the Company before this Commission regarding the services that are competitive, which are outlined in detail in the Order, and we stand ready to carefully consider them should BellSouth choose to seek such relief.

\s\ Jo Anne Sanford
Chair Jo Anne Sanford

DOCKET NO. P-100, SUB 72b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Implementation of Session Law 2003-91,)
Senate Bill 814 Titled "An Act to Clarify the) ORDER RULING ON MOTION
Law Regarding Competitive and Deregulated) REGARDING PROMOTIONS
Offerings of Telecommunications Services")

BY THE COMMISSION: On June 25, 2004, the Public Staff filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions to Resellers. On July 7, 2004, the Commission issued an *Order Seeking Comments on the Public Staff's Motion Regarding Promotions* with initial comments due no later than August 6, 2004 and reply comments August 24, 2004. The following parties or groups of parties filed timely initial comments: the Public Staff; BellSouth Telecommunications, Inc. (BellSouth); Time Warner Telecom of North Carolina, L.P., US LEC of North Carolina, Inc., and Southeastern Competitive Carriers Association (collectively, the "Joint Commenters"); and ALLTEL Carolina, Inc., Carolina Telephone and Telegraph Company, Central Telephone Company, and Verizon South Inc. (collectively, the "ILECs").

By *Supplemental Order* issued on August 24, 2004, the Commission granted the Public Staff's Motion for an extension of time until August 31, 2004, for all parties to file reply comments. The following parties filed timely reply comments: the Public Staff, BellSouth, Verizon South Inc. (Verizon), and Carolina Telephone and Telegraph Company (Carolina) and Central Telephone Company (Central) (collectively, "Sprint").

PUBLIC STAFF'S MOTION

The Public Staff's Motion sought the Commission's further guidance on the proper construction of the provision in G.S. 62-133.5(f) authorizing the filing on one day's notice and without Commission approval of

> any promotion or bundled service offering for residence or business customers involving both regulated and nonregulated services that feature price discounts that apply exclusively to services not regulated by the Commission.

G.S. 62-133.5(f). Specifically, the Public Staff sought guidance on construction of the statutory language as it relates to matters regarding promotional discounts/nonregulated service as set forth below. In addition, the Public Staff sought guidance, also as set forth below, on the application of the resale obligation created by TA96.

A. Promotional Discounts/Nonregulated Service
1) Are gift cards, checks, coupons for checks or similar types of benefits promotional discounts or nonregulated services, as Carolina/Central have contended?

The **Public Staff** argued that bill credits, gift cards, checks or coupons offered to customers by a company's regulated business as a promotion to encourage subscription to a regulated service are promotions featuring price discounts. When inducements such as gift cards are given in exchange for subscription to both regulated and nonregulated services, the customer effectively receives a price discount even though the company's tariffed price for the regulated service remains unchanged. It is irrelevant whether the cost of the telecommunications service is directly affected or the customer reduces his expenses elsewhere through use of a gift card, check or coupon. The Public Staff further stated that gift card type promotions are not telecommunications services.

The **Joint Commenters** noted that, while not "services" according to the definition in G.S. 62-3(27), gift cards, checks, coupons and similar incentives are discounts offered to induce customers to purchase certain specified services. In order to invoke the one-day notice provision of Section 62-133.5(f) applicable when a discount applies solely to nonregulated services, the company offering the promotional discount has the burden of establishing that such discount applies only to the nonregulated portion of a mixed or bundled regulated/nonregulated service offering.

BellSouth contended that gift cards, checks, coupons for checks and similar types of benefits are marketing incentives. According to BellSouth, such incentives are not telecommunications services, nor are they promotional discounts, since customers are not provided a reduction, i.e., a discount, from the retail price of the service(s) offered in conjunction with the incentive(s).

According to the **ILECs**, gift cards, checks, coupons for checks and similar types of benefits are themselves nonregulated services. Sprint maintained in its reply comments that any services, such as gift cards, checks or check coupons, not contained in Carolina's and Central's General Subscriber Services or Intrastate Access Tariffs are not regulated by the Commission and are, therefore, nonregulated services. Verizon noted in its reply comments that gift cards, checks and coupons are marketing incentives, not regulated services. Verizon further stated that gift card type incentives cannot be considered promotional discounts because they cannot be used to reduce the retail price a customer pays for regulated services.

DISCUSSION OF QUESTION A-1

The Commission agrees with the Joint Commenters and the Public Staff inasmuch as they argued (1) that gift cards, checks, check coupons and similar benefits offered as an inducement to purchase telecommunication services are not themselves services (regulated or nonregulated) offered by a public utility, and (2) that such inducements are promotional discounts nonetheless. The

Commission is persuaded that anything of economic value paid, given, or offered to a customer to promote or induce purchase of a bundled service offering of both regulated and nonregulated telecommunications services is a promotional discount. Gift cards and similar benefits or incentives are not services offered by a public utility and they are not being offered by local exchange carriers as either regulated or nonregulated services. However, when such benefits are offered to induce the purchase of regulated and/or nonregulated services these benefits are promotional discounts. While the retail price to the customer of neither the regulated or nonregulated portions of the bundle is necessarily lowered as part of gift card type promotions, the customer nevertheless receives the offered bundle for a savings because the gift card, check, coupon for check, or other thing of value provided returns value to the customer for the purchase of a bundle. The customer does not receive this savings or value unless he purchases the specified bundle associated with the promotion. Thus, because the savings or benefit is received only in exchange for the purchase of the bundle, the bundle is in effect discounted to the customer by the amount of the monetary benefit or thing of value provided in return.[1]

2) If such benefits are promotional discounts rather than nonregulated services, in what cases are the promotional discounts considered "price discounts that apply exclusively to services not regulated by the Commission"?

The **Public Staff** argued that, only when the benefit of promotional discounts is funded solely from nonregulated operations of the local exchange carrier, are such discounts price discounts that apply exclusively to services not regulated by the Commission. The Public Staff stated that since the statute restricts the one-day notice provision to cases in which price discounts apply exclusively to services not regulated by the Commission, the burden rests on the company offering the promotional discount to establish that the promotional discount applies exclusively to nonregulated services, i.e, is funded from nonregulated operations. The Public Staff commented that a bundle typically has one price for two or more services, making it impossible to discern, without further information, which services in the bundle have been discounted.

The **Joint Commenters** implicitly agreed that a price discount applies exclusively to nonregulated services when a promotion is funded solely from nonregulated service offerings and the revenue from the regulated portion of a mixed offering is "booked" at the full retail rate or value. The Joint Commenters stated that to the extent a LEC seeks to invoke the one-day notice provision of G.S. 62-133.5(f) with respect to gift card type incentives, the burden should be on the LEC to demonstrate that the promotional discount generated by the incentive is solely applied to (charged against) the nonregulated portion of any mixed bundle of regulated and nonregulated services. According to the Joint Commenters, if the regulated portions of a bundled offering are accounted for or "booked" at less than the retail value of the regulated services, then the discount does not apply exclusively to nonregulated services and the one-day notice provision of G.S. 62-133.5 is not applicable to the LEC's promotion.

BellSouth stated that since these benefits are not promotional discounts, Question A-2 is not applicable.

The **ILECs** also found Question A-2 inapplicable since they argued that gift card type benefits are not promotional discounts, but are nonregulated marketing incentives. However, the ILECs, Verizon and Sprint suggest that if a promotion is found to feature a price discount for subscription to a bundled service offering of regulated and nonregulated services, and the offering company does not lower or in any way alter the price for the regulated service portion of the bundle, it is fairly simple to determine that the discount for the promotional offering was applied exclusively

[1] Also, as discussed below in Part B of this *Order*, the real price of the service eventually becomes the retail price minus the value received for purchasing the service, i.e., the price is discounted by the value received. After a promotion is offered for a long enough period of time, the tariffed retail price is then no longer the real price.

to the nonregulated service. Therefore the one-day notice of Section 133.5(f) would apply to the promotion.

DISCUSSION OF QUESTION A-2

Promotional discounts are considered "price discounts that apply exclusively to services not regulated by the Commission" when the benefit of the discount is funded solely from or charged against the nonregulated operations of the local exchange carrier. The LEC[1] is entitled to invoke the one-day notice provision of G.S. 62-133.5(f) when the promotional discount is not used to lower retail revenues of any regulated service offered as part of a mixed bundle, but is instead applied to or accounted for against revenues for nonregulated services contained in the bundle.

3) Does the source of the discount offered in a promotion, i.e., from regulated or nonregulated operations or both, determine whether a one- or five-day notice is required if the promotion otherwise qualifies as a one business-day promotion?

The **Public Staff** stated that, if the price of the regulated and nonregulated services in the bundle is lower than the sum of the individual prices, it is reasonable to conclude that the price of one or more of the services in the bundle has been discounted. The Public Staff argued that additional information is needed to confirm that such a discount was applied only to the nonregulated service(s) in the bundle. In some cases, the nonregulated services are not available individually, so it is not always possible to determine the price of the individual services. The Public Staff believes that the regulated company has an obligation to specify whether the marketing incentive or price discount is provided by or charged against regulated or nonregulated operations. If the regulated operations of the company will record the tariffed price of the regulated service as revenue (or, conversely, if the cost of the promotion is not recorded as a regulated expense), it is reasonable to conclude that the price discount has been taken only on the nonregulated service(s) in the bundle, qualifying the promotional offer for the one business day notice provision. Otherwise, an ILEC bundle or promotion must be made under the five business-day provision of the ILEC tariffs. Specification of the source of the price discount is a reliable, determinative factor for ensuring that notice of the promotion or bundle has been properly filed.

The **Joint Commenters** stated that in order to use the one-day notice provision, the company offering the promotional discount has the burden of showing that the exclusive source of funding for any promotional discount offered as an incentive to purchase a mixed bundle is nonregulated service operations. The Joint Commenters believe the source should be identified through accounting records that will show whether any discount was applied to or accounted for against regulated service operations or nonregulated service operations.

BellSouth emphasized that it is not the accounting treatment of the benefit or marketing incentive that determines the proper notice period, but whether a price discount is being offered. BellSouth maintained that gift card type promotions are mere incentives and do not provide price discounts against the services offered, since such promotions do not impact or reduce the retail price of the bundled service package purchased by the customer.

The **ILECs** again stated that the only necessary test for determining whether there is a discount applicable exclusively to the nonregulated services in a mixed bundle is to determine whether the price for any regulated services in the bundle has been lowered. If the price for a regulated service has been lowered, a five-day notice filing is required. If a price discount is present without any lowering of the regulated price, the Commission must determine that the discount was

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[1] The Commission uses the term "LEC" to refer to local exchange carriers, including competing local providers, unless otherwise stated.

applied exclusively to the nonregulated service in the bundled offering and that one-day notice to the Commission of the promotion is all that is required. The ILECs maintained that if services in a bundle or promotion offered by a company operating under price regulation include any nonregulated service, there should be no consideration of the source of the funds for the promotion or discount.

DISCUSSION OF QUESTION A-3

Whether a new promotion featuring a price discount applies exclusively to services not regulated by the Commission is what determines whether a LEC is entitled to invoke the one-day notice provision of G.S. 62-133.5(f). Accordingly, the real question raised by the Public Staff's Motion is whether the source of funding for a promotional discount must come from nonregulated service operations in order for a LEC to establish that the featured promotional price discount applies exclusively to services not regulated by the Commission. The Commission believes, as argued by the Public Staff and the Joint Commenters, that the source of funding for any promotional discount is determinative of whether the discount "applies exclusively to services not regulated by the Commission." If the discount is funded in whole or in part by charging it to a regulated service or the regulated service operations, then it would not apply exclusively to nonregulated services or operations and the LEC offering the promotion would not be entitled to avail itself of the one-day notice provision.

4) If the source of the discount determines whether a one- or five-day notice is required, should the Commission require that [a LEC] specify in its filing whether the benefit offered in conjunction with a promotion is funded by nonregulated operations, regulated operations, or both so that the Public Staff can determine whether the promotion is properly filed?

The **Public Staff** in effect argued that if the source of funding is determinative of whether a promotion "appl[ies] exclusively to services not regulated by the Commission" and therefore the Commission need only receive one day's notice prior to the effective date of the promotion, then the Commission's *Order* dated January 2, 2004 must be expanded to include a specification of the source of the funding for the promotional discount. The Public Staff claimed that without further information from companies regarding the source of a promotional discount, the Public Staff and Commission are unable to monitor promotions and to ensure that the proper amount of notice has been given.

The **Joint Commenters** requested the Commission to impose upon LECs seeking to invoke the one-day notice provision in G.S. 62-133.5(f) the requirement that their notices contain more specific information in support of their filings made pursuant to the one-day notice provision of the statute. The Joint Commenters proposed a rule that would address the LEC's internal accounting procedures as they may relate to G.S. 62-133.5(f). The Joint Commenters stated that without the adoption of appropriate and detailed protective mechanisms and guidance concerning LEC bundling and promotions, the one-day notice provision is extremely difficult to administer and could lead to anticompetitive behavior.

BellSouth argued that the source of funding does not determine the proper amount of notice and that it is not required by any statute or rule to give any notice of marketing incentives. BellSouth reiterated that gift card promotions are marketing incentives—not promotional discounts that impact the retail price of any service. Because these types of promotions are not discounts, they do not require any notice whatsoever pursuant to any North Carolina statute or rule. However, BellSouth stated that it "does not object generally to providing information indicating whether marketing incentives [such as gift card promotions] are funded by regulated and/or non-regulated operations."

The **ILECs** opposed the imposition of any requirement that LECs provide information in addition to that required by the Commission's *Order* dated January 2, 2004. The ILECs stated that

any requirement by the Commission of anything more than a statement from carriers describing the promotional/bundled service offerings, and the dates during which those offerings would be made available, would suggest that Commission has approval authority not provided for in G.S. 62-133.5(f). Further, the ILECs suggested that the Commission's *Order* dated January 2, 2004 requires more information in notices of promotional offerings than the statute requires. In its reply, Sprint answered that the Commission should not require LECs to provide any additional information regarding the funding source for a promotion. Sprint noted that perhaps the Public Staff's proposal may be justified for those companies which are rate of return regulated. However, examination of a price regulated company's financial accounting by the Public Staff is not required or appropriate.

DISCUSSION OF QUESTION A-4

While, as discussed above, the Commission finds the source of funding for promotional discounts, such as gift cards, relevant to the determination of whether a discount applies exclusively to the nonregulated services in a mixed bundle of services, thereby qualifying the promotion for the one-day notice requirement, the Commission rules that there is no need to expand its *Order* dated January 2, 2004, regarding the content of notices provided under G.S. 62-133.5(f). Pursuant to the statute at issue, a LEC is not entitled to give the Commission one business day's notice *unless* the promotion or bundled service offering (1) involves both regulated and nonregulated services and (2) features a price discount that applies exclusively to the nonregulated services. Therefore, the Commission need not impose a requirement that the LEC specify the funding source for its promotion in its one-day notice filing. When a LEC purports to file a one-day notice pursuant to G.S. 62-133.5(f) for a promotional offering involving both regulated and nonregulated services, it is representing that any discount applies exclusively to nonregulated services, i.e., that it has chosen to fund any discount from its nonregulated operations.

Thus, as argued by the ILECs, if a LEC provides the Commission with one-day notice of a promotion and a price discount is present without any lowering of the regulated price, the Commission will view the one-day notice as the LEC's representation that the discount was applied exclusively to the nonregulated service in the bundled offering in accordance with the reasoning of this *Order*. The Commission's decision does not impose internal accounting procedures on the LECs; rather, by submitting a one-day notice under G.S. 62-133.5(f), a LEC, on its own volition, has elected to fund its promotion from its nonregulated operations. The Commission still believes, as asserted by the Public Staff in earlier comments when the Commission was initially requested to adopt rules related to the notice required under G.S. 62-133.5(f), that imposing unnecessary "rules" or requirements on notices for promotions and bundled service offerings could make it more difficult and more time-consuming for LECs than the Legislature intended when it enacted the one-day notice provision and exempted these types of offerings from the Commission's approval authority.

In sum, the Commission finds that companies who avail themselves of the one-day notice provision of G.S. 62-133.5(f) necessarily represent that any promotional discount applies exclusively to the nonregulated portion of a mixed bundle, and that any such discount given for the purchase of a mixed bundle will be funded, accounted for or applied against only the nonregulated portion of the bundle. Therefore, for all regulatory purposes and required filings, regulated companies must assign the full tariff rate to sales of (or revenues from) regulated services that were subscribed to as a result of promotional discounts involving bundled offerings of both regulated and nonregulated services.[1] LECs who invoke the one-day notice provision should keep records regarding the funding of their promotion and be mindful that they are subject to audit. *See* G.S. 62-51.

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[1] The Commission notes that it is not concerned with the rate of return of price regulated companies such as the ILECs who filed comments. However, inquiring into the source of funding for purposes of applying G.S. 133.5(f) is not the same as inquiring into a company's rate of return. The Commission's interest is not in a company's margins or profits or in any particular amount of reduction of revenues; the Commission's interest is in whether the costs (no matter the amount) of a given promotion were applied to nonregulated services.

B. Resale Obligation

1) If a LEC offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?

The **Public Staff** alleges that BellSouth's 1FR + 2 Cash Back promotion, which provides subscribers with a $100 check for subscribing to certain services, is implicated by Question B-1. The Public Staff argued that when inducements such as gift cards are offered to promote new or continued subscriptions to regulated telecommunications services, the regulated services are discounted. The resulting discount, brought about by the inducing promotion, should be available to resellers at the discounted resale rate whenever the promotion is offered for more than 90 days. The FCC's Local Competition Order makes no distinction between charging a reduced price for service, and charging the standard tariff rate while awarding the customer with a check or a coupon for a check.

The **Joint Commenters** declined to take a position with respect to resale obligations related to gift card type promotions offered for the purchase of bundles of both regulated and nonregulated services.

BellSouth stated that gift cards, coupons, etc. are not telecommunications services and therefore are not subject to the resale obligation of TA96. Gift card type promotions are marketing tools that do not provide end-user customers with a reduction of the price of the ILEC's services.

The **ILECs** argued that marketing incentives, gift cards, checks, coupons for checks, and similar incentives are not telecommunications services and are not subject to the resale requirements of the Act. Sprint reiterated that the obligation to resell services does not extend to nonregulated services (i.e., incentives, gift cards, checks etc.) offered with regulated services.

DISCUSSION OF QUESTION B-1

At the outset, the Commission notes that Question B-1 does not address mixed bundles of regulated and nonregulated services. Instead, Question B-1 is directed to promotions that offer a gift such as a gift card or a check for cash in exchange for subscribing to regulated services.

Section 251(c)(4) of TA96 addresses the extent to which an ILEC may restrict resale of its retail telecommunications services. Section 251(c)(4) requires an ILEC "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." This Section further requires ILECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of . . . telecommunications service" provided at retail to end-user subscribers. Section 252(d)(3) provides that wholesale rates are to be determined on the basis of rates charged to subscribers.

While gift cards, check coupons and other similar promotions or incentives offered for the purchase of a regulated telecommunications service are not themselves services that ILECs offer at retail from their tariffs, they are promotional offerings for telecommunications services. Promotional offerings are subject to the limitations and conditions set forth by the FCC. In ¶ 948 of its Local Competition Order[1], the FCC stated that Section 251(c)(4)'s requirement that ILECs resell retail telecommunications services

[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, (CC Docket 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order").

makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for *all promotional or discount service offerings* made by incumbent LECs. [Emphasis added.] A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts.

The Commission interprets ¶ 948 of the FCC's Local Competition Order to mean that an ILEC's duty to resell telecommunications services it offers at retail does not exclude an ILEC's promotional offerings. The FCC clearly stated that any other conclusion would allow ILECs routinely to create promotions or nonstandard offerings just to avoid their resale obligation. The FCC was concerned that ILEC promotions could become *de facto* standard offerings that would not be made available to resellers and would therefore undercut the duty to resell retail services to resellers at wholesale rates. The FCC's statement that the subject of its discussion on promotions referred to "price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts," does not define or limit the term "promotion," as used by the FCC in its Order, to a reduction from the retail price of a tariffed service. Rather, the FCC was speaking to the temporary nature of a promotion. The term "promotion" in the context of a sale or advertising campaign usually refers to an opportunity or offer that is temporary or short-term, rather than one that is more permanent or long-lasting.[1] The FCC distinguished a promotional price discount from a "standard offering" that would remain available for sale at retail and therefore available for resale at the wholesale rate. Contrasted with a promotional offering, a standard offering is one that is of a more permanent, long-lasting nature. When the reference to a promotion as a price discount is read in context, the Commission believes it is clear that the FCC was not stating that a promotion exists only when there is a reduction or discount of the retail price of a telecommunications service.[2]

The Commission's interpretation of ¶ 948 of the FCC's Order is supported by the Order's next paragraph. In ¶ 949, the FCC immediately began a discussion of whether "short-term promotional prices" are "retail rates." Since resale wholesale rates are based on retail rates, state commissions setting wholesale rates must know if the rates for promotions, i.e., short-term prices, are "retail rates" that are to be discounted to the wholesale rates that ILECs must offer to resellers. Because TA96 does not define "retail rates," the FCC interpreted the meaning of the term as follows:

> In view of this ambiguity, we conclude that "retail rate" should be interpreted in the light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effect. We therefore conclude that

[1] The Commission's interpretation is supported by the FCC's opinion and order in *In the Matter of American Communications Services, Inc.*,(CC Docket 97-100); FCC No. 99-386, 14 FCC Rcd 21579 (rel. December 23, 1999), ¶¶ 41, 51 (noting that phrases such as "service packages" and "trial offerings" connote an element of a temporary price discount).

[2] The FCC's use of the phrase "all promotional or discount service offerings" in ¶ 948 of the Local Competition Order implies a distinction between a promotional service offering and a discount service offering. That is to say, the FCC appears to have contemplated that an ILEC could offer a promotion that would not necessarily result in a reduced service price per se.

> short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.[1]

Thus, short-term promotional prices or nonstandard offerings are not the "retail rate" for purposes of establishing the wholesale rate. If a promotion is offered for an indefinite extended period of time, at some point it starts to become or look more like a standard retail offering that should be subject to the duty to resell at the wholesale rate. Cognizant of this situation, the FCC made a determination as to when a promotional price ceases to be short-term and must be treated as the retail rate to be used in calculating the wholesale rate.

> We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to 251(c)(4)(A).[2]

Despite the ILECs' argument that gift card type promotions are incentives and/or marketing tools used to distinguish their services in the marketplace, these promotions are in fact promotional offers subject to the FCC's rules on promotions.[3] While these promotional offerings are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings, they do result in a savings to the customers who subscribe to the regulated service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the "real" retail rate available in the marketplace. The promotion reduces the subscriber's cost for the service by the value received in the form of a gift card or other giveaway. The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the "real" retail rate. Thus, the ILEC could use the promotion as a *de facto* rate change without changing its tariff pricing. The FCC hoped to avoid this situation, where the promotional rate competes with the tariffed price for a long or indefinite period of time, by defining the point at which the promotional rate would become a retail rate to be discounted for resale as the 91st day the promotion is available to end-users purchasing a particular telecommunications service. In other words, the FCC decided that after 90 days, resellers are entitled to the promotional rate (the "real" retail rate) minus the wholesale discount.

Therefore, pursuant to TA96, in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation.[4]

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[1] Local Competition Order, ¶ 949.

[2] Local Competition Order, ¶ 950.

[3] *See In re AT&T Communications of the Southern States, Inc.*, Docket No. 960833-TP, PSC-96-1579-FOF-TP (Fla. P.S.C. 1996); *In re AT&T Communications of the Southern States, Inc.*, Docket No. 6801-U (Ga. P.S.C. 1996); *In re Sprint Communications Company, L.P.*, Case No. TO-97-124 (Mo. P.S.C. 1997); *In re US West Communications, Inc.*, Docket No. 70000-TT-98-379, Record No. 3992, (Wyo. P.S.C. 1999) (rejecting similar "marketing tool"/"marketing expense" arguments offered by ILECs to avoid resale obligation with regard to promotions).

[4] 47 C.F.R. § 51.613(b).

Does the record before the Commission sufficiently establish that it is reasonable and nondiscriminatory for ILECs not to apply the wholesale discount to the promotional rate for gift card type promotions? The Commission finds it extremely noteworthy that while its *Order* seeking comments on the questions raised by the Public Staff's Motion was served on companies authorized to resell local service in North Carolina, no resellers filed comments addressing the ILECs' resale obligation with respect to promotional offerings. This absence of comment would appear to suggest that the reseller community believes competition will not be stifled or unduly harmed by gift card type promotions such as the one presently being offered by BellSouth since June 29, 2004 and scheduled to run until March 31, 2005. Although the resellers offered no comments, ILECs such as BellSouth commented that they offer these type promotions precisely because there is robust competition they are trying to meet by distinguishing their services with gift card type promotions. While these promotions do provide a savings and therefore a type of discount to subscribers, they do not in fact lower the charge to the subscribers for the regulated services purchased. Therefore, the Commission believes these promotions do not have the same degree of anticompetitive effect that a direct discounting of the retail price would have on the reseller market. Some customers will likely subscribe to the regulated service offering at the retail rate, although the gift received (particularly a gift card) may have little value to them.[1] Furthermore, the ILECs continue to resell the regulated services offered in their promotions to resellers, reducing the retail rate for these services by the amount of the applicable wholesale discount. Hence, the ILECs argue they are meeting their statutory obligation to resell their retail telecommunication services; resellers are not being prevented from reselling these services. Moreover, after purchasing services from the ILECs at the wholesale discount rate (a rate made possible by excluding ILEC marketing costs from the resale price), resellers may resell these services to end-users and may offer promotional inducements at their own expense whether or not the ILECs offer such promotions. In fact, ILECs have argued that their promotions are in response to promotions (fee waivers and the like) offered by resellers. Finally, to the extent that these gift card promotions are for a reasonably limited duration and are not offered consecutively, their procompetitive effects in a market that is more competitive than it was in 1996 when the Local Competition Order was issued will likely outweigh the anticompetitive effects.

Given that there has been no opposition to gift card type promotions from the reseller community, the Commission is reluctant to establish a rule that the benefit of these promotions must be offered to resellers in addition to the reseller discount. To the contrary, given the absence of opposition, the Commission is persuaded by the arguments put forth by the ILECs. Although the Commission believes that restrictions on resale obligations must be considered on a promotion-by-promotion basis, some restrictions on resale of some gift card type promotions that run for more than 90 days may be proven to be reasonable and nondiscriminatory. While promotions must be analyzed individually for their anticompetitive effects, the Commission finds that, upon proof that it is reasonable and nondiscriminatory not to offer the benefit of a promotion offered for more than 90 days to resellers, ILECs will not be required to provide such benefit to resellers in addition to the established reseller wholesale discount. However, ILECs should be mindful that resale restrictions on unreasonably long, unlimited or permanent promotions that compete with and undercut the tariffed retail price for services would gut the resale obligation of TA96 and will be held unreasonable.[2]

[1] For example, BellSouth commented that some customers accepting gift card type promotions never use the gift card or coupon for check, etc.

[2] The Commission notes that to the extent a gift card type promotion may be associated with a mixed bundle offering of regulated and nonregulated services with respect to which an ILEC invokes the one-day notice in G.S. 62-133.5(f), case-by-case determinations for the purpose of determining resale obligations will not run afoul of the ILECs' right to offer the promotion without obtaining the Commission's approval. The Commission's case-by-case determination would not be for approval purposes but would be to determine whether, under TA96 and the FCC's rules, the benefit of a promotion offered for more than 90 days must be accounted for in determining the retail rate that must be discounted by the wholesale discount.

With regard to BellSouth's 1FR + 2 Cash Back promotion, based on the Commission's current knowledge, the Commission would be inclined to find that a restriction on resale is reasonable and non-discriminatory. Resellers have not complained or asked the Commission to find the restriction unreasonable or harmful to competition. Resellers have not been precluded from reselling the regulated service and are able to purchase the service at the tariffed rate minus the wholesale discount. The wholesale discount was, in part, set by deducting ILEC marketing expenses from the ILECs' costs for the regulated service—at least in part a recognition that resellers would have their own marketing expenses. Resellers remain free to offer, at their own expense, promotional inducements to customers who purchase the tariffed service(s) from them. Although the Commission would ordinarily be concerned about a promotion in competition with the tariffed offering for a nine-month period (from June to March), BellSouth's promotion will be offered for a limited time, and the resellers' apparent disinterest or indifference would tend to persuade the Commission that, at least with respect to 1FR + 2 Cash Back, the anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the procompetitive effects.

2) Is an ILEC offering a bundle of regulated and nonregulated services for more than ninety days obligated to offer the bundle, the regulated portion of the bundle, or both to resellers during the term of the promotion or, as BellSouth has contended, is no part of such a bundle subject to the resale obligations?

The **Public Staff** argued that the regulated portion of a mixed bundle containing regulated services is subject to resale. Companies should not be allowed to evade their resale obligations by placing regulated services in bundles, discounting these services, and refusing to offer the regulated portion of the bundle to resellers. Bundling regulated services does not suddenly make those services immune from regulation. Bundles certainly can be in the public interest by allowing customers to buy services they desire at a lower rate. However, they are not immune from regulation.

The **Joint Commenters** did not address this issue.

BellSouth maintained that a company is not required to resell mixed bundles containing non-telecommunications services or services provided by other entities. There is no obligation to make the separate parts of a bundled offering available to resellers at a "hypothetical" discounted price which would be the equivalent of providing resellers a service at a price that does not relate to the prices for which those services are sold at retail to non-carrier subscribers. However, a company must offer for resale each regulated service contained in a bundle at the retail rate minus the wholesale discount.

The **ILECs** commented that if a bundle consists of regulated and nonregulated services, resellers should not be allowed to sell the bundle at the promotional discount rate. Requiring the resale of bundled offerings containing regulated and nonregulated services would be contrary to the TA96.

DISCUSSION OF QUESTION B-2

As has been discussed hereinabove, Section 251(c)(4)(A) of TA96 requires ILECs to offer for resale at wholesale discounts any telecommunications service that it provides at retail to non-telecommunications end-user subscribers. The FCC has held that promotions offered for more than 90 days must be made available to resellers at the promotional rate minus the wholesale rate, because any promotion exceeding 90 days would be in competition with the retail rate and would allow the ILEC to undercut the reseller by shifting customers to the promotional offerings and denying the benefits of those offerings to the resellers. An ILEC's obligation to make the benefit of a promotional offering available to resellers is, therefore, directly related to whether the promotional rate is available to the end-user retail customer in such a way as to be in competition with the tariffed

retail rate. Service bundles, such as those implicated by Question B-2, are not categorically exempt from the resale obligation.[1]

In the context of analyzing the obligation of ILECs to resell services, there are at least two different types of mixed bundle offerings. The first type is similar to the gift card type promotion and must be made available to resellers if offered for more than 90 days, unless a restriction on reselling the promotion is reasonable and nondiscriminatory. The second type of mixed bundle offering requires the customer to subscribe to a bundle of services, the total cost of which exceeds the cost of the consideration of the regulated service(s) on a stand-alone basis if purchased from the tariff. ILECs should not be obligated to resell this second type of promotion.

The first type of mixed bundle promotion consists of regulated telecommunications services, provided at no less than the tariffed retail rate, and nonregulated services, provided free of charge. For resale purposes, this type of promotion should be treated no differently than gift card type promotions. Promotions that allow the customer to receive something of value as a giveaway for the purchase of a regulated telecommunications service would provide the customer with a discount off the price of the regulated service, i.e., a discount equal to the value of the giveaway, whether it be a gift card, cash back or free nonregulated services. These promotions permit the customer to purchase the regulated service for the same price listed in the tariff but gives the customer more for the same amount of money by providing the customer a giveaway of some value. These promotions, therefore, compete head-to-head with the retail price. The customer's choice is between paying the retail price of, for example, $20, and receiving only the tariffed regulated service, or paying the same $20 retail price for the same service but receiving an additional value or giveaway for making the exact same dollar cost purchase. Thus, the promotion reduces or discounts the retail price by the value of the giveaway. When such a discount of the regulated service is offered for more than 90 days, the discounted price (the tariffed rate minus the value of the giveaway) becomes the "real" retail rate and competes directly with the tariffed rate for the regulated service. Therefore, in order for the reseller to receive the true wholesale rate, the wholesale discount must be from the discounted promotional rate. The ILEC must allow the reseller's purchase price to be determined by applying the wholesale discount to the promotional rate that is, in effect, available at retail to end-user subscribers. To further clarify the ILEC's resale obligation as to this first type of mixed bundle promotion, the Commission notes that the ILEC does not have to allow the reseller to purchase the bundle of services offered in the ILEC's promotion as long as it offers for resale each telecommunications service component of the bundle at the promotional rate minus the wholesale discount. Of course, if the promotional rate is not available to end-user subscribers for more than 90 days, the ILEC is not obligated to permit resellers to take advantage of the promotional rate.

The second type of mixed bundle promotion also consists of both regulated telecommunications services and nonregulated services, but the entire bundle is offered to the customer for more consideration than the customer would pay if purchasing from the tariffed offering.[2] For resale purposes, the ILEC should not be required to provide these bundled offerings or the benefit of these promotions to resellers. Such promotions do not compete directly with tariffed offerings. With these promotions, end-user subscribers cannot purchase the bundle (or the regulated portion of the bundle) for a price less than or equal to the tariffed retail rate for the regulated service(s) in the bundle. The subscriber to such a promotional offering must accept the complete bundle and pay not only for the regulated service(s), but also for the additional services in the bundle at a total cost that exceeds the price of the regulated service(s) when purchased on a stand-alone basis

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[1] *In the Matter of American Communications Services, Inc.*, ¶¶ *41, 51, 52.*

[2] For purposes of this discussion on the second type of mixed bundle, more consideration includes all additional consideration (beyond the tariffed price) from the customer, such as the price paid for service, the signing of a contract binding the consumer to purchase a service for a set or extended period of time, or the subscription to a certain increased level of service at a specified premium price.

under the tariff. Some or all of the services (regulated and/or nonregulated) may be discounted, but the customer cannot purchase the regulated portion of the bundle, discounted or not, without purchasing the entire bundle for consideration that exceeds the tariffed price for just the regulated retail services. Any discount that may apply to a regulated service in such a promotional bundle is not available to end-users because they cannot receive the discounted service unless they purchase the entire bundle of services for consideration that exceeds the retail price for the regulated service. Therefore, with these promotions, neither the promotional bundle nor the regulated services in the bundle competes directly with or undercuts the equivalent regulated tariffed offerings. The customer's choice is between the regulated service(s) at the tariffed price on the one hand, or the regulated service(s) plus additional services for a total price exceeding the cost of the stand-alone regulated service(s) under the tariff on the other hand. The promotional bundle, which costs the customer more, is not a lower cost means of obtaining the regulated services in the bundle; instead, it is a higher cost means of purchasing the service because the customer can only receive the regulated service in the bundle by paying additional money or consideration for additional services.[1]

However, ILECs are advised that if promotional mixed bundles should be offered for a total price that is less than or equal to the price of the regulated services offered on a stand-alone basis under their tariffs, the promotions would cause head-to-head competition with the tariffed retail rates. Accordingly, with regard to the regulated services in such a bundle, the benefit of such promotions offered for more than 90 days would have to be offered to the resellers, as discussed in the section above on the first type of mixed bundle offerings. In any event, as with the first type of promotions, ILECs are not required to make the bundles themselves available to resellers and would only have to make the promotional rate of the regulated services available for resale if the entire bundle was offered for less than the price of the tariffed regulated services.

3) If the ILEC is required to offer the bundle or the regulated portion of the bundle to resellers, does the reseller discount apply in addition to any promotional discount offered in the bundle to the ILEC's end users during the term of the promotion?

The **Public Staff** argued that the regulated portion of a bundle is subject to resale, and both the promotion discount and the reseller discount should apply. The Public Staff opined that, since the promotion discount has lowered the retail rate of the regulated service, the wholesale discount should be applied to the reduced retail rate.

The **Joint Commenters** did not address this question.

BellSouth stated that, as set forth in its initial comments, a service is required to be offered for resale at the wholesale discount only if it is made available to end-users at the retail rate. Retail customers do not have the ability to pick and choose selected portions of bundles. They can purchase a component of a bundle alone if that service is available on a stand-alone basis, and when they do so they pay the tariffed rate for the individual service, not some percentage of the price for a bundle that includes that service (and others). In those cases, BellSouth makes the retail service available for resale at the retail price minus the wholesale discount. There is no further requirement in any jurisdiction that BellSouth break apart and resell parts of bundles piece-meal, and there is no valid basis for the Commission to create one.

Again, the **ILECs** commented that if a bundle consists of regulated and nonregulated services, resellers should not be allowed to sell the bundle at the promotional discount rate. Requiring the resale of bundled offerings containing regulated and nonregulated services would be contrary to the TA96.

[1] While the bundle costs more than just the regulated service(s), a customer who wants the additional services *and* the regulated services saves money by choosing the promotional bundle because it is priced lower than the total cost of the services purchased individually.

DISCUSSION OF QUESTION B-3

This question has been answered by the discussion hereinabove. Whenever an ILEC is required to make the benefit of a promotion available to resellers because it is being offered for more than 90 days and is therefore in competition with the tariffed retail rates, the reseller discount applies to the promotional rate. That is to say, the reseller discount applies in addition to the promotional discount.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

1) That gift cards, checks, coupons for checks or similar types of benefits are promotional discounts for the purposes of G.S. 62-133.5(f);
2) That promotional discounts are considered "price discounts that apply exclusively to services not regulated by the Commission" pursuant to G.S. 62-133.5(f) when the benefit of the discounts is funded solely from or charged against the nonregulated operations of the local exchange carrier;
3) That the source of funding for any promotional discount is determinative of whether the discount "applies exclusively to services not regulated by the Commission." A discount funded in whole or in part by charging it to a regulated service or to regulated service operations is not one that "appl[ies] exclusively to services not regulated by the Commission;"
4) That LECs who avail themselves of the one-day notice provision of G.S. 62-133.5(f) necessarily represent that any promotional discount appl[ies] exclusively to the nonregulated portion of a mixed bundle, and that any discount given for the purchase of a mixed bundle will be funded, accounted for or applied against only the nonregulated portion of the bundle. The Commission declines to expand its *Order* of January 2, 2004 to require a LEC to specify the funding source of its promotions;
5) That the benefit of a gift card type promotion offered for more than 90 days must be made available to resellers such that resellers are permitted to purchase the regulated service(s) associated with the promotion at the promotional rate minus the wholesale discount, unless the ILEC proves to the Commission (per 47 C.F.R. § 51.613(b)) that not applying the wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation;
6) That the benefit of a mixed bundle offering that results in a regulated service in the bundle being in direct competition with the tariffed retail rate for the regulated service must be made available to resellers if the bundled promotion is offered for more than 90 days, but the benefit of a mixed bundle offering that does not result in such direct competition with the tariff offering (as discussed above in this *Order)* need not be made available to resellers; and,
7) That whenever an ILEC is required to make the benefit of a promotion available to resellers because it is being offered for more than 90 days and is therefore in competition with the tariffed retail rates, the reseller discount applies to the promotional rate instead of the tariffed retail rate.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the _22nd_ day of December, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb121404.01

DOCKET NO. P-100, SUB 99

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Quality of Service Objectives for Local Exchange Telephone Companies) ORDER INSTITUTING WEBSITE POSTING OF SERVICE QUALITY RESULTS

BEFORE: Chairman Jo Anne Sanford, Presiding and Commissioners Robert V. Owens, Jr., J. Richard Conder, Sam J. Ervin, IV, James Y. Kerr, II, Lorinzo L. Joyner, and Michael S. Wilkins

BY THE COMMISSION: On December 27, 2002, the Commission issued its *Order Amending Commission Rule R9-8 and Scheduling an Evidentiary Hearing on Specific Issues.* In its *Order*, the Commission noted that the first legal issue related to website reporting concerned the Public Staff's recommendation that the Commission post service quality reports, updated on a quarterly basis, on its website. In its *Order*, the Commission concluded that

> . . . it can require ILECs and CLPs to post on their websites a pass/fail statement regarding each of the Rule R9-8 requirements, together with the amount of penalties levied against them or credits or refunds required of them with citation to that part of Rule R9-8 which gave rise to the penalty, credit, or refund. The Public Staff is requested to make a similar website posting. The Commission will provide a prominent link to this information on its own website. (Page 32)

The Commission further concluded that it

> .. sees no necessary or convincing legal impediment to requiring companies to post <u>on their own websites</u> whether or not they have been assessed penalties for quality of service violations, the nature of such violations, and the amount assessed in addition to the pass/fail information. (Page 35 with emphasis in original)

Finally, the Commission stated

> [i]t would, however, be useful for the Public Staff to provide independent posting of both the pass/fail and the penalties information on its website so that all this information can be gathered in one place. The Commission will provide a prominent link to this information on its own website. (Page 35)

Motions for reconsideration of the *December 27, 2002 Order* were filed. Further, the *December 27, 2002 Order* had scheduled an evidentiary hearing to consider an appropriate maximum answertime standard for the business office and repair service and appropriate uniform reporting procedures for Operator "O" Answertime, Directory Assistance Answertime, Business Office Answertime, and Repair Service Answertime.

On March 7, 2003, the Commission issued its *Order Continuing Hearing, Comment Cycle and Amendments' Effective Date* allowing the parties to the proceeding the opportunity to conduct negotiations on issues related to the *December 27, 2002 Order*. In the *March 7, 2003 Order*, the evidentiary hearing previously scheduled was continued, the comment cycle on the motions for reconsideration was suspended, and the effective date of amended Rule R9-8 was postponed indefinitely.

On October 30, 2003, the Public Staff, on behalf of itself and the Industry Task Force (ITF), filed its Joint Report. The parties stated in the Joint Report that they had been able to resolve most of the issues in the docket and had narrowed the remaining issues. The parties noted that 17 issues remained unresolved after the negotiation process and that the parties had negotiated all other aspects of Rule R9-8. The parties stated that they believed that the disputed issues did not require a hearing, but could be resolved by the Commission after the parties had been allowed to file comments.

On November 7, 2003, the Commission issued its *Order Requesting Initial and Reply Comments* on the October 30, 2003 Joint Report. The *Order* also requested that the parties file Joint Comments listing each issue that the parties negotiated and providing detailed support for each issue negotiated if the result was different than that ordered by the Commission in its *December 27, 2002 Order*. The Commission noted in its *November 7, 2003 Order* that it "will consider the negotiated issues and, after reviewing and considering the Joint Comments, will either accept or reject each of the negotiated issues."

Initial comments were filed on December 8, 2003 and, after an extension of time, reply comments were filed on January 14, 2004. The Joint Comments were filed on January 20, 2004.

On June 4, 2004, the Commission issued its *Order Amending Commission Rule R9-8 Effective July 1, 2004*. In its *June 4, 2004 Order*, the Commission concluded for Negotiated Issue No. 11 (website reporting), as follows[1]:

> The Commission concludes that website reporting is appropriate. The Commission upholds and affirms its decision on website reporting as outlined in the *December 27, 2002 Order*. However, the Commission finds it appropriate to hold in abeyance the specific details of the website reporting requirement and the effective date of the website reporting requirement in order to allow the parties the opportunity to negotiate on a[n] appropriate means to allow the public access to the service quality information. The parties are requested to file a report with the Commission detailing the negotiations and their specific recommendations by no later than Tuesday, August 3, 2004. The Public Staff is specifically requested to facilitate the negotiation process.

Further, the Commission stated in its *June 4, 2004 Order* that "it is entirely appropriate and reasonable to uphold its conclusions on website reporting as outlined in the *December 27, 2002 Order* (See pages 33-35 of the *December 27, 2002 Order*)." The parties were instructed in the *June 4, 2004 Order* to follow the logic and intent of the *December 27, 2002 Order* concerning website reporting.

On August 3, 2004, the Public Staff, on behalf of itself and the other parties to the docket, filed its Report on Web Posting. The Public Staff noted that it had met twice with representatives from the industry to discuss this issue.

The Public Staff noted that the parties have agreed that the service quality results will be averaged over a 12-month period and updated quarterly. The Public Staff explained in a footnote that after receipt of the results from the fourth quarter of 2004, the results for each measure for each month in 2004 will be added together and divided by 12 (unless a company has applied for or received a waiver). The Public Staff noted that after receipt of the results from the first quarter of 2005, the results would be recalculated by removing the results from the first quarter of 2004 and adding in the results from the first quarter of 2005.

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[1] Commissioner Conder and Commissioner Wilkins dissented from the majority's decision on website reporting in the *June 4, 2004 Order*.

The Public Staff noted that there are two alternative format proposals for website posting: Attachment A of the August 3, 2004 Report (a copy of which is **attached** hereto) which is supported by the Public Staff, BellSouth Telecommunications, Inc. (BellSouth), and Verizon South, Inc. (Verizon), with Carolina Telephone and Telegraph Company, Central Telephone Company, and Sprint Communications Company, L.P. (collectively Sprint) not opposed to the format, and Attachment B of the August 3, 2004 Report (a copy of which is **attached** hereto) which is supported by Time Warner Telecom of North Carolina, L.P. (Time Warner), MCImetro Access Transmission Services, LLC (MCI), AT&T Communications of the Southern States, LLC (AT&T) , BTI, and ITC^DeltaCom, Inc. (ITC).

The Public Staff commented that there are two other issues which require a decision by the Commission: (1) whether companies should be allowed to post comments on the website explaining certain service quality results; and (2) whether the service quality results should be posted on the Public Staff's website or the Commission's website.

The Public Staff noted that the parties propose that the Commission allow them to file initial and reply comments on the outstanding issues before the Commission makes a final determination.

On August 12, 2004, the Commission issued its *Order Requesting Comments on August 3, 2004 Report on Web Posting*. The Commission requested the parties to file initial and reply comments on the following specific issues:

(1) Whether the Commission should require (a) the posting of service quality results averaged over a 12-month period and updated quarterly; **or** (b) the posting of monthly service quality results on a quarterly basis. (See page 32 of the Commission's *December 27, 2002 Order*)

(2) Whether the Commission should adopt the website reporting format outlined in Attachment A or Attachment B of the August 3, 2004 Report on Web Posting.

(3) Whether the Commission should allow companies to post comments on the website explaining certain service quality results.

(4) Whether the Commission should require that service quality results be posted on: (a) each individual company's website; **and** (b) on the Public Staff's **or** Commission's website. (See pages 32 and 35 of the Commission's *December 27, 2002 Order*)

(5) Whether the Commission should require companies to post on their own websites the amount of penalties levied against them with citation to the service objective which gave rise to the penalty. Further, whether the Commission or the Public Staff, as appropriate, should make a similar website posting on penalties. (See pages 32 and 35 of the Commission's *December 27, 2002 Order*)

Initial comments were filed on August 30, 2004 by ALLTEL Carolina, Inc. (ALLTEL), jointly by AT&T, MCI, Time Warner, and US LEC of North Carolina, Inc. (US LEC) (the Joint Commenters), the Attorney General, BellSouth, the Public Staff, Sprint, and Verizon. Reply comments were filed on September 9, 2004 by Sprint and on September 13, 2004 by BellSouth and the Public Staff.

Following is a discussion of each of the five unresolved issues related to website reporting including the Commission's conclusions on each issue.

ISSUE NO. 1: Whether the Commission should require (a) the posting of service quality results averaged over a 12-month period and updated quarterly; **or** (b) the posting of monthly service quality results on a quarterly basis. (See page 32 of the Commission's *December 27, 2002 Order*)

INITIAL COMMENTS

ALLTEL: ALLTEL stated that it prefers scenario (a), quarterly reporting of a rolling annual average updated quarterly. ALLTEL maintained that this approach will more accurately reflect service quality objective achievement by reporting companies.

ATTORNEY GENERAL: The Attorney General asserted that, as a general matter, consumers probably would benefit by having the results posted both ways – averaged over a 12-month period updated quarterly and on a quarterly basis. The Attorney General argued that the two are not mutually exclusive.

The Attorney General maintained that quarterly results allow consumers to see exactly how the company performed over a particular quarter. The Attorney General noted that if a company had a particularly good or bad quarter from a service standpoint, the consumer will be able to see that.

On the other hand, the Attorney General commented, results averaged over a 12-month period and updated quarterly give the consumer a more long term perspective on how the company has performed regarding the service quality standards. The Attorney General noted that, however, if a company had a particularly good or bad quarter just before the results are posted, the high and low numbers might be smoothed out over the 12 month average and not noticeable to the consumer.

Therefore, the Attorney General stated that his office recommends that the Commission require that the service quality results be posted both ways (averaged over a 12-month period updated quarterly and on a quarterly basis), in two separate charts, with both charts utilizing the reporting format outlined in Attachment A. [**Commission Note:** Attachment A would provide a listing of a company's service quality results all on a single line, such that, under the Attachment A format, multiple companies' results would be listed on a single page. Whereas, under the Attachment B format, each company's service quality results, service area(s), and types of service would be provided on a single page with additional page(s) to follow if the reporting company chose to provide related explanatory comments. The issue of Attachment A versus Attachment B is discussed in Issue No. 2.]

BELLSOUTH: BellSouth noted that it supports the posting of results that are averaged over a 12-month period and updated on a quarterly basis. BellSouth asserted that many factors can skew service quality results in a single month and, accordingly, monthly data reported on a quarterly basis may mislead a consumer who has not seen service results "smoothed out" by an averaging over a 12-month period. For example, BellSouth noted, ice storms, severe thunderstorms, and hurricanes can dramatically impact service quality results for a single month. BellSouth maintained that although the rules contain a force majeure provision that will allow companies to ultimately obtain forgiveness for service-affecting events that are outside its control, the company must file unadjusted and adjusted data while waiting for Commission review of its force majeure requests. For example, BellSouth stated, if the results for a particular company were impacted because of an ice storm in the month of December, that company would have to report its December results by January 20th. BellSouth noted that it is not likely that in such a short timeframe the company could receive a ruling on its force majeure request. Therefore, BellSouth asserted, quarterly reports in a monthly format would not be a fair and balanced representation of the company's performance. Moreover, BellSouth argued, since companies operate in different geographic areas, weather events for a single month may skew results for one company but not others. Reporting results over a year eliminates this problem and allows consumers to make applicable and relevant comparisons across companies.

JOINT COMMENTERS: The Joint Commenters stated that to the extent the Commission requires website reporting, such reports should be averaged over a 12-month period and updated quarterly, as proposed in the Public Staff's Report on Web Posting.

The Joint Commenters noted that the proposed 12-month averaging is the product of negotiated compromise among industry members and the Public Staff and to the extent that this compromise is not adopted by the Commission the participating carriers do not acquiesce to the resulting regulation.

The Joint Commenters stated that the issue of averaging, in particular, is of great importance to the industry because it relates directly to issues of confidentiality and fair competition that have created controversy concerning the proposed website reporting. The Joint Commenters maintained that they continue to believe that the Commission should not require website reporting, that such reporting will do little to promote public understanding of service quality issues and that requiring the posting of company-specific information could lead to disclosure of competitively sensitive information in contravention of North Carolina laws concerning the protection of what are defined as "trade secrets" under the Trade Secrets Act.

However, the Joint Commenters stated, the negotiated 12-month averaging period serves to diminish the carriers' concerns. The Joint Commenters argued that use of a longer averaging period helps to ensure that company-specific, competitively sensitive information will not be publicly disclosed and that such results will not be used in a potentially anticompetitive fashion by competing carriers. The Joint Commenters stated that the use of a longer averaging period simply will not be as susceptible to misleading and inaccurate comparisons among companies and will not be as likely to disclose information that companies have a compelling interest to protect from public disclosure.

The Joint Commenters maintained that in addition to helping to alleviate the carriers' concern with the release of competitively sensitive information, yearly averaging will more accurately reflect a company's overall service quality performance, which would seem to be the relevant information that the Commission wishes to make available to interested consumers. The Joint Commenters maintained that monthly results obviously can be greatly influenced by temporary events and fluctuations, many of which are beyond the control of a particular provider (e.g., extraordinary weather events). The Joint Commenters stated that even as to those events which are in the control of the provider, averaging over a longer period of time will help distinguish between carriers that are having systemic difficulty in achieving compliance and those carriers that may only be a percentage point out of compliance in a particular period. The Joint Commenters asserted that averaging of results over a longer period of time has the benefit of rounding out such temporary aberrations and anomalies so that consumers would have a more accurate picture of a company's overall performance.

PUBLIC STAFF: The Public Staff maintained that the industry taskforce first proposed the posting of service quality results averaged over a 12-month period in order to smooth out anomalies that might occur. The Public Staff noted that after much discussion, the Public Staff made a decision to accede to this request if the annual results were updated quarterly. The Public Staff asserted that quarterly updating allows consumers to review the most recent results. Therefore, the Public Staff stated that it supports the posting of service quality results averaged over a 12-month period and updated quarterly.

SPRINT: Sprint stated that it strongly believes the Commission should post service quality results which represent an averaged rolling 12-month period that are updated quarterly. Sprint argued that merely posting monthly results on a quarterly basis simply does not reflect the long term quality of service provided by a company. Sprint stated that in its considerable experience, it has determined that customers rarely sign up for service with the intent of remaining on the network for only three months. Consequently, Sprint maintained, a quarterly report is far less beneficial to customers than an annual report would be. Furthermore, Sprint argued, yearly results will tend to level out the "peaks and valleys" associated with summer and winter storms and will be far more representative of the overall customer experience provided by the company. Sprint asserted that this is especially important to Carolina as it provides service in a part of the state sometimes ravaged by extremely violent and unpredictable hurricanes. Sprint maintained that if the intent of posting service quality

results is to benefit consumers, then clearly a 12-month average provides more complete and useful information.

VERIZON: Verizon argued that the Commission should require the posting of service quality results averaged over a 12-month period and updated quarterly. Verizon asserted that the reporting of averaged results gives a clearer picture of a company's performance over a period of time by minimizing the impact of temporary service fluctuations.

REPLY COMMENTS

BELLSOUTH: BellSouth submitted reply comments to Issue No. 1 - Whether the Commission should require (a) posting of service quality results averaged over a 12-month period and update quarterly; or (b) the posting of monthly service quality results on a quarterly basis.

BellSouth stated that it believes that a majority consensus was reached on this issue. BellSouth noted that with the exception of the Attorney General, all other parties, including the Public Staff, supported averaging the data over a 12-month period. BellSouth commented that the Attorney General has suggested using both methods, and like Sprint, BellSouth does not believe that the Attorney General's office has provided sufficient support for the Commission to adopt this approach to reporting. In fact, BellSouth opined, the Attorney General's comments do not indicate that the Attorney General is convinced that it is appropriate to report both ways, as he stated that "consumers probably would benefit by having the results posted both ways." (emphasis added) BellSouth asserted that it is likely that consumers would be overwhelmed and confused by viewing service quality reports both ways for all companies, and it is not clear what useful purpose it would serve. For example, BellSouth noted, if a company fails for one month but passes on the 12-month average, the consumer is likely to have questions regarding past performance. BellSouth argued that with no explanations or past data available, the consumer will be inclined to contact the Public Staff for more detail. BellSouth maintained that reporting a 12-month average is straight forward and easily understood; it is either pass or fail.

BellSouth stated that companies that operate in different geographic areas may have markedly different results for a single month due to a weather related event. BellSouth maintained that averaging over a 12-month period seems the only logical solution to balancing these results.

BellSouth stated that the Commission, therefore, should adopt the position advocated by the majority of the parties and order posting of service quality results averaged over a 12-month period and updated quarterly.

PUBLIC STAFF: The Public Staff stated that after carefully studying the initial comments submitted by the other parties in this docket, the Public Staff is not persuaded to alter the positions detailed in its initial comments.

SPRINT: Sprint maintained that with the sole exception of the Attorney General's office, the consensus on this issue is that the Commission should post service quality results on an averaged rolling 12-month period, updated quarterly. Sprint noted that the Attorney General's office suggested that the Commission should post results using both methods, yet provided no real support for posting monthly results on a quarterly basis other than to state the obvious that it will allow consumers to see such results. Sprint maintained that it is opposed to posting monthly results on a quarterly basis as doing so simply does not reflect the long-term quality of service provided by a company. Sprint argued that customers rarely sign up for service with the intent of remaining on the network for only three months, and utilizing two separate reporting structures as advocated by the Attorney General's office will confuse customers.

DISCUSSION

The Commission notes that all parties except the Attorney General support the posting of service quality results averaged over a 12-month period and updated quarterly. The Attorney General maintained that consumers would benefit by having service quality results posted both ways – averaged over a 12-month period updated quarterly and on a quarterly basis. The Commission further notes that the *December 27, 2002 Order* did not contemplate posting service quality results on a 12-month average, updated quarterly; the parties negotiated a 12-month average updated quarterly as outlined in the August 3, 2004 Report on Web Posting.

The Commission understands the desire of the parties to smooth out anomalies but believes that a 12-month average is inappropriate. The Commission believes that a 12-month average is simply too long of a period to average service quality results. The Commission believes that a three-month average (or quarterly average), updated quarterly would be sufficient to smooth out any basic anomalies while still reflecting the most recent service quality results. Further, the Commission notes that the force majeure clause should be utilized by any company which faces a force majeure event which impacts its service quality results.[1]

CONCLUSIONS

The Commission finds it appropriate to require the posting of service quality results (i.e., in the pass/fail format) averaged over a three-month (quarterly) period and updated quarterly.[2]

ISSUE NO. 2: Whether the Commission should adopt the website reporting format outlined in Attachment A (attached hereto) or Attachment B (attached hereto) of the August 3, 2004 Report on Web Posting.

INITIAL COMMENTS

ALLTEL: ALLTEL stated that it believes that reporting in the form shown in Attachment A is adequate with an average 12-month reporting format. ALLTEL stated that if the Commission chooses to require monthly reporting on a quarterly basis, then the Attachment B format would more accurately reflect company performance and allow for comments to be provided.

ATTORNEY GENERAL: The Attorney General stated that he believes that the Commission should adopt the website reporting format outlined in Attachment A, the format preferred by the Public Staff. The Attorney General commented that the format outlined in Attachment A allows consumers to more easily compare the service quality reports of different companies because the results for all companies are listed on the same page. By contrast, the Attorney General noted, the format outlined in Attachment B only lists one company per page. The Attorney General asserted that under that format, consumers would have to flip back and forth between many pages in order to compare companies. In addition, the Attorney General stated, the format outlined in Attachment A is simpler and contains only factual information. The Attorney General stated that, by contrast, the format outlined in Attachment B allows companies to post subjective "comments" on the reporting form. The Attorney General stated that he does not believe that it is appropriate to devote space on the reporting form for such comments.

BELLSOUTH: BellSouth stated that it supports the proposed format in Attachment A. BellSouth noted, however, that its support for this proposal was made with the understanding that service quality results will be averaged over a 12-month period and updated quarterly. BellSouth maintained

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[1] The Commission notes that companies, specifically BellSouth and US LEC, have recently filed force majeure waiver requests with the Commission and that previous waiver requests by Sprint have been granted.

[2] The four quarters of a calendar year would be: First – January, February, and March; Second – April, May, and June; Third – July, August, and September; and Fourth – October, November, and December.

that should the Commission rule that monthly results are to be posted on a quarterly basis, then BellSouth would support Attachment A only if it is revised to allow room for comments.

JOINT COMMENTERS: The Joint Commenters stated that to the extent the Commission requires website posting of service quality results, it should adopt a reporting format consistent with that set forth in Attachment B to the Public Staff's Report on Web Posting (the "carriers' approach"), for the following five reasons.

(1) Use of a measure-specific, side-by-side approach will lead to consumer frustration and confusion.

The Joint Commenters stated that the main difference between the proposed reporting formats is that the Public Staff's proposed format provides a side-by-side comparison of each company's performance on a measure-by-measure basis while the carriers' proposed format provides company-specific service quality information. In other words, the Joint Commenters maintained, the Public Staff's approach is to attempt to condense all service quality reporting for all North Carolina telephone companies into one report while the carriers' approach is to have separate reports for each company. The Joint Commenters asserted that while a side-by-side comparison of companies does have surface level appeal, and on its face seems simpler, on closer examination it is clear that the Public Staff's proposed format will be confusing and frustrating to consumers because telecommunications service is not an undifferentiated, commodity service.

The Joint Commenters argued that the side-by-side comparison of providers' service quality results gives the appearance of comparing apples to apples (i.e., consumers will assume that Company A's products and services are comparable to Company Z's) but this appearance is deceiving. Most importantly, the Joint Commenters asserted, not all providers offer all services. The Joint Commenters noted that it will serve no purpose to inform a consumer about Company Z's consistently compliant service quality if the consumer cannot purchase service from that company. For example, the Joint Commenters noted:

- A consumer investigating alternatives for residential telephone service would derive no benefit from learning of the compliant service quality performance of a company providing only business services;
- A consumer desiring standard residential telephone service would derive no benefit from learning of the service quality performance of a company providing only prepaid service; and
- A consumer desiring standard business service in Concord would derive no benefit from learning of the service quality performance of a company providing service only in Raleigh.

The Joint Commenters maintained that the list could go on and on. The Joint Commenters commented that the fundamental point is that service quality information divorced from any information about the type of services provided and the areas where such services are provided is of virtually no use to consumers. The Joint Commenters stated that consumers attempting to obtain service quality information in this manner will only be frustrated as they contact companies that cannot or do not provide the service the consumer is interested in purchasing.

(2) The carriers' approach will provide more information to consumers to assist them in making meaningful choices.

The Joint Commenters asserted that the company-specific approach set forth in Attachment B allows the Commission to contextualize the quality of service information in a manner that will provide more information to consumers as they make decisions in selecting telecommunications providers. Significantly, the Joint Commenters noted, the Public Staff's proposed measure-specific approach does not allow for the presentation to consumers of information relevant to a consumer's ability to make meaningful choices about providers, such as:

- type(s) of service offered by each provider;
- geographic areas served by each provider; and
- provider comments, to contextualize performance levels, especially if and when performance falls below the threshold levels.

By contrast, the Joint Commenters argued, the carriers' approach would allow for the presentation of this data, in addition to potentially other similar information, that will be of critical importance to consumers as they evaluate competitive carriers.

(3) The carriers' approach more accurately reflects the manner in which consumers will likely use the reports.

The Joint Commenters argued that the Public Staff's approach, by virtue of its format, encourages consumers to use a list of undifferentiated providers' service quality results as a "first filter" in selecting service providers while providing no information about whether such carriers are capable of providing the services desired. The Joint Commenters maintained that under the Public Staff's approach, it would be only upon seeking out further information from providers that the consumer would learn the kinds of services offered by a specific carrier and the geographic areas wherein a specific carrier provides service.

The Joint Commenters argued that this process would not seem to reflect the manner in which consumers should be encouraged to – and do in fact – evaluate competitive carriers. In other words, the Joint Commenters maintained, the first step in this process is for consumers to identify carriers that are capable of and willing to provide the services desired by the consumer. The Joint Commenters noted that after such carriers are identified, consumers may, if desired, assess the carriers based on a range of factors, including service quality. The Joint Commenters asserted that access to individual provider reports is consistent with this reality because consumers are likely to be searching the Commission's website for information regarding particular providers prompted by the marketplace – whether through providers' advertising campaigns, other consumers' word of mouth, or other means – rather than attempting to use the Commission's list as the first place to look in selecting a telecommunications provider.

(4) Without an opportunity for carriers to provide comments, the results may be misleading and less informative.

The Joint Commenters stated that because the Public Staff's approach provides no opportunity for providers to contextualize the service quality results by adding comments to the reporting form, consumers will have no way of knowing whether noncompliance during a particular period is the result of a benign and anticipated "hiccup" in the provider's services caused by a beneficial systems upgrade or is the result of some other, more serious cause. In this regard, the Joint Commenters noted, carriers should be allowed to provide relevant information concerning such deviations so that consumers are fully informed in evaluating the service quality results.

The Joint Commenters asserted that the bottom line is that, to the extent that the Commission gets into the consumer information business by requiring the disclosure of service quality results, consumers should be given more, not less, information about service quality, including information deemed relevant by the affected providers. The Joint Commenters stated that this conclusion is consistent with that reached by the New Hampshire Public Utilities Commission in adopting a "Carrier Report Card" similar to the approach set forth in Attachment B. *See* DT 02-105 Local Exchange Carriers Quality of Service Reporting, *Order Nisi Regarding Quality of Service Reporting, Order No. 24,156 (April 11, 2003)* (available at http://www.puc.state.nh.us/Regulatory/orders.htm). The Joint Commenters noted that in adopting a carrier-specific "report card" allowing for carriers to provide narrative comments on their service quality performance, the New Hampshire Commission found: "The fact that consumers will access carriers one-by-one emphasizes diversity and allows for

consideration of all the explanatory information provided. We find that New Hampshire consumers and the competitive marketplace will benefit from the availability of this information." *Id.* at 7-8. The Joint Commenters stated that as realized by the New Hampshire Commission, consumers will be free to accept or reject any explanations provided, which will in no way undermine basic "compliance/non-compliance" disclosure contained in this report. Moreover, the Joint Commenters noted, in the absence of such an opportunity to explain deviations, carriers will be incented to try to alleviate every deviation, no matter how minor, by seeking a waiver of non-compliance through the Commission petition process. The Joint Commenters noted that this will lead to needless litigation before the Commission and will not serve the goal of providing meaningful information to consumers.

(5) The carriers' approach will be easier to administer than the Public Staff's approach.

The Joint Commenters stated that using the carrier-proposed format, each provider would file its report with the Commission, and the Commission or Public Staff would, in turn, upload each provider's form to the designated website (whether the Commission website or the Public Staff website). The Joint Commenters maintained that this process could be done electronically, with carriers uploading reports directly to the relevant website without the need for Commission intervention. The Joint Commenters noted that consumers would then be able to access each provider's data individually, and, in the course of reviewing a provider's compliance with the R9-8 quality standards, the consumers would see whether the provider offers services of the nature and in the location sought.

The Joint Commenters argued that because the carrier-proposed format would only need to be uploaded to the website in its native format, the Commission Staff would not need to compile or reformat any data, and there would be very little risk of error in the posting process. The Joint Commenters maintained that expenditure of resources on the web posting requirement would be minimal for the Commission and the Public Staff, and neither the Commission nor the Public Staff would have any significant additional administrative burdens because they would not be involved in the transfer, compiling, or reformatting of data. Moreover, the Joint Commenters noted, the carriers' approach would minimize the risk of posting erroneous information, because – unlike the Public Staff's approach – no transfer, reformatting, or compiling of the reported information would be required. The Joint Commenters asserted that this benefit should not be underestimated, as it is clear that the Public Staff's approach will require a significant devotion of staff resources to assemble, compile, and update the report.

PUBLIC STAFF: The Public Staff stated that it believes that the reporting format proposed in Attachment A is much clearer and more concise than the alternative offered in Attachment B. The Public Staff asserted that the format in Attachment A would allow consumers to quickly review and compare the "pass/fail" service quality results for all reported measures for all companies by visiting a single web page and scrolling down to the rows containing data on the companies of interest. The Public Staff opined that this format would also readily identify companies that did not file service quality reports and all instances in which companies had indicated that an objective did not apply to them. Finally, the Public Staff noted, although it is not obvious from the hard copy version, the Public Staff has structured this website report so that users can view the Rule R9-8 benchmark for any service quality measure by simply moving a mouse pointer over the heading for the appropriate column.

The Public Staff stated that Attachment B would require posting each company's service quality results on a separate web page. The Public Staff maintained that this arrangement would be tedious and awkward for visitors to use. The Public Staff stated that it would require them to repeatedly click on individual web links for each company in order to compare information on all companies of interest. The Public Staff argued that this one-company-per-page format would effectively frustrate visitors in their efforts to compare the service quality afforded by multiple providers. The Public

Staff asserted that this report format would also require more maintenance on the part of the persons responsible for posting the data and make it significantly more difficult to spot potential errors in company data, making it a source of potential concern for all providers.

The Public Staff recommended that the Commission adopt the reporting format proposed in Attachment A of the Report on Web Posting.

SPRINT: Sprint stated that it much prefers and supports the format outlined in Attachment B.

VERIZON: Verizon argued that the Commission should adopt the website reporting format as filed by the Public Staff and outlined in Attachment A. In addition, Verizon asserted, the Commission should allow footnote inclusion of comments by companies to explain certain service quality results not meeting objectives, such as when a company files a Force Majeure waiver due to inclement weather.

REPLY COMMENTS

BELLSOUTH: BellSouth did not specifically address this issue in its reply comments.

PUBLIC STAFF: The Public Staff stated that after carefully studying the initial comments submitted by the other parties in this docket, the Public Staff is not persuaded to alter the positions detailed in its initial comments. However, the Public Staff stated that it wishes to briefly address the Joint Commenters' views concerning the appropriate format to use for the online service quality report.

The Public Staff stated that it cannot understand why the compact, concise reporting format advocated in Attachment A would be more frustrating and confusing to customers than the format proposed in Attachment B. The Public Staff argued that the latter would require consumers to follow each company's web page link – literally dozens of them – and scrutinize each company's service quality web page in order to find companies that offered services within the appropriate geographical areas. The Public Staff maintained that service quality results for all companies of interest would need to be retained somehow through this lengthy process and then assembled side-by-side and compared. The Public Staff stated that it believes that a service quality website arranged in this manner would make it impractical for visitors to make meaningful use of any available service quality information.

However, the Public Staff stated that it agrees with the Joint Commenters that providing details on the local telephone services offered by ILECs and CLPs and the specific locations they serve would benefit a consumer searching for a local provider. The Public Staff noted that its Communications Division maintains current contact information on ILECs and CLPs on its website and would be willing to provide a prominent link to each company's website in order to direct visitors to information about the company, its service offerings, and the areas it serves. The Public Staff argued that the format depicted on Attachment A could be readily configured to enable visitors to click on any company name (for example, "Company M") and be routed directly to the corresponding contact information that is posted on the Communications Division's web page. The Public Staff opined that this would facilitate public access to information on companies' geographic availability and offerings while ensuring that the information provided to prospective subscribers is current and relevant. The Public Staff maintained that this contact information would not be linked in any way to the service quality website.

SPRINT: Sprint noted that for the reasons set forth by the Joint Commenters, Sprint continues to support Attachment B although it does not oppose Attachment A so long as the Commission utilizes a 12-month reporting period with waiver provisions as outlined by the Public Staff.

DISCUSSION

The Commission notes that ALLTEL (if a 12-month average is adopted), the Attorney General, BellSouth (if a 12-month average is adopted), the Public Staff, and Verizon support Attachment A while the Joint Commenters and Sprint support Attachment B. Sprint stated in reply comments that it continued to support Attachment B although it does not oppose Attachment A so long as the Commission utilizes a 12-month reporting period (See Issue No. 1) with waiver provisions as outlined by the Public Staff.

The Commission understands the arguments of the Joint Commenters; however, the Commission believes that the arguments of ALLTEL, the Attorney General, BellSouth, the Public Staff, and Verizon supporting Attachment A are more persuasive. The Commission believes that it would be much simpler and cleaner to reflect a report on service quality by listing multiple companies on a single page with additional pages as needed depending on the number of carriers, than to have separate pages on each individual company. However, the Commission supports the suggestion offered by the Public Staff in its reply comments, whereby it offered to provide a link on the Attachment A format to company-specific information. The Commission believes that this suggestion adequately and appropriately addresses the concerns and issues raised by the Joint Commenters. Therefore, the Commission finds it appropriate to adopt the website posting format as outlined in Attachment A (except reflecting a three-month average – See Issue No. 1), with access to company-specific links as proposed by the Public Staff (i.e., via the Public Staff Communications Division's webpage).

CONCLUSIONS

The Commission finds it appropriate to adopt the website posting format as outlined in Attachment A (except reflecting a three-month average – See Issue No. 1), with access to company-specific links as proposed by the Public Staff (i.e., via the Public Staff Communications Division's webpage).

ISSUE NO. 3: Whether the Commission should allow companies to post comments on the website explaining certain service quality results.

INITIAL COMMENTS

ALLTEL: ALLTEL stated that it prefers a rolling 12-month average reporting of service quality results, updated quarterly. ALLTEL argued that this approach should lessen the need for comments to be provided by a reporting company. ALLTEL stated that if, however, the Commission chose to require monthly reporting, there would be a greater need for companies to have the option of offering an explanation of any deviations from the Commission's service quality objectives, and such explanations could only be offered through comments.

ATTORNEY GENERAL: The Attorney General stated that it would not be appropriate to devote space on the reporting form, whereby, companies would post subjective comments regarding their service quality results. The Attorney General maintained that the Commission should not give companies the opportunity, on a government website, to explain away their failure to meet service quality objectives, to criticize the service quality standards, to market their services, to criticize another company, or to make whatever other use the companies might make of a "comment" space on the reporting form.

The Attorney General stated that the service quality results are what they are; the company would either meet the Commission's service quality standards for the relevant period or it would not. The Attorney General maintained that if, under the Commission's rules, the company had a valid excuse for not meeting the standard, such as severe weather, the company can apply for an appropriate waiver; all such waiver applications would be shown in the reporting format outlined in Attachment A. The Attorney General stated that if a company had a valid reason for not meeting the standard, that would be reflected in the format preferred by the Public Staff and the Attorney General.

The Attorney General stated that previously, most of the companies filed comments in this docket objecting, on trade secret grounds, to the original proposed website reporting plan whereby the companies' specific service quality results for each standard (i.e., specific numbers) would be posted. The Attorney General noted that in order to accommodate such concerns, the Attorney General and the Public Staff proposed a pass/fail system where the companies would not have to post specific data. The Attorney General maintained that having gone with that format, it would not be appropriate for the Commission to now give companies the opportunity to, among other things, provide specific service quality data in the "comment" section and/or to state that they came close to meeting the standard but just barely missed it. The Attorney General noted that the companies cannot have it both ways by discussing specific data only when it fits their needs. The Attorney General stated that while the companies are free to say whatever they want about the service quality standards/results on their own websites or through other methods, the Commission should not have to carve out space on the Commission's website reporting form for such comments. Instead, the Attorney General argued, the Commission should require that the results be posted in a clean, simple, factual manner, incorporating the format outlined in Attachment A.

BELLSOUTH: BellSouth noted that if the Commission ultimately rules that monthly results should be reported on a quarterly basis, BellSouth strongly submits that companies be allowed to post comments on the website to explain anomalies in service results for a particular month.

JOINT COMMENTERS: The Joint Commenters stated that they believe that the Commission should allow companies to post comments concerning service quality results. The Joint Commenters referenced their comments on Issue No. 2.

PUBLIC STAFF: The Public Staff stated that it believes that it would be extremely unwise for the Commission to allow providers to post comments or explanations concerning their service quality data on the website where the service quality results are posted for public inspection.

The Public Staff maintained that the Commission has extended considerable time and effort in this docket to establish rules that treat local telephone providers identically with respect to the service quality requirements they are expected to meet and the provision of meaningful service quality information to the Commission. The Public Staff noted that the Commission is currently attempting to develop effective website posting standards, and in doing so it should make every effort to continue to provide a level service quality playing field among the companies. The Public Staff asserted that allowing companies to post comments explaining their service quality data would be extremely unwise and could substantially degrade consumers' perceived usefulness of these data. The Public Staff opined that the service quality data being reported by the companies should require no explanation; the data speak for themselves. The Public Staff argued that introducing company comments into the service quality reports would add subjectivity to what should be an objective process.

However, the Public Staff maintained, the Commission should allow one exception to the prohibition on company comments within the online reports. The Public Staff proposed that if a company has filed a request for a force majeure waiver under the provisions of Rule R9-8(c), the monthly service quality data for the objective and period for which the waiver had been requested should be expunged from the data that are used to calculate the posted service quality results. The Public Staff noted that the resulting figures should then be footnoted with the text recommended by the Public Staff in Attachment A of the Report on Web Posting, i.e., "The company has requested waiver of Commission objectives due to inclement weather. The data shown represent an average of unaffected months." The Public Staff stated that if a waiver were subsequently granted, the footnote would be updated to reflect the approval. In the event a waiver is not granted, the expunged data would be added back into the calculation and the results would be recalculated and reposted; and, at such time, the Public Staff maintained that the waiver footnote would also be dropped.

SPRINT: Sprint stated that it strongly believes that companies should be given an opportunity to comment on results to ensure they are put in the proper context. Sprint asserted that in order to give consumers who are truly interested in this information an accurate picture, an explanation of the data should be made available. For example, Sprint noted, sometimes events which are outside the control of the companies can impact the quality of service. Sprint opined that a brief explanation of such an occurrence would likely be helpful to any interested party. Sprint noted that this would in no way alleviate a company's obligation to state whether or not they are in compliance. Accordingly, Sprint asserted, companies should be given the opportunity to comment; doing so will ultimately prove beneficial to customers.

VERIZON: Verizon argued that the Commission should allow companies to post comments on the website explaining certain service quality results. Verizon opined that this will give consumers a more complete and accurate picture of the circumstances underlying a company's performance. For example, Verizon stated, if a company missed a service quality standard due to forces beyond its control, such as a hurricane or other *force majeure*, the company should be allowed to explain that it was not responsible for the missed service quality standard. Otherwise, Verizon maintained, consumers may draw erroneous conclusions and develop an incomplete or inaccurate view of a company's performance.

REPLY COMMENTS

BELLSOUTH: BellSouth did not specifically address this issue in its reply comments.

PUBLIC STAFF: After carefully studying the initial comments submitted by the other parties in this docket, the Public Staff stated that it is not persuaded to alter the positions detailed in its initial comments.

SPRINT: Sprint stated that it continues to believe that companies should be given an opportunity to comment on results to ensure they are put in proper context. Sprint noted that while the positions of ALLTEL and BellSouth that a 12-month averaged period lessens the need for comments does have some validity, there remains the possibility that unusual circumstances and deviations still warrant comments. For example, Sprint stated, in those companies with national call centers that are located outside North Carolina, weather conditions that have no physical impact on the citizens of North Carolina might prevent call center employees from making it to their work locations and thus impact answertime results. Sprint argued that such a scenario is highly possible and can likely be explained only through comments.

Sprint noted that the Attorney General's office also stated, "The Commission should not give companies the opportunity, on a government website, to explain their failure to meet service quality objectives, to criticize the service quality standards, to market their services, to criticize another company, or make whatever other use the companies might make of the 'comment' space on the reporting form." Sprint asserted that these are mere assumptions with no stated basis whatsoever. Sprint stated that it believes that space for comments should be limited and would therefore be inadequate for the types of material the Attorney General's office assumes could take place. Furthermore, Sprint stated that it has no doubt that were a comment section abused in the manner suggested by the Attorney General's office, the Commission could quickly correct the situation.

DISCUSSION

The Commission notes that the Joint Commenters, Sprint, and Verizon support allowing companies to post comments on the website explaining certain service quality results; the Attorney General and the Public Staff do not support allowing companies to post comments on the website; and ALLTEL and BellSouth stated that if the Commission allows a 12-month rolling average, updated quarterly (See Issue No. 1), then the need for comments should be lessened.

The Commission agrees with the Public Staff and the Attorney General that it is inappropriate to allow companies to post comments on the service quality results. The standards in Rule R9-8 were instituted after a detailed, painstaking proceeding to establish fair and reasonable service standards, and the standards are what they are. The Commission notes that with Attachment A (See Issue No. 2), if a company files a force majeure waiver with the Commission, the waiver request will be noted and until the waiver request is ruled on, the results will be excluded from the website posting. The Commission notes that two companies have recently filed waiver requests with the Commission. The Commission believes that this notation provision in Attachment A for a force majeure waiver request is adequate to address any of the concerns raised by the Joint Commenters, Sprint, and Verizon. Therefore, the Commission finds it inappropriate to allow companies to post comments on the website explaining certain service quality results with the exception of the notation provision in Attachment A for a force majeure waiver request.

CONCLUSIONS

The Commission finds it inappropriate to allow companies to post comments on the website explaining certain service quality results with the exception of the notation provision in Attachment A for a force majeure waiver request.

ISSUE NO. 4: Whether the Commission should require that service quality results be posted on: (a) each individual company's website; and (b) on the Public Staff's or Commission's website. (See pages 32 and 35 of the Commission's *December 27, 2002 Order*)

INITIAL COMMENTS

ALLTEL: ALLTEL stated that it believes that the most likely site for consumers to visit in seeking this type information is the Commission's website, not the company's website and not the Public Staff's website. As a result, ALLTEL stated it believes that the Commission, being a state-specific source of information, is where this information should be posted, if there is going to be a website posting. ALLTEL asserted that companies should not be required to post this information on their websites. ALLTEL maintained that it is likely that end-users will go to the Commission's website to look for service quality – they are less likely to go to the Public Staff's website or a company website.

ATTORNEY GENERAL: The Attorney General opined that the results should be posted on the Commission's website. The Attorney General asserted that consumers are more likely to visit the Commission's website than the Public Staff's website. The Attorney General stated that its office understands that the Public Staff is willing to do all the necessary data input, etc., in order for the results to be posted on the Commission's website.

The Attorney General stated that its office does not believe that it is necessary to require the companies to post the service quality results on each individual company's website.

BELLSOUTH: BellSouth argued that since the companies file service results with the Public Staff, BellSouth submits that it should be the Public Staff's responsibility to post and maintain the data on the Public Staff website. BellSouth asserted that the Commission can always post a link on its own website to allow consumers who visit the Commission website to easily find the service quality results on the Public Staff's website. BellSouth maintained that there is simply no practical need for the Commission to maintain this information on its website as well.

Further, BellSouth stated that it strongly objects to any Commission order requiring posting of service quality results on its own website. BellSouth opined that a Commission rule requiring the posting of either service quality results or penalty information on BellSouth's website would violate BellSouth's free speech rights. BellSouth noted that in Verizon's February 5, 2003 motion for reconsideration filed in this docket, Verizon provided the constitutional grounds underlying its objection to any rule requiring Verizon to publish information on its website over its objections.

BellSouth stated that rather than repeat that analysis, BellSouth incorporates that portion of Verizon's February 5, 2003 pleading by reference in its initial comments. Moreover, BellSouth commented, if the Commission requires service quality results to be posted on either the Public Staff's website or the Commission's own site, there is no need for the Commission to compel BellSouth to place this same information on its own website. BellSouth asserted that the Commission, therefore, would have achieved a "non-speech" related means of meeting its consumer-information objective without infringing on BellSouth's First Amendment rights.

JOINT COMMENTERS: The Joint Commenters noted that to the extent the Commission adopts a website reporting requirement, such a requirement could only apply to the Commission's and/or Public Staff's websites. The Joint Commenters asserted that the Commission does not have jurisdiction over individual company websites and to assert such jurisdiction opens a Pandora's box of issues regarding the extent of the Commission's authority. The Joint Commenters maintained that certainly nothing in the Commission's authorizing statutes explicitly grants the Commission authority over websites, and the Commission, to this date, has not asserted such jurisdiction. The Joint Commenters stated that nothing would prohibit a company from voluntarily posting service quality results on their own website, but the Commission does not have jurisdiction to require such posting. Moreover, the Joint Commenters argued, even if the jurisdictional issues can be surmounted, a requirement that providers post content of the Commission's choosing on their internal company websites would raise significant First Amendment issues, as has been previously demonstrated in this proceeding.

The Joint Commenters commented that for these reasons, if the Commission determines that website reporting of service quality reports is appropriate and necessary, it should confine any such reports to its own, or the Public Staff's, website.

PUBLIC STAFF: The Public Staff argued that while the Commission may be able to require each company to post its service quality results on its own company website, it should carefully consider the fact that there may be considerable obstacles to implementing such a requirement. First of all, the Public Staff noted, every local telephone provider may not have its own website, and there is presently no requirement that a provider operate online. Moreover, the Public Staff opined, this approach would necessitate the adoption of comprehensive regulations to address at least the following areas:

- the information that would be required to be posted and any posting deadlines;
- the location or locations where the results would be posted on company websites so as to be easily accessible;
- formatting requirements such as text font, size, and color so as to be clearly visible; and
- presentation of the information in a practical, readable format.

The Public Staff maintained that monitoring compliance with these requirements would be a burdensome task for the Public Staff and potentially for the Commission. Finally, the Public Staff asserted, companies would likely claim a First Amendment right to include comments on their websites explaining the service quality results. The Public Staff stated that this would introduce subjectivity into the reporting and degrade the perceived usefulness of the data to consumers.

The Public Staff maintained that these considerations lead it to recommend that the Commission refrain from requiring companies to post their service quality results on their own websites.

The Public Staff noted that with regard to the issue of service quality postings at the Commission's or Public Staff's website, the Public Staff's web pages have never been used for the purpose of communicating information to the public concerning Commission docket activity. The Public Staff maintained that its website indicates that it has not been revised since May 13, 2003. The Public Staff asserted that its website contains little information. The Public Staff opined that the

Commission's website, on the other hand, is continually updated and contains a wealth of public information. Thus, the Public Staff asserted, consumers are much more likely to visit the Commission's website than that of the Public Staff.

The Public Staff stated that it also believes that the service quality results should not be posted on the Public Staff Communication Division's web page. The Public Staff maintained that the primary functions of this page are the dissemination of contact information on certified ILECs, CLPs, long distance carriers, and payphone service providers; provision of public information on the status of interconnection agreements; and provision of useful internet links to the public.

For those reasons, the Public Staff stated that it proposes that any service quality reports that are populated with data gleaned from company service quality filings which are made in Docket No. P-100, Sub 99A and produced in accordance with Commission Rule R9-8 should be posted on the Commission's website.

However, the Public Staff noted that it recognizes that it has traditionally taken a major role in obtaining and evaluating telephone service quality data, and that it would be unreasonable to expect the Commission Staff to bear the responsibilities of gathering and verifying service quality data, converting them into a useful format, and posting results on its website. The Public Staff proposed the following arrangement as an alternative: that the Commission post public service quality reports on its website, and that the Public Staff facilitate the postings by accepting and cataloguing each company's service quality information, verifying its completeness and accuracy as needed, using the data to generate a report in a format suitable for posting, and finally, transmitting this report to the Commission Staff. The Public Staff stated that it believes that these arrangements will ensure that the postings are handled as efficiently as possible.

SPRINT: Sprint asserted that the Commission's decision on Issue No. 4 should be largely based upon the decision it reaches regarding the appropriate reporting format, i.e. Attachment A or Attachment B (Issue No. 2). Sprint commented that publication on an individual company's website will only be reasonable when using the single company format found on Attachment B. Sprint argued that the Commission definitely should not require a company to publish the consolidated format (Attachment A) as it contains the service results of multiple companies. Sprint asserted that requiring a company to post the results of a competitor on its own website is not acceptable nor is it warranted under any circumstances of which Sprint is aware. Sprint noted that the Commission is and should continue to be perceived by the public as an impartial body that does not favor, recommend, or endorse one service provider over another. Sprint argued that for this reason alone, it would not be appropriate for the Commission to publish service results on its official website. Sprint maintained that the Public Staff, however, is charged with being the public's advocate and could publish information such as that found in Attachment A on its website. Consequently, Sprint opined, if the Commission rules that Attachment A is the most appropriate format, publication on the Public Staff's website is the only reasonable alternative. Sprint asserted that if the Commission rules that Attachment B is the most appropriate format, publication by either the individual company or the Public Staff is reasonable.

VERIZON: Verizon stated that it continues to oppose website posting of service quality results. However, Verizon noted, given that the Commission has mandated website posting, the Commission's website is the most appropriate place to post the results. Verizon commented that in states where Verizon is required to post results, the Commission's website is used. Verizon opined that from a customer standpoint, it may be easier to locate service results on the Commission's website, because company websites vary considerably and are not state-specific. Moreover, Verizon noted, results should be posted on only the Commission's website because posting the results on multiple websites would be redundant and unduly burdensome.

REPLY COMMENTS

BELLSOUTH: BellSouth did not specifically address this issue in its reply comments.

PUBLIC STAFF: After carefully studying the initial comments submitted by the other parties in this docket, the Public Staff stated that it was not persuaded to alter the positions detailed in its initial comments.

SPRINT: Sprint stated that on this issue, the consensus of all commenting parties is that the Commission should not require companies to post service quality results on individual company websites. Sprint maintained that there does however continue to be disagreement as to whether the results should be posted on the Public Staff's of Commission's website. Sprint stated that it believes the Commission is, and should continue to be perceived by the public to be, an impartial body that does not favor, recommend, or endorse one service provider over another. Sprint opined that for this reason alone, it is not appropriate for the Commission to publish service results on its official website. Sprint argued that the Public Staff represents the using and consuming public and thus would be the most appropriate publisher of such information.

Sprint maintained that the Public Staff and the Attorney General's office appear to be the highest advocates of maintaining the results on the Commission's website. Sprint stated that, specifically, the Public Staff incorrectly reasons that the results should not be posted on its own website as it has not been updated since May 13, 2003 when in fact the Public Staff's website contains documents that are updated almost weekly. Sprint noted that the Public Staff is willing to do the work to update the Commission's website, so updating its own website should be no more cumbersome. Sprint maintained that the Attorney General's office states that the results should be posted on the Commission's website for the mere reason that consumers are more likely to visit the Commission's website than the Public Staff's website. Sprint opined that while this may or may not be true as no factual evidence has been introduced to confirm this, the Public Staff is the representative of the using and consuming public. As such, Sprint noted, the Public Staff's website is the most appropriate.

DISCUSSION

The Commission notes that BellSouth and Sprint support posting of service quality results on the Public Staff's website; ALLTEL, the Attorney General, the Public Staff, and Verizon support posting of results on the Commission's website; and the Joint Commenters support posting of results on the Commission's and/or the Public Staff's website. No party supported posting of results on individual company websites.

The Commission further notes that the Commission specifically stated in its *December 27, 2002 Order* that it ". . . sees no necessary or convincing legal impediment to requiring companies to post on their own websites whether or not they have been assessed penalties for quality of service violations, the nature of such violations, and the amount assessed in addition to the pass/fail information" (Page 35 with emphasis in original). However, the Commission notes, the parties were asked to negotiate the specific details of a website reporting procedure, and the parties unanimously agreed that it is not appropriate to require companies to post service quality results on their own websites.

The Commission believes that, since Rule R9-8 is, in fact, a Commission rule, it is appropriate to post service quality results on the Commission's website. The Commission does not believe, as Sprint suggested, that posting service quality results on the Commission's website would lead the public to believe the Commission favors, recommends, or endorses one service provider over another. Commission Rule R9-8 sets service quality standards, and simply listing each company and whether that company passed or failed each particular standard in no way indicates that the Commission favors, recommends, or endorses one service provider over another.

The Commission further finds appropriate the Public Staff's suggestion that the Public Staff facilitate the postings by accepting and cataloguing each company's service quality information, verifying its completeness and accuracy as needed, using the data to generate a report in a format suitable for posting, and finally, transmitting this report to the Commission Staff.

CONCLUSIONS

The Commission finds it appropriate to require that service quality results be posted on the Commission's website only (and not the Public Staff's or each individual company's websites) and to request the Public Staff to facilitate the postings by accepting and cataloguing each company's service quality information, verifying its completeness and accuracy as needed, using the data to generate a report in a format suitable for posting, and finally, transmitting this report to the Commission Staff.

ISSUE NO. 5: Whether the Commission should require companies to post on their own websites the amount of penalties levied against them with citation to the service objective which gave rise to the penalty. Further, whether the Commission or the Public Staff, as appropriate, should make a similar website posting on penalties. (See pages 32 and 35 of the Commission's *December 27, 2002 Order*)

INITIAL COMMENTS

ALLTEL: ALLTEL stated that it believes that as to the first question posed in this issue, the Commission should not require companies to post information on their own websites as to the amount of any penalties that may have been levied against them. ALLTEL argued that any penalties assessed would have been levied by the Commission and, if they are to be posted anywhere, it should be on the Commission's website.

As to the second aspect of this issue, ALLTEL stated that it believes it would not be appropriate for the Commission to post information as to penalty assessments on its website. ALLTEL maintained that any reference to penalty assessments may actually be misleading to consumers, who are not likely to understand the basis for the penalty or the fact that different LECs are subject to different price regulation plans with different penalty regimes. ALLTEL noted that as the Commission knows, different LECs are subject to different price regulation plans, and some LECs are still subject to rate of return regulation. ALLTEL stated that the price regulation plans that are in effect are not uniform as to inclusion of a penalty provision and not all penalty provisions are identical. As a result, ALLTEL opined, penalty assessment information could be misleading.

In addition, ALLTEL noted, consumers can study the information reported in Attachment A and determine if a company has or has not met the Commission's service quality objectives. ALLTEL maintained that this information is sufficient for the particular forum involved here, where companies will, at best, have a limited opportunity to provide comments regarding any past penalty assessments. ALLTEL noted that while its price regulation plan does not include a penalty provision, it would seem that publication of this piece of information would be inappropriate, given the lack of uniform penalty regimes which leaves some providers subject to penalty assessments while others are not.

ATTORNEY GENERAL: The Attorney General maintained that while the Commission is obviously free to publicize penalties in any manner it sees fit, the Attorney General does not believe it is necessary to devote space for penalties on the website reporting format outlined in Attachment A. The Attorney General stated that for one thing, under the pertinent Commission rules and price plans, some companies are subject to such penalties and others, such as CLPs, are not. Therefore, the Attorney General asserted, providing space on the form for such penalties may not provide for a fair, or easily understood, comparison.

The Attorney General stated that its office does not believe that it is necessary to require the companies to post the amount of penalties levied against them on their own individual websites.

BELLSOUTH: BellSouth stated that it objects to any posting on any website of penalties incurred as a result of service quality misses. BellSouth noted that it incorporates by reference its argument that requiring said posting would violate its free speech rights. Additionally, BellSouth maintained, as the Commission is well aware, only BellSouth and Sprint are required, as part of their current price regulation plans, to pay penalties for service quality misses. Therefore, BellSouth argued, it would be extremely misleading, discriminatory, and inequitable for consumers to visit the Public Staff/Commission website, view penalty information posted by BellSouth or Sprint, and conclude that somehow those companies' service is more deficient than others because those were the only companies that had incurred penalties. BellSouth asserted that the Commission can avoid this discriminatory situation altogether by not requiring any posting of penalties. Moreover, BellSouth opined, its customers will learn of penalties for service quality misses because the Plan requires the monies to be returned to customers in the form of bill credits. Thus, BellSouth opined, it is not as if BellSouth's performance under its own penalty plan will go undetected by its customers. Therefore, BellSouth argued, the Commission should not require any posting of penalties associated with service quality misses on any website.

JOINT COMMENTERS: The Joint Commenters asserted that the Commission has no jurisdiction to require posting of penalties on individual company websites. The Joint Commenters noted that as to publication on the Commission's or the Public Staff's website, Commission decisions and company filings are already posted on the Commission website, so there does not appear to be a need to require any additional posting or disclosure.

PUBLIC STAFF: The Public Staff asserted that self-enforcing penalties for recurrent service quality failures are required for only four telephone companies in North Carolina: BellSouth, Carolina, Central, and North State Telephone Company. The Public Staff maintained that these providers voluntarily agreed to incorporate provisions for self-enforcing penalty provisions into their price plans. The Public Staff noted that the penalty provisions that were adopted in each company's price plan have continued to operate without change since their initial approval.

The Public Staff stated that it is concerned that posting details on the self-enforcing penalties paid by these four companies along with service quality data obtained pursuant to Rule R9-8 might give the impression that the service provided by these companies is inferior to that provided by other price plan ILECs, rate-of-return ILECs, and CLPs; this would be misleading to consumers. The Public Staff asserted that it would also effectively punish the four providers that have voluntarily accepted self-enforcing penalty provisions in their price plans, and benefit companies that either are not subject to these same provisions or have refused to incorporate them into their price plans.

The Public Staff maintained that there are wide variations among companies as to size and number of access lines. The Public Staff noted that although the penalties are scaled to the size of the company, a consumer would be unlikely to know the differences between companies and could give inappropriate weight to a penalty in selecting a local telephone provider. Therefore, the Public Staff stated that it does not believe that the Commission should require the posting of penalties on either a company's or the Commission's or the Public Staff's website.

SPRINT: Sprint noted that the penalties in question are those arising from self-executing plans voluntarily entered into by various companies. Sprint stated that it is strongly opposed to the posting of such penalties. Sprint asserted that publication would be inherently unfair to Carolina and Central because competing companies may not be subject to self-executing plans. Sprint maintained that although it may be argued that those companies which entered into such plans did so voluntarily, the posting of penalties was not a condition contemplated at the time the companies agreed to the self-executing penalty plans. Sprint argued that to create such a requirement at this time would be unjust and without proper regard to the voluntary entry. Furthermore, Sprint noted, not all companies are subject to self-executing penalty plans. Sprint opined that to require a company who is subject to a penalty plan to post any penalty it may have incurred alongside a company which is not subject to a

penalty plan, yet whose service may be far inferior, clearly sends the wrong message to consumers. Sprint maintained that when examining the pass/fail report a consumer might incorrectly assume that a company which paid a penalty might have provided service that was inferior to those companies that still missed the objective, but were not subject to a penalty. Sprint stated that such a scenario is highly plausible, sends the wrong message to consumers, and is grossly unfair to the impacted company and ultimately to consumers of telecommunications services.

VERIZON: Verizon argued that companies should not be required to post the penalties levied against them, because such postings could mislead consumers. Verizon asserted that is because not all companies are subject to penalties, and, even among those companies that are subject to penalties, the penalties are not uniform among all companies.

REPLY COMMENTS

BELLSOUTH: BellSouth did not specifically address this issue in its reply comments.

PUBLIC STAFF: After carefully studying the initial comments submitted by the other parties in this docket, the Public Staff stated that it was not persuaded to alter the positions detailed in its initial comments.

SPRINT: Sprint noted that, on this issue, the consensus of all commenting parties is that the Commission should not require companies to post the amount of penalties levied against them on any website.

DISCUSSION

The Commission notes that no party supported a requirement that companies post on their own websites (or on the Commission's or Public Staff's websites) the amount of penalties levied against them with citation to the service objective which gave rise to the penalty.

The Commission further notes that the Commission stated in its *December 27, 2002 Order* that "... it can require ILECs and CLPs to post on their websites a pass/fail statement regarding each of the Rule R9-8 requirements, together with the amount of penalties levied against them or credits or refunds required of them with citation to that part of Rule R9-8 which gave rise to the penalty, credit, or refund. The Public Staff is requested to make a similar website posting. The Commission will provide a prominent link to this information on its own website." (Page 32) The Commission further concluded that it "... sees no necessary or convincing legal impediment to requiring companies to post <u>on their own websites</u> whether or not they have been assessed penalties for quality of service violations, the nature of such violations, and the amount assessed in addition to the pass/fail information" (Page 35 with emphasis in original) Finally, the Commission stated "[i]t would, however, be useful for the Public Staff to provide independent posting of both the pass/fail and the penalties information on its website so that all this information can be gathered in one place. The Commission will provide a prominent link to this information on its own website." (Page 35). Therefore, in the *December 27, 2002 Order*, the Commission intended for penalty information to be posted on the companies' websites as well as the Public Staff's website. The parties were asked in the *June 4, 2004 Order* to negotiate the specific details of website posting, and the parties unanimously agreed that posting of penalty information is not appropriate.

Based upon the parties' comments in this regard, the Commission agrees with the parties that it is inappropriate to require the posting of the amount of penalties levied against a company on either the company's own website or on the Public Staff's or the Commission's websites. The Commission specifically agrees with the Public Staff that since only four ILECs are subject to self-enforcing penalties under their price regulation plans, it would be misleading to consumers to post penalty information. The Commission further agrees that such posting could be considered effectively punishing the four companies that have voluntarily accepted self-enforcing penalty provisions in their price plans.

Further, the Commission agrees with BellSouth's assertion that customers will learn of penalties for service quality misses because the price regulation plans require the monies to be returned to customers in the form of bill credits.

Therefore, the Commission concludes that companies should not be required to post on their own websites (or on the Public Staff's or Commission's websites) the amount of penalties levied against them with citation to the service objective which gave rise to the penalty.

CONCLUSIONS

The Commission concludes that companies are not required to post on their own websites (or on the Public Staff's or Commission's websites) the amount of penalties levied against them with citation to the service objective which gave rise to the penalty.

OVERALL COMMISSION CONCLUSIONS

Overall, the Commission concludes that it is appropriate to:

(1) Require the posting of service quality results (i.e., in the pass/fail format) averaged over a three-month (quarterly) period and updated quarterly.

(2) Adopt the website posting format as outlined in Attachment A (except reflecting a three-month average – See Issue No. 1), with access to company-specific links as proposed by the Public Staff (i.e., via the Public Staff Communications Division's webpage).

(3) Not allow companies to post comments on the website explaining certain service quality results with the exception of the notation provision in Attachment A for a force majeure waiver request.

(4) Require that service quality results be posted on the Commission's website only (and not the Public Staff's or each individual company's websites) and request the Public Staff to facilitate the postings by accepting and cataloguing each company's service quality information, verifying its completeness and accuracy as needed, using the data to generate a report in a format suitable for posting, and finally, transmitting this report to the Commission Staff.

(5) Conclude that companies should not be required to post on their own websites (or on the Public Staff's or Commission's websites) the amount of penalties levied against them with citation to the service objective which gave rise to the penalty.

The Commission further concludes that website posting of service quality results will begin as soon as possible after the service quality reports reflecting results for January, February, and March 2005 are filed with the Commission. Therefore, the first posting on the Commission's website will include a three-month average of the results for January, February, and March 2005.

IT IS, THEREFORE, ORDERED as follows:

1. That website posting of service quality results will begin as soon as possible after the service quality reports reflecting results for January, February, and March 2005 are filed with the Commission.

2. That the posted service quality results (i.e., in the pass/fail format) will reflect a three-month (quarterly) average and will be updated quarterly.

3. That the website posting format as outlined in Attachment A (except reflecting a three-month average), with access to company-specific links as proposed by the Public Staff (i.e., via the Public Staff Communications Division's webpage), is hereby adopted.

4. That companies will not be allowed to post comments on the website explaining certain service quality results with the exception of the notation provision in Attachment A for a force majeure waiver request.

5. That service quality results will be posted on the Commission's website only (and not the Public Staff's or each individual company's websites) and that the Public Staff is requested to facilitate the postings by accepting and cataloguing each company's service quality information, verifying its completeness and accuracy as needed, using the data to generate a report in a format suitable for posting, and finally, transmitting this report to the Commission Staff.

6. That companies will not be required to post on their own websites (or on the Public Staff's or Commission's websites) the amount of penalties levied against them with citation to the service objective which gave rise to the penalty.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of November, 2004

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

bp110804.01

Period Covered: July 1, 2004 - June 30, 2005

REPORTING COMPANY	ANSWERTIMES				TROUBLE REPORTS, SERVICE ORDERS, AND CUSTOMER APPOINTMENTS					
	Operator "0"	Directory Assistance	Business Office	Repair Service	Initial Customer Trouble Reports	Repeat Customer Trouble Reports	Out-of-Service Troubles Cleared within 24 Hours	Regular Service Orders Completed within 5 Working Days	New Service Installation Appointments Not Met for Company Reasons	New Service Held Orders Not Completed within 30 Days
Company A	■	■	■	✓	✓	■	■	✓	✓	■
Company B	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company C	✓ *	■	■	✓	✓	✓	■	✓	✓	✓
Company D	✓	✓	✓	■	✓	✓	✓	■	✓	✓
Company E	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company F	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company G	✓	■	✓	✓	✓	✓	✓	✓	✓	✓
Company H	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company I	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company J	✓	✓	✓	✓	■	✓	✓	✓	■	✓
Company K	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company L	✓	✓	■	✓	✓	✓	■	✓	✓	✓
Company M	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company N	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company O	✓	■	✓	✓	■	✓	✓	✓	■	✓
Company P	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company Q	■	✓	✓	✓	■	✓	✓	✓	■	✓
Company R	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company S	✓	✓	■	■	✓	✓	■	■	✓	✓
Company T	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company U	✓	✓	■	■	■	■	■	■	■	■
Company V	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Company W	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR
Company X	✓	■	✓	✓	✓	✓	✓	✓	✓	✓
Company Y	✓	✓	✓	■	✓	■	✓	■	✓	■
Company Z	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Company AA	✓	■	✓	✓	■	✓	✓	✓	■	✓
Company BB	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

✓ indicates the company met the objective.
■ indicates the company failed to meet the objective.
NR Indicates the company did not file a service quality report.
N/A Indicates the objective does not apply to this company.

* The company has requested waiver of Commission objectives due to inclement weather. The data shown represent an average of the unaffected months.

Sample

SERVICE QUALITY WEBSITE REPORTING FORM

COMPANY NAME:
REPORTING PERIOD:
AREAS SERVED IN NC:

TYPE OF SERVICE PROVIDED:

	Yes	No		Yes	No
Basic Residential?	☐	☐	Prepaid Residential?	☐	☐
Basic Business?	☐	☐	Complex Business?	☐	☐

Description	Objective	Compliance?	Comments
Operator "O" Answertime	90% or more of calls answered within 10 seconds or ASA of 6 seconds	☐	
Directory Assistance Answertime	85% or more of calls answered within 10 seconds or ASA of 6 seconds	☐	
Business Office Answertime	ASA of 30 seconds	☐	
Repair Service Answertime	ASA of 30 seconds	☐	
Initial Customer Trouble Reports	4.75 or less per 100 total access lines	☐	
Repeat Reports	1.0 report or less per 100 total access lines	☐	
Out-of-Service Troubles Cleared within 24 Hours	95% or more	☐	
Regular Service Orders Completed within 5 Working Days	90% or more	☐	
New Service Installation Appointments Not Met for Company Reasons	5% or less	☐	
New Service Held Orders Not Completed within 30 days	0.1% or less of total access lines	☐	

Compliance is reported based on the company's average performance over the reporting period.

☒ indicates the company met the objective.

☐ indicates the company did not meet the objective.

"ASA" is Average Speed of Answer.

Comments are added at discretion of the reporting company to explain deviations from the service quality objectives. Any comments of the reporting company do not necessarily reflect the views of the North Carolina Utilities Commission or the North Carolina Utilities Commission – Public Staff.

"N/A" means that the objective is not applicable to the reporting company.

DOCKET NO. P-100, SUB 99
DOCKET NO. P-100, SUB 99a

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-100, SUB 99 In the Matter of Quality of Service Objectives for Local Exchange Telephone Companies	)	ORDER AMENDING COMMISSION RULE R9-8 EFFECTIVE JULY 1, 2004
DOCKET NO. P-100, SUB 99a In the Matter of Quality of Service Reports Pursuant to Rule R9-8	)	

BY THE COMMISSION: This Order concerns Commission Rule R9-8 – Service Objectives for Local Exchange Telephone Companies.

Due to the length of this Order, the following Sections have been created:

Section I Background (Pages 1 and 2)
Section II Discussions and Conclusions for 17 Unresolved Issues (Pages 2 – 76)
Section III Issues Negotiated and Detailed in Joint Comments (Pages 76 - 82)
Section IV Miscellaneous (Page 82)
Section V Uniform Quarterly Report (Pages 82 – 85)
Section VI Amended Rule R9-8 (Pages 86 - 103)

SECTION I - BACKGROUND

On December 27, 2002, the Commission issued its *Order Amending Commission Rule R9-8 and Scheduling an Evidentiary Hearing on Specific Issues.* Motions for Reconsideration of the *December 27, 2002 Order* were filed. Further, the *December 27, 2002 Order* had scheduled an evidentiary hearing to consider an appropriate maximum answertime standard for the business office and repair service and appropriate uniform reporting procedures for Operator "O" Answertime, Directory Assistance Answertime, Business Office Answertime, and Repair Service Answertime.

On March 7, 2003, the Commission issued its *Order Continuing Hearing, Comment Cycle and Amendments' Effective Date* allowing the Parties to the proceeding the opportunity to conduct negotiations on issues related to the *December 27, 2002 Order.* In the *March 7, 2003 Order*, the evidentiary hearing previously scheduled was continued, the comment cycle on the Motions for Reconsideration was suspended, and the effective date of amended Rule R9-8 was postponed indefinitely.

On October 30, 2003, the Public Staff, on behalf of itself and the Industry Task Force (ITF), filed its Joint Report. The Parties stated in the Joint Report that they had been able to resolve most of the issues in the docket and had narrowed the remaining issues. The Parties noted that 17 issues remained unresolved after the negotiation process and that the Parties had negotiated all other aspects of Rule R9-8. The Parties stated that they believed that the disputed issues did not require a hearing, but could be resolved by the Commission after the Parties had been allowed to file comments. The Parties noted that with each Party's initial comments, the Party would provide a markup of Rule R9-8 with the changes it proposed and if the Party changed its proposal between the filing of initial and reply comments, it would file a second markup of Rule R9-8.

On November 7, 2003, the Commission issued its *Order Requesting Initial and Reply Comments* on the October 30, 2003 Joint Report. The *Order* also requested that the Parties file Joint Comments listing each issue that the Parties negotiated and providing detailed support for each issue

negotiated if the result was different than that ordered by the Commission in its *December 27, 2002 Order*. The Commission noted in its *November 7, 2003 Order* that it "will consider the negotiated issues and, after reviewing and considering the Joint Comments, will either accept or reject each of the negotiated issues."

Initial comments were filed on December 8, 2003 and, after an extension of time, reply comments were filed on January 14, 2004. The Joint Comments were filed on January 20, 2004.

SECTION II – DISCUSSIONS AND CONCLUSIONS FOR 17 UNRESOLVED ISSUES

UNRESOLVED ISSUE NO. 1: Should the standard for "Out-of-Service Troubles Cleared Within 24 Hours" remain at 95% or be lowered to 90%?

POSITIONS OF PARTIES

ALLTEL: ALLTEL supports either standard upon the condition that, if the standard remains at 95%, this standard be revised to exclude trouble reports received between 5:00 pm on Saturday and 7:00 am Monday or on holidays.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: This standard should be set at 90%. This is the only network service measurement that BellSouth and other companies have recommended be relaxed.

CITIZENS: Citizens did not take a position on this issue.

CONCORD: Concord did not take a position on this issue.

LEXCOM: Lexcom supports a 90% clearing percentage.

MCI: MCI did not take a position on this issue.

MEBTEL: MebTel did not take a position on this issue.

PUBLIC STAFF: The standard should remain at 95%.

QUANTUMSHIFT: The standard should remain at 95%.

RANDOLPH: Randolph did not take a position on this issue.

SPRINT: The standard should be lowered to 90% consistent with the self-effectuating penalty provisions in Sprint's Price Regulation Plan.

VERIZON: The standard should be lowered to 90%.

INITIAL COMMENTS

ALLTEL: ALLTEL noted that there are some states that have the 95% requirement while other states have more relaxed standards. ALLTEL commented that Alabama has a 90% standard while South Carolina has an 85% standard. ALLTEL maintained that it is imperative for the Commission to establish a clear definition of which reports are included and which are not. ALLTEL stated that trouble reports that are received during the period between 5:00 p.m. Saturday and 7:00 a.m. on Monday or on holidays may not be dispatched immediately, depending on the availability of on-call weekend repair technicians. ALLTEL stated that, while the volume of these trouble reports received during this part of the weekend is not significant, they should be excluded to avoid distorting companies' performance on this standard. ALLTEL asserted that from its perspective, this would not be an issue if the Commission adopts the 90% standard.

BELLSOUTH: BellSouth maintained that technological and regulatory changes since this measurement was established in the 1960s/1970s have made a 95% compliance standard unrealistic. BellSouth asserted that with deregulation of items like inside wire and customer premises equipment (CPE) and a proliferation of various service/equipment providers, BellSouth can no longer dispatch a technician on an out-of-service trouble and reasonably expect that 95% of the time the trouble will be cleared within 24 hours. BellSouth noted that a large percentage of troubles are caused not by regulated services within BellSouth's control, but rather are caused by matters totally outside of BellSouth's control, i.e., the technician was dispatched in the proper timeframe but found the trouble to be in the customer's CPE; associated with another carrier; or caused by some other nonregulated

problem. BellSouth commented that these troubles consume the time of BellSouth technicians and make it almost impossible for BellSouth to clear troubles 95% of the time within 24 hours.

Moreover, BellSouth stated, as noted by the ITF in its final report, of the 42 states that have such a measure, only 14 had a standard equal to or more stringent than the Commission's. BellSouth argued that revising the standard to 90% will appropriately reflect the competitive environment that telephone carriers now face in North Carolina but will still demand excellent performance.

Finally, BellSouth stated that it recently analyzed the out-of-service trouble results for North Carolina (95%), South Carolina (85%) and Georgia (79%) and compared that data to overall customer satisfaction survey results for each state. BellSouth noted that the results of that evaluation revealed that the correlation between overall customer satisfaction with BellSouth's performance and the time it took to clear the trouble is quite low for all three states, with only a three percent (3%) or less variation in customer satisfaction being explained by variation in service restoration time. Thus, BellSouth maintained, dropping the standard five percentage points will not have a perceptible impact on a customer's overall satisfaction with BellSouth's performance in clearing an out-of-service trouble.

PUBLIC STAFF: The Public Staff stated that it believes that "Out-of-Service Troubles Cleared Within 24 Hours" is the most important service quality objective in Rule R9-8. The Public Staff noted that in the Commission's December 27, 2002, *Order Amending Commission Rule R9-8 and Scheduling An Evidentiary Hearing on Specific Issues*, the Commission found that "Out-of-Service Troubles Cleared Within 24 Hours" is a "critical measure" and retained the 95% standard. The Public Staff stated that in response to the ITF's complaint that the standard in North Carolina is unduly stringent, the Commission noted that the state survey presented in the analysis by the Georgetown Consulting Group, Inc. (GCG) attached to the ITF's November 30, 2001, Final Report reveals that 13 states have an objective equal to or more stringent than 95%. The Public Staff commented that according to the GCG's analysis, four states have a standard of 100%.

The Public Staff opined that service quality reports indicate that most companies meet or exceed this standard almost every month. The Public Staff noted that companies experiencing widespread outages due to unusual, unavoidable events, such as the December 2002 ice storm, can request a waiver of the standard for the period in which the event caused unavoidable damages.
The Public Staff asserted that the 95% benchmark for "Out-of-Service Troubles Cleared Within 24 Hours" is realistic and achievable and should not be lowered to 90%.

SPRINT: Sprint asserted that in an increasingly competitive telecommunications market, service quality standards should be established at the least level acceptable to the average customer. Sprint argued that service quality objectives should also be consistent with the service standards included in Sprint's Price Regulation Plan. Sprint stated that it has consistently exceeded those standards. Sprint noted that with the exception of periods when adverse weather conditions were experienced, it has maintained service levels consistent with the 90% standard without a material number of customer complaints. Consequently, Sprint maintained, this objective could be modified without perceptible effect on customer service or satisfaction and should be set at 90% to establish consistency between the service quality objective and the self-effectuating penalty standard in Sprint's Price Regulation Plan.

VERIZON: Verizon argued that this standard should be lowered from 95% to 90% for two related reasons. First, Verizon asserted, there is no evidence to suggest that the existing 95% standard, which is the highest of its kind in the Southeast, is necessary to maintain customer satisfaction. Second, Verizon maintained that updating the standard from 95% to 90% would be appropriate given the lengthy drive times that technicians face in serving Verizon's rural North Carolina customers.

REPLY COMMENTS

BELLSOUTH: BellSouth noted that, in its initial comments, it reiterated its long-standing position that this standard be set at 90%. BellSouth maintained that all Industry Members either supported a relaxation of this standard or took no position on it. BellSouth asserted that only the Public Staff maintained that the standard should remain at 95% -- a level of compliance that has been adopted by only 14 of 42 states and is the highest of its kind in the Southeast. BellSouth stated that it agrees with the views articulated by Verizon and Sprint on this issue in their initial comments. BellSouth stated that Verizon noted there was no evidence in the record to suggest that a 95% standard is needed to maintain customer satisfaction and that revising the standard to 90% will allow Verizon to devote resources to other endeavors that will have a positive impact on customer satisfaction. BellSouth maintained that Sprint's comments aptly noted that the objective could be modified without perceptible effect on customer service and should be set at 90% to establish consistency between this measurement and the self-effectuating penalty standard in Sprint's price regulation plan.

PUBLIC STAFF: The Public Staff noted that BellSouth argued that "technological and regulatory changes since this measurement was established in the 1960s/1970s have made a 95% compliance standard unrealistic." The Public Staff disagreed. The Public Staff argued that, according to BellSouth, a large percentage of troubles are caused by unregulated services and matters outside BellSouth's control, which consume a large part of the time of BellSouth technicians and make it almost impossible for BellSouth to meet this standard. However, the Public Staff maintained, the network changes that have occurred since the 1970s include statewide deployment of interoffice fiber optics, including numerous self-healing rings; installation of digital switching in every central office in North Carolina; implementation of self-diagnostics which enable a repair service representative to test a customer's loop whenever the customer calls in a trouble report; and computerized dispatching of trouble reports which more efficiently utilizes repair technicians in the field. The Public Staff asserted that companies routinely cite these technological advances to support their claims of network reliability. The Public Staff stated that it believes that the 95% compliance standard is as realistic today as it was 40 years ago, if not more so.

SPRINT: Sprint stated that it has approximately 1.6 million access lines in North Carolina, and BellSouth has another approximately 2.5 million access lines. Sprint asserted that, in approving the price regulation plans for these companies, the Commission has previously found that 90% is an appropriate standard, and these plans are not subject to change in this proceeding. Sprint argued that increasing these standards for other companies in North Carolina would not apply to the approximately 4.1 million access lines, the majority of access lines in North Carolina, served by Sprint and BellSouth. Sprint maintained that insufficient justification has been given for increasing these standards.

Sprint noted that, while the Public Staff makes mention of the availability of force majeure provisions in Rule R9-8 as a possible remedy should the 95% standard be maintained, the Public Staff fails to mention the very severe standards the Public Staff would have the Commission apply to grant a force majeure exception. Sprint stated that, for example, the Public Staff does not reference the extraordinarily burdensome data requests and other requirements the Public Staff sought to apply to companies seeking force majeure treatment following the December 2002 ice storm.

DISCUSSION

The Commission notes that in the *December 27, 2002 Order*, the Commission determined that it was inappropriate to "alter the current objective for Out-of-Service Troubles Cleared Within 24 Hours thereby leaving the objective at 95%." The ITF had proposed that the objective be reduced to 90%; however, the Commission rejected the ITF's proposal. The Commission noted that "the state survey presented in the GCG's Report reveals that 13 states (or 26% of all states) have an Out-of-Service Troubles Cleared Within 24 Hours objective which is the same as or more stringent than the 95% objective currently reflected in Rule R9-8." The Commission asserted that the ITF/GCG did not provide adequate or convincing evidence to warrant a change in the current objective.

Addressing Sprint's comment that in the price regulation plans, the standard is 90% and, therefore, it is inappropriate to increase the standard for other companies in North Carolina, the Commission notes that the objective for Rule R9-8 has always remained at 95%. The Commission notes that the only application of the 90% standard in Sprint's and BellSouth's price regulation plans is in its use to calculate penalties. Sprint and BellSouth have remained obligated to provide service in North Carolina under the 95% standard required in Rule R9-8. The 90% standard is solely used to calculate any necessary penalty payments – not as the standard under Rule R9-8.

The Commission does not believe that any party filing comments provided any new or compelling reason for the Commission to alter its previous decision. The Commission continues to agree with the Public Staff that this is a critical measure for customer satisfaction. BellSouth, Verizon, and Sprint argued that a 90% objective would not adversely impact customer satisfaction. If a customer has no dial tone from a telephone line he pays a monthly fee for, obviously that customer will not be satisfied with his service or lack thereof. And the Commission believes that it goes without saying that a customer would be "more satisfied" if he could actually use his telephone sooner rather than later. The Commission continues to believe that it is entirely appropriate for the Out-of-Service Troubles Cleared Within 24 Hours objective to remain at 95%.

CONCLUSIONS: The Commission concludes that the standard for Out-of-Service Troubles Cleared Within 24 Hours should remain at 95% and not be lowered to 90%.

UNRESOLVED ISSUE NO. 2: Should the requirements to receive a waiver under the Force Majeure clause in R9-8(c) be scaled down?

POSITIONS OF PARTIES

ALLTEL: ALLTEL does not support the proposed rigorous requirements for obtaining a waiver due to a force majeure event. ALLTEL supports a more relaxed standard requiring only a detailed description of the force majeure event subject to Commission review.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: BellSouth suggested that the Commission adopt the following approach for companies who ask that the Commission excuse their performance for a particular measurement due to exogenous circumstances. First, if a company can demonstrate that a state of emergency, as declared by the Governor, existed during the time period encompassing the missed measurement and the measurement is of the type obviously impacted by such an emergency (i.e., a network measure impacted by severe weather), the company in question should not have to make any further showing to gain the requested waiver. In the absence of a state of emergency declaration, BellSouth agrees that the Public Staff's process as set forth in Rule R9-8(c) can be used for demonstrating the need for a waiver.

CITIZENS: Citizens believes that the requirements to receive a waiver under the Force Majeure clause in R9-8(c) should be scaled down, in order that this provision not impose too demanding a standard for receiving a waiver as a result of isolated and unusual or extreme circumstances.

CONCORD: Yes. The requirements should be scaled down.

LEXCOM: Lexcom still believes that, consistent with the Alliance's filing, waiver requirements should be scaled down.

MCI: MCI did not take a position on this issue.

MEBTEL: Yes.

PUBLIC STAFF: The requirements to receive a waiver under the Force Majeure clause in Rule R9-8(c) should not be scaled down.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: Yes.

SPRINT: Yes.
VERIZON: Yes.

INITIAL COMMENTS

ALLTEL: ALLTEL argued that the relative burden associated with implementing the rigorous force majeure waiver process far outweighs any additional benefits which might accrue to the public as a result. ALLTEL noted that in Georgia, for example, in regards to trouble reports, Rule 515-12-1-.23(7) states, "This standard does not apply to trouble reports related to customer premise equipment, inside wiring, force majeure, or outages of services caused by persons or entities other than the telephone utility." ALLTEL maintained that there are no exogenous waiver requests or reports to file; instead, each company must identify the event(s) and provide a detailed description. ALLTEL advocated the implementation of such a process in North Carolina, which would fully provide for, in the event that the Commission finds that the company has not given satisfactory descriptions, the provision of further information as requested by the Commission, which can be audited if necessary.

CONCORD: Concord stated that while it appreciates the Commission's desire to ensure that force majeure waivers are not improvidently granted, the current approved requirements to obtain such waivers are unduly burdensome. Concord maintained that it is confident that the Commission would agree (1) that no telephone company would perceive a service outage due to force majeure as a positive event; and (2) that in the event of such an outage the first priority is to restore service to end users as quickly and efficiently as possible. Concord noted that the existing requirements to document force majeure waiver requests, however, are unnecessarily rigorous with respect to the evidentiary burden placed upon telephone companies. Concord maintained that these requirements will compel telephone companies to document each and every event and decision involved in recognizing, addressing, and resolving force majeure events. Concord noted that, in doing so, the requirements will necessarily require the commitment of company assets to these tasks at a time when these assets might be better used to assist in the restoration of service. Concord stated that it believes that the Commission's general supervisory jurisdiction over service quality is sufficient to ensure that unjustified force majeure waivers are not granted in cases where they are not justified and that the requirements of Rule R9-8(c) can be safely scaled down to this end.

LEXCOM: Lexcom stated that it believes that in most instances, where it has not met monthly service quality objectives, a simplified form of notice describing the event should be sufficient.

MEBTEL: MebTel argued that it is unduly burdensome to require small companies like MebTel that operate with limited personnel and resources to simultaneously respond to an emergency and make detailed regulatory filings. MebTel stated that events of force majeure are exceptional and notorious. MebTel maintained that the efforts of telecommunications carriers during an emergency should be focused on restoration of service to customers rather than documentation of force majeure to justify a waiver. MebTel stated that this issue hinges on a matter of trust; it is appropriate that certified public utilities with a good reputation and service history be entitled to a presumption of good faith regarding any claim of force majeure.

PUBLIC STAFF: The Public Staff noted that, as indicated by the version of Rule R9-8 attached to the Joint Report, it has acceded to requests from the industry parties to soften the language of the Force Majeure clause adopted by the Commission in its *December 27, 2002 Order*. The Public Staff maintained that while the changes agreed upon by the parties do not necessarily scale down the requirements to receive a waiver, they clarify the standard for determining whether a company has shown that the force majeure event was unavoidable and that it made adequate preparations for the event.

The Public Staff noted that, to receive a waiver, a company must show that the event was sufficiently serious to merit a waiver, that it reasonably planned and prepared for the event, and that it could not have reasonably avoided the adverse impacts of the event. The Public Staff commented that the

company must also show that the extent and nature of the requested adjustments are appropriate. The Public Staff opined that these requirements are reasonable. The Public Staff argued that a company should not receive a waiver when it had forewarning of an event, such as a hurricane or winter storm, and failed both to take prudent steps before, during, and after the event to mitigate potential service impacts and to ensure that service interruptions are corrected as quickly as possible.

The Public Staff maintained that the requirements to receive a waiver under the Force Majeure clause adopted by the Commission in its *December 27, 2002 Order*, with the modifications proposed in the Joint Report, should not be scaled down.

RANDOLPH: Randolph believes the force majeure waiver requirements as proposed by the Public Staff are unduly burdensome, especially for small companies. Randolph stated that during times of adverse weather conditions which would warrant a waiver, Randolph would be forced to allocate resources away from servicing its customers to documenting the steps taken before, during, and after the event, compiling the request and submitting the waiver request to the Commission. Randolph noted that as seen with Sprint's request for a waiver due to the ice storm, the Public Staff was not satisfied with Sprint's documentation and requested even more information.

Randolph argued that adverse conditions affect all utilities but they are especially trying for small companies with limited personnel and resources. Randolph stated that it believes its efforts should be directed toward restoring service to its customers and not documenting the entire restoration process in hopes it will meet the Public Staff's definition of a waiver request.

Randolph noted that the Public Staff stated that it will simplify the process by providing a form to use when requesting a waiver under force majeure; however, since Randolph has not seen the form, it cannot provide comment on it.

SPRINT: Sprint commented that while it agrees that waivers should not be granted without appropriate supporting documentation, requirements to receive waivers under the Force Majeure clause in Rule R9-8(c) should be reasonable and free from unnecessarily burdensome and time consuming requests for information that prevent timely action on requests for such waivers. For this reason, Sprint stated that it has agreed to the language provided in the Joint Report of the ITF and the Public Staff filed on October 30, 2003.

VERIZON: Verizon argued that the requirements to receive a waiver under the Force Majeure Clause in Rule R9-8(c) should be modified. Verizon maintained that the existing requirements may result in companies being unreasonably denied a waiver. Verizon noted that the modest modifications to the force majeure clause set forth below will ensure that the rule is sufficiently flexible to ensure that companies are not improperly held accountable for unexpected and unforeseeable events:

> Force Majeure. A company may seek a waiver of part or all of Rule R9-8 due to force majeure. To request a waiver, a company should file adjusted and unadjusted data to support its request. In order to secure Commission approval, the waiver request should ~~clearly~~ reasonably demonstrate that (1) the force majeure event was sufficiently serious and unusual to warrant adjustment of the monthly service quality statistics, and should include a detailed description of the adverse consequences of the event on the ratepayers' service and the company's facilities; (2) to the extent ~~possible~~ reasonably foreseeable, the company prudently planned and prepared in advance for such emergencies; (3) despite these plans and preparations, and the best efforts of the company personnel before, during, and after the event, failures to satisfy the service objections could not reasonably have been avoided; and (4) the extent and nature of the adjustments requested are appropriate for the circumstances. The Commission may grant waiver requests if it finds that all four criteria have been met.

REPLY COMMENTS

CONCORD: Concord commented that it continues to believe that the force majeure waiver requirements contained in the service quality rules are unduly burdensome. Concord stated that it has discussed why this is the case in its initial comments. Concord noted that the majority of parties were silent on this issue in their initial comments, although BellSouth did address the issue. Concord maintained that its concern is that a request for this type of waiver should be based on a good faith analysis of the event in question and an assumption that the impacted telephone company is working in good faith to sustain and/or reestablish service to its customers in cases of force majeure. Concord argued that the current rule, by establishing very rigorous waiver documentation requirements, appears to presume that North Carolina telephone companies would abuse the public interest and claim force majeure waivers when they are not justified. Concord stated that it does not believe that such a presumption is warranted and wishes to avoid having a waiver claim take on an adversary character necessitating the involvement of counsel which may be necessary under the existing rules.

PUBLIC STAFF: The Public Staff commented that companies that anticipate the need for a force majeure waiver would be expected to preserve some records to support their requests. However, the Public Staff maintained, it is inaccurate to suggest, as a few parties do, that companies would be expected to compile or file waiver requests while they are recovering from emergency situations and trying to restore service. The Public Staff argued that there is no time limit specified in Rule R9-8 for the filing of such a waiver request. Certainly, the Public Staff asserted, a company could file a waiver request long after the emergency situation has occurred.

The Public Staff stated that it believes that it would be inappropriate to amend the force majeure provisions to include BellSouth's proposal to grant automatic waivers in situations where the Governor proclaims a state of emergency. The Public Staff noted that while it agrees that the Commission should take into account any state of emergency that leads to disruptions in or impairments to telephone service, this is only one factor among many that need to be considered. The Public Staff maintained that BellSouth's proposal omits any mention of the geographical scope or duration of such a state of emergency, which may exist for only a small portion of a company's region or only for a few days. The Public Staff opined that each waiver request should be tailored to include the areas affected by the emergency and the temporal parameters of the emergency.

RANDOLPH: Randolph stated that it believes the force majeure waiver requirements as proposed by the Public Staff are unduly burdensome. Randolph maintained that during times of adverse conditions which would warrant a waiver, Randolph would be forced to allocate resources away from servicing its customers to documenting the steps taken before, during, and after the event, compiling the request and submitting the waiver request to the Commission. Randolph asserted that adverse conditions affect all utilities and forcing companies to provide extraordinarily detailed reports is unreasonable and unnecessary. Randolph argued that, contrary to the comments of the Public Staff, meteorological data is not always correct and does not always adequately inform the public of the potential effect of weather related events. Randolph maintained that not one meteorologist predicted the severity of the ice storm in December 2002. Randolph noted that in its serving area the forecast was for a small, insignificant amount of freezing rain. Randolph commented that stating a company should prepare for weather events in advance should also take into account that the information a company is given as to the potential severity of an event directly affects the actions it takes to prepare.

SPRINT: Sprint commented that it seconds BellSouth's view that when a state of emergency is declared by the Governor for the time period encompassing the missed measurement, if the measurement is of the type impacted by such emergency, the company in question should not be required to make any further showing to gain the requested waiver. Sprint noted that such an exclusion from the rule is little more than an exercise in good judgment which will avoid unnecessary expenditure of resources in circumstances such as the ice storm of December 2002, major hurricanes such as Hurricane Floyd which flooded much of eastern North Carolina for many days, Hurricane

Isabel which physically isolated Hatteras Village from North Carolina and the remainder of the world, and other such extraordinary events. Sprint argued that to task companies with hyper-technical and extraordinarily detailed reporting of data as sought by the Public Staff when Sprint sought force majeure relief following the December 2002 ice storm is unreasonable, unnecessary, and a wasteful expenditure of scarce resources which would be better used in other ways to maintain high levels of customer service.

DISCUSSION

The Commission notes that, in the *December 27, 2002 Order*, the Commission determined that it was appropriate to adopt a Force Majeure clause in Rule R9-8. In fact, the ITF itself had proposed that the Commission adopt a Force Majeure clause and agreed with all but one of the Public Staff's proposed four criteria. The ITF had argued that criteria No. 2 was unreasonable. In the *December 27, 2002 Order*, the Commission modified criteria No. 2 in response to the ITF's concerns and inserted the phrase "to the extent possible".

The Commission does not believe that any party filing comments provided any new or compelling reason for the Commission to alter its previous decision. The Commission agrees with the Public Staff that there is no time limit in Rule R9-8 for the filing of a waiver request and that the companies would absolutely not be required or expected to compile or file waiver requests while they are recovering from emergency situations and trying to restore service. The Commission also agrees with the Public Staff that BellSouth's state of emergency proposal does not consider geographic scope or duration.

The Commission also notes that on May 16, 2003, Sprint filed a Petition for Waiver of Self-Effectuating Penalties Related to Service Objectives for December 2002 due to an ice storm. The Commission further notes that by Order dated September 9, 2003, the Commission granted Sprint's Petition. In fact, the Commission granted Sprint's Petition although the Public Staff had outstanding data requests. The Commission found that, regardless of the outstanding Public Staff data requests, Sprint had adequately supported its request for an exemption.

The Commission does note that the Parties agreed to make minor modifications to the Force Majeure clause which are reflected below with underline and strikeout from the Commission's *December 27, 2002 Order*:

> Force Majeure. A company may seek a waiver of part or all of Rule R9-8 due to force majeure. To request a waiver, a company should file adjusted and unadjusted data along with its waiver request ~~with the Commission which includes appropriate data to support its request~~. In order to secure Commission approval, the waiver request should clearly demonstrate that (1) the force majeure event was sufficiently serious and unusual to warrant adjustment of the ~~reported~~ monthly service quality statistics, including a detailed description of the adverse consequences of the event on the ratepayers' service and the company's facilities; (2) to the extent ~~possible~~ reasonably foreseeable, the company prudently planned and prepared in advance for such emergencies; (3) despite these plans and preparations, and the best efforts of the company personnel before, during, and after the event, failures to satisfy the service objectives ~~were unavoidable~~ could not reasonably have been avoided; and (4) the extent and nature of the adjustments requested are appropriate for the circumstances. The Commission ~~may~~ shall grant waiver requests if it finds that all four criteria have been met.

The Commission agrees with and adopts the minor modifications negotiated by the Parties for the Force Majeure clause as outlined above. The Commission notes that this issue is further discussed under Negotiated Issue No. 7.

CONCLUSIONS: The Commission declines to scale down the requirements to receive a waiver under the Force Majeure clause in Rule R9-8(c). The Commission further finds it appropriate to adopt the various minor language modifications negotiated by the Parties and to adopt the Force Majeure clause as outlined above.

UNRESOLVED ISSUE NO. 3: Should the requirement in R9-8(f) that "callers to operator '0', directory assistance, business office, and repair service must be explicitly advised that they may press a '0' at any time during the call" be removed?

POSITIONS OF PARTIES

ALLTEL: ALLTEL does not object to the imposition of this requirement.
AT&T: Yes. This specific provision should be removed from R9-8(f).
BELLSOUTH: Yes.
CITIZENS: Citizens does not oppose imposition of this requirement.
CONCORD: Yes. This requirement should be removed.
LEXCOM: Lexcom does not have an automated attendant system installed. Therefore, it does not take a position on this issue.
MCI: MCI did not take a position on this issue.
MEBTEL: MebTel did not take a position on this issue.
PUBLIC STAFF: No. The requirement in Rule R9-8(f) that "Callers to operator '0', directory assistance, business office, and repair service must be explicitly advised that they may press a '0' at any time during the call" should remain.
QUANTUMSHIFT: QuantumShift did not take a position on this issue.
RANDOLPH: Randolph did not take a position on this issue.
SPRINT: Although Sprint does not agree that the Commission should dictate the structure of a company's automated menu, Sprint has not opposed such a provision in the Commission's Rule R9-8 in hopes that by doing so an acceptable compromise could be reached in this proceeding.
VERIZON: Yes.

INITIAL COMMENTS

AT&T: AT&T argued that there is no need for a requirement to inform consumers that they may press "0" at any time during the call to opt out to a live attendant. AT&T noted that, although consumers have encountered recorded menus and are aware of this option without carriers being required to proactively provide this option, AT&T would not be able to comply with this measure if required by the Commission without significant capital expenditures to change existing systems.

BELLSOUTH: BellSouth commented that companies like itself which have specialized representatives to handle the various call types, i.e., collections, service, support, etc. spend a great deal of time developing and designing the initial menu to be customer-friendly and to route the customer to the right place the first time. BellSouth maintained that, given the "0" option, many customers will make that selection without listening to further options. BellSouth argued that, based on past experience and through customer surveys, BellSouth knows that customers are not happy when a service representative tells them that they have reached the wrong center and must transfer them to the proper call center. BellSouth asserted that this requirement will likely result in customers being on hold twice, in addition to having to explain their request twice. BellSouth stated that while there will inevitably be customers who are confused by any menu and will desire to immediately press "0" to speak to an attendant without listening to the complete menu, reaching the wrong call center will only serve to confuse and frustrate them more. Thus, BellSouth contended that this requirement be removed from Rule R9-8(f).

CONCORD: Concord stated that the purpose of an automatic call distribution (ACD) system is to assist callers seeking services by providing information or directing calls in an efficient and organized manner. Concord noted that while the ability to access a live operator is critical for some

purposes, in many cases it is not necessary for the caller to accomplish his or her desired goal. Concord maintained that a properly designed ACD system recognizes and serves both these situations. Concord asserted that an overly aggressive notification requirement that a caller can access an operator immediately could unintentionally subvert the purpose and functioning of the ACD system without improving customer service. Concord stated that, in fact, such a requirement could actually harm the level of customer service provided by keeping live operators tied up routing calls to other departments that could be efficiently handled by the ACD system while callers with more complicated problems have to wait for service.

PUBLIC STAFF: The Public Staff asserted that a number of callers are unfamiliar or uncomfortable with the interactive voice response (IVR) systems used by many companies and prefer to deal with an operator. The Public Staff noted that in other cases, a caller may have a specific problem that does not fit into any of the options presented by the IVR. The Public Staff maintained that if there is not an option to press "0" to reach an operator, the caller will be forced to choose an alternative and enter submenus that will not lead to resolution of the consumer's concern. The Public Staff argued that advising callers within 30 seconds that they can press "0" at any time to reach an operator allows persons who do not wish to utilize the options presented by the IVR unit to be transferred to a live attendant instead.

The Public Staff maintained that one drawback of this "0"–out option is that a consumer may reach an operator who is not trained to handle the customer's request and must transfer the customer to another operator. The Public Staff commented that, while a customer should have his query handled as quickly as possible, it is even more important that a customer not be forced to utilize an IVR and be given an option to speak to an operator. The Public Staff opined that the proposed Rule R9-8 submitted with the Joint Report supports the use of IVRs by allowing the inclusion of calls handled completely in the IVR in the answertime statistics. However, the Public Staff asserted, their use should be balanced with the consumers' right to speak to a live operator instead of being forced to use an IVR.

The Public Staff noted that a number of the companies already meet this requirement. For instance, the Public Staff noted, the initial menu for Verizon's residential business office informs the customer very early in the IVR script of the "0" option. However, the Public Staff asserted, the initial menu for BellSouth's residential business office forces the consumer to listen twice to an IVR script lasting almost 60 seconds before automatically transferring the caller to a service representative queue. The Public Staff stated that a caller who presses "0" during the initial menu is informed that "0" is not a valid option and the initial menu is then replayed from the beginning.

The Public Staff argued that the requirement in Rule R9-8(f) that "Callers to operator '0', directory assistance, business office, and repair service must be explicitly advised that they may press a '0' at any time during the call" is not unduly burdensome or unworkable and should not be removed.

SPRINT: Sprint maintained that it currently complies with this provision and has done so even in the absence of this proposed modification of the Commission's rules. However, Sprint argued, a Commission requirement that automated menus be structured in a specific manner can severely impair the flexibility needed to meet competitive challenges. Sprint noted that an increasingly competitive telecommunications market will protect consumers from automated menus at variance with customer expectations. Sprint asserted that additional regulation that prescribes how a company structures its menu is a step in the wrong direction and is clearly unwarranted.

VERIZON: Verizon maintained that callers dialing "0" today reach an operator. Verizon noted that this requirement should therefore not apply to callers dialing operator "0" because these callers have purposefully already dialed "0" to reach an operator. Verizon noted that advising them to again dial zero makes little sense. Similarly, Verizon argued, the requirement should not apply to calls to DA. Verizon noted that, at present, callers dialing DA also reach an operator and therefore, an advisory to

press "0" will simply confuse customers. Verizon stated that in the case of either "0" or DA calls, requiring customers to listen to an audio advisory to dial "0" to reach an operator can only serve to delay the time it takes for a customer to reach an operator and is counterproductive to providing prompt and efficient service. Verizon maintained that, even if an IVR system is used to provide DA or "0" calls, the requirement should be modified to state that no explicit advice is required if the company's service is designed to automatically default the customer's call to an operator for assistance.

REPLY COMMENTS

BELLSOUTH: BellSouth noted that in its initial comments, it recommended that this requirement be removed. BellSouth commented that several other Industry Members agreed with BellSouth. For instance, BellSouth maintained, AT&T stated that it would "not be able to comply with this measure if required by the Commission without significant capital expenditures to change existing systems." BellSouth observed that Concord noted that, consistent with BellSouth's initial comments, "an overly aggressive notification requirement that a caller can access an operator immediately would unintentionally subvert the purpose and functioning of the ACD system without improving customer service." BellSouth stated that it concurs with Concord's contention that such a requirement could actually harm the level of service "by keeping live operators tied up routing calls to other departments that could be efficiently handled by the ACD system while callers with more complicated problems have to wait for service." BellSouth argued that routing a customer to a service representative who cannot handle the customer's problem or question is not an improvement in customer service.

BellSouth noted that, as it states in its answertime discussion in its rely comments, competition will apply the appropriate amount of discipline on telephone company customer service systems. BellSouth asserted that if consumer frustration with a company's ACD system is great enough to prompt those consumers to leave their provider for a competitor, that provider will be forced to alter its systems to address that issue. BellSouth argued that there is no evidence in this record regarding actual consumer complaints about the placement of the "zero out" option with BellSouth's ACD system. BellSouth maintained that the Commission should, therefore, eliminate this requirement from Rule R9-8(f).

CONCORD: Concord stated that it believes that the current requirement could substantially reduce the value of ACD systems, which are designed to route customers to the appropriate departments best able to address their concerns in the shortest possible time. Concord noted that it is in a situation similar to BellSouth in that it has specialized representatives trained to handle different matters. Concord explained that if customers are implicitly encouraged to "zero out" of the ACD system, then the routing of calls and the ability to respond to calls promptly and efficiently will be inhibited. Concord noted that the Public Staff appears to be concerned about customer interaction with IVR systems where a customer "converses" with the system to achieve the customer's desired goals. Concord maintained it is important to note that these systems are not the same as ACD systems, which only serve to route customer calls by means of automated menus. Concord asserted that while ACD systems are in common use by many industries, including many telephone companies, the use of IVR systems is much less common. Finally, Concord commented that, like AT&T, Concord would be required to incur substantial costs to make the system alterations necessary to comply with this requirement.

PUBLIC STAFF: The Public Staff noted that AT&T contended that consumers already know they can press "0" within a menu. The Public Staff disagreed. The Public Staff commented that many residence customers who are not accustomed to dealing with menus tend to respond only to the options presented to them. The Public Staff stated that if the "press 0 for an operator" option is not explicitly announced, those customers will not consider that to be an option. The Public Staff maintained that BellSouth's menu does not allow callers access to the "0" option to reach a live representative until callers have listened to its entire IVR menu. The Public Staff noted that if the

"press 0" option were available, it would take a customer less time to press "0", wait 30 seconds in the queue, and then have a representative transfer him to the correct representative than to listen to the entire menu.

The Public Staff commented that Verizon argued that a "0" opt-out option should not be required for operator and DA calls. The Public Staff argued that the proposed opt-out requirement would only apply if the "0" and DA menus were over 30 seconds long.

The Public Staff noted that Concord contended that an "overly aggressive" requirement that a caller be notified that he can access an operator immediately could unintentionally subvert the purpose and functioning of the ACD system. The Public Staff stated that it does not believe that a company with a simple and effective IVR message would be negatively impacted by including the "0" option. The Public Staff asserted that if a company has a user-friendly IVR, callers will utilize the options offered by the menu. The Public Staff opined that callers who do not wish to remain in the IVR should be able to quickly exit and be transferred to a live representative. The Public Staff maintained that only explicit advice within the menu can assure that the customer is aware of that option.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(f) should include a requirement that callers to operator "0", directory assistance, business office, or repair service be explicitly advised that they may press "0" at any time during the call was not addressed in the Commission's *December 27, 2002 Order*. In fact, this is the first time this issue has been presented to the Commission in this docket. Apparently, as the Parties were negotiating language to include in the general considerations section on answertimes, the Parties disagreed on inserting this requirement.

AT&T, BellSouth, Concord, Sprint, and Verizon argued that this requirement should be removed; ALLTEL and Citizens did not oppose this requirement; Lexcom, MCI, MebTel, QuantumShift, and Randolph did not take a position on the issue; and the Public Staff asserted that the requirement should not be removed. AT&T claimed that customers are used to recorded menus and are already aware of this option. BellSouth fears that customers will hit "0" too quickly, reach a service representative that cannot help them, and will be confused and frustrated when they are transferred to the proper call center best able to assist them. Concord maintained that this requirement could subvert the purpose and functioning of ACD systems. Sprint argued that competitive forces would adequately protect customers from unsatisfactory automated menus. Finally, Verizon maintained that for Operator "0" and DA calls, telling customers they may dial "0" at any time will confuse them since these calls are routed directly to an operator for assistance.

The Commission notes, as did the Public Staff, that the proposed requirement is only for menus lasting more than 30 seconds. However, the Commission believes that a more appropriate timeframe would be 45 seconds. Therefore, the Commission believes that 45 seconds is an appropriate time limit in which carriers can restrict the choices in a menu, and in the alternative, be required to inform a customer that he can dial "0" at any time to be transferred to a live attendant. The Commission believes that this 45 second exclusion adequately addresses the concerns raised by AT&T, BellSouth, Concord, Sprint, and Verizon. The Commission believes that customers should be informed that they can reach a live attendant if a company's menu lasts for longer than 45 seconds.

CONCLUSIONS: The Commission concludes that it is appropriate to include a requirement in Rule R9-8(f) that "callers to operator '0', directory assistance, business office, and repair service must be explicitly advised that they may press '0' at any time during the call and have the call transferred to a live attendant if the respective menus exceed 45 seconds."

UNRESOLVED ISSUE NO. 4: Is the requirement in R9-8(g) Measure 7 that "live business office representatives are expected to be available to handle incoming calls from North Carolina for a minimum of nine hours per day Monday through Friday, excluding company holidays" necessary?

POSITIONS OF PARTIES

ALLTEL: ALLTEL does not oppose imposition of this requirement.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: As a practical matter, BellSouth has no problem with this requirement since its hours exceed the requirement. However, introducing a rule to manage the hours that a company must be open is simply increased regulation which is completely unnecessary in a competitive environment. Customers who are unhappy with a company's call center hours are free to find another firm whose hours are more to their liking.

CITIZENS: Citizens does not oppose imposition of this requirement.

CONCORD: Concord did not take a position on this issue.

LEXCOM: Lexcom's normal operations meet these standards.

MCI: MCI did not take a position on this issue.

MEBTEL: MebTel did not take a position on this issue.

PUBLIC STAFF: The requirement in Rule R9-8(g) Measure 7 that "Live business office representatives are expected to be available to handle incoming calls from North Carolina for a minimum of nine hours per day Monday through Friday, excluding company holidays" is necessary.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: Randolph did not take a position on this issue.

SPRINT: Although Sprint does not agree that the Commission should dictate the hours of operation for call centers, Sprint has not opposed such a provision in the Commission's Rule R9-8 in hopes that by doing so a compromise resolution could be reached in this proceeding.

VERIZON: No.

INITIAL COMMENTS

PUBLIC STAFF: The Public Staff stated that it believes that this requirement is necessary to ensure that the companies continue to have representatives available for nine hours a day, Monday through Friday. The Public Staff opined that, with the budget cutting that is rife throughout the telecommunications industry, the Public Staff fears that a company might cut the hours live representatives are available, thereby limiting the types of service available to customers. The Public Staff maintained that, while computerized systems are helpful additions to a company's customer service options, they can never totally replace the functions of a live business office representative. Moreover, the Public Staff asserted, there are a number of customers uncomfortable or unfamiliar with IVRs who prefer to speak to live representatives. The Public Staff stated that it is its understanding that all companies currently meet this requirement.

The Public Staff asserted that the requirement in Rule R9-8(g) Measure 7 that "Live business office representatives are expected to be available to handle incoming calls from North Carolina for a minimum of nine hours per day Monday through Friday, excluding company holidays" is not unduly burdensome and is necessary.

SPRINT: Sprint noted that, while it currently complies with this provision, Commission requirements for specific hours of operation hamper flexibility in an industry that is being faced with ever increasing levels of competition and change. Sprint asserted that a company should be free to allocate its limited resources in a manner consistent with changing customer expectations. Sprint argued that additional regulation that goes so far as to prescribe hours of operation is a step in the wrong direction and is excessive. Sprint opined that as competition has grown, the need for telecommunications companies to provide services that meet customer expectations in order to keep and maintain customers has become more than sufficient to motivate the desired accessibility.

VERIZON: Verizon stated that this requirement is unnecessary as it reflects standard business operating hours. Verizon noted that it is currently meeting this requirement.

REPLY COMMENTS

No party filed reply comments on this issue.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(g) Measure 7 should include a requirement that live business office representatives are expected to be available to handle incoming calls from North Carolina for a minimum of nine hours per day Monday through Friday, excluding company holidays was not addressed in the Commission's *December 27, 2002 Order*. In fact, this is the first time this issue has been presented to the Commission in this docket. Apparently, as the Parties were negotiating language to reflect the measurement procedures for Business Office Answertime, the Parties disagreed on inserting this requirement.

The Commission notes that ALLTEL, Citizens, Lexcom, and Sprint did not oppose this requirement; AT&T, Concord, MCI, MebTel, QuantumShift, and Randolph did not take a position on this issue; BellSouth stated that its hours exceed the requirement, but BellSouth is against increased regulation; Verizon opposed the requirement; and the Public Staff supported the requirement. The Commission notes that no party stated that it could not meet this requirement with its current operational hours. Further, the Commission notes that the only objection to this requirement is that it represents increased regulation.

The Commission does not believe that the imposition of this requirement is excessive or burdensome; in fact, the companies filing comments noted that they currently meet this requirement. Further, the Commission agrees with the Public Staff that this requirement is necessary to ensure that companies continue to have live representatives available to assist customers for nine hours a day, Monday through Friday, excluding company holidays. Therefore, the Commission concludes that it is appropriate to include the requirement in Rule R9-8(g) Measure 7 that live business office representatives are expected to be available to handle incoming calls from North Carolina for a minimum of nine hours per day Monday through Friday, excluding company holidays.

CONCLUSIONS: The Commission concludes that it is appropriate to include the requirement in Rule R9-8(g) Measure 7 that live business office representatives are expected to be available to handle incoming calls from North Carolina for a minimum of nine hours per day Monday through Friday, excluding company holidays.

UNRESOLVED ISSUE NO. 5: Is the requirement in R9-8(g) Measure 8 that a live operator be available 24 hours a day, seven days a week to answer repair calls necessary?

POSITIONS OF PARTIES

ALLTEL: ALLTEL does not object to the imposition of this requirement.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: BellSouth's repair service representatives are available 24 hours a day, seven days a week. However, BellSouth finds this requirement to be unnecessary in a competitive environment.

CITIZENS: Citizens did not take a position on this issue.

CONCORD: Concord did not take a position on this issue.

LEXCOM: Lexcom provides this service now and has no issues with the objective.

MCI: MCI did not take a position on this issue.

MEBTEL: No.

PUBLIC STAFF: The requirement in Rule R9-8(g) Measure 8 that a live operator be available 24 hours a day, seven days a week to answer repair calls is necessary.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: No.
SPRINT: Although Sprint does not agree that the Commission should dictate the hours of operation for call centers, Sprint has not opposed such a provision in the Commission's Rule R9-8 in hopes that by doing so a compromise could be reached in this proceeding.
VERIZON: No.

INITIAL COMMENTS

LEXCOM: Lexcom believes that it is important for customers to have access to repair service 24/7.

MEBTEL: MebTel stated that it provides 24/7 repair call coverage, but small telephone companies currently providing adequate coverage should not be forced to incur the expense of implementing this new requirement. MebTel maintained that, provided that there is no history of service issues or customer complaints, a voice mailbox to handle after hour repair calls is sufficient for a small company.

PUBLIC STAFF: The Public Staff stated that it believes that this requirement is necessary for the timely provision of adequate repair service. The Public Staff maintained that a customer experiencing service problems may need to speak directly to a live attendant to describe the nature of the problems or to provide specific details, such as location information. The Public Staff opined that a live operator may also be able to give the customer information or guidance regarding the outage. Further, the Public Staff asserted, if there is an outage that could be life threatening (such as service to a hospital) or one that affects a large number of customers (such as a cable cut), the Public Staff believes that the affected company would want to be informed of this outage as soon as possible, so that repairs may be promptly initiated.

The Public Staff stated that it is its understanding that the only party that opposes this requirement is Randolph Telephone Company, which uses an answering machine for after-hours repair calls. The Public Staff asserted that it would not be unduly burdensome or expensive for a small company to employ an answering service to receive after-hours repair calls or to have the calls transferred to the home or wireless telephone of an on-call employee.

The Public Staff argued that the requirement in Rule R9-8(g) Measure 8 that a live operator be available 24 hours a day, seven days a week to answer repair calls is reasonable and necessary.

RANDOLPH: Randolph commented that it is a small company with only one exchange and less than 4,900 access lines. Randolph noted that it currently uses a voice mail box to handle after hour repair calls. Randolph stated that it has used this system for years and has always met service objectives for repairing out-of-service troubles within 24 hours. Randolph argued that there is no evidence that the current process is not working, and Randolph has received no customer complaints concerning the current process; therefore, Randolph does not believe it should be forced to incur the expense of either staffing for this new requirement or outsourcing to a third party provider. Randolph maintained that there is also no evidence that utilizing a third party provider would improve upon Randolph's current process.

SPRINT: Sprint noted that it currently complies with this provision and has done so in the absence of the proposed Commission rule. Sprint argued that a Commission requirement for specific hours of operation will hamper flexibility in an industry that is being faced with increasing levels of competition and change. Sprint asserted that a company should be free to allocate its limited resources in a manner consistent with customer expectations which change over time. Sprint opined that additional regulation that goes so far as to prescribe hours of operation is a step in the wrong direction and is not warranted when the industry has made it a practice to provide live repair service operators 24 hours a day, seven days a week. Sprint noted that an increasingly competitive telecommunications market provides the incentives for telecommunications companies to innovate in providing services that meet customer expectations in order to keep and maintain customers. Sprint

argued that additional regulation is simply not necessary and may foreclose development of more efficient alternatives in the future.

VERIZON: Verizon stated that, although it currently is meeting this requirement, it is too restrictive and unnecessary in today's competitive environment. Verizon noted that, given that competition will motivate companies to respond rapidly and efficiently to customer demands and preferences, there is no need to dictate the type of procedure (e.g., 24-hour live operator) that carriers must use in responding to customer calls.

REPLY COMMENTS

RANDOLPH: Randolph asserted that it has only one exchange and has less than 4,900 access lines. Randolph noted that it currently uses a voice mail system to handle after hour repair calls. Randolph stated that it has used this system for years and has always met service objectives for repairing out-of-service troubles within 24 hours. Randolph maintained that the Public Staff believes that contracting out to a service bureau is necessary to provide adequate repair service. Randolph argued that there is nothing in the record to support this unnecessary change in regulation.

Randolph noted that, when one of its customers experiences a service problem after hours, they dial the business office number and are forwarded to a voice mail system. Randolph stated that the customer can push "2" to leave a message for the business office; push "3" to leave a message for repair service; or, if the customer deems it an emergency, push "0". Randolph maintained that the customer is then instructed to leave a detailed message including their name and telephone number. Randolph commented that the person on-call checks the repair mail system at specified intervals throughout the night. Randolph stated that, if the customer leaves a message on the emergency mail system, it automatically pages the person on-call for immediate response.

Randolph noted that customers dialing into a service bureau would be connected to a representative who has an instruction sheet to follow and no knowledge whatsoever about Randolph or its service area. Randolph argued that the on-call person would still be required to call in and check with the service bureau for any calls received and would be paged if an emergency existed. Randolph asserted that it does not believe this extra step would improve the repair service it currently provides to its customers and that the Public Staff has not shown in its comments the necessity for making this change, only its belief that somehow this would improve Randolph's response to after-hour repair calls. Randolph, therefore, maintained that it does not believe this new requirement and expense should be imposed.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(g) Measure 8 should include a requirement that a live operator be available 24 hours a day, seven days a week to answer repair calls was not addressed in the Commission's *December 27, 2002 Order*. In fact, this is the first time this issue has been presented to the Commission in this docket. Apparently, as the Parties were negotiating language to reflect the measurement procedures for Repair Service Answertime, the Parties disagreed on inserting this requirement.

The Commission notes that ALLTEL and Lexcom did not oppose this requirement; AT&T, Citizens, Concord, MCI, and QuantumShift did not take a position on this issue; BellSouth, MebTel, Sprint, and Verizon noted that they currently met this requirement but argued that it represents increased and unnecessary regulation which should not be adopted; Randolph opposed the requirement; and the Public Staff supported the requirement. The Commission notes that Randolph was the only party which stated that it could not meet this requirement with its current repair service procedures. Randolph explained that it currently uses a voice mail box to handle after hour repair calls and that there is no evidence that its current process is not working.

Based on the comments filed by Randolph, the Commission believes that it is appropriate for this issue to make allowances for companies providing service to fewer than 10,000 access lines in North Carolina. Therefore, the Commission concludes that it is appropriate to include the requirement in Rule R9-8(g) Measure 8 that carriers with 10,000 or more access lines have a live operator available 24 hours a day, seven days a week to answer repair calls.

CONCLUSIONS: The Commission concludes that it is appropriate to include the requirement in Rule R9-8(g) Measure 8 that carriers with 10,000 or more access lines have a live operator available 24 hours a day, seven days a week to answer repair calls.

UNRESOLVED ISSUE NO. 6: Is it necessary that the reports cover the first to the last day of the calendar month in Measures 9 and 10 in R9-8(g), or is it sufficient if the reports cover a preset 30 day period that is not tied to the first and last day of the calendar month?

POSITIONS OF PARTIES

ALLTEL: ALLTEL supports the establishment of a consistent 30 day reporting period by the company that would parallel a calendar month reporting period; however, companies should not have to reconfigure and reprogram their systems solely to generate reports tied to the first and last day of the calendar month.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: BellSouth's reports are built on the calendar month.

CITIZENS: Citizens did not take a position on this issue.

CONCORD: Concord did not take a position on this issue.

LEXCOM: Currently Lexcom reports by calendar month so it has no issue with the objective.

MCI: MCI did not take a position on this issue.

MEBTEL: MebTel did not take a position on this issue.

PUBLIC STAFF: The reports required in Measures 9 and 10 in Rule R9-8(g) should cover the first through the last day of the calendar month.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: Randolph did not take a position on this issue.

SPRINT: Reports should cover the first to the last day of the calendar month.

VERIZON: Reports should be made on a calendar month basis.

INITIAL COMMENTS

ALLTEL: ALLTEL stated that, by allowing the company to report data over a consistent 30-day (or 28 or 31 days, as it parallels the reporting month) reporting period, yet giving the company the flexibility to set the report period, the same results sought by the Commission will be achieved. For example, ALLTEL noted, if it reports December results from 11/26/03 to 12/25/03 and then reports January results from 12/26/03 to 1/25/04, there is no meaningful difference than if the data had been reported for the periods 12/1 – 12/31/03 and 1/1 – 1/31/04. ALLTEL maintained that it does not believe that the Commission should adopt a rigid standard with regard to the reporting period that would require costly software enhancements or extensive administration in order to achieve uniform reporting procedures that would be of no meaningful benefit to consumers.

LEXCOM: Lexcom stated that, while it reports already by calendar month, it should not matter as long as the reported month includes at least all billing cycles for the last 30 days.

PUBLIC STAFF: The Public Staff argued that the purpose of this requirement is to ensure uniform reporting. The Public Staff maintained that, in reviewing the service quality reports, the Public Staff often compares results from different companies to determine whether a problem is specific to one company or affects the entire industry. For instance, the Public Staff commented, in evaluating a company's Force Majeure waiver request, the Public Staff might look at other companies' reports to determine the geographic area affected by a storm, as well as the extent to which the other

companies' service was impacted. The Public Staff noted that if the companies do not use the same reporting period, such a comparison would be difficult, if not impossible.

The Public Staff stated that it believes that it is necessary for purposes of uniform comparisons that the reports cover the first to the last day of the calendar month in Measures 9 and 10 in Rule R9-8(g).

SPRINT: Sprint noted that simplified consistency in reporting will promote administrative ease for all parties.

VERIZON: Verizon stated that it takes no position on whether it is necessary for all companies to file reports covering the first to the last day of the calendar month. However, Verizon noted, it should be permitted to continue to file reports on that basis because its internal systems and processes are designed to produce reports on a calendar-month basis. Verizon maintained that it would be resource intensive to modify these internal systems and processes, and such modifications would not deliver any appreciable benefits.

REPLY COMMENTS

ALLTEL: ALLTEL asserted that the Public Staff seeks imposition of a requirement that ILECs' data reporting periods be tied to the calendar month, i.e., from the last day of each month. ALLTEL noted that, in order to accommodate its data collection systems, ALLTEL has requested that the rule be written to allow a reporting company sufficient flexibility to establish a consistent analogous reporting period that would parallel a calendar month, without necessarily having to start on the first day and on the last day of the month.

ALLTEL stated that, as it noted in its initial comments, by allowing a company to report its data for a consistent 30 day (or 28 or 31 day period, as appropriate to parallel the applicable monthly reporting period), a company would have the flexibility to establish a report period yielding data that is effectively identical to the data yielded by the Public Staff's version of the measure. However, ALLTEL noted that this flexibility would spare companies the need to reconfigure and reprogram systems solely to generate data collection and reports tied to the first and last day of the calendar month.

ALLTEL maintained that the Company would still have a uniform reporting period and there would be no material difference in the quality or significance of the data produced. ALLTEL noted that if, for example, for the December reporting period, ALLTEL was to report the results of its service from November 26 through the following December 25, instead of reporting from December 1 through December 31, there would be no meaningful difference between the data collected for the analogous 31 day period (11/26-12/25), and the equivalent data collected from December 1 through December 31. ALLTEL stated that it understands that not all companies are reporting today on a standardized calendar month basis, and this does not appear to have caused any problem for Public Staff and Commission in reviewing and analyzing the reported data.

ALLTEL argued that so long as the reporting company utilizes data from an equivalent length reporting period which closely parallels the subject month, there will simply be no real difference in the value of the data. ALLTEL maintained that there is insufficient justification for requiring costly software enhancements or additional administrative costs in order to achieve totally uniform comparative reporting by all companies; particularly not for the sole proffered reason of allowing perfect comparison of various companies' reports for a given period. ALLTEL asserted that requiring calendar month reporting does not advance any discernable public interest or provide meaningful benefit to any interested party.

ALLTEL noted that it appreciates and respects the Commission and Public Staff objectives of insuring that North Carolina citizens continue to receive high quality telecommunication services. In this regard, ALLTEL noted again that it has consistently met the Commission's existing service

objective standards. ALLTEL maintained that, because of the legitimate question as to the extent of any additional benefit which might accrue to the public as a result of the imposition of the requirement to report on a calendar month basis, rather than an equivalent closely analogous reporting period, ALLTEL requested that the Commission grant ILECs the flexibility to report their data in a way that is functionally equivalent to reporting based on the calendar month.

PUBLIC STAFF: The Public Staff maintained that the monthly reporting requirement for initial troubles per 100 access lines dates back to a January 15, 1971 memorandum. The Public Staff asserted that, although the Commission did not specify that the reporting periods should be "calendar" months, it is the normal meaning of the term.

The Public Staff noted that ALLTEL contended that it will incur reprogramming expense to convert to a calendar month reporting system. However, the Public Staff argued that this expense, which ALLTEL has not quantified, should be a one-time expense. The Public Staff asserted that the Commission should not alter the rule to accept ALLTEL's unique trouble reporting schedules, as this will make it almost impossible to compare trouble report performance among the companies.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(g) Measures 9 and 10 should require that the reports cover the first to the last day of the calendar month was addressed in the Commission's *December 27, 2002 Order*.

The Commission notes that BellSouth and Lexcom did not oppose this requirement; AT&T, Citizens, Concord, MCI, MebTel, QuantumShift, and Randolph did not take a position on this issue; the Public Staff, Sprint, and Verizon supported a calendar month reporting period; and ALLTEL was opposed to such a reporting period. The Commission notes that ALLTEL was the only party which was opposed to reporting on a calendar month basis. ALLTEL argued that, so long as the reporting company utilizes data from an equivalent length reporting period which closely parallels the subject month, there will simply be no real difference in the value of the data. ALLTEL further maintained that there is insufficient justification for requiring costly software enhancements or the incurrence of additional administrative costs in order to achieve totally uniform comparative reporting by all companies, particularly not for the sole proffered reason of allowing perfect comparison of various companies' reports for a given period. ALLTEL asserted that requiring calendar month reporting does not advance any discernable public interest or provide meaningful benefit to any interested party.

The Commission agrees with the Public Staff that the purpose of a calendar month basis reporting requirement is to ensure uniform reporting. Further, the Commission believes it is essential to have companies report on the same timeframe and that a calendar month basis is a normal reporting period. The Commission also notes that ALLTEL is the only party to oppose this requirement and the Commission agrees with the Public Staff that ALLTEL has not quantified its reprogramming expense and that the expense should be a one-time expense.

Therefore, the Commission finds it appropriate to require that reports for Measures 9 and 10 in Rule R9-8(g) cover the first to the last day of the calendar month as initially ordered by the Commission in its *December 27, 2002 Order*.

CONCLUSIONS: The Commission concludes that reports for Measures 9 and 10 in Rule R9-8(g) should cover the first to the last day of the calendar month consistent with the Commission's finding in its *December 27, 2002 Order*.

UNRESOLVED ISSUE NO. 7: Should Measures 9-14 in R9-8(g) exclude nonregulated equipment or services from the calculations?

POSITIONS OF PARTIES

ALLTEL: Yes.
AT&T: Yes. Measures 9 - 14 of R9-8(g) should not include nonregulated equipment or services.
BELLSOUTH: Yes.
CITIZENS: Yes. Citizens believes that Measures 9-14 should exclude nonregulated equipment or services from the calculations.
CONCORD: Yes.
LEXCOM: No.
MCI: MCI did not take a position on this issue.
MEBTEL: No.
PUBLIC STAFF: Yes. Companies should exclude nonregulated equipment or services from their calculations of Measures 9 - 14 in Rule R9-8(g).
QUANTUMSHIFT: QuantumShift did not take a position on this issue.
RANDOLPH: No.
SPRINT: Yes. Measures 9-14 in Rule R9-8(g) should exclude nonregulated equipment and services from the calculations.
VERIZON: Yes.

INITIAL COMMENTS

AT&T: AT&T maintained that there is no reason to include equipment and services (i.e., inside wire, terminal equipment) that are not regulated by the Commission in the computation of any service quality measures. AT&T noted that if it were required to comply with this requirement, significant capital expenditures would be required to change existing reporting systems during a time when AT&T, like other CLPs, is faced with a reduction of capital resources. AT&T stated that it has not been required to provide information on nonregulated services as part of any service quality measures. AT&T further noted that such a requirement would be extremely burdensome and would not provide the Commission with beneficial information regarding whether or not a consumer's service has been successfully installed.

BELLSOUTH: BellSouth asserted that, by definition, these network measurements are obviously associated with BellSouth's regulated common carrier business. BellSouth stated that it has no public utility obligation to maintain or concern itself with a customer's unregulated CPE, which can be purchased from a myriad of providers, and that the Commission cannot promulgate rules that either directly or indirectly regulate either an unregulated line of business or BellSouth's treatment of an unregulated portion of a customer's telephone service. In addition, BellSouth stated that its systems and reports are set up to exclude this information today and it would require significant and unnecessary expense for BellSouth to re-design these systems to include nonregulated equipment or services in these calculations.

CONCORD: Concord stated that, by definition, nonregulated services and equipment are not matters within the control or jurisdiction of the Commission. As such, Concord maintained, reporting of service quality measurements for these services and equipment is not a matter properly ordered by the Commission. Concord noted that the only exception that might be appropriate is in the case where a provider cannot readily distinguish between regulated and nonregulated equipment and services for purposes of reporting, in which case it may be appropriate to permit combined reporting.

LEXCOM: Lexcom noted that on Measures 9 through 11, Lexcom uses one call-in number for all repair calls. Lexcom stated that it does not distinguish or discriminate between these categories of calls. Lexcom argued that to try and segregate these calls would require, at the least, multiple call-in numbers. Lexcom maintained that this would be confusing to its customers, as well as add additional expense. Lexcom noted that for Measures 12 through 14, Lexcom classifies a service order that contains both regulated and nonregulated items as a regulated order; orders which contain only nonregulated items are classified as nonregulated orders.

MEBTEL: MebTel maintained that its current service order system does not have the capability to exclude nonregulated service orders. MebTel stated that segregation of nonregulated equipment and services would require either an unduly burdensome manual process or significant expense to reprogram its systems and re-train its service representatives. MebTel asserted that it is a small company, and it is much more efficient to train its representatives to take all incoming calls and work within one unified service order system, regardless of distinctions between regulated and nonregulated service inquiries. MebTel stated that the changes necessary to exclude nonregulated service orders would require significant time and expense, create confusion, and negatively impact service as a result of changes to longstanding business practices.

PUBLIC STAFF: The Public Staff noted that in the Commission's *December 27, 2002 Order*, the Commission adopted language in Rule R9-8 requiring companies to exclude nonregulated equipment or services from their calculations of Measures 12-17. The Public Staff stated that it believes that it is logical to exclude results for equipment and services over which the Commission has no jurisdiction. The Public Staff noted that it is also important that the Commission and Public Staff receive service quality reports that measure the same things. The Public Staff opined that it would be impossible to compare service quality across North Carolina if one company reports service quality results reflecting both its regulated and nonregulated equipment and services, while another company only reports results associated with its regulated equipment and services.

The Public Staff argued that Measures 9 through 14 in Rule R9-8(g) should exclude nonregulated equipment and services.

RANDOLPH: Randolph noted that its current service order system does not have the capability of excluding nonregulated service orders from either the numerator or denominator of the equation. Randolph stated that, in order to exclude nonregulated service orders, Randolph would either have to manually inspect and tally each order received during the month or incur significant programming costs to automate the process with little corresponding benefit to its ratepayers.

SPRINT: Sprint stated that nonregulated equipment and services are beyond the jurisdiction of the Commission and should therefore be excluded from service quality reports.

VERIZON: Verizon stated that nonregulated equipment and services should be excluded from the calculations. Verizon argued that nonregulated equipment and services, by definition, are free of regulatory oversight, and thus including them in the regulatory reports would be improper. Verizon stated that unnecessary regulation of these items will interfere with the operation of market forces and needlessly expend resources monitoring items that are more efficiently regulated by competition. Accordingly, Verizon maintained, only regulated services should be included in the calculations.

REPLY COMMENTS

No party filed reply comments on this issue.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(g) Measures 9 through 14 should exclude nonregulated equipment or services from the calculations was addressed in the Commission's *December 27, 2002 Order*. In the *December 27, 2002 Order*, the Commission found that for Initial Customer Trouble Reports, Repeat Reports, Out-of-Service Troubles Cleared Within 24 Hours, Regular Service Orders Completed Within 5 Working Days, New Service Installation Appointments Not Met for Company Reasons, and Held Orders Not Completed Within 30 Days, nonregulated equipment, products, and services should be excluded from the calculations. In fact, at least for Initial Customer Trouble Reports, both the ITF and the Public Staff had recommended that the calculation exclude nonregulated services.

The Commission notes that ALLTEL, AT&T, BellSouth, Citizens, Concord, the Public Staff, Sprint, and Verizon support excluding nonregulated equipment and services; MCI and QuantumShift did not take a position on this issue; and Lexcom, MebTel, and Randolph recommend that nonregulated equipment and services be included in the calculations. Lexcom, MebTel, and Randolph explained that their current systems do not distinguish between regulated and nonregulated equipment and services.

The Commission agrees with the Public Staff that it is logical to exclude all nonregulated equipment and services from the calculation of service standards. The Commission also agrees that it is important that the service quality reports submitted by the companies measure the same thing. However, to address the fact that Lexcom, MebTel, and Randolph have indicated that their current systems do not distinguish between regulated and nonregulated equipment and services, the Commission finds it appropriate for this requirement to allow carriers to file for a waiver for good cause shown.

Therefore, the Commission finds it appropriate to continue to find that Measures 9 through 14 in Rule R9-8(g) should exclude nonregulated equipment and services from the calculations, with the caveat that carriers may request a waiver of this requirement from the Commission and the Commission may grant such waiver requests for good cause shown.

CONCLUSIONS: The Commission continues to find that Measures 9 through 14 in Rule R9-8(g) should exclude nonregulated equipment and services from the calculations. However, carriers may request a waiver of this requirement from the Commission and the Commission may grant such waiver requests for good cause shown.

UNRESOLVED ISSUE NO. 8: Should the average speed of answer (ASA) for business office and repair service be 30 or 60 seconds?

POSITIONS OF PARTIES

ALLTEL: ALLTEL supports the adoption of an average speed of answer standard and does not object to the implementation of either standard, as ALLTEL can satisfy either one.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: The average speed of answer should be 60 seconds.

CITIZENS: Citizens does not oppose a requirement that the average speed of answer for business office and repair be 30 seconds.

CONCORD: Concord did not take a position on this issue.

LEXCOM: Lexcom currently supports a 30 second answertime. However, it would not object to a 60 second answertime.

MCI: An average speed of answer for business office and repair service of 30 seconds engenders substantial costs and would limit competition. MCI recommends that the average speed of answer be 60 seconds.

MEBTEL: MebTel did not take a position on this issue.

PUBLIC STAFF: The average speed of answer for business office and repair service should be 30 seconds.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: Randolph did not take a position on this issue.

SPRINT: Telecommunications companies should not be held to answertime standards. No other category of state-regulated utilities in North Carolina of which Sprint is aware is held to such standards. Nevertheless, some telecommunications companies believe that a 60 second average speed of answer is appropriate while other ITF members have agreed to 30 seconds. A reasonable compromise altérnative is a 45 second average speed of answer.

VERIZON: Verizon did not take a position on this issue.

INITIAL COMMENTS

ALLTEL: ALLTEL noted that, under an ASA standard, every call has an equal value for purposes of scoring service quality performance. ALLTEL stated that there is no answer time threshold that, once missed, devalues answering a call from a service level measurement perspective. ALLTEL maintained that under an ASA system, a company continues to be motivated to answer every call as quickly as possible. Thus, ALLTEL contended, an ASA standard would be just as effective in promoting the quickest possible answer.

BELLSOUTH: BellSouth stated that its position has not changed since its Motion for Reconsideration was filed on February 7, 2003 in this docket, where it discussed this matter in great detail. In summary, BellSouth noted, based on the study conducted by Georgetown Consulting, and the research conducted by Maritz Marketing Research, Inc., the ITF recommended 60 seconds to the Commission as an average industry standard. BellSouth commented that the average was based on a review of other states' standards plus customer surveys. BellSouth noted that adoption of the 60 second ASA would not place the Commission outside the mainstream of states that have established standards in this area. In fact, BellSouth maintained, 22 states have not established a business office answertime standard at all and 15 states have no repair office answertime standard. Further, BellSouth argued, changes in the general call center environment since the current answertime standards were established must be recognized. BellSouth commented that one would be hard pressed to call any business or governmental agency today and not be required to hold for some length of time. BellSouth asserted that, considering the extraordinary changes to BellSouth's business environment (which demand that service representatives engage in much longer discussions with customers) as well as changes to the call center environment as a whole, the Commission should find 60 seconds to be an excellent answertime standard.

MCI: MCI noted that it appreciates the willingness of the Commission and the Public Staff to listen to and address the concerns of all carriers, both CLPs and ILECs alike. MCI stated that it shares the concerns of the Commission and other interested parties in guaranteeing that this process will produce rules that ensure that the interests of North Carolina consumers are protected, while at the same time ensuring that North Carolina consumers have choice in their local telephone provider.

MCI noted that last year it launched competing residential local service – "The Neighborhood built by MCI" – in North Carolina and a number of other states. MCI stated that by using the unbundled network element-platform (UNE-P), the Neighborhood provides North Carolina residential and small business consumers with packages of local, intraLATA, and interLATA voice services, along with assortments of popular features. MCI noted that it now serves tens of thousands of North Carolinians with the Neighborhood, and more than 3 million mass markets customers nationally.

MCI commented that achieving the goal of effective and sustainable competition should be the lodestar of telecommunications regulation. MCI argued that competition is still in the embryonic stage in North Carolina, particularly for residential and small business customers. Thus, MCI asserted, the purpose of regulation is to act as a surrogate for marketplace regulation (i.e. competition) until such time as competition is sufficiently established. MCI maintained that, where competition does not exist, Commission regulation is necessary to protect the interests of consumers; as competition develops, there is less of a need for Commission regulation. MCI noted that the reality is that CLPs just entering the local telephone market in North Carolina are immediately subject to marketplace regulation. In other words, MCI stated, unless CLPs can provide services that are better in quality and price than those offered by incumbent monopolies, they will simply never attract customers. MCI argued that, with competition, a consumer should have the choice of going with the company that provides the level of service he or she seeks. MCI maintained that if a consumer does not need a high standard of service, and in return he or she receives a lower price, he or she should have that option. MCI argued that competition will create the impetus for carriers to offer customer service that will satisfy the consumer, or they will risk losing customers to another carrier that will meet that need. MCI opined that market forces will keep carriers providing customer

service at levels that meet customer needs. MCI noted that regulation becomes unnecessary in this scenario.

Against this backdrop, MCI asserted, there remains a dispute in this docket concerning whether the ASA should be 30 seconds or 60 seconds. MCI noted that a 30 second ASA, particularly if it begins at the moment the call enters the queue leading to a live representative, requires many more representatives and means that at low volume times they sit idle, creating an inefficient and expensive situation for the carrier. Under these circumstances, MCI noted, the costs to achieve a 30 second ASA are extremely high, in the millions of dollars for a national company. MCI commented that, even with the best efforts to manage call volumes to achieve low ASAs, there may be unintended consequences. MCI stated that there may be unneeded pressure to move "through" the calls more quickly than desired to keep up with incidents like call volume "spikes" for example, which could cause reduced call handling satisfaction for consumers calling with more complex issues that could require additional attention. MCI maintained that consumers do not like to be kept waiting for longer than necessary, but when it is their turn for attention from the representative, they will expect efficient resolution to the extent needed to resolve their concern. MCI stated that carriers are training representatives and using call routing to provide that efficient and accurate resolution. By doing so, MCI commented, carriers reduce the chance and cost of a repeat call and an unsatisfied customer.

MCI argued that a 30 second ASA is an unrealistic standard in today's marketplace, particularly when there are technological solutions being used today as well as ones under development in the industry, which will provide service that will make ASA an unnecessary and arbitrary measure. MCI asserted that today's IVR units are being used in "smarter" ways to route the right customer to the right representative with the right information to resolve the customer's concern accurately and efficiently. MCI noted that customers are also using IVR to self-service their accounts at their convenience, 24 hours a day, seven days a week. MCI stated that the same is true of web-based customer service and email customer service.

MCI acknowledged and supported the business office and repair service measurement procedures. MCI noted that defining the way calls handled by automated menus or IVR should be included in the measure recognizes the value and widespread use and acceptance of this technology. At the same time, MCI argued, requiring a 30 second ASA is setting a standard that would be challenging and costly for a national carrier to comply with on a consistent basis. MCI recommended that the Commission not set service standards at unnecessarily low rates and allow carriers in the competitive marketplace to create innovative solutions.

PUBLIC STAFF: The Public Staff noted that, as the Commission is aware, the appropriate objective for answertime has been the most difficult issue in this docket. The Public Staff commented that the current standard requires that 90% of all calls to the business office or to repair be answered in 20 seconds. The Public Staff maintained that, based on calculations made by BellSouth a number of years ago, this standard translates to an ASA of 13 seconds. The Public Staff noted that all companies but one have been meeting the current standard or missing it very narrowly.

The Public Staff opined that going to an ASA of 30 seconds is a significant loosening of the current standard. The Public Staff noted that the proposed Rule R9-8 attached to the Joint Report recognizes changes in technology, especially the use of IVRs, and allows the companies wide latitude in determining how best to serve their customers. The Public Staff asserted that the proposed rule also allows companies that utilize IVRs to assume an answertime of one second for all calls handled entirely in the IVR. Thus, the Public Staff noted, if 30% of a company's calls were handled entirely within its IVR system, the ASA for the calls answered by a live operator would need to be 42 seconds to achieve an overall ASA of 30 seconds. The Public Staff commented that as a company improves its IVR so that even a greater percentage of calls are handled without the intervention of a live operator, the ASA for live operator calls could increase and the company could still meet the 30-second ASA standard.

The Public Staff stated that it believes that almost all companies currently meet a 30-second ASA standard, and only one company opposes it. The Public Staff maintained that further relaxing of the answertime standard would not be in the public interest and that the ASA for business office and repair service should be 30 seconds.

SPRINT: Sprint argued that the competitive nature of the telecommunications industry provides adequate incentives for companies to answer calls in timeframes that meet customer expectations. However, Sprint asserted that it has not opposed a 30 second average speed of answer with the inclusion of automated calls in the expectation that by doing so a compromise settlement could be reached in this proceeding. Sprint argued that it is illogical to hold a competitive industry to standards not required of industries that have virtually no competition at all. Sprint noted that the potential loss of customers associated with the failure to meet customer expectations provides more than adequate incentive for telecommunications companies to answer customer calls in a timely manner. Sprint maintained that, perhaps, this requirement is a vestige of an earlier time, but, if it was ever necessary, it is no longer required because telecommunications competition is flourishing and customers have options that were not available in the past.

REPLY COMMENTS

BELLSOUTH: BellSouth noted that, in its initial comments, it recommended that the ASA for Business Office and Repair Service be 60 seconds. BellSouth stated that MCI filed extensive comments supporting the establishment of a 60-second ASA requirement for this measurement. In fact, BellSouth commented, this was the only issue on which MCI offered initial comments, which clearly indicates the seriousness of the issue to MCI.

BellSouth maintained that MCI noted that the "costs to achieve a 30-second ASA are extremely high, in the millions of dollars for a national company. This is an unnecessary and unrealistic requirement that will limit the amount of competition in the marketplace." BellSouth pointed out that MCI noted that "a 30-second ASA is an unrealistic standard in today's marketplace" (a point made by BellSouth in its initial comments) and that competition will "create the emphasis for carriers to offer customer service that will satisfy the customer, or they will risk losing customers to another carrier that will meet that need." BellSouth asserted that it agrees wholeheartedly with MCI's comments on this issue. BellSouth argued that business and residential customers in North Carolina clearly have a myriad of choices for their telecommunications needs. Indeed, BellSouth opined, MCI's comments noted the success of its Neighborhood offering around the nation and within North Carolina for residential customers, and AT&T recently announced its widespread entry into the residential markets in this state. BellSouth asserted that carriers that require customers to wait an inordinate amount of time to conduct transactions via the telephone will quickly lose those customers to competitive alternatives.

BellSouth noted that Sprint's initial comments on this issue correctly noted that the "competitive nature of the telecommunications industry provides adequate incentives for companies to answer calls in timeframes that meet customer expectations." Echoing a point BellSouth has consistently made in this proceeding, BellSouth noted that Sprint observed: "It is illogical to hold a competitive industry [telecommunication] to standards not required of industries that have virtually no competition at all [rate-of-return regulated electric, gas, and water companies]." BellSouth argued that it is absurd for the Commission to single out the most competitive industry under its purview for imposition of any answertime measurement, when *de jure* monopolies such as electric and gas companies (whose customer literally has no choice of providers) have no answertime standards. For all the reasons previously stated and in its prior comments on this issue, BellSouth asked that, if the Commission insists upon the continuation of an answertime measurement for business office and repair access, that standard should be set at 60 seconds ASA.

PUBLIC STAFF: The Public Staff noted that BellSouth contended that 60 seconds is an "excellent answertime standard" considering "extraordinary changes to BellSouth's business environment

(which demand that service representative engage in much longer discussions with customers) as well as changes to the call center environment as a whole." The Public Staff asserted that there is no question that BellSouth's business and call center environments have changed. Indeed, the Public Staff stated that it believes that answertime delays are related, in part, to an increased emphasis on marketing unregulated services such as voice mail and DSL and to responding to questions on features such as call waiting or caller ID. The Public Staff maintained that many of the non-POTS services that are available today did not exist when the "90% within 20 seconds" answertime standard was adopted by the Commission. However, the Public Staff noted that it does not believe the Commission can find much excellence in a 60 second ASA standard. The Public Staff argued that there is considerable difference between what customers have had to endure and come to expect and what they should be provided. The Public Staff maintained that many companies consistently meet the current standard, which equates to an ASA of less than 30 seconds. The Public Staff opined that a 30 second ASA standard recognizes changes such as the extensive use of IVRs without resulting in a significant diminution in service quality.

DISCUSSION

The Commission notes that in the *December 27, 2002 Order*, the Commission found it appropriate to retain the current answertime standard in Rule R9-8 for Business Office and Repair Service of 90% or more of calls answered within 20 seconds. However, the Commission also found it appropriate to adopt an absolute maximum answertime standard which the Commission noted would be established after a hearing on the matter.

It appears from the filings in this matter that none of the Parties supported the findings in the Commission's *December 27, 2002 Order*. It does appear that the Parties have agreed that the standard for Business Office and Repair Service answertime should be an ASA, with BellSouth and MCI supporting 60 seconds and ALLTEL, Citizens, Lexcom, and the Public Staff supporting 30 seconds. AT&T, Concord, MebTel, QuantumShift, Randolph, and Verizon did not take a position on this issue. Sprint offered a compromise of 45 seconds. The Commission further notes that the Public Staff stated that, based on calculations made by BellSouth a number of years ago, the current 90% within 20 seconds standard translates to an ASA of 13 seconds. Therefore, the Commission observes, increasing the objective to an ASA of 30 seconds is **more than doubling** the current objective. Further, as the Public Staff noted, the proposed rule allows companies that utilize IVRs to assume an answertime of one second for all calls handled entirely within its IVR. Therefore, if a call is handled completely within the IVR and a one second answertime is assumed and another call is handled by a live operator, to meet the 30 second ASA, the live call would need to be answered in 59 seconds (1 second + 59 seconds = 60 seconds / 2 calls = 30 seconds per call or an ASA of 30 seconds).

The Public Staff also noted that all companies but one have been meeting the current standard or missing it very narrowly. And again, adopting a 30 second ASA is more than doubling the current objective.

Although the Commission is not entirely persuaded that the decision in the *December 27, 2002 Order* to retain the 90% in 20 seconds standard plus an absolute maximum answertime should be altered, the Commission does realize that all of the Parties involved in this docket have agreed that an ASA should be utilized. The only issue between the Parties is whether the ASA should be 30 seconds or 60 seconds. BellSouth and MCI were the only parties that support a 60 second ASA, and the Commission was not persuaded by the comments of those two companies that a 60 second ASA is reasonable. The Commission believes that a 30 second ASA is entirely reasonable and appropriate.

Therefore, the Commission finds it appropriate to adopt a 30 second ASA for Business Office and Repair Service answertimes.

CONCLUSIONS: The Commission finds it appropriate to adopt a 30 second ASA for Business Office and Repair Service answertimes.

UNRESOLVED ISSUE NO. 9: In Measure 11 of R9-8(g), should the calculations for the Out-of-Service Troubles Cleared Within 24 Hours measure exclude Saturdays, Sundays, and holidays?

POSITIONS OF PARTIES

ALLTEL: Yes, the Commission should clarify that the time for calculating the Out-of-Service Troubles Cleared Within 24 Hours excludes reports received between 5:00 p.m. Saturday and 7:00 a.m. Monday or on holidays.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: BellSouth currently includes Saturdays, Sundays, and holidays.

CITIZENS: Citizens did not take a position on this issue.

CONCORD: Yes.

LEXCOM: Lexcom accepts a 24 hour out-of-service clear time.

MCI: MCI did not take a position on this issue.

MEBTEL: MebTel did not take a position on this issue.

PUBLIC STAFF: The calculations for the Out-of-Service Troubles Cleared within 24 Hours measure should include results for Saturdays, Sundays, and holidays.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: Randolph did not take a position on this issue.

SPRINT: Sundays should be excluded from the calculations for the Out-of-Service Troubles Cleared within 24 Hours measure.

VERIZON: Yes.

INITIAL COMMENTS

ALLTEL: ALLTEL commented that it feels strongly that trouble reports received during the period between 5:00 p.m. Saturday and 7:00 a.m. Monday or on holidays should not be included in this measurement. ALLTEL noted that, during that part of the weekend, repair forces may not be dispatched immediately, depending on the availability of on-call weekend repair technicians. ALLTEL commented that, while the volume of these trouble reports received during this time is not significant, their inclusion could, in certain unusual circumstances such as an unexpected weekend event not rising to the level of a force majeure event, adversely and unfairly impact performance as to this standard for that month.

CONCORD: Concord noted that although many out-of-service customer situations are handled by Concord on Saturdays, Sundays, or holidays, Concord has only limited staff availability during these periods for these purposes. Concord maintained that the Commission's standards should recognize the legitimate differences between staff and service availability on working and nonworking days. Concord stated that by including these days in the Out-of-Service Troubles Cleared service quality requirement, the Commission will effectively be issuing a new, and much more stringent, service quality requirement on Concord. Concord argued that this requirement may require Concord to restructure its service employment arrangements and add significant new costs to Concord's provision of service. Concord submitted that no showing has been made that its customers are dissatisfied with its existing out-of-service procedures and, therefore, it is not appropriate for the Commission to impose this unilateral change in Concord's service procedures in this docket.

PUBLIC STAFF: The Public Staff noted that, as it previously stated with regard to Unresolved Issue No. 1, the Public Staff believes that the Out-of-Service Troubles Cleared Within 24 Hours measure is the most important of all the service quality measures. The Public Staff opined that, from the customers' perspective, out-of-service troubles are the same regardless of when they occur, and the companies should be expected to make out-of-service repairs every day of the year.

The Public Staff opined that if companies were allowed to exclude weekend and holiday performance from their out-of-service repair results, a customer could, for example, report an outage the Friday evening before Memorial Day, and his carrier could wait to restore service until the next Tuesday evening, a total of four calendar days, but still meet the standard in regard to that customer. The Public Staff maintained that moreover, since the standard for this measure is not 100%, but rather 95%, companies already have some flexibility in determining whether to require their repair forces to work on Saturdays, Sundays, and holidays.

The Public Staff argued that the calculations for the Out-of-Service Troubles Cleared within 24 Hours measure should include results for Saturdays, Sundays, and holidays.

SPRINT: Sprint noted that its service technicians have not generally worked out-of-service troubles on Sundays in the past. Sprint maintained that this practice has proven satisfactory, and there is no reason to change. If anything, Sprint opined, increasing competition should render such rules less, not more, necessary. Sprint noted that it does dispatch technicians to clear out-of-service troubles on any day, including Saturdays, Sundays and holidays, for medical and other emergency reasons and will continue to do so even with the Sunday exclusion.

VERIZON: Verizon stated that weekends and holidays should be excluded to account for the fact that staffing levels are lower during these time periods than during normal working hours. Verizon argued that requiring it to maintain the same workforce on weekends and holidays that it does during normal business hours would be resource intensive – at a time when the industry can ill afford to bear any unnecessary expense. Verizon asserted that the Commission should limit the calculation to business days to allow companies the flexibility to allocate their finite resources to endeavors that they believe will have a greater positive impact on customer satisfaction.

REPLY COMMENTS

ALLTEL: ALLTEL stated that, as indicated in its initial comments, it supports either the existing 95% standard or the lowering of that standard to 90%; provided that, if this standard remains at 95%, then the calculation of this measure should exclude trouble reports received between 5:00 p.m. on Saturday and 7:00 a.m. on Monday or on holidays. ALLTEL commented that trouble reports received by ALLTEL during the period between 5:00 p.m. on Saturday and 7:00 a.m. on Monday or on holidays may not be dispatched immediately, depending on the availability of on-call repair technicians. ALLTEL maintained that this would not be an issue if the Commission adopts the 90% standard; however, if the Commission maintains the 95% standard, then it could be.

ALLTEL noted that it currently handles emergency situations all day on Saturday, Sunday, and holidays. ALLTEL asserted that this capability addresses the unusual but potential scenarios proffered by the Public Staff in its comments, such as a cable cut. ALLTEL likewise meets the current 95% standard in Rule R9-8(a). ALLTEL noted that it also currently works regular trouble tickets received during the period, to the extent it has technicians available during that period. ALLTEL maintained that any trouble reported between 5:00 p.m. on Saturday and 8:00 a.m. on Monday, or on a holiday, which is not resolved by Monday morning, will be handled before 8:00 a.m. Tuesday morning. ALLTEL stated that its concern is that the inclusion of these unresolved weekend trouble reports in the computation of company performance with regard to this standard could yield a distorted result.

ALLTEL argued that Sundays are a traditional day of rest and requiring employees to work on that day is not only a serious and unpopular imposition on employees, it is expensive. ALLTEL commented that, as it has limited work forces available to work regular trouble reports after 5:00 p.m. on Saturday, Sundays, and holidays, it continues to believe that regular trouble reports received during those times should be excluded. ALLTEL noted that, while the Public Staff characterized this as one of the "most important service quality measures," ALLTEL would point out the practical reality that exclusive reliance on wireline service has declined as the prevalence of wireless service

has dramatically increased. ALLTEL asserted that the general public's utilization of wireless service has become so commonplace as to be nearly ubiquitous. Thus, as a practical matter, ALLTEL argued that, given the extensive number of homes which also have access to wireless service in the unlikely event that there is a problem with wireline service, even if the customer's trouble reported over the weekend is not cleared until Monday, it is still quite unlikely that a household will be seriously inconvenienced or deprived of any means of telephonic communication.

PUBLIC STAFF: The Public Staff noted that companies point out that their staff is limited outside of normal business hours and ask the Commission to allow out-of-service troubles received on weekends and holidays to be excluded from the performance calculations. However, the Public Staff opined that a customer whose residential service is interrupted on weekends or holidays is just as inconvenienced (perhaps more so, if the customer is at home on weekends or holidays) as a customer whose service is interrupted during the work week. The Public Staff maintained that customers pay for and expect to have continuous, dependable telephone service 24 hours a day, seven days a week. Therefore, the Public Staff argued, companies should be expected to make diligent efforts to restore service 24 hours a day, seven days a week.

The Public Staff noted that it has never suggested that companies maintain full staffing levels on weekends and holidays to handle out-of-service repairs. The Public Staff asserted that the 5% margin and 24 hour time limit are both built into this objective to allow companies to exercise some discretion as to whether they must respond to out-of-service troubles at inconvenient times or under adverse conditions.

SPRINT: Sprint stated that the Public Staff would not exclude Sundays from this measure. Sprint noted, however, that Sundays are a traditional day of rest and requiring employees, who are, in fact, real people, to work on Sundays is most often a great imposition on them. Sprint asserted that, while much has changed in our state and region in recent decades, this remains true, and this is reflected by the fact that Sprint's employment contracts require payment of double time for employees working on the Sabbath. Sprint argued that it can handle these calls more efficiently on Mondays, rather than Sundays, as the cost of fully staffing the technicians would cost twice as much on Sunday. Furthermore, Sprint maintained, with a limited workforce available to respond to troubles on Sunday, the personnel would waste considerably more time traveling extended distances between troubles as opposed to the greater number of employees staffing Mondays through Fridays who can each be assigned more limited geographic areas of coverage.

Sprint argued that, contrary to the Public Staff's unsupported argument that this is the most important of all service quality measures, this service measure is no more important than others, and its importance has been greatly diminished by the advent of new offerings such as wireless services. Sprint noted that there are currently more than 80 wireless phones for every 100 local access lines in North Carolina. Historically, Sprint contended, it has not worked nonemergency troubles on Sundays and holidays even when there were no, or essentially no, wireless telephones. Sprint noted that it understands that this does not mean that 8 out of 10 households have wireless phones, as many have more than one wireless phone, but this high level of wireless penetration surely suggests that a significant percentage of North Carolina households do have wireless phones which, in turn, makes wireline out-of-service conditions much easier for customers to deal with. Sprint argued that the Sunday and holiday exclusion was not problematic for many years, and with the proliferation of wireless telephones and the communications option they provide, the importance of the local access line has clearly been diminished. Sprint concluded that it does, of course, dispatch on Sundays, holidays, and all other days of the year in emergency situations.

DISCUSSION

The Commission notes that this issue concerning whether the calculations for Rule R9-8(g) Measure 11 – Out-of-Service Troubles Cleared Within 24 Hours should exclude Saturdays, Sundays, and holidays was not specifically addressed in the Commission's *December 27, 2002 Order*. In fact,

this is the first time this specific issue has been presented to the Commission in this docket. In the *December 27, 2002 Order*, the Commission determined that the measurement procedure for Out-of-Service Troubles Cleared Within 24 Hours would include dividing the number of out-of-service troubles cleared during the calendar month and within 24 hours of their receipt by the total number of out-of-service trouble reports cleared during the calendar month to obtain the percentage cleared within 24 hours. However, the *Order* did not define if the 24 hours was for seven days a week or excluded Saturdays, Sundays, and holidays. During the negotiations on this issue, the Parties disagreed on whether the 24 hours should exclude Saturdays, Sundays, and holidays.

The Commission notes that ALLTEL, Concord, and Verizon support excluding Saturdays, Sundays, and holidays from the calculation; BellSouth, Lexcom, and the Public Staff support including Saturdays, Sundays, and holidays; Sprint supports excluding Sundays from the calculation; and AT&T, Citizens, MCI, MebTel, QuantumShift, and Randolph did not take a position on this issue.

Again, the Commission continues to believe that out-of-service troubles is a critical service objective. Further, the Commission agrees with the Public Staff that, from the customers' perspective, out-of-service troubles are the same regardless of when they occur, and the companies should be expected to make out-of-service repairs every day of the year. The Commission also notes, as did the Public Staff, that since the standard for this measure is currently 95% and not 100%, companies have some flexibility in determining whether to require their repair forces to work on Saturdays, Sundays, and holidays. The Commission also agrees with the Public Staff that customers pay for and expect to have continuous, dependable telephone service 24 hours a day, seven days a week.

The Commission is not persuaded by ALLTEL's and Sprint's argument that, with the prevalence of wireless service, even if a customer's trouble reported over the weekend is not cleared until Monday, it is unlikely that the customer will be seriously inconvenienced or deprived of any means of telephonic communication. Simply because a customer has another way to communicate does not lessen the responsibility of the wireline telephone company to provide wireline service to customers who pay for such service.

Therefore, the Commission finds that the calculation for Measure 11 in Rule R9-8(g) should include Saturdays, Sundays, and holidays.

CONCLUSIONS: The Commission concludes that the calculation for Measure 11 in Rule R9-8(g) should include Saturdays, Sundays, and holidays.

UNRESOLVED ISSUE NO. 10: Should R9-8(g) Measure 13 give the customer a choice of either 4-hour appointment windows or morning or evening appointment windows?

POSITIONS OF PARTIES

ALLTEL: ALLTEL supports the use of morning or evening appointment windows, but only under circumstances when access to the customer's premises is necessary.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: BellSouth offers morning appointments (between the hours of 8:00 a.m. and 12 noon) and evening appointments (between the hours of 1:00 p.m. and 5:00 p.m.) today and feels strongly that they are appropriate appointment windows. These appointment windows have not prompted customer complaints and have worked extremely well for BellSouth and its customers. Having set windows, as opposed to just any four-hour appointment period, allows for more efficient scheduling and dispatching of BellSouth technicians. The rule should also clearly state that the appointment has been met if the technician arrives within the specified appointment period and the order was completed by midnight.

CITIZENS: Citizens did not take a position on this issue.

CONCORD: Concord supports flexibility on this issue.

LEXCOM: Lexcom would prefer to have the schedule set up by a.m. and p.m. appointments.
MCI: MCI did not take a position on this issue.
MEBTEL: MebTel did not take a position on this issue.
PUBLIC STAFF: Measure 13 of Rule R9-8(g) should give the customer a choice of four-hour appointment windows.
QUANTUMSHIFT: QuantumShift did not take a position on this issue.
RANDOLPH: Randolph did not take a position on this issue.
SPRINT: Although Sprint does not agree that the Commission should dictate the structure of a company's appointment schedule, Sprint has not opposed such a provision in the Commission's Rule R9-8 in hopes that by doing so a compromise could be reached in this proceeding.
VERIZON: No.

INITIAL COMMENTS

CONCORD: Concord noted that it currently allows selection of either a morning or afternoon appointment window and that that system appears to be functioning adequately. Concord stated that a four-hour appointment window allows more flexibility for the customer but may also be more difficult for the telephone company to meet when prior service calls encounter unanticipated difficulties. Concord asserted that, in the absence of compelling evidence of a distinct customer preference, Concord would support allowing each company to select the method that best suits its practical experience.

PUBLIC STAFF: The Public Staff noted that in the Commission's *December 27, 2002 Order*, the Commission required companies to give customers four-hour appointment windows when scheduling premises visits for new installations rather than allowing a company merely to inform its customers that the installer will arrive for a premises visit in either the morning or the evening. The Public Staff opined that this provision gives the customer a shorter, more precise period of time in which to be available at the premises waiting for the installer to arrive. Moreover, the Public Staff asserted, allowing a company a four-hour window in which to schedule an installation should give a company enough flexibility to account for unforeseen problems.

The Public Staff argued that Measure 13 of Rule R9-8(g) should require companies to allow a customer to select from two or more four-hour appointment windows when scheduling premises visits for new installations.

SPRINT: Sprint noted that, while it currently complies with this provision, Sprint believes that a Commission requirement for four-hour appointment windows hampers flexibility in an industry that is faced with ever increasing levels of competition and other changes and challenges. Sprint argued that companies should be free to allocate limited resources consistent with changing customer expectations. Sprint noted that this clearly is a circumstance where the market is superior to regulation. Sprint asserted that as competition increases, less regulation, not more, should be the norm.

VERIZON: Verizon argued that this proposal would interfere with the Company's ability to schedule its workforce in the most efficient manner and needlessly drive up costs.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that it agrees with the Public Staff that Measure 13 of Rule R9-8(g) "should require companies to allow a customer to select from two or more four-hour appointment windows when scheduling premises visits for new installations." BellSouth argued that it is unnecessary for the Commission to specifically define the exact four-hour time periods. BellSouth commented that, as it noted in its initial comments, it offers morning appointments (between the hours of 8:00 a.m. and 12:00 noon) and evening appointments (between the hours of 1:00 p.m. and 5:00 p.m.) today and feels strongly that they are appropriate appointment windows. BellSouth

asserted that those appointment windows have not prompted customer complaints and have worked extremely well for BellSouth and its customers. BellSouth argued that altering its standard appointment intervals would require costly system modifications without furthering the cause of improved customer service.

CONCORD: Concord stated that its current practice is similar to that of BellSouth in that it utilizes morning and afternoon appointment schedules for new installation and this approach appears to have worked well for Concord without customer complaint. Concord noted that this approach also allows it to schedule its appointments based on fixed blocks of time rather than more arbitrary four-hour blocks of time selected by its customers which are bound to vary from customer to customer. Concord asserted that in the absence of substantial evidence of customer unhappiness with or inconvenience caused by the existing practice, Concord does not believe that it is necessary or appropriate for the Commission to exercise this degree of control over its service scheduling practices.

PUBLIC STAFF: The Public Staff stated that it believes the morning and evening appointment windows BellSouth specified in its initial comments would satisfy recodified Rule R9-8. However, the Public Staff maintained that in discussing customer appointments for new service installations with end users, BellSouth would need to specify appointment windows from 8:00 a.m. – 12:00 noon or 1:00 p.m. – 5:00 p.m. instead of "morning" or "evening" windows, so that customers clearly understand when BellSouth expects them to be at the premises.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(g) Measure 13 should allow customers a choice of two or more four-hour appointment windows was addressed in the Commission's *December 27, 2002 Order*. In the *December 27, 2002 Order*, the Commission found that the measurement procedures for New Service Installation Appointments Not Met for Company Reasons should include the following provision:

> Companies, at a minimum, shall offer customers scheduling premises appointments the opportunity to select from a set of two or more four-hour appointment 'windows' that will be made available for each day that appointments are being scheduled.

ALLTEL, BellSouth, and Lexcom support morning and evening appointment windows; Concord supports flexibility on the issue; AT&T, Citizens, MCI, MebTel, QuantumShift, and Randolph did not take a position on this issue; and Sprint and Verizon did not support either four-hour or morning or evening appointment windows. Parties generally argued that the Commission should allow companies the flexibility to schedule appointment windows as they see fit. The Commission sees the main area of contention being that carriers do not want to define four-hour windows and prefer maintaining morning and evening windows without any definition of the exact times considered morning or evening.

The Commission agrees with the Public Staff that a four-hour provision gives the customer a shorter, more precise period of time in which to be available at the premises waiting for the installer to arrive. Further, the Commission agrees with the Public Staff that allowing a four-hour window gives a company enough flexibility to account for unforeseen problems. The Commission believes that no party offered a compelling reason why this provision of the *December 27, 2002 Order* should be revised or altered.

The Commission believes that it is appropriate and reasonable to give customers a four-hour window in which they would be expected to be at the premises to meet the installer. The Commission believes that this decision will not require BellSouth to alter its standard appointment windows and incur costly system modifications since BellSouth already offers morning appointments with a defined window of 8:00 a.m. to 12 noon and evening appointments with a defined window of

1:00 p.m. to 5:00 p.m. BellSouth will simply be required to inform customers of the specific times associated with a morning or evening appointment. Implicit with this decision is the fact that each carrier may define the precise hours of its two, four-hour windows.

CONCLUSIONS: The Commission concludes that Measure 13 – New Service Installation Appointments Not Met for Company Reasons in Rule 9-8(g) should not be altered to merely offer a customer a morning or evening appointment without specific time parameters, but should continue to require companies to establish a minimum of two, precise, four-hour appointment windows. A carrier must define the exact four-hour window periods that best suit its business practices.

UNRESOLVED ISSUE NO. 11: In R9-8(h), should the 48 hours allowed for updating DA listings be extended to two business days?

POSITIONS OF PARTIES

ALLTEL: ALLTEL did not take a position on this issue.
AT&T: Yes. Updated customer information should be provided within two business days.
BELLSOUTH: BellSouth currently updates listings within 48 hours.
CITIZENS: Citizens did not take a position on this issue.
CONCORD: Yes.
LEXCOM: Yes. Lexcom believes that it should be extended to two business days.
MCI: MCI did not take a position on this issue.
MEBTEL: MebTel did not take a position on this issue.
PUBLIC STAFF: No. In Rule R9-8(h), the 48 hours allowed for updating listings should not be extended to two business days.
QUANTUMSHIFT: QuantumShift did not take a position on this issue.
RANDOLPH: Randolph did not take a position on this issue.
SPRINT: Although Sprint does not agree that a Commission rule requiring 48 hour updates to DA listings is necessary, Sprint has not opposed such a provision in the Commission's Rule R9-8 in hopes that by doing so an acceptable compromise could be reached in this proceeding.
VERIZON: Yes.

INITIAL COMMENTS

AT&T: AT&T stated that it understands the desire to ensure that customers who call DA receive up-to-date information. However, AT&T argued, this interest should also be balanced against the cost and burden on carriers to provide accurate updated customer information to third party DA providers. AT&T maintained that, in this instance, accuracy is extremely important if carriers are to be required to provide refunds for incorrect DA listings. AT&T asserted that extending the time to two business days for transmittal of updated customer information should not have a detrimental impact on North Carolina consumers.

CONCORD: Concord noted that it does not provide its own DA listings; that function is currently outsourced to a third party. Concord stated that it will provide updated customer information to its DA vendor within 48 hours, but, following the provision of such information, Concord has no control over how quickly that information is converted in the DA database. Concord maintained that two business days would provide a more reasonable timeframe for accomplishment of all the tasks necessary to implement a change in customer information into the DA database.

LEXCOM: Lexcom noted that staffing outside of regular working hours is a significant cost increase. Therefore, Lexcom would prefer a two business day objective.

PUBLIC STAFF: The Public Staff noted that the Commission, in its *December 27, 2002 Order*, required the companies to update DA listings in databases they maintain or control within 48 hours excluding Saturdays, Sundays, and holidays. The Public Staff commented that, under the proposed rule attached to the Joint Report, companies must update a listing within 48 hours, excluding Saturdays, Sundays, and holidays, of either notification of such a new or changed listing or receipt of

a completed service order from another carrier or DA provider. The Public Staff noted that if the 48 hours were extended to two business days, a customer's listing given to a company the Friday before Memorial Day might not be included in the company's database until the next Wednesday. The Public Staff opined that it is important for new or updated listings to be available as soon as possible, and five days is too long. Moreover, the Public Staff stated that, until a listing is updated, a company would be giving out incorrect information and would be liable for DA refunds if customers requested them.

The Public Staff argued that the 48 hours allowed in Rule R9-8(h) for updating DA listings should not be extended to two business days.

SPRINT: Sprint noted that, while it currently complies with this provision, Sprint believes a specific Commission requirement for updating DA listings is unnecessary. Sprint argued that companies should be free to allocate their limited resources consistent with customer expectations which change over time. Sprint maintained that as competition increases, less regulation, not more, should be the norm.

VERIZON: Verizon noted that the existing interval includes weekend and holiday hours when staffing levels are lower. Verizon asserted that it is therefore reasonable to extend the existing interval to two business days, which will still assure timely updating by staff working during normal business hours. Verizon stated that this will help ensure that companies can allocate the limited resources that they may have on weekends and holidays to emergency and other priority matters impacting customer service.

REPLY COMMENTS

CONCORD: Concord noted that, in clarification of the statement it made in its initial comments that "Concord does not provide its own DA listings", it provides DA listings to third-party DA providers who then provide DA service to Concord's end-users. Concord maintained that, in addition to this clarification, it supports the position of AT&T on this issue to the effect that two business days represents a reasonable compromise for updated DA information given the relative competing interests in providing accurate and timely DA information.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(h) should allow for DA listing updates in 48 hours was addressed in the Commission's *December 27, 2002 Order*. In the *December 27, 2002 Order*, the Commission found that carriers must update their DA customer listings in any directory database that the company maintains and/or controls within 48 hours of a service order resulting in a new or changed listing, excluding Saturdays, Sundays, and holidays.

BellSouth and the Public Staff support updates in 48 hours; AT&T, Concord, Lexcom, and Verizon support updates in two business days; ALLTEL, Citizens, MCI, MebTel, QuantumShift, and Randolph did not take a position on this issue; and Sprint, although it does not agree with 48 hours, does not oppose such a provision.

The Commission agrees with the Public Staff that extending the time period to two business days could result in instances when DA listing updates are not provided for several days after a change occurs. Further, the Commission believes that no party offered a compelling reason why this provision of the *December 27, 2002 Order* should be revised or altered.

The Commission also notes that Verizon's contention is incorrect – the existing interval actually does exclude Saturdays, Sundays, and holidays.

The Commission believes that it is appropriate and reasonable to require DA updates in any directory database a company maintains and/or controls within 48 hours excluding Saturdays, Sundays, and holidays as originally ordered by the Commission in the *December 27, 2002 Order*.

CONCLUSIONS: The Commission concludes that it is not appropriate to alter Rule R9-8(h) by allowing DA updates in two business days, thereby continuing to require such updates to be completed within 48 hours excluding Saturdays, Sundays, and holidays.

UNRESOLVED ISSUE NO. 12: In R9-8(i), should there be a requirement that a refund be issued for an incorrect DA listing?

POSITIONS OF PARTIES

ALLTEL: Yes. ALLTEL supports this requirement.
AT&T: No.
BELLSOUTH: BellSouth currently issues a refund for incorrect DA listings.
CITIZENS: Citizens does not oppose imposition of this requirement.
CONCORD: A refund policy should be ordered only if the same refund obligation exists for all carriers, ILEC and non-ILEC.
LEXCOM: Currently Lexcom provides five free DA listings and it does allow refunds if the listing is incorrect and the customer has initially paid for the listing.
MCI: MCI did not take a position on this issue.
MEBTEL: MebTel did not take a position on this issue.
PUBLIC STAFF: The Commission should require companies to issue refunds for incorrect DA listings provided to customers.
QUANTUMSHIFT: QuantumShift did not take a position on this issue.
RANDOLPH: Randolph did not take a position on this issue.
SPRINT: While Sprint currently complies with this provision, Sprint does not agree that a Commission rule requiring a refund for an incorrect DA listing is necessary. Nevertheless, Sprint has not opposed such a provision in the Commission's Rule R9-8 in the hope that by doing so an acceptable compromise could be reached in this proceeding.
VERIZON: No.

INITIAL COMMENTS

ALLTEL: ALLTEL noted that it already provides credits to its customers who inform the company that they have received incorrect directory assistance information. ALLTEL stated that it will continue to do so.

AT&T: AT&T asserted that, in some instances, AT&T contracts with an outside vendor to provide DA. AT&T noted that the outside vendor relies upon the data obtained from the ILEC to provide the customer with the DA listing. AT&T stated that, because it has no control over the accuracy of the ILEC DA database and there is no requirement for the ILEC to share updated information it receives with third party providers within 48 hours, AT&T would incur costs to query the ILEC's database that cannot be recovered if refunds were required for incorrect listings.

CONCORD: Concord noted that incorrect DA listings can result from a number of possible mistakes in the chain of transmission and storage of such information. Concord maintained that it should not be presumed that the mistake always lies with the underlying telephone providers unless there is a factual basis for that conclusion. Concord noted that because this is an economic issue, automatic refund obligations should not be imposed unless the requirement will be imposed equally on all providers of telecommunications services, including wireless service providers and interexchange carriers.

PUBLIC STAFF: The Public Staff noted that the rule adopted by the Commission in its *December 27, 2002 Order* requires companies to issue refunds to customers for providing incorrect DA information, if customers so request. The Public Staff stated that it believes this requirement is

appropriate. The Public Staff argued that it recognizes the frustration experienced by a customer who calls DA, receives an incorrect listing, and then receives a bill from the provider for the incorrect information. The Public Staff maintained that it also gives companies an incentive to ensure that their DA databases are correct. The Public Staff commented that Section (h) of the proposed rule attached to the Joint Report deletes the requirement that a refund be issued for no listing, since it may not be a company's fault that there is no listing for a customer.

The Public Staff argued that there should be a requirement in the rule that customers be issued refunds for incorrect DA listings.

SPRINT: Sprint argued that a specific Commission requirement for a refund for an incorrect DA listing is unnecessary and even unreasonable. Sprint noted that customers frequently provide incorrect or partial information when requesting directory listings, and it is often impossible to determine whether fault for provision of incorrect listing information lies with the customer or the company. Sprint maintained that when it is not clear where the fault lies, Sprint's practice is to defer to the customer. Sprint argued that DA is a highly competitive service with numerous alternatives that range from wholesalers, to the Internet, to wireless providers. Therefore, Sprint opined, less, not more, regulation is called for.

VERIZON: Verizon maintained that there are a variety of reasons for incorrect DA listings other than company error. Verizon maintained that there should be no automatic requirement for a refund. Verizon noted that, under its existing DA credit policy, North Carolina customers can request a refund for an incorrect listing at any time, either through their operator, or by calling the appropriate customer service center and requesting a refund. Verizon noted that there is no evidence that the existing policies are inadequate. Therefore, Verizon argued, more extensive direct regulation in this area is unnecessary and inappropriate.

REPLY COMMENTS

CONCORD: Concord stated that it continues to support its position as outlined in its initial comments. Concord maintained that its position is that incorrect DA listings can result from a number of possible mistakes in the chain of transmission and storage of such information. Concord asserted that, as such, it cannot be presumed that the mistake always lies with the local telephone service provider. Concord commented that because this is an economic issue, automatic refund obligations should not be imposed unless the requirement will be imposed equally on all providers of telecommunications services including wireless service providers, interexchange carriers, and VoIP providers.

PUBLIC STAFF: The Public Staff noted that many companies point out that the possibility of fraud exists if refunds are automatically required whenever a customer claims to have received an incorrect DA listing. The Public Staff argued that the Commission should encourage companies to inform the Commission if they have evidence that the automatic DA refund requirement is being abused by customers. The Public Staff opined that the Commission may then consider modifying the refund requirement.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(i) should include a requirement that a refund be issued for an incorrect DA listing was addressed in the Commission's *December 27, 2002 Order*. In the *December 27, 2002 Order*, the Commission ordered carriers to provide DA refunds for an incorrect DA listing or no listing.

ALLTEL, BellSouth, Lexcom, and the Public Staff support requiring DA refunds; AT&T, Concord, and Verizon do not support DA refunds; Citizens does not oppose imposition of the refund requirement; MCI, MebTel, QuantumShift, and Randolph did not take a position on this issue; and Sprint, although it does not agree with the refund requirement, does not oppose such a provision.

The Commission agrees with the Public Staff and believes that a customer that calls DA, receives an incorrect listing, and then is billed for the incorrect listing most likely would be frustrated. In fact, several companies such as ALLTEL, BellSouth, and Verizon already will provide DA refunds for incorrect listings. The Commission does not believe that any party offered a compelling reason why this provision of the *December 27, 2002 Order* should be revised or altered.

The Commission also notes that the Parties have agreed that refunds for no DA listing should be removed from Rule R9-8(i) since it may not be a company's fault that there is no listing for a customer and that Rule R9-8(i) should be clarified to reflect that refunds should be provided "upon request".

Further, the Commission supports the Public Staff's suggestion that, if companies experience customer abuse with the DA refund policy, the companies should inform the Commission of such evidence and the Commission should examine the evidence and consider removing the requirement.

The Commission believes that it is appropriate and reasonable to require companies to provide refunds upon request for incorrect DA listings as originally ordered by the Commission in the *December 27, 2002 Order*.

CONCLUSIONS: The Commission concludes that Rule R9-8(i) should continue to have the requirement that a refund be issued upon request for an incorrect DA listing.

UNRESOLVED ISSUE NO. 13: In R9-8(i), should there be a requirement that the refund policy be published prominently?

POSITIONS OF PARTIES

ALLTEL: No. ALLTEL does not support adding this requirement to prominently publish the refund policy.
AT&T: AT&T did not take a position on this issue.
BELLSOUTH: BellSouth had no comment on this issue.
CITIZENS: Citizens did not take a position on this issue.
CONCORD: No.
LEXCOM: No. Lexcom believes that it is not necessary.
MCI: MCI did not take a position on this issue.
MEBTEL: MebTel did not take a position on this issue.
PUBLIC STAFF: Yes. The Commission should require that a company's DA refund policy be published prominently in the DA section of each local telephone directory.
QUANTUMSHIFT: QuantumShift did not take a position on this issue.
RANDOLPH: No.
SPRINT: Although Sprint does not agree that there should be a Commission rule requiring that the refund be published prominently, Sprint has not opposed such a provision in the Commission's Rule R9-8 in the hope that by doing so a compromise could be reached in this proceeding.
VERIZON: No.

INITIAL COMMENTS

ALLTEL: ALLTEL noted that, with regard to the imposition of a new requirement to publish the uniform DA refund policy prominently in the DA section of each local telephone directory, ALLTEL believes that this additional requirement will significantly increase costs, particularly for companies that have standardized directory formats. ALLTEL maintained that the Commission should be cognizant of these costs and should remove this requirement based on the lack of evidence supporting this additional requirement. ALLTEL stated that it also has concerns that the publication of this policy will increase the likelihood of fraudulent efforts to obtain unwarranted credits. ALLTEL asserted that the fact that customers already call and request a credit when incorrect numbers are

given supports removal of this requirement. ALLTEL stated that there is no evidence before the Commission that would support the conclusion that there will be any significant benefits derived from this additional publication.

CONCORD: Concord maintained that a requirement is not necessary to ensure that the DA refund policy is published prominently.

PUBLIC STAFF: The Public Staff stated that it believes that publishing the DA refund policy in the directory is the best way to inform customers of their right to refunds for inadequate DA service and about the correct procedures to follow to request a refund. The Public Staff opined that customers should not be required to call the company or consult the company's tariff to find out if such a policy exists. The Public Staff maintained that, if there is no requirement that customers be informed of this policy unless they specifically inquire about it, the company is less likely to be required to give refunds for incorrect listings and therefore is more likely to profit from its provision of less than adequate service; this is clearly inappropriate. However, the Public Staff noted that it has withdrawn its previous proposal that customers also be informed of companies' DA refund policies by yearly bill insert.

The Public Staff argued that there should be a requirement in the rule that a company's DA refund policy be published prominently in the DA section of each local telephone directory.

RANDOLPH: Randolph stated that it does not believe companies should be required to publish DA refund policies in their directories. Randolph noted that required regulatory bill inserts and directory information have increased exponentially over the past few years and this imposes additional costs and administrative burdens on companies. Randolph commented that prominent posting of refund policies may also lead to abuse by some customers.

SPRINT: Sprint asserted that many customers are aware that Sprint provides refunds in the unusual circumstance when an incorrect DA listing is provided. However, Sprint argued, an additional requirement to publish such a policy may encourage fraud.

VERIZON: Verizon asserted that it provides excellent DA service to its North Carolina customers, and therefore there is no good reason to impose this additional regulation on the Company. Verizon noted that, given that there is no cost-effective means for the Company to verify that a customer refund is appropriate, this requirement may increase the number of erroneous and/or fraudulent refund requests.

REPLY COMMENTS

PUBLIC STAFF: The Public Staff noted that ALLTEL, Randolph, Sprint, and Verizon contended that publishing details of a DA refund policy in the telephone directory would increase the likelihood of fraudulent claims. The Public Staff asserted that, while the number of fraudulent claims may increase to some extent, it is more likely that there will be an even greater increase in the number of legitimate claims. The Public Staff stated that it believes that the publication of the refund policy will have a positive impact on consumers overall, and urged the Commission to retain this requirement.

DISCUSSION

The Commission notes that this issue concerning whether Rule R9-8(i) should include a requirement that the uniform DA refund policy be published prominently in the DA section of each local telephone directory was addressed in the Commission's *December 27, 2002 Order*. In the *December 27, 2002 Order*, the Commission ordered carriers to publish the uniform DA refund policy prominently in each local telephone directory.

The Public Staff supports requiring publication of the DA refund policy; ALLTEL, Concord, Lexcom, Randolph, and Verizon do not support requiring publication of the DA refund policy;

AT&T, BellSouth, Citizens, MCI, MebTel, and QuantumShift did not take a position on this issue; and Sprint, although it does not agree with the requirement, does not oppose such a provision.

The Commission agrees with the Public Staff that publishing the DA refund policy is a way to inform customers of their right to refunds for inadequate DA service and the procedures to follow to request a refund. The Commission believes that it is important for customers to be informed about the policy. The Commission also agrees that publication of the refund policy would have a positive impact on consumers overall. Further, the Commission does not believe that any party offered a compelling reason why this provision of the *December 27, 2002 Order* should be revised or altered. The Parties' concern over fraud was addressed in the *December 27, 2002 Order* and, as noted in Unresolved Issue No. 12, the Commission supports the Public Staff's suggestion that if companies experience customer abuse with the DA refund policy, the companies should inform the Commission of such evidence and the Commission should examine the evidence and consider removing the requirement.

The Commission believes that it is appropriate and reasonable to require companies to prominently publish the uniform DA refund policy in the DA section of each local telephone directory.

CONCLUSIONS: The Commission concludes that it is appropriate to require carriers to prominently publish the uniform DA refund policy in the DA section of each local telephone directory consistent with the Commission's finding in its *December 27, 2002 Order.*

UNRESOLVED ISSUE NO. 14: Should self-effectuating penalties for violation of service quality standards be included in price plans?

POSITIONS OF PARTIES

ALLTEL: As new price plans are approved or current price plans are modified, and to the extent that all providers of local services are required to be regulated for service quality standards, then it would be reasonable to determine what, if any, penalties should exist at that time.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: The application of self-effectuating penalties in price plans should not be addressed in this docket.

CITIZENS: Citizens did not take a position on this issue.

CONCORD: No.

LEXCOM: Lexcom is a rate of return company and takes no position on this issue.

MCI: MCI did not take a position on this issue.

MEBTEL: MebTel did not take a position on this issue.

PUBLIC STAFF: Self-effectuating penalties for violation of service quality standards should be included in price plans whenever possible.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: Randolph did not take a position on this issue.

SPRINT: Although Sprint does not agree that self-effectuating penalties are necessary to ensure good customer service, it has agreed to a number of self-effectuating penalties in its Price Regulation Plan.

VERIZON: No.

INITIAL COMMENTS

ALLTEL: ALLTEL stated that its current price plan in effect under N.C.G.S. 62-133.5 does not establish any penalties for violations of service quality standards. ALLTEL noted that this plan will remain in effect until ALLTEL seeks to modify the current plan and the Commission approves a modified plan. ALLTEL maintained that it is imperative that when and if the Commission undertakes to impose penalties associated with failure to meet service objective standards, it applies all standards equally and fairly to all carriers providing local service.

CONCORD: Concord stated that it believes that this approach is inherently punitive in nature and should not be required for companies, such as Concord, that have no history of poor service quality. Concord further noted that, by definition, this requirement would apply only to companies that are price regulated by the Commission and, therefore, would not apply to large numbers of competitive providers who would be operating under entirely different regulatory requirements. Concord asserted that this approach is inherently discriminatory in nature and should not be pursued.

PUBLIC STAFF: The Public Staff noted that in the Commission's *December 27, 2002 Order*, the Commission found that self-effectuating penalties for rendering inadequate service were an integral part of price plans. However, the Public Staff noted that Senate Bill 814 has considerably changed the likelihood of including self-effectuating penalties in existing price plans, unless a company agrees to such a provision in return for other modifications to its plan. Thus, the Public Staff opined, the Commission may wish to revisit the Public Staff's earlier proposal for including a self-effectuating penalty plan in Rule R9-8.

The Public Staff argued that self-effectuating penalties for violation of service quality standards should be included in price plans whenever possible.

SPRINT: Sprint argued that the competitive nature of the telecommunications industry itself provides far more incentive to provide good customer service than self-effectuating penalties. Sprint maintained that the loss of customers and associated loss of revenues due to failures to provide adequate service are far more effective than self-effectuating penalties.

VERIZON: Verizon stated that the ITF and Verizon have explained in detail that the Commission has no authority to order self-effectuating penalties. Verizon noted that they have also made clear that the Commission cannot force a company to adopt "voluntarily" illegal self-enforcing penalties so that the Company may obtain lawful changes to its price plan regulation. Additionally, Verizon commented, it has shown that, even if the Commission had the authority to order self-enforcing penalty mechanisms, which it does not, the Commission still could not adopt them based on the record in this proceeding. Verizon maintained that, because there is no evidence to demonstrate that self-enforcing penalty mechanisms are necessary, adopting the penalties would be an illegal "arbitrary and capricious" act. Finally, Verizon argued that imposing self-imposing penalty mechanisms on the parties would be poor public policy. Verizon asserted that, given the troubled state of the telecommunications industry today, it would be a particularly bad time to impose additional, unnecessary regulatory burdens on Verizon – especially without any legal foundation.

REPLY COMMENTS

ATTORNEY GENERAL: The Attorney General noted that he had previously filed comments in this docket stating that the Commission should review the proposals set forth by the ITF and the Public Staff with an eye towards maintaining service quality to consumers. The Attorney General noted that he also recommended that, once the Commission determines what the appropriate rules should be, the Commission should provide appropriate incentives for the companies to abide by the rules. Specifically, the Attorney General noted that he previously recommended: (1) that the Commission issue bill credits or impose penalties on carriers when they failed to meet important service objectives (such as out-of-service troubles cleared within 24 hours); and (2) that the Commission post pass/fail statements on its website indicating whether carriers were in compliance with the service quality rules. The Attorney General stated that bill credits or penalties provide carriers with monetary incentives to comply with the rules. The Attorney General commented that publicizing non-compliance with the rules provides carriers with reputation-related incentives to comply; indeed, many of the carriers filed extensive comments in which they stated that they feared their reputations would be damaged if compliance reports were made public. The Attorney General maintained that both of these incentives are needed to ensure compliance with the service quality rules because under price plan regulation local exchange carriers no longer have their returns on

equity strictly regulated and have economic incentives to cut costs, including costs that impact service quality, in order to increase profits.

For the foregoing reasons, the Attorney General stated that in his reply comments he would comment on the recent positions taken by the ITF and the Public Staff regarding the two issues described above – the penalty issue and the website reporting issue. The Attorney General stated that he continues to believe that the Commission must provide the companies with appropriate incentives to comply with the service quality rules. As a matter of common sense, the Attorney General maintained, service quality rules, like many rules, are virtually meaningless if there are not enforcement mechanisms to ensure compliance.

The Attorney General noted that in its *December 27, 2002 Order*, the Commission stated that "the Commission has the power in appropriate circumstances to require penalties or bill credits, which are in the nature of refunds." The Attorney General commented that the Commission considered the extent to which it could streamline the penalty/refund process for service quality deficiencies and determined that the most efficient approach to take was to require local exchange carriers that did not already have self-effectuating penalty provisions in their price plans to voluntarily accept such mechanisms in their price plans when their plans were up for review. The Attorney General maintained that the Commission stated that it viewed such penalty mechanisms as "integral" to the price plans.

Since that time, the Attorney General noted, Senate Bill 814 has eliminated, or at least greatly reduced, the Commission's ability to require companies to include self-effectuating penalties in their price plans (if the plan does not already contain such a provision) because, if the company does not agree with proposed modifications made to the price plan by the Commission, the company can continue to operate under its current plan. Recently, the Attorney General commented, the companies having plans without self-effectuating penalties filed comments taking the position that self-effectuating penalties should not be included in their price plans. The Attorney General stated that, in light of Senate Bill 814, it may no longer be feasible to require these companies to include such mechanisms in their price plans.

The Attorney General noted that the Public Staff filed comments on December 8, 2003 stating that, due to Senate Bill 814, the Commission may wish to revisit the Public Staff's earlier proposal for including a self-effectuating penalty plan in Rule R9-8. The Attorney General maintained that this proposal requires companies to pay bill credits, refunds, or penalties when a company fails to meet important service quality standards, such as out-of-service troubles cleared within 24 hours. The Attorney General stated that he agrees and believes that this penalty mechanism, or something like that, should be included in the service quality rules in light of recent developments.

Further, the Attorney General noted that in its *December 27, 2002 Order*, the Commission decided that it would be appropriate to publish pass/fail information on its website indicating whether companies were in compliance with the Commission's service quality rules, along with information indicating whether companies had paid penalties to the Commission for violations of said rules. The Attorney General commented that the Public Staff and the Attorney General had worked together to develop these pass/fail statements and filed comments in support of them. The Attorney General maintained that the Commission stated that it "views the disclosure of service quality information to be very much in the public interest." However, the Attorney General noted, in their joint report, the Public Staff and the ITF now propose deleting this provision from the rules.

The Attorney General stated that he believes that this provision should not be deleted from the rules, especially in light of the fact that no agreement or consensus was reached among the parties regarding self-effectuating penalties. The Attorney General noted that, in the absence of such agreement, it simply makes no sense to delete this provision because, as set forth above, publicizing non-compliance with the rules provides the companies with the incentive to comply. The Attorney

General maintained that the Commission previously decided that publication of such information was lawful and in the public interest; no compelling reason has been given for reversing that decision.

The Attorney General concluded by noting that service quality rules are necessary because the telecommunications market is still not fully competitive. The Attorney General stated that, while the market has become more competitive in recent years, competition has not reached many residential customers, particularly in rural areas. Indeed, if anything, the Attorney General opined, service quality rules take on an even greater importance during the transition to competition because under price plan regulation companies have more freedom to cut costs. The Attorney General maintained that if cutting costs significantly impacts service quality, then the public interest is harmed. The Attorney General asserted that proper incentives must be put in place to ensure that companies devote appropriate resources that enable them to comply with the rules. The Attorney General argued that imposing penalties and publishing pass/fail information on the Internet will help ensure compliance.

DISCUSSION

In the *December 27, 2002 Order*, the Commission found it appropriate to concentrate on adequate self-effectuating penalties under the various price regulation plans in preference to a universal self-effectuating penalty or bill credit mechanism that would be applicable to all ILECs. The Commission stated that it views a self-effectuating penalty provision to be a central element in determining whether a proposed price plan is in the public interest; since a company up for a new price plan or price plan review would voluntarily accept the self-effectuating penalty mechanism as part of the price plan, it could not be heard to object to the inclusion of such a provision on due process grounds, although the precise terms of such mechanism would surely be subject to debate.

As noted by the Parties, on May 30, 2003, Senate Bill 814 was signed into law. Senate Bill 814 added the following language to G.S. 62-133.5(c):

> If the Commission disapproves, in whole or in part, a local exchange company's application to modify its existing form of price regulation, the company may elect to continue to operate under its then existing plan previously approved under this subsection or subsection (a) of this section.

As the Attorney General noted, Senate Bill 814 has eliminated, or at least greatly reduced, the Commission's ability to require companies to include self-effectuating penalties in their price plans (if the plan does not already contain such a provision) because, if the company does not agree with proposed modifications made to the price plan by the Commission, the company can continue to operate under its current plan. The Attorney General commented that, in light of Senate Bill 814, it may no longer be feasible to require companies to include such mechanisms in their price plans.

The Public Staff maintained that Senate Bill 814 has changed the landscape considerably as to the likelihood of including self-effectuating penalties in existing price plans, unless a company agrees to such a provision in return for other modifications to its plan. Therefore, the Public Staff suggested that the Commission may wish to revisit the Public Staff's earlier proposal for including a self-effectuating penalty plan in Rule R9-8.

The Commission notes that the *December 27, 2002 Order* clearly outlined that "an overly ambitious approach by the Commission, whatever its abstract merits, could lead to years of argument and litigation." The Commission is not persuaded by any of the comments provided on this issue or Senate Bill 814 that the Commission should alter its previous decision on this issue. The Commission believes that it is still appropriate not to adopt the Public Staff's recommendation that the Commission revise Rule R9-8 to require the issuance of bill credits whenever local service providers fail to provide adequate service at or better than the benchmark performance for certain measures. The Commission believes it remains appropriate to concentrate on adequate self-effectuating penalties under the various price regulation plans.

CONCLUSIONS: The Commission finds it appropriate to affirm its decision in the *December 27, 2002 Order* that it views a self-effectuating penalty mechanism to be a central element in whether a proposed price plan is in the public interest.

UNRESOLVED ISSUE NO. 15: Should there be a mechanism for waiver of service quality standards or credits for missing service quality standards for the small companies?

POSITIONS OF PARTIES

ALLTEL: Yes. ALLTEL supports adoption of a waiver mechanism for very small companies. ALLTEL further supports a procedure that would allow any company that has met the service quality standards for 12 consecutive months to elect to file a streamlined report; in the event a company filing streamlined reports fails to meet service standards for two consecutive months, then the full reporting requirements would be reinstituted.

AT&T: AT&T did not take a position on this issue.

BELLSOUTH: No. BellSouth argued that network measures are reported based on either "per 100 access lines" or on a percentage basis; either of these methods of reporting takes into account the difference in the number of lines in service between companies. BellSouth stated that it fails to understand why it would be appropriate for small companies to be treated differently.

CITIZENS: Yes. Citizens maintained that the revised rules on service objectives should make provision for some waiver of service quality standards, or some sort of mechanism providing an allowance or credits for isolated incidents when smaller companies miss service quality standards on an irregular basis.

CONCORD: Yes.

LEXCOM: This may be an issue for smaller companies (i.e., companies smaller than Lexcom), but Lexcom does not need a waiver.

MCI: MCI did not take a position on this issue.

MEBTEL: MebTel did not take a position on this issue.

PUBLIC STAFF: No. The Public Staff argued that a mechanism for waiver of service quality standards or credits for missing service quality standards for the small companies is unnecessary.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: Yes.

SPRINT: This issue is not applicable to Sprint.

VERIZON: Verizon did not take a position on this issue.

INITIAL COMMENTS

ALLTEL: ALLTEL pointed out that it has consistently met the Commission's existing service objective standards. ALLTEL stated that it believes that most other service providers are likewise meeting the current service objectives. ALLTEL maintained that because of legitimate questions about the extent of any additional benefits which might accrue to the public as a result of the imposition of new, more rigorous standards, relative to the cost of implementation, ALLTEL submitted that it may be appropriate for the Commission to consider establishing a sliding scale of service objective standards, by imposing requirements which are tied to company performance. ALLTEL proposed that factors to be considered before imposing any additional service objective standards, reporting requirements, or waiver mechanisms could include a company's service objective compliance history, including whether there have been service quality complaints. ALLTEL stated that the result of such an approach would be that companies, such as ALLTEL and any other company consistently satisfying the requirements of Rule R9-8, and who are not the subject of consumer complaints, would not be subjected to the more onerous requirements proposed in the *December 27, 2002 Order* unless and until they failed to satisfy those service objective standards.

CONCORD: Concord maintained that where small telephone companies are able to demonstrate a lack of customer dissatisfaction with existing service mechanisms and/or a lack of immediate technical capability to implement the heightened standards under review in this docket, the Commission should be amenable to issuing waivers or otherwise not penalizing these companies. Concord asserted that the genesis of the instant docket was a significant number of service quality issues that arose with some of the larger service providers in the State which were not shared by the small ILECs. Concord stated that these smaller ILECs are now faced with more rigorous service quality standards than they are technically capable of measuring in many instances because of the problems of larger carriers notwithstanding the fact that all of the available evidence is that the small ILECs are providing good service to their customers and their customers are satisfied with that service.

LEXCOM: Lexcom noted that because of its high service standards, it believes that it should not need a waiver.

PUBLIC STAFF: The Public Staff opined that a special waiver or credit mechanism for small companies is inappropriate and unnecessary. The Public Staff asserted that Section (c) of both the version of Rule R9-8 adopted by the Commission in its *December 27, 2002 Order* and the version attached to the Joint Report is a Force Majeure clause allows any sized company to seek a waiver of the service quality standards due to unforeseen or catastrophic events. The Public Staff maintained that this waiver should be adequate to meet the concerns of small companies. Moreover, the Public Staff asserted, small and large companies should be held to the same standards. The Public Staff argued that it would be unfair for a consumer served by a small company to receive inferior service as opposed to a customer of a large company.

The Public Staff argued that there should not be a mechanism for waiver of service quality standards or credits for missing service quality standards for the small companies.

RANDOLPH: Randolph stated that it believes special consideration should be given to small companies because their limited size could easily cause them to miss a standard due to no fault of their own.

REPLY COMMENTS

No party filed reply comments on this issue.

DISCUSSION

The Commission notes that this issue concerning whether there should be a mechanism for waiver of service quality standards or credits for missing service quality standards for the small companies was not specifically addressed in the Commission's *December 27, 2002 Order.* In fact, this is the first time this specific issue has been presented to the Commission in this docket.

The Commission notes that ALLTEL, Citizens, Concord, and Randolph support a waiver for small companies; BellSouth and the Public Staff oppose a waiver for small companies; and AT&T, Lexcom, MCI, MebTel, QuantumShift, Sprint, and Verizon did not take a position on this issue.

The Commission agrees with the Public Staff that a special waiver or credit mechanism for small companies is inappropriate and unnecessary. As noted by the Public Staff, including a Force Majeure clause in Rule R9-8 will allow any sized company to seek a waiver of the service quality standards due to unforeseen or catastrophic events. Further, the Commission notes that, notwithstanding the Force Majeure clause, companies are free to file a waiver request with the Commission on any matter. Therefore, special waiver or credit mechanisms are not necessary.

CONCLUSIONS: The Commission concludes that it is inappropriate to adopt a mechanism for waiver of service quality standards or credits for missing service quality standards for small companies.

UNRESOLVED ISSUE NO. 16: Should updated customer information to a third party DA provider be provided in 24 or 48 hours?

POSITIONS OF PARTIES

ALLTEL: ALLTEL does not oppose adoption of either standard.

AT&T: Updated customer information should be provided within two business days.

BELLSOUTH: BellSouth provides updated customer information within 48 hours.

CITIZENS: Citizens did not take a position on this issue.

CONCORD: Updated customer information should be provided within 48 hours.

LEXCOM: In regards to information Lexcom controls, it believes that 48 hours would be a reasonable time to expect an update.

MCI: MCI did not take a position on this issue.

MEBTEL: MebTel did not take a position on this issue.

PUBLIC STAFF: Updated customer information to a third-party DA provider should be provided in 24 hours.

QUANTUMSHIFT: QuantumShift did not take a position on this issue.

RANDOLPH: Randolph believes customer information should be provided to a third party DA provider within 48 hours.

SPRINT: Although Sprint does not agree that a Commission rule requiring a specific timeframe for updates is necessary, Sprint has not opposed such a provision in the Commission's Rule R9-8 in hopes that by doing so a compromise could be reached.

VERIZON: No to both requirements.

INITIAL COMMENTS

AT&T: AT&T stated that it understands the desire to ensure that customers who call DA receive up-to-date information. However, AT&T argued, this interest should also be balanced against the cost and burden on carriers to provide accurate updated customer information to third party DA providers. AT&T maintained that, in this instance, accuracy is extremely important if carriers are to be required to provide refunds for incorrect DA listings. AT&T asserted that extending the time to two business days for transmittal of updated customer information should not have a detrimental impact on North Carolina consumers.

CONCORD: Concord maintained that its current business practices allow for provision of this information within a 48 hour window. Concord noted that moving this requirement up to 24 hours will not materially increase service quality but will require changes in Concord's business practices. Concord asserted that it is not aware of any evidence that the public is being harmed by the existing methodology or that the public would be materially benefited by the proposed change.

PUBLIC STAFF: The Public Staff noted that, as it stated with regard to Unresolved Issue No. 11, it believes it is important that DA listings be updated as soon as possible to minimize the likelihood of a customer being told there is no listing or being given an incorrect listing. The Public Staff maintained that when a company employs a third-party DA provider, both the company and the third-party provider need to work together as efficiently as possible so that information is updated quickly and accurately. The Public Staff stated that it does not believe it will be unduly burdensome for companies to forward this information to DA providers within a 24-hour timeframe, particularly since the information is likely to be shared electronically.

The Public Staff argued that updated customer information to a third-party DA provider should be provided in 24 hours.

RANDOLPH: Randolph argued that small companies have a need for additional flexibility in updating DA information due to limited resources and personnel.

SPRINT: Sprint noted that, while it currently complies with this provision, Sprint believes that a specific Commission requirement for updating DA listings is unnecessary. Sprint argued that companies should be free to allocate limited resources in a manner consistent with changing customer expectations. Sprint maintained that as competition increases, less regulation, not more, should be the norm.

VERIZON: Verizon argued that there is no good reason to impose this regulation on Verizon. Verizon stated that updated customer information from completed service orders is made available to third-party DA providers under contract with Verizon. Verizon noted that daily updates are provided to such third-party providers at the same frequency and with the same listing information that Verizon uses to update its own database. Therefore, Verizon stated, third party providers receive listings at parity with Verizon, as required under applicable federal law.

REPLY COMMENTS

No party filed reply comments on this issue.

DISCUSSION

The Commission notes that this issue concerning whether updated customer information should be provided to a third party DA provider in 24 or 48 hours was not addressed in the Commission's *December 27, 2002 Order*. In fact, this is the first time this issue has been presented to the Commission in this docket. Apparently, as the Parties were negotiating language for Rule R9-8(g), the following language was proposed:

> Carriers that provide DA to their customers from a third party should select a provider that updates new or changed listings within 48 hours of notification; these carriers must provide updated information to the third party provider within 24 hours of receipt.

The Commission notes that AT&T supports two business days; BellSouth, Concord, Lexcom, and Randolph support 48 hours; ALLTEL does not oppose either 24 or 48 hours; Citizens, MCI, MebTel, and QuantumShift did not take a position on this issue; the Public Staff supports 24 hours; Sprint does not agree with the provision but does not oppose it; and Verizon opposes both 24 hours and 48 hours.

The Commission notes that this requirement addresses circumstances in which the company contracts with a third party to provide DA service. This proposal would require the company to provide updates to DA information to the third party provider within 24 hours of receipt. Then the third party provider would have 48 hours to reflect the update. The Commission agrees with the Public Staff that it will not be unduly burdensome for companies to forward this information to DA providers within a 24-hour timeframe, particularly since the information is likely to be shared electronically. This requirement would require companies to simply forward updated DA information to a third-party DA provider which should not be a time-consuming or burdensome task to perform and 24 hours should be more than enough time to accomplish the requirement.

CONCLUSIONS: The Commission finds it appropriate to require that companies should provide updated DA customer information to the third-party provider within 24 hours of receipt.

UNRESOLVED ISSUE NO. 17: Should the service quality standards only apply to ILECs or to both ILECs and CLPs?

POSITIONS OF PARTIES

ALLTEL: ALLTEL believes that the same service standards should apply to CLPs as well as ILECs. ALLTEL also believes that the Commission should continually monitor the evolution of the competitive marketplace. As the marketplace becomes more competitive, market forces, rather than regulation, will drive service quality. As this occurs, ALLTEL submits that regulation and reporting regarding service objectives should be relaxed accordingly.

AT&T: AT&T did not take a position on this issue in its initial comments. In reply comments, AT&T asserted that the Commission's service quality standards should not apply to CLPs. Alternatively, AT&T maintained, in the event the Commission determines that the service objectives of Rule R9-8 should be applicable to CLPs, the Commission should exempt CLPs from the quarterly reporting requirements and associated penalties.

BELLSOUTH: If the Commission desires to mandate retail service quality standards through Rule R9-8, those standards must apply to every facilities-based company that offers basic local exchange service in North Carolina, whether they are an ILEC or a CLP. Any other conclusion would result in unreasonable discrimination. Consumers who are aware of the Commission's standards would expect the same quality of service from any facilities-based company offering basic local exchange service. Thus, all facilities-based companies should be subject to the rules and the Public Staff should monitor all companies' performance through their filed service quality results.

CITIZENS: Citizens believes that the service quality standards should apply equally to CLPs and ILECs, as well as to any other entities that are effectively providing local exchange service, either under existing technology, such as commercial mobile radio service (CMRS) providers, or for future technologies, such as Voice over Internet Protocol (VoIP) providers.

CONCORD: If service quality standards are applicable to ILECs, they must also be applicable to CLPs.

LEXCOM: Lexcom strongly believes in an even playing field. Both ILECs and CLPs should have to report.

MCI: MCI did not take a position on this issue in its initial comments. In reply comments, MCI asserted that it supports the requirement that service quality standards apply to CLPs as well as ILECs.

MEBTEL: MebTel did not take a position on this issue.
PUBLIC STAFF: The service quality standards should apply to both ILECs and CLPs.
QUANTUMSHIFT: QuantumShift did not take a position on this issue.
RANDOLPH: Randolph believes the standards should apply to both ILECs and CLPs.
SPRINT: Customer expectations and satisfaction are the ultimate standards that should be applied to all companies. The Commission's service quality standards should not be applied to CLPs.
VERIZON: The service quality standards should be identical for both ILECs and CLPs.

INITIAL COMMENTS

CONCORD: Concord noted that, by definition, service quality only has meaning when measured from the perspective of a customer. Concord noted that it can think of no reason why service quality provided to an ILEC customer should be critical to the Commission yet service quality provided to a CLP customer should be so unimportant as to not merit regulation at all. Concord argued that this disparate treatment of similarly situated customers does not make sense from a public interest perspective. Concord asserted that if the underlying notion is that service quality is competitive for CLPs, and therefore does not require regulation, then it must also be true that it is competitive for ILECs – in which case these regulations should not apply to ILECs either. Concord noted that logical

consistency and fundamental competitive fairness require that service quality standards be equally applicable to all carriers.

LEXCOM: Lexcom stated that it believes that a CLP would have an unfair competitive advantage by not having to play by the same rules and regulations as the ILEC.

PUBLIC STAFF: The Public Staff stated that it believes the Commission should ensure that all telephone customers receive adequate service regardless of whether they are served by ILECs or CLPs. The Public Staff opined that while companies can compete in a number of areas, such as price, calling area scope, or services offered, the Public Staff believes that the service quality rules should specify a set of minimum requirements for adequate service for all North Carolina telephone customers. The Public Staff asserted that the proposed Rule R9-8 attached to the Joint Report recognizes the differences between ILECs and CLPs by relaxing the reporting requirement for CLPs, but requires both CLPs and ILECs to adhere to the service quality standards.

The Public Staff argued that the service quality standards should apply to both ILECs and CLPs.

RANDOLPH: Randolph noted that it believes, that in an increasingly competitive environment, regulations should be imposed in a competitively neutral manner; therefore, ILECs and CLPs should both be held to the same service quality standards, including reporting requirements.

SPRINT: Sprint maintained that the telecommunications industry has become competitive, and, for this reason, it is not necessary for the standards to apply to CLPs. Sprint argued that losses of customers and associated losses of revenues due to failures to provide adequate service are more than sufficient incentives to motivate service levels that are consistent with customer expectations.

VERIZON: Verizon stated that the service quality standards should be identical for both ILECs and CLPs for two reasons. First, Verizon noted, the ITF, which is made up of ILECs and CLPs, the Public Staff (at one time) and the Commission have previously recognized that equal reporting requirements should be imposed on ILECs and CLPs. Specifically, Verizon commented, the ITF advocated in its Final Report to the Commission that reporting of service objectives should be identical for both ILECs and CLPs. Moreover, Verizon maintained, the Public Staff originally recommended that all companies provide reports on the service quality objectives. Most important, Verizon opined, the Commission decided that the service quality standards should apply to both ILECs and CLPs, requiring service quality reports from each local exchange telephone company actually providing basic local residential and/or business exchange service to customers in North Carolina. Second, Verizon commented, an asymmetrical reporting requirement would be illegal and patently unfair. Verizon argued that Section 253(b) of TA96 allows states to impose on a competitively neutral basis requirements to ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Verizon asserted that applying the service quality standards unevenly would violate this competitive neutrality requirement. Moreover, Verizon maintained, it would unnecessarily and unfairly handicap ILECs in today's competitive telecommunications marketplace.

REPLY COMMENTS

AT&T: AT&T argued that quality of service standards such as those in Rule R9-8, and the measurement and reporting thereof, should not be imposed on CLPs for at least three reasons: (1) they unnecessarily increase the cost of providing service and have the effect of limiting consumer choice; (2) the pressures of the competitive marketplace will force CLPs to provide good quality service; and (3) CLPs lack the ability to control the quality of the services they provide because, to a large extent, CLPs rely on ILEC services and UNEs in the provision of their services to the public. Consequently, AT&T maintained, the Commission's service quality standards should not apply to CLPs.

AT&T asserted that imposing the service quality standards of Rule R9-8 on CLPs would create an unnecessary burden on CLPs without providing any meaningful benefit to CLP customers. Indeed, AT&T argued, the imposition of such regulations would require the establishment of expensive measurement systems that would serve only to increase the cost of providing services to the public. In addition, AT&T maintained, the imposition of quality of service standards could result in limiting customer choice in an emerging competitive market rather than encouraging the development of competitive alternatives as intended by the General Assembly when it passed legislation allowing the provision of competitive local services. In G.S. § 62-2(d), the North Carolina General Assembly clothed the Commission with the authority to:

> ...develop regulatory policies to govern the provision of telecommunications service to the public which promote efficiency, technological innovation, economic growth, and **permit telecommunications utilities a reasonable opportunity to compete in an emerging competitive environment**, giving due regard to customers, stockholders, and maintenance of reasonably affordable local exchange service and long distance service. (emphasis added).

Thus, AT&T opined, the Commission should be doing everything it can to encourage new market entrants to come to North Carolina and to increase the development of competition rather than to increase the burdens new entrants must face in an attempt to break into a market that to this day is still dominated by monopoly ILECs.

AT&T commented that it is interesting to note that none of the ILECs that filed initial comments supporting the application of service quality standards to CLPs argued that the public would benefit from such regulations. In fact, AT&T maintained, the public interest would be better served by not applying service quality regulations to CLPs. AT&T argued that one of the purposes of introducing competition into the telecommunications marketplace is to create increased consumer choice. AT&T asserted that competitors are constantly seeking ways to differentiate their services from those of their competitors. AT&T noted that this differentiation may take the form of different types of services, different prices, or differences in the quality of service provided. AT&T argued that some customers are willing to accept lower quality of service for a lower price. AT&T maintained that if the Commission limits the ability of CLPs to offer a quality of service that is less than that contained in Rule R9-8, it could be depriving consumers of the ability to choose a desirable service at a lower price than would otherwise be available. AT&T opined that by imposing regulations that narrow customer choice rather than expand the available alternatives, the Commission would be creating a roadblock to the development of competition instead of promoting "a reasonable opportunity to compete in an emerging competitive environment."

AT&T noted that Sprint agrees that service quality rules should not apply to CLPs; MebTel takes no position on the issue; Citizens and ALLTEL give no reason for their position; and the remaining ILECs filing initial comments generally contend that it is unfair to apply the requirements to ILECs alone.

AT&T asserted that service quality regulations for ILECs may serve a purpose as long as the ILECs continue to dominate the market. AT&T maintained that CLPs, on the other hand, have very little market share in North Carolina and have absolutely no market power with which they can abuse their market position. For this reason, AT&T argued, it is not unjust discrimination to impose service quality regulations on ILECs and not on CLPs. AT&T opined that, in doing so, the Commission would be creating an environment that encourages new companies to enter the North Carolina market and enhancing consumer choice consistent with the stated policy of the General Assembly.

AT&T argued that the competitive pressures of the marketplace will force CLPs to provide good quality service. AT&T noted that CLPs have a significant uphill battle in breaking into the monopoly

consumer base of the ILECs. AT&T maintained that in order for a CLP to attract customers away from an ILEC, the CLP is going to have to offer the customer value for the price it charges. AT&T stated that if the customer is not satisfied with the quality of service offered or provided, he or she will stay with the ILEC or perhaps choose another CLP. Therefore, AT&T contended, if the CLP is going to remain viable in the marketplace, it is going to have to offer a quality of service that is acceptable to the consumer for the price charged. AT&T argued that, as long as there is a competitive alternative available to the consumer in the form of the ILEC, there is no need to impose quality of services regulations on CLPs that are trying to get established in the marketplace.

AT&T further maintained that CLPs compete in North Carolina mostly through the purchase of UNEs or in some cases through the resale of ILEC services. AT&T asserted that the CLP is thus dependent on the ILEC for the delivery of the underlying facilities or services used to provide telephone service to the end-user and is, to a large extent, unable to control whether it meets the service objectives of Rule R9-8. AT&T argued that, in these circumstances, it is unreasonable to hold CLPs accountable for the delivery of services by ILECs. AT&T maintained that, rather than being concerned with whether CLPs are meeting certain service objectives, the Commission's attention should more appropriately be focused on whether the ILECs are providing services to CLPs in a nondiscriminatory manner. To this end, AT&T noted, the Commission has adopted rules governing performance measures for BellSouth in Docket No. P-100, Sub 133k. AT&T stated that while it does not agree that those rules are completely adequate, they do provide a much stronger base for protecting the delivery of CLP services to end users than applying service quality regulations to CLPs that are beyond the ability of CLPs to control. Consequently, AT&T maintained, the public interest would be much better served by focusing the Commission's time and resources on BellSouth's compliance with the performance measure rules of Docket No. P-100, Sub 133k and assuring that BellSouth is not discriminating in the delivery of its services and facilities to CLPs.

AT&T noted that, for all of the reasons set forth above, the Commission should not apply the service quality standards set out in Rule R9-8 to CLPs in North Carolina. Alternatively, AT&T stated, in the event the Commission determines that the service objectives of Rule R9-8 should be applicable to CLPs, the Commission should exempt CLPs from the quarterly reporting requirements and associated penalties based upon all of the foregoing reasons.

BELLSOUTH: BellSouth noted that, in its initial comments, it stated that any Commission-adopted service quality standards should apply to every facilities-based company that offers basic local exchange service in North Carolina, whether it is an ILEC or a CLP. Importantly, BellSouth asserted, no party filing initial comments in this proceeding disagreed that the service quality standards ultimately adopted by the Commission should be applied to ILECs and CLPs alike. **[COMMISSION NOTE:** Sprint did propose that the standards should not apply to CLPs.] BellSouth argued that it is also important, however, for the Commission to require all companies to report their results against these measurements to the Commission. BellSouth commented that the Public Staff's initial comments recommend a reporting requirement <u>only</u> for ILECs, and this makes no sense from an equitable or enforcement standpoint. BellSouth maintained that, without requiring all companies to report their results, how will the Public Staff or the Commission know whether companies are simply ignoring the rules? BellSouth opined that allowing such a result would create a severe competitive disadvantage for the companies who must spend the money and devote the resources needed to ensure that they are, in fact, complying with the rules and proving their compliance to the Commission. BellSouth argued that it is nonsensical for the Commission to promulgate universally-applied service quality rules and then have no means of enforcing or even monitoring them. Thus, BellSouth concluded, all ILECs and CLPs subject to the rules should be required to report their results to the Public Staff and the Commission.

MCI: MCI asserted that it has long advocated that CLPs should not be subjected by rote to the traditional governmental regulation of ILECs. MCI argued that regulation has been premised on the former <u>de jure</u> monopoly status, and present market share, economies of scale, exclusive marketing

arrangements, and other competitive advantages enjoyed by ILECs. MCI opined that these arrangements and advantages not only create barriers to entry for CLPs, but also lessen the competitive alternatives available to consumers. MCI maintained that there are strong policy grounds, which have been recounted several times throughout the long history of this proceeding, for excusing CLPs from regulation of service quality. Nevertheless, MCI stated that it, like other CLPs, for the sake of expediency and administrative finality, supports the requirement in this proceeding that service quality standards apply to CLPs (at least those for which the CLP has control) as well as to ILECs.

MCI asserted that this requirement should not be controversial. MCI noted that what is disputed by some ILECs, however, is whether CLPs should not have to *report on a scheduled basis*. MCI stated that no one disputes that this Commission has the authority to ask a CLP to issue a report on service quality when the need and circumstances for such information arises. Thus, MCI contended, the Public Staff, following months of negotiations in this already protracted docket, has proposed a compromise resolution that should render Unresolved Issue No. 17 moot. MCI maintained that this resolution simply removes the scheduled reporting requirement, while retaining the requirement that CLPs meet certain service quality standards. MCI argued that the Commission should approve the compromise resolution, recognize that it acknowledges the continuing supervisory role of the Commission, and bring this proceeding to conclusion.

MCI noted that, for the reasons stated, it supports the compromise resolution in this docket: that service quality standards apply, but that CLPs need not file the scheduled reports that would be required of ILECs.

MCI maintained that several ILECs contended that an "even playing field," "fundamental competitiveness fairness," "competitive neutrality", and like considerations compel the same service quality reporting from CLPs as for ILECs. MCI stated that although it is not clear that these ILECs apprehend the issue correctly – as stated above, CLPs in this proceeding do not contest the authority of the Commission to supervise their service quality and do not oppose efforts to subject them to service quality standards – it is clear that these ILECs ignore the economies of scale, exclusive marketing arrangements, first mover advantages, and other advantages that they enjoy, which among other factors have resulted in an overwhelming market share advantage that ILECs enjoy in the mass market.

MCI stated that Sprint, however, broke rank with its incumbent brethren. MCI noted that Sprint stated that "(l)osses of customers and associated losses of revenues due to failures to provide adequate service are more than sufficient incentives to motivate service levels that are consistent with customer expectations." MCI asserted that these comments recognize the present embryonic level of competition in North Carolina, particularly for residential and small business customers.

MCI footnoted that, moreover, BellSouth would require only facilities-based CLPs that offer local exchange service in North Carolina to engage in scheduled reporting. MCI commented that BellSouth at least recognized that CLPs are dependent upon the underlying ILEC for providing network service to customers. MCI stated that there are many aspects of local telephone service – for example, outages, installation, and repairs – over which dependent CLPs simply have no control. MCI stated that the Commission recognized this reality by allowing CLPs to ask the Commission for a waiver of service quality rules if the CLPs lease UNEs. MCI commented that in Ordering Paragraph No. 6 of the Commission's November 29, 2000 *Order Denying Motion for Reconsideration But Clarifying the Commission's September 20, 2000 Order*, the Commission stated

> That resellers of basic local residential and business exchange service and companies that purchase UNEs from ILECs to provide basic local residential and business exchange service are expected to comply with the reporting requirements. However, if a carrier is not in direct control of the

> results of a particular objective outlined in Rule R9-8, that carrier may place an "N/A" for not applicable in the report for that particular objective and footnote an explanation of why the results for the objective are not within the company's control. Companies are to only use "N/A" in circumstances where it is clear that results of the particular objective are not within the company's control; companies should not abuse the use of "N/A" on their reports.

MCI maintained that the purpose of regulation, then, is to act as a surrogate for marketplace regulation (i.e., competition). MCI argued that, until such time as competition is sufficiently established, Commission regulation may be necessary to protect the interests of consumers with regard to ILECs. MCI noted that the same degree of regulation is not as necessary with regard to CLPs just entering the local telephone market in North Carolina. MCI contended that unless CLPs can provide services that are better in quality and lower in price than those offered by ILECs, CLPs will not attract customers.

SPRINT: Sprint stated that service quality standards need not, and should not, apply to small companies such as most, perhaps all, North Carolina CLPs. Sprint maintained that other states such as Indiana exclude companies, CLPs and others, that do not have a minimum number of access lines as there are clear competitive alternatives to the services provided by these companies, and, especially in the case of CLP subscribers, customers have demonstrated they know how to change providers. Sprint stated that it believes that exempting companies with less than 15,000 access lines, less than 1% of total access lines in North Carolina, would be proper. Sprint noted that in practice, it expects that such an exemption would apply to most North Carolina CLPs.

DISCUSSION

The Commission notes that this issue was not specifically addressed in the *December 27, 2002 Order* because the Commission had previously ruled that service quality standards should apply to both ILECs and CLPs.

On November 29, 2000, the Commission issued its *Order Denying Motion for Reconsideration but Clarifying the Commission's September 20, 2000 Order*. The Commission's *September 20, 2000 Order* revised Rule R9-8 to incorporate a new subsection concerning reporting on the service objectives. In the *September 20, 2000 Order*, the Commission required all ILECs and CLPs actually providing service to customers in North Carolina to file monthly reports detailing the results of their compliance with each of the objectives outlined in Rule R9-8.

In the *November 29, 2000 Order*, the Commission clarified its *September 20, 2000 Order* to require that all ILECs and CLPs actually providing basic local residential and/or business exchange service to customers in North Carolina should file their service quality results monthly.

Further, in the *November 29, 2000 Order*, the Commission stated

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

ALLTEL, BellSouth, Citizens, Concord, Lexcom, MCI, the Public Staff, Randolph, and Verizon support applying service quality standards to both ILECs and CLPs; AT&T and Sprint oppose applying the standards to CLPs; and MebTel and QuantumShift did not take a position on this issue.

The Commission notes that Commission Rule R17-2(g) states that Rule R9-8 applies to CLPs. The Commission does not believe that any party provided any new or compelling arguments why service quality standards should not apply to both ILECs and CLPs. The Commission believes that this issue should not even be up for debate at this point in time since Rule R17-2(g) specifically requires CLPs to be subject to Rule R9-8. Further, the Commission notes that this instant issue concerns whether Rule R9-8 should apply to CLPs; the question of whether CLPs should be required to file quarterly reports is discussed in Negotiated Issue No. 1 below.

CONCLUSIONS: The Commission concludes that the service quality standards should apply to both ILECs and CLPs.

SECTION III - ISSUES NEGOTIATED AND DETAILED IN JOINT COMMENTS

On January 20, 2004, the ITF and the Public Staff filed their Joint Comments as requested in the Commission's *November 7, 2003 Order*.

The purpose of the Joint Comments was to have the Parties outline and explain the issues that the Parties negotiated wherein the result was different from that ordered by the Commission in its *December 27, 2002 Order*. The Commission notes that the Parties were allowed to negotiate on disputed issues from the *December 27, 2002 Order* and that the Parties did indeed reach agreement on many of the issues. However, some of the issues that were negotiated were settled contrary to the Commission's previous decision.

The Commission has reviewed the Joint Comments and notes the following substantive changes to Rule R9-8 the Parties have negotiated along with a Commission Conclusion on the resulting agreement:

NEGOTIATED ISSUE NO. 1: The majority of Parties proposed that Rule R9-8 should apply to both ILECs and CLPs; however, they further proposed that only ILECs should be required to file service quality reports with the Commission. The Parties stated in the Joint Comments that because of the CLPs' difficulties in reporting service quality due to their inability to obtain state-specific data, CLPs should not be required to file quarterly reports. The Parties stated that the CLPs would not be absolved from meeting the minimum service quality standards required by the Commission for all local service providers.

CONCLUSIONS: The Commission notes that the applicability of Rule R9-8 to CLPs has been discussed under Unresolved Issue No. 17. In Unresolved Issue No. 17, the Parties disagree about whether Rule R9-8 should apply to both ILECs and CLPs. However, the Parties apparently do agree that if the Commission determines that Rule R9-8 should apply to CLPs, CLPs should not be required to file quarterly reports. The Commission does not understand how a CLP can be expected to comply with Rule R9-8 service standards but not be required to file quarterly reports. If a company monitors whether it is in compliance with the standards, there must necessarily be information to support a finding of its compliance or noncompliance with the standards. Further, the Commission notes that CLPs have been filing monthly reports for service objectives since reporting was first required for both ILECs and CLPs back in 2001.

Therefore, the Commission finds it appropriate not to accept the stipulation to not require CLPs to file quarterly reports with the Commission. If state-specific results are not available, the company should be free to report N/A; however, for several measures such as Initial Customer Trouble Reports, Repeat Reports, Out-of-Service Troubles Cleared Within 24 Hours, Regular Service Orders

Completed Within 5 Working Days, New Service Installation Appointments Not Met for Company Reasons, and New Service Held Orders Not Completed Within 30 Days, the Commission fails to understand how these measures would not be available on a state-specific basis. Further, the Commission finds that CLPs should continue to be allowed to report "N/A" for standards in which the CLP is not in direct control of the results.

The Commission finds it appropriate to continue to require CLPs to file service quality reports with the Commission.

NEGOTIATED ISSUE NO. 2: The Parties proposed that reports be filed quarterly rather than monthly. The Parties maintained that quarterly reports will require companies to submit reports less often, reducing their work loads and costs, and reducing the paperwork to be handled and stored by the Commission and the Public Staff. The Parties asserted that the quarterly reports will still detail monthly results, thereby allowing the Commission to review the same amount of data.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that the reports be filed quarterly reflecting monthly results.

NEGOTIATED ISSUE NO. 3: The Parties asserted that the Commission no longer has jurisdiction over Direct Distance Dialing Completion Rate, Intrastate Toll Transmission Loss, and Intrastate Toll Trunk Noise after the passage of Senate Bill 814 and, therefore, these measures should be removed from Rule R9-8.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that the service objectives relating to Direct Distance Dialing Completion Rate, Intrastate Toll Transmission Loss, and Instate Toll Trunk Noise should be removed from Rule R9-8.

NEGOTIATED ISSUE NO. 4: The Parties negotiated appropriate uniform reporting procedures for Operator "O" Answertime, Directory Assistance Answertime, Business Office Answertime, and Repair Service Answertime. In the *December 27, 2002 Order*, the Commission noted that, with the current use of menu-driven systems and IVR units, a hearing would be necessary to develop appropriate procedures. However, the Parties negotiated a complete set of uniform reporting procedures for these four service objectives. The Commission has reviewed the procedures and finds them to be reasonable and appropriate. Therefore, the Commission finds it appropriate to adopt the negotiated procedures.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that it is appropriate to adopt the negotiated uniform reporting procedures for Operator "O" Answertime, Directory Assistance Answertime, Business Office Answertime, and Repair Service Answertime.

NEGOTIATED ISSUE NO. 5: The Parties proposed that an ASA of 6 seconds be added to Operator "O" Answertime and Directory Assistance Answertime because it is more common than the "% in x seconds" standard previously adopted. The Parties noted that some switches cannot calculate "% in x seconds" and conversion tables have been used; the accuracy of the conversion tables is questionable and it would be expensive to update them. The Parties maintained that the 6-second ASA used is approximately equivalent to one ring, which the Task Force and Public Staff agree is a reasonable answertime for these two measures.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that an ASA of 6 seconds should be added to Operator "O" Answertime and Directory Assistance Answertime.

NEGOTIATED ISSUE NO. 6: The Parties proposed that the 90% within 20 seconds plus the maximum answertime standard for Business Office Answertime and Repair Service Answertime should be removed and an average speed of answer should be used. The Parties disagree about whether the ASA should be 30 seconds or 60 seconds and this is addressed in Unresolved Issue No. 8. The Task Force and the Public Staff determined that an ASA standard was preferable to a "% in x seconds" standard. All Task Force participants indicated that they were able to calculate answertime using the ASA standard, while some Task Force members were unable to calculate answertime using the "% in x seconds" standard without using an equivalency chart. The Parties maintained that adopting an ASA standard will ensure more uniformity in companies' calculations of answertime. No party was in favor of mandating a maximum answertime.

CONCLUSIONS: Although the Commission is not completely convinced that it is appropriate to alter the Commission's *December 27, 2002 Order* based on the support provided by the Parties, out of consideration and respect for the negotiation that occurred on this issue, and the fact that no party supported a maximum answertime, the Commission agrees with and supports the Parties' negotiation on this issue. Therefore, the Commission concludes that an ASA be used for Business Office Answertime and Repair Service Answertime.

NEGOTIATED ISSUE NO. 7: The Parties maintained that the Force Majeure clause should be tweaked to replace to the extent "possible" with to the extent "reasonably foreseeable", replace "were unavoidable" with "could not reasonably have been avoided", and replace the Commission "may" grant a waiver with the Commission "shall" grant a waiver to denote that granting of a waiver should be mandatory rather than discretionary if the carrier has shown that it has met the four criteria.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue.

NEGOTIATED ISSUE NO. 8: The Parties maintained that data at the wire center level should not be provided. The Parties stated that exchange level reporting should generally be adequate for the Commission and Public Staff to monitor service quality. The Parties noted that, pursuant to the section on Data Retention, the Public Staff or Commission may obtain data on a wire center level as deemed necessary.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that data at the wire center level should not be required. As noted, Section (f) Data Retention will allow access to the information if it is ever deemed necessary.

NEGOTIATED ISSUE NO. 9: The Parties proposed that, for small businesses with five lines or less that are handled by a carrier's residential service center, the carrier may include the statistics for these small businesses in the residential customer category, but must notate this inclusion and verify that there is no preferential treatment given to either class of customers in its quarterly report.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that a carrier should be allowed to include statistics for small businesses with five lines or less that are handled by a carrier's residential service center in the residential customer category, including the notation and verification requirement.

NEGOTIATED ISSUE NO. 10: The Parties proposed that companies that serve certain customers on an individual account basis rather than by call or service center not be required to add the service quality results for those customers into the business or residential categories. However, the Parties maintained that companies acting under this provision must note in their first report which customer groups are excluded from the report and notify the Commission if this exclusion changes.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that companies that serve certain customers on an individual account basis rather than

by call or service center are not required to add the service quality results for those customers into the business or residential categories.

NEGOTIATED ISSUE NO. 11: The Parties proposed that website reporting should be deleted. The Parties asserted that, due to the CLPs' inability to calculate state-specific results, many CLPs would be unable to post service quality information and would have to be excepted from this requirement. The Parties asserted that this would be unfair to those companies that would be required to post such information. The Parties maintained that, due to the vast difference in the size of local exchange companies, consumers could be misled by the amount of penalties that might be assessed against individual companies and make incorrect conclusions about the service quality provided by different carriers. The Parties stated that the pass/fail system could also be misleading, as it would not indicate the reason why a company failed to meet a standard or the degree to which the company failed to meet the standard.

Although the Commission understands that all of the Parties agreed to remove this requirement from Rule R9-8, the Commission does not believe that this result is appropriate. The Commission believes that it is entirely appropriate and reasonable to uphold its conclusions on website reporting as outlined in the *December 27, 2002 Order* (See pages 33-35 of the *December 27, 2002 Order*). However, the Commission finds it appropriate to hold in abeyance the specific details of the website reporting requirement and the effective date of the website reporting requirement in order to allow the Parties the opportunity to negotiate on an appropriate means to allow the public access to the service quality information that will be filed with the Commission with amended Rule R9-8. The Parties are instructed to follow the logic and intent of the *December 27, 2002 Order* concerning website reporting and to negotiate all of the specific details necessary for the Commission to implement a website reporting requirement. The Parties shall file a report with the Commission detailing the negotiations and their specific recommendations by no later than Tuesday, August 3, 2004. The Public Staff is specifically requested to facilitate the negotiation process.

CONCLUSIONS: The Commission concludes that website reporting is appropriate. The Commission upholds and affirms its decision on website reporting as outlined in the *December 27, 2002 Order*. However, the Commission finds it appropriate to hold in abeyance the specific details of the website reporting requirement and the effective date of the website reporting requirement in order to allow the Parties the opportunity to negotiate on a appropriate means to allow the public access to the service quality information. The Parties are requested to file a report with the Commission detailing the negotiations and their specific recommendations by no later than Tuesday, August 3, 2004. The Public Staff is specifically requested to facilitate the negotiation process.

NEGOTIATED ISSUE NO. 12: The Parties proposed that the monthly reporting requirement for Initial Customer Trouble Reports, Repeat Reports, Out-of-Service Troubles Cleared Within 24 Hours, Regular Service Orders Completed Within 5 Working Days, New Service Installation Appointments Not Met for Company Reasons, and New Service Held Orders Not Completed Within 30 Days should be made more liberal so as to not require companies to file explanations for every narrow miss of the service quality standards, just the misses that are more significant. The Parties maintained that raising the threshold when such explanations are required should prevent companies from being forced to make unnecessary explanations.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that the thresholds for explanations of misses should be increased as negotiated by the Parties.

NEGOTIATED ISSUE NO. 13: The Parties proposed that language needs to be added to the DA section of Rule R9-8 since all carriers do not provide their own DA. The Parties proposed the following language:

> . . . Carriers that provide DA to their customers from a third party should select a provider that updates new or changed listings within 48 hours of notification; these carriers must provide updated information to the third party provider within 24 hours of receipt.

The issue of providing the data in 24 hours is discussed under Unresolved Issue No. 16.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and concludes that it is appropriate to adopt the proposed language.

NEGOTIATED ISSUE NO. 14: The Parties proposed that because a number of incorrect directory listings are not the fault of the DA provider, refunds should not be automatic, but be available upon request by the customer.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and finds it appropriate to adopt the proposed language that refunds be provided upon request by the customer.

NEGOTIATED ISSUE NO. 15: The Parties proposed that if carriers meet the DA updating standard outlined in Rule R9-8, then a customer being told that there is "no listing" should not be the fault of the carrier. Therefore, refunds should not be required for no listing.

CONCLUSIONS: The Commission agrees with and supports the Parties' negotiation on this issue and finds it appropriate to remove the "no listing" language (i.e., refunds will not be required for "no listing".)

NEGOTIATED ISSUE NO. 16: The Parties proposed that carriers should not be required to provide annual bill inserts to inform customers of the uniform DA refund policy because customers should be adequately informed of the policy when it is published prominently in the DA section of the local telephone directory. The Commission does not find it appropriate to accept this negotiation. The Commission believes that it is entirely appropriate to require carriers to provide annual bill inserts to inform customers of the uniform DA refund policy. The Commission believes that customer information in this regard is in the public interest. As previously noted, carriers should inform the Commission if they experience customer abuse of the DA refund policy.

CONCLUSIONS: The Commission declines to adopt the Parties' negotiation on this issue and finds that annual bill inserts on the uniform DA refund policy should be required as outlined in the *December 27, 2002 Order.*

SECTION IV – MISCELLANEOUS

The Commission notes that Ordering Paragraph 5 of the *December 27, 2002 Order* required carriers that provide their own DA service to complete an audit of the accuracy of their DA and file a copy of the audit results with the Commission within six months.

From the filings, it does not appear that the Parties discussed this issue. Therefore, the Commission believes that it is appropriate to require carriers that provide their own DA service to complete an audit as required in the *December 27, 2002 Order*. The Commission finds that carriers should be allowed six months to complete the audit and submit the audit results to the Commission.

SECTION V - UNIFORM QUARTERLY REPORT

The Commission finds it appropriate to adopt the following uniform report (Exchange Level Form and Statewide Level Form) for carriers to file quarterly in compliance with Rule R9-8:

COMPLIANCE WITH COMMISSION RULE R9-8
EXCHANGE LEVEL FORM
PAGE 1 OF 2

COMPANY NAME: ____________________
REPORTING PERIOD: ____________________
EXCHANGE: ____________________

Description	Objective	Month 1	Month 2	Month 3
Initial Customer Trouble Reports	4.75 or less per 100 total access lines			
Repeat Reports	1.0 report or less per 100 total access lines			
Out-of-Service Troubles Cleared within 24 Hours – Business	95% or more			
Out-of-Service Troubles Cleared within 24 Hours – Residential	95% or more			
Out-of-Service Troubles Cleared within 24 Hours – All North Carolina	95% or more			
Regular Service Orders Completed Within 5 Working Days – Business	90% or more			
Regular Service Orders Completed Within 5 Working Days – Residential	90% or more			
Regular Service Orders Completed Within 5 Working Days – All North Carolina	90% or more			
New Service Installation Appointments Not Met for Company Reasons – Business	5% or less			
New Service Installation Appointments Not Met for Company Reasons – Residential	5% or less			

COMPLIANCE WITH COMMISSION RULE R9-8
EXCHANGE LEVEL FORM
PAGE 2 OF 2

COMPANY NAME: ____________________
REPORTING PERIOD: ____________________
EXCHANGE: ____________________

Description	Objective	Month 1	Month 2	Month 3
New Service Installation Appointments Not Met for Company Reasons – All North Carolina	5% or less			
New Service Held Orders Not Completed Within 30 Days – Business	0.1% or less of total access lines			
New Service Held Orders Not Completed Within 30 Days – Residential	0.1% or less of total access lines			
New Service Held Orders Not Completed Within 30 Days – All North Carolina	0.1% or less of total access lines			

OTHER: If explanations/comments/notes are necessary in compliance with Rule R9-8 to explain results, please indicate and attach such explanations/comments/notes.

COMPLIANCE WITH COMMISSION RULE R9-8
STATEWIDE LEVEL FORM
PAGE 1 OF 1

COMPANY NAME: ____________________
REPORTING PERIOD: ____________________

Description	Objective	Month 1	Month 2	Month 3

Operator "O" Answertime	90% or more of calls answered within 10 seconds or ASA of 6 seconds			
Directory Assistance Answertime	90% or more of calls answered within 10 seconds or ASA of 6 seconds			
Business Office Answertime – Business	ASA of 30 seconds			
Business Office Answertime – Residential	ASA of 30 seconds			
Business Office Answertime – All North Carolina	ASA of 30 seconds			
Repair Service Answertime – Business	ASA of 30 seconds			
Repair Service Answertime – Residential	ASA of 30 seconds			
Repair Service Answertime – All North Carolina	ASA of 30 seconds			

OTHER: If explanations/comments/notes are necessary in compliance with Rule R9-8 to explain results, please indicate and attach such explanations/comments/notes.

SECTION VI - AMENDED RULE R9-8

Overall, the Commission adopts amended Rule R9-8, as follows. The original Rule R9-8 as adopted by the Commission in its *December 27, 2002 Order*, has been underlined to indicate additions and struck through to indicate deletions.

Rule R9-8. Service objectives for regulated local exchange telephone companies and competing local providers (CLPs).

(a) Service Objectives. Each regulated local exchange telephone company and CLP shall perform and provide service in accordance with the following uniform service objectives:

Measure No.	Description	Objective
1	Intraoffice Completion Rate	99% or more
2	Interoffice Completion Rate	98% or more
~~3~~	~~Direct Distance Dialing Completion Rate~~	~~95% or more~~
~~4~~ 3	EAS Transmission Loss	95% or more between 2 and 10 dB
~~5~~	~~Intrastate Toll Transmission Loss~~	~~95% or more between 3 and 12 dB~~
~~6~~ 4	EAS Trunk Noise	95% or more 30 dBrnc or less
~~7~~	~~Intrastate Toll Trunk Noise~~	~~95% or more 33 dBrnc or less~~
~~8~~ 5	Operator "O" Answertime	90% or more of calls answered within 10 seconds or ASA of 6 seconds
~~9~~ 6	Directory Assistance Answertime	85% or more of calls answered within 10 seconds or ASA of 6 seconds
~~10~~ 7	Business Office Answertime	~~90% or more within 20 seconds PLUS an absolute maximum answertime to be determined later~~ ASA of 30 seconds
~~11~~ 8	Repair Service Answertime	~~90% or more within 20 seconds PLUS an absolute maximum answertime to be determined later~~ ASA of 30 seconds
~~12~~ 9	Initial Customer Trouble Reports	4.75 or less per 100 total access lines
~~13~~ 10	Repeat Reports	1.0 report or less per 100 total access lines
~~14~~ 11	Out-of-Service Troubles Cleared within 24 Hours	95% or more

Measure No.	Description	Objective

~~15~~ 12	Regular Service Orders Completed within 5 Working Days	90% or more
~~16~~ 13	New Service Installation Appointments Not Met for Company Reasons	5% or less
~~17~~ 14	New Service Held Orders Not Completed within 30 days	0.1% or less of total access lines

(b) This rule shall not preclude flexibility in considering future circumstances that may justify changes in or exceptions to these service objectives.

(c) Force Majeure. A company may seek a waiver of part or all of Rule R9-8 due to force majeure. To request a waiver, a company should file adjusted data and unadjusted data along with its waiver request ~~with the Commission which includes appropriate data to support its request~~. In order to secure Commission approval, the waiver request should clearly demonstrate that (1) the force majeure event was sufficiently serious and unusual to warrant adjustment of the ~~reported~~ monthly service quality statistics, including a detailed description of the adverse consequences of the event on the ratepayers' service and the company's facilities; (2) to the extent ~~possible~~ reasonably foreseeable, the company prudently planned and prepared in advance for such emergencies; (3) despite these plans and preparations, and the best efforts of the company personnel before, during, and after the event, failures to satisfy the service objectives ~~were unavoidable~~ could not reasonably have been avoided; and (4) the extent and nature of the adjustments requested are appropriate for the circumstances. The Commission ~~may~~ shall grant waiver requests if the Commission finds that all four criteria have been met.

(d) Reporting Requirement. Each regulated local exchange telephone company and CLP actually providing basic local residential and/or business exchange service to customers in North Carolina shall file an original, ~~and five (5)~~ three (3) hard copies, and ~~one~~ two electronic ~~copy~~ copies on diskette of a report each ~~month~~ calendar quarter with the Chief Clerk of the Commission detailing the monthly results of its compliance with Measures ~~8 – 17~~ 5 – 14 as set forth in this Rule. The Chief Clerk's Office shall forward one hard copy and one electronic copy to the Public Staff – Communications Division. Companies should reflect the company name as certified by the Commission. Additionally, the hard copies and electronic copies on diskette should be clearly marked with the company name, the docket number, and the ~~report month~~ reporting period. The Commission will specify the format of the report.

Each regulated local exchange company and CLP shall report its performance results for the following six objectives on an exchange ~~and/or wire center~~ level:

- Initial Customer Trouble Reports (Measure ~~12~~ 9);
- Repeat Reports (Measure ~~13~~ 10);
- Out-of-Service Troubles Cleared Within 24 Hours (Measure ~~14~~ 11);
- Regular Service Orders Completed Within 5 Working Days (Measure ~~15~~ 12);
- New Service Installation Appointments Not Met for Company Reasons (Measure ~~16~~ 13); and
- New Service Held Orders Not Completed Within 30 Days (Measure ~~17~~ 14).

[COMMISSION NOTE: ~~This requirement would only be in effect for a one year period at which time the Commission would make a determination whether the requirement should continue.~~ After one year, companies may petition the Commission for exemption from the requirement to report these results on an exchange level.]

Each regulated local exchange company and CLP that uses separate call or service centers or service representatives to provide service to their business and residential customers shall file performance results for the following measures for the following categories of customers: (1) all North Carolina

business[1] customers; (2) all North Carolina residential customers; and (3) all North Carolina customers:

- ▶ Business Office Answertime (Measure ~~10~~ 7);
- ▶ Repair Service Answertime (Measure ~~11~~ 8);
- ▶ Out-of-Service Troubles Cleared Within 24 Hours (Measure ~~14~~ 11);
- ▶ Regular Service Orders Completed Within 5 Working Days (Measure ~~15~~ 12);
- ▶ ~~Customer~~ New Service Installation Appointments Not Met for Company Reasons (Measure ~~16~~ 13); and
- ▶ New Service Held Orders Not Completed Within 30 Days (Measure ~~17~~ 14).

If a company's residential call or service centers handle the calls or service for small businesses of five lines or less, the company may include the statistics for these small businesses in the residential customer category, but must notate this inclusion and verify that there is no preferential treatment given to either class of customers in its quarterly report.

Companies are not required to report statistics for customer groups that are not served by call or service centers, but on an individual account basis. In the first report following the effective date of the amendments to this rule, each company should note which customer groups are excluded from the report and notify the Commission if customer groups that are excluded should change.

[**COMMISSION NOTE:** ~~This requirement would only be in effect for a one year period at which time the Commission would make a determination whether the requirement should continue.~~ After one year, companies may petition the Commission for exemption from the requirement to separately report residential, business, and combined residential and business results for these six objectives.]

~~This~~ The quarterly report shall be filed no later than twenty (20) days after the last day of the ~~month~~ quarter covered by the report and the person submitting the report shall verify its accuracy under oath. Such verification shall be in the following form:

VERIFICATION UNDER OATH
REGARDING ACCURACY OF SERVICE OBJECTIVES REPORT

I, ____________________________, state and attest that the attached Service Objectives Report is filed on behalf of ________________________ (Name of Public Utility) as required by North Carolina Utilities Commission Rule R9-8; that I have reviewed said Report and, in the exercise of due diligence, have made reasonable inquiry into the accuracy of the information provided therein; and that, to the best of my knowledge, information, and belief, all of the information contained therein is accurate and true, no material information or fact has been knowingly omitted or misstated therein, and all of the information contained in said Report has been prepared and presented in accordance with all applicable North Carolina General Statutes, Commission Rules, and Commission Orders.

____
Signature of Person Making Verification

____
Job Title

____
Date

Subscribed and sworn before me this the ____________ day of ________________, 200_.

[1] Companies are not required to report statistics for business customer groups that are not served by service or repair centers, but on an individual account basis. In the first report under the new rule, the company should note what business customer groups are excluded. If the company should thereafter change what business groups are excluded, it should notate the change on the first subsequent report.

Notary Public

My Commission Expires: ____________

~~(e) Website Reporting. Each regulated local exchange telephone company and CLP shall post on its website on a quarterly basis, beginning on March 31, 2003, the following information:~~

~~(1) a pass/fail statement with respect to Measures 8 through 17 of Rule R9-8(a), as applicable to the company, and~~

~~(2) a listing of any penalties paid by a company for service quality violations, the amount of such penalties, and the service objective(s) involved.~~

~~The Public Staff shall also post on its website on a quarterly basis, beginning March 31, 2003, a pass/fail statement with respect to Measures 8 through 17 of Rule R9-8(a) together with a listing of any penalties for service quality violations, for all companies required to post such data.~~

COMMISSION NOTE: A website reporting section will be added by the Commission at a later date after the Parties have negotiated all of the specific details.

(~~f~~ e) Data Retention. Each local exchange company and CLP is required to retain complete records of the data collected and procedures used to calculate each ~~objective~~ service quality performance result for a minimum of one year from the date a report is filed with the Commission. Within this one-year period, local exchange companies and CLPs will provide, upon reasonable request by the Public Staff or Commission, breakdowns by wire center of their monthly service quality results for Measures 9 -14. If a company can show that it is unable to provide wire center level data, it may provide data at the most granular level possible, such as at the switch level.

(~~g~~ f) Uniform Measurement Procedures. Each company shall adhere to the following uniform measurement procedures when calculating its service objectives:

~~**COMMISSION NOTE:** Procedures for Operator "O" answertime (Measure 8), directory assistance answertime (Measure 9), business office answertime (Measure 10), and repair service answertime (Measure 11) will be included after final resolution following an evidentiary hearing on these measures.~~

Answertimes - General Considerations

Companies are expected to engineer the switching and interoffice facilities they use to provide operator "O", directory assistance, business office services, and repair services to customers in order to minimize the possibility of lost, misdirected, or abandoned calls and to keep customer delays to a minimum, consistent with Commission requirements and industry standards. All facilities, including network, ports, and trunks, used for provision of these services shall be engineered to provide a maximum blocking probability of one percent (1%) or less. No call that has been directed to a live operator or service representative queue should be blocked from entering the queue or deflected (abandoned by company action without consent of the calling party) after it has entered a queue.

Callers to operator "O", directory assistance, business office, and repair service must be explicitly advised that they may press a "O" at any time during the call and have the call transferred to a live attendant if the respective menus exceed 45 seconds. All menu options, including any sub-menus, must be used in the calculation of the 45 seconds.

Where an opt-out message is required, the option must be offered within the first 45 seconds of the initial menu. There is no requirement for offering the opt-out message when a menu, including sub-menus, is 45 seconds or less. Calls initially directed to a menu shall be transferred to a live attendant or a live attendant queue immediately if the customer presses a key to request the transfer or within 10 seconds if the customer fails to interact with the menu system following any prompt by pressing a key of a Dual-Tone Multi-Frequency (DTMF) telephone keypad or providing a voice response.

Any company that obtains its operator "O" service, directory assistance, business office service, or repair service from another source shall identify the company that actually provides the service in its monthly report. The company that provides service to the customer is responsible for selecting a service provider that furnishes answertime service that satisfies Commission requirements.

Companies must ensure that the monthly service quality statistics they report to the Commission reflect the performance they provide to North Carolina customers. Companies that submit performance results to the Commission reflecting regionwide or nationwide performance must be prepared to demonstrate to the Commission that the performance they provide to their North Carolina customers is equivalent to the performance they report on a regionwide or nationwide basis.

Companies without automatic answertime testing may evaluate their answertime performance by manually placing test calls as long as they place a sufficient number of calls at appropriate times to ensure that a statistically valid and representative sample is obtained each month. These companies should notate on their reports that their answertimes are calculated through random sampling and should describe the methodology used, including the number of test calls completed per month and the times such calls were made.

Operator "O" Answertime (Measure 5):
Measured quantity: (a) The percentage of operator "O" calls from North Carolina each month that reach a live operator within 10 seconds; or (b) the average length of time it takes for calls from North Carolina to operator "O" telephone numbers to be answered each month.

Measurement procedures:
(1) For calls routed directly to live operators (no initial menu): Each answertime measurement shall begin at the instant the call arrives at the switch serving the operator service positions and continue until a live operator prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements. Companies may utilize a recorded branding announcement, not over 10 seconds in length, after the call has reached the switch. The timing for a branded call will begin at the end of the recorded announcement and continue until a live operator prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements.
(2) For calls initially routed to an automated menu: Each answertime measurement shall begin at the instant the call enters the queue leading to a live operator and continue until a live operator prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements.
(3) For calls initially routed to an automated menu and handled without the intervention of a live operator: The answertime for these calls should be counted as one second.

The monthly performance figure reported to the Commission may be calculated as a % in x seconds or as an average speed of answer.

(a) % in x seconds format: Operator "O" answertime=

100 x Total Operator "O" calls with answertimes of 10.0 seconds or less
Total calls routed to live "O" operators

Companies shall exclude from the numerator and denominator of this calculation data for all calls in which the caller abandons the call within 10 seconds after it (1) arrives at the switch serving the operator service positions (for calls routed directly to a live operator) or (2) enters the queue leading to a live "O" operator (for calls initially routed to a menu). The operator "O" answertime calculation shall reflect all other "O" calls that are routed to live operators, including calls abandoned after 10 seconds.

(b) Average speed of answer format: Operator "O" answertime =

$$\frac{\text{Sum of queue holding times for all Operator "O" calls}}{\text{Total Operator "O" calls}}$$

Monthly reporting requirement: Companies shall report either the percentage of Operator "O" calls from North Carolina answered within 10 seconds by a live "O" Operator or their Operator "O" average speed of answer using the appropriate formula set forth above to the nearest tenth of a percent.

Directory Assistance (DA) Answertime (Measure 6):
Measured quantity: (a) The percentage of calls from North Carolina to all publicly available local DA telephone numbers each month that access a live DA operator within 10 seconds; or (b) the average length of time it takes for calls from North Carolina to all publicly available local DA telephone numbers to be answered each month.

Measurement procedures:
(1) For calls routed directly to live DA operators (no initial menu): Each answertime measurement shall begin at the instant the call arrives at the switch serving the DA operator positions and continue until a live DA operator prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements. Companies may utilize a recorded branding announcement, not over 10 seconds in length, after the call has reached the switch. The timing for a branded call will begin at the end of the recorded announcement and continue until a live DA operator prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements.
(2) For calls initially routed to an automated menu: Each answertime measurement shall begin at the instant the call enters the queue leading to a live DA operator and continue until a live DA operator prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements.
(3) For calls initially routed to an automated menu and handled without the intervention of a live DA operator: The answertime for these calls should be counted as one second.
The monthly performance figure reported to the Commission may be calculated as a % in x seconds or as an average speed of answer.

(a) % in x seconds format: DA answertime=

$$\frac{\text{100 x Total number of DA calls with answertimes of 10.0 seconds or less}}{\text{Total calls made to DA and routed to live operators}}$$

Companies shall exclude from the numerator and denominator of this calculation data for all calls in which the caller abandons the call within 10 seconds after it (1) arrives at the switch serving the live DA operator positions (for calls routed directly to a live DA operator) or (2) enters the queue leading to a live DA operator (for calls initially routed to a menu). The DA answertime calculation shall reflect all other DA calls that are routed to live DA operators, including calls abandoned after 10 seconds.

(b) Average speed of answer format: DA answertime =

$$\frac{\text{Sum of queue holding times for all DA calls}}{\text{Total DA calls}}$$

Monthly reporting requirement: Companies shall report either the percentage of DA calls from North Carolina answered within 10 seconds by a live DA operator or their DA average speed of answer using the appropriate formula set forth above to the nearest tenth of a percent.

Business Office Answertime (Measure 7):
Measured quantity: The average length of time it takes for calls from North Carolina to all publicly available company business office telephone numbers to be answered each month.

Measurement procedures:
(1) For calls routed directly to live business office representatives (no initial menu): Each answertime measurement shall begin at the instant the call arrives at the switch serving the business office representative positions and continue until a live business office representative prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements.
(2) For calls initially routed to an automated menu and then routed to a live business office representative: Answertime measurement shall begin at the instant the call enters the queue leading to a live business office representative and continue until a live business office representative prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements.
(3) For calls initially routed to an automated menu and handled without the intervention of a live business office representative: The answertime for these calls should be counted as one second.

The monthly performance figure reported to the Commission shall be calculated as follows:

Business office answertime =

$$\frac{\text{Sum of queue holding times for all business office calls}}{\text{Total business office calls}}$$

Live business office representatives are expected to be available to handle incoming calls from North Carolina for a minimum of nine hours per day Monday through Friday, excluding company holidays.

Monthly reporting requirement: Companies shall report their business office average speed of answer using the formula set forth above to the nearest tenth of a percent.

Repair Service Answertime (Measure 8):
Measured quantity: The average length of time it takes for calls from North Carolina to all publicly available company repair service telephone numbers to be answered each month.

Measurement procedures:
(1) For calls routed directly to live repair service representatives (no initial menu): Each answertime measurement shall begin at the instant the call arrives at the switch serving the repair service representative positions and continue until a live repair service representative prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements.
(2) For calls initially routed to an automated menu and then routed to a live repair service representative: Answertime measurement shall begin at the instant the call enters the queue leading to a live repair service representative and continue until a live repair service representative prepared to offer immediate assistance answers the call. The answertime for the call is the interval between these two time measurements.
(3) For calls initially routed to an automated menu and handled without the intervention of a live repair service representative: The answertime for these calls should be counted as one second.

The monthly performance figure reported to the Commission shall be calculated as follows:

Repair service answertime =

$$\frac{\text{Sum of queue holding times for all repair service calls}}{\text{Total repair service calls}}$$

For carriers with 10,000 access lines or more, live repair service representatives are expected to be available to handle incoming calls from North Carolina customers 24 hours a day, seven days a week.

Monthly reporting requirement: Companies shall report their repair service average speed of answer using the formula set forth above to the nearest tenth of a percent.

Trouble Reports, Service Orders, and Customer Appointments – General Considerations

A trouble report is defined as "any report from a subscriber or end user of telephone service to the telephone company indicating improper functioning or defective conditions with respect to the operation of telephone facilities over which the telephone company has control." Such reports shall be date and time stamped immediately upon receipt and date and time stamped again immediately after ~~they~~ the troubles have been cleared by company personnel. Note: Whenever Rule R9-8 requires a date and/or time stamp, the date and/or time stamp may be recorded electronically or otherwise so long as the date and/or time is saved for future reference.

Service orders and new service installation appointment requests shall also be date and time stamped immediately upon receipt and again after the service order has been completed or the new service installation appointment has been met.

Reported troubles that involve different access lines shall be regarded as separate troubles, even if the access lines terminate at the same premises, and/or the troubles result from a common cause, such as damaged cable or defective common equipment at a central office.

Each company shall file with its initial quarterly report a detailed list of the specific categories of troubles, service orders, and appointments it considers excludable for purposes of reporting trouble reports, service ordering, or appointment statistics. This list should reflect exclusion of such categories as inside wiring, terminal equipment, voice mail, and long distance services. Each company shall notify the Commission promptly in writing of any changes to this list.

Subsequent reports and duplicate reports of previously reported troubles that have not been cleared by the company shall not be included in either initial or repeat trouble report totals.

Initial Customer Trouble Reports (Measure ~~12~~ 9):

Measured quantity: The number of initial troubles reported by telephone company subscribers in proportion to the number of total company access lines.

Company measurement procedures: Companies should continuously track the initial trouble reports that are received by their trouble reporting center(s). The statistic reported to the Commission shall be computed by taking the count of initial troubles reported in a given area between 12:00 midnight at the beginning of the first day of the calendar month and 12:00 midnight at the end of the last day of the same month, dividing this figure by the total access lines in service in that same area at the end of the last day of the month, and multiplying the quotient by 100.

~~% initial troubles per = 100 x initial troubles reported during month~~
~~100 access linesTotal access lines in service at the end of month~~

Initial customer trouble reports =

$$\frac{100 \times \text{initial trouble reports received during month}}{\text{Total access lines in service at the end of month}}$$

Troubles associated with nonregulated equipment, products, or services, and subsequent reports of the same trouble that are made after the initial report has been received but before the company has cleared the trouble condition should be excluded from the numerator of this formula. Companies shall identify in their ~~monthly~~ quarterly reports the specific categories of equipment, products, or services that they consider nonregulated and exempt from Commission jurisdiction for initial trouble reporting purposes. Carriers may request a waiver of this requirement, and the Commission may grant such a waiver for good cause shown.

In the event a company systematically excludes the initial troubles reported by a class or classes of customers (for example, large business customers) from the troubles counted in the numerator of this calculation, the company shall also exclude the access lines for the same class(es) of customers from the total access lines figure appearing in the denominator. The company shall explain in its ~~monthly~~ quarterly service quality report any deviation between the access line count used for monthly reporting of initial troubles per 100 access lines and the total access line count which it furnishes each month in its access line report.

~~Monthly r~~Reporting requirement: All companies shall file statistics on initial customer trouble reports per 100 total access lines. Figures shall be reported to the nearest hundredth of a percent. Each company shall report a separate figure for its entire North Carolina service area~~,~~; and each exchange~~, and each wire center, if an exchange has multiple wire centers~~. If the monthly figure for any ~~wire center or~~ exchange exceeds ~~4.75~~ 7.125 per 100 access lines, a brief explanation should be provided for the failure to meet this objective.

Repeat Reports (Measure ~~13~~ 10):
Measured quantity: The number of repeat troubles reported by telephone company subscribers in proportion to the number of company access lines.

Company measurement procedures: Companies should continuously track the repeat trouble reports that are reported to their trouble reporting center(s). A repeat trouble is a trouble reported on an access line for which another trouble or troubles has been reported within the preceding 30 days and subsequently cleared. The statistic reported to the Commission shall be computed by taking the count of repeat troubles reported in a given area between 12:00 midnight at the beginning of the first day of the calendar month and 12:00 midnight at the end of the last day of the same month, dividing this figure by the total access lines in service in that same area at the end of the last day of the month, and multiplying the quotient by 100.

~~% of repeat troubles per = 100 x repeat troubles reported during month~~
~~100 access lines — Total access lines in service at end of month~~

Repeat customer trouble reports =

$$\frac{100 \times \text{repeat trouble reports received during month}}{\text{Total access lines in service at end of month}}$$

Repeat troubles associated with nonregulated equipment, products, or services shall be excluded from the count appearing in the numerator of this formula. Companies shall identify in their ~~monthly~~ quarterly reports the specific categories of equipment, products, or services that they consider nonregulated and exempt from Commission jurisdiction for repeat trouble reporting purposes. Carriers may request a waiver of this requirement, and the Commission may grant such a waiver for good cause shown.

In the event that a company systematically excludes the repeat troubles reported by a class or classes of customers (for example, large business customers) from the troubles counted in the numerator of this calculation, the company shall also exclude the access lines for the same class(es) of customers from the total access lines figure appearing in the denominator. The company shall explain in its ~~monthly~~ quarterly service quality report any deviation between the access line count used for monthly reporting of repeat troubles per 100 access lines and the total access line count which it furnishes each month in its access line report.

Monthly reporting requirement: All companies shall file statistics on repeat customer trouble reports per 100 access lines. Figures shall be reported to the nearest hundredth of a percent. Each company shall report a separate figure for its entire North Carolina service area~~,~~; and for each exchange~~, and each wire center, if an exchange has multiple wire centers~~. If the monthly figure for any ~~wire center~~

~~or~~ exchange exceeds ~~1.0~~ 1.5 per 100 access lines, a brief explanation should be provided for the failure to meet this objective.

Out-of-Service Troubles Cleared Within 24 Hours (Measure ~~14~~ 11):
Measured quantity: The percentage of total out-of-service troubles that are cleared within 24 hours during the reporting month.

Company measurement procedures: Companies should continuously track the out-of-service troubles (troubles involving inability to make outgoing calls or receive incoming calls, or line impairments so severe that they render voice communication impossible) that are reported by company subscribers and end users. Each out-of-service trouble report should be date and time stamped immediately upon receipt and date and time stamped immediately after the trouble condition is cleared. The time taken to clear the trouble is the difference between these two times. To obtain the reported statistic, the company shall count the number of out-of-service troubles that ~~were~~ was cleared during the calendar month and within 24 hours of their receipt, ~~and~~ divide this figure by the total number of out-of-service trouble reports cleared during the calendar month, and then multiply by 100 to obtain the percentage cleared within 24 hours:

~~% out-of-service troubles cleared within 24 hours = 100 x total out-of-service troubles cleared within 24 hours during month / Total out-of-service troubles cleared during month~~

Out-of-service troubles cleared within 24 hours =

$$\frac{100 \times \text{total out-of-service troubles cleared within 24 hours during month}}{\text{Total out-of-service troubles cleared during month}}$$

Troubles associated with nonregulated equipment, products, or services and troubles that do not involve out-of-service conditions shall be excluded from the troubles counted in the numerator and denominator of this formula. Companies shall identify in their monthly reports the specific categories of equipment, products, or services that they consider nonregulated and exempt from Commission jurisdiction for out-of-service trouble reporting purposes. Carriers may request a waiver of this requirement, and the Commission may grant such a waiver for good cause shown. Troubles in which the customer specifically requested an appointment beyond 24 hours shall be excluded from the troubles counted in the numerator and denominator of this formula.

Monthly reporting requirement: All companies shall file statistics on out-of-service troubles cleared within 24 hours of receipt, reported to the nearest tenth of a percent. Each company shall report a separate figure for its entire North Carolina service area~~,~~ and for each exchange~~, and each wire center, if an exchange has multiple wire centers~~. If the monthly figure for any wire center or exchange is below ~~95%~~ 80%, a brief explanation should be provided for the failure to meet this objective.

Regular Service Orders Completed Within 5 Working Days (Measure ~~15~~ 12):
Measured quantity: The percentage of regular service orders that are completed during any calendar month within five working days of receipt by the company.

Company measurement procedures: Companies should continuously track the receipt and completion dates and times of all regular service orders (service orders placed by residential customers and by business customers with five or fewer access lines). Each regular service order should be date and time stamped immediately upon receipt by the company and date and time stamped immediately after the order has been completed. The reported statistic shall be calculated as follows:

~~% of regular service orders completed within 5 working days = 100 x orders completed during month within 5 working days of receipt / Total orders completed during month~~

Regular service orders completed within 5 working days =

$$\frac{100 \times \text{regular service orders completed during month within 5 working days of receipt}}{\text{Total regular service orders completed during month}}$$

For purposes of this calculation, "working days" shall be considered to be all days except Saturdays, Sundays, New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day, provided these are observed as paid company holidays.

Orders for nonregulated equipment, products, or services shall be excluded from both the numerator and denominator of this formula. Companies shall identify in their ~~monthly~~ quarterly reports the specific categories of equipment, products, or services that they consider nonregulated and exempt from Commission jurisdiction for regular service order reporting purposes. Carriers may request a waiver of this requirement, and the Commission may grant such a waiver for good cause shown. Orders wherein a customer specifically requests an appointment beyond 5 days and/or the delay was specifically and solely caused by the customer should be excluded from both the numerator and denominator of this formula.

Monthly reporting requirement: All companies shall report the percentage of regular service orders completed during the calendar month within five working days of receipt by the company. Figures shall be reported to the nearest tenth of a percent. Each company shall report a separate figure for its entire North Carolina service area~~,~~ and for each exchange~~, and each wire center, if an exchange has multiple wire centers~~. If the monthly figure for any ~~wire center or~~ exchange is below ~~90.0%~~ 80%, a brief explanation should be provided for the failure to meet this objective.

New Service Installation Appointments Not Met for Company Reasons (Measure ~~16~~ 13):
Measured quantity: The percentage of ~~customer~~ new service installation appointments that are scheduled to be completed during the calendar month but are missed due to company reasons.

Company measurement procedures: Companies shall maintain a record of the ~~customer~~ new service installation appointments that are scheduled to be completed during each calendar month. The company shall track the scheduled dates and times for these appointments and the actual completion dates and times and, for those appointments that are not kept, shall maintain a detailed record of the reason(s) for failure to keep them. The percentage of ~~customer~~ new service installation appointments missed during the calendar month due to company reasons shall be calculated as follows:

~~% of customer appointments not met for company reasons = 100 x customer appts not completed because of company reasons / Customer appointments scheduled to be completed~~

New service installation appointments not met for company reasons =

$$\frac{100 \times \text{new service installation appointments not met because of company reasons}}{\text{New service installation appointments scheduled to be met}}$$

Any ~~customer~~ new service installation appointment missed due to customer actions shall be excluded from the numerator of this formula.

Appointments associated with installation or moving of, or changes or repairs to, nonregulated equipment, products, or services shall be excluded from the numerator and denominator of this formula. Companies shall identify in their ~~monthly~~ quarterly reports the specific categories of equipment, products, or services that they consider nonregulated and exempt from Commission jurisdiction for customer appointments reporting purposes. Carriers may request a waiver of this requirement, and the Commission may grant such a waiver for good cause shown.

Companies, at a minimum, shall offer customers scheduling premises appointments the opportunity to select from a set of two or more four-hour appointment "windows" that will be made available for each day that appointments are being scheduled. An appointment will be considered "missed" if the

company representative responsible for performing the premises work fails to arrive at the premises and begin work within the appointment window, or if the representative fails to complete the requested work by 12:00 midnight at the end of the appointment date.

Monthly reporting requirement: Companies shall file the percentage of total ~~customer~~ new service installation appointments not met during the month for company reasons to the nearest tenth of a percent. Each company shall report a separate figure for its entire North Carolina service area~~,~~ and for each exchange~~, and each wire center, if an exchange has multiple wire centers~~. If the monthly figure for any ~~wire center or~~ exchange exceeds ~~5.0%~~ 7.5%, a brief explanation should be provided for the failure to meet this objective.

New Service Held Orders Not Completed Within 30 Days (Measure ~~17~~ 14):
Measured quantity: The number of new access line orders that, at any time during the calendar month, have been held for over 30 calendar days following receipt, in proportion to the total company access lines in service.

Company measurement procedures: Companies shall date and time stamp each new service order immediately upon receipt and shall identify and count all orders during the calendar month that have not been completed within 30 days from the date and time they were received. Each such order shall be counted as a new service held order not completed within 30 days. The total number of new service held orders not completed within 30 days shall be reported to the Commission as a percentage of total company access lines as of midnight at the end of the last day of the month:

~~% of new service held orders not completed within 30 days = 100 x orders not completed within 30 days at any time during month / Total access lines in service at the end of month~~

New service held orders not completed within 30 days =

$$\frac{100 \times \text{new service orders not completed within 30 days at any time during month}}{\text{Total access lines in service at the end of month}}$$

Delays caused by the customer that prevent the company from completing an order within 30 days of receipt shall be excluded from the numerator of this formula. Further, orders with customer-requested appointments beyond 30 days shall be excluded from the numerator of this formula.

New service orders for nonregulated equipment, products, or services shall be excluded from the numerator of this formula. Companies shall identify in their monthly reports the specific categories of equipment, products, or services that they consider nonregulated and exempt from Commission jurisdiction for new service held order reporting purposes. Carriers may request a waiver of this requirement, and the Commission may grant such a waiver for good cause shown.

In the event a company systematically excludes the new service held orders for a class or classes of customers (for example, large business customers) from the held orders counted in the numerator of this calculation, the company shall also exclude the access lines for the same class(es) of customers from the total access lines figure appearing in the denominator. The company shall explain in its ~~monthly~~ quarterly service quality report any deviation between the access line count used for monthly reporting of held orders and the total access line count which it furnishes each month in its access line report.

Monthly reporting requirement: Companies shall report the percentage of new service held orders not completed within 30 days, to the nearest hundredth of a percent. Each company shall report a separate figure for its entire North Carolina service area~~,~~ and for each exchange~~, and each wire center, if an exchange has multiple wire centers~~. If the monthly figure for any ~~wire center or~~ exchange is above ~~0.1%~~ 0.15% of total access lines, a brief explanation should be provided for the failure to meet this objective.

(~~h~~ g) Directory Assistance Listing Updates. Carriers must update their DA customer listings in any directory database the company maintains and/or controls within 48 hours of a service order resulting in a new or changed listing, excluding Saturdays, Sundays, and holidays or within 48 hours excluding Saturdays, Sundays, and holidays of either notification of such a new or changed listing or receipt of a completed service order from another carrier or DA provider. Carriers that provide DA to their customers from a third party should select a provider that updates new or changed listings within 48 hours of notification; these carriers must provide updated information to the third party provider within 24 hours of receipt.

(~~i~~ h) Directory Assistance Refunds. Carriers are required to provide DA refunds, upon request, for an incorrect listing ~~or no listing~~ provided to a DA customer. Carriers are further required to provide an annual bill insert to customers informing them of the uniform DA refund policy and to publish the uniform DA refund policy prominently in the directory assistance section of each local telephone directory.

IT IS, THEREFORE, ORDERED as follows:

1. That Commission Rule R9-8 shall be amended as reflected in Section VI of this Order effective July 1, 2004.

2. That the first quarterly reports due under revised Rule R9-8 shall be filed by no later than October 20, 2004 and reflect the results for July, August, and September 2004.

3. That Companies are not required to file the monthly reports in the interim. The next report due will be October 20, 2004.

4. That no later than Tuesday, August 3, 2004, the Parties shall file a report with the Commission detailing the negotiations and their specific recommendations on website reporting. The Commission upholds and affirms its decision on website reporting as outlined in the *December 27, 2002 Order*. However, the Commission finds it appropriate to hold in abeyance the specific details of the website reporting requirement and the effective date of the website reporting requirement in order to allow the Parties the opportunity to negotiate on a appropriate means to allow the public access to the service quality information.

5. That carriers that provide their own DA service shall complete an audit of the accuracy of their DA and file a copy of the audit results with the Commission by no later than December 3, 2004.

ISSUED BY ORDER OF THE COMMISSION.
This the 4th day of June, 2004

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Commissioner Robert V. Owens, Jr. dissents, in part, on Unresolved Issue No. 2 and Negotiated Issue No. 7. Specifically, Commissioner Owens believes that the last sentence of the Force Majeure Clause should read, "The Commission may grant waiver requests if the Commission finds that all four criteria have been met."

Commissioner Michael S. Wilkins concurs on Unresolved Issue No. 8.
Commissioner J. Richard Conder and Commissioner Michael S. Wilkins dissent on Negotiated Issue No. 11 (website reporting).

bp060304.01

COMMISSIONER MICHAEL S. WILKINS, CONCURRING: With this order, I take issue to answer times that we invoke on the Telephone Companies. In my opinion, I don't care if the phone is answered in 20 seconds, 30 seconds or 60 seconds. What I am most concerned about is how long it takes me to get the proper person on the line that can resolve my problem or complaint in a timely manner. If the phone is answered in 15 seconds then I am transferred to another person after holding for five (5) minutes and then still transferred once again and hold for another additional (3) three minutes before finally arriving at the appropriate service person that can actually resolve my issue, what is my answer time as viewed by the Commission order. The answer time is 15 seconds; not 8 minutes and 15 seconds and even though I waited on the phone for 8 minutes 15 seconds that company has met the criteria for our Quality of Service Test. On the other hand, if the answer time is 50 seconds and I am immediately transferred to the person who can solve my problem; This company failed the Quality of Service measure as set forth by the Commission. Something is not right about this scenario.

We should place more emphasis on the consumer being connected to the proper service person than how long it takes to receive the call from the consumer.

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

DOCKET NO. P-100, SUB 99
DOCKET NO. P-100, SUB 99a

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-100, SUB 99 In the Matter of Quality of Service Objectives for Local Exchange Telephone Companies	)	ERRATA ORDER
DOCKET NO. P-100, SUB 99a In the Matter of Quality of Service Reports Pursuant to Rule R9-8	)	

BY THE CHAIR: On June 4, 2004, the Commission issued its *Order Amending Commission Rule R9-8 Effective July 1, 2004.*

Section VI of the *June 4, 2004 Order* provides an amended Rule R9-8 as adopted by the Commission. The Commission reflected the original Rule R9-8 as adopted in the *December 27, 2002 Order*, with underlining to indicate additions and strike through to indicate deletions.

On Page 99 of the *June 4, 2004 Order*, which is in Section VI, the Commission provided the adopted uniform reporting procedure for Out-of-Service Troubles Cleared Within 24 Hours. The section titled "Monthly reporting requirement" contains an error. The Commission erroneously did not remove the phrase "wire center or" from the monthly reporting requirement. This phrase should be removed since the Parties negotiated, and the Commission accepted the negotiation, that data at the wire center level should not be provided (See Negotiated Issue No. 8 on Page 79 of the *June 4, 2004 Order*). Therefore, the monthly reporting requirement section on Page 99 of the *June 4, 2004 Order* should be changed to read:

> Monthly reporting requirement: All companies shall file statistics on out-of-service troubles cleared within 24 hours of receipt, reported to the nearest tenth of a percent. Each company shall report a separate figure for its entire North Carolina service area;

and for each exchange~~, and each wire center, if an exchange has multiple wire centers~~. If the monthly figure for any ~~wire center or~~ exchange is below ~~95%~~ 80%, a brief explanation should be provided for the failure to meet this objective.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 11th day of June, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bp061004.01

DOCKET NO. P-100, SUB 99
DOCKET NO. P-100, SUB 99a

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-100, SUB 99 In the Matter of Quality of Service Objectives for Local Exchange Telephone Companies DOCKET NO. P-100, SUB 99a In the Matter of Quality of Service Reports Pursuant to Rule R9-8	ERRATA ORDER

BY THE CHAIR: On June 4, 2004, the Commission issued its *Order Amending Commission Rule R9-8 Effective July 1, 2004.*

Page 85 of the *June 4, 2004 Order* contains a typographical error. The Objective column for Directory Assistance Answertime should read "85% or more of calls answered within 10 seconds or ASA of 6 seconds."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 17th day of June, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bp061604.01

DOCKET NO. P-100, SUB 133d

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of General Proceeding to Determine Permanent Pricing for Unbundled Network Elements	ORDER ON IMPACT OF TRO ON COST OF CAPITAL AND DEPRECIATION RATE INPUTS FOR THE UNE RATES OF BELLSOUTH, CAROLINA, CENTRAL, AND VERIZON

BY THE COMMISSION: On December 30, 2003, the Commission issued its *Order Adopting Permanent Unbundled Network Element (UNE) Rates for BellSouth Telecommunications, Inc. (BellSouth).* Finding of Fact Nos. 8 and 9 were as follows:

Finding of Fact No. 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.

Finding of Fact No. 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.

Further on December 30, 2003, the Commission issued its *Order Requesting Comments on Impact of TRO on Cost of Capital and Depreciation Rate Inputs for the UNE Rates of BellSouth, Carolina, Central, and Verizon.*

The Commission explained in the *December 30, 2003 Order* requesting comments that on February 20, 2003, the Federal Communications Commission (FCC) adopted new rules for network unbundling obligations of incumbent local exchange companies (ILECs). The Commission noted that the FCC stated in its Attachment to its Triennial Review Press Release:

> Clarification of TELRIC [Total Element Long Run Incremental Cost] Rules – The order clarifies two key components of its TELRIC pricing rules to ensure that UNE prices send appropriate economic signals to incumbent LECs and competitive LECs. First, the order clarifies that the risk-adjusted cost of capital used in calculating UNE prices should reflect the risks associated with a competitive market. The order also reiterates the Commission's finding from the Local Competition Order that the cost of capital may be different for different UNEs. Second, the Order declines to mandate the use of any particular set of asset lives for depreciation, but clarifies that the use of an accelerated depreciation mechanism may present a more accurate method of calculating economic depreciation.

The Commission also pointed out that on August 21, 2003, the FCC released its *Triennial Review Order* (*TRO*), wherein 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 Commission noted that the FCC specifically addressed the cost of capital in Paragraphs 677 through 684 of the *TRO* and depreciation in Paragraphs 685 through 691 of the *TRO*.

Therefore, the Commission requested initial and reply comments from the Parties to consider and address the following question:

> How does the FCC's clarification on cost of capital and depreciation as outlined in the FCC's August 21, 2003 *TRO* impact the UNE rates established for BellSouth, Carolina, Central, and Verizon?

After granting an extension of time, initial comments were filed on February 4, 2004 by Carolina, Central, and Sprint Communications Company, L.P. (collectively referenced as Sprint) and on February 5, 2004 by AT&T Communications of the Southern States, LLC (AT&T) and MCImetro Access Transmission Services, LLC (MCI) (collectively referenced as AT&T/MCI), BellSouth, the Public Staff, and Verizon.

On February 12, 2004, the Public Staff filed its Motion for Clarification and/or to Strike Statement. The Public Staff noted that it considered filing testimony along with its initial comments in this matter but stated that this would not be in compliance with the Commission's *Order*. The Public Staff stated its belief that the Commission would not solicit or accept testimony unless it scheduled an evidentiary hearing. The Public Staff commented that it was surprised to find that the statement of Dr. Randall Billingsley was attached as Exhibit A to BellSouth's initial comments. The Public Staff asserted that the statement was in the same format as testimony and even has Dr. Billingsley's resume attached.

The Public Staff requested that the Commission clarify whether its *Order* sought only comments or whether the parties should also submit testimony, statements, or affidavits. The Public Staff stated that if the Commission only sought comments, the Public Staff would request that the Commission strike without prejudice Exhibit A to BellSouth's comments as being premature.

The Public Staff noted that it was seeking the Commission's ruling on this issue as soon as possible because otherwise it will need to prepare testimony or a statement of its cost of capital witness in response to BellSouth's Exhibit A.

On February 16, 2004, the Presiding Commissioner issued his *Order Addressing Public Staff's Motion for Clarification and/or to Strike Statement*. The Presiding Commissioner stated that it was appropriate to allow BellSouth's Exhibit A to be recognized as initial comments filed in this matter.

On February 20, 2004, AT&T filed a Motion for Reconsideration of the *February 16, 2004 Order*. On March 2, 2004, BellSouth filed a Response to AT&T's Motion.

On March 5, 2004, the Presiding Commissioner issued his *Order Ruling on AT&T Motion for Reconsideration and Extending Time for Replies*. In the Order, the Presiding Commissioner found, in this particular case, good cause existed to strike Exhibit A sponsored by Dr. Billingsley to BellSouth's initial comments. The Presiding Commissioner also extended the time for reply comments to March 15, 2004. The Order stated that Dr. Billingsley's testimony, even were it in the form of comments, was an expert opinion primarily addressing what the cost of capital should be.

The Order noted that this issue is only to be reached after the Commission has determined what effect, if any, the TRO has on this subject. The Order noted that this testimony and other testimony may be appropriate later and possibly be subject to cross-examination, but not at that point in time. The Order struck Dr. Billingsley's testimony without prejudice to its subsequent refiling should the Commission decide to seek evidence addressing what the cost of capital should be.

Reply comments were filed by AT&T on March 1, 2004 and on March 12, 2004, MCI filed a motion to join in AT&T's reply comments. Sprint filed its reply comments on March 8, 2004. Finally, on March 19, 2004, reply comments were filed by BellSouth, the Public Staff, and Verizon.

The remainder of this Order summarizes the comments of the parties and presents the Commission's conclusions with regard to the impact of the TRO on the cost of capital and depreciation inputs previously established for the UNE rates of BellSouth, Carolina, Central, and Verizon.

FINDING OF FACT NO. 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, Central, and Verizon by soliciting comments in this regard by separate order.

FCC'S TRIENNIAL REVIEW ORDER

In Paragraphs 680 and 683 of the FCC's *TRO*, the FCC specifically stated the following with regard to its clarification on the cost of capital issue:

> 680. To ensure that UNE prices set by the states appropriately reflect the risks associated with new facilities and new services, we think it would be helpful to clarify two types of risks that should be reflected in the cost of capital. First, we clarify that a TELRIC-based cost of capital should reflect the risks of a competitive market. The objective of TELRIC is to establish a price that replicates the price that would exist in a market in which there is facilities-based competition. In this type of competitive market, all facilities-based carriers would face the risk of losing customers to other facilities-based carriers, and that risk should be reflected in TELRIC prices.
>
> 683. Second, we clarify that a TELRIC-based cost of capital should reflect any unique risks (above and beyond the competitive risks discussed above) associated with new services that might be provided over certain types of facilities. In the *Local Competition Order*, the Commission stated that different UNEs may have different costs of capital. We now clarify that the use of UNE-specific costs of capital is an acceptable method of reflecting in UNE prices any risk associated with new facilities that employ new technology and offer new services. A carrier in a TELRIC proceeding could, for example, attempt to demonstrate that the cost of capital associated with new services that might be provided over mixed copper/fiber loops is higher than the cost of capital used for voice services provided over other UNEs.

> We think this approach responds to the incumbent LECs' concern that our rules provide no opportunity for them to recover the cost of investing in facilities to provide services that are more advanced than those modeled under TELRIC.
>
> [footnotes omitted]

INITIAL COMMENTS

AT&T/MCI: AT&T/MCI asserted that the *TRO* was merely a clarification, not a revision, of the rules the FCC adopted in the 1996 *Local Competition Order.* According to AT&T/MCI, this clarification by the FCC does not require any changes to the 9.79% overall cost of capital that the Commission just determined was applicable to BellSouth in the recent UNE cost proceeding or the 10.01% value for Verizon and 10.10% value for Carolina/Central adopted by the Commission in the 1998 UNE cost proceeding. Specifically, as to Verizon and Carolina/Central, AT&T/MCI claimed that the *TRO*, which was issued more than five years after the evidence was presented on the cost of capital in the 1998 proceeding, does not have retroactive application.

AT&T/MCI stated that the cost of capital reflects the rate of return required to attract capital, i.e., the rate of return that investors expect to receive from alternative investments that have the same risk. In its 1996 *Local Competition Order*, the FCC defined the relevant cost of capital as one that reflects the risk incurred in the business of leasing UNEs at wholesale. In addition, Paragraph 702 of the *Local Competition Order* provided that the required return on investment would be defined by the "business risks that" the incumbents "face". AT&T/MCI argued that this reference was made to the risks that incumbents currently or foreseeably face, not the risks of a hypothetical competitive market. The FCC's *TRO* merely clarified this risk standard in Paragraphs 680 and 683.

According to AT&T/MCI, the FCC's requirement to reflect the risks of a competitive market in a TELRIC-based cost of capital for UNEs is a way of creating a consistent set of assumptions for a UNE cost study, but it does not become the license to increase costs as ILECs have claimed. Further, the assumption of a competitive market must be considered in the context of other assumptions with which the cost of capital is to be used for it to be consistent. AT&T/MCI stressed that each and every one of the assumptions used in a TELRIC study must reflect the costs that a hypothetical efficient carrier would incur if it were to deploy the least-cost technology currently available in the most efficient network configuration. The fundamental purpose of requiring ILECs to offer UNEs at cost-based prices is to prevent them from exercising the market power that AT&T/MCI believe ILECs have. Therefore, AT&T/MCI suggested that a forward-looking cost study should reflect the risks that the hypothetical efficient carrier would incur if it were subject to effective competition, but no more, because any higher cost of capital would defeat the object of TELRIC pricing.

AT&T/MCI opined that the primary risk a hypothetical efficient carrier would face is that a future competitor would have available even more efficient technology and/or a lower cost network configuration. However, this risk is, and always has been, reflected in the depreciation rates such as those assumed in TELRIC studies. Therefore, AT&T/MCI submitted that it is far from clear that investors would demand a high return from a hypothetical carrier applying economic depreciation to its assets, even assuming that carrier was subject to facilities-based competition.

AT&T/MCI argued that the *TRO* also eliminated any conceivable "real-world" basis for competitive risks or any technological risks that the *TRO* indicates should be reflected in the cost of capital input. First, AT&T/MCI stated that the impairment standard adopted in the *TRO* requires ILECs to unbundle network elements only when the likelihood of significant facilities-based competitive entry is low. Second, AT&T/MCI believe that the *TRO* largely eliminated any rationale for adjusting the cost of capital upward to reflect the second type of risk, which according to Paragraph 683, is "any risk associated with new facilities that deploy new technology and offer new services." AT&T/MCI asserted that the UNEs in this docket are ones that allow competitors to offer standard, basic voice-

grade services. Further, AT&T/MCI noted that Paragraph 683 of the *TRO*, explicitly affirmed the right of state commissions to adopt a single cost of capital for all UNEs. Therefore, AT&T/MCI considered it inappropriate to consider any risk associated with technology in the UNE cost of capital.

Further, AT&T/MCI noted that the *TRO* did not provide any quantitative guidance concerning the appropriate cost of capital for a UNE cost study. The *TRO* left to state commissions the task of deciding the appropriate cost of capital inputs for a TELRIC study, subject to the FCC's clarification. AT&T/MCI proffered that two decisions have been rendered after the *TRO* which may provide some additional guidance to interpret the *TRO's* clarification regarding the cost of capital input in a TELRIC study. First, the Wireline Competition Bureau of the FCC took the FCC's clarification on cost of capital into account in rendering its opinion in an arbitration between Verizon Virginia and AT&T/WorldCom on August 29, 2003 (the *Virginia Arbitration Order.*) Second, the New Hampshire Public Utilities Commission issued a decision on cost of capital in an Order dated January 16, 2004, (the *New Hampshire Cost of Capital Order*) in which it determined that an overall cost of capital for Verizon of 8.2% was appropriate. AT&T submits that there are examples where application of the specific methodology adopted in the *Virginia Arbitration Order* to the methodology adopted by the Commission demonstrate that the 9.79% cost of capital recently adopted for BellSouth and the 10.01% for Verizon an 10.10% for Carolina/Central adopted in 1998 is clearly reasonable. For example, AT&T/MCI stated that the *Virginia Arbitration Order* used the same analysis to determine the forward-looking cost of debt for Verizon that Public Staff witness Hinton used to determine the cost of debt for BellSouth in 2003 and Verizon and Carolina/Central in 1998 which was adopted by the Commission. Further, the *Virginia Arbitration Order* relied upon the Capital Asset Pricing Model (CAPM) approach to estimate the cost of equity. While the Public Staff witness relied upon the results of a Discounted Cash Flow (DCF) analysis to determine his cost of equity recommendation which was adopted by the Commission, a CAPM analysis was used in his testimony to confirm the reasonableness of the DCF analysis results. In the *New Hampshire Cost of Capital Order*, the New Hampshire Commission used a group of telecommunications companies as a proxy for businesses that have risks similar to those of a company selling UNEs and used the DCF analysis because it was the model that achieves the most reliable and consistent results which was the same conclusion reached by the Public Staff witness. AT&T/MCI stated that although the capital structure used by the Commission for BellSouth, Verizon, and Carolina/Central differs from that adopted in the *Virginia Arbitration Order*, this difference does not warrant review. The Commission determined that the evidence in the record supported a forward-looking capital structure of 60% equity and 40% debt which was used by BellSouth in its UNE model and was consistent with BellSouth's own target capital structure ratios. Reliance on a projected book value capital structure is reasonable and supported by the same analysis used by the New Hampshire Public Utilities Commission.

For the reasons summarized above, AT&T/MCI believed that the previously adopted cost of capital inputs for BellSouth, Verizon, and Carolina/Central are clearly reasonable in light of the *TRO* as interpreted in the *New Hampshire Cost of Capital Order* and the *Virginia Arbitration Order*. Further, AT&T/MCI submitted that there is no reason to believe that application of the clarification in the *TRO* would result in different UNE rates based upon the cost of capital inputs determined in the 1998 and 2003 UNE cost proceedings.

BELLSOUTH: BellSouth pointed out that Section 252(d)(1) of the Telecommunications Act of 1996 (TA96) provided that rates for UNEs shall be based on the cost of providing the UNE and may include a reasonable profit and gave state utility commissioners the authority to establish just and reasonable rates for UNEs. However, state commissions must adhere to the pricing standards set out in TA96 and to the FCC rules implementing those standards when determining UNE rates. Soon after passage of TA96, the FCC issued its *Local Competition Order*. That Order included, among other rules and regulations, a requirement that state commissions must use the TELRIC methodology

to establish UNE rates. One component of TELRIC includes the appropriate risk-adjusted cost of capital.

In the *TRO*, which was released after the parties filed their post-hearing proposed orders or briefs in the instant proceeding, the FCC clarified that the application of TELRIC to the cost of capital, like other inputs, should reflect the risks of a competitive market. Therefore, BellSouth stated that the Commission did not consider the FCC's clarification in the *TRO* of the application of a TELRIC cost of capital. BellSouth further asserted that the FCC's requirement that the cost of capital reflect the future conditions of a competitive market is in direct contrast to the cost of capital recently set by the Commission equal to 9.79% for BellSouth based upon "current economic conditions." BellSouth opined that as a matter of law, a cost of capital based on "current economic conditions", rather than on the future risks BellSouth will face in a highly competitive market, is not forward-looking.

BellSouth noted that the FCC explained in Paragraph 682 of the *TRO* that UNE rates based on an assumption of a forward-looking network that uses the most efficient technology and deployed in a competitive market, without also compensating for the risks associated with investment in such a network, would artificially reduce the value of the ILEC network and send improper pricing signals to competitors. Such artificially low UNE rates would encourage CLPs to lease the ILEC's network rather than invest in their own facilities and thus slow the development of facilities-based competition. For that reason, BellSouth pointed out that the FCC expressly rejected the proposal AT&T made to the FCC, and to the Commission in this proceeding, that only the actual competitive risk the ILEC currently faces in providing UNEs should be considered in establishing the cost of capital.

BellSouth also pointed out that the FCC's Wireline Competition Bureau, assuming the role of the Virginia Commission and incorporating the clarifications regarding cost of capital in the *TRO*, set a cost of capital for Verizon of 12.95%. According to BellSouth, the *Virginia Arbitration Order* explained that it was not proper to use a comparison group of other utilities, particularly ILECs like BellSouth, because they did not face a competitive environment like the one that TELRIC requires and, instead, they continue to operate as regulated monopolies or near-monopolies in many of their markets. BellSouth pointed out that Paragraph 90 of the *Virginia Arbitration Order* explained why the FCC Wireline Competition Bureau chose to use a beta value, or risk measure, for a group of companies that face competition. BellSouth submitted that the large non-utilities which it urged the Commission to use as a comparison in this proceeding approximate the appropriate risks. In sum, BellSouth submitted that the *Virginia Arbitration Order* rejected the methodology used by the Commission in calculating BellSouth's cost of equity as inconsistent with TELRIC. Further, under the FCC's rules, BellSouth stated that a cost of debt cannot be forward-looking if it is based on the actual competitive market that BellSouth currently faces. Finally, in determining the appropriate capital structure, BellSouth stated that it is essential to look to the competitive market of the future, rather than a company's actual capital structure, and that the percentages of debt and equity that BellSouth actually has today is not pertinent under the correct legal test. BellSouth stated that the FCC Wireline Competition Bureau expressly rejected the precise approach to capital structure that the Commission used when it found that the theoretically correct capital structure is based on market values of debt and equity, not book values, in Paragraphs 101 and 102 of the *Virginia Arbitration Order*.

According to BellSouth, the Commission acknowledged that it did not apply the legal standard mandated by the FCC's rules in establishing a cost of capital. The proper legal question for the Commission to ask, at this point, is what is the appropriate cost of capital given the risks that BellSouth would face in a highly competitive market. BellSouth believed that the Commission should clearly conform its analysis to the FCC's requirement that state commissions assume a highly competitive market in setting a cost of capital. Accordingly, the Commission should take the critical next step and establish a cost of capital for use in calculating UNE rates that complies with the FCC's

TELRIC methodology as clarified in the *TRO*. BellSouth asserted that a failure to do so will result in UNE prices that do not send appropriate economic signals to ILECs and competitors.

PUBLIC STAFF: The Public Staff stated that the FCC clarified two types of risks that should be reflected in the cost of capital component of TELRIC-based UNE rates. First, because TELRIC is intended to replicate pricing in a facilities-based, competitive market, the FCC explained in Paragraphs 677 through 682 of the *TRO* that the cost of capital should reflect the competitive risks associated with new facilities and new services. In other words, the cost of capital should reflect the risks of a competitive market where facilities-based carriers may lose customers to other facilities-based carriers.

The Public Staff believes that the cost of capital recently approved by the Commission Order dated December 30, 2003 in this docket already reflects that competitive risk and therefore complies with the *TRO*. Furthermore, the Commission-approved cost of capital component for use in the UNE cost model by BellSouth sends the appropriate economic signals consistent with the promotion of efficient facilities investment as intended by TA96. In this latest BellSouth UNE proceeding, the Commission approved a 9.79% overall cost of capital. The testimony of BellSouth and intervenor witnesses discussed the growing competitive risks in the telecommunications industry. In particular, Public Staff witness Hinton's testimony reviewed numerous investor-related risk measures that investors consider when assessing BellSouth's overall risk. This perceived level of risk is factored into the rate of return that investors demand before they are willing to purchase a particular company's bonds or common stock. The financial reports by Value Line, Standard & Poor's, and other investment advisors clearly indicate that investors were then, as they are today, cognizant of the continued erosion of BellSouth's and other ILECs' revenues due to competition from other facilities-based competitors, cable companies, and wireless communications providers.

The Public Staff noted that in determining the forward-looking cost of common equity for purposes of this proceeding, the Commission gave its greatest weight to the market-based methods embodied in the Discounted Cash Flow (DCF) model as proposed by witness Hinton. The Public Staff asserted that the Commission appropriately recognized that investors' pricing decisions provide the most credible assessment of a security's future risk and future return. Witness Hinton's forward-looking cost of equity recommendation was based upon the application of the DCF model to both a group of companies in the telecommunications industry and a group of competitive companies with comparable measures of investor-related risk as the telecommunications group of companies. As with the cost of equity, the approved forward-looking cost of debt and capital structure reflect both current and future expectations of risk from an increasingly competitive telecommunications business.

The Public Staff added that the cost of capital components that the Commission approved in 1998 for use in Verizon's and Sprint's UNE cost models, however, do not necessarily reflect the increased competitive risks facing facilities-based carriers and may not comply with the *TRO*. Changes in the debt and equity capital markets and changes in facilities-based competition may necessitate a review of the appropriate cost of capital for Verizon and Sprint. However, a comparison of the approved costs of capital in the 1998 UNE proceeding and the 2003 BellSouth UNE proceeding indicates that the increased competitive risks from facilities-based carriers have been more than offset by decreases in the required rate of returns on debt and equity capital demanded by investors. The Public Staff commented that it appears the same may be true for Verizon and Sprint. Therefore, the Public Staff recommended that the Commission allow the currently approved overall costs of capital of 10.01% for Verizon and 10.10% for Sprint to remain until these companies' UNE rates are further reviewed.

Second, in Paragraph 683 of the *TRO*, the FCC clarified that a TELRIC-based cost of capital should reflect any unique risks (above and beyond the competitive risks discussed above) associated with new services that might be provided over certain types of facilities. Thus, the FCC suggested that the use of UNE-specific costs of capital may be appropriate to reflect any risk associated with new facilities that employ new technology and offer new services. However, the FCC noted in Paragraph

685 of the *TRO*, that the administrative burden associated with establishing multiple costs of capital could outweigh the benefits. Consequently, the FCC left it to the states to determine whether a single cost of capital appropriately reflects the risks associated with the competitive markets for the services provided over the ILECs' networks. With regard to the use of different costs of capital for different UNEs, the Public Staff believes that the increased administrative burden would outweigh any benefits. Indeed, not only would it be too speculative for the Commission to assign a particular or unique risk factor for any service above and beyond the competitive risks previously discussed, such a practice could also lead to inappropriate price signals for such services in the Public Staff's opinion. Therefore, based on its review of the *TRO*, the Public Staff recommended that the cost of capital input for BellSouth remain at 9.79%. Further, the Public Staff recommended that the cost of capital input for Verizon and Carolina/Central remain at 10.01% and 10.10%, respectively, until further review of those companies' UNE rates.

SPRINT: Sprint cited Paragraphs 680 and 683 of the *TRO* and noted that the FCC Wireline Competition Bureau has addressed the cost of capital issue within the context of the *TRO* in the *Virginia Arbitration Order*. Sprint pointed out that the *Virginia Arbitration Order* calculated a cost of capital in excess of what was recommended by competing local providers (CLPs) and even greater than requested by Verizon. Based on a comparison of the cost of debt and equity and the capital structure contained in the *Virginia Arbitration Order* to those approved by the Commission, Sprint stated that recalculating the TELRIC-based UNE rates as clarified in the *TRO*, the cost of capital will be greater than that approved in this docket. Sprint stated that this will result in higher UNE rates for all network elements.

VERIZON: Verizon stated that its Commission-approved UNE rates contravene the FCC's guidance regarding cost of capital and the Commission should modify the cost of capital component so that Verizon's UNE rates reflect the competitive risks recognized by the FCC. In the *TRO*, the FCC clarified that a proper TELRIC-based cost of capital should reflect the risks of operating in a market characterized by facilities-based competition and rejected the argument that the states should consider only the actual competitive risk the ILEC currently faces in providing UNEs. The FCC also clarified that the cost of capital for TELRIC should reflect any unique risks associated with new services that might be provided over certain types of facilities.

Verizon argued that the cost of capital the Commission adopted in its *UNE Orders* does not comply with the clarification articulated in the *TRO*. In arriving at a 10.01% overall cost of capital for Verizon, the Commission adopted the Public Staff's proposal, which in part, was based on book value capital structure. Such a capital structure fails to account for the effects of competition. Accordingly, Verizon believes the Commission should revisit its cost of capital determination so that it can be modified to reflect the risks inherent in TELRIC.

REPLY COMMENTS

AT&T/MCI: AT&T/MCI stated that the issue before the Commission in this phase of the docket is whether or not the FCC's clarification on the cost of capital in the *TRO* impacts the UNE rates established for BellSouth, Carolina/Central, and Verizon. AT&T/MCI asserted that the *TRO* clarification indicates that the Commission only needs to determine, as it has done, that the cost of capital established for the ILECs reflects the risks of a competitive market.

According to AT&T/MCI, BellSouth appears to find fault with only two aspects of the Commission's *December 30, 2003 Order* with respect to cost of capital and the *TRO* clarification. AT&T/MCI characterized these two aspects as follows: (1) the Commission did not rely upon a comparison group of non-utilities to determine the risk faced by BellSouth in providing UNEs in a competitive market and (2) relied upon the actual capital structure of BellSouth. In reply, AT&T/MCI noted that the New Hampshire Public Utilities Commission re-evaluated the cost of capital for Verizon New Hampshire, after the *TRO* and the *Virginia Arbitration Order*, and arrived at the conclusions that a group of telecommunications companies can be utilized as proxies to determine the risks faced by an

incumbent to provide UNEs in a competitive market and the book value of the incumbent can be relied upon to determine the appropriate capital structure.

AT&T/MCI noted that the *TRO* clarification did not mandate a particular methodology for assessing the appropriate competition-based risk adjustment. State commissions continue to have broad discretion to determine exactly what the costs and risks of facilities-based competition would be in their respective states. Mere rejection of BellSouth's evidence on the applicable competitive risk does not warrant establishing a different cost of capital based upon the *TRO* clarification. AT&T/MCI asserted that this Commission had, and continues to have, the discretion to accept or reject evidence presented in adversarial generic proceedings.

Contrary to BellSouth's arguments, AT&T/MCI also took the position that the *TRO* clarification does not mandate use of market values to determine capital structure. AT&T/MCI cited pages 48 through 49 of the *New Hampshire Cost of Capital Order*, wherein it states that "TELRIC requires a forward-looking estimate of capital costs, but it does not require a capital structure based on the market value of the components of the company's capital structure" as support for this position.

In reply to Sprint's initial comments, AT&T/MCI stated that Sprint implied that the passage of time between 1998 and now mandate higher UNE rates and Sprint relies upon the cost of capital established in the *Virginia Arbitration Order* to support Sprint's contention. AT&T/MCI argued that a mere comparison of the cost of capital established for Verizon-Virginia and the cost of capital established by the Commission is not instructive and meaningless with regard to the *TRO* clarification. Sprint is not Verizon-Virginia and did not present the same evidence in 1998 that the FCC Wireline Competition Bureau evaluated as a result of its proceedings in 2001. AT&T/MCI added that because the methodology used by the Commission to determine the cost of capital was appropriate, even in light of the *TRO* clarification and *Virginia Arbitration Order*, the cost of capital for Sprint should remain the same.

BELLSOUTH: In the *TRO*, the FCC stated unequivocally in Paragraph 681, that its TELRIC rules require that the cost of capital, like all other cost inputs, reflect the future conditions that would be present in markets with facilities-based competition. BellSouth noted that Paragraph 681 of the *TRO* expressly rejected AT&T/MCI's contention that the risks the ILEC faces currently should be considered in computing the appropriate cost of capital under TELRIC. BellSouth also stated that the United States District Court for the Northern District of Georgia reaffirmed this fundamental point in ruling that the cost of capital adopted by the Georgia Public Service Commission for BellSouth to set its UNE rates violated TELRIC. In the Court's Order dated March 18, 2004, among other things, the Court stated "Under TELRIC the cost of capital must be based upon the risk that BellSouth would face in a competitive market with multiple facilities-based providers, not the risk that BellSouth actually faces to date or currently."

According to BellSouth, AT&T/MCI attempted to negate the significance of the FCC's directives by characterizing them as "merely" clarifications. BellSouth argued that no matter what the label, the FCC was clear that a cost of capital based on "current economic conditions" which is what the Commission adopted in the *UNE Order*, albeit without the FCC's clarifying statements, does not comply with TELRIC. Consequently, BellSouth opined that the cost of capital approved in the *UNE Order* is improper as a matter of law.

BellSouth also asserted that AT&T/MCI's claim that the Commission's cost of capital analysis comports with the requirements set forth in the *TRO* because the FCC's Wireline Competition Bureau used the same models to calculate the cost of equity and debt misses the mark. BellSouth argued that the issue is the assumptions used in the model, not the particular model used to measure the cost of equity and/or debt.

BellSouth stated that the Public Staff contended in its initial comments that the cost of capital approved in the *UNE Order* reflects the risk associated with a market reflecting facilities-based competition. According to BellSouth, the basis for the Public Staff's contention is that the investor-related risk measures, used in its witness' analysis, includes the growing competitive risks in the telecommunications industry. However, BellSouth believes there is no indication that these actual foreseeable risks include a market with facilities-based competition. BellSouth asserted that the FCC made clear that the TELRIC methodology requires the assumption of facilities-based competition to assess the ILEC's risks for purposes of calculating its cost of capital. As it must do when calculating network investment in a TELRIC study, Bellsouth observed that the Commission is required to deal with hypothetical, and not "current conditions."

In summary, BellSouth argued that the cost of capital established in the *UNE Order* is not based on the legal standard required by the FCC's rules. Rather, the Commission based the 9.79% cost of capital it adopted on "current economic conditions." Therefore, BellSouth asserted that the Commission should calculate a cost of capital based on an assessment of what risks BellSouth would face in a market with full facilities-based competition which is what the FCC Wireline Competition Bureau did in adopting a 12.95% cost of capital for Verizon in Virginia.

PUBLIC STAFF: The Public Staff first replied to BellSouth's argument that the Commission should determine BellSouth's capital structure considering market values of debt and equity, not book values. The Public Staff pointed out that the Commission has previously heard arguments, through testimony, for market value based capital structures from ILEC witnesses in both the 1998 UNE proceedings and the 2003 UNE proceeding, but adopted the Public Staff's recommendation that the forward-looking capital structure for providing UNE should be calculated based on projected capitalization ratios for telecommunications companies, among other evidence. The Public Staff stated that the *TRO* does not require the Commission to alter its decision regarding capital structure. The Public Staff believes that numerous investor-related publications, such as the Value Line Investment Survey which was the source of the Public Staff's recommended capital structure ratios, are thoroughly familiar with facilities-based competition and such risks and uncertainties are factored into their future growth rate projections of earnings and projected external financings. Thus, the Public Staff maintained the record shows that the effects of competition are included in the Commission-approved capital structure.

Second, the Public Staff responded to BellSouth's argument that the methodology relied upon by the Commission to determine the cost of equity is inconsistent with TELRIC. In support of its argument, BellSouth cited Paragraph 93 of the *Virginia Arbitration Order* on the importance of using a group of nonutility companies to reflect the risk of a competitive environment and the FCC Wireline Competition Bureau's rejection of the sole use of telecommunications companies as a comparison group. However, the Public Staff noted that the DCF of its witness, which the Commission found persuasive, was applied to a group of seven telecommunications companies and to another group of 38 nonutility companies. Therefore, the Public Staff believed this argument by BellSouth is without merit.

Finally, the Public Staff noted that BellSouth emphasized the decision of the FCC Wireline Competition Bureau, in the *Virginia Arbitration Order*, which approved a 12.95% overall cost of capital that included a 14.37% cost of equity, to support BellSouth's argument that the *TRO*'s clarification requires a higher cost of capital for BellSouth in this proceeding. In rebuttal, the Public Staff stated that the testimony and the evidence in that record were several years old and in a footnote to Paragraph 64 of the *Virginia Arbitration Order*, the Wireline Competition Bureau conceded that the application of its methodology to a record with more current data, including a significant decline in interest rates, could have produced different results. In addition, the Wireline Competition Bureau generally used "baseball arbitration" rules in determining the cost of capital with one witness recommending a 12.95% cost of capital and another witness recommending a 9.54% cost of capital. The Public Staff submitted such considerations could partially explain the Wireline Competition

Bureau's decision to approve a relatively high cost of capital. Despite BellSouth's assumption that all references in the *TRO* equate to an increase in the investor-related return requirement, the Public Staff took the position that the required return on debt and equity have actually decreased for a variety of reasons, including lower interest rates. In other words, the Public Staff maintained that an increase in risk in one particular aspect of a company's operations, such as increased facilities-based competition, does not simply translate into higher investor required returns or approved returns. The Public Staff also cited decisions by the Indiana Utility Regulatory Commission on January 5, 2004 which approved a 9.51% overall cost of capital, the New Hampshire Public Utilities Commission on January 14, 2004 which approved an overall cost of capital of 8.20%, and a proposed decision by the Public Utility Commission of Texas on February 25, 2004 which included a 9.29% overall cost of capital, with a final decision expected later this year, as examples.

In summary, the Public Staff stated that BellSouth failed to show that the risks clarified in the *TRO* warrant an increase in its approved 9.79% overall cost of capital. The Public Staff also stated that Verizon's contention that the Commission should revisit its capital structure was without merit for the reasons discussed above in its response to BellSouth's similar contention. And finally, with respect to Sprint's contention that recalculating the cost of capital input as outlined in the *TRO* will result in a higher cost of capital than previously approved by the Commission, the Public Staff incorporated its response to BellSouth's initial comments to reject Sprint's contention.

SPRINT: In its reply comments, Sprint noted that the Public Staff takes the position in its initial comments that the cost of capital component approved by the Commission in 1998 for use in Sprint's UNE cost model does not necessarily reflect the increased competitive risks facing facilities-based carriers and may not comply with the *TRO*. However, the Public Staff also goes on to say that the increase in competitive risks from facilities-based carriers have been more than offset by decreases in the required rate of returns on debt and equity capital demanded by investors. Sprint stated that the Public Staff's suggestion that the Commission allow Sprint's currently approved UNE rates to remain in effect until further notice is not appropriate for two reasons. First, Sprint believes leaving Sprint's UNE rates unchanged does not comply with the *TRO*. Second, doing so unjustly requires Sprint to wholesale its network at rates below TELRIC as clarified by the FCC in the *TRO*. Therefore, Sprint stated that the cost of capital used to determine Sprint's UNE rates should reflect a competitive market and any unique risks associated with new services and facilities and increasing Sprint's cost of capital to comply with the *TRO* will result in higher UNE rates for all network elements.

VERIZON: In its reply comments, Verizon stated that the *TRO* makes clear that the actual degree of competition is irrelevant in determining the cost of capital. The *TRO* expressly provides that the cost of capital must be estimated on the assumption of facilities-based competition, regardless of the actual level of competition.

Verizon's UNE cost of capital was set by the North Carolina Utilities Commission in an Order dated December 10, 1998, in which the Commission adopted the Public Staff's cost of capital recommendation. Verizon stated that the Public Staff's cost of capital recommendation was based on an analysis of the Regional Bell holding companies, which face significantly less risk than a sole provider of UNEs under the TELRIC standard. However, according to Verizon, in an Order dated July 11, 2002, the Massachusetts Department of Telecommunications and Energy found the S&P Industrials to be the appropriate and reasonable proxy group. Similarly, in an updated Order dated December 11, 2003, the Pennsylvania Public Utilities Commission found the S&P Industrials should be used to calculate the cost of capital input in UNE cost studies.

Verizon also took the position that the Public Staff's 1998 recommendation failed to comply with the FCC's requirement that UNE rates must be based on forward-looking economic costs rather than embedded, historical, or accounting costs. Specifically, the Public Staff's recommendation was based on a projected capital structure containing 42% debt and 58% equity, which Verizon believes undoubtedly reflects embedded, historical, and accounting costs. According to Verizon, competitive

companies make investment decisions based on cost of capital estimates that reflect the market values of debt and equity in the company's capital structure, not the book values.

Verizon also cited that its UNE costs of capital have already been increased in other jurisdictions to reflect the clarifications in the *TRO*. In an Order entered on December 11, 2003, the Pennsylvania Public Utility Commission increased Verizon's cost of capital for use in UNE cost studies from 9.83% to 12.37% based on consideration of the clarification advanced in the FCC's *TRO* with regard to the appropriate competitive market risk to be considered in evaluating cost of capital. Verizon stated that the Pennsylvania Commission based its decision on Verizon's recommended DCF analysis of the S&P Industrial group and recommended cost of equity of 14.75%. In addition, the Wireline Competition Bureau also recognized the need to revise Verizon's cost of capital upward based on its consideration of the FCC's guidance in the *TRO* as previously discussed herein.

Therefore, Verizon recommended that the Commission should take the same steps that the Pennsylvania Commission and the Wireline Competition Bureau have already taken to bring Verizon's UNE rates into compliance with the requirements set forth in the *TRO*.

DISCUSSION

After considering the comments of the parties which are generally summarized above, the Commission believes it is first appropriate to discuss at least some specific examples where the Commission disagrees with the stated or implied positions taken by various parties. For example, although not even included in the summary of BellSouth's comments above, BellSouth devoted a significant amount of effort to explain that its UNE rates have been reduced and should be increased. While the cost of capital is an important input in a UNE cost model which obviously affects UNE rates, the cost of capital issue, even as clarified by the FCC in the *TRO*, is not a means to apply to achieve an end of higher UNE rate levels. Rather, the Commission should objectively examine the cost of capital which it approved on the basis of its record to determine its compliance with the *TRO*, without regard to prejudice to reach new levels of UNE rates. In addition, on Page 11 of its initial comments, BellSouth states that

> The NCUC acknowledged in its *UNE Order* that it did not apply the legal standard mandated by the FCC's rules in establishing a cost of capital. The Commission stated that at the outset of its discussion on the cost of capital that the FCC in its 1996 Local Competition Order provided "no guidelines on the meaning of a forward-looking and risk adjusted economic cost of capital," and that it would be guided by the principles of two court decisions decided in the first half of the twentieth century, long before the FCC established TELRIC. *UNE Order*, at 68. The Commission did not consider the FCC's clarifications in the *TRO* of the proper application of a TELRIC cost of capital because the FCC released the *TRO* after the parties submitted their post-hearing briefs.

While the *TRO* was released after the parties submitted their post-hearing briefs, it is not correct that the Commission acknowledged in its *Order* that it did not apply the legal standard mandated by the FCC's rules in establishing a cost of capital. Rather, the Commission simply sought comments regarding the FCC's clarification contained in the *TRO*. Further, with reference to "two court decisions decided in the first half of the twentieth century, long before the FCC established TELRIC," the Commission does not believe that this obvious reference to the Hope and Bluefield decisions by the U.S. Supreme Court in any way impugns the appropriateness of reliance on these two decisions by the Commission. In this regard, the Commission notes the FCC's reference to these decisions in footnote 1707 to Paragraph 700 of the 1996 *Local Competition Order*, wherein the FCC acknowledges that its interpretation of what constitutes a reasonable rate of return for a regulated utility is consistent with the Hope and Bluefield decisions, and the *TRO* does not abandon this previous interpretation by the FCC.

On Page 8 of its initial comments, BellSouth also states that "As a matter of law, a cost of capital based on 'current economic conditions,' rather than on the future risks BellSouth will face in a highly competitive market, is not forward-looking." The Commission believes there is nothing in the *TRO* which prevents the Commission from considering current economic conditions, so long as the established cost of capital reflects the risks of a competitive market. Current or recent stock prices and interest rates are examples of general indicators of current economic conditions and are used as inputs in different models to measure the cost of debt and equity, even by BellSouth's own witness in this proceeding. While the FCC explicitly rejected the argument made by AT&T/MCI that would limit a state to consider only the actual risk an ILEC currently faces in providing UNEs, which AT&T/MCI seem to continue to make in its comments in this proceeding, the *TRO* simply does not mandate that a Commission should not consider such general indicators.

The comments of all the parties cite the decisions of various regulatory bodies since the release of the *TRO* by the FCC. For example, the ILECs tend to cite decisions where the cost of capital was higher than the cost of capital established by the Commission, while AT&T/MCI and the Public Staff tend to cite decisions with the opposite results. In addition, all parties tend to point out why the Commission's decision in this proceeding should differ from other decisions where the cost of capital is not favored. While relevant and helpful to review the decisions of other regulatory bodies, the Commission is mindful of the fact that all records of evidence and issues raised in such proceedings differ when making comparisons of decisions by various regulatory bodies.

At this juncture, the decision before the Commission concerning the cost of capital issue is whether the Commission's previously established cost of capital input used to calculate the UNE rates for BellSouth, Verizon, and Carolina/Central should change due to the clarifications provided by the FCC in the *TRO*. After careful consideration of the *TRO*, the comments of all parties and the evidence of record, the Commission reaches the following conclusions.

First, with respect to the cost of capital inputs determined for Verizon and Carolina/Central in the 1998 UNE proceeding, the Commission notes that the *TRO* was issued approximately five years after the evidence was presented concerning the cost of capital in the 1998 proceeding. While the *TRO* addressed the cost of capital issue, there are many other issues which impact UNE rates. The Commission believes it would be inappropriate to review the cost of capital issue in isolation without reviewing all other inputs to the UNE cost model. Therefore, the Commission believes that the cost of capital inputs for Verizon and Carolina/Central should remain in effect until the Commission reviews their UNE rates in a full UNE rate proceeding initiated by petitions demonstrating good cause.

Second, while the cost of capital, as well as all other inputs necessary to calculate UNE rates, were just recently established for BellSouth, the Commission believes the clarification by the FCC in the *TRO* on the cost of capital input does not require any changes to the 9.79% cost of capital input established for use in BellSouth's UNE cost models. The clarification by the FCC that the cost of capital input should reflect the risks of a competitive market was important, but it was not a revision of any FCC rule. The FCC did not even mandate any particular methodology or approach for the states to consider to establish a cost of capital input.

The 9.79% overall cost of capital established for BellSouth was based on a cost of debt of 7.23%, a cost of equity of 11.50% and a capital structure consisting of 60% equity and 40% debt as recommended in the testimony of the Public Staff. The 7.23% cost of debt was based on the yields to maturity on outstanding issues of BellSouth long-term debt. This rate was higher than the cost of debt recommended by BellSouth's own witness. While not conceding that the Commission's determinations on the cost of capital issue must be consistent in all respects with that of the FCC Wireline Competition Bureau, the Commission notes that the same general approach was followed in the *Virginia Arbitration Order* to determine the cost of debt for Verizon. The 7.23% cost of debt was

determined to be reflective of the current and prospective cost of long-term debt associated with the provision of UNEs by BellSouth.

The Commission also adopted an 11.5% cost of equity recommended by the Public Staff. In reviewing the record, the *Order* dated December 30, 2003, as well as the comments, the Commission points out that the DCF analysis was applied to a group of seven telecommunications companies as well as another group of 38 nonutility companies. It is significant to note that the results of the DCF analysis to a proxy group of 38 nonutility companies supports the 11.5% cost of equity determination. Such nonutility companies should certainly be a reasonable proxy upon which to establish a cost of equity that reflects the risk of a competitive market.

Finally, the 60% equity and 40% debt capital structure recommended by the Public Staff and adopted by the Commission was derived by averaging Value Line Investment Survey's projected percentages of common equity for a comparable group of seven publicly traded telephone companies. In support of this recommended capital structure, the Public Staff witness testified that BellSouth's financial planning incorporates a target capital structure containing 35% to 45% debt capital and even BellSouth used a capital structure consisting of 60% equity and 40% debt in its UNE cost model. The evidence in the record also indicates that the 60% equity and 40% debt capital structure contains a higher equity ratio and a lower debt ratio than BellSouth's actual 2001 capital structure which consisted of 55% equity and 45% debt. Since this capital structure was projected, there can be no doubt as to whether it is forward-looking. In Paragraph 102 of the *Virginia Arbitration Order*, the FCC Wireline Competition Bureau discusses its views on why it believes that a capital structure based on market value, not book value, is appropriate. That *Order* specifically cites Section 252(d)(1) of TA96, wherein Congress specifically prohibited the use of traditional rate-base, rate-of-return ratemaking and the FCC's interpretation of this section to require prices based on forward-looking costs under TELRIC. In comparison, the capital structure established by the Commission is based on projected, and therefore, forward-looking common equity ratios, which are neither entirely based on book value or market value. Further, the evidence in our record indicates the 60% equity and 40% debt ratios are also consistent with BellSouth's financial planning. This implies that the amounts and types of securities which are issued at future market prices will be managed so as to target the forward-looking capital structure ratios of 60% equity and 40% debt. While, giving the appropriate amount of deference to the FCC Wireline Competition Bureau's approach on the capital structure issue, which was not mandated by the FCC, the Commission believes that the forward-looking capital structure established in this proceeding is appropriate.

The Commission notes that the FCC has raised specific questions and requested comments from interested parties on the cost of capital input in its *Notice of Proposed Rulemaking in the Matter of the Commission's Rules Regarding Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, released on September 15, 2003 (*TELRIC NPRM*). The Commission will consider the conclusions of the FCC from the *TELRIC NPRM* on the cost of capital issue where appropriate in future proceedings.

CONCLUSIONS

In summary, the Commission believes that the 9.79% cost of capital input for the provision of UNEs as recently established by the Commission in the proceeding involving BellSouth is consistent with the FCC's rules, as clarified in the *TRO*. Further, while the *TRO* clarified the cost of capital input, the cost of capital established by the Commission in the 1998 UNE proceeding for Verizon and Carolina/Central should not be adjusted until these companies' UNE rates are reviewed in a proceeding that examines all other inputs to the UNE cost models and may be initiated by petitions demonstrating good cause.

FINDING OF FACT NO. 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.

FCC'S TRIENNIAL REVIEW ORDER

In Paragraphs 685 through 691 of the FCC's *TRO*, the FCC specifically stated the following with regard to its clarification on depreciation expense:

> 685. Like cost of capital, the depreciation component of TELRIC provides a mechanism by which UNE prices will reflect certain risks associated with new facilities and new services. The *Local Competition Order* contains a very limited discussion of depreciation. Specifically, the Commission stated that properly designed depreciation schedules should take into account expected declines in the value of goods. Similarly, our rules require the use of "economic depreciation" but provide no additional detail. There appears to be general agreement among the parties that depreciation should reflect any factors that would cause a decline in asset values, such as competition or advances in technology.
>
> 686. There are two components of depreciation – the useful life of the asset, and the rate at which the asset is depreciated over the useful life. In their comments, the incumbent LECs address only the issue of asset lives. Verizon requests that, "at an absolute minimum, the Commission should make clear that the starting point should be the same lives that are used for financial reporting purposes in accordance with well-recognized accounting principles." These lives are "intrinsically forward-looking and are updated frequently to reflect technological and other changes that affect the length of an asset's economic life." SBC takes a similar approach, noting that Commission action is necessary because "virtually all states applying TELRIC have applied historical, backward-looking legacy regulation depreciation rates devised years ago." SBC states that these legacy depreciation rates are "inconsistent with real depreciation lives of real telephony assets in the ground, and they are even more inconsistent with the forward-looking TELRIC methodology itself, which assumes, after all, a hypothetical competitor that maintains state-of-the-art equipment."
>
> 687. AT&T and WorldCom respond by arguing that no clarification of TELRIC is necessary. AT&T states that the incumbent LEC position "misrepresents the Commission prescribed depreciation lives" because "those lives reflect a rigorous application of forward-looking principles." Depreciation lives based on financial accounting, on the other hand, are "biased towards the low (shorter) side because they are driven by corporate objectives, including the objective of protecting shareholders." WorldCom echoes these arguments, and notes that the Commission rejected the use of financial lives, and endorsed the use of Commission prescribed regulatory lives, for use in the TELRIC model used to calculate universal service support.
>
> 688. We decline to adopt the incumbent LECs' suggestion that we mandate the use of financial lives in establishing depreciation expense under TELRIC. The incumbent LECs have not provided any empirical basis on which we could conclude that financial lives always will be more consistent with TELRIC than regulatory lives. Both financial lives and regulatory lives were developed for purposes other than, or in addition to, reflecting the actual useful life of an asset. We cannot conclude on this record that one set of lives or the other more closely reflects the actual useful life of an asset that would be anticipated in a competitive market. Accordingly, state commissions continue to have discretion with respect to the asset lives they use in calculating depreciation expense.

689. Although we decline to mandate a particular method of deciding the useful life of an asset, we believe that clarification of our rules is necessary with respect to the rate at which an asset is depreciated over its useful life. As noted above, the various components of TELRIC rates should be developed using a consistent set of assumptions about competition. In calculating depreciation expense, therefore, the rate of depreciation over the useful life should reflect the actual decline in value that would be anticipated in the competitive market TELRIC assumes. In this way our "economic depreciation" requirement is designed to replicate the results that would be anticipated in a competitive market.

690. We clarify that under our "economic depreciation" requirement, a carrier may accelerate recovery of the initial capital outlay for an asset over its life to reflect any anticipated decline in its value. For example, an approach that accelerates cost recovery based on an index showing that equipment prices are declining over time may be consistent with our requirement to use economic depreciation. Recovering more of the initial capital outlay for the asset in the early years would enable a carrier to recover less in later years, thereby allowing it to compete with carriers that have purchased new, lower-priced equipment in those later years.

691. To date, state commissions generally have used straight-line depreciation, rather than accelerated depreciation that reflects the anticipated decline in value of assets. Accordingly, the use of accelerated depreciation may raise issues that have not been addressed previously in state proceedings. Among the questions that would have to be addressed by regulators – either the Commission or the states – are how to measure the anticipated decline in value of assets, whether shorter asset lives represent an alternative method of capturing this decline, how UNE prices should be structured to reflect decreases in depreciation expense from one period to the next, and whether levelizing rates across periods, as most cost models do, diminishes, or even eliminates the intended effect of the acceleration. The record in this proceeding does not provide sufficient information for the Commission to resolve these questions at this time, but we encourage state commissions to consider these issues in future UNE pricing proceedings.

[footnotes omitted]

INITIAL COMMENTS

AT&T/MCI: AT&T/MCI asserted in their comments that the Commission's use of regulatory lives is consistent with the FCC's findings in the *TRO*. AT&T/MCI commented that in the *TRO*, the FCC determined that the record before it was inadequate to conclude that "one set of lives or the other more closely reflects the actual useful life of an asset that would be anticipated in a competitive market" and that state commissions had discretion to choose between regulatory and financial lives. AT&T/MCI noted that the FCC's Wireline Competition Bureau's *Virginia Arbitration Order* (¶115) rejected as unsupported Verizon's claim that "FCC regulatory lives are not sufficiently forward looking". AT&T/MCI opined that the depreciation lives proposed by BellSouth in 1998 and 2003 as well as by Carolina, Central and Verizon in 1998 fare no better than those presented by Verizon in Virginia. BellSouth's economic and salvage lives proposal in 1998 and 2003 was based upon a "depreciation study".[1] AT&T/MCI argued that despite submitting a massive amount of documents as the "depreciation study" in 1998, BellSouth's study, like Verizon's, lacked any documentation for the Commission to conclude that the asset lives it proposed reflected the "anticipated economic life of assets in a competitive market".

[1] *1998 UNE Order*, p. 37; *2003 UNE Order*, p. 75.

AT&T/MCI stated that in the 1998 UNE proceeding Verizon and Sprint did not present depreciation studies to contradict the FCC-authorized rates. Sprint relied upon Technology Future Incorporated's (TFI's) estimates for forwarding-looking lives and Verizon proposed depreciation rates which were based upon the National Association of Regulatory Utility Commissioners (NARUC) factors. AT&T/MCI noted that there was ample testimony in the 1998 UNE cost proceeding demonstrating that Sprint did not provide any support for their proposed depreciation lives and that Verizon had to adjust the NARUC factors to develop its proposed depreciation rates.

AT&T/MCI asserted that unlike the depreciation rates proposed by BellSouth, Sprint and Verizon, the FCC-prescribed lives rely upon analyses of company plans, technological developments, and other future oriented studies. According to AT&T/MCI, the statistical studies that the FCC evaluated contain detailed analyses of each carrier's most recent retirement patterns, the carrier's plans, and the current technological developments and trends. As recently as 1999, AT&T pointed out that the FCC completed a review of these ranges, updated them, and found them to be appropriate for use by federal and state regulatory commissions for determining the appropriate depreciation factors for interconnection and UNE prices. AT&T/MCI commented that in addition, the FCC later reiterated that depreciation expense calculations based on the Commission's [FCC's] prescribed projection lives and salvage factors represent the 'best forward-looking estimates' of depreciation lives and net salvage percentages. Finally, AT&T/MCI argued that the FCC's finding supports the Commission's determinations in 1998 and 2003 that the FCC-authorized ranges were forward-looking and appropriate for use in UNE cost proceedings. AT&T/MCI stated that nothing in the *TRO* mandates reversal of that finding or a determination that UNE rates should be revised based upon the depreciation inputs.

BELLSOUTH: BellSouth maintained that the Commission's determinations in adopting regulatory asset lives to be used in calculating depreciation expense do not yet reflect the FCC's clarified rules. In the *TRO*, the FCC declined to endorse the use of "regulatory lives" for use in calculating UNE rates. It made clear that the rate of depreciation should reflect the actual useful, anticipated life of an asset in a competitive market. BellSouth stated that the regulatory lives recently ordered in North Carolina were prescribed by the FCC several years ago and are clearly not appropriate in a competitive market. BellSouth contended that the Commission should establish depreciation rates/economic lives for use in calculating UNE rates that comply with the FCC's TELRIC methodology as clarified in the *TRO*. BellSouth claimed that a failure to do so, as the FCC noted, will result in UNE prices that do not send appropriate economic signals to ILECs and CLPs.

BellSouth stated that the FCC clarified how depreciation must be applied under its UNE pricing rules. BellSouth noted that the FCC did not adopt the use of particular lives in establishing depreciation expense under TELRIC. Rather, the FCC stated that "state commissions continue to have discretion with respect to the asset lives they use in calculating depreciation expense". (*TRO* ¶688) The FCC made clear, however, that in order to be TELRIC-compliant, a depreciation schedule must take into account the anticipated useful life of the asset and that "the rate of depreciation over the useful life should reflect the actual decline in value that would be anticipated in the competitive market TELRIC assumes. In this way, our 'economic depreciation' requirement is designed to replicate the results that would be anticipated in a competitive market." (*TRO* ¶689)

BellSouth argued that the depreciation rates/economic lives the Commission adopted in the *2003 UNE Order* do not, as the FCC's rules require, reflect the projected useful lives of assets in a highly competitive market. BellSouth observed that the FCC made clear in the *TRO* that economic lives must reflect the anticipated useful life of the asset in a competitive market. The FCC noted in Paragraph 685 of the *TRO* that, as with cost of capital, the *Local Competition Order* "contains a very limited discussion of depreciation." The FCC made clear in the *TRO* that the "useful life" of the asset must be used as the economic life in calculating depreciation rates, and that "depreciation should reflect any factors that would cause a decline in asset values, such as competition or advances in technology." (*TRO* ¶685)

BellSouth also noted that the FCC declined in the *TRO* to hold that regulatory asset lives are appropriate for use in TELRIC studies. Indeed, the FCC specifically noted that "both financial lives and regulatory lives were developed for purposes other than, or in addition to, reflecting the actual useful life of an asset." (*TRO* ¶688) BellSouth commented that the FCC held that state commissions had "discretion with respect to the asset lives they use in calculating depreciation expense" so long as they reflect "the actual useful life of an asset that would be anticipated in a competitive market". BellSouth claimed that the Commission adopted old regulatory lives without assessing whether they meet the FCC's standard. BellSouth stated that it submitted a detailed Depreciation Study in this proceeding that determined the economic lives of assets based on the anticipated useful life of an asset in a competitive environment, taking into account technological changes, as required by TELRIC. However, BellSouth noted that in the *2003 UNE Order* the Commission, with one exception, adopted, for use in establishing UNE rates, regulatory lives prescribed by the FCC which the Commission adopted in its *1998 UNE Order*.

BellSouth pointed out that other state commissions have recently rejected the use of FCC prescribed regulatory lives for calculating depreciation in UNE studies. The Indiana Utility Regulatory Commission released a new UNE rate order in Cause No. 42393 on January 5, 2004. In its Order, the Indiana Commission specifically noted that many state commissions used FCC-prescribed regulatory lives for depreciation purposes in the first round of UNE proceedings following passage of TA96 but concluded that those lives are no longer appropriate for use in calculating UNE rates. The Indiana Commission, citing the *TRO*, concluded that it was appropriate to use financial reporting lives. It stated:

> The *TRO* makes clear that the 1996 Act and UNE prices set under that Act are supposed to encourage the deployment of new technologies as they become available. This is the same goal the Commission sought to promote by adopting financial reporting lives. Technological advancement continues at a rapid pace, leading to faster obsolescence of all types of telecommunications equipment. If anything, the pace of technological advancements should only increase as unbundling and pricing determinations are brought more in line with the goals of the 1996 Act in the wake of the 1999 *Biennial Order*, the *TRO*, and the *TELRIC NPRM*, and as the incentive for facilities-based investment and innovation increases. We want to encourage SBC Indiana to take advantage of and deploy technological advancements, and one way to do that is to allow it to use reasonable depreciation lives based on criteria SBC employs for financial reporting purposes. We also note the increase in competition faced by SBC Indiana, both intermodal and intramodal, compels use of shorter depreciation lives. *TRO* ¶685 SBC Indiana also has now 'fully and irreversibly opened' the local market to competition, as evidenced by the FCC grant of Section 271 long-distance authority, and such approvals often accelerate the pace and level of competition for the ILEC. For all these reasons, we adopt SBC Indiana's proposal to use financial reporting lives in computing depreciation expense. (Indiana Order, at pages 61, 66.)

BellSouth asserted that the Commission should adopt the economic lives presented in BellSouth's Depreciation Study, because they reflect the anticipated useful lives in a competitive market. BellSouth stressed that it was the only party that submitted any evidence of anticipated useful lives in a competitive market. BellSouth argued that the Commission should, therefore, adopt those lives for use in setting UNE rates in North Carolina.

PUBLIC STAFF: The Public Staff explained that depreciation is a process by which the decline in usefulness of a company's tangible assets may be recorded over a period of time through a systematic cost allocation for both accounting and tax purposes. Accelerated depreciation can be generally viewed as any depreciation method that allows larger deductions or charges to be booked in the earlier years of an asset's depreciable life, with charges progressively decreasing in each successive

period. Examples of accelerated depreciation include the double declining balance and sum-of-the-years digits methods of depreciation.

The Public Staff stated that in the *TRO*, the FCC noted that depreciation, like cost of capital, provides a mechanism by which UNE prices reflect certain risks associated with new facilities and new services. The rules in effect prior to the *TRO* required the use of "economic depreciation", but provided no additional guidance. However, in the *TRO*, the FCC stated that the commenters generally agreed that depreciation should reflect any factors that would cause a decline in asset values, such as competition or advances in technology.

The Public Staff stated that although the FCC specifically declined to mandate a particular method of deciding the useful life of an asset for the purpose of calculating TELRIC-based UNE rates, it clarified that the rate at which an asset is depreciated over its useful life should reflect the actual decline in value that would be anticipated in the competitive market that TELRIC assumes. To clarify the requirement that "economic depreciation" be used, the FCC explained that a carrier may accelerate recovery of the initial capital outlay for an asset over its life to reflect any anticipated decline in its value.

The Public Staff commented that the FCC's discussion of depreciation in the *TRO* acknowledged that use of accelerated depreciation rather than the commonly used straight-line depreciation could raise issues not previously addressed in prior UNE rate proceedings. Some of the questions that the FCC recognized would need to be answered include how to measure the anticipated decline in the value of assets, how UNE prices should be structured to reflect decreases in depreciation expense, and whether levelizing rates would impact the intended effect of accelerated depreciation.

The Public Staff claimed that for the UNE rates previously approved by the Commission in this docket, use of accelerated depreciation would require changes to the cost models adopted by the Commission for calculating UNE rates. The cost models essentially use a snapshot approach in determining the cost of UNEs, a method that does not lend itself to use of depreciation expenses that vary over time. For this reason, the Public Staff contended that it does not believe that the cost models, as they currently exist, are capable of using a method other than straight-line depreciation. The Public Staff noted that in its discussion of depreciation in the *TRO*, the FCC spoke of only two components of depreciation, the useful life of the asset and the rate at which the asset is depreciated over its useful life. The Public Staff observed that a component of depreciation not addressed by the FCC is the net salvage value of the asset that also affects the expense level. Of these three components, the cost models previously adopted by the Commission to calculate UNE rates depreciate the asset over its useful life at a constant rate determined solely by the asset's useful life and net salvage value.

The Public Staff stated that prior to adopting accelerated depreciation for calculating UNE rates, the Commission must decide whether the use of accelerated rather than straight line depreciation will more accurately reflect the actual anticipated decline in value of an ILEC's asset. If the Commission concludes that accelerated depreciation is appropriate, it must then decide how to incorporate accelerated depreciation expense in the calculation of UNE rates and which accelerated depreciation method best tracks the anticipated reduction in the asset's value over its useful life. The Public Staff implied that only then will the Commission be able to determine how to incorporate accelerated depreciation in the cost models and the calculation of UNE rates.

The Public Staff also suggested that the Commission must decide when to initiate a proceeding on depreciation. The FCC noted that the record for the *TRO* contained insufficient information to resolve the depreciation issues but encouraged state commissions to consider them in future UNE pricing

proceedings. In a footnote in the *TRO*, the FCC noted it planned to commence a proceeding to consider depreciation issues and other issues related to TELRIC pricing in the near future.[1]

The Public Staff stated that it does not believe that the Commission should initiate a proceeding at this time to address the use of accelerated depreciation in UNE rate pricing. The FCC intends to consider the issue further in its TELRIC pricing proceeding, and the Public Staff expects the FCC to provide further guidance on the use of accelerated depreciation in that proceeding. The Public Staff suggested that if this Commission delays any proceeding on depreciation until after the FCC proceeding, it will be able to take advantage of the FCC's conclusions similar to the manner in which the Commission adopted economic lives and net salvage values within ranges found to be reasonable by the FCC. The Public Staff claimed that initiating a proceeding now would, at best, duplicate efforts and, at worst, produce results that conflict with the conclusions of the FCC. The Public Staff recommended that the Commission not initiate a proceeding at this time to address the use of accelerated depreciation in UNE pricing until the FCC provides further guidance on the subject.

SPRINT: Sprint commented that in the *TRO*, the FCC stated that depreciation should reflect the useful life in a competitive market. Specifically, the FCC stated:

> In calculating depreciation expense, therefore, the rate of depreciation over the useful life should reflect the actual decline in value that would be anticipated in the competitive market TELRIC assumes. In this way our 'economic depreciation' requirement is designed to replicate the results that would be anticipated in a competitive market. (¶689)

Sprint pointed out that in the FCC's *TELRIC NPRM*, (released September 15, 2003) the FCC questions if its depreciation lives are still accurate. The FCC's prescribed depreciation lives are intended to be forward-looking for the purposes of determining UNE rates. The FCC stated:

> We also ask parties to comment on whether FCC regulatory lives reflect the competition and technology assumptions required under a forward-looking costing methodology. We note that it has been almost a decade since the Commission first established forward-looking asset lives, and the Commission last adjusted its 'safe harbor' asset lives in 1999. (¶101)

Sprint argued that based on the FCC's *TRO* and *TELRIC NPRM*, the economic lives approved by the Commission are too long to be reflective of current competitive conditions and technology assumptions required in a forward-looking costing methodology. Furthermore, Sprint noted that if the Commission adopted economic lives similar to those recommended by Sprint, the TELRIC-based rates for UNEs would increase.

VERIZON: Verizon argued that with respect to depreciation, the FCC recognized that both the useful life measurements and the appropriate rates of depreciation over that life should reflect the genuine risks associated with the decline in value anticipated in a competitive market. In light of these risks, the FCC concluded "a carrier may accelerate recovery of the initial capital outlay for an asset over its life to reflect any anticipated decline in its value." (*TRO* ¶690)

Verizon contended that the useful lives and depreciation rates underlying Verizon's UNE rates violate these principles. In adopting the Public Staff's proposals to set depreciation rates at a level consistent with those previously adopted in the Commission's USF cost docket and within the range of rates authorized by the FCC before TA96, Verizon claimed that the Commission failed to account

[1] *TRO*, ¶ 691, fn. 2063.

for the genuine likelihood of declining value in a competitive market. Therefore, Verizon asserted that the Commission should immediately and unambiguously remedy these errors.

REPLY COMMENTS

AT&T/MCI: AT&T/MCI argued that the FCC's clarification on cost of capital and depreciation in the *TRO* does not impact the UNE rates established for BellSouth, Sprint, and Verizon.

BELLSOUTH: BellSouth stated that in its *UNE Order*, the Commission adopted regulatory lives first prescribed several years ago for purposes of calculating the depreciation expense component of BellSouth's UNE costs. BellSouth claimed that the Commission did not determine projected useful lives of assets in a highly competitive market, which is what the FCC's rules require. BellSouth requested that the Commission should follow the lead of other state commissions that, in the wake of the clarifications set forth in the *TRO*, have rejected the use of FCC prescribed regulatory lives for calculating depreciation in UNE studies, and it should determine the appropriate economic lives of assets in a highly competitive market.

PUBLIC STAFF: The Public Staff did not provide additional comments regarding depreciation rates in its reply comments.

SPRINT: In its reply comments, Sprint noted that the *TRO* states that depreciation should reflect an asset's useful life in a competitive market by taking into account the actual decline in value that would be anticipated in the competitive market TELRIC pricing assumes. In the FCC's *TELRIC NPRM*, the FCC questioned whether its depreciation lives are still reflective of a forward-looking costing methodology. Sprint claimed that the technology and services in the telecommunications industry have changed tremendously since the FCC's depreciation lives were established. Sprint argued that Sprint's Commission-approved depreciation lives in Docket No. P-100, Sub 133d are too long.

In the *TRO*, the FCC acknowledged the use of accelerated methods of depreciation in addition to straight-line depreciation as a means of capturing the additional risk associated with declines in asset values due to competition and advances in technology. Sprint remarked that the Public Staff, in its comments, expressed concerns with using accelerated depreciation. Sprint emphasized that the Public Staff does not believe that the currently approved UNE cost models are designed to reflect accelerated depreciation. Sprint offered to investigate how accelerated methods of depreciation could be reflected in its TELRIC cost models.

Sprint referenced the Public Staff's comments which suggested that the Commission should not address the depreciation issue since the FCC has said that it will commence a proceeding to address depreciation issues related to TELRIC pricing in the near future. Sprint explained that there is no definite time line for the FCC's proceeding mentioned above. Sprint noted that based on prior FCC proceedings and the amount of issues that are currently ongoing at the FCC, the commencement of this proceeding could be well into the future. The *TRO* proceeding itself is an excellent example of how long this future proceeding to address depreciation issues related to TELRIC pricing could take. Sprint advocated that the Commission is not prohibited from moving forward with its own depreciation proceeding for TELRIC pricing and should not wait for further guidance from the FCC. Finally, Sprint urged the Commission to adopt the recommended depreciation lives for TELRIC pricing Sprint provided in its initial comments.

VERIZON: Verizon maintained that the depreciation inputs ordered for Verizon in the *1998 UNE Order* clearly are not reflective of the principles in the *TRO*. Verizon argued that its depreciation inputs are now nearly six years old and do not account for the competitive and technological developments that have occurred since that time, all of which have substantially shortened the useful lives of Verizon's assets.

Verizon recommended that the Commission adopt the depreciation lives used by Verizon for financial reporting purposes. Verizon stated that these lives, which are based on Generally Accepted Accounting Principles (GAAP), are updated annually and reflect the most current view of the asset's useful life. The financial reports are also reviewed and approved by Verizon's independent auditors. Even though financial lives are more up-to-date and forward-looking than the FCC regulatory lives previously adopted by the Commission, they still do not fully account for all of the risks inherent in a view of TELRIC that assumes full competition and the construction of a brand new network every three to five years. Rather, financial lives take into account current competition and expected near-term construction. Financial lives thus reflect a more conservative estimate of the useful lives of Verizon's assets than is required under TELRIC, resulting in lower UNE rates.

Verizon noted that in January 2004, the Indiana Utility Regulatory Commission approved the use of financial lives in UNE cost studies, stating that this approach is more appropriate in light of TELRIC and the overall goals of the 1996 Act. As the Indiana Commission explained,

> Technological advancement continues at a rapid pace, leading to faster obsolescence of all types of telecommunications equipment. If anything, the pace of technological advancements should only increase as unbundling and pricing determinations are brought more in line with the goals of the 1996 Act in the wake of the 1999 *Biennial Order*, the *TRO*, and the *TELRIC NPRM*, and as the incentive for facilities-based investment and innovation increases. (Indiana Order, at page 60)

Verizon stated that the Indiana Commission found that using GAAP lives would provide an incentive to use these rapidly developing new technologies, stating, "We want to encourage SBC Indiana to take advantage of and deploy technological advancements, and one way to do that is to allow it to use reasonable depreciation lives based on criteria employed for financial reporting purposes." In addition, the Indiana Commission concluded that competition warranted the use of GAAP lives. Citing the FCC's *TRO*, the Indiana Commission stated that "the increase in competition faced by ILECs, both intermodal and intramodal, compels use of shorter depreciation lives." For the foregoing reasons, Verizon urged the Commission to adopt the depreciation lives used by Verizon for financial reporting purposes in Verizon's UNE cost studies and development of UNE rates.

DISCUSSION

As noted above, the Commission *Order* dated December 30, 2003 found that the reasonable and appropriate economic lives and future net salvage values for calculating depreciation rates for use in BellSouth's UNE 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 was found to have a life of 12 years. The issue now before the Commission is whether the depreciation inputs established in the *First UNE Order* for Verizon and Carolina/Central and more recently established in the December 30, 2003 *Order* for BellSouth should change due to the clarification provided by the FCC in the *TRO* with respect to the depreciation issue.

In the *TRO*, the FCC clarified that the rate of depreciation over the useful life of an asset should reflect the actual decline in value that would be anticipated in the competitive market TELRIC assumes. In this way, the FCC explained that the "economic depreciation" requirement in its rules would replicate the results that would be anticipated in a competitive market as designed. The *TRO* also clarified that a carrier may accelerate recovery of its initial capital outlay for an asset over its life to reflect any anticipated decline in its value. Using an example in which an index shows that equipment prices are declining over time, the FCC states that an accelerated cost recovery of the initial capital outlay may be consistent with its requirement to use economic depreciation. The FCC explained that recovering more of the initial capital outlay for the equipment in the early years would enable the carrier to recover less in later years, thereby allowing it to compete with carriers that have purchased new, lower-priced equipment in those later years. However, the FCC noted that, to date, state commissions have generally used straight-line, rather than accelerated depreciation, and the use of accelerated depreciation may raise issues that have not previously been addressed such as: 1) how

to measure the decline in asset values, 2) whether shorter asset lives represent an alternative measure of capturing a decline, 3) how UNE prices should be structured to reflect decreases in depreciation expense from one period to the next, and 4) whether levelizing rates across periods, as most cost models do, diminishes or even eliminates the intended effect of allowing accelerated depreciation. The FCC stated that its record did not provide sufficient information for it to resolve such questions or issues related to accelerated depreciation, but encouraged state commissions to consider these issues in future UNE pricing proceedings.

The FCC also stated in the *TRO* that it declined to adopt the ILECs' suggestion that it mandate the use of financial lives in establishing depreciation expense under TELRIC because the ILECs provided no empirical basis on which the FCC could conclude that financial lives will always be more consistent with TELRIC than regulatory lives. Accordingly, the *TRO* stated that state commissions continue to have discretion with respect to the asset lives they use in calculating depreciation expense.

In response to the *Order* dated December 30, 2003, which requested comments on the impact of the *TRO,* BellSouth continues to recommend that the Commission adopt the depreciation rates presented in the BellSouth Depreciation Study because they reflect the anticipated useful lives in a competitive market. In its comments, Sprint simply urged the Commission to adopt the recommended depreciation lives attached to its initial comments but provided no explanation in its comments for the basis of its recommended depreciation lives. Verizon generally argued that the Commission should adopt the same lives that are used for financial reporting purposes in accordance with GAAP. According to the *TRO,* Verizon made the same recommendation to the FCC but the FCC could not conclude on its record whether financial lives or its regulatory lives more closely reflects the actual useful life of assets that would be anticipated in a competitive market.

After careful consideration of the *TRO*, the comments of all parties and the evidence of record, the Commission reaches the following conclusions. The *TRO* was issued approximately five years after the 1998 UNE proceeding in which the Commission determined the depreciation inputs for Verizon and Carolina/Central. The Commission believes that it would be inappropriate to review the depreciation issue without reviewing all other inputs to the UNE cost models. Therefore, the Commission believes that the depreciation inputs for Verizon and Carolina/Central should remain in effect until the Commission reviews the UNE rates of those companies in a full UNE rate proceeding. In addition, the clarification by the FCC in the *TRO* that the rate of depreciation over the useful life of assets should reflect the actual decline in value that would be anticipated in the competitive market that TELRIC assumes did not change the economic depreciation requirement in its rules. With respect to the depreciation inputs determined by the Commission in the 1998 UNE proceeding, and more recently determined by the Commission in the *Order* dated December 30, 2003 for BellSouth, the Commission found that the appropriate economic lives for use in the UNE cost studies were the regulatory lives previously approved by the FCC. In finding that the reasonable and appropriate economic lives were the regulatory lives approved by the FCC, the Commission complied with the requirements of the FCC as clarified by the *TRO* concerning depreciation. Moreover, the Commission points out that the FCC stated that state commissions continue to have discretion with respect to the asset lives they use in calculating depreciation expense. Finally, the Commission notes that the FCC has raised specific questions and requested comments from interested parties on the depreciation issue in its *TELRIC NPRM*, released on September 15, 2003. The Commission will consider the conclusions of the FCC from the *TELRIC NPRM* on the depreciation issue where appropriate in future proceedings.

CONCLUSIONS

In summary, the Commission concludes that the depreciation inputs previously determined reasonable and appropriate by the Commission for use in the UNE cost studies of Verizon, Carolina/Central, and BellSouth continue to be appropriate and that they are consistent with the FCC's rules, as clarified by the *TRO*. Therefore, no change in the previously-approved depreciation inputs is required due to the *TRO*.

IT IS, THEREFORE, ORDERED that the Commission has concluded and determined that the FCC's clarification provided in the TRO shall have no impact on the cost of capital and depreciation inputs previously established by the Commission for the UNE rates of BellSouth, Carolina, Central, and Verizon.

ISSUED BY ORDER OF THE COMMISSION.
This the 9th day of July, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

mr070904.01

DOCKET NO. P-100, SUB 133d

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
General Proceeding to Determine Permanent) ORDER RULING ON MOTIONS
Pricing for Unbundled Network Elements) FOR RECONSIDERATION

BY THE COMMISSION: On February 5, 2002, WorldCom, Inc. (WorldCom) filed its Petition for Expedited Commission Action to Promote Local Competition. In its Petition, WorldCom argued that unbundled network element (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 was several years old and that a new loop model, the BellSouth Telecommunications Loop Model (BSTLM), was available and had been 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 agreed 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:

Issue No. 1 – Do BellSouth's cost models and cost studies comply with the 1996 Act and the Federal Communications Commission's (FCC's) UNE pricing rules?
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?
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?
Issue No. 4 – Should the Commission use multiple scenarios in the BSTLM to set UNE loop rates?
Issue No. 5 – How should shared digital loop carrier (DLC) equipment costs be allocated in the BSTLM?
Issue No. 6 – Is BellSouth's use of a melded value based on the costs of its two vendors' prices for DLC equipment appropriate?
Issue No. 7 – What fill factors should be used in BellSouth's cost model?
Issue No. 8 – What is the appropriate cost of capital to use in calculating BellSouth's UNE rates?
Issue No. 9 – What depreciation rates/economic lives should be used in calculating BellSouth's UNE rates?
Issue No. 10 – What are the appropriate shared and common cost factors to use in calculating BellSouth's UNE rates?
Issue No. 11 – Is it appropriate to decrease UNE rates based on AT&T/WorldCom's forecasted "growth" adjustment?
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?
Issue No. 13 – Are AT&T/WorldCom's proposed adjustments to BellSouth's switching cost study appropriate?
Issue No. 14 – What are the appropriate task times and other inputs to use in calculating BellSouth's nonrecurring rates?
Issue No. 15 – Should disconnect costs be recovered through nonrecurring charges?
Issue No. 16 – 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?
Issue No. 17 – 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 Total Element Long-Run Incremental Cost (TELRIC)-compliant cost studies. The cost of capital and depreciation were 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*.

On December 30, 2003, the Commission issued its *Order Adopting Unbundled Network Element Rates for BellSouth Telecommunications, Inc.* The Commission made the following <u>Findings of Fact</u>:

1. BellSouth's cost models, from a design perspective, are capable of developing UNE prices which comply with the Telecommunications Act of 1996 (the Act or TA96) 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.

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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*).

7(d). BellSouth's proposed transport study input for busy hour centum call seconds (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.

Also on December 30, 2003, the Commission issued its: (1) *Order Requesting Comments on Impact of TRO on Cost of Capital and Depreciation Rate Inputs for the UNE Rates of BellSouth, Carolina, Central, and Verizon*; and (2) *Order Requesting Response from Sprint and Verizon*. The impact of the *TRO* on the cost of capital and depreciation inputs has been addressed separately by the Commission in its July 9, 2004 *Order on Impact of TRO on Cost of Capital and Depreciation Rate Inputs for the UNE Rates of BellSouth, Carolina, Central, and Verizon.*

On February 25, 2004, BellSouth filed a Motion for Reconsideration of certain Findings of Fact in the *December 30, 2003 Order*. Further, on March 1, 2004, AT&T/MCI filed its Motion for Reconsideration of the *Order*. The following chart indicates the issues for which a Motion for Reconsideration has been filed:

Finding of Fact No.	Party filing Motion for Reconsideration
2	AT&T/MCI
5	AT&T/MCI
7(a)	BellSouth
11	AT&T/MCI
13	AT&T/MCI
16	AT&T/MCI
Ordering Paragraph No. 3	AT&T/MCI

Further, BellSouth stated in its Motion for Reconsideration that the Commission should adopt BellSouth's cost of capital and depreciation inputs. BellSouth argued that the Commission erred in adopting 9.79% as BellSouth's cost of capital input and in adopting FCC regulatory lives, with the exception of digital switching, to calculate BellSouth's depreciation rates. Accordingly, BellSouth stated it was seeking the Commission's reconsideration on both of these conclusions. However,

BellSouth stated, because the Commission had indicated in the *December 30, 2003 Order* that it would consider altering its findings on cost of capital and depreciation after receiving comments from the parties on the impact of the *TRO*, it would not repeat its arguments on the issues of cost of capital and depreciation in its Motion for Reconsideration. Rather, BellSouth incorporated by reference in its Motion for Reconsideration all of its comments filed in response to the Commission's request on the cost of capital and depreciation issues.

On July 9, 2004, the Commission issued an *Order* on the impact of the *TRO* on the cost of capital and depreciation issues as determined for BellSouth in the *December 30, 2003 Order*. In so doing, the Commission has already addressed the comments and ruled on the cost of capital and depreciation issues referenced in BellSouth's Motion for Reconsideration. Therefore, a discussion of these two issues need not be repeated herein.

On March 4, 2004, the Commission issued an *Order* requesting comments and reply comments on the Motions for Reconsideration. BellSouth filed a Motion for Extension of time, and by Order dated March 16, 2004, the Commission ordered initial comments to be filed by March 24, 2004 and reply comments by April 16, 2004. On April 15, 2004, the Commission granted a Motion for Extension of Time filed by AT&T and granted all parties an extension of time to file reply comments by May 7, 2004.

On March 24, 2004, initial comments were filed by AT&T/MCI/Covad, BellSouth, and the Public Staff. On May 7, 2004, reply comments were filed by AT&T/MCI.

The Commission notes that there are several instances in the *December 30, 2003 Order* and this *Order Ruling on Motions for Reconsideration* wherein BellSouth's approved SGAT is referenced, specifically in Finding of Fact Nos. 14 and 16, and Ordering Paragraph No. 3. In this regard, the Commission notes that on July 21, 2004, BellSouth sent a letter to the Commission withdrawing its SGAT. However, since the SGAT was effective when the original decision in this docket was issued (December 30, 2003), the Commission does not believe that the withdrawal is an impediment to referencing SGAT charges previously approved. In addition, the Commission notes that on August 2, 2004, CompSouth[1] filed its Motion to Deny BellSouth's Request to Withdraw its SGAT. CompSouth requested that the Commission enter an Order denying BellSouth's request to withdraw its SGAT and establishing an investigation into what changes to the SGAT are appropriate. By Order dated August 3, 2004, the Commission requested the Public Staff and any other party not a member of CompSouth to file initial comments by no later than August 16, 2004, and requested BellSouth to file reply comments by no later than August 23, 2004.

On July 22, 2004, AT&T/MCI filed a Motion to Dismiss BellSouth's February 25, 2004 Motion for Reconsideration. AT&T/MCI noted that the Commission issued its *July 9, 2004 Order* on the impact of the *TRO* on the cost of capital and depreciation which eviscerates the major portion of BellSouth's Motion for Reconsideration. AT&T/MCI argued that no further deliberation, other than to reference the findings in the *July 9, 2004 Order*, is necessary for the Commission to dismiss BellSouth's request for reconsideration of the cost of capital and depreciation rates established in the *December 30, 2003 Order*. As to fill factors, AT&T/MCI stated that they had fully addressed this issue in their comments in response to BellSouth's Motion for Reconsideration. Therefore, AT&T/MCI also requested that the Commission deny BellSouth's Motion for Reconsideration concerning the fill factors issue.

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[1] CompSouth's CLPs doing business in the Southeast include: InLine, ITC^DeltaCom, MCI, Access Point Inc., AT&T, NuVox Communications, Inc., Access Integrated Networks, Inc., Birch Telecom, Talk America, Z-Tel Communications, Network Telephone Corp., Momentum Telecom, Inc., Covad, KMC Telecom, IDS Telcom, LLC, Xspedius Communications, and LecStar Telecom, Inc. National association members include CompTel/ASCENT and Promoting Active Competition Everywhere (PACE).

As noted above and in the AT&T/MCI pending Motion, the Commission has already addressed the comments and ruled on the cost of capital and depreciation issues referenced in BellSouth's Motion for Reconsideration. The fill factors issue included in BellSouth's Motion for Reconsideration is addressed by the Commission elsewhere in this *Order*. Therefore, the Motion of AT&T/MCI to dismiss BellSouth's Motion for Reconsideration dated February 25, 2004 appears to be moot at this point in time.

On July 27, 2004, BellSouth filed a Motion for Extension of Time to Appeal and/or Seek Reconsideration of the Commission's *July 9, 2004 Order*. In its Motion, BellSouth noted that the deadline for filing an appeal was August 9, 2004 and it sought an additional 30 days up to and including September 8, 2004 to file a notice of appeal. On July 28, 2004, the Commission issued an *Order* granting BellSouth an extension of time up to and including September 8, 2004 to file a Notice of Appeal pursuant to G.S. 62-90(a).

Following is a discussion, by Finding of Fact, of the Motions for Reconsideration and Clarification and comments filed in response to the December 30, 2003 *Order Adopting Permanent Unbundled Network Element Rates for BellSouth Telecommunications, Inc.* Appendix A provides a list of the acronyms used in this Order.

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?

INITIAL COMMISSION DECISION

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

MOTIONS FOR RECONSIDERATION

AT&T/MCI: AT&T/MCI stated that BellSouth does not dispute that the "bottoms-up" version of the BSTLM, which lessens the use of loading factors, is the tool the Commission can use to access a more granular level of information. As further stated by AT&T/MCI, BellSouth has relied over and over on the FCC's previous approval of 271 applications that included UNE loop rates based upon loading factors which predated the pricing decision in the *Virginia Arbitration Order*. AT&T/MCI commented that, in the *Virginia Arbitration Order*, the Wireline Competition Bureau of the FCC indicated that it would not rely upon cost study assumptions that use historical data to develop TELRIC prices.

AT&T/MCI commented that using the bottoms-up BSTLM produces significantly lower UNE loop rates than those produced using a tops-down approach, and supports the empirical data that telecommunications costs are decreasing. Furthermore, AT&T/MCI stated that it spent a considerable amount of time and resources to develop a record with abundant evidence to support using a bottoms-up costing approach. AT&T/MCI opined that the bottoms-up BSTLM yields more accurate UNE rates than a tops-down approach because it does not rely upon loading factors that are based upon outdated historical relationships and averages that overstate equipment investments.

Although AT&T/MCI disagreed with the general proposition that the tops-down version of the BSTLM should be used to establish rates, AT&T/MCI pointed out that the Public Staff did propose adjustments to BellSouth's in-plant factors which were not discussed in the *UNE Order*. AT&T/MCI stated that, upon reconsideration, if the Commission decides not to adopt the bottom-up approach of the BSTLM, the Commission should adopt the Public Staff's adjustments to BellSouth's in-plant factors.

INITIAL COMMENTS

AT&T/MCI/COVAD: AT&T/MCI/Covad did not address this issue in their Initial Comments.

BELLSOUTH: BellSouth observed that AT&T/MCI contended that the Commission should use hundreds of bottoms-up inputs in the BSTLM rather than in-plant factors to calculate the costs to engineer, furnish and install outside plant. Furthermore, BellSouth stated that AT&T/MCI continue to insist that using the BSTLM with bottoms-up inputs is more accurate than using the factors approach adopted by the majority of the state commissions in the BellSouth region. BellSouth pointed out that the Commission has already stated that it 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.

BellSouth stated that it is a fact that the results produced using BellSouth's or even the Commission's inputs in a tops-down approach in the model would produce higher costs than those produced using the AT&T/MCI proposed bottoms-up inputs and other changes. BellSouth remarked that would not be a relevant comparison because the Commission did not conclude that AT&T/MCI's proposed bottoms-up inputs are appropriate. BellSouth stated that, because the hundreds of inputs required in the bottoms-up version of the BSTLM allow AT&T/MCI greater opportunities to use invalid inputs, they are able to come up with a more desirable result using that version of the model.

As observed by BellSouth, the Public Staff stated in its Proposed Order that it was concerned that many of the recommendations proposed by AT&T/MCI to the bottoms-up study have not been supported with adequate evidence. Furthermore, BellSouth commented that the Public Staff stated that the number of recommended input adjustments could easily number in the hundreds, with many of those being deemed inappropriate in the absence of further justification.

BellSouth commented that AT&T/MCI continued to contend that in-plant factors are based on embedded costs and therefore produce UNE rates that do not comply with TELRIC. BellSouth stated that the in-plant factor calculation is based on the latest year-end data available at the time BellSouth's cost studies were conducted. As further stated by BellSouth, the foundation of BellSouth's factor development is the most recent calendar year of plant addition activity. BellSouth commented that, since "the resulting investment (i.e., the result from the application of the in-plant factor to the forward-looking material price) is one based upon an efficiently deployed, least-cost, hypothetical network, the result – by definition – is forward-looking."

BellSouth stated that AT&T/MCI contend in their Motion for Reconsideration that the Commission should adopt certain adjustments to a few of the factors used in the cost study. However, BellSouth opined that because the *UNE Order* is silent on the issue, there is nothing for the Commission to reconsider.

PUBLIC STAFF: The Public Staff stated that, while AT&T/MCI extensively cited the *Virginia Arbitration Order*, there is no evidence in this case regarding the cost model Verizon used in that proceeding or how its compares to the BSTLM. As stated by the Public Staff, "the Wireline Competition Bureau simply arrived at a different conclusion than the Commission, based upon a set of facts that are probably different than those in this case."

As described by the Public Staff, AT&T/MCI witness Pitkin's comparison of the results of BellSouth's bottoms-up and tops-down approaches to BSTLM "reveals that the bottoms-up approach produces higher UNE rates in many of the rate categories." Furthermore, as stated by the Public Staff, while using AT&T/MCI's inputs will naturally produce lower rates, there was no support provided for the vast majority of these input changes. The Public Staff stated that, "indeed, there was little, if any, evidence on the validity of BellSouth's bottoms-up inputs." As further stated by the Public Staff, "thus, it is unclear whether putting in the correct inputs in a bottoms-up study would produce rates that are lower than those resulting from the Commission's Order as alleged by AT&T/MCI."

The Public Staff commented that AT&T/MCI requested that, should the Commission not adopt the bottoms-up application of the BSTLM, then the AT&T/MCI proposed adjustments made by the Public Staff to BellSouth's in-plant loading factors should be adopted. Specifically, the Public Staff stated that the Commission should require BellSouth to adjust its in-plant factors to reflect the cap on sales tax applicable to purchases of central office equipment as set out in its Proposed Order.

REPLY COMMENTS

AT&T/MCI: As stated by AT&T/MCI, they never contended that the *Virginia Arbitration Order* should be used to determine evidentiary disputes, but rather it should be used as a guide to settle methodological issues. Further, they stated that the Public Staff claims that in 271 proceedings the FCC approved BellSouth's use of loading factors; however the FCC's 271 Orders were decided prior to the *Virginia Arbitration Order*, which rejected the use of loading factors.

AT&T/MCI believed that the Commission should not be swayed by the Public Staff's contention that the Verizon model and BellSouth's BSTLM cannot be compared to each other. AT&T/MCI stated that the Wireline Competition Bureau accepted the use of a variation of the FCC's Synthesis Model, which models costs bottoms-up, as more consistent with TELRIC rules.

AT&T/MCI pointed out the Georgia Public Service Commission's use of the bottoms-up version of the BSTLM is the most recent state commission decision on UNE pricing. They stated that, procedurally, the Georgia UNE proceeding included workshops on the workings of BSTLM, filings of the bottoms-up and tops-down version of the models, and tutorials by BellSouth's expert witnesses and AT&T/MCI's outside consultants for the Georgia Public Service Commission on the capabilities of the BSTLM. Furthermore, AT&T/MCI stated that BellSouth did not appeal the Georgia Commission decision to use the bottoms-up approach even after the FCC 271 decisions which BellSouth contends support the use of the tops-down study approach.

Furthermore, AT&T/MCI stated that, at the heart of BellSouth's and the Public Staff's arguments in opposition to the bottoms-up approach of the BSTLM, is the concern that obtaining data on the appropriate inputs requires a review of subject-matter expert opinion and evaluation by the Commission as to the accuracy of the inputs. AT&T/MCI stated that the bottoms-up inputs were supported by subject-matter opinion based upon a review of the data provided by BellSouth.

AT&T/MCI further commented that BellSouth's use of factors results in a distortion of UNE rates from their economic costs. AT&T/MCI stated that BellSouth does not contest that the in-plant loading factors are "averages." AT&T/MCI argued that BellSouth's use of averages to anticipate the future was not verified through documentation. Furthermore, AT&T/MCI stated that there is no indication that BellSouth made any adjustments to embedded data to make the historical factors consistent with the functions and processes of a forward-looking network being costed using BSTLM. As argued by AT&T/MCI, there is nothing in the record which supports a conclusion that BellSouth's application of in-plant factors yields TELRIC-compliant costs.

AT&T/MCI also commented that the last argument by BellSouth and the Public Staff is that a bottoms-up approach would not necessarily produce more accurate or lower UNE rates. AT&T/MCI stated that the administrative ease of performing a tops-down versus bottoms-up study approach does not comport with good practices, if the rates produced in the former case are not TELRIC compliant. AT&T/MCI opined that "it conclusively established that use of the tops-down version of the BSTLM, which includes the use of loading factors, would result in a substantial increase for the costs to place a 25-pair aerial cable compared to the costs to place a 50-pair aerial cable." AT&T/MCI stated that this one example illustrates how loading factors distort costs and why the bottoms-up approach, which discretely analyzes equipment costs, is far superior for determining UNE rates.

DISCUSSION

AT&T/MCI requested that the Commission reconsider its decision to allow BellSouth to use the tops-down approach to calculate UNE rates using the BSTLM, rather than using a bottoms-up approach. AT&T/MCI continued to argue that the bottoms-up approach provides a fairer presentation of TELRIC-compliant costs because of the increased granularity of cost elements in this approach, as compared to a purported use of "averages" in the tops-down approach.

The Commission notes that AT&T/MCI stated that they never contended that the *Virginia Arbitration Order* should be used to determine evidentiary disputes, but rather it should be used as a guide to settle methodological issues. However, the Public Staff further stated that while AT&T/MCI cite extensively to the *Virginia Arbitration Order*, there is no evidence in this case regarding the cost model Verizon used in that proceeding or how it compares to the BSTLM. The statement made by the Public Staff simply states that there is no comparison between the Verizon model used in the *Virginia Arbitration Order* and the BSTLM in the present proceeding.

As suggested by AT&T/MCI, the Public Staff and BellSouth are opposed to committing the resources required to perform a bottoms-up cost study in North Carolina. AT&T/MCI stated that the level of information and experience gained in developing and refining data in previous BellSouth proceedings, namely in Georgia, would provide a valuable basis for development of cost inputs that would be required by this Commission. The Commission observes from AT&T/MCI's reply comments that the process to arrive at data values in developing a completed study in Georgia, which remains contentious, involved the resources of numerous parties over a two-year period. There remains a great deal of uncertainty as to the reasonableness and practical value to be derived from expending two or more years in defining and executing a bottoms-up study process.

Further, AT&T/MCI stated that BellSouth's use of loading factors results in a distortion of UNE rates from their economic costs and that the use of the bottoms-up approach would produce accurate UNE rates. The Public Staff pointed out that AT&T/MCI witness Pitkin's comparison of the results of BellSouth's bottoms-up and tops-down approaches to BSTLM "reveals that the bottoms-up approach produces higher UNE rates in many of the rate categories." BellSouth commented that, since "the resulting investment (i.e., the result from the application of the in-plant factor to the forward-looking material price) is one based upon an efficiently deployed, least-cost, hypothetical network, the result – by definition – is forward-looking." AT&T/MCI argued that there is nothing in the record which supports a conclusion that BellSouth's application of in-plant factors yields TELRIC-compliant costs. The Commission believes that there remains no dispositive analysis which would arrive at the conclusion that the tops-down approach in using the BSTLM does not result in development of TELRIC-compliant costs.

AT&T/MCI asserted that the last argument by the Public Staff and BellSouth against reconsideration of using the bottoms-up version of the BSTLM is that such a methodology will not necessarily produce more accurate or lower UNE rates. AT&T/MCI stated that the administrative ease of performing a tops-down versus bottoms-up study approach does not comport with good practices, if the rates produced in the former case are not TELRIC-compliant. The Commission believes that, at the genesis of this proceeding, the parties were advised that the focus of this proceeding would be the development of UNE costs based on BellSouth's BSTLM, which was not available earlier in this proceeding. Additionally, the parties were to evaluate inputs to the model, while developing both recurring and nonrecurring rates.

The Public Staff stated that AT&T/MCI requested that, should the Commission not adopt the bottoms-up approach to the application of the BSTLM, the proposed adjustments made by the Public Staff to BellSouth's in-plant loading factors be adopted. The Public Staff, in its Proposed Order of February 14, 2003, stated that, based on all the evidence, the Commission should find and conclude that BellSouth's proposed use of loading factors is reasonable and appropriate to calculate the costs of UNEs and interconnection, with the exception of the level of sales tax applied to central office

equipment. The Public Staff stated that BellSouth witness Reid commented that one of the changes reflected in BellSouth's calculations was the reduction in the sales tax from 4% to 1% for central office equipment. However, the Public Staff commented that AT&T/MCI witness Pitkin discovered that BellSouth had adjusted the sales tax rate to 1% without capping the maximum level of sales tax at $80.00 per article in the BSTLM calculations. The Commission notes that the Public Staff in its comments on reconsideration supported AT&T/MCI's Motion for Reconsideration in this regard and recommended that the Commission require BellSouth to adjust its in-plant factors to reflect the cap on sales tax applicable to purchases of central office equipment as set out in its February 14, 2003 Proposed Order.

The Commission believes that it should affirm its previous decision that it is appropriate for BellSouth to use a "tops-down" approach in its cost studies. Furthermore, the Commission believes that BellSouth should adjust its in-plant factors to reflect the cap on sales tax applicable to purchases of central office equipment as set out in the Public Staff's February 14, 2003 Proposed Order.

CONCLUSIONS

The Commission affirms its previous decision that it is appropriate for BellSouth to use a "tops-down" approach in its cost studies. Furthermore, BellSouth should adjust its in-plant factors to reflect the cap on sales tax applicable to purchases of central office equipment as set out in the Public Staff's February 14, 2003 Proposed Order.

FINDING OF FACT NO. 5 (ISSUE NO. 5): How should shared DLC equipment costs be allocated in the BSTLM?

INITIAL COMMISSION DECISION

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

MOTIONS FOR RECONSIDERATION

AT&T/MCI: AT&T/MCI requested reconsideration of the Commission's decision that investment allocation should be based upon DS0 equivalents rather than on the space or slots utilized in the channel bank assembly. AT&T/MCI stated that the Georgia Public Service Commission recently considered this exact same issue in the context of a UNE cost proceeding and determined that: "Capacity of Digital Loop Carrier (DLC) shared equipment is exhausted not based upon the capacity of the multiplexing equipment housed in the DLC, but on the number of cards the equipment can hold." (*Georgia UNE Order*, Page 17) AT&T/MCI described DLC equipment as being analogous to a computer. AT&T/MCI stated that the number of items that can be plugged into a computer, such as a printer, monitor, speakers, mouse, etc., is not limitless and will exhaust before the memory or capacity of the computer. AT&T/MCI contended that, likewise, the number of items that can be plugged into a DLC, such as POTS cards, DSL cards, DS1 cards, etc., is not limitless and will exhaust before the capacity of the DLC. As such, AT&T/MCI argued that the Commission should reconsider allocating investments based upon shelf space rather than DS0 equivalents.

INITIAL COMMENTS

AT&T/MCI/COVAD: AT&T/MCI/Covad did not address this issue in their Initial Comments.

BELLSOUTH: In support of its position, BellSouth noted that this Commission, just like state commissions in Alabama, Florida, Kentucky, Louisiana, Mississippi and South Carolina, determined that it was appropriate to use DS0 equivalents to allocate shared DLC investment in the BSTLM. BellSouth stated that AT&T/MCI incorrectly asserted that "it is the physical equipment space occupied by the service specific circuitry that limits the total capacity of DLCs." BellSouth explained 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. BellSouth further explained that 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. BellSouth emphasized that when providing a DS1 service, the DLC equipment and transport bandwidth are used at a greater capacity than when used to provide voice-grade service.

BellSouth pointed out that the BSTLM uses DS0 equivalents not only to assign "fixed" investments among services, but also to size the equipment. Therefore, BellSouth explained that, 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. BellSouth maintained that, without a corresponding change in the way in which the model develops equipment requirements, AT&T/MCI's proposed changes inappropriately understate the amount of DLC system equipment generated by the BSTLM and assigned to UNEs, and therefore, understates the costs. BellSouth argued that by using AT&T/MCI's flawed approach, $153 million (approximately 30%) of the DLC costs that are developed based on their inputs go unrecovered.

BellSouth stated that AT&T/MCI also contended that the Commission's ruling on this issue has a negative impact on the ability of CLPs to compete for customers served with high capacity loops because the DS0 allocation methodology assigns a greater amount of DLC costs to services provided by such loops. According to BellSouth, AT&T/MCI's erroneous conclusion was based on the difference in the costs of the DS1 loop proposed in this proceeding and the existing rate. BellSouth maintained that the architecture BellSouth 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, BellSouth stated that the BSTLM's algorithms recognize the most forward-looking equipment currently available, including High-Bit-Rate Digital Subscriber Line (HDSL) cards, which were not considered in the earlier study. BellSouth also noted that the earlier studies filed in the previous UNE proceeding 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 argued that the prior filed costs were, in fact, understated. Finally, BellSouth asserted that AT&T/MCI do not offer any new fact or point to any evidence that the Commission overlooked in its analysis of this issue. BellSouth stated that the Commission considered and rejected in the *UNE Order* the same arguments AT&T/MCI make in their Motion for Reconsideration.

PUBLIC STAFF: In its comments, the Public Staff noted that much evidence was presented on this issue and the Commission received briefs and proposed orders containing extensive arguments on the subject. The Public Staff commented that the Commission concluded that the allocation method proposed by AT&T/MCI witness Pitkin appeared to be based on only one small component of DLC equipment, while BellSouth's method of allocating DLC equipment based on equivalent DS0s was properly based on cost-causation principles. The Public Staff stated that, moreover, as the Commission noted, the majority of investment in DLC equipment is dependent on DS0 equivalents, which is the basis for the methodology advocated by BellSouth.

The Public Staff emphasized that the only new argument advanced by AT&T/MCI was that the Georgia Public Service Commission decided the same issue in their favor. The Public Staff suggested that, while the Commission should certainly consider the decisions of other commissions on identical or similar issues, it should not alter its position when it has made a reasoned decision based on the record evidence in this proceeding.

REPLY COMMENTS

AT&T/MCI: AT&T/MCI averred that the cost of channel bank assembly of DLC equipment, and the assignment of this cost to the appropriate rate elements, is not a "minor portion" of the total DLC investment as BellSouth and the Public Staff contend. AT&T/MCI stated that they requested reconsideration of this issue because the Commission may have overlooked the fact that channel bank assemblies are part of the common equipment which BellSouth contends comprises the "majority of the investment of DLC equipment." In addition, multiplexing equipment would not exhaust before the physical space of the DLC channel bank assembly. Thus, AT&T/MCI asserted that two of the

three components that BellSouth argues constitute the "majority" of the DLC investment are not consumed based upon the number of DS0s.

AT&T/MCI commented that, although BellSouth is correct that this allocation will result in a very small understatement of the DLC capacity, BellSouth refused to provide AT&T/MCI with the information necessary to make changes to the BSTLM to correct this problem. Thus, AT&T/MCI opined that the choice left to the Commission is to use a methodology that results in a very small understatement of DLC investment but produces rates closer to TELRIC or to use BellSouth's methodology, which results in a huge misallocation and overstatement of costs.

Further, AT&T/MCI argued that BellSouth also misstates the basis for AT&T/MCI's argument that an investment allocation based upon DS0 equivalents results in assigning more costs to high capacity services. AT&T/MCI asserted that their argument is not based upon a comparison of the rates for a DS1 loop between the 1997 proceeding and the current proceeding. Rather, AT&T/MCI stated that, pursuant to the investment allocation approved by the Commission in this docket, "a competitor will pay 12 times the structure investment for an HDSL loop than for a POTS loop."

DISCUSSION

AT&T/MCI requested that the Commission reconsider its decision to allocate investments on a per DS0 equivalent basis. AT&T/MCI stated that the Georgia Public Service Commission recently considered this exact same issue in the context of a UNE cost proceeding and determined that: "Capacity of DLC shared equipment is exhausted not based upon the capacity of the multiplexing equipment housed in the DLC, but on the number of cards the equipment can hold." However, BellSouth noted that this Commission, just like state commissions in Alabama, Florida, Kentucky, Louisiana, Mississippi and South Carolina, determined that it was appropriate to use DS0 equivalents to allocate shared DLC investment in the BSTLM.

The Commission notes that BellSouth explained 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. BellSouth further explained that 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. BellSouth emphasized that, when providing a DS1 service, the DLC equipment and transport bandwidth are used at a greater capacity than when used to provide voice-grade service.

The Commission notes that BellSouth pointed out that the BSTLM uses DS0 equivalents not only to assign "fixed" investments among services, but also to size the equipment. Therefore, BellSouth explained that 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/MCI's proposed changes inappropriately understate the amount of DLC system equipment generated by the BSTLM and assigned to UNEs, and therefore, understates the costs. Furthermore, the Commission notes that AT&T/MCI commented that, although BellSouth is correct that this allocation will result in a very small understatement of the DLC capacity costs, BellSouth refused to provide AT&T/MCI with the information necessary to make changes to the BSTLM to correct this problem. Thus, AT&T/MCI opined that the choice left to the Commission is to use a methodology that results in a very small understatement of DLC investment but produces rates closer to TELRIC or use BellSouth's methodology, which results in a huge misallocation and overstatement of costs.

As noted by the Public Staff, much evidence was presented on this issue and the Commission received briefs and proposed orders containing extensive arguments on the subject. The Commission concluded that the allocation method proposed by AT&T/MCI witness Pitkin appeared to be based on only one small component of DLC equipment, while BellSouth's method of allocating DLC

equipment based on equivalent DS0s was properly based on cost-causation principles. The Commission believes that it is appropriate to affirm its previous decision that it is proper for BellSouth to allocate investments on a per DS0 equivalent basis. AT&T/MCI have presented no persuasive argument or substantial evidence based on the record that would lead the Commission to revise its decision herein.

CONCLUSIONS

The Commission finds it appropriate to affirm its decision that it is proper for BellSouth to allocate investments on a per DS0 equivalent basis.

FINDING OF FACT NO. 7(a) (ISSUE NO. 7): Distribution - What fill factors should be used in BellSouth's cost model?

INITIAL COMMISSION DECISION

The Commission concluded that an input value higher than 1.25 pairs was not justified for residential locations and required BellSouth to adjust its input values accordingly in its cost study.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 7(a) and stated that the Commission should adopt BellSouth's proposed input of 2.0 pairs to existing residential locations in calculating the average effective fill for distribution cable. BellSouth asserted that the Commission's adoption of 1.25 pairs per residential customer location places the Commission in conflict with prior orders regarding the effective distribution utilization and is inconsistent with the evidence.

BellSouth noted that utilization or fill factors play a key role in the calculation of loop costs. With respect to a facility that can support multiple users, BellSouth stated that these terms refer to the percentage of the facility's total capacity being used. BellSouth commented that the FCC's TELRIC methodology allows for a reasonable projection of actual utilization to be used in calculating loop costs.

BellSouth noted that in ruling on utilization inputs in the first UNE proceeding in this docket, the Commission concluded in its December 10, 1998 *Order Adopting Permanent Prices for Unbundled Network Elements*, at Page 66 that "BellSouth should adjust its utilization and fill factors to comply with the cable sizing factors for feeder cable and distribution cable and distribution pairs per residential housing unit consistent with the factors set out for BellSouth in the Commission's *FLEC Order*."[1] Further, BellSouth stated that in the first UNE proceeding, the Commission found the utilization for distribution plant of 44.6% (equivalent to the 1.4 pairs per housing unit utilized in the BCPM 3.1[2]) to be the appropriate input to be used in determining cost-based rates for UNE loops. BellSouth explained that a distribution utilization of 44.6% was entered as a direct input into the Loop Model, since this 44.6% utilization was equivalent to the distribution utilization resulting from 1.4 pairs per housing unit in the BCPM 3.1 ordered by the Commission on December 10, 1998. Further, BellSouth commented that in the most recent UNE proceeding, BellSouth introduced a new model that functions in a manner somewhat similar to the BCPM 3.1 used in the FLEC proceeding

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[1] *FLEC Order* refers to the Commission's *Order Adopting Forward-Looking Economic Cost [FLEC] Model and Inputs* issued on April 20, 1998, in Docket No. P-100, Sub 133b, wherein the Commission adopted the FLEC model for submission to the FCC in regards to determining the forward-looking economic cost of providing universal service in North Carolina.

[2] In regard to the Benchmark Cost Proxy Model (BCPM) 3.1, BellSouth stated that "The BCPM 3.1 requires an input for the number of distribution cable pairs placed per residential housing unit. Housing units include all existing BellSouth residential customer locations, all households without BellSouth service, and all other structures classified as housing units by the U.S. Census Bureau."

with respect to the way in which distribution utilizations are reflected, i.e., utilizations are calculated based upon the pairs per residential unit that are input.[1] BellSouth also noted that in the current proceeding, BellSouth witness Caldwell testified that

> [T]he distribution cables are sized based on the appropriate standard size cable and the number of pairs provisioned to each living unit. BellSouth assumes two pairs per residential location and uses the existing number of pairs per business location. Even though it is not an input, the effective distribution utilization can be calculated from the BSTLM-CP. The average effective fill for distribution cable in BellSouth's study for North Carolina is 43.76%.

Thus, BellSouth asserted that the effective utilization produced by the BSTLM, using 2.0 pairs per residential location, in the current proceeding (43.76%) is comparable to the fill previously adopted by the Commission in the FLEC study using the BCPM 3.1 and in the first UNE proceeding using the Loop Model (44.6%).

BellSouth argued that an input of 1.25 pairs per residential location adopted by the Commission in its *December 30, 2003 Order* significantly impacts distribution utilization in a way not supported by the record. BellSouth stated that the use of an input of 1.25 pairs per residential location arbitrarily inflates distribution utilization from 43.67% to 60%. According to BellSouth, this change artificially lowers distribution investment by over 20%. BellSouth remarked that the focus of the Commission's concern in the *December 10, 1998 Order* was on the appropriate utilization, which the Commission found to be 44.6% for distribution plant. BellSouth stated that, in this most recent UNE proceeding, it appears the Commission has based its dramatically new and different opinion regarding distribution utilization on the rise of digital subscriber line (DSL) service availability in BellSouth's territory. BellSouth asserted that the Commission's decision is in direct conflict with the recent FCC Notice of Proposed Rulemaking (NPRM) on TELRIC in which the FCC has indicated its support for moving the TELRIC methodology toward an approach more rooted in actual network attributes. BellSouth contended that a distribution utilization rate of 60% has never been achieved in BellSouth's network, is not attainable in any network belonging to any carrier, and moves BellSouth farther away from real-world network attributes rather than closer to the real world. Furthermore, BellSouth opined that there is nothing in the record to support such a dramatic increase in the distribution utilization value in this case.

In addition, BellSouth pointed out that in the seven other BellSouth states where the UNE case was litigated using the BSTLM to develop loop costs, no other state commission adjusted BellSouth's distribution pairs per residential location input. BellSouth noted that, in fact, the Florida Commission found that the 2.0 pairs per household input "in some instances may be conservative." (Florida Docket No. 990649-TP, May 25, 2001 Order, Page 170.)

In conclusion, BellSouth stated that

> [T]he only evidence in the record concerning BellSouth's average effective fill for distribution cable in North Carolina is contained in BellSouth's North Carolina cost study, and that factor is 43.76% (using an input of 2 pairs per existing residential

[1] BellSouth explained as follows: "The BSTLM uses cable sizing factors and inputs for distribution pairs per customer location similar to the BCPM 3.1. However, while the BCPM 3.1 input applies to distribution pairs per *housing unit*, the BSTLM input applies only to existing residential locations that had BellSouth service as of the date the billing records were extracted. Thus, an input of 2 pairs per housing unit in the BCPM 3.1 and an input of 2 pairs per existing residential customer location in the BSTLM produce very different effective fill rates. The use of 2 pairs in the BSTLM produces a higher effective fill rate (i.e., less spare) than the same input value of 2 pairs produces in the BCPM 3.1 since the BSTLM places no distribution pairs to vacant housing units or non-customer locations as of the billing record extracts."

customer location). This result is consistent with the distribution cable utilization previously approved by the NCUC, and consistent with the utilizations experienced in the real world distribution network of BellSouth in North Carolina. Ordering BellSouth to use an input of 1.25 pairs per residential location produces an effective distribution utilization of 60%, a factor that is 37% greater than the distribution fill proposed by BellSouth, not supported by the record, and is clearly unattainable. This results in a direct and artificial lowering of the distribution investment to a level well below TELRIC. Accordingly, BellSouth asks the NCUC to reconsider its conclusion in Finding of Fact 7(a) and adopt BellSouth's proposed input of 2 pairs per residential customer location.

INITIAL COMMENTS

AT&T/MCI/COVAD: AT&T/MCI/Covad pointed out that BellSouth's argument that the Commission erred in adopting an input value of 1.25 pairs per residential household for use in the BSTLM was based upon the Commission's previous UNE decision in 1998, as well as UNE decisions by other state commissions in the BellSouth region. However, in opposition, AT&T/MCI/Covad asserted that the record in the current UNE proceeding establishes that 1.25 pairs per residential household reflects the appropriate distribution fill for the BSTLM. Accordingly, AT&T/MCI/Covad requested that the Commission deny BellSouth's motion for reconsideration on this issue.

AT&T/MCI/Covad stated that, as indicated in the Commission's *December 30, 2003 Order*, there is absolutely no evidence in the record to support BellSouth's proposed use of 2.0 pairs per household. In particular, AT&T/MCI/Covad referenced certain excerpts from the *Order* as follows:

> 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. (*Order*, Page 56.)
>
> 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. (*Order*, Page 58.)

AT&T/MCI/Covad asserted that the lack of evidentiary support for BellSouth's position can be contrasted with the overwhelming amount of evidence in the record regarding the reduction in demand for second lines as well as BellSouth's outdated position on deploying extra capacity in distribution plant. AT&T/MCI/Covad noted that, as Department of Defense witness Gildea indicated, the fill factor of 44% established in 1998 is not reflective of efficient planning in 2002 or the decrease in nonrevenue producing idle spare capacity at residential living units. Further, AT&T/MCI/Covad pointed out that BellSouth's motion did not address the testimony by Department of Defense witness Gildea that the July 2, 1998 Commission *Order on Reconsideration*, in the FLEC proceeding, resulted in a modified fill factor for distribution cable of 52% for BellSouth and not the 44.6%, as BellSouth contended.

AT&T/MCI/Covad stated that BellSouth cannot dispute the overwhelming evidence in the record regarding the aggressive deployment of DSL service in North Carolina by BellSouth. Furthermore, AT&T/MCI/Covad noted that, since BellSouth rolled out DSL in the 1990's, the need for second lines has been significantly reduced. AT&T/MCI/Covad argued that BellSouth has, without directly disputing the record, asserted that the Commission's decision is in conflict with what the FCC <u>may do</u> and BellSouth has, inexplicably, stated that there is nothing in the record to support the Commission's increase in the distribution utilization value in this proceeding. Because the record is void of any documentation of BellSouth's current statewide average distribution pairs per household,

AT&T/MCI/Covad asserted that BellSouth's position on the real-world attributes of its network should be dismissed. Further, AT&T/MCI/Covad noted that there is not any FCC order inconsistent with the Commission's decision on this issue.

In regard to BellSouth's argument relying on the Commission decision in the *1998 UNE Order* that the effective fill for distribution cable should be 44.6% based upon the *FLEC Order* in North Carolina, AT&T/MCI/Covad pointed out BellSouth has argued in this proceeding against using universal service proceeding inputs to set UNE rates, as evidenced by the discussion in the *2003 UNE Order* at Page 64. AT&T/MCI/Covad explained that BellSouth witness Caldwell filed rebuttal testimony disputing AT&T/WorldCom witness Turner's reliance on inputs for fill factors for transport from a Georgia universal service proceeding. Thus, AT&T/MCI/Covad stated that it is disingenuous for BellSouth to now claim that this Commission must rely on universal service inputs when, in this proceeding, it has previously argued that such inputs have no place in establishing costs for UNEs.

Furthermore, AT&T/MCI/Covad commented that, not only has BellSouth argued that universal service inputs are inappropriate for use in setting UNE rates, but the FCC has specifically cautioned against using such an approach.[1] Further, AT&T/MCI/Covad noted that in prior proceedings in Florida, BellSouth has advocated exactly the opposite of what it is now arguing: "In response, BellSouth's witness Caldwell asserted that Universal Service funding is designed to set a subsidy level for all providers, while the UNE proceeding is designed to set permanent rates for BellSouth."[2] AT&T/MCI/Covad noted that, ultimately, the Florida Commission determined: "As discussed above, we agree with BellSouth that the inputs ordered in our Universal Service proceeding were for a different purpose and are not appropriate here."[3] AT&T/MCI/Covad argued that BellSouth cannot have it both ways; it cannot say that universal service inputs are not appropriate, but then trumpet universal service inputs when it suits its purpose. In fact, AT&T/MCI/Covad noted that the Commission followed BellSouth's own recommendation - to ignore universal service inputs and determine appropriate inputs for establishing UNE rates based on the evidence in the record.

Next, AT&T/MCI/Covad pointed out that the FCC itself has used a different approach for establishing UNE rates in the recent Verizon Virginia proceeding[4] than it has used in estimating the costs for universal service purposes. As an example, AT&T/MCI/Covad noted that the FCC specifically incorporated a growth adjustment when setting UNE rates; this growth offsets the spare capacity in the network by assuming that future customers will help pay for the modeled network investment. Thus, AT&T/MCI/Covad commented that the FCC itself recognizes that a different

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[1] AT&T/MCI/Covad referenced the *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Tenth Report and Order (released November 2, 1999)*, at Paragraph 32.

[2] AT&T/MCI/Covad referenced a proceeding before the Florida Public Service Commission, Docket No. 990649-TP, *Investigation into Pricing of Unbundled Network Elements*, Order No. PSC-01-1181-FOF-TP, May 25, 2001, Page 174.

[3] *Id.*, Page 188.

[4] AT&T/MCI/Covad referenced a proceeding *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.* (CC Docket Nos. 00-218, 00-251), *Memorandum Opinion and Order* (released August 29, 2003) (*Verizon Virginia Arbitration Order*).

approach may be appropriate for establishing the cost of UNEs than for estimating high-cost support amounts.[1]

In addition, AT&T/MCI/Covad observed that BellSouth neglected to mention that because the Commission initially determined that growth in the customer base using the network should not be included when calculating demand for UNEs, a lower fill factor, as BellSouth had proposed, would result in current customers paying for future growth in the network. AT&T/MCI/Covad argued that if excess capacity (lower fill factors) is included in the BSTLM, this increased network investment for additional distribution plant is only allocated to the current demand – the number of customers using the network today. AT&T/MCI/Covad commented that BellSouth has indicated that customer demand is based upon "existing residential locations that had BellSouth service as of the date the billing records were extracted." AT&T/MCI/Covad asserted that if investment is to be included in the network to accommodate growth, then growth must be included in the calculation of demand to reflect the future customers that will use the network and should help pay for the network. Otherwise, according to AT&T/MCI/Covad, BellSouth will over-recover its costs from current customers. AT&T/MCI/Covad observed that this is exactly what the FCC recognized in the recent Verizon Virginia arbitration proceeding. Further, AT&T/MCI/Covad noted that the Georgia Public Service Commission, which issued the most recent UNE decision in the BellSouth region, may not have adjusted BellSouth's distribution pairs per residential location input; however, the Commission did determine that growth in the network should be accounted for when determining the applicable UNE rates.[2] AT&T/MCI/Covad requested that the Commission dismiss BellSouth's motion for reconsideration.

BELLSOUTH: BellSouth did not file any initial comments with respect to this issue.

PUBLIC STAFF: The Public Staff observed that the Commission's discussion in the *December 30, 2003 Order* reflects careful consideration of the positions of AT&T/MCI, BellSouth, and the Public Staff. Further, the Public Staff noted that, as evidenced throughout the Commission's discussion of this issue, the Commission was aware that its decision to approve AT&T/MCI's proposed input of 1.25 pairs per residential unit would increase the effective fill for distribution plant.

Furthermore, the Public Staff stated that it believes the Commission's desire to reflect a more efficient network through a higher utilization rate is appropriate. However, the Public Staff asserted that there are tradeoffs between designing a network for optimum efficiency and BellSouth's ability to provide facilities to customers in a timely manner. The Public Staff expressed concern that the adoption of a factor of 1.25 pairs per existing residential location overemphasizes the Commission's desire to reflect an efficient network to the detriment of ensuring adequate facilities for customers. Therefore, the Public Staff recommended that the Commission reconsider its finding and adopt the Public Staff's recommendation for an input of 1.4 pairs per existing residential location.

REPLY COMMENTS

AT&T/MCI: AT&T/MCI did not file any reply comments with respect to this issue.

DISCUSSION

In summary, in its Motion for Reconsideration, BellSouth requested that the Commission reconsider its adoption of 1.25 pairs per residential customer location and recommended that the Commission adopt BellSouth's proposed input of 2.0 pairs to existing residential locations in calculating the average effective fill for distribution cable. In support of its position, BellSouth stated that its witness Caldwell testified in this proceeding that

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[1] *Verizon Virginia Arbitration Order*, Paragraph 199.

[2] AT&T/MCI/Covad referenced a proceeding *In Re: Review of Cost Studies, Methodologies, Pricing Policies and Cost Based Rates for Interconnection and Unbundling for BellSouth Telecommunications, Inc.'s Services*, Georgia Public Service Commission, Docket No. 14361-U, June 24, 2003 (*Georgia UNE Order*).

> [T]he distribution cables are sized based on the appropriate standard size cable and the number of pairs provisioned to each living unit. BellSouth assumes two pairs per residential location and uses the existing number of pairs per business location. Even though it is not an input, the effective distribution utilization can be calculated from the BSTLM-CP. The average effective fill for distribution cable in BellSouth's study for North Carolina is 43.76%.

In addition, BellSouth stated that the Commission's decision is in direct conflict with the FCC's *TELRIC NPRM*, released September 15, 2003, in which the FCC has indicated its support for moving the TELRIC methodology toward an approach more rooted in actual network attributes. Further, BellSouth observed that in the seven other BellSouth states where the UNE case was litigated using the BSTLM to develop loop costs, no other state commission adjusted BellSouth's distribution pairs per residential location input.

In their initial comments, AT&T/MCI/Covad asserted that 1.25 pairs per residential household would reflect the appropriate distribution fill for the BSTLM and thus, AT&T/MCI/Covad recommended that the Commission should dismiss BellSouth's motion. In support of their position, AT&T/MCI/Covad argued that there is an overwhelming amount of evidence in the record regarding the reduction in demand for second lines as well as BellSouth's outdated position on deploying extra capacity in distribution plant. AT&T/MCI/Covad noted that the fill factor of 44.6% established in 1998 is not reflective of efficient planning in 2002. AT&T/MCI/Covad commented that BellSouth cannot dispute the overwhelming evidence in the record regarding BellSouth's aggressive deployment of DSL service in North Carolina. Further, AT&T/MCI/Covad observed that the record is devoid of any documentation on BellSouth's current statewide average distribution pairs per household.

In its initial comments, the Public Staff recommended that the Commission modify its decision and adopt an input of 1.4 pairs per existing residential location. The Public Staff stated that it believes the Commission's desire to reflect a more efficient network through a higher utilization rate is appropriate. However, the Public Staff asserted that there are tradeoffs between designing a network for optimum efficiency and BellSouth's ability to provide facilities to customers in a timely manner. The Public Staff expressed concern that the adoption of a factor of 1.25 pairs per existing residential location overemphasizes the Commission's desire to reflect an efficient network to the detriment of ensuring adequate facilities for customers.

Reply comments with respect to this issue, were not filed by BellSouth, nor any other interested party.

In regard to BellSouth's assertion that the Commission's decision is in direct conflict with the FCC's *TELRIC NPRM*, the Commission disagrees. The Commission's decision is clearly not prohibited by the *TELRIC NPRM*, as evidenced by the excerpts from the *TELRIC NPRM*, which are cited hereinafter. Further, the Commission observes that the FCC has stated in the *TELRIC NPRM*, in regard to fill factors, that "[t]he *Local Competition Order* provides no guidance to state commissions on this specific issue beyond the general requirement that the network should be sized to meet reasonably foreseeable demand." Furthermore, the Commission understands that the FCC is seeking comments on the appropriate guidelines for states to follow in establishing fill factors and on the methods for quantifying dynamically efficient fill factors on a forward-looking basis. In particular, the Commission notes the following pertinent excerpts from the FCC's *TELRIC NPRM*, as follows:

> Perhaps the most controversial aspect of the TELRIC rules is the assumption that the cost of a UNE should be calculated based on the cost of ubiquitous deployment of the

most efficient technology currently available.[1] In implementing this requirement, current TELRIC models typically are designed to answer the following question: If a single carrier were to build an efficient network today to serve all customer locations within a particular geographic area, taking as given only the locations of existing wire centers, how much would it cost to construct and maintain the network? (Paragraph 49 and Footnote 97 (which is provided herein as Footnote 12))

We tentatively conclude that our TELRIC rules should more closely account for the real-world attributes of the routing and topography of an incumbent's network in the development of forward-looking costs. We seek comment on whether such an approach would address claims that our TELRIC rules currently distort a competitor's decision whether to invest in new facilities or to lease an incumbent's existing facilities. Yet we also wish to ensure that a reformed TELRIC methodology does not swing in the other direction and give incumbents undue advantages. We seek comment on this tentative conclusion and, in particular, on how such an approach may differ from the practices of state commissions in UNE pricing proceedings. (Paragraph 52)

The dispute as to the relevant network for pricing purposes is in large part a dispute over what constitutes efficiency.... What is the efficiency standard that the Commission should use in order to achieve UNE prices that send the correct economic signals regarding investment, while still achieving the necessary level of cost recovery? ...We ask parties to be very specific in defining the standard of efficiency and explaining how to determine whether a network is optimized for economic efficiency. (Paragraph 57)

Our current rules require states to assume that the 'most efficient telecommunications technology currently available' is used throughout the network. The Commission concluded in the *Local Competition Order* that the forward-looking pricing methodology for interconnection and UNEs should be based on a 'reconstructed local network [that] will employ the most efficient technology for reasonably foreseeable capacity requirements.' At the same time, the Commission recognized a need for 'basing prices on efficient, new technology that is compatible with the existing infrastructure.' (Paragraph 67, footnotes omitted)

We seek comment on how our tentative conclusion above affects the technology assumptions used to develop UNE prices.... (Paragraph 69)

A fill factor represents the percentage of the capacity of a particular facility or piece of equipment that is used on average over its life. Increasing fill factors has the effect of lowering costs by reducing the amount of spare capacity that must be allocated to working units. For example, if the investment in loop plant is $1 million and there are 1000 total loops, the investment per working loop would be $2000 if the fill factor were 50 percent, but only $1429 per loop with a 70 percent fill factor. The *Local Competition Order* provides no guidance to state commissions on this specific issue beyond the general requirement that the network should be sized to meet reasonably

[1] *Local Competition Order*, 11 FCC Rcd at 15848-49, para. 685; 47 C.F.R. §51.505(b)(1).

foreseeable demand.[1] . . . (Paragraph 73 and Footnote 117 (which is provided herein as Footnote 13))

We seek comment on appropriate guidelines for states to follow in establishing fill factors. . . . (Paragraph 74)

. . . Finally, we seek comment on methods for quantifying dynamically efficient fill factors on a forward-looking basis. (Paragraph 75)

Next, in regard to BellSouth's following statement that "in the seven other BellSouth states where the UNE case was litigated using the BSTLM to develop loop costs, no other state commission adjusted BellSouth's distribution pairs per residential location input", the Commission has reviewed the UNE Orders issued in those states to discover what those other state commissions discussed and concluded with regard to the issue of distribution pairs per residential location. In this regard, the Commission summarizes such Orders as follows:

1. **Alabama Order in Docket 27821, May 31, 2002**
In the Section IV discussion of the Order, Section IV titled as "The Inputs to the BellSouth Model", it is mentioned that the Southeastern Competitive Carriers Association (SECCA) recommended changing the number of pairs per housing unit from 2.0 to 1.5 pairs (Page 29), but otherwise, there is no specific discussion by the Commission. In its Section IV conclusions, the Commission simply states that "The intervenors in this docket have recommended numerous adjustments, many of which have merit. Although we have not *per se* adopted such adjustments, we have nonetheless considered many of these recommended adjustments in our development of prices of unbundled network elements that are adopted herein and attached to this document as Appendix A." (Pages 40-41)

2. **Florida Order No. PSC-01-1181-FOF-TP in Docket 990649-TP, May 25, 2001**
In the Section F - Fill Factors discussion of the Order, it is noted that the Florida Competitive Carriers Association (FCCA) Alternative Local Exchange Companies (ALECs), the Data ALECs, and Time Warner argued that the number of pairs per residential household should be 1.5 pairs (Page 188), based on the Florida Commission's Order in Florida's Universal Service Docket, whereas, BellSouth argued that the input should be 2.0 pairs. The Commission found that it disagreed that the inputs from the Universal Service Docket were appropriate in the UNE pricing docket and stated "We believe that 2 pairs per household is reasonable, and in some instances may be conservative." BellSouth witness Caldwell testified in Florida that "The average distribution cable effective fill in BellSouth's study for Florida is 47%." (Page 183) Further, in a discovery response, BellSouth responded that "The effective fill is determined by dividing the number of working distribution pairs by the number of available pairs placed. Overall, the BSTLM produces an effective distribution fill of 47%, which is very close to the fill BellSouth has experienced in the past and expects to experience in its copper distribution plant in the future." (Page 183) The Order also states that "When asked for actual distribution and feeder fills, BellSouth responded, '[N]o record is kept for 'distribution' cables." (Page 184) The Commission stated at the end of the Section F Decision that "We also find that BellSouth's distribution fill factors that result in utilizations of 47 percent are reasonable." (Page 189)

[1] *Local Competition Order*, 11 FCC Rcd at 15847, para.682. We note that competitive LECs raised issues related to fill factors in limited instances during section 271 proceedings before the Commission. In one case, the Commission concluded that a fill factor of 30 percent for distribution cable in Oklahoma was too low and violated TELRIC principles because it assumed that too much of the capacity would be idle for an indefinite time, contrary to TELRIC's presumption of an efficient network. SWBT *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 627-76, para. 80.

Florida Order No. PSC-01-2051-FOF-TP in Docket 990649-TP, October 18, 2001
The Order addressed BellSouth's and other intervenors' requests for reconsideration of the May 25, 2001 Order. Based upon a review of the Order, it appears that the matter of pairs was not an issue in the Order.

Florida Order No. PSC-02-1311-FOF-TP in Docket 990649A-TP, September 27, 2002
The Order addressed matters raised in BellSouth's 120-day filing that was required by the May 25, 2001 Order. Based upon a review of the Order, it appears that the matter of pairs was not an issue in the Order.

3. **Georgia Order in Docket No. 14361-U, June 24, 2003**
Based upon a review of the Order, it appears that the matter of pairs was not explicitly addressed as an issue in the Order.

Georgia Order in Docket No. 14361-U, September 22, 2003
The Order addressed BellSouth's and other intervenors' requests for reconsideration or clarification of the June 24, 2003 Order. Based upon a review of the Order, it appears that the matter of pairs was not explicitly addressed as an issue in the Order.

4. **Kentucky Order in Administrative Case No. 382, December 18, 2001**
In the Order at Page 6, the Commission observed that "BellSouth has made a parallel filing with the Florida Commission using the same models it filed in Kentucky, Louisiana, Alabama, Mississippi, and South Carolina in 2000. More recently, BellSouth filed new cost studies in Georgia to true-up the interim rates in that state based upon the BellSouth Telecommunications Loop Model and related cost calculators." Based upon a review of the Order, it appears that the matter of pairs was not explicitly addressed as an issue in the Order. Further, in its Ordering Paragraph No. 2, the Kentucky Commission stated that "The decisions reached by the Florida Commission, as described herein, and absent further Order, shall be implemented in Kentucky."

5. **Louisiana Order in Docket U-24714 (Subdocket A), September 21, 2001**
In regard to the matter of appropriate assumptions and inputs in regard to fill factors, the Order states that "We accept the fill factors proposed by BellSouth." And the Order simply states that "we conclude that SECCA has failed to provide reasoning or support for its proposed modifications sufficient to demonstrate that BellSouth's well-defended assumptions are inappropriate." (Pages 9-10) [North Carolina Commission Note: The Order did not provide any summary discussion of SECCA's specific proposed modifications to BellSouth's fill factors or provide the number of pairs proposed by BellSouth.]

6. **Mississippi Order in Docket 00-UA-999, October 12, 2001**
Based upon a review of the Order, it appears that the matter of pairs was not explicitly addressed as an issue in the Order. In regard to UNE rates, the Commission imposed a competitive discount of 10% on all loop and UNE combination recurring charges that were produced after its other approved input modifications were made and the Commission adopted nonrecurring charges equal to 50% of BellSouth's proposed nonrecurring charges. (Pages 24-25)

7. **South Carolina Order No. 2001-1089 in Docket 2001-65-C, November 30, 2001**
Based upon a review of the Order, it appears that the matter of pairs was not explicitly addressed as an issue in this Order. In regard to UNE rates the Commission stated that "We find that the rates calculated using BellSouth's models and inputs fall at the upper end of a range of reasonable TELRIC rates. Based on our pro-competitive policy and the current economic conditions within this State, we hereby adopt a competitive discount of 20% off

BellSouth's proposed recurring rates for all UNE loops and combinations, except for BellSouth's 4-wire DS1 digital loop, for which we adopt a competitive discount of 30%, and a competitive discount of 50% off all of BellSouth's proposed nonrecurring charges." (Page 6)

In regard to the aforementioned other BellSouth states' UNE Orders, the Commission makes the following summary observations concerning the number-of-pairs input. In Alabama, that Commission merely mentioned the number-of-pairs input that was proposed in opposition to BellSouth and stated that it had considered many of the recommended adjustments in its development of prices for BellSouth's UNEs. Consequently, it is not clear whether the Alabama Commission accepted BellSouth's proposed number-of-pairs input or how that Commission may have considered SECCA's recommended number-of-pairs input of 1.5 in the development of rates. In Florida, that Commission apparently accepted BellSouth's proposed input of 2.0 pairs, but it resulted in an effective fill of 47%, which is 7.4% higher than the 43.76% utilization that BellSouth is reflecting in its study in North Carolina. In Louisiana, as BellSouth claims, that Commission accepted BellSouth's proposed fill factors, but we are unable to determine if BellSouth proposed 2.0 pairs there. In Mississippi, that Commission found that a competitive discount of 10% should be implemented to determine recurring rates for UNE loops and combinations and a 50% discount should be implemented to determine all nonrecurring rates. And in South Carolina, that Commission concluded that the rates resulting from BellSouth's models and inputs were in the upper end of a range of reasonable rates and, consequently, the South Carolina Commission found that a competitive discount of 20% should be implemented to determine recurring rates for UNE loops and combinations (except 4-wire DS1 digital loops received a 30% discount) and that a 50% discount should be implemented to determine all nonrecurring rates. Thus, the Commission observes that the Mississippi and South Carolina Commissions' competitive discount rate adjustments imply that their respective adopted inputs for the models would not otherwise result in appropriate UNE recurring rates for loops and combinations and UNE nonrecurring rates. And in regard to the Georgia and Kentucky Orders, the Commission was unable to find any explicit discussion concerning the number-of-pairs input or competitive discount rate adjustments. Consequently, the Commission concludes that the matter of the number-of-pairs input must not have been a contested issue in those states and therefore, in the absence of controversy, BellSouth's input was apparently accepted, but we are unable to determine if BellSouth proposed 2.0 pairs there.

In North Carolina, the issue of the appropriate number-of-pairs input has been an issue, in some form, in three different proceedings.

First, in the Commission's *April 20, 1998 FLEC Order*, issued in Docket No. P-100, Sub 133b, our universal service docket, in regard to the issue of distribution pairs per residential housing unit, the Commission found that an input of 1.4 pairs was appropriate. Said *Order* stated that "Calculations based on BCPM summary report data show the ratios of the number of residential lines in service to the total number of households served were 1.02 for Central, 1.09 for Carolina, and 1.12 for GTE and BellSouth, well below the proposed 1.6 to 2.0 factors. In light of these ratios, the Commission concurs with the Public Staff that a factor of 1.4 appears to be entirely reasonable for determining the forward-looking costs of all of the ILECs."

Next, in the first UNE case, in the Commission's *December 10, 1998 UNE Order*, issued in Docket No. P-100, Sub 133d, in regard to fill factors, the Commission stated that it found no compelling argument or evidence to support a change in either the cable sizing factors for feeder and distribution plant, nor for the input value for distribution pairs per residential housing unit from those previously adopted by the Commission in the *FLEC Order*, i.e., the number of pairs per residential location remained at 1.4 pairs.

Most recently, in the second UNE case, in the *December 30, 2003 Order*, based upon the evidence presented, the Commission stated that it was 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. The Commission also stated in the *Order* that it did not find any information in the record which would establish, definitively, BellSouth's current statewide average distribution pairs per residential household. Further, the Commission noted that 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. Furthermore, in the *Order*, the Commission stated 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 transport both voice and data simultaneously over the same line from virtually all of its wire centers. In particular, the Commission pointed out that BellSouth 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".[1] 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 observed that 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. The Commission carefully reviewed the evidence presented in this proceeding and decided that an input of 1.25 pairs per existing residential location would be an appropriate factor.

Based upon our further review of the evidence in this proceeding and our review of the *TELRIC NPRM* and the other BellSouth states' *Orders*, as noted hereinbefore, the Commission concludes that BellSouth's motion for reconsideration provides insufficient justification for an increase in the Commission's approved input of 1.25 pairs to 2.0 pairs, as recommended by BellSouth. However, the Commission is influenced by the concern expressed by the Public Staff in its comments that "the adoption of a factor of 1.25 pairs per existing residential location overemphasizes the Commission's desire to reflect an efficient network to the detriment of ensuring adequate facilities for customers." The Commission considers this to be a credible and significant concern that warrants a revision in the previously-approved number-of-pairs input. Consequently, the Commission believes that it would be prudent to modify its input by adopting the Public Staff's recommendation of 1.4 pairs per existing residential customer location to ensure the provision of adequate facilities for customers.

CONCLUSIONS

The Commission finds it appropriate to reconsider its decision and revise its previously approved input of 1.25 pairs to 1.4 pairs to ensure adequate facilities for customers. Therefore, the Commission finds it appropriate to modify its *December 30, 2003 Order*, Finding of Fact No. 7(a), to read as follows:

> An input value higher than 1.4 pairs is not justified for residential locations, and BellSouth should adjust its input values accordingly in its cost study.

FINDING OF FACT NO. 11 (ISSUE NO. 11): Is it appropriate to decrease UNE rates based on AT&T/WorldCom's forecasted "growth" adjustment?

INITIAL COMMISSION DECISION

The Commission concluded that it is not appropriate to decrease UNE rates based on AT&T/MCI's forecasted "growth" adjustment.

[1] See *December 30, 2003 Order*, Page 57.

MOTIONS FOR RECONSIDERATION

AT&T/MCI: AT&T/MCI stated that adjustments to BellSouth's proposed UNE rates to account for customer growth are essential to ensure that BellSouth does not over recover its costs as it has done since rates were set in 1998. AT&T/MCI argued that, based upon recent decisions by the Wireline Competition Bureau (WCB) of the FCC and the Georgia Public Service Commission, the Commission should reconsider rejecting the growth adjustment as arbitrary.

AT&T/MCI stated that BellSouth erroneously contended that FCC rules do not require the use of projected future demand in the development of costs. Yet, the WCB found it "appropriate to use updated line count data" to develop forward looking costs. (*Virginia Arbitration Order*, Paragraph 192) Specifically, the WCB referenced the use of updated line count data in the universal service proceedings, which is the same proceeding cited to by AT&T/MCI as support for use of updated line counts in UNE cost proceedings. AT&T/MCI argued that their methodology to update the line count data is not "arbitrary"; it is the same methodology used by the WCB to update the line count data from year 2000 to year-end 2002 to determine loop rates in Virginia. (*Id.*, Paragraphs 197-199) Thus, AT&T/MCI requested that the Commission reconsider incorporating the growth adjustment as proposed by AT&T/MCI to ensure that the UNE rates adopted in this proceeding fairly and accurately reflect the costs BellSouth is expected to incur.

INITIAL COMMENTS

AT&T/MCI/COVAD: AT&T/MCI/Covad did not address this issue in their Initial Comments.

BELLSOUTH: BellSouth stated that AT&T/MCI contended in their motion that the "Commission should reconsider rejecting the growth adjustment as arbitrary" based upon the decisions reflected in the *Georgia UNE Order* and *Virginia Arbitration Order.* BellSouth argued that neither provides a valid basis for the Commission to reconsider its decision. BellSouth noted that on appeal from the *Georgia UNE Order*, the federal district court ruled that the Georgia Commission acted arbitrarily and capriciously in adopting the same "growth" adjustment that AT&T/MCI continue to recommend to the Commission.

BellSouth stated that AT&T/MCI's reliance on the *Virginia Arbitration Order* is also misplaced. The ruling in that order that it was appropriate to update line counts in the model used in that proceeding is not the same thing as applying an arbitrary "growth" adjustment after costs have been calculated by BSTLM. BellSouth noted that the Commission recognized on pages 82 – 83 of the *UNE Order* that, "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 argued that AT&T/MCI's proposed "growth" adjustment erroneously assumes that there would be zero cost to serve additional demand.

BellSouth stated that AT&T/MCI attempt to sell their "growth" adjustment by asserting that "[e]vidence in the record indicates that without updating line count data the 1998 UNE rates (which were based upon 1997 data) allowed BellSouth to over recover its costs more than 37 percent from 2000 to 2002." To the contrary, BellSouth asserted that the record is that BellSouth demonstrated that the "evidence" which AT&T/MCI cite consists of a flawed "analysis" fraught with incorrect assumptions, such as that there is no incremental cost associated with an increase in demand.

PUBLIC STAFF: The Public Staff stated that AT&T/MCI requested that the Commission reconsider its decision not to include a growth adjustment, citing the *Virginia Arbitration Order*, which did require the use of a growth adjustment. The Public Staff stated that this request should be denied for two reasons. First, the Commission has already found the adjustments to growth proposed by AT&T/MCI to be arbitrary. Second, BellSouth demonstrated that when updated line data with increased demand was input into BellSouth's forward-looking loop model, the per line cost did not change because any decreases due to growth in demand were offset by increases in the network

routing and plant requirements. Thus, the Public Staff argued that, with BellSouth's loop model, the net effect of any growth adjustment is zero, making such an adjustment unnecessary.

REPLY COMMENTS

AT&T/MCI: AT&T/MCI stated that, contrary to BellSouth's assertions, the federal court for the Northern District of Georgia did not determine that a growth adjustment cannot be incorporated into the UNE rates. Rather, the court merely remanded this issue to the Georgia Commission to "rationally determine the costs associated with that growth" because the court found that there are costs associated with growth to build new facilities. Thus, AT&T/MCI argued that the Georgia Public Service Commission's decision that a growth adjustment to the UNE rates was warranted remains valid. AT&T/MCI believed that BellSouth did not prevail in federal court on the argument that any adjustment to UNE rates based upon an increase in demand is "arbitrary," "capricious" or unwarranted.

AT&T/MCI stated that, in this proceeding, they did not claim that there are no additional costs for growth at new locations outside of the network. Rather, AT&T/MCI stated that they accounted for the additional investment necessary for new growth outside the network by reducing the projected demand by 6.78%. Thus, AT&T/MCI argued that the growth adjustment they proposed herein fully complies with the federal district court decision.

According to AT&T/MCI, the Commission also erroneously relied upon the data provided by BellSouth that network investment would increase as line count increased. AT&T/MCI claimed that they established that BellSouth's per line investment for an A.1.1. (2-wire analog loop) would decrease as demand increased between the years 1998 and 2000. In addition, AT&T/MCI contended that BellSouth's own late filed exhibit established that as demand for this same UNE increased, the per line investment for material decreased. AT&T/MCI noted that, although the investment for A.9.1 (4-wire DS1 Digital Loop) increased, AT&T/MCI extensively addressed why it believes this anomaly is not credible in its post hearing brief. AT&T/MCI commented that in Paragraph 194 of the *Virginia Arbitration Order*, the WCB of the FCC found it was appropriate to update the line count data without updating the customer location data because: "In the line count update orders, the Bureau noted that 72 percent and 65 percent, respectively, of the increase in residential lines nationwide were due to the installation of additional lines at existing locations." Thus, AT&T/MCI opined that it is evident that the post-hearing analysis upon which the Commission relied is flawed. AT&T/MCI argued that, based upon the affirmation of the federal court that a growth adjustment can be properly incorporated into the UNE rates and the analysis in the *Virginia Arbitration Order* that there would not be a significant increase in network costs as line count demand increases as BellSouth contends, the Commission should reconsider this issue.

Finally, AT&T/MCI commented that BellSouth also argues that the "ruling in that [*Virginia Arbitration*] order that it was appropriate to update line counts in the model used in that proceeding is not the same thing as applying an arbitrary 'growth' adjustment after costs have been calculated by the BSTLM." Yet, AT&T/MCI stated that BellSouth refused to provide AT&T/MCI with the ability to adjust the line count in the BSTLM to account for growth. AT&T/MCI opined that BellSouth should not now criticize AT&T/MCI for making a growth adjustment based on the only available option. AT&T/MCI asserted that whether growth in demand is included in the UNE rates through an updated line count or adjustment to the resulting rates, the *Virginia Arbitration Order* supports including increased customer demand for the time period that UNE rates will remain in effect.

DISCUSSION

AT&T/MCI requested that the Commission reconsider incorporating the growth adjustment as proposed by AT&T/MCI to ensure that the UNE rates adopted in this proceeding fairly and accurately reflect the costs BellSouth is expected to incur. AT&T/MCI argued that, based upon recent decisions by the WCB of the FCC and the Georgia Public Service Commission, the Commission should reconsider rejecting the growth adjustment as arbitrary. However, BellSouth

noted that on appeal from the *Georgia UNE Order*, the federal district court ruled that the Georgia Commission acted arbitrarily and capriciously in adopting the same "growth" adjustment that AT&T/MCI continue to recommend to the Commission. BellSouth stated that the ruling in the *Virginia Arbitration Order* that it was appropriate to update line counts in the model used in that proceeding is not the same thing as applying an arbitrary "growth" adjustment after costs have been calculated by BSTLM.

BellSouth noted that the Commission recognized in the *UNE Order* that "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." Moreover, the Public Staff stated that BellSouth demonstrated that when updated line data with increased demand was input into BellSouth's forward-looking loop model, the per line cost did not change because any decreases due to growth in demand were offset by increases in network routing and plant requirements. Thus, the Public Staff argued that, with BellSouth's loop model, the net effect of any growth adjustment is zero, making such an adjustment unnecessary.

Based on the foregoing, the Commission agrees with BellSouth and the Public Staff and therefore believes it should affirm its previous decision that it is not appropriate to decrease UNE rates based on AT&T/MCI's forecasted "growth" adjustment.

CONCLUSIONS

The Commission finds it appropriate to affirm its decision that it is not appropriate to decrease UNE rates based on AT&T/MCI's forecasted "growth" adjustment.

FINDING OF FACT NO. 13 (ISSUE NO. 13): Are AT&T/WorldCom's proposed adjustments to BellSouth's switching cost study appropriate?

INITIAL COMMISSION DECISION

The Commission found that the switching costs proposed by BellSouth are reasonable and appropriate for use in calculating its UNE rates subject to the applicable adjustments and modifications concerning the various cost and capital expense factors discussed in the *December 30, 2003 Order*. 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 offer a composite features per port rate which includes all available vertical features.

MOTIONS FOR RECONSIDERATION

AT&T/MCI: AT&T/MCI objected to Finding of Fact No. 13 and maintained that vertical features should be priced at zero. According to AT&T/MCI, the cross-examination of BellSouth's witness Shell established that the witness did not know whether or not the feature hardware costs were already included in the cost of the switch and did not know what hardware was used to provide basic features such as call waiting, caller ID or conference calling. AT&T/MCI believe that such cross-examination, by inference, supports the testimony of AT&T/MCI's witness that: 1) the switch list price used as an input in the Switching Cost Information System/Model Office (SCIS/MO) also includes material costs for certain feature hardware; 2) the switch list prices are used as SCIS/MO inputs to determine the switch discount; and 3) the SCIS/MO outputs, which include the cost for certain feature hardware, are used to determine the switch port and minutes of use (MOU) rates. Therefore, AT&T/MCI argued that the cost for feature hardware is already included in the switch port and MOU rates. In addition, AT&T/MCI stated that the FCC reached the same conclusion in the *Virginia Arbitration Order* and cited Paragraph 490, which reads in part, "Costs for the numerous vertical features that do not require specific unique hardware are included in Verizon's proposed per port and MOU switch prices." Therefore, AT&T/MCI take the position that the cross-examination of BellSouth's own witness and the *Virginia Arbitration Order* support reconsideration of the rate, if any, for vertical features.

AT&T also pointed out that the Commission determined that the nonrecurring rates in this proceeding should be based upon BellSouth's SGAT. Yet, the Commission did not agree with AT&T/MCI's argument that the vertical features rate should also be zero even though BellSouth's SGAT filing on May 7, 2002 indicated that a feature rate of zero was cost-based and appropriate. According to AT&T/MCI, BellSouth never refuted that filing and the *Order* dated December 30, 2003 never references the previous SGAT in the discussion on vertical features. For the reasons discussed above, AT&T/MCI argued that the Commission should reconsider adopting any per feature rate as well as any composite feature rate.

INITIAL COMMENTS

AT&T/MCI/COVAD: AT&T/MCI/Covad did not address this issue in their Initial Comments.

BELLSOUTH: BellSouth stated that AT&T/MCI's claim that the cross-examination of witness Shell "by inference" supports a double-counting theory is simply wrong. According to BellSouth, witness Shell testified on cross-examination, consistent with his pre-filed rebuttal testimony, that the equipment items in the SCIS/MO model do not include any vertical features hardware. Further, BellSouth commented that witness Shell explained that the list of equipment which includes some feature hardware was used solely to compare list prices to actual prices for use as a starting point in the process to determine the appropriate discount level for new/replacement switches, and was not used in the development of features cost. In addition, BellSouth argued that the fact an FCC bureau determined that such costs are included in Verizon's per port and switching usage rates is irrelevant. BellSouth noted that the Commission has already concluded that BellSouth has not double-counted the hardware costs for vertical features.

In response to AT&T/MCI's argument that it should not have to pay any amount for vertical features because BellSouth's SGAT at one time contained no rate for features, BellSouth replied that there is no dispute that BellSouth is legally entitled to recover its cost of providing vertical features to CLPs. BellSouth stated that the Commission should not disregard the cost-based UNE pricing standard and should reaffirm that its cost-based vertical features rates are correct.

PUBLIC STAFF: The Public Staff first addressed AT&T/MCI's contention that vertical features should be priced at zero, based, in part, on the fact that BellSouth's SGAT filed on May 7, 2002, used a rate of zero and was accompanied by a cover letter from BellSouth indicating that the rates were "cost-based and appropriate." AT&T/MCI then contended that the Commission was being inconsistent in this proceeding when it determined that the appropriate nonrecurring rates were those in BellSouth's SGAT, while not adopting the SGAT rates for recurring vertical features rates. The Public Staff responded to this contention by pointing out that the Commission determined that BellSouth's proposed nonrecurring charges were not supported by the evidence in the record, while the vertical features rates were supported by competent testimony. Therefore, there was no inconsistency in the two positions taken by the Commission.

The Public Staff also stated that the Commission's conclusion that vertical features should be unbundled and priced separately was based on the Commission's reconciliation of the FCC's rules prior to the issuance of the *TRO*. However, the Public Staff cited a portion of Paragraph 433 of the *TRO*, in which the FCC said:

> The features, functions, and capabilities of the switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks. In addition, we conclude that the features, functions, and capabilities of the local circuit switching UNE also include the same basic capabilities that are available to the incumbent LEC's customers, such as telephone number, directory listing, dial tone, signaling, and access to 911, in the cases described below, operator services and directory assistance. The end office switching element includes all vertical features that the switch is capable

> of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions. Thus, when a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. (Footnotes excluded)

The Public Staff added that this portion of the *TRO* was not disturbed by the D.C. Circuit's decision vacating much of the *TRO*. Thus, it appears to the Public Staff that the current FCC directive does not support the unbundling of vertical features from the switch.

REPLY COMMENTS

AT&T/MCI: AT&T/MCI stated that neither the Public Staff nor BellSouth refuted AT&T/MCI's argument that the switch list prices used as an input to SCIS/MO included material costs for certain feature hardware and the SCIS/MO outputs included the costs for feature hardware in the switch port and MOU rates established by the Commission. BellSouth's comment that the list of switch equipment was not used to develop feature costs misses the mark, according to AT&T/MCI, because AT&T/MCI have not argued that the switch list price was used to develop the cost for features. Rather, AT&T/MCI argued that the switch list prices, which included feature hardware costs, were used to develop the switch port and MOU rates. AT&T/MCI continued to believe that this results in a double-counting of the feature costs, once in the MOU rates and once when costs are developed for features. AT&T/MCI also stated that BellSouth failed to address the FCC Wireline Competition Bureau's similar conclusion in the *Virginia Arbitration Order* with respect to Verizon.

With regard to the Public Staff's contention that the rates for vertical features were supported by competent evidence, AT&T/MCI reiterated its belief that such rates were not supported because they were proferred by a witness who did not know what hardware is used to provide vertical features. In addition, should the Commission adopt the Public Staff's position that vertical features should not be unbundled based upon the language cited in the *TRO*, then AT&T/MCI believe that the end office switching rate, which includes the costs for feature hardware in the MOU rate, should remain the same.

Finally, AT&T/MCI submitted that they are not asking the Commission to disregard the UNE pricing standard. Rather, AT&T/MCI are seeking to have the Commission order BellSouth to abide by its filing dated May 7, 2002 that the cost for features is zero. AT&T/MCI believe it is patently duplicitous for BellSouth to claim that a zero rate is cost based to obtain 271 approval and immediately thereafter to seek a significantly higher rate from the Commission. Allowing this type of action sets a bad precedent for CLPs who develop business plans and offer services based upon established UNE rates only to have those rates unilaterally changed by BellSouth. Therefore, AT&T/MCI recommended that the Commission should reconsider adopting any rate for switch features in North Carolina.

DISCUSSION

In the *December 30, 2003 Order*, the Commission concluded that BellSouth's calculation of the switch-related investments using the SCIS/MO, the Simplified Switching Tool (SST), and the Switching Cost Information System / Intelligent Network (SCIS/IN) models was reasonable. The Commission believed that BellSouth appropriately calculated the switch discounts, appropriately allocated the getting started and EPHC investment, and had not double-counted the hardware costs for vertical features. Therefore, the Commission found that the switching investment costs proposed by BellSouth were reasonable. In addition, the Commission noted that it had given extensive consideration to the vertical features issue in prior proceedings. The Commission agreed with Department of Defense 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, the Commission

stated that BellSouth should continue to offer, on a "per feature" basis, each feature that it makes available to its own subscribers. However, the Commission believed that it was certainly appropriate for BellSouth to offer vertical features on a bundled basis and concluded 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 were subject to the applicable adjustments and modifications concerning the various cost and capital expense factors discussed elsewhere in the *Order* to calculate its UNE rates.

In their Motion for Reconsideration, AT&T/MCI continued to argue that the cost for vertical features hardware is included in the switch port and MOU rates, contrary to the Commission's conclusion, but failed to make any new or compelling argument in that regard for reconsideration. In addition, AT&T/MCI also contended that the Commission was inconsistent when it determined that the appropriate nonrecurring rates to approve in this proceeding should be those in BellSouth's previously approved SGAT, while not adopting the rates in the SGAT for the recurring vertical features rates. This argument by AT&T/MCI seems to rely on a belief by AT&T/MCI that the Commission chose to employ the nonrecurring rates in the SGAT without considering the evidence in this proceeding relating to the nonrecurring costs and rates, and therefore, the Commission was bound by the vertical feature rates in the SGAT. However, on Page 103 of the *Order*, the Commission discussed the lack of evidentiary support for the nonrecurring rates proposed by BellSouth in this proceeding, as well as the adjustments recommended by intervenors, in reaching its decision that the nonrecurring rates in the SGAT were reasonable and appropriate for purposes of this proceeding. Likewise, on Page 97 of the *Order*, the Commission discussed its conclusion regarding vertical features based upon the evidence. Therefore, while the Commission reached different conclusions regarding the proposed nonrecurring and vertical feature rates, each conclusion was consistent with its view of the best evidence after weighing the record as a whole in this proceeding and in compliance with the cost-based UNE pricing standard.

The Public Staff stated that the Commission's decision regarding vertical features was based on the Commission's reconciliation of the FCC's rules prior to issuance of the *TRO*. Citing Paragraph 433 of the *TRO*, the Public Staff opined that it appears that the current FCC directives do not support the unbundling of vertical features from the switch. In this regard, AT&T/MCI only responded that should the Commission agree with the Public Staff, then the end office switching rate should remain the same. A careful comparison of the language in Paragraph 433 of the *TRO* to the language in Paragraph 412 of the *Local Competition Order* reveals there is very similar language in both orders. Further, any difference in such language certainly seems insufficient to support an interpretation that the Commission's authority to unbundle vertical features from the switch and price such features separately has been changed by the language in Paragraph 433 of the *TRO*.

CONCLUSIONS

After careful consideration of the comments filed by the parties, the Commission finds it appropriate to affirm its decision with respect to the rates for vertical features.[1]

<u>FINDING OF FACT NO. 16 (ISSUE NO. 16)</u>: Should the costs BellSouth incurs when CLPs access BellSouth's OSS be recovered as a nonrecurring charge on a per-LSR basis?

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[1] The Commission is aware that the unbundling requirements applicable to ILECs were addressed by the FCC in the *TRO* and by the United States Court of Appeals for the D.C. Circuit in the decision in United States Telecom Association v. FCC, which vacated and remanded parts of the *TRO*. The Parties did not address the impact of these *TRO*-related proceedings in their comments and reply comments on reconsideration. The decision of the Commission on reconsideration does not address the extent to which any particular UNE must be provided at TELRIC rates; instead, that issue will be addressed, if necessary, in another context.

INITIAL COMMISSION DECISION

The Commission concluded that recovery of one-time development costs for new OSS and improvements through nonrecurring charges on a per-LSR basis is appropriate. The correct nonrecurring rates for OSS costs are those in the SGAT currently approved for BellSouth.

MOTIONS FOR RECONSIDERATION

AT&T/MCI: AT&T/MCI observed that the decision to recover OSS costs through a nonrecurring charge was a departure from the Commission's previous UNE Order. They also asserted that it was unsupported by the record. Generally speaking, nonrecurring rates are designed to recover costs for one-time activities to initiate, change, or disconnect service. OSS costs include ongoing expenses incurred to update and maintain software to process orders. OSS expenses are not specifically incurred on behalf of CLP customers, but OSS also benefits BellSouth and its customers.

The FCC has determined that, even if a cost is a nonrecurring expense, it can be recovered as a recurring expense to prevent high nonrecurring rates from being a "barrier to entry." In contrast to BellSouth, Verizon agrees with the proposition that OSS costs should be recovered through a recurring rate. OSS costs should be forward-looking, not actual. BellSouth did not present any evidence that the current recurring rate prevented recovery of its forward-looking economic costs to provide OSS access.

INITIAL COMMENTS

AT&T/MCI/COVAD: AT&T/MCI/Covad did not address this issue in their Initial Comments.

BELLSOUTH: BellSouth argued that the Commission had properly determined that OSS costs should be recovered as a nonrecurring charge on a per-LSR basis, instead of using the previous practice of amortizing and converting the cost of one-time developments and improvements into a monthly recurring charge. Under the earlier system, all CLPs paid the same amount, regardless of the number of LSRs generated, so naturally AT&T and MCI, as the larger CLPs, favor this system. BellSouth contended that the Commission was merely recognizing this inequity and correcting it. BellSouth asserted that OSS costs are in fact specifically incurred on behalf of CLP customers and do not "benefit" BellSouth. BellSouth contended that the charges are TELRIC compliant.

PUBLIC STAFF: The Public Staff stated that a review of the evidence on this issue indicates that the evidence presented by AT&T/MCI mainly involved whether nonrecurring charges for OSS duplicate costs that are already recovered through shared and common costs. The Commission rejected this contention based on substantial evidence presented by BellSouth showing that it was more appropriate to recover these costs through a nonrecurring charge. This evidence indicated that recovery through a nonrecurring charge allows more certainty that BellSouth will recover its costs, and it complies with cost causation principles. As a result, CLPs such as AT&T and MCI that submit a large number of LSRs will now be required to pay more toward BellSouth's OSS costs, while CLPs submitting fewer LSRs will now be required to pay less. The Public Staff believes that the Commission's decision was fair, and there is no evidence in the record to show that charging on a per-LSR basis will serve as a barrier to the entry or continued existence of CLPs in North Carolina.

REPLY COMMENTS

AT&T/MCI: AT&T/MCI emphasized that utilizing nonrecurring rates can become a barrier to competition, as the Commission recognized in its *1998 UNE Order*.

DISCUSSION

In the original discussion on this issue, the Commission determined based on substantial evidence that nonrecurring charges proposed by BellSouth for OSS do not duplicate recovery through shared or common costs. Recovery through a nonrecurring charge will allow more certainty that BellSouth will in fact recover its costs. Moreover, those CLPs that generate a larger number of LSRs will pay more, while those that generate a smaller number will pay less. This is simple fairness and

more in accord with cost causation principles and an improvement over the Commission's *1998 UNE Order* in this respect. AT&T/MCI have presented no persuasive argument or substantial evidence based on the record that would lead to the Commission to revise its decision herein.

CONCLUSIONS

The Commission finds it appropriate to affirm its decision that the recovery of one-time development costs for new OSS and improvements to existing systems through nonrecurring charges on a per-LSR basis is appropriate and that the correct nonrecurring charges for OSS costs are those in the SGAT previously approved for BellSouth.[1]

<u>ORDERING PARAGRAPH NO. 3</u>: That, after approval by the Commission, the rates filed pursuant to this *Order* [the *December 30, 2003 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.

MOTIONS FOR RECONSIDERATION

AT&T/MCI: AT&T/MCI objected to Ordering Paragraph No. 3 of the *December 30, 2003 Order*, stating that the revised permanent UNE rates should be effective as of December 30, 2003. AT&T/MCI maintained that the current UNE rates were established in 1998. AT&T/MCI asserted that since that time, BellSouth's costs have declined significantly, as evidenced by the rate reduction contained in the *December 30, 2003 Order* as well as BellSouth voluntarily proposing lower rates for certain UNEs. AT&T/MCI argued that, evidently, the rates that were set in 1998 are no longer cost-based, and thus, BellSouth over-recovers its costs every day that the 1998 rates remain in effect. Yet, AT&T/MCI asserted, the Commission's *December 30, 2003 Order* fails to specify a date certain for implementation of the new permanent rates.

AT&T/MCI argued that this proceeding was initiated more than 21 months ago in March 2002; yet, as of today, CLPs are not entitled to the new permanent rates that the Commission has determined are cost-based and TELRIC compliant. AT&T/MCI asserted that there is no reason why the *December 30, 2003 Order* should not be effective the date it was issued. AT&T/MCI stated that the ministerial act of submitting rates for Public Staff review and Commission approval should not delay implementation of the permanent UNE rates in BellSouth's SGAT or existing interconnection agreements.

AT&T/MCI opined that, presumably, the Commission intended for the new UNE rates to spur competition in various areas of the State as well as incent competitors to provide innovative services to North Carolina consumers; AT&T is one of those competitors that recently began offering local residential service in North Carolina. However, AT&T/MCI maintained, delaying implementation of the rates until some future date subverts the goal of competitive service offerings and ultimately deprives CLP consumers of the benefits that lower UNE prices can bring to the marketplace. AT&T/MCI noted that although the Commission's *1998 UNE Order* contained the same type of effective date ordering paragraph as the *December 30, 2003 Order*, in 1998 there was nascent local competition that would have been impacted by an implementation date. AT&T/MCI argued that, today, the competitive landscape in North Carolina has changed, and AT&T and others are struggling to compete against BellSouth.

AT&T/MCI maintained that when adopting new permanent UNE rates in the context of a generic proceeding, the Alabama Public Service Commission (PSC), the Maryland PSC, and the Georgia

[1] As previously noted, on July 21, 2004, BellSouth sent a letter to the Commission withdrawing its SGAT. In addition, CompSouth filed a Motion to Deny BellSouth's Request to Withdraw the SGAT. The Commission is seeking comments on CompSouth's Motion. However, since the SGAT was effective when the original decision in this docket was issued (December 30, 2003) and this decision is being affirmed, the Commission does not believe that the potential withdrawal is an impediment to referencing SGAT charges previously approved.

PSC have all determined effective dates for the rates. AT&T/MCI opined that the Commission can and should allow CLPs to receive the benefits of the UNE rate reductions that the Commission ordered on December 30, 2003, as of that date.

INITIAL COMMENTS

AT&T/MCI/COVAD: AT&T/MCI/Covad did not address this issue in their Initial Comments.

BELLSOUTH: BellSouth argued that the UNE rates resulting from final determinations in the docket should not be made effective retroactively to December 2003. BellSouth noted that the *December 30, 2003 Order* set out a process to be followed before UNE rates filed pursuant to the *Order* would be deemed permanent prices for purposes of replacing prior rates contained in existing interconnection agreements and BellSouth's SGAT; BellSouth noted that it is the same process as the Commission set forth in its *1998 UNE Order*. BellSouth stated that, notably, not only did AT&T, MCI, or any other CLP not object to the process then, no CLP asked the Commission to implement some different procedure or timetable in the current proceeding. BellSouth asserted that a reconsideration motion is not the appropriate mechanism to raise this issue for the first time. BellSouth maintained that for that reason alone, the Commission should deny AT&T/MCI's belated request that the rates that result from the *December 30, 2003 Order* should be retroactive to December 30, 2003.

BellSouth asserted that there are additional reasons to deny AT&T/MCI's request for retroactive application of the new UNE rates. First and foremost, BellSouth stated, as the Commission recognized in Ordering Paragraph No. 3 of the *December 30, 2003 Order*, the rates that a CLP pays for UNEs are a part of its interconnection agreement with BellSouth. BellSouth noted that those contracts specifically contemplate regulatory changes such as the ordering of new rates and provide expressly how the parties will go about incorporating new rates into the agreement. BellSouth maintained that the interconnection agreements require one of the contracting parties to request that the agreement be amended to reflect the change and provide a specific timetable for the parties to amend their agreement. BellSouth asserted that the parties become bound to charge and pay the new rates once their contract is amended. BellSouth argued that the Commission should recognize AT&T/MCI's new request for what it is – an attempt to do an end run around the new UNE rates in North Carolina retroactive to December 30, 2003, or to any other date.

Second, BellSouth noted, AT&T/MCI's claims that they are struggling to compete with BellSouth while paying the existing UNE rates are inconsistent with the facts. BellSouth stated that both MCI and AT&T use UNEs purchased from BellSouth to serve business and residential customers in North Carolina. BellSouth maintained that the record firmly established that they are making profits by doing so at the UNE rates they pay today. BellSouth asserted that their interconnection agreements with BellSouth dictate when they will begin to receive the benefit of those new rates. BellSouth recommended that the Commission deny AT&T/MCI's Motion with regard to Ordering Paragraph No. 3.

PUBLIC STAFF: The Public Staff stated that it does not oppose AT&T/MCI's request that the new UNE rates go into effect as of the date of the Commission's *Order*, December 30, 2003.

REPLY COMMENTS

AT&T/MCI: AT&T/MCI asserted that BellSouth failed, in its initial comments, to cite to any Commission rule, order, North Carolina case law, or statute which supports the arguments that: (1) the Commission cannot consider the applicable effective date for the *December 30, 2003 Order* on reconsideration; or (2) a December 30, 2003 effective date would be a retroactive application of the *December 30, 2003 Order*. AT&T/MCI noted that the Public Staff does not oppose the request to have the new UNE rates effective as of December 30, 2003. AT&T/MCI maintained that if any authority existed in opposite to AT&T/MCI's Motion, the Public Staff would have opposed the request, and BellSouth would have cited to such authority in its comments. Therefore, AT&T/MCI

asserted, any argument that AT&T/MCI have somehow waived the right to have the Commission consider the issue on reconsideration or that a December 30, 2003 effective date is retroactive is without merit.

AT&T/MCI maintained that BellSouth's argument should not persuade the Commission that the interconnection agreement dates for amendments should govern the effective date for the 2003 UNE rates. AT&T/MCI stated that the 2003 UNE rates were determined in a generic proceeding and should be effective for all parties on the same date; otherwise, certain CLPs would have the rates effective on different dates (i.e., upon "final order", upon "last signature to amendment", upon an "effective order"). AT&T/MCI noted that this is what happened in Georgia; BellSouth used the varying effective dates in the interconnection agreements to its advantage to delay implementation of the *Georgia UNE Order* until the Georgia PSC issued another order indicating that the rates were effective the date of the *June 24, 2003 UNE Order* (first UNE Order) unless otherwise specified in the interconnection agreements. AT&T/MCI maintained that the Commission can prevent a similar end run by BellSouth around its obligations to provide cost-based UNEs in North Carolina by determining that the UNE rates are effective December 30, 2003. AT&T/MCI stated that the rulings by the Georgia, Maryland, and Alabama PSCs support the clear authority by the Commission to order the UNE rates effective December 30, 2003.

AT&T/MCI concluded that BellSouth is over-recovering from every single CLP each day that the 1998 UNE rates remain in effect.

DISCUSSION

The Commission notes that on June 24, 2003, the Georgia PSC released its *Order* concerning its review of the cost studies, methodologies, pricing policies, and cost-based rates for interconnection and unbundling of BellSouth's services. Subsequently, BellSouth requested a stay of the effective date of the Georgia PSC's *June 24, 2003 Order*, and the CLPs requested that the Georgia PSC clarify that its *June 24, 2003 Order* was effective on March 18, 2003, the date of the Administrative Session at which the Georgia PSC issued its vote in the docket. On September 2, 2003, the Georgia PSC released its *Order on Reconsideration* wherein the Georgia PSC: (1) denied BellSouth's Motion for a stay of the Georgia PSC's *June 24, 2003 Order*; (2) stated that the effective date of the Georgia PSC's Order was the date it was signed (i.e., June 24, 2003) and not the date the Georgia PSC voted on the matter; and (3) stated that the rates ordered in the *June 24, 2003 Order* were available to CLPs on June 24, 2003, unless the interconnection agreement indicated that the parties intended otherwise.

On September 22, 2003, the Georgia PSC released its *Second Order on Reconsideration* wherein the Georgia PSC ruled on various Motions for Reconsideration on inputs ordered by the Georgia PSC in its *June 24, 2003 Order*.

BellSouth has objected to AT&T/MCI's Motion for Reconsideration that the Commission find that the rates established in its *December 30, 2003 Order* should be effective on that date. BellSouth argued that the Commission should not find that the UNE rates resulting from final determinations in this docket should be made effective retroactive to December 30, 2003. BellSouth noted that the process was the same as followed by the Commission in its *1998 UNE Order* and that no CLP objected to the use of these procedures or proposed a different timetable in this instant proceeding. The Commission notes, however, that AT&T/MCI acknowledged that it was the same process but commented that in 1998 there was nascent local competition that would have been impacted by an implementation date. The Commission does not believe that BellSouth's argument on this point is relevant; the fact that no party objected to the process in 1998 does not preclude the Commission from considering AT&T/MCI's Motion for Reconsideration on the process in this instant proceeding.

BellSouth also argued that AT&T/MCI's Motion for Reconsideration on this issue should be denied because the rates that a CLP pays for UNEs are a part of its interconnection agreement with BellSouth. The Commission does not believe that terms of individual interconnection agreements prevent the Commission from establishing an effective date of the UNE rates it orders. The Georgia PSC stated in its September 2, 2003 *Order on Reconsideration* that the rates ordered in its *June 24, 2003 Order* were available to CLPs on June 24, 2003, unless the interconnection agreement indicated that the parties intended otherwise. The Commission believes that this approach by the Georgia PSC would satisfy BellSouth's argument in this regard.

BellSouth also argued that AT&T/MCI are not struggling to compete with BellSouth while paying the existing UNE rates and that AT&T/MCI are making profits at the UNE rates they pay today. The Commission believes that this argument is irrelevant. The Commission believes that deciding an effective date for the new UNE rates should have nothing to do with which party benefits more from a particular effective date.

In the end, the Commission agrees with AT&T/MCI that BellSouth has failed to cite to any Commission rule, order, North Carolina case law, or statute which supports the arguments that: (1) the Commission cannot consider the applicable effective date for the *December 30, 2003 Order* on reconsideration; or (2) a December 30, 2003 effective date would be a retroactive application of the *December 30, 2003 Order.*

The Commission also notes that the Public Staff was not opposed to the Commission finding that the effective date for the new UNE rates should be December 30, 2003.

The Commission notes that, generally, it has established an effective date for rates as of the date of the final order in the docket. Therefore, the Commission envisioned, before AT&T/MCI's Motion for Reconsideration on Ordering Paragraph No. 3, that the effective date of the new BellSouth UNE rates would be after: (1) an Order on the Motions for Reconsideration was released; (2) BellSouth refiled, if necessary, its new cost studies and resulting rates; (3) the Public Staff reviewed those cost studies and rates; and (4) the Commission issued a final order approving the new BellSouth UNE rates. However, AT&T/MCI have specifically requested that the Commission conclude that the effective date should be December 30, 2003. The Commission does not believe that BellSouth provided any persuasive arguments in opposition to a December 30, 2003 effective date. In addition, the Public Staff did not oppose a December 30, 2003 effective date.

Based on the foregoing, the Commission believes that it is appropriate to grant AT&T/MCI's Motion for Reconsideration in this regard. Therefore, the Commission finds that the effective date of the UNE rates produced from its decisions in the *December 30, 2003 Order* is December 30, 2003. Further, the Commission concludes that the new BellSouth UNE rates were available to CLPs on December 30, 2003, unless an interconnection agreement indicates that the parties intended otherwise.

CONCLUSIONS

The Commission concludes that the new BellSouth UNE rates were available to CLPs on December 30, 2003, unless an interconnection agreement indicates that the parties intended otherwise.

IT IS, THEREFORE, ORDERED as follows:

1. That, at a time which will be specified by further order of the Commission, BellSouth shall refile its cost studies, supporting documentation, and resulting rate schedules based on the conclusions reached in this *Order* and the forthcoming order on certain rate elements relating to local channels, common channel signaling system 7 (CCS7) signaling connections and line sharing/splitting.

2. That the rates produced from the Commission's *December 30, 2003 Order* were effective as of December 30, 2003, unless an interconnection agreement indicates that the parties intended otherwise.

3. That the rates produced from this Order, reflecting changes from the *December 30, 2003 Order* after reconsideration, are effective as of August 26, 2004.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of August, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Commissioners Sam J. Ervin, IV and Michael S. Wilkins dissent on the majority's decision concerning Ordering Paragraph No. 3 of the *December 30, 2003 Order*. Commissioner Wilkins joins in Commissioner Ervin's written dissent.

Commissioner Lorinzo L. Joyner did not participate in this decision.

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DOCKET NO. P-100, SUB 133D

COMMISSIONER SAM J. ERVIN, IV, DISSENTING, IN PART: Although I concur in the remainder of the Commission's order, I cannot agree with the majority of my colleagues that the Commission should decide for the first time at this stage in the present proceeding that the decisions made in the December 30, 2003, order should result in the establishment of UNE rates effective from December 30, 2003, until the date of this order. As a result, I respectfully dissent from this portion of the Commission's decision on reconsideration.

Until the issuance of the present order, the Commission had not indicated any intention of making the determinations contained in the December 30, 2003, order the basis for UNE rates to be effective as of the date of that decision. Nothing in the Order Ruling on WorldCom Petition entered on March 20, 2002; the Order Establishing Schedule for New UNE Proceeding entered on April 19, 2002; or the Order Adopting Permanent Unbundled Network Element Rates for BellSouth Telecommunications, Inc., entered on December 30, 2003, suggested that any rates established in this proceeding would become effective prior to the completion of the entire ratemaking process. On the contrary, Ordering Paragraph No. 3 of the December 30, 2003, order expressly 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 prior rates contained in existing interconnection agreements and BellSouth's SGAT." Order Adopting Permanent Unbundled Network Element Rates for BellSouth Telecommunications, Inc., Docket No. P-100, Sub 133d, Ninety-Third Report of the North Carolina Utilities Commission: Orders and Decisions 189 (2003). As a result, the majority correctly indicates that "the Commission envisioned, before AT&T/MCI's Motion for Reconsideration on Ordering Paragraph No. 3, that the effective date of the new BellSouth UNE rates would be after: (1) an Order on the Motions for Reconsideration was released; (2) BellSouth refiled, if necessary, its new cost studies and resulting rates; (3) the Public Staff reviewed those cost studies and rates; and (4) the Commission issued a final order approving the new BellSouth UNE rates." The Commission has not approved final UNE rates for BellSouth and has only now resolved all of the substantive costing issues that need to be decided in order to permit the establishment of BellSouth's new UNE rates. Thus, the Commission's decision on reconsideration with respect to the "effective date" issue represents a departure from the plan for implementing new UNE rates specified in the December 30, 2003, order.

The principal justification for this result provided by the Commission is its conclusion that BellSouth "has failed to cite to any Commission rule, order, North Carolina case law, or statute which supports the arguments that: (1) the Commission cannot consider the applicable effective date for the *December 30, 2003, Order* on reconsideration; or (2) a December 30, 2003 effective date would be a retroactive application of the *December 30, 2003, Order*." In addition, the Commission relies upon the fact that "the Public Staff was not opposed to [a] finding that the effective date for the new UNE rates should be December 30, 2003," and contends that BellSouth had failed to "provide[] any persuasive arguments in opposition to a December 30, 2003, effective date." As a result, the Commission concluded that the ordering clause concerning the effective date of BellSouth's new UNE rates contained in the December 30, 2003, order should be revisited and that rates based on the costing decisions made in the December 30, 2003, order should be deemed to have been in effect from December 30, 2003, until the issuance of this order on reconsideration "unless an interconnection agreement indicates that the parties intended otherwise."

The Commission's logic does not provide adequate justification for this "effective date" determination. Although the lack of legal authority prohibiting the Commission from reaching a specified result is a necessary precondition to the Commission's ability to reach that result, the absence of such a prohibition does not provide an affirmative justification for acting in any particular manner. In other words, adoption of a particular party's proposal with respect to an issue presented for Commission consideration should involve a two-step analysis, with the first step being a determination of whether the proposal is legally permissible and the second being a determination of whether an otherwise permissible proposal is appropriate as a matter of sound regulatory policy. The Commission's reasoning appears to omit the second of these two steps. Similarly, the fact that a particular party either fails to oppose a particular contested result or fails to provide an adequate justification for declining to reach a particular result, while relevant, overlooks the fact that the burden generally rests on the proponent of a particular idea to demonstrate its appropriateness rather than on the opponent to show its inappropriateness.[1] At bottom, a decision such as that at issue here should be supported by an affirmative justification rather than the mere absence of legal obstacles and effective opposition.

Although AT&T/MCI advanced a number of policy arguments in favor of reconsidering the "effective date" provision of the December 30, 2003, order, the Commission does not appear to have explicitly adopted any of those arguments. In essence, AT&T/MCI argue that BellSouth's existing UNE rates are excessive; that CLPs are still not entitled to the implementation of the lower UNE rates found appropriate in the December 30, 2003, order; and that further delay in the implementation of new UNE rates hampers competition and deprives CLP customers of the benefits that lower UNE prices can bring to the telecommunications marketplace. The first problem with this line of reasoning is that, until the issuance of this order, the Commission has not finally determined the level of TELRIC-compliant UNE costs for BellSouth, much less established rates based on its costing decisions. Furthermore, as the Commission properly notes, effective date decisions should be based on competitively-neutral criteria rather than on the identity of the party benefited by a particular decision.[2] Finally, the inherently difficult and time-consuming process of establishing TELRIC-

[1] As an aside, I agree with the majority that BellSouth's emphasis on the alleged necessity to incorporate any UNE rates eventually approved in this proceeding into individual interconnection agreements is essentially irrelevant to a proper resolution of the "effective date" issue. As I understand the situation, the terms and conditions contained in individual interconnection agreements have no relation to the effective date of a Commission order. Instead, the interconnection agreement process relates entirely to the time when the UNE rates established by the Commission may become available to individual CLPs. Thus, I agree with the majority that BellSouth's reliance on the interconnection agreement process has no relevance to a proper determination of the "effective date" issue addressed in this order.

[2] For this reason, I agree with the majority that the dispute between AT&T/MCI and BellSouth over (1) the extent of competition in North Carolina telecommunications markets in 1998 and at present and (2) the profitability of CLPs under current UNE rates is irrelevant to a proper resolution of the "effective date" issue.

compliant UNE rates for BellSouth has been significantly affected by the uncertainty concerning the impact of the FCC's decision with respect to UNE costing issues in the Triennial Review Order. Thus, the policy arguments advanced by AT&T/MCI do not provide sufficient support for the decision reached by the Commission with respect to the "effective date" issue and the majority wisely appears to have essentially refrained from adopting them.

At bottom, I have two fundamental concerns about the Commission's resolution of the "effective date" issue. First, the Commission's decision appears to me to be inconsistent with existing Commission precedent.[1] As best I can tell from my review of our prior pricing decisions under the Telecommunications Act of 1996, the Commission has approved the use of an effective date for new rates other than the date of the Commission order actually establishing those rates in only two situations. On at least two occasions, the Commission announced at the beginning of a particular proceeding that existing rates would be deemed interim and subject to true-up at the conclusion of the proceeding in question. See: Order Adopting Permanent Prices for Unbundled Network Elements, Docket No. P-100, Sub 133d, Eighty-Eighth Report of the North Carolina Utilities Commission: Orders and Decisions 142 (1998) ("The Commission ruled in the RAOs that prices for unbundled network elements (UNEs) should be established as interim rates subject to true-up at such time as the Commission established permanent rates based on appropriate cost studies."); Order Addressing Collocation Issues, Docket No. P-100, Sub 133j (2001) ("[T]he Commission ordered that the collocation rates filed by the ILECs on September 17, 1999 should be used as the interim collocation rates until the final rates were established by the Commission."). On another occasion, the Commission ruled in approving certain ILEC compliance filings that the rates established in the deaveraging proceeding should be deemed effective as of the date of the Commission's last substantive order in that docket. Order Adopting Final Permanent Deaveraged UNE Rates, Docket No. P-100, Sub 133d (2002) ("That the deaveraged UNE rates for BellSouth, Sprint, and Verizon shall have an effective date of December 11, 2001, the date of the Commission's *Order Finalizing Deaveraged UNE Rates and Denying ALLTEL's Motion to Deaverage Nonrecurring Rates*."). Except for these two instances, I am not aware of any occasion on which the Commission has announced that rates established pursuant to the pricing provisions of the Telecommunications Act of 1996 would be deemed effective on a date other than the date of the Commission's order actually approving the rates in question.

A decision in the present order that rates based on the decisions made in the December 30, 2003, order would be deemed effective from December 30, 2003, until the effective date of this order seems inconsistent with this prior Commission practice. The salutary effect of the Commission's prior practice has been to give ILECs and CLPs adequate notice of UNE rate adjustments, subject to the exception that Commission decisions resolving all substantive issues in a particular proceeding might be given effect before any necessary compliance filings had been made and approved. As a result, parties have been able to make necessary business decisions with ample understanding of the effect of those decisions. I am concerned, however, that today's decision may produce consequences that the parties simply could not anticipate in light of earlier Commission

[1] BellSouth has argued that the process set out in the December 30, 2003, order was identical to that employed in the 1998 UNE Order and that no CLP objected to the use of similar procedures in this case prior to AT&T/MCI's reconsideration motion. The Commission seems to dismiss this contention as irrelevant because there was only "nascent" competition in 1998 and because the fact that no party objected to the process employed in 1998 does not preclude the Commission from adopting a different set of procedures here. I agree with the Commission that we are not bound by the procedures adopted in the 1998 UNE Order; however, the fact that we are not bound by earlier decisions is not an affirmative justification for adopting a different approach here. In addition, given my previously-expressed belief that the "effective date" issue should be resolved without regard to the impact of that decision on specific parties, I cannot agree with the Commission's emphasis on the differing levels of competition in 1998 and at present. Thus, while I do not completely agree with this aspect of BellSouth's argument, I would tend to give considerations akin to the gist of BellSouth's argument some weight in resolving the "effective date" issue.

orders. Thus, I cannot agree with the departure from existing Commission practice embodied in the present decision, which implements a set of rates for a prior period that no party reasonably could have understood to be in effect until the issuance of this order on reconsideration.

Secondly, the Commission's decision requires BellSouth to pay UNE rates based on cost determinations that the Commission has revisited and changed in this order. As I understand the Commission's decision, the rates that BellSouth could be required to pay[1] for the period from December 30, 2003, until the issuance of this order would include the effect of the Commission's initial decision with respect to the "fill factor" issue. Elsewhere in this order, the Commission has unanimously decided to revisit its initial decision with respect to that issue and to require the use of a lower effective fill in determining BellSouth's UNE rates. Thus, the effect of the majority's decision with respect to the "effective date" issue is to establish and make effective rates that rest on a ratemaking determination that the Commission has subsequently concluded to have been in error. I have difficulty understanding the justification for that action, particularly when the parties had no notice that the determinations made in the December 30, 2003, order were to be given actual effect until the issuance of this order.

I do not want to be understood as in any way questioning the Commission's authority to determine the dates upon which its orders take effect. The concern that has motivated my decision to dissent from the Commission's determination with respect to the "effective date" issue rests on policy rather than legal considerations. It may well be that, in the future, Commission orders establishing UNE rates should contain ordering clauses making the order in question effective immediately. Such an approach would not be subject to the objections that I have raised here, since all parties would be on notice as of the date upon which the order was entered that it would take effect immediately. Given that fact, I do not object to the provision in the present order giving our determinations here immediate effect. Such an approach should, however, only be implemented on a prospective basis. I simply cannot agree with the majority of my colleagues that considerations of sound regulatory support giving the provisions of a prior ratemaking order effect during a period of time that has already ended, particularly when we have revisited and changed the result reached in that earlier order. As a result, I respectfully disagree with and dissent from the Commission's decision to make rates based on the costing determinations found to be appropriate in the December 30, 2003, order effective for the period from December 30, 2003, until the effective date of this order.

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

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Glossary of Acronyms

1996 Act	Telecommunications Act of 1996
Act	Telecommunications Act of 1996
ADUF	Access Daily Usage File
ALEC	Alternative Local Exchange Company (Carrier)
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©
Carolina	Carolina Telephone and Telegraph Company
CCS	Centum (Hundred) Call Seconds
Central	Central Telephone Company

[1] Admittedly, the extent to which BellSouth has any actual obligation to pay the rates the Commission has deemed effective from December 30, 2003, until the entry of the present order could well be affected by the provisions of the interconnection agreements between BellSouth and individual CLPs.

CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
Covad	Dieca Communications, Inc., d/b/a Covad Communications
DLC	Digital Loop Carrier
DS0	Digital Signal Zero
DS1	Digital Signal One
DSL	Digital Subscriber Line
DUF	Daily Usage File
ECI	Employment Cost Index
EODUF	Enhanced Optional Daily Usage File
EPHC	Equivalent POTS Half Calls
FCC	Federal Communications Commission
FCCA	Florida Competitive Carriers Association
FLEC	Forward-Looking Economic Costs
HDSL	High-Bit-Rate Digital Subscriber Line
ILEC	Incumbent Local Exchange Company (Carrier)
LSR	Local Service Request

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MCI	MCIMetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc.
MOU	Minutes of Use
NPRM	Notice of Proposed Rulemaking
OCN	Operating Carrier Number
ODUF	Optional Daily Usage File
OSS	Operations Support Systems
POTS	Plain Old Telephone Service
PSC	Public Service Commission
Public Staff	Public Staff – North Carolina Utilities Commission
SCIS/IN	Switching Cost Information System / Intelligent Network
SCIS/MO	Switching Cost Information System / Model Office
SECCA	Southeastern Competitive Carriers Association
SGAT	Statement of Generally Available Terms and Conditions
SST	Simplified Switching Tool©
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order
UNE	Unbundled Network Element
Verizon	Verizon South, Inc. f/k/a GTE South Incorporated
WCB	Wireline Competition Bureau
WorldCom	MCIMetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., and MCI WorldCom Network Services, Inc.

DOCKET NO. P-100, SUB 133d

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
General Proceeding to Determine Permanent) ORDER DENYING MOTION
Pricing for Unbundled Network Elements) FOR RECONSIDERATION

BY THE COMMISSION: On December 30, 2003, the Commission issued an Order Adopting Unbundled Network Element Rates for BellSouth Telecommunications, Inc. (BellSouth). In Finding of Fact No. 8, the Commission determined that the reasonable and appropriate forward-looking cost of capital associated with the provision of unbundled network elements (UNEs) by BellSouth is 9.79%. However, the Commission recognized that the Triennial Review Order (TRO) of the Federal Communications Commission (FCC) released on August 21, 2003, which was after the Parties to this proceeding filed their proposed orders and briefs, had provided clarification on the cost

of capital issue that could impact the Commission's cost of capital decision in this proceeding. Therefore, the Commission also found it appropriate to seek comments from the Parties on the impact of the TRO on the cost of capital established for BellSouth in this proceeding.

By a separate Order also dated December 30, 2003, the Commission requested comments and reply comments from the Parties on this matter and established filing dates. BellSouth, AT&T Communications of the Southern States, LLC (AT&T) and MCImetro Access Transmission Services, LLC (MCI) (collectively, AT&T/MCI), the Public Staff, as well as other Parties submitted comments and reply comments.

After carefully considering the comments of all Parties, including BellSouth, the Commission issued an Order on July 9, 2004 in which the Commission determined that the clarification by the FCC in the TRO on the cost of capital issue did not require any change to the 9.79% cost of capital established for use in BellSouth's UNE cost models in this proceeding. The Order dated July 9, 2004 summarized the comments and reply comments of the Parties and cited evidence and conclusions in support of the Commission's decision in consideration of the TRO.

On July 27, 2004, BellSouth filed a motion for an extension of time to appeal and/or seek reconsideration of the Commission's Order dated July 9, 2004. On July 28, 2004, the Commission issued an Order granting BellSouth an extension of time up to and including September 8, 2004, to file a Notice of Appeal pursuant to G.S. 62-90(a).

BELLSOUTH'S PENDING MOTION

On September 8, 2004, BellSouth filed a motion, pursuant to G.S. 62-80, requesting the Commission to reconsider its decision set forth in the Order dated July 9, 2004 that 9.79% is the appropriate cost of capital input to use in establishing BellSouth's UNE rates. In its motion, BellSouth noted that it had previously explained in its comments what the FCC clarified in the TRO with regard to the cost of capital and argued how the Commission's decision of the cost of capital failed to meet the UNE pricing standards in the TRO. BellSouth urged the Commission to reconsider its establishment of an unlawful cost of capital and set a cost of capital to be used in establishing BellSouth's UNE rates that complies with the FCC's total element long-run incremental cost (TELRIC) methodology.

AT&T/MCI RESPONSE

On September 17, 2004, AT&T/MCI filed comments in response to BellSouth's motion for reconsideration. In its comments, AT&T/MCI argued against reconsideration based on certain procedural grounds and stated that BellSouth did not raise any arguments that were not previously addressed by the Commission in ruling upon the comments filed by the parties concerning the effect of the FCC's TRO on the cost of capital. Accordingly, AT&T/MCI believes that the Commission should exercise its discretion and summarily deny BellSouth's motion.

CONCLUSIONS

The Commission has carefully considered the comments contained in BellSouth's motion in support of its request for reconsideration. The Commission simply disagrees with BellSouth's allegation that the Commission "shoe-horned" the cost of capital determination from the Order dated December 30, 2003 into compliance with the TRO in its Order dated July 9, 2004. Rather, the Commission objectively examined its cost of capital determination in light of the competitive market clarification provided in the TRO. In the Order dated July 9, 2004, the Commission noted that the 9.79% overall cost of capital established in the Order dated December 30, 2003 was based upon a cost of debt of 7.23%, a cost of equity of 11.5% and a capital structure consisting of 60% equity and 40% debt. After carefully re-examining the cost of debt, equity and capital structure ratios, under the FCC's clarification that the Commission is to assume a market in which there is facilities-based competition, the Commission set forth several reasons why its decision is reasonable, appropriate and consistent with the required assumption regarding competition. For example, the Commission

pointed out that the 7.23% cost of debt was based on the yields to maturity on outstanding issues of BellSouth's long-term debt and that the FCC Wireline Competition Bureau used such an approach to determine the cost of debt in the Virginia Arbitration Order. This cost of debt was determined to be reflective of the current and prospective cost of long-term debt associated with the provision of UNEs by BellSouth and was higher than the cost of debt recommended by BellSouth's own witness. The Commission also explained that the 11.5% cost of equity determination was supported by the results of a DCF analysis applied to a group of seven telecommunications companies as well as another group of 38 nonutility companies. The Commission stated that it is significant to note that the results of the DCF analysis applied to the group of 38 nonutility companies supports the 11.5% cost of equity because such nonutility companies should certainly be a reasonable proxy upon which to establish a cost of equity that reflects the risk of a competitive market. Finally, the 60% equity and 40% debt capital structure was derived by averaging the Value Line Investment Survey's projected percentages of common equity for a group of seven publicly traded telephone companies. The Commission noted that this capital structure contained more equity and less debt than BellSouth's actual capital structure in 2001, was consistent with BellSouth's financial planning which incorporates a target capital structure containing 35% to 45% debt capital, and even BellSouth used a capital structure consisting of 60% equity and 40% debt in its UNE cost model. In response to the FCC Wireline Competition Bureau decision in the Virginia Arbitration Order to use a capital structure based upon market value, as opposed to book value, the Commission noted that the projected capital structure ratios which it used were neither entirely based on book value or market value. However, since the evidence in this record indicates that the 60% equity and 40% debt ratios are consistent with BellSouth's financial planning, the Commission explained that the amounts and types of securities which are issued at future market prices will be managed so as to target the forward-looking capital structure ratios of 60% equity and 40% debt. For such reasons, the Commission believes that the 9.79% overall cost of capital associated with the provision of UNEs by BellSouth is appropriate.

In its motion, BellSouth also contends that the Commission, like the Georgia Commission, failed to reconsider its cost of capital determination for BellSouth in light of the clarifications provided in the TRO. Without regard to the proceedings in Georgia, the Commission points out that the entire purpose of requesting comments and reply comments and the Order dated July 9, 2004 was to enable the Commission to reconsider its cost of capital (and depreciation) determination for BellSouth in light of the clarification provided in the TRO.

As to the remainder of BellSouth's comments in support of its request for reconsideration, the Commission believes there is nothing new or compelling that was not contained in BellSouth's earlier comments and which the Commission has not previously considered in reaching the conclusions contained in the Order dated July 9, 2004. The Commission continues to believe that the 9.79% cost of capital associated with the provision of UNEs by BellSouth is consistent with the clarification of the FCC that the risk-adjusted cost of capital used in calculating UNE prices reflects the risks of a competitive market. Therefore, the Commission finds good cause to deny BellSouth's motion.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 14th day of October, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr100404.01

DOCKET NO. P-100, SUB 133d

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
General Proceeding to Determine Permanent Pricing for Unbundled Network Elements	))	ORDER RULING ON EXCEPTIONS

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

BY THE COMMISSION: On August 26, 2004, the Commission entered an Order in this docket entitled "Order Ruling on Motions for Reconsideration."

On August 30, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed exceptions and a notice of appeal regarding the August 26, 2004 Order. BellSouth also requested that its exceptions be set for further hearing by the Commission pursuant to G.S. 62-90(c) and that the Commission stay the imposition of its decision to make new BellSouth unbundled network element (UNE) rates effective as of December 30, 2003.

On September 10, 2004, AT&T Communications of the Southern States, LLC (AT&T) and MCImetro Access Transmission Services, LLC (MCI) filed comments in opposition to BellSouth's exceptions, notice of appeal, request for further hearing, and motion for stay.

By Orders entered in this docket on September 21 and 23, 2004, the Commission scheduled BellSouth's exceptions for further hearing pursuant to G.S. 62-90(c). The matter was thereby scheduled for oral argument on Monday, October 11, 2004, at 11:30 a.m., in Commission Hearing Room 2115. The parties were also required to file briefs setting forth their positions on BellSouth's exceptions no later than Wednesday, October 6, 2004.

Briefs were thereafter filed by BellSouth, AT&T, MCI, and the Public Staff. In addition, those parties were represented by counsel at the further hearing on October 11, and counsel for each of the parties offered oral argument in support of their positions.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

As a matter of sound regulatory policy, the Commission finds good cause to grant in part the exceptions filed in this docket by BellSouth on August 30, 2004. Therefore, the Commission will reconsider, modify, and amend the Order Ruling on Motions for Reconsideration entered herein on August 26, 2004, as follows:

1. The conclusion reached by the Commission in the August 26, 2004 Order that "... the new BellSouth UNE rates were available to CLPs on December 30, 2003, unless an interconnection agreement indicates that the parties intended otherwise" is rescinded.

2. Decretal paragraph number 2 of the August 26, 2004 Order is rescinded.

In so ruling, the Commission has considered and based its decision on the following relevant matters regarding the issues raised by the parties.

STANDARD OF REVIEW

On August 30, 2004, BellSouth filed exceptions and a notice of appeal regarding the August 26, 2004 Order. BellSouth also requested that its exceptions be set for further hearing before the Commission. The Commission is clearly authorized by G.S. 62-90(c) to conduct a further hearing to consider BellSouth's exceptions and that is what the Commission did in this instance.[1] The Commission scheduled an oral argument to consider BellSouth's exceptions and allowed the parties to present oral and written argumentation in support of their positions. The issues raised by BellSouth's exceptions involved legal and policy considerations rather than disputed issues of fact. No party requested an opportunity to present further evidence. For that reason, no further evidentiary hearing appeared necessary to resolve the issues before the Commission as a result of BellSouth's exceptions. As a result of this further hearing, the Commission has examined the merits of its previous decision and considered all relevant legal and policy issues as part of that process. State ex rel. Utilities Commission v. Champion Papers, Inc., 259 N.C. 449, 454, 130 S.E.2d 890 (1963) (Upon reconsideration pursuant to the predecessor of G.S. 62-90(c), the Commission is entitled to "make such changes in the original record as the Commission concludes the facts and the law warrant in order that the record may speak the truth" and correct "[a]ny error in the record."). At the conclusion of that process, the Commission has reconsidered and rescinded the decision set forth in the August 26, 2004 Order, which held that "... the new BellSouth UNE rates were available to CLPs on December 30, 2003, unless an interconnection agreement indicates that the parties intended otherwise." The Commission has reached this decision as a matter of sound regulatory policy rather than as the result of any conclusion that its original decision with respect to the "effective date" issue was unlawful. The Commission does, however, believe that the result reached in the August 26, 2004 Order with respect to the "effective date" issue was inconsistent with the competent, material, and substantial evidence in the present record and considerations of sound regulatory policy. Therefore, this conclusion must be rescinded. For the same reasons, Decretal Paragraph No. 2 contained in the August 26, 2004 Order must also be rescinded.

ILLEGAL RETROACTIVE RATEMAKING

BellSouth's exception alleging that the Commission engaged in illegal retroactive ratemaking when it granted the AT&T/MCI motion for reconsideration in the August 26, 2004 Order and made certain rates effective December 30, 2003, is rendered moot since the Commission has now reconsidered that issue and rescinded that decision.[2] Notwithstanding the fact that BellSouth's exception on this issue is now moot, the Commission concludes for the record that BellSouth's allegations and legal arguments regarding prohibited retroactive ratemaking have no validity or merit. We agree with the position taken on this issue and the legal arguments advanced by the Public Staff and AT&T/MCI.

"EFFECTIVE DATE" CONSIDERATIONS

Although the Commission has the unquestioned statutory authority to determine the dates upon which its Orders will become effective and to reconsider its earlier decisions, the Commission concludes, upon further consideration, that it should not have reconsidered the result reached with respect to the effective date of BellSouth's new UNE rates in the December 30, 2003 Order. The Commission reaches this conclusion for two different, albeit related, reasons. First, the Commission's decision was inconsistent with existing Commission precedent concerning the effective date of newly-established UNE rates and the language of earlier Orders entered in the process of establishing new UNE rates for BellSouth in this proceeding. At bottom, the effect of the

[1] G.S. 62-80 also provides additional statutory authority for the Commission to reconsider the August 26, 2004 Order. The Commission has complied with the procedural requisites of both this statute and G.S. 62-90(c) in conducting a further hearing and rendering this decision.

[2] Notwithstanding BellSouth's assertions to the contrary, the Commission did not put an impermissible burden of proof on BellSouth to show why the December 30, 2003, Order should not be reconsidered. Nevertheless, this exception has also been rendered moot by this decision.

Commission's August 26, 2004 decision with respect to the "effective date" issue was to change the UNE rates charged and paid by the parties after actual competition had commenced, depriving the parties of adequate notice of the point at which the new UNE rates established in this proceeding would become effective. Second, the effect of the result reached in the August 26, 2004 Order with respect to the "effective date" issue is to require BellSouth to pay UNE rates predicated on a costing determination that the Commission rejected elsewhere in that same Order. For these reasons, the Commission concludes that the provisions of the August 26, 2004 Order providing that rates based on the costing determinations made in the December 30, 2003 Order would be effective from December 30, 2003, until August 26, 2004, should be rescinded.

The result reached in the August 26, 2004 Order with respect to the "effective date" issue is inconsistent with the Commission's treatment of similar issues in the past. The Commission has, in previous cases establishing rates under the Telecommunications Act of 1996 (TA96), announced at the commencement of or during the pendency of particular proceedings that particular rates were to be considered interim and subject to true-up. For example, the Commission has stated at the beginning of a particular pricing proceeding that existing rates would be deemed interim and subject to true-up at the conclusion of the proceeding in question. See: Order Adopting Permanent Prices for Unbundled Network Elements, Docket No. P-100, Sub 133d, Eighty-Eighth Report of the North Carolina Utilities Commission: Orders and Decisions 142 (1998) ("The Commission ruled in the RAOs that prices for unbundled network elements (UNEs) should be established as interim rates subject to true-up at such time as the Commission established permanent rates based on appropriate cost studies."); Order Addressing Collocation Issues, Docket No. P-100, Sub 133j (2001) ("[T]he Commission ordered that the collocation rates filed by the ILECs on September 17, 1999 should be used as the interim collocation rates until the final rates were established by the Commission."). In another case involving our ratemaking authority under TA96, the Commission ruled in approving certain ILEC compliance filings that the rates established in that proceeding should be deemed effective as of the date of the Commission's last substantive Order in that docket. Order Adopting Final Permanent Deaveraged UNE Rates, Docket No. P-100, Sub 133d (2002) ("That the deaveraged UNE rates for BellSouth, Sprint, and Verizon shall have an effective date of December 11, 2001, the date of the Commission's *Order Finalizing Deaveraged UNE Rates and Denying Alltel's Motion to Deaverage Nonrecurring Rates."*). Other than in these instances, the Commission has not made any date other than the date of the Commission's Order actually approving the rates in question the effective date of newly established rates under TA96. Although the mere fact that the Commission has never acted in a particular manner in the past does not prevent it from acting differently in the future, the Commission should be hesitant to change established procedures without adequate notice, which we conclude upon further reflection that we did not provide in this instance.

The insufficient notice of the effective date of BellSouth's newly-established UNE rates resulting from a failure to follow precedent was compounded by the inconsistency of that result with the language of prior Commission Orders in this proceeding concerning the "effective date" issue. Prior to the issuance of the August 26, 2004 Order, the Commission had not indicated any intention of making rates based on the costing determinations contained in the December 30, 2003 Order effective as of that date. On the contrary, Decretal Paragraph No. 3 of the December 30, 2003 Order expressly 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 prior rates contained in existing interconnection agreements and BellSouth's SGAT." Order Adopting Permanent Unbundled Network Element Rates for BellSouth Telecommunications, Inc., Docket No. P-100, Sub 133d, Ninety-Third Report of the North Carolina Utilities Commission: Orders and Decisions 189 (2003). As a result, the August 26, 2004 Order plainly indicated that "the Commission envisioned, before AT&T/MCI's Motion for Reconsideration on Ordering Paragraph No. 3, that the effective date of the new BellSouth UNE rates would be after: (1) an Order on the Motions for Reconsideration was released, (2) BellSouth refiled, if necessary, its new cost studies and resulting rates, (3) the Public Staff reviewed those cost studies and rates, and (4) the Commission issued a final order approving the new BellSouth UNE rates." Wholly aside from the fact that the result reached in

the August 26, 2004 Order was inconsistent with the Commission's prior practice with respect to the effective date of new rates established pursuant to TA96, the Commission clearly stated in the December 30, 2003 Order that the new UNE rates established in this proceeding would not become effective until after the completion of further proceedings. By reversing ourselves with respect to this very issue in the August 26, 2004 Order, we added to the notice problems created by this departure from our existing precedent concerning the effective date of new UNE rates.

A decision that rates based on the costing decisions made in the December 30, 2003 Order would be effective from December 30, 2003, until the entry of the August 26, 2004 Order is both inconsistent with prior Commission practice, which clearly suggests that newly-established UNE rates would not be effective until the date of the last substantive Commission Order needed to resolve disputed costing issues absent prior notice, and with the language of the Commission's prior Orders in this proceeding. The combination of these two factors provided the parties with no notice that rates based on the costing determinations made in the December 30, 2003 Order would become effective as of that date. In fact, the combination of those factors provided the parties with every reason to believe that the new rates would not become effective until the date of the Commission's last substantive decision in this proceeding. Although one might argue that the adequacy of the notice provided to the parties is entitled to little weight in the ultimate policymaking process on the grounds that the parties would not have acted any differently had the Commission followed its existing precedent or acted consistently with the "effective date" provisions of the December 30, 2003 Order, there is ultimately no way for the Commission to know whether that is the case. It is, however, possible that the parties might have acted differently had they had notice that new UNE rates would become effective as of December 30, 2003. For example, a party adequately informed that rates based on the costing decisions made in the December 30, 2003 Order would be deemed effective as of that date might have been able to seek a stay of such an Order or to obtain expedited review of the underlying costing decisions. The Commission's existing practice with respect to the effective date of newly-established rates under TA96 and the approach adopted in the Commission's earlier Order in this proceeding ensured that the parties would be generally aware of the impact of their business decisions before action was actually taken. No sufficient reason for departing from our prior practice and the approach to the "effective date" issue adopted in the December 30, 2003 Order has been provided in this instance. Thus, upon reconsideration, we conclude that we should not adhere to the result reached in the August 26, 2004 Order with respect to this "effective date" issue.

Secondly, the effect of the "effective date" determination reached in the August 26, 2004 Order is to put into effect rates based on a costing determination that the Commission revisited and changed in that same Order. In the August 26, 2004 Order, the Commission unanimously decided to revisit its decision with respect to the appropriate "fill factor" to be used in establishing BellSouth's new UNE rates. Assuming that the "effective date" decision with respect to the December 30, 2003 Order had remained in effect, BellSouth would be called upon to pay UNE rates based on a "fill factor" that the Commission ultimately determined to be insufficient to ensure the provision of adequate facilities for customers. The inappropriateness of such a result is obvious. The implications of this aspect of the Commission's decision with respect to the "effective date" issue in the August 26, 2004 Order were sufficiently troubling that the Public Staff did not argue that the Commission should adhere to that decision on reconsideration. On the contrary, the Public Staff recommended that the Commission consider making the rates resulting from the August 26, 2004 Order effective retroactively to December 30, 2003, an outcome that would raise a whole host of legal and equitable questions that the Commission is reluctant to address.

Although one might argue that the August 26, 2004 Order did not find the "fill factor" determination embodied in the December 30, 2003 Order to have been erroneous, such a claim cannot withstand close analysis. Acceptance of this argument would require a conclusion that one "fill factor" was appropriate for the period of time from December 30, 2003, through August 26, 2004, and that a different "fill factor" was appropriate for the period of time after

August 26, 2004. The fundamental problem with this logic is that the record on which the Commission's "fill factor" determinations have been based was closed before the issuance of the August 26, 2004 Order. In other words, the Commission based its "fill factor" decision on reconsideration on the same record used at the time of its initial "fill factor" determination. For that reason, there are no "changed circumstances" involved here. The Commission simply decided in the August 26, 2004 Order that, upon further reflection, the record developed in this proceeding supported a finding with respect to the "fill factor" issue that differed from the result reached in the December 30, 2003 Order. There is simply no support for a determination that that the Commission did not find in the August 26, 2004 Order that its initial "fill factor" decision was erroneous. Such an erroneous "fill factor" determination should not, at this stage in the proceeding, find its way into the UNE rates actually charged and paid by the parties.

The essential argument advanced by AT&T/MCI in support of the "effective date" determination contained in the August 26, 2004 Order during the proceedings on reconsideration was that the Commission had found BellSouth's existing UNE rates to have been excessive in the December 30, 2003 Order and that a failure to immediately implement the rates resulting from the costing decisions contained in the December 30, 2003 Order would allow BellSouth to continue to charge unreasonably high rates. There are, however, a number of problems with this argument. First, the Federal Communications Commission (FCC) has acknowledged that the proper application of TELRIC principles can produce a range of valid UNE rates. The only truly excessive UNE rates are those which are not TELRIC-compliant. As a result, although the Commission's costing decisions in the December 30, 2003 Order support a reduction in BellSouth's UNE rates, those decisions do not definitively indicate that BellSouth's existing rates are not TELRIC-compliant. Secondly, and more importantly, a finding that BellSouth's UNE rates should be reduced ignores the question of what BellSouth's new UNE rates should be. Generally speaking, one set of UNE rates should only be replaced by another properly-established set of UNE rates. As was noted in detail earlier in this Order, the practice traditionally followed by the Commission in setting UNE rates is to make a costing determination, prescribe the use of certain additional procedures to ensure the development of proper rates, and allow for the filing and resolution of motions for reconsideration. All of these steps are important to the establishment of appropriate TELRIC-compliant UNE rates given the complexity of the costing process. Although the Commission does not grant reconsideration motions with great regularity, the ratemaking procedures described above give the Commission an opportunity to consider all aspects of its decision thoroughly before actually implementing new UNE rates. In this instance, the Commission actually took the opportunity occasioned by BellSouth's reconsideration motion to make a significant change in its costing decisions. Any UNE rates made effective from December 30, 2003, until August 26, 2004, in accordance with the "effective date" provisions of the August 26, 2004 Order would not, for the reasons set forth above, have been properly established due to the change in the "fill factor" determination contained in the August 26, 2004 Order. As a result, this argument does not justify adhering to the "effective date" decision contained in the August 26, 2004 Order.

AT&T/MCI argued in support of the "effective date" provisions of the August 26, 2004 Order that a failure to adhere to that decision would reward BellSouth for "slow rolling" compliance with the Commission's costing order. Although the Commission recognizes the potential validity of this concern, we do not believe that the approach adopted in the August 26, 2004 Order is an appropriate method for dealing with this problem. While the Commission does not believe that AT&T/MCI have in any way waived the right to advance the argument contained in their own reconsideration motion with respect to the "effective date" issue, the relief that they sought in that motion was, for the reasons set out above, problematic. Effectively, AT&T/MCI sought to remedy perceived BellSouth delaying tactics by having the Commission implement BellSouth's new UNE rates as of December 30, 2003, despite the fact that BellSouth had no prior notice that the Commission contemplated such a result and despite the fact that there were substantive reconsideration motions (which were ultimately allowed, at least in part) pending decision. AT&T/MCI could have asked the Commission to make the costing determinations contained in the December 30, 2003 Order effective

as of that date prior to the issuance of that Order in their testimony or brief, but they did not do so. Similarly, AT&T/MCI could have asked the Commission to set a specific prospective effective date for BellSouth's new UNE rates (such as the date of their motion), but they did not do this either. Either approach would have provided the Commission with a more equitable solution to the concern that appears to have motivated the approach to the "effective date" issue actually advocated in their reconsideration motion. Putting it simply, the Commission has other, more equitable ways to deal with any alleged delaying tactics employed by BellSouth to prevent the timely implementation of new UNE rates. At an absolute minimum, this understandable concern about delay does not justify the result deemed appropriate in the August 26, 2004 Order given the other considerations set forth in this Order.

The record reflects some concern that the adoption of the approach to the "effective date" issue set forth in this Order will result in the negation of the Commission's UNE costing decisions by virtue of the provisions of the FCC's interim rules order. According to the interim rules order, all UNE rates for unbundled switching, enterprise loops, and dedicated transport were frozen as of June 15, 2004, subject to certain exceptions, including one for instances in which a state commission increased the UNE rates in question. Admittedly, the FCC's order may prevent certain of the Commission's UNE decisions from being implemented, at least in the near term, since they tend to result in a reduction in BellSouth's UNE rates. On the other hand, the Commission has no authority over the FCC; instead, we are bound by and must respect valid FCC orders, regardless of their impact. It is not even clear that a decision to make the UNE rates resulting from the costing determinations contained in either the December 30, 2003, or August 26, 2004 Orders effective as of December 30, 2003, would have any practical effect, given that these lower UNE rates may not actually become available to particular CLPs until after June 15, 2004, depending upon the provisions contained in the interconnection agreements between BellSouth and the affected CLPs. Furthermore, the interim rules order does not stop all of the UNE rates that will be established in this proceeding from taking immediate effect. On the contrary, the rates for UNEs that are not frozen by the interim rules order established in this proceeding will go into effect as of August 26, 2004, in accordance with an uncontested portion of our August 26, 2004 Order. Finally, it is not clear what result the FCC will reach with respect to the availability of the UNEs the rates for which were frozen in the interim rules order. To the extent that the FCC preserves the availability of these UNEs in its final order, the rates that the Commission has set in this proceeding for those UNEs will eventually be given effect. Thus, the Commission's decision with respect to the "effective date" issue in response to BellSouth's exceptions will not inappropriately negate the Commission's labors in this proceeding.

During the proceedings on reconsideration, AT&T/MCI argued that the FCC's decision in the interim rules order to freeze all UNE rates for switching, enterprise loops, and dedicated transport at the rates that were in effect as of June 15, 2004, was unlawful and appeared to suggest that the Commission should disregard the "rate freeze" contained in the interim rules order. Assuming that AT&T/MCI were actually attempting to persuade the Commission to disregard the interim rules, the Commission does not believe it should take AT&T/MCI up on that offer. The appropriate recourse for those aggrieved by an FCC order is for the affected parties to challenge that order on reconsideration or by seeking appellate review. As long as the FCC's order remains in effect, it would not be appropriate for the Commission to simply disregard it.

The Commission does, of course, recognize that this issue has resulted in considerable contention among the parties. As should be obvious, the Commission has not reached unanimity with respect to the proper resolution of this issue even now. In order to avoid similar problems in the future, the Commission believes that it should establish an effective date for the new rates to be established in a future UNE pricing proceeding at the beginning of that proceeding and adhere to that "effective date" decision throughout the course of that proceeding. Such a decision would be fair to all parties and provide needed clarity. Our decision to make the UNE rates ultimately approved in this proceeding effective on and after August 26, 2004, produces such a result. Any attempt to make UNE rates resulting from any Commission Order entered in this proceeding effective prior to

August 26, 2004, would, however, deprive affected parties of adequate notice and be otherwise inequitable given the circumstances present here. As a result, the Commission finds good cause to grant in part the exceptions filed in this docket by BellSouth on August 30, 2004, to the extent that the Commission rescinds those potions of the August 26, 2004 Order that render rates based on the costing decisions contained in the December 30, 2003 Order effective from that date until the entry of the August 26, 2004 Order.

IT IS, THEREFORE, ORDERED as follows:

1. That the conclusion reached by the Commission in the August 26, 2004 Order that ". . . the new BellSouth UNE rates were available to CLPs on December 30, 2003, unless an interconnection agreement indicates that the parties intended otherwise" is rescinded.

2. That Decretal Paragraph No. 2 of the August 26, 2004 Order is rescinded.

ISSUED BY ORDER OF THE COMMISSION.
This the 24th day of November, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

B5111604.01

Chairman Jo Anne Sanford and Commissioner James Y. Kerr, II dissent.

DOCKET NO. P-100, SUB 133d

CHAIR JO ANNE SANFORD AND COMMISSIONER JAMES Y. KERR, II, DISSENTING: This case—both in our original order and now on reconsideration—turns on differing views of the balance of fairness between the CLPs and BellSouth as to the effective date of lower UNE rates. BellSouth contends that fairness is found in an effective date of August 26, 2004; the CLPs contend that the Commission correctly decided in our Order of August 26 that the effective date should be December 30, 2003.

The case does not turn on lawfulness. The Majority opinion herein recognizes that the Commission's prior Order, granting AT&T's motion to pin the effective date at December 30, 2003, is lawful. We agree. The Full Commission understands this decision as one of policy that should turn on fairness, and we now on reconsideration simply measure the balancing point differently. We in the Minority persist in a belief that the best policy is to make the revised permanent UNE rates effective as of December 30, 2003, and that the Majority's decision to reverse our earlier determination unnecessarily favors BellSouth's position at the expense of the CLPs. We believe the Commission could have afforded other remedies for the harm described by BellSouth, and that a more balanced result could have been achieved.

Just as the lawfulness of our earlier decision is not reasonably in dispute, it is indisputable that when we issued our *Order Adopting Permanent Unbundled Network Element Rates for BellSouth Telecommunications, Inc.*, all six participating Commissioners agreed that the new rates produced by the *Order* were the most appropriate, TELRIC-compliant rates as of December 30, 2003, the date of the *Order* adopting the new rates. The new rates were based on the most accurate data available to the Commission at the time the *Order* was issued. In fact, this second UNE rate proceeding was initiated by order of the Commission on March 20, 2002, precisely because the previous rates had been established using outdated data from as far back as 1997, and because BellSouth had developed a better model for producing TELRIC rates than had been used to set the prior rates. Therefore, regardless of whether one calls the pre-December 30, 2003 rates "outdated," "less appropriate," or "inappropriate," by establishing new rates based on more current data and a more accurate cost

model, this Commission unanimously determined that the prior rates did not best comply with the competition goals of the Act and the FCC's UNE pricing rules.

Given that the Commission has found the new rates to be more accurate and to better serve the purposes and intentions of the Act, we believe the better policy is to cause these new rates to be in effect at the earliest legally permissible time. The Majority has relied on precedent and prior practice to argue that it is unfair to make new rates effective prior to the date of an order finalizing the rates established by the December Order. Though fairness is generally found in reasonable consistency of practice and in clear notice, this argument bears further examination in light of the facts of this case.

"Precedent and practice" here can actually only be traced to one single instance, since we have conducted only one other full UNE rate proceeding.[1] More pointedly, in this case AT&T's Motion for Reconsideration raised concerns about the procedure we had initially intended to use in this proceeding. AT&T's Motion was filed in this docket and presumably put all parties on precisely the kind of notice that BellSouth contends it lacked. Should not knowledge that the Commission was being asked to make the rates effective in December constitute notice that a December effective date was a possible outcome? AT&T supported its motion by pointing out that the procedure used in our last proceeding resulted in undue delay in implementation of established rates and could again result in a lengthy delay in implementing the rates found to best serve the competition goals of the Act. This argument was clearly compelling and was accepted by the Commission in our August 26, 2004 *Order*, wherein we agreed with AT&T and decided that the effective date for the newly adopted rates should be December 30, 2003. This avoided additional delay in implementation of the appropriate rates and is the date which, but for the procedural statement in original Ordering Paragraph 3, would have been the presumed effective date of the December 30 *Order*.[2]

As correctly argued by AT&T, the rates produced by the December *Order* would have gone into effect and been finalized when that *Order* was issued if the Commission had possessed the resource capability to run inputs resulting from its decision through the BellSouth cost model. The Commission does not have this ability and that is the only reason the rates were not "finalized" when the policy decisions setting the rates were made in December. However, for all practical purposes, the rates were set by the policy decisions made in the December *Order* and subsequent compliance submissions obtained from inputting adjusted numbers in the BellSouth model would not change the rates produced by our December *Order*. This means there was no compelling reason for the Commission to have delayed the effective date of the new rates. Thus, we modified our procedure in the August 26, 2004 *Order Ruling on Motions for Reconsideration* by setting the effective date as December 30, 2003. Then and now it seemed on balance to be the fairest decision.

But what about BellSouth's---and now the Majority's---concern, regarding the lack of notice to BellSouth that the effective date might be eight months earlier than they expected or assumed? There is merit to the argument---especially at first blush---but when considered closely it loses weight in the balancing exercise.

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[1] It is important to note that the first full UNE rate proceeding was conducted when interim UNE rates <u>subject to true-up</u> were in place.

[2] Ordering Paragraph 3 generally stated that after the Commission approved rates filed to comply with the December Order, those rates would be deemed the permanent UNE prices, but did not address when those permanent rates would become effective. After consideration of all the comments submitted regarding AT&T's Motion, the Commission set the effective date for the new rates as December 30, 2003, and candidly stated that the Commission had initially envisioned that the effective date for new rates would be the date of a subsequent order finalizing the rates set by the December *Order*. However, as a result of studying AT&T's Motion, the Commission realized it was more appropriate to make the new rates effective as of December 30, 2003 and found no reason not to do so.

- First of all, we believe that BellSouth was absolutely on notice from March 1, 2004 of this possibility.
- Secondly, prior to our August Order, BellSouth never argued, in opposition to AT&T's March Motion, that it would be "harmed" in this fashion by a later decision which pinned the effective date at an earlier point in time.
- Third, the harm BellSouth alleges can be remedied in other ways that also preserve fairness for the CLPs.

To the third point, BellSouth stated that the harm it would suffer as a result of the December effective date would be in having to reimburse the CLPs for payments it collected since December 30, 2003 in excess of the newly established rates—a liability for which BellSouth had not accrued or contemplated. Yet the Commission has the authority to approve payment arrangements whereby payment, with interest, of the unexpected liability to the CLPs could be delayed or broken into installments. BellSouth would then have the opportunity to plan and accrue for a "known" liability and the CLPs would receive the benefit of the "proper" rates at the earliest legal point in time. Moreover, in the absence of proof to the contrary, BellSouth's failure to record a liability is not a matter which warrants the action taken by the Majority. Statements of financial position and results of operations are inherently based on assumptions, estimates, and judgment that often vary from actual results. When actual information becomes available, it is commonplace for financial records to be adjusted to reflect that information. To the extent BellSouth assumed that the revenue in question was not subject to refund, authoritative rules of the accounting profession are adequate to permit proper adjustment of financial records impacted by the Commission's prior decision to establish December 30, 2003 as the effective date of its order of the same date.

Thus, with a reasoned argument that notice of this possibility was contained in the Motion which requested it, with no "notice" to the Commission that granting this relief would impose the harm now cited by BellSouth and accepted by the Majority, and with available remedies to address that harm in large part, we must weigh BellSouth's position against the harm to both the CLPs and the goals of the Act in delaying implementation of the appropriate UNE rates for eight months. Thirty-three months[1] after the CLPs raised the issue that the rates established in the proceeding that started in 1998 are too high and eleven months after we decided all issues necessary to produce new rates based on more current data, the CLPs are still being charged rates that are not the most appropriate. It follows that the public is denied the opportunity of the benefit that would have flowed to it as a result of lower UNE rates. The CLPs are being charged rates the Commission has *already* agreed are too high and, as a result of the Majority's decision, they will never recover the excess payments—the loss is irreparable.

It appears to us that the valid concern that BellSouth not be improperly harmed by lack of notice of the Commission's procedural modification can be effectively addressed. However, the financial and opportunity losses to the CLPs, stemming from prolonged payment of charges that are too high, are irreparable and cannot be remedied. Given the choices available, we simply believe that the position we take best fulfills the Commission's appropriate policy objectives and strikes a better balance of fairness.

Therefore, inasmuch as this decision is one of policy, not law, we believe that fairness is found in implementation of the UNE rates at the earliest legally permissible time, which is December 30, 2003.

[1] Includes time required by the Commission and the parties for thorough study of the issues and full opportunity to be heard.

In accord with the foregoing discussion, we respectfully dissent from the Majority opinion rescinding that part of the Commission's August 26, 2004 *Order* that established December 30, 2003 as the effective date of the new UNE rates.

\s\ Jo Anne Sanford
Chair Jo Anne Sanford
\s\ James Y. Kerr, II
Commissioner James Y. Kerr, II

DOCKET NO. P-100, SUB 145

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Notification of Customers Regarding the	)	ORDER CONCERNING TEXT OF BILL
Avoidance of Telephone Solicitations	)	INSERTS AND INFORMATION
	)	REGARDING DO NOT CALL LAW

BY THE CHAIR: On January 29, 2004, the Attorney General and the Public Staff filed a Motion Regarding Bill Insert and Telephone Directories[1]. This Motion was made pursuant to the requirements of Senate Bill 872 (Do Not Call Law) which was ratified on July 19, 2003. G.S. 62-54 and G.S. 75-102(m) together require the Attorney General, in consultation with the Public Staff, to draft a bill insert and other consumer information to notify consumers of the provisions of the Do Not Call Law and their rights thereunder. Specifically, the Attorney General and Public Staff have requested that the Commission require:

1. That each local exchange company and competing local provider print the information (attached hereto as Exhibit A) in a clear and conspicuous manner in the consumer information pages of each telephone directory distributed to residential customers and ensure, to the greatest extent possible, that such information appears clearly and conspicuously in the consumer information pages of each telephone directory published by a nonregulated entity on behalf of, or at the request of, such local exchange company or competing local provider, and

2. That each local exchange company and each competing local provider certified to do business in North Carolina enclose the bill insert (attached hereto as Exhibit B), at least annually, in at least one telephone bill mailed to every residential customer.

After careful consideration, the Chair concludes, as a preliminary matter, that the notices ought to be approved. However, the Chair believes that good cause exists to allow local exchange companies, competing local providers, or the North Carolina Justice and Community Development Center to propose amendments in the language of the notices, should they desire to do so, by no later than February 10, 2004.

If no amendments are proposed, the notices will be deemed approved as proposed by the Public Staff and Attorney General and shall be provided to customers of local exchange companies and competing local providers in the manner proposed by the Attorney General and Public Staff. If amendments are proposed, then the Attorney General and Public Staff are requested to consider them and propose the notices anew, with any revisions, as soon as practicable.

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[1] On February 3, 2004, the Attorney General filed a letter stating that the Appendix references has been inadvertently transposed, and refiling the Motion.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 5th day of February, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb020204.01

EXHIBIT A

UNWANTED TELEMARKETING CALLS

About The Do Not Call Registry
The Do Not Call Registry is a list of residential and cellular telephone numbers that telemarketers may not call, except in limited circumstances. The Registry is operated by the Federal Trade Commission (FTC) and enforced by North Carolina Attorney General Roy Cooper, the Federal Communications Commission (FCC) and the FTC. Placing your number on the Registry will stop most, but not all, telemarketing calls. By law, exceptions to the Registry include companies with which you have had a business relationship in the past 18 months or to which you made an inquiry in the past 3 months, non-profit organizations, political organizations and polling firms. The Registry also does not apply to business-to-business calls.

If you are on the Registry and get a call from a company with which you have an established business relationship or from a nonprofit organization, or if you are not on the Registry and want a particular telemarketer to stop calling you, simply direct that telemarketer to put your phone number on its internal Do Not Call list. The telemarketer must respect your wishes.

How To Sign Up For The Do Not Call Registry
Signing up for the Registry is free and easy. To register by phone, call 1 (888) 382-1222 from the phone you wish to register. To register online, go to *www.nocallsNC.com.* You must have an active e-mail address to register through the Internet, and you will receive a confirmation e-mail as part of the registration process. Registration will be valid for 5 years, after which time you can re-register.

What To Do If Telemarketers Continue To Call You
Under North Carolina and federal law, with limited exceptions, telemarketers may not call your phone number if it has been on the Do Not Call Registry for at least 3 months. If you continue to receive calls and your number is on the Registry, file a complaint with Attorney General Roy Cooper's Consumer Protection Division. Complaint forms can be obtained online at *www.nocallsNC.com,* or by calling 1 (877) 5-NO-SCAM.

You may also enforce the law against telemarketers by filing an action in state court. You can also file a complaint with the Federal Trade Commission online at *www.donotcall.gov* or by calling 1(888) 382-1222. In addition, you may file a complaint with the Federal Communications Commission by email at *donotcall@fcc.gov,* by calling 1(888) CALL-FCC, or by writing to Federal Communications Commission, Consumer & Governmental Affairs Bureau, Consumer Inquiries and Complaints Division, 445 12th Street, SW, Washington, DC 20554.

Other Telemarketing Protections
North Carolina and federal law provide other important protections against abusive and disruptive telemarketing calls. This is what the law says:

- At the beginning of each call, the telemarketer must clearly identify himself and the business or entity that he represents.

- At your request, the telemarketer must provide you with a telephone number or address where you can reach him.
- You may request to have your name removed from the telemarketer's calling list, and the telemarketer must take all necessary steps to remove your name and telephone number from the list.
- No telemarketer may call your home after 9 PM or before 8 AM.
- Telemarketers may not use prerecorded messages with few limited exceptions.
- Telemarketers must transmit their telephone numbers, and if possible, their names, through your caller ID service.
- Telemarketers must connect you to a sales representative two seconds after you answer the phone to eliminate annoying "dead air" calls.

Rules Applying To Telemarketing Calls Placed to Your Business
The FCC has rules in place to help business customers with telemarketing calls. The FCC's rules prohibit:

- the use of autodialers in a way that would tie up two or more lines of any business that has multiple lines. The rules require that any calls made with an autodialer must release your telephone line within five seconds of your hanging up.
- the transmission of unsolicited advertisements to fax machines. The FCC requires that the first page of each fax or each page of the message must clearly mark: (a) the date and time the transmission is sent; (b) the identity of the sender; and (c) the telephone number of the sender or of the sending fax machine. No person may transmit advertisements to your fax machine without your prior express permission or invitation, unless you have a business relationship with the transmitter of the fax. This rule applies to residential and business fax machines.

For More Information
To learn more about your rights under our telemarketing laws or how to avoid telemarketing fraud, go to www.nocallsNC.com or call Attorney General Roy Cooper's Consumer Protection Division at 1 (877) 5-NO-SCAM.

EXHIBIT B

DO NOT CALL
Residential customers who wish to reduce the number of telemarketing calls they receive may add their telephone numbers to the national Do Not Call Registry. After three months, customers on the Registry should experience a reduction in unwanted calls. To register your home or mobile phone number for free, call 1-888-382-1222 from the phone you wish to register. For more information, to register by the Internet, or to file a complaint with Attorney General Roy Cooper, go to www.nocallsnc.com or call 1-877-5-NOSCAM (566-7226).

DOCKET NO. P-100, SUB 152

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Competitive Access to Commercial and Residential Developments) ORDER CONCERNING COMPETITIVE) ACCESS TO DEVELOPMENTS

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, January 29-30, 2004

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Sam J. Ervin, IV, and Michael S. Wilkins

APPEARANCES:

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BY THE COMMISSION: On June 6, 2003 the Commission issued an Order Establishing Proceeding and Scheduling Conference, establishing a general rulemaking docket on competitive access to commercial and residential developments, and setting a procedural conference for June 25, 2003.

The procedural conference was held as scheduled, and subsequently, at the Commission's request, the conference participants submitted filings outlining their positions on a variety of procedural issues.

On July 16, 2003 the Commission issued an order requiring all parties desiring to participate actively in the proceeding to file a notice of participation; requiring all incumbent local exchange companies (ILECs) and competing local providers (CLPs) to file copies of all their preferred provider contracts (PPCs) with commercial or residential property developers, together with abstracts of the contracts, or to file a notice that they had not entered into PPCs'; establishing guidelines for discovery; and listing issues to be addressed in the proceeding.

The following companies filed notices of participation: CTC Exchange Services, Inc. (CTCES); ALLTEL Carolina, Inc. (ALLTEL); BellSouth Telecommunications, Inc. (BellSouth); US LEC of North Carolina, Inc.; Springboard Telecom, LLC; AT&T Communications of the Southern States, LLC (AT&T); North Carolina Cable Telecommunications Association; MClmetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; Carolina Telephone and Telegraph Company and Central Telephone Company (collectively Sprint); Verizon South Inc. (Verizon); Verizon Select Services Inc.; and One Point Communications - Georgia, L.L.C., d/b/a Verizon Avenue Corp. (Verizon Avenue). Time Warner Telecom of North Carolina, LP (TWT), although it did not file a notice of participation, nevertheless did participate in the proceeding without objection from any party.

Following extensive discovery by the parties, the Commission issued an order on October 3, 2003 scheduling a hearing on this case for December 14, 2003. The hearing was subsequently rescheduled for January 29, 2004.

On December 12, 2003 ALLTEL filed the testimony of Jayne Eve and Joseph A. Marano; AT&T filed the testimony of James V. Di Dia; BellSouth filed the testimony of John A. Ruscilli; CTCES filed the testimony of Michael A. Ruziska; Sprint filed the testimony of Cathy A. Clucas; and Verizon Avenue filed the testimony of Richard P. Kolb. Rebuttal testimony by witnesses Eve, Di Dia, Ruscilli, Ruziska and Kolb, and supplemental direct testimony by witness Di Dia, were filed on January 16, 2004.

On January 22, 2004, Sprint filed a letter with the Commission setting out the terms of an agreement among all parties concerning the order of witnesses and other procedural matters.

The hearing was held on January 29 and 30, 2004 as scheduled. On March 9, 2004 the Presiding Commissioner issued an order extending the time for filing briefs and proposed orders and requesting the parties to explore whether they could agree on resolution of certain of the issues presented. Meetings were held for this purpose, via conference call, with the following parties participating: CTCES, ALLTEL, BellSouth, AT&T, Sprint, Verizon Avenue, TWT, the Attorney General, and the Public Staff. These parties filed a report on March 26, 2004, containing stipulations on six matters as to which all parties were in agreement.

After the hearing had ended and proposed orders and briefs had been received, the Commission received a number of filings from persons in the real estate sector in opposition to the Public Staff's Proposed Order in particular or to regulations in general which were argued to impinge on the rights of property owners or developers. These included: Mr. Stephen Wylie of Wood Partners; Mr. James H. McLawhorn of Marsh Associates, Inc.; Mr. Joe Kaylor, President, and Mr. Dean DeVillers, Executive Vice President, Charter Properties, Inc.; Ms. Stephanie Atkinson, real estate management associate of Crosland; Mr. Mark A. Babb, Cornerstone Realty Income Trust, Inc.; Mr. John Gray, President, Spectrum Properties Residential, Inc.; Mr. Stephen Kenney, President, Kenney Properties; Ms. Sherilette S. Austin, Regional Property Manager, ISC Management; Mr. Justin Little, Vice President, Crosland, Inc.; Mr. John Porter, Charlotte Apartment Association; Ms. Miranda Rutledge, Broker/Owner, Cape Fear Management LLC; Ms. Lisa Taylor, Regional Property Manager, Trammell Crow Residential Services; Ms. Linda Page, Regional Manager, Edwin B. Raskin Company; Ms. Amanda Pressley, Simpson Property Group, LP; Ms. Patricia Myers, District Manager, Sentinel Real Estate Corp.; Mr. Thomas Gwyn, Jr., President, and Mary Gwyn, CPM, Apartment Dynamics; Mr. Tom Spanger, Sr. Vice President, United Dominion Realty Trust, Inc.; Mr. Paul O'Conner, Trammell Crow Company; Mr. Jeffrey T. Reep, HVM Management Company, Inc.; Ms. Amanda Skinner, Sr. Property Manager, Beacon Partners; Mr. Frank L. Robuck, President, Ms. Christie Rhoad and Shelly R. Bishop, Robuck Homes, Inc.; Ms. Gloria J.B. Fortune, General Manager, Vice President, and Chief Operating Officer, Triple E Apartment Management, Inc.; Mr. Robert A. Bishop, Vice President, Asset Management, Summit Properties; Mr. Scott Templeton, Vice President-Ancillary Services, Archstone-Smith Operating Trust.

On June 25, 2004, the North Carolina Real Estate Alliance (NCREA), a coalition of North Carolina real estate industry associations and their respective national chapters and affiliates listed in Exhibit A of its filing, filed a Brief in Support of Petition to Intervene and Opposition to Proposed Order by the [Public] Staff of the North Carolina Utilities Commission. The Commission granted intervention to the NCREA out of time and allowed other parties to file comments in response. On August 13, 2004, ALLTEL, AT&T, BellSouth, Sprint, TWT, and Verizon Avenue filed a Motion to Strike the NCREA's brief either in its entirety or as to those portions which are based on assertions concerning matters not part of the record of the proceeding, which make reference to matters outside the record. The Commission sought a response from the NCREA and, having received it, denied the Motion to Strike.

In a rulemaking proceeding such as this, the issues in dispute are primarily questions of regulatory policy rather than questions of fact in the ordinary sense; thus, findings of fact are not required. The Commission will begin with a summary of its decisions on the contested issues, followed by a detailed discussion of these issues. Accordingly, based on a careful consideration of the entire record in this proceeding, the Commission now makes the following

DECISIONS ON CONTESTED ISSUES

1. Certain "exclusive" provisions in PPCs are anticompetitive and void. These include (a) "exclusive provisioning" provisions, which require that the preferred carrier be the exclusive provider of telecommunications services within a specified development, and (b) "exclusive access" provisions, which (i) state that the preferred carrier shall have exclusive right-of-way in a development, or (ii) limit the ability of the owner or developer of a development, or their agents, to grant right-of-way or access for placement of facilities to any competitor of the preferred carrier.

2. CLPs that have entered into PPCs with developers or property owners of developments shall make subloops available to competitors as set out in the discussion below.

3. In order to ensure that customers, landowners and developers are fully informed of the invalidity of the PPC provisions held to be anticompetitive in paragraph 1 above, in each development where a PPC containing any such provision is in effect, the preferred provider shall, within 60 days from the date of this order, take the following steps:

   a. Mail to each of its customers in the development the letter attached hereto as Exhibit A; and

   b. Send to each of the parties to the PPC, or their successors, a letter identifying all provisions of the PPC held to be anticompetitive pursuant to paragraph 1; advising the parties that the preferred provider will no longer seek to enforce such provisions; offering to enter into a contract amendment deleting such provisions from the PPC; and enclosing a copy of this order.

4. Absent extraordinary circumstances, "exclusive marketing PPCs," which designate a particular telecommunications provider as the preferred provider in a specified development, and authorize or require the developer to market or promote the preferred provider's services within the development on an exclusive basis, but do not contain any provisions prohibited in paragraph 1 above, are valid and enforceable and not anticompetitive.

5. In view of the UNE obligation authorized in this order, "weighted commissions" are not deemed to be anti-competitive.

6. CLPs that have entered into PPCs with developers shall make their telecommunications services in the development available to other telecommunications providers for resale.

7. The existence of a PPC in a development does not relieve the ILEC in whose service area the development is located of its obligations as carrier of last resort (COLR), or of its status as Eligible Telephone Carrier (ETC) for universal service purposes.

8. PPCs are not required to contain provisions granting "opt-in" rights to competitors of the preferred provider.

9. PPCs are not required to contain provisions requiring the preferred provider to grant other providers access to poles, conduits and rights-of-way.

10. In view of Decision No. 2, it is not necessary for PPCs to be required to contain provisions expressly requiring the preferred provider to make UNEs available to other providers.

11. PPCs are not required to contain provisions stating that telecommunications providers other than the preferred provider must be granted access to install their facilities within the development.

12. The obligations of paragraph 1 of Section A of the Commission's order of July 16, 2003 in this docket, relating to the filing of copies of PPCs with the Commission, shall apply to all regulated telecommunications utilities in North Carolina on a continuing basis, and copies of all PPCs entered into in the future shall be filed in accordance with the July 16 Order.

13. The brief filed by the NCREA raised important issues for consideration in the context of this docket. However, while informative and cautionary, the arguments are not persuasive in establishing that the decisions contained in this Order are either illegal or contrary to sound public policy.

14. While this Order is effective immediately, as soon as possible thereafter the Commission expects to adopt rules embodying the decisions reached herein.

DISCUSSION OF ISSUE NO. 1

The Commission's decision on this issue is supported by the stipulations filed by certain parties on March 26, 2004.[1] All witnesses who testified at the hearing agreed that PPCs which explicitly exclude competitors of the preferred provider from a development -- whether in the form of "exclusive provisioning contracts," which state that the preferred provider will be the only provider in the development, or in the form of "exclusive access contracts," which prohibit the developer from allowing competitors of the preferred provider to enter upon the premises -- are anticompetitive and void. No party (other than the NCREA) contended that these contracts should be allowed.

This Commission has authority to invalidate anticompetitive provisions in public utilities' contracts, even if the contracts have already been executed. The Commission did so in the ALLTEL complaint proceeding involving Morrison Plantation, Docket No. P-89, Sub 79, which addressed issues similar to those that gave rise to this rulemaking proceeding. The courts have recognized that the Commission may invalidate contracts executed by a utility if the contracts "do not serve the public welfare." *In re C & P Enterprises, Inc.*, 126 N.C. App. 495, 499, 486 S.E.2d 223, 226, *disc. rev. denied*, 347 N.C. 136, 492 S.E.2d 36 (1997); *State ex rel. Utilities Commission v. Virginia Electric & Power Co.*, 285 N.C. 398, 206 S.E.2d 283 (1974). Likewise, the courts have not hesitated to declare contracts void, even if they have already been signed, when they are contrary to statutes governing fair competition, *Arey v. Lemons*, 232 N.C. 531, 61 S.E.2d 596 (1950), or violate the common-law prohibition against contracts in restraint of trade, *Hartman v. W.H. O'Dell & Associates, Inc.*, 117 N.C. App. 307, 450 S.E.2d 912 (1994), *disc. rev. denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). Accordingly, there is no basis for drawing any distinction between anticompetitive contracts already in effect and those that may be entered into in the future.

DISCUSSION OF ISSUE NO. 2

The parties differed significantly on the question of whether preferred providers should be required to offer UNEs to competitors in developments and, if so, to what extent. ALLTEL and the Public Staff supported what might be characterized as a comprehensive UNE provisioning requirement coextensive with, but no broader than, the obligation imposed by federal law on an ILEC in the same location. Verizon and BellSouth argued that subloop-only unbundling requirement was

[1] The NCREA filed for intervention on June 25, 2004, and argued in its Brief in favor of exclusive provisions.

necessary, while CTCES argued against any unbundling at all, preferring a resale requirement instead.

An unbundling requirement to be imposed on CLPs would not derive from federal law, since TA96 does not appear to obligate a CLP, unlike ILECs, to provide UNEs (or discounted resale, for that matter). However, G.S. 62-110(f1) provides in relevant part that "[t]he Commission is authorized to adopt rules it finds necessary (i) to provide for the reasonable interconnection of facilities between all providers...,(ii) to determine when necessary the rates for such interconnection, (iii) *to provide for the reasonable unbundling of the essential facilities where technically and economically feasible*... and (vi) to carry out the provisions of this subsection in a manner consistent with the public interest." (emphasis added). G.S. 62-133.5(e) also exhibits concern for anticompetitive activities by either ILECs or CLPs and authorizes complaint proceedings specifically on this such anticompetitive activities. An unbundling requirement is an attempt to mitigate anticompetitive concerns. The imposition of an unbundling requirement on a CLP does not appear to run athwart of federal law. *See*, especially, Section 251(d)(3) of TA96 (preservation of state access regulations).

Nevertheless, to impose an unbundling requirement on CLPs would represent a relatively novel approach that should be undertaken only with great care. The primary justification in an economic sense of an unbundling requirement is that a development subject to a PPC by a CLP not subject to such a requirement amounts, other things being equal, to a "mini-monopoly" out of which the developer and preferred provider have the opportunity to extract monopoly rents. The challenge to the Commission is to address the problem of access to end-users within these "mini-monopolies" without excessively burdening the parties involved, wrongfully intruding on their property rights, or unreasonably stifling technological innovation.

The Commission believes that an unbundling requirement on PPC CLPs is an essential means whereby competitors can obtain access at reasonable rates to end-users. It will enable the Commission to avoid excessive interference in other areas, such as commissions. Its attractiveness is enhanced because it does not physically invade the property of the developer or owner, being, rather, an obligation of the carrier, who has already been granted physical access to the premises in order to serve end-users. It accords with the public purpose enunciated in both federal and state law of promoting competition in telecommunications services. Only the most extravagant of legal interpretations could construe this type of obligation *upon the carrier* as a taking of the property interests of the owner.

Nevertheless, the Commission is determined to adhere to a middle ground in defining the extent of the UNE obligation. The Commission notes that the Public Staff, despite its support for a comprehensive UNE obligation, made repeated references in its proposed order to the "potentially cumbersome nature of proceedings to determine UNE rates for CLPs," noting that "a UNE requirement creates an ongoing relationship (often a very argumentative relationship) between the carrier providing UNEs and the carrier acquiring them." This sort of contentiousness does not need to be replicated in the developments context if it can be at all avoided.

Accordingly, the Commission concludes that in a development where a CLP is a preferred provider, the CLP should be required as a matter of state law to make the subloop UNE available to competitors at just and reasonable rates. For the purposes of this requirement, the term "subloop" refers to that portion of the loop from the end-user premises to the minimum point of entry outside the development.

Some may object that this will have the practical effect of excluding some CLP competitors (principally those without facilities) from achieving access through interconnection. In reply, the Commission would state that we must not make the perfect the enemy of the good, and the significance of this "problem" has not been demonstrated. The point is that a *significantly greater*

degree of competition will be made practicable, as, for example by ILECs in whose franchise area the development is located and who are currently shut out from providing service and by CLPs with facilities of their own. For others, there will be encouragement to the deployment of new facilities to the degree accessing the development makes economic sense in their business model. Besides, in many (if not most) cases, even a CLP without facilities may access the preferred provider CLP's minimum point of entry by simply purchasing UNEs, including loops, from the ILEC whose facilities run nearby. It should also not be forgotten that resale will be available. It does not make sense to implement an elaborate and potentially burdensome UNE obligation, when a leaner obligation will perform satisfactorily and other alternatives will be becoming available over time. In any event, the Commission always retains the right to reexamine the exact parameters of the unbundling obligation.

It is extremely important to set out clear ground rules for the parties to follow so that rates can be arrived at efficiently and expeditiously. The Commission certainly expects that the parties involved will deal with each other in good faith and in an efficient and businesslike manner in carrying out their respective obligations. The Commission does not anticipate that most PPC CLPs will have either the appetite or means to engage in protracted struggles over rates. The Commission therefore believes that it would better serve the public interest to set some rebuttable proxies to guide parties in this matter. It should not be necessary, as the saying goes, to "reinvent the wheel." Accordingly, in order to mitigate the "cumbersome proceedings" to which the Public Staff refers, the Commission concludes that the following process is appropriate:

1. A CLP which is the preferred provider of facilities in a development (PPC CLP) has an obligation to provide subloops to a requesting carrier. The PPC CLP has a good faith obligation to negotiate with a carrier upon receipt of a bona fide request for subloop interconnection.

2. The PPC CLP shall make the requested subloop(s) available to the requesting carrier at the rebuttably presumptive rate set out below, subject to true-up should there be a proceeding in which the Commission sets a different rate. Such subloops shall be provisioned within the same time period that the ILEC in whose franchise area the development is located makes subloops available. If no such period exists, such subloops shall provisioned within seven days.

3. At any point 60 days after the receipt of a bona fide request for subloop interconnection, either party may request the Commission to set a subloop rate for the PPC CLP.

4. There is a rebuttable presumption that the appropriate rate for a subloop is the applicable subloop rate of the ILEC in whose franchise area the development is located. If there is no such rate in existence, then the rebuttably presumptive subloop rate is BellSouth's Zone 1 subloop rate.

5. The PPC CLP shall have the burden of proof to demonstrate that the presumptive subloop rate is not just and reasonable.

6. The Commission will fix subloop rates for a PPC CLP on a company-wide basis in an initial contested proceeding.

Having set out these principles, the Commission must take note of developments in federal law which may impinge upon ILEC responsibilities which were not discussed at hearing or in subsequent briefing. As one instance, Paras. 273 through 284 of the *Triennial Review Order* (TRO) discuss "fiber-to-the-home" (FTTH), and 47 CFR 51.319(a)(3)(i) provides, with respect to "New Builds," that "[a]n incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to a residential unit that previously has not been served by a loop facility." This may have the effect of not requiring an ILEC which is providing FTTH facilities to a new residential development as a preferred provider to unbundle the subloop there. This would obviously create an asymmetrical situation as to the

respective duties of ILECs and CLPs who are preferred providers in developments. FTTH is the most obvious example of a rule that may restrict ILEC subloops obligations in the developments context; there may be other instances where recent changes in the federal law and rules may also create disparate treatment. In order to remedy this disparity and at the same time to create incentives for the ILECs to provide subloop unbundling on a comprehensive basis in developments in which they are the preferred provider of facilities, the Commission promulgates the following to go at the end of the above numbered paragraphs:

> 7. *Notwithstanding the above, to the extent that an ILEC is not required to unbundle subloops pursuant to law or regulation in developments for which it is the preferred provider of facilities, a PPC CLP is likewise not required to unbundle subloops in like manner in developments located in the franchise area of the ILEC in developments for which the such CLP is the preferred provider of facilities; provided, however, that if such ILEC voluntarily provides subloop unbundling not otherwise required by law or regulation to applicable developments in which it is the preferred provider of facilities, a PPC CLP must do likewise in applicable developments located in the franchise area of such ILEC for which the CLP is the preferred provider of facilities.*

It should be noted that the above is written in a manner that it will address situations beyond FTTH which may affect the duty of an ILEC to provide subloop unbundling. The general intent is that the CLP not have any more of an obligation under the state law obligation being imposed here to unbundle subloops in a CLP PPC development located in an ILEC franchise area than the ILEC does in an ILEC PPC development under its federal law obligation. In an FTTH context, this would mean that, if the ILEC has a new development that is served by way of fiber and the ILEC takes advantage of the apparent unbundling exemption for FTTH, then a CLP may do likewise as to a new development which it is serving by way of fiber; but, if the ILEC forgoes its exemption with respect to such developments and agrees to provide subloop unbundling, then the CLP must do likewise.

The Commission recognizes that there may be situations in which the subloop UNE access obligation to developments fails because of the operation of federal law, but it is to be hoped that the benefits that the ILECs calculate they will receive from access to PPC CLP developments will counterbalance any desire to maintain monopolies in their own. The Commission also notes that the resale obligation outlined elsewhere does not appear to be affected by changes in federal law. And, finally, the Commission observes that the pace of telecommunications technological change is quickening, and it is likely that over time, perhaps sooner rather than later, alternative modes of access will become available, including VOIP, cable, wireless, and voice-over-powerlines, which will render monopolies on telecommunications to developments as obsolete as medieval castles upon the advent of firearms.

DISCUSSION OF ISSUE NO. 3

It is important to make sure that the Commission's decision in this case is brought to the attention not only of the state's telecommunications utilities, but also of the developers who have entered into PPCs containing the provisions we have held to be invalid and, as of the effective date of this Order, void, as well as the customers whose choice of telephone providers has been wrongfully restricted. Therefore, all preferred providers with unlawful provisions in their PPCs must communicate with the parties to those PPCs, and with all customers in the developments affected by those PPCs. In order to ensure that all customers are notified of their rights in simple, understandable language that is uniform throughout the state, the Commission has drafted a standard letter to customers, which is attached as Exhibit A hereto. Each utility with unlawful PPC provisions should draft its own letter to all parties to the affected PPCs (or to the successors of the original parties, if other entities have succeeded to the original parties' rights and obligations). The information to be included in these letters can be drawn from our "Decisions on Contested Issues" above and from CTCES's communications with its developers following the Commission's order in Docket No.

P-89, Sub 79. The Commission takes note of CTCES's good-faith response to the Sub 79 order and is confident that all affected utilities will exercise similar good faith in their response to this order.

DISCUSSION OF ISSUE NO. 4

This issue relates to exclusive marketing arrangements between a developer and a preferred provider. Verizon Avenue witness Kolb testified that his company, which is a subsidiary of Verizon, resells the ILEC's service in areas outside Verizon's service area and serves as a sales channel for Verizon within its service area. He stated that Verizon Avenue has entered into marketing agreements with numerous developers, and some of them are exclusive. The marketing agreements typically require the developer to promote Verizon Avenue's services as a property amenity, distribute Verizon Avenue's marketing materials, provide prominent space for these materials in the property management office, permit the use of common space for marketing events, and take various other steps to promote Verizon Avenue's service. The exclusive agreements further provide that the developer will not market or sell any other provider's communications services and will not grant any other person or entity a license to enter upon the property for the purpose of marketing communications services. Witness Kolb testified that his company's exclusive marketing agreements are not anticompetitive, and any customer in a development served by Verizon Avenue is free to purchase the service of the ILEC or any other competitor.

ALLTEL witness Eve testified that exclusive marketing PPCs should be considered permissible, so long as they do not designate the preferred carrier as the exclusive provider of telephone service, restrict access to the development by competitors of the preferred carrier, or provide for payment of the weighted commissions. BellSouth witness Ruscilli, Sprint witness Clucas and CTCES witness Ruziska similarly expressed the opinion that exclusive marketing PPCs should not be held anticompetitive.

The only witness who took a different position was AT&T witness Di Dia. Witness Di Dia testified that unlike CLPs, ILECs possess market power, because of the fact that they held monopoly status for many years and still serve the great majority of customers. Consequently, exclusive marketing arrangements between ILECs and developers serve to maintain the existing imbalance in the market, and they should be prohibited as anticompetitive; on the other hand, CLPs should be allowed to enter into exclusive marketing PPCs.

The Commission does not find witness Di Dia's testimony persuasive. It is certainly true that ILECs may have significant market power resulting from their historical monopoly status. However, state and federal law provide CLPs with a number of advantages to compensate for their lack of market power. For example, CLPs are free to set their own rates and adjust them as often as desired, without Commission review; they have the right to purchase UNEs from ILECs at Commission-fixed rates; and they have the right to purchase discounted ILEC services for resale to their own customers. We see no need to confer an additional, relatively small benefit upon them by adopting one rule on exclusive marketing PPCs for ILECs and a different rule for CLPs. The Commission concludes that exclusive marketing PPCs are lawful and not anticompetitive, so long as they do not (1) designate the preferred provider as the exclusive provider of local telephone service within a development or (2) restrict access to the development by competitors of the preferred provider or otherwise violate the provisions of this Order.

DISCUSSION OF ISSUE NO. 5

One of the most contested issues at the hearings was whether certain commissions should be prohibited as anticompetitive. While viewing a UNE provisioning requirement as "secondary remedy," the Public Staff also favored the invalidation of PPC provisions providing for the payment of commissions to developers that are (a) based on the number of customers in the development who purchase service from the preferred provider, or (b) are based on a percentage of the revenues received by the preferred provider from customers in the development, or (c) otherwise provide a financial incentive for the developer to exclude competitors of the provider from the development

(collectively, "weighted commissions" to distinguish them from other commission arrangement not based on the success of the preferred provider in marketing service to customers in the development). ALLTEL and AT&T generally supported this view, while BellSouth, CTC, and Sprint generally opposed restrictions on these types of commissions. Verizon Avenue appeared generally opposed to PPCs which directly or indirectly exclude competitors but did not express a firm opinion on weighted commissions. BellSouth developed the argument that the existence of a UNE requirement in effect renders a weighted commissions ban redundant. BellSouth noted that it had a number of PPCs with weighted commissions, but those PPCs are not anticompetitive because any competitor can service customers in a development through UNEs.

The Commission can certainly appreciate the force of an argument that states that weighted commissions, other things being equal, provide an immoderate temptation to developers and carriers to exclude competitors and are thus anticompetitive. The Commission might even find this argument persuasive *were there not other means by which access by competitors can be had to a development which do not require the assent of the developer or impinge on the developer's rights.* We have sought to balance innovation with fairness by means of a lean and efficient administrative approach. Such means, of course, are a UNE and a resale requirement, which the Commission has endorsed elsewhere in this Order. One can justify one approach or the other, but to attempt to justify both is like the man who wears both a belt and suspenders. It looks odd, and it is certainly not necessary.

DISCUSSION OF ISSUE NO. 6

Several witnesses briefly addressed issues relating to resale of a preferred provider's service. ALLTEL witness Eve testified that in the developments where CTCES is the preferred provider and ALLTEL has been unable to obtain access, CTCES has offered to provide its service to ALLTEL for resale. However, she stated that resale is not an adequate substitute for facilities-based service, especially for an ILEC such as ALLTEL that customarily provides service through its own facilities, and CTCES's resale proposal raised issues as to pricing, branding, and other concerns. BellSouth witness Ruscilli testified that based on information he had received from fellow employees, CTCES had offered to sell its service to BellSouth for resale, but the price CTCES proposed to charge BellSouth was the very same price CTCES charged its retail customers, so that BellSouth could not compete with CTCES except by foregoing any markup whatever. CTCES witness Ruziska testified that contrary to witness Ruscilli's understanding, CTCES does not sell its service to resellers at the same rate it charges retail customers, but rather at the discounted rate charged to resellers by the ILEC in whose service territory a given development is located. He further stated that while CTCES chooses to make its service available for resale, it is not required by federal law to do so. Sprint witness Clucas testified that Sprint is opposed to any proposal that the Commission establish interconnection rates for CLPs, either for UNEs or for resale.

No witness specifically proposed that CLPs who are preferred providers be required to make their service available at a prescribed rate to competitors for resale. However, TA96 requires ILECs to offer CLPs the option of either purchasing service for resale or acquiring UNEs. CLPs that have PPCs in effect are in many respects analogous to ILECs, and the Commission concludes under state law that it is appropriate to require them to offer the same two options to their competitors. Unless the CLP and the reseller agree on a different rate, the wholesale discount percentage offered by the CLP must be the same wholesale discount percentage offered by the ILEC in whose service territory the development is located. In the event no wholesale discount percentage has been set for the ILEC in whose territory the development is located, the discount percentage established for BellSouth in Docket No. P-140, Sub 50 should apply as the default rate. However, if either party contends that this proxy discount percentage is inappropriate, it may request the Commission to calculate the discount based specifically on the circumstances of the CLP in question. Since a CLP is free to set its own retail rates, it may, at least in theory, have the ability to manipulate these rates in an attempt to avoid the effect of the resale discount. The Commission is confident that North Carolina utilities will not attempt this type of abuse; however, if such abuses do occur, we are confident that we have ample authority to remedy them.

DISCUSSION OF ISSUE NO. 7

This issue relates to whether ILECs should be relieved of their COLR obligations and ETC rights in developments where a CLP is the preferred provider. Sprint witness Clucas testified that an ILEC should not be required to serve as carrier of last resort if a CLP has entered into a PPC in a development and (1) the PPC restricts or limits the ILEC's access to install its facilities in the development, (2) all new construction is required to fulfill service obligations to a new-build development, or (3) the developer of a new-build property delays or withholds project construction information selectively. On cross-examination, witness Clucas stated that the ILEC should retain its ETC status in such a situation. BellSouth witness Ruscilli testified that in particular developments where a CLP has a *de facto* monopoly, an ILEC should be entitled to obtain relief from its COLR obligations on a case-by-case basis. Verizon Avenue witness Kolb suggested that the Commission should convene a workshop or similar informal negotiating forum to develop procedures for handling COLR obligations in developments with PPCs; however, he noted that this was only his own view and not a corporate policy of Verizon Avenue. CTCES witness Ruziska did not specifically take a position on the issue of relief for ILECs from COLR obligations, but he stated that CTCES is willing to serve every customer in the developments where it has PPCs in effect. The other witnesses did not address this issue in their testimony.

The Commission is not persuaded that ILECs should be relieved of their COLR obligations. The basic reason advanced by witnesses Clucas and Ruscilli for granting such relief was that it can be prohibitively costly, or even impossible, for an ILEC to serve a handful of individual customers in a development where the overwhelming majority of customers take service from the preferred provider. This reasoning might well be persuasive if we had allowed CLPs to continue using exclusive PPCs, or permitted them to achieve *de facto* exclusivity through the use of the weighted commissions or declined to require CLPs with PPCs to interconnect with their competitors through UNEs or resale. However, the Commission has chosen a different approach. Since we have prohibited exclusive PPCs, preferred providers will not be able to establish an exclusive right to serve all customers in a development; and since we have directed preferred providers to make sub-loop UNEs and resale available, an ILEC should be able to serve even a single residential customer in a development of this type as economically as it serves an average residential customer in any other development. Thus the rationale for relieving the ILEC from its COLR obligations no longer holds. On the other hand, the rationale for requiring an ILEC to serve as carrier of last resort retains its validity, since any CLP -- including a preferred provider -- has the legal right to withhold service from a customer at its discretion, and such a customer should have the opportunity to turn to the carrier of last resort.

Another important consideration is that if the ILEC continues to serve as carrier of last resort, customers in developments with preferred providers will be assured of having a choice of telecommunications providers.

Finally, administrative difficulties are likely to arise if ILECs are relieved of their COLR obligations in developments with PPCs in effect. On occasion, a preferred provider may deny service to a customer, and the ILEC may also refuse service because it believes that the development meets the criteria for relief from COLR status. The customer will then have to turn to the Commission for a decision as to which carrier should provide him service. An individual customer should not have to bear the inconvenience of filing a Commission proceeding, simply to obtain telephone service.

For all these reasons, the Commission concludes that the obligation of the state's ILECs to serve as carriers of last resort throughout their service areas should continue in effect.

DISCUSSION OF ISSUE NO. 8

ALLTEL witness Eve testified that the Commission should require all PPCs to include an "opt-in" provision, under which any competitor of the preferred provider would have the right to "opt in" to the contract. On cross-examination, she explained that she intended for the "opt-in" clause to

be applicable only to those portions of the PPC providing for payment of the weighted commissions. In other words, if a PPC states that the preferred provider will pay commissions at a specified rate to the developer for each customer who purchases the preferred provider's service, and a competitor opts in, the competitor will then have the right to compete for customers in the development on the same basis as the preferred provider, and it will have to pay commissions to the developer at the same rate. No other witness proposed an "opt-in" requirement of this type.

Since the Commission has authorized a subloop UNE and resale to achieve access there is no persuasive basis for imposing the "opt-in" requirement proposed by witness Eve, and it should not be approved. Moreover, such a requirement appears unnecessary, might have a chilling effect on innovation and would take us beyond the realm of a balanced and light handed approach to something entirely more burdensome.

DISCUSSION OF ISSUE NO. 9

ALLTEL witness Eve proposed in her testimony that all PPCs be required to include a provision under which the preferred carrier agrees to provide its competitors with access to its poles, conduits and right-of-way in the development. On cross- examination, however, she stated (Tr. Vol. 3 at 32) that this was not the primary focus of her testimony, and that she was more concerned with access to UNEs than access to poles and conduits. CTCES witness Ruziska testified that the Commission should not establish requirements concerning poles, conduits and right-of-way, since these matters are already governed by extensive FCC regulations.

On this issue the Commission agrees with witness Ruziska. Access to poles, conduits and right-of-way is regulated by FCC Rules 1.1401-.1418, and any regulation by this Commission would likely be either duplicative of or inconsistent with the FCC requirements. Indeed, since this Commission has not submitted the certification provided for in FCC Rule 1.1414(a), we do not at this time have jurisdiction to regulate these matters.

DISCUSSION OF ISSUE NO. 10

ALLTEL witness Eve testified that all PPCs should be required to include language obligating the preferred provider to offer UNEs and subloops to other carriers at cost-based rates. The Commission has already directed CLPs which have PPCs in effect to make subloops available to their competitors at just and reasonable rates. This order, and the regulations that ultimately will embody the decisions reached in this order, are sufficient to establish the obligation; there is no need to require that it be expressly set out in all PPCs.

DISCUSSION OF ISSUE NO. 11

AT&T witness Di Dia suggested in his testimony that PPCs should include mandated provisions allowing for physical or other access to the development by the relevant ILEC or carrier of last resort. CTCES witness Ruziska opposed this proposal, and BellSouth witness Ruscilli also took issue with it, asserting that it was inconsistent with this Commission's order of August 15, 2002 in Docket No. P-89, Sub 79, which provided that the Commission "cannot force a developer to grant a right-of-way to a competing carrier."

The Commission does not believe that a provision such as this is appropriate. In the first place, no distinction should be drawn between the access rights of an ILEC and those of any CLP that seeks to provide facilities-based service in a development. More significantly, the language proposed by witness Di Dia is unnecessary. Because we have prohibited exclusive PPCs, and authorized sub-loop UNE access and resale, we expect that carriers will be denied access to developments in the future only on infrequent occasions. When there is physical exclusion, the excluded carrier will still be able to serve carriers in the development through subloops or resale. Consequently, there is no need for the mandated PPC provision proposed by witness Di Dia.

However, the Commission must express its disagreement with one assertion in witness Ruscilli's testimony. The mandated provision advocated by witness Di Dia would not have been inconsistent with the Commission's ruling in Docket No. P-89, Sub 79. In that case we found it inappropriate to exercise jurisdiction over the developer of the Morrison Plantation shopping center, a non-utility, by compelling it to participate as a respondent in a complaint proceeding.. By the same reasoning, it would have been improper for us to issue an order specifically directing a non-utility to allow a telephone carrier to enter upon its property. In contrast, a rule requiring the inclusion of a specified provision in all PPCs would be directed to utilities; its only effect upon non-utilities would be indirect. Such a rule would direct utilities to refrain from entering into any PPC that did not contain the mandated provision. It would not direct developers (or any other non-utility) to do anything, or to refrain from doing anything. An order of this type would be fully within the Commission's jurisdiction and would not be inconsistent with our decision in Docket No. P-89, Sub 79. As noted above, however, we have concluded that the contract provision proposed by witness Di Dia is inappropriate and should not be mandated.

DISCUSSION OF ISSUE NO. 12

Witness Di Dia testified that the state's ILECs should be required to disclose their PPCs on an ongoing basis, as they have been doing under the Commission's order of July 16, 2003 in this proceeding. He stated (Tr. Vol. 2 at 88DD) that this step "would assist the Commission in monitoring whether nondiscriminatory access to MTEs has been implemented in North Carolina." On cross-examination, witness Di Dia testified that it would also be helpful for CLPs to continue disclosing their PPCs. No witness expressed disagreement with witness Di Dia on this issue.

The Commission agrees with witness Di Dia that paragraph 1 of Section A of the July 16 Order, requiring all carriers to file copies of their PPCs with the Commission, should remain in effect on an ongoing basis. With the obligation of disclosure in effect, carriers will not be tempted to insert prohibited provisions into PPCs in the hope that they will go unnoticed. The Commission will not require carriers to continue filing abstracts of PPCs, as required by paragraph 2 of Section A of the order, because these abstracts have proved to be of limited usefulness.

DISCUSSION OF ISSUE NO. 13

On June 25, 2004, the North Carolina Real Estate Alliance (NCREA), an unincorporated association of real estate associations, filed a Petition in Intervene and a Brief in opposition to the proposed Order of the Public Staff in this docket. The Commission allowed this intervention out of time and sought comments from the parties. The Commission also received numerous individual filings from persons in the real estate industry which were generally supportive of the NCREA's views.

The gist of the NCREA's filing was that the recommendations made by the Public Staff were both bad policy and contrary to law, especially with reference to the constitutional provisions concerning "unlawful takings." With respect to policy, the NCREA argued that exclusive contracts are not anti-competitive and, in fact, are vital to ensure the long-term prospects for competition in the residential market—in other words, they are a positive boon. The NCREA also opposed regulation of preferential marketing arrangements. The NCREA argued that no harm in the current state of affairs had been demonstrated and that high quality telecommunications provision is demanded by the marketplace.

With respect to constitutional provisions, the NCREA cited both to the United States and North Carolina constitutions. The Fifth Amendment to the United States Constitution provides: "No person shall...be deprived of...property, without due process of law; nor shall private property be taken for public use without compensation." Article I, Section 19 of the North Carolina Constitution similarly provides: "No person shall be...disseized of his freehold, liberties or privileges...or in any manner deprived of his life, liberty, or property, but by the law of the land...." The NCREA also attached to its Brief an August 8, 2000, legal memorandum of Professor Laurence H. Tribe entitled "Taking Issues Raised by NPRM in FCC No. 99-141."

The NCREA maintained that the denial of a property owner's ability to require compensation for access to his property or, alternatively, the right of a carrier to access a developer's property without permission would give rise to such a deprivation of property rights. The NCREA relied heavily on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (*Loretto)* in which the United States Supreme Court held a New York statute authorizing a cable television company to place equipment on an apartment building to be a taking. It follows, the NCREA suggested, that to the extent the Commission either denies the property owner the right to exclude individuals from its property or mandates access to private property without its consent, a *per se* taking has occurred. The NCREA also cited to other cases, such as *Bell Atlantic v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic),* for the proposition that any rule requiring a landowner to acquiesce to the presence of a communications carriers on his private property constitutes a taking.

The NCREA pressed the argument further in stating that the Commission may not avoid the limitations of the Takings Clause by substituting indirect regulation for direct regulation—that is, by regulating the actions of the carriers but not the developers. This they suggested would constitute a taking because it would have the same effects as a direct regulation on developer. *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) (granting of public easement as condition to a building permit for ocean-front residence struck down).

The Commission invited comments on the NCREA's filing.

CTCES Comments

CTCES stated that it agreed with the vast majority of points raised by the NCREA in its Brief, including the NCREA's conclusion that the Public Staff's proposed Order is over-reaching and unlawful. CTCES echoed the NCREA's view that the Commission has no jurisdiction over property owners, and it argued that the drive to investigate the matters in this docket was driven by a desire of some telecommunications providers to have unfettered physical access to other people's property and not on consumer dissatisfaction with the current state of affairs. PPCs in general and exclusive marketing arrangements in particular are proper and lawful; and what CTCES characterizes as "forced access" would be unconstitutional and beyond the Commission's authority.

Public Staff Comments

The Public Staff, by contrast, disputed both the NCREA's policy arguments and its legal conclusions. With respect to policy, the Public Staff noted that the studies that NCREA cited were not put together in a timely manner or an appropriate setting, nor has it provided a full text of the studies it cites. They have been the subject neither of cross-examination nor discovery. The evidence is therefore of limited usefulness. Moreover, much of the general discussion in the NCREA's brief is based on studies drawn from earlier FCC proceeding and, as such, is based on nationwide observations, not the particular North Carolina experience. The North Carolina experience has been a different one. For instance, Verizon Avenue witness Richard Kolb testified that his company has done business throughout the nation but only in North Carolina have CLPs such as CTCES succeeded in using PPCs in such a way to achieve "mini-monopoly" status and create barriers to entry in particular subdivisions. CTCES itself has boasted to its stockholders about its ability to "create 'mini' telephone companies with incumbent-like positions to service specific developments." With respect to broadband deployment—which the NCREA argued was promoted by exclusive contracts—the Public Staff noted that significant broadband deployment was being achieved under the auspices of the Governor's office, in stipulations in contested cases, and in the establishment by the General Assembly of the Rural Internet Access Authority. The limited additional broadband growth resulting from exclusive PPCs is not sufficient to justify the loss of the customer's right to choose among competing telecommunications providers. The NCREA's unique position that exclusive contracts for telephone service in developments are not anticompetitive but rather serve to promote competition is positively Orwellian—that the freedom to choose is enhanced by denying the freedom to choose.

With respect to legal matters, the Public Staff observed that neither it nor any other party had suggested that landlords and developers should be compelled to grant telecommunications providers physical access to their properties. Neither, for that matter, has the Public Staff sought to expand the Commission's jurisdiction to include property owners or landlords, which the Commission declined to do in Docket No. P-89, Sub 79. The Public Staff's proposed Order is directed exclusively to the state's telecommunications utilities and does not direct any non-utility to do anything or refrain from doing anything. The Commission's jurisdiction to disapprove contracts between public utilities and non-utilities is well established under G.S. 62-110(f1), 62-133.5(e), 62-153, 75-1, and 75-1.1, as well as the common law principle that contracts in restraint of trade are contract to the public interest and unenforceable. *See, In re C&P Enterprises, Inc.*, 126 N.C. App. 495, 499, 486 S.E.2d 223, *disc. Rev. denied,* 347 N.C. 136, 492 S.E.2d 36 (1997). The exercise of its powers may affect non-utilities indirectly, but it would be impossible for the Commission to accomplish its lawful purposes otherwise, and it is not unlawful for the Commission to exercise its power in the manner proposed by the Public Staff. The fundamental purpose of utility regulation as set out in G.S. 62-2 is to ensure that utility companies deal with the public in a just and reasonable manner and do not take advantage of their monopoly or near-monopoly status. Orders regulating a utility's rates, its service practices, and its securities issuances all have significant indirect effects on non-utilities, yet they are clearly within the Commission's jurisdiction.

With respect to the "takings" issue, the Public Staff distinguished the *Loretto* case and the other citations of the NCREA by noting that nothing in its proposed order requires landlords or developers to grant other telephone companies physical access to their property, as was the case in *Loretto* and others. The measures proposed by the Public Staff in this docket do not amount to takings either directly or indirectly under the interpretations that the United States Supreme Court has given to the "takings" clause. *See, e.g., FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) and *Yee v. City of Escondido,* 503 U.S. 519 (1992). Both these cases make clear that clear that *Loretto* is narrowly directed against physical intrusions upon real property and cannot be viewed as a broad invalidation of regulatory measures.

Joint Parties' Comments

ALLTEL, AT&T, BellSouth, Sprint, TWT, and Verizon Avenue (collectively, for the purposes of these comments, the Joint Parties) also disputed the NCREA's brief, primarily on legal grounds. The Joint Parties argued that the NCREA's brief betrays a fundamental misunderstanding of the issues presented to the Commission and the rulemaking process.

First, the Commission has clear jurisdiction under Chapter 62 to promulgate rules governing PPCs. *See, e.g.,* G.S. 62-3(23)(a)6., 62-30, 62-31, 62-133-5(e), 62-73, 62-37, 62-42, 62-140(b), and 62-110(f1). No party has asked the Commission to override or circumvent North Carolina real property law or FCC complaint regulation. The NCREA seeks to divert the Commission's gaze from the simple fact: If a LEC (either an ILEC or CLP) has entered into a contract with a property owner which effectively prohibits the owner from granting right-of-way to any competitor, it is that contractual arrangement, and no aspect of property law, that has the effect of denying competitors access so as to offer service to end-users. It should further be noted that the FCC does not have exclusive jurisdiction with regard to rules governing competitive access, nor did it assert such a claim in its *Fifth Report and Order and Memorandum Opinion and Order*, CC Docket No. 96-98, adopted October 12, 2000 (*MTE Order*). The FCC noted with approval that several states had already taken regulatory or legislative actions to prohibit anticompetitive, exclusive contracts, including California, Connecticut, Nebraska, and Texas.

As to the "takings" issue, there is simply no valid issue here under either federal or state law. For one thing, no party in this proceeding has advocated any rules providing for denial of the property owner's right to exclude individuals from their property, mandatory access to the private property of property owners without their consent, denial of the property owner's ability to require compensation for such access; or the right of carriers to access a developer's property without permission. The cases that NCREA has cited, such as *Loretto* and *Bell Atlantic,* are clearly

distinguishable from the Public Staff proposals in this proceeding because those cases involve physical invasions of a landowner's property and the Public Staff proposals do not. Similarly, the NCREA's citation to *Nollan* is inapposite. Furthermore, the NCREA's argument that the Commission "cannot do indirectly what it cannot do directly" is clearly specious. The Public Staff in its proposed order clearly recognized the limits of the order it was recommending when it stated that "it would have been improper for [the Commission] to issue an order specifically directing a telephone carrier to enter upon its property." (Public Staff Proposed Order at 19-20).

Commission Conclusion

The filing of the NCREA in this docket added valuable additional perspective to the questions under consideration in this docket. It was a reminder that state agencies should be measured and careful when they contemplate actions that may affect the rights and privileges of landowners and should seek to achieve a balanced result. There was no opportunity for parties to explore its assertions and recommendations in the evidentiary hearing. Comments have had to suffice, but they have been adequate.

Based on these comments, the Commission is not persuaded that the decisions it has made in this Order are either bad policy or bad law for the reasons as generally set forth by the Public Staff and the Joint Commenters. First of all, it should be noted that the NCREA has directed its criticisms toward the Public Staff Proposed Order. The Commission herein has not adopted all of the proposals advanced in the Public Staff's Proposed Order. It has in fact declined to adopt two of the main recommendations of the Public Staff—it has not banned "weighted commissions," and it has not mandated what might be called a "comprehensive" UNE requirement for CLPs, opting instead for a narrower subloop obligation.

The Commission's decision constitutes good policy because it extends the principle of competition in this instance further to the end-user in developments without compromising the fundamental rights of the landowner. It is very clear that the principle of telecommunications competition is the policy of this nation and state, as embodied both in the Telecommunications Act and in the various provisions of HB161. Monopolies, even "mini-monopolies," are antithetical to this. But to say that not all measures can or should be used to break down these monopolies is not the same thing as saying that no measures can be used. One must be judicious in selecting what is both good and lawful, and the Commission has done so.

The Commission's decision also constitutes good law. The Public Staff's and Joint Parties' exposition of the authority of the Commission in this area need not be repeated here. It is sufficient to note that the Commission's decision does not constitute a "taking" under either the United States or North Carolina constitutions. As noted by the Public Staff and Joint Commenters, the main cases upon which the NCREA has relied speak to physical invasions of the landowner's property. This is far from the case here where a limited UNE obligation is being imposed on the *carrier the landowner or developer has selected* which, furthermore, involves no physical invasion of the property concerned and takes place under *existing* easements freely given. There is no greater burden on the landowner that exists in the context of other unbundling taking place under federal law. While this decision may have indirect effects on the interests of the landowner, these are not interests of such a nature or level as to invoke the protections of the Fifth Amendment or Article I, Section 19 of the North Carolina Constitution.

DISCUSSION OF ISSUE NO. 14

This order sets out the Commission's decisions on the issues raised in this proceeding. The order is effective immediately, and all parties will be expected to comply immediately.

The Commission intends to adopt a set of rules governing anticompetitive practices relating to PPCs and competitive access to real estate developments consistent with the conclusions in this docket. These rules will not be promulgated in this order. Instead, the Commission will direct the

Public Staff to file a set of draft rules, codifying the decisions reached in this order, and will provide all parties an opportunity to comment on the draft rules and propose any desired revisions. The parties' comments and proposed revisions to the language of the rules should not include requests for changes in the substantive decisions set out in this order; any such requests should be made by motion for reconsideration. The Commission believes that this procedure will provide the best method for dealing with the detailed wording issues that often arise in the process of drafting rules.

All parties should be fully aware, however, that this order is effective immediately. No party may delay its compliance with the order until the Commission's final rules are adopted.

IT IS, THEREFORE, ORDERED as follows:

1. That this order is effective immediately, except to the extent that it may subsequently be stayed by the Commission in whole or in part in connection with a motion for reconsideration.

2. That in any development where any telecommunications utility has entered into a preferred provider contract containing provisions held by this order to be anticompetitive, the preferred provider shall mail to each of its customers in the development, within 60 days from the date of this order, the letter attached hereto as Exhibit A.

3. That in any development where any telecommunications utility has entered into a preferred provider contract containing provisions held by this order to be anticompetitive, the preferred provider shall, within 60 days from the date of this order, send to each of the parties to the preferred provider contract, or their successors, a letter identifying all provisions of the contract held to be anticompetitive pursuant to paragraph 1; advising the parties that the preferred provider will no longer seek to enforce such provisions; offering to enter into a contract amendment deleting such provisions from the contract; and enclosing a copy of this order.

4. That within 90 days from the date of this Order, all telecommunications utilities shall report to the Commission on their compliance with Ordering Paragraphs 2 and 3 above, or, if they have no preferred provider contracts containing provisions held by this order to be anticompetitive, shall advise the Commission of this fact. Utilities that have previously notified the Commission in this docket that they have no preferred provider contracts, and have not subsequently entered into any preferred provider contracts, are exempted from this requirement.

5. That any Motions for Reconsideration of this order shall be filed within 30 days of the issuance of this Order.

6. That the Public Staff shall file proposed rules within three months from the date of this Order or, if Motions for Reconsideration have been filed, within six weeks from the issuance of an Order of Reconsideration, reflecting the decisions reached by the Commission in such Order(s).

7. That, in light of the issuance of this Order, ALLTEL and CTCES confer and report to the Commission regarding their recommendations regarding the status of Docket No. P-621, Sub 3 and Sub 4, which have hitherto been held in abeyance, thirty days from the issuance of this Order, or if Motions for Reconsideration are filed, within 30 days of the Order of Reconsideration.

ISSUED BY ORDER OF THE COMMISSION.

This the 29th day of October, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

dl102904.01

EXHIBIT A

(Company letterhead)
(Date) .
(Customer address)
(Salutation):

As you know, *(name of preferred provider)* has been selected as the preferred provider of local telephone service in *(name of development)* by the [owner] [developer], *(name of owner or developer).*

The North Carolina Utilities Commission has recently held that all telephone customers in North Carolina are free to choose among competitive providers of local telephone service. This includes customers in developments where a preferred provider has been selected by the owner or developer. Customers in these developments are not required to take their local telephone service from the preferred provider, and may obtain service from any provider that is willing and able to serve them.

If you are interested in obtaining local telephone service from a company other than the preferred provider, you should contact that company directly and ask whether it currently offers service in your area. The local telephone company whose franchised service area includes your development is required to serve you, upon request, in accordance with its tariff and Commission rules; other authorized providers may also serve you if they so choose.

If, after contacting the company you prefer, you believe you are still being unlawfully denied the right to obtain local telephone service from the provider of your choice, you may call the Consumer Services Division of the Public Staff - North Carolina Utilities Commission at 919-733-9277. Their address is 4326 Mail Service Center, Raleigh, North Carolina 27699-4326. You may also call the Consumer Protection Section of the North Carolina Department of Justice at 1-877-566-7226 (toll-free within North Carolina) or 919-716-6000. Their address is Post Office Box 629, Raleigh, North Carolina 27602-0629.

(Signature block including company name and name of person signing letter)

DOCKET NO. WR-100, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Rulemaking to Implement North Carolina)
Session Law 2001-502 (House Bill 1061)) ORDER OF RECONSIDERATION

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 these 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.

On December 3, 2003, the Commission issued a Notice of Proposed Decision (NPD), in which it responded to the Joint Petitioners' request for clarification regarding the following two issues:

1. 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?
2. 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?

In response to its the issuance of the NPD, the Commission received four filings:

1. Comments of the Attorney General, Public Staff, and Justice Center (AGPSJC), filed on December 17, 2003
2. Letter from D. Scott Wilkerson, President & CEO of BNP Residential Properties, Inc. (BNP), filed on December 17, 2003
3. Letter from Mary Gwyn, President of the Apartment Association of North Carolina (AANC), filed December 18, 2003
4. Letter from Justin Little, President of Crosland Properties (Crosland), filed on December 30, 2003

The filing by AGPSJC addressed the Commission's discussion of Issue No. 1. AGPSJC quoted a portion of the discussion from the second full paragraph on page two of the NPD, which reads as follows:

> 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.

AGPSJC asserted that its interpretation of the aforementioned was incongruent with the following quote from the second paragraph on page three of the NPD, which reads as follows:

> As noted above, the use of addendums (sic) to the lease may accelerate the onset of utilizing the allocation of rental costs methodology, if all tenants have voluntarily signed addendums (sic).

The Commission agrees with the AGPSJC in this regard. Unfortunately, an important word, also, was inadvertently left out of the first quoted passage (second paragraph, page two of NPD), which should have read as follows:

> The Commission is of the opinion that an addendum may be used to modify an existing lease. The addendum would also be applicable if the tenant holds over on a month-to-month basis after the initial term of the lease expires. (Emphasis added.)

The Commission intended that an addendum could be used to modify an existing lease at any time (during the initial term of the lease, at the juncture of the initial term and the month-to-month term, or during the month-to-month tenancy). Consequently, the Commission's statement that Athe use of addendums (sic) to the lease may accelerate the onset of utilizing the allocation of rental costs methodology, if all tenants have voluntarily signed addendums (sic)' was and is an appropriate statement.

The other three filings in December 2003, all address the same issue, which is that BNP, AANC, and Crosland all disagree with the Commission's interpretation of its own Rules and Orders regarding the requirement that all tenants must have signed a conforming lease before rental allocation charges may be made. BNP, AANC, and Crosland asked for a clarification and the Commission reaffirmed its original intent. Thus, they are now seeking reconsideration of the Commission's clarification.

The letter from BNP asserts that it is a major economic disincentive to require that all tenants sign a conforming lease before any tenants are charged for water/sewer service through an allocation of rent. BNP notes that every lease has different terms based on differing commercial considerations (e.g., size, location, amenities, scarcity, competition, length of term, etc.). In this regard, the Commission does not believe that the Commission should have any interest in the terms of leases beyond the requirement that they conform to the provisions of Commission Rule R18-17.

The letter from AANC states the following:

> Tenants cannot be "forced" to sign the addendum, and residents who elect not to sign the addendum or a renewal lease would prevent the Applicant from being eligible to charge allocation;
>
> Theoretically, in the event a tenant chose never to renew but to remain month to month under their existing lease conditions, and since tenants cannot be evicted for not paying the rent allocation, Applicant could conceivably never become eligible as the NCUC interprets the Rule.

While it is true that tenants cannot be forced to sign an addendum during the initial term of their lease, either party (tenant or landlord) may terminate a lease upon one month's notice during the month-to-month phase of the lease. Thus, the Commission does not believe that one particular tenant may prevent the landlord from implementing rent allocation to all tenants beyond the initial term of that particular tenant's lease. The Commission understands that all the landlord has to do is terminate the lease of the reluctant tenant at the end of the initial term (or at any time in the month-to-month tenancy), execute a conforming lease with the next tenant, certify to the Commission that all leases conform to Rule R18-18, and apply for a Certificate of Authority for Allocation of Rental Costs.

The letter from Crosland states that, "(t)his rule seems to have as a goal that all residents in an apartment community at any one time will be charged the same." The Crosland letter goes on to

indicate that the rent in an apartment is dependent on amenities and other market conditions. Contrary to the assertion of the Crosland letter, the Commission is not interested in comparing the rental terms of the fixed portion of rental rates. The Commission is only concerned that all tenants are charged for the variable portion of rent in the same manner. The Commission has stated in two prior Orders in this Docket that it is inappropriate for some tenants to be charged allocation of rental costs rates and for others to not be charged in that manner.

The Commission is of the opinion that BNP, AANC, and Crosland have not shown any compelling reason why the Commission should reverse its intention in Commission Rule R18-17 to require conforming leases for all tenants before any tenant may be charged rent allocation. It seems to the Commission that the landlords have control of their own destiny - it is through their initiative that leases may be converted at the earliest possible date. Several of the letters spoke of market conditions - the Commission observes that if appropriate incentives are offered, tenants are more likely to be inclined to sign an addendum before the end of the initial lease period. Thus, the onset of charging for rent allocation could be hastened. Further, the Commission also notes that a landlord may reduce its incurrence of expenditures for meter installation before rental allocation rates can be charged by ensuring that leases are conforming before meter installation commences.

The Commission is of the opinion that the missing word "also" should be incorporated into the passage as noted hereinabove and, with that correction, the Commission should issue an Order which would adopt its earlier proposed decision as final, with the amendment of its language to reflect this corrected language.

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 used to modify an existing lease at any time (during the initial term of the lease, at the juncture of the initial term and the month-to-month term, or during the month-to-month tenancy).

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 addenda 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.

ISSUED BY ORDER OF THE COMMISSION
This the 23rd day of February, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

rb021804.02

DOCKET NO. WR-100, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Rulemaking to Implement North Carolina	)	ORDER INITIATING
Session Law 2004-143 (House Bill 1083)	)	RULEMAKING PROCEEDING

BY THE COMMISSION: On July 29, 2004, North Carolina Session Law 2004-143 (House Bill 1083) was signed into law. The legislation provided that it would become effective on August 1, 2004. In addition to changes to the General Statutes, Commission Rules R18-11 through

R18-17 would be rescinded and Commission Rules R18-1 through 18-7, as they existed on December 18, would be reinstated.

The Commission has found that, although the former rules (Rules R18-1 through R18-7) are better suited for operating in accordance with the new legislation than the current rules (Rules R18-11 through R18-17), the former rules need some revision in order to properly implement the new legislation. Whereupon, the Commission finds good cause to initiate a rulemaking proceeding to implement North Carolina Session Law 2004-143 and, after receiving comments from interested parties, to adopt certain proposed rules.

IT IS, THEREFORE, ORDERED as follows:

1. That the proposed revisions to Rules R18-1 through R18-7, attached as Appendix A, are hereby adopted on an interim basis effective as of the date of this Order pending completion of this rulemaking proceeding.

2. That the Chief Clerk shall serve a copy of this Order on all providers charging for water and/or sewer utility service pursuant to certificates of authority granted by the Commission pursuant to G.S. 62-110(g) and Chapter 18 of the Commission's Rules and Regulations, all providers with pending applications seeking such certificates of authority, the Attorney General, and all parties to the earlier rulemaking proceeding (Docket No. WR-100, Sub 1).

3. That interested parties who desire to comment shall file petitions to intervene and their comments in Docket No. WR-100, Sub 5, not later than Friday, August 13, 2004.

4. That, absent adverse comments and petition to intervene by interested parties, the interim rules shall be adopted as the permanent rules on August 16, 2004.

ISSUED BY ORDER OF THE COMMISSION.

This the 2nd day of August, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

rb072004.01

APPENDIX A

Chapter 18.
Provision of Water and Sewer Service by Landlords.

Rule R18-1. Application.
This Chapter governs charging for the costs of providing water or sewer utility service as authorized by G.S. 62-110(g).

Rule R18-2. 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) *Provider.* The landlord purchasing water or sewer utility service from a supplier and charging for the costs of providing the service or services to tenants. The provider shall be the owner of the premises served.

(c) *Supplier.* A public utility or an agency or organization exempted from regulation from which a provider purchases water or sewer service.

(d) *Tenant.* The lessee of property from the landlord, to whom the water or sewer service purchased by the provider from the supplier is provided.

(e) *Apartment complex.* Premises where one or more buildings under common ownership comprising fifteen (15) or more apartments are available for rental to tenants.

(f) *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 R18-3. Utility status; certificate; bonds.

Every provider 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 provider shall begin charging for the costs of providing water or sewer service prior to applying for and receiving a certificate of authority from the Commission. No provider shall be required to post a bond pursuant to G.S. 62-110.3.

Every application for authority to charge for the costs of providing water or sewer service shall be in such form and detail as the Commission may prescribe and shall include (a) a description of the applicant and the property to be served, (b) a description of the proposed billing method and billing statements, (c) a schedule of the rates charged to the applicant by the supplier, (d) the schedule of rates the applicant proposes to charge the applicant's customers, (e) the administrative fee proposed to charged by the applicant, (f) the name of and contact information for the applicant and its agents, (g) the name of and contact information for the supplying water or sewer system, and (h) any additional information that the Commission may require. The Commission shall approve or disapprove an application within 30 days of the filing of a completed application with the Commission. If the Commission has not issued an Order disapproving a completed application within 30 days, the application shall be deemed approved.

Rule R18-4. Compliance with rules.

Every provider shall comply with any applicable rules of local governmental agencies regarding the provision of water or sewer service.

Rule R18-5. Records, reports and fees.

(a) All records shall be kept at the office or offices of the provider in North Carolina, or shall be made available at its office in North Carolina upon request, and shall be available during regular business hours for examination by the Commission or Public Staff or their duly authorized representatives.

(b) Providers shall not be required to 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. Providers 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 R18-6. Rates.

(a) The rates shall equal the cost of purchased water or sewer service (The usage rate charge by the provider shall equal the usage rate charged by the supplier. Any charge by the supplier that is not related to the quantity of usage shall not be passed on to the tenant through water or sewer rates). 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 provider 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), unless specifically authorized by the Commission.

(b) A provider of water or sewer service may track increases in the unit consumption rate charged by the supplier of such service, and may (subject to limitations imposed by Commission Rules) change its administrative fee, by filing with the Commission a notification of revised schedule of rates and fees. Every notification of revised schedule of rates and fees shall be in such form and detail as the Commission may prescribe and shall include (1) the current schedule of the unit consumption rates charged by the provider, (2) the schedule of unit consumption rates charged by the supplier to the provider that the provider proposes to pass through to the provider's customers, (3) the schedule of the unit consumption rates proposed to be charged by the provider, (4) the current administrative fee charged by the provider, and, if applicable, (5) the administrative fee proposed to be charged by the provider. Any such notification of revised schedule of rates and fees shall be presumed valid and shall be allowed to become effective simultaneously with the increase in the unit consumption rate of the supplier upon 14 days notice to the Commission, unless otherwise suspended or disapproved by Commission Order issued within 14 days after filing.

(c) No provider shall charge or collect any greater or lesser compensation for the costs of providing water or sewer service than the rates approved by the Commission.

Rule R18-7. Disconnection; billing procedure; meter reading.

(a) No charge for connection or disconnection, charge for late payment, or similar charge in addition to the rate specified in Rule R18-6 shall be allowed.

(b) No provider may disconnect water or sewer service for nonpayment.

(c) Bills shall be rendered at least monthly.

(d) The date after which a bill for water or sewer utility service 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.

(e) A provider 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 provider.

(f) Every provider 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 provider 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 provider'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.

(g) Each provider 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. Additionally, the bill shall contain a toll-free phone number for contacting the provider or the agent regarding service or billing matters. 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.

DOCKET NO. WR-100, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Rulemaking to Implement North Carolina Session Law 2004-143 (House Bill 1083)	)))	ORDER GRANTING CERTIFICATE OF AUTHORITY TO UTILITIES OPERATING PURSUANT TO G.S. 62-110(g)

BY THE COMMISSION: On July 29, 2004, North Carolina Session Law 2004-143 (House Bill 1083) was signed into law. The legislation provided that it would become effective on August 1, 2004. In addition to changes to the General Statutes, Commission Rules R18-11 through R18-17 would be rescinded and Commission Rules R18-1 through 18-7, as they existed on December 18, would be reinstated. On August 2, 2004, the Commission issued an Order in the above-captioned docket initiating a rulemaking proceeding which adopted revised Rules R18-1 through R18-7 on an interim basis.

Section 9 of the House Bill provided that, upon the effective date (August 1, 2004), of the Session Law, all certificates of authority for allocation of rental costs and all temporary operating authority as traditional water or sewer utilities issued to entities that provide water or sewer services pursuant to G.S. 62-110(g), shall terminate. Furthermore, all entities operating under these certificates or temporary operating authority shall be deemed to have certificates of authority to charge for water or sewer service at their then existing rates.

Based upon the foregoing, the Commission is of the opinion that an Order should be issued granting a certificate of authority to charge for water or sewer service to all utilities currently holding a certificate of authority for allocation of rental costs and all holders of temporary operating authority as traditional water or sewer utilities (operating pursuant to G.S. 62-110(g)) at the rates currently authorized.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 2nd day of August, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

rb080304.01

DOCKET NO. E-2, SUB 839

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Progress Energy Carolinas, Inc.	)	ORDER GRANTING
for a Certificate of Environmental Compatibility	)	CERTIFICATE OF
and Public Convenience and Necessity to	)	ENVIRONMENTAL
Construct Approximately 14.3 Miles of 230 kV	)	COMPATIBILITY AND
Transmission Line in Columbus County,	)	PUBLIC CONVENIENCE
North Carolina	)	AND NECESSITY

HEARD: Wednesday, August 4, 2004 at 7:00 p.m. and Thursday, August 5, 2004 at 9:00 a.m., Dempsey B. Herring Courthouse Annex, 112 West Smith Street, Whiteville, North Carolina

BEFORE: Commissioner James Y. Kerr, II, Presiding; and Commissioners J. Richard Conder and Michael S. Wilkins

APPEARANCES:

For Progress Energy Carolinas, Inc.:

Len S. Anthony, Deputy General Counsel - Regulatory Affairs, and Kendal C. Bowman, Associate General Counsel, Progress Energy Service Company, Post Office Box 1551, Raleigh, North Carolina 27602-1551

For Intervenors:

Marvin J. Tedder, Tedder & Tedder, 110 West Nance Street, Whiteville, North Carolina 28472

For the Using and Consuming Public:

Elizabeth D. Szafran, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On April 8, 2004, pursuant to G.S. 62-100 et seq. and Commission Rule R8-62, Progress Energy Carolinas, Inc. (PEC) filed an application for a certificate of environmental compatibility and public convenience and necessity to construct approximately 14.3 miles of 230 kV transmission line in Columbus County, North Carolina. This line segment is part of a new line that will extend from an existing 230 kV line east of PEC's Nichols Substation in Nichols, South Carolina to an existing PEC 230 kV line west of the Brunswick Electric Membership Corporation's (EMC) Peacock point of delivery (Peacock POD) southeast of Chadbourn, North Carolina. The total length of the new 230 kV transmission line is approximately 21 miles, of which 14.3 miles is located in North Carolina.

On April 14, 2004 the Commission issued an Order scheduling a public hearing in Whiteville, allowing the filing of petitions to intervene, and requiring PEC to give public notice of the application and of the scheduled hearing. PEC's Application was properly served on the parties designated by G.S. 62-102, and PEC properly published notice in newspapers of general circulation.

On June 16, 2004, the Commission issued an order granting the petition to intervene of Chandler French Worley, William Howell Strickland, Alfred James Worley, Jr., Mickey D. Hobbs and wife, Peggy H. Hobbs, Chris L. Hobbs and wife, Lisa E. Hobbs, and Ruth Enzor Strickland (collectively, the Intervenors), which had been filed on June 14, 2004. On July 21, 2004, letters received by the Public Staff from Kenneth and Pansy Strickland and Dr. Floyd Enzor were filed with the Commission.

On August 4 and 5, 2004, a public hearing was held in Whiteville, North Carolina. PEC presented the direct and rebuttal testimony and exhibits of Steve Wilson, Mark Byrd, Kristi Wise and David Hill. The Intervenors presented the testimony and exhibits of Arouna Kaloko, Kenneth Moss, William Howell Strickland, Alfred James Worley, and Chandler French Worley. Public witnesses S.T. Enzor and Jerry Gelezinsky appeared at the hearing and testified. A written statement was accepted from Intervenor Ruth Enzor Strickland who had been involved in an accident and was unable to attend the hearing.

Subsequent to the close of the hearing, the Commission received a letter dated August 30, 2004, from Intervenor William Howell Strickland; an electronic mail message dated September 7, 2004, from J.W. Hammond; a letter dated September 7, 2004, from Vanessa Freeman; a letter dated September 13, 2004, from Intervenor witness Arouna Kaloko; and a letter dated September 28, 2004, from Intervenor William Howell Strickland which were served upon all parties in this matter by Commission Orders dated September 9, 2004, and October 1, 2004. The Commission additionally received a letter dated October 4, 2004, from Intervenor Ruth Enzor Strickland and a letter dated November 4, 2004, from H. Bruce Brandon, Attorney at Law, purportedly representing Intervenor William Howell Strickland.[1]

Based on PEC's verified Application, the testimony and exhibits received into evidence at the hearing, and the record as a whole in this docket, the Commission now makes the following:

FINDINGS OF FACT

1. PEC is duly organized as a public utility under the laws of the State of North Carolina and is subject to the jurisdiction of the Commission. PEC is engaged in the business of generating, transmitting, distributing and selling electric power in its assigned territory in North and South Carolina.

2. Approximately half of Columbus County is located within PEC's service territory, including the municipalities of Whiteville, Chadbourn, Tabor City, and Fair Bluff. PEC is also the transmission service provider to Brunswick EMC and Four County EMC, the electric membership corporations serving the remaining portions of Columbus County.

3. Continuing load growth, including service requirements for Brunswick EMC, coupled with certain critical generation and transmission conditions will overload the existing transmission lines in the Marion-Whiteville area by the summer of 2007, resulting in an unacceptable degradation of reliability. The proposed transmission line will relieve the overloading in the existing corridor and will provide for long-term load growth, which is projected to increase approximately two to three percent each year for the next ten years.

4. To determine the appropriate route for the proposed transmission line, PEC analyzed numerous alternatives. Such analyses consisted of identifying alternative routes, gathering public input and evaluating such routes based upon their length, impacts upon the social and natural environment (including but not limited to environmental, historical and archaeological concerns and land use), and impact upon existing homes and businesses.

[1] In addition to improperly attempting to introduce late evidence and briefs, Mr. Strickland, Mr. Kaloko and Ms. Freeman alleged in their letters that they were not given an adequate opportunity to be heard at the August 4-5, 2004, hearing. The Commission finds such assertions to be without merit. Both Messrs. Strickland and Kaloko were called by counsel, took the witness stand and testified. In the case of Mr. Strickland, an Intervenor in this proceeding, the final question posed by counsel was: "Anything else you want to say, sir?" and his response, "No, sir, I think that is it." (Tr. v. 2, p. 70) The Commission in no way limited the testimony of Messrs. Strickland or Kaloko or prevented them from presenting their statements. Regarding Ms. Freeman, the Commission asked at both the beginning and end of the hearing if there were any public witnesses who wished to be heard. Ms. Freeman, who indicated in her letter that she was present in the hearing room, did not respond or ask to speak. There was no response when the Presiding Commissioner asked those in attendance "if anyone else would like to come forward and share their thoughts on this matter." (Tr. v. 1, pp. 14-15) Therefore, these individuals' allegations of a lack of due process are without merit.

5. Based upon PEC's evaluation and analysis of the various alternative routes studied, PEC determined that the preferred route would extend approximately 21 miles, of which 14.3 miles is in North Carolina, between Nichols, South Carolina, and Chadbourn, North Carolina. The new 230 kV line will connect an existing 230 kV transmission line constructed in the mid-1980's between Marion and Nichols (terminating 1,000 feet east of the Nichols Substation) with another 230 kV transmission line constructed in early 2002 between Whiteville and the Brunswick EMC's Peacock POD (terminating 1,200 feet west of the Peacock POD). PEC's existing Nichols Substation is located northeast of Nichols, South Carolina, east of State Highway 9. The Peacock POD is located approximately two miles southeast of Chadbourn, North Carolina, on Peacock Road.

6. The preferred route selected by PEC would parallel an existing 115 kV line on a 36.7-acre parcel of land owned by William Howell Strickland and Ruth Enzor Strickland. The preferred route also crosses the property of Alfred James Worley, Jr., Chandler French Worley, Chris Hobbs and Mickey Hobbs.

7. The proposed transmission line is necessary to satisfy the reasonable needs of the public for an adequate and reliable supply of electric energy.

8. When compared with reasonable alternative courses of action, construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest.

9. The costs associated with the proposed transmission line are reasonable.

10. The impact the proposed transmission line will have on the environment is justified considering the state of available technology, the nature and economics of the various alternatives, and other material considerations.

11. The environmental compatibility, public convenience, and necessity require the transmission line.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

The evidence supporting the Commission's decision is found in the testimony and exhibits received at the hearing and in PEC's Application, including the Routing Study and Environmental Report (Routing Study) attached thereto.

Standard of Review

G.S. 62-105(a), which controls the Commission's decision in this proceeding, provides as follows:

> The burden of proof is on the applicant in all cases under this Article, except that any party proposing an alternative location for the proposed transmission line shall have the burden of proof in sustaining its position. The Commission may consider any factors that it finds are relevant and material to its decision. The Commission shall grant a certificate for the construction, operation, and maintenance of the proposed transmission line if it finds:
>
> (1) That the proposed transmission line is necessary to satisfy the reasonable needs of the public for an adequate and reliable supply of electric energy;
> (2) That, when compared with reasonable alternative courses of action, construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest;
> (3) That the costs associated with the proposed transmission line are reasonable;

(4) That the impact the proposed transmission line will have on the environment is justified considering the state of available technology, the nature and economics of the various alternatives, and other material considerations; and

(5) That the environmental compatibility, public convenience, and necessity require the transmission line.

In its Final Order Overruling Exceptions and Affirming Recommended Order, Docket No. E-2, Sub 796 (N.C.U.C. 2002), the Commission interpreted the burden of proof under G.S. 62-105(a) as follows:

> In interpreting this statute, the Commission concludes that the electric utility applying for approval to site a transmission line has the initial burden of proof, including that it examined "reasonable alternative courses of action" and that "construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest." A landowner or other intervenor who believes that an alternative route studied by the utility is preferable to that proposed or that the utility did not consider or appropriately weigh relevant factors in reaching its decision may introduce evidence and otherwise argue that the utility has not met its burden of proof. Once the utility has sustained its burden of proof, a landowner or other intervenor proposing an alternative not originally examined by the utility has the burden under the statute of proving that its alternative should have been studied and is preferable to the proposed route.

In considering other "relevant and material" factors under G.S. 62-105(a), the Commission notes two additional provisions of state law. First, G.S. 62-2 provides, in part:

> It is hereby declared to be the policy of the State of North Carolina: ... (5) To encourage and promote harmony between public utilities, their users and the environment.

G.S. 113A-3, entitled "Declaration of State environmental policy," further provides:

> The General Assembly of North Carolina, recognizing the profound influence of man's activity on the natural environment, and desiring, in its role as trustee for future generations, to assure that an environment of high quality will be maintained for the health and well-being of all, declares that it shall be the continuing policy of the State of North Carolina to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in productive harmony. Further, it shall be the policy of the State to seek, for all of its citizens, safe, healthful, productive and aesthetically pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety; and to preserve the important historic and cultural elements of our common inheritance.

Necessity of the Proposed Line

In applying these statutes to the evidence in this case, PEC's witnesses and the Routing Study sponsored by them explained that PEC follows applicable North American Electric Reliability Council (NERC) Planning Standards. In accordance with these Planning Standards, PEC plans its transmission system such that the network can be operated to supply projected customer demands and projected firm purchases and sales even under contingency conditions. PEC witnesses Wilson and Byrd and PEC's Application stated that the increasing demand for electricity in the Columbus County area will create a number of loading and voltage problems in the coming years. They further stated that the existing transmission line serving this area has been in service for many years and that it has a smaller wire size than would today be used. Thus, because of the smaller wire size; the projected growth in the area between Marion, South Carolina, and Whiteville, North Carolina; the service requirements for Brunswick EMC; and significant response to certain critical generation and

transmission conditions, the existing transmission line is expected to overload by the summer of 2007 and no longer be capable of performing reliably.

The Routing Study explained that the credible planning contingency of a planned or forced shutdown of the Brunswick Plant coupled with the loss of the 230 kV transmission line from Cumberland to Whiteville will produce line loading in excess of the 178 MVA rating of the Marion-Whiteville 115 kV Line. In the mid 1980's, to remedy voltage and loading problems on this line, 14.8 miles of new 230 kV transmission line (operating at 115 kV) was constructed from Marion to Nichols. It was determined that during 2001 loading on the Marion-Whiteville 115 kV Line under high load conditions could produce unacceptably low voltage when the Whiteville terminal was out of service. This problem led to the construction of a new 7-mile 115 kV feeder from Whiteville to Brunswick EMC's Peacock POD in 2002. In anticipation of future need, this feeder was constructed for operation at 230 kV. Currently, there is 230 kV capability that reaches from Marion toward Whiteville at one end and from Whiteville toward Marion at the other end. The "gap" between these line sections is approximately 21 miles. The proposed project is to construct approximately 21 miles (14.3 miles in North Carolina) of 230 kV line, which will complete the "gap" and result in a second direct path and new transmission connection from Marion to Whiteville. Although constructed to operate at 230 kV, the new line will be operated initially at 115 kV. Substations and EMC PODs on these two lines will be served in such a manner as to relieve contingency overloading and to provide adequate voltage.

The Routing Study also explained that over time continued growth in the area decreases the transmission line electrical capacity available to transfer power from PEC's Robinson and Darlington County Generating Plants to northeastern South Carolina and southeastern North Carolina. This project will reduce contingency loadings on the existing transmission lines to acceptable levels, allowing the Robinson Plant and Darlington County Plant generation complex to operate at full output to help PEC meet customer demands for electricity in the region. This project would also improve the power quality and reliability in the area and reduce the frequency and duration of potential power outages. The Routing Study explained that without the transmission system upgrades, load in the area would exceed the electric system capability in the near future.

Intervenor witness Moss challenged the "purpose and necessity" section of PEC's Routing Study and proposed several alternatives, which in his opinion, PEC should have considered to "solve voltage problems." Mr. Moss recommended reconductoring the existing line; reconductoring a portion of the existing line; installing a capacitor bank; installing co-generation facilities; negotiating tie-lines; and adopting operating procedures.[1]

---

[1] In addition to the alternatives proposed for consideration, Mr. Moss identified numerous conclusions in PEC's report for which he believed there was either inadequate foundation or no evidentiary basis at all. Intervenors argue that PEC's conclusions as set forth in the Routing Study should be reasonably supported by the materials within the report and that the Commission would fail to fulfill its duty and obligation if it were to accept opinions that are not reasonably supported by the evidence.

During cross-examination, however, Mr. Moss admitted that he had never prepared or reviewed a routing study prior to reviewing PEC's Application. He further testified that Santee Cooper, the state-owned utility where he was formerly employed and where he gained his electric utility experience, is not required to prepare routing studies or to obtain Public Service Commission of South Carolina approval to build new transmission lines because "their process is different." Mr. Moss admitted that he spent only 8-10 hours reviewing PEC's Application and that he did not seek through discovery to obtain information that was allegedly lacking or that was necessary to better understand the study.

In contrast, PEC witness Wise, on redirect, stated that she spent over 1,000 hours reviewing and compiling data for inclusion in the Routing Study and that PEC personnel spent thousands of hours evaluating the alternatives and preparing the report. PEC witnesses Byrd, Wilson and Wise testified that Mr. Moss's concerns were based upon his lack of understanding of the transmission routing process, the contents of the Routing Study, and the reasons behind the need for the new line.

In response, PEC witness Byrd testified that the need for the line was not based upon voltage concerns, the basis for many of Mr. Moss's concerns, but rather upon thermal overload issues. Mr. Byrd explained that the alternatives suggested by Mr. Moss would not resolve the overloading conditions. Mr. Byrd further explained that it is PEC's goal to build transmission lines only when absolutely necessary to maintain the reliability of the power system and that PEC evaluates the transmission system annually to analyze those system needs. He stated that Mr. Moss was mistaken in his belief that only a few sections of the line would overload and that rebuilding only portions of the existing line would be only a short-term solution. Mr. Byrd testified that all of Mr. Moss's specific concerns were addressed in the Routing Study at some level of detail. In response to a question by the Commission whether any of the alternatives Mr. Moss presented would eliminate the need for the proposed line or just be kind of a "stop gap," Mr. Byrd stated that most of Mr. Moss's proposals would be very short term in nature.

PEC witness Byrd testified further that if PEC were to reconductor the line it would lead to a rebuilding of the entire line, including the replacement of the existing structures with new ones, because the structures on the existing 115 kV line were not built to carry a larger conductor. Thus, construction costs for a rebuild would be nearly as much as for construction of an all-new 230 kV line. Regarding double circuiting, an alternative which PEC also considered and rejected, Mr. Byrd testified that NERC contingency planning criteria recommends that utilities consider a common structure failure when evaluating system constraints. He stated that if PEC were to double circuit the line and a segment of that double circuit line was lost, it would cause other overloads on PEC's system that could lead to a cascading blackout of the area.

Objections to the Preferred Route

In addition to the concerns raised with regard to the adequacy of the Routing Study and the need for the new transmission line, a number of Intervenors objected to the specific route selected by PEC. The proposed route parallels the existing 115 kV line which crosses a 36.7-acre parcel of land owned by Intervenors William Howell Strickland and Ruth Enzor Strickland. The new line also crosses the property of Intervenors Alfred James Worley, Jr., Chandler French Worley, Chris Hobbs and Mickey Hobbs. These Intervenors oppose the route proposed by PEC to the extent it crosses or is in close proximity to their properties.

PEC witnesses Wilson and Wise and the Routing Study explained that PEC analyzed various routes for the construction of a new transmission line in the Columbus County area to address the identified service quality issues. This evaluation ultimately resulted in the selection of the preferred route proposed by PEC in this proceeding. According to PEC's Routing Study, the first step employed by PEC was to establish the study area in which potential alternative routes were identified. The goal of the routing analysis was to identify the route(s) that offered the most benefits in terms of reliable electric power while minimizing adverse impacts on the social and natural environment. This routing analysis involved the following components: field reconnaissance and public meetings; review of USGS topographic maps and available aerial photography; and, contacts with local, state and federal agencies. The major concerns regarding routing were to avoid, to the greatest extent possible, existing homes, agricultural land and wetlands.

To determine community opinions and values relative to the proposed project, the route selection process included several forms of public input. Input was first obtained through meetings with public officials and local agencies,[1] and then through public information meetings.[2] Input was

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[1] To obtain input from public officials, PEC met with the Columbus County Economic Development Office and Planning Board and the Chadbourn Town Office. Other state and federal agencies provided PEC with information on threatened and endangered species, cultural resources, wetlands and soils.

[2] Regarding the public input, PEC held public meetings at the National Guard Armory in Fair Bluff on February 25, 2003, and at Southeastern Community College in Whiteville on February 27, 2003. The public meetings

also obtained from the public via information available on PEC's website. This input was used to determine the values and attitudes of the residents and public officials regarding the alternative routes and the routing criteria used to evaluate the routes. The public participation program also provided the public with an understanding of the need for the project, the decision-making criteria used to select the preferred route, and a forum to voice concerns with the proposed project.

The routing criteria utilized by PEC considered the following: the total length of the line; the maintenance of reliable electric service; the length of line along existing transmission lines; the number of residences within 200 feet of the new line; the number of businesses within 200 feet of the new line; the number of public facilities within 1,000 feet; the amount of agricultural land crossed; the amount of forest land to be crossed and cleared; the amount of wetlands and the number of streams/rivers to be crossed; and the visibility of the new line to the public. Based upon these factors (weighted as appropriate based upon the public input) and PEC's experience in routing transmission lines, PEC selected the preferred route. The preferred route was selected from over a hundred routes considered because it would have the least overall environmental and social impacts by paralleling an existing transmission line, where possible, thus reducing the required right-of-way and by minimizing impacts to residences, agricultural land, woodland, visibility and wetlands. The statistical analysis technique used in the evaluation of the proposed routes included a systematic comparison of all the alternative routes based on social, environmental and engineering criteria. This analysis allowed the routes to be screened and identified the lesser impacting routes for further analysis.

Intervenors Alfred and Chandler Worley oppose the preferred route and having the line placed upon their respective properties. They allege that PEC should use existing transmission line right-of-way, thus avoiding crossing their properties. Intervenor Howell Strickland expressed concern about the impact on the new line on the operation of a small private airstrip on his property and opposes the line being placed across his property above ground parallel to the existing 115 kV line, requesting that the line be placed underground instead. The Intervenors introduced evidence regarding recently platted, and as yet unimproved, subdivisions planned to be developed on their properties in the path of the proposed transmission line. Both the Worleys and Mr. Strickland claim that the new line will interfere with the use and development of their land.

Regarding the impact of the proposed line on the Worleys' use of their lands, the question before the Commission is whether the route proposed by PEC minimizes the overall impact to all landowners. PEC witnesses Wilson and Wise and PEC's Application explained that in deciding between the preferred route and the route advocated by the Intervenors, the key issues were the number of residences and businesses near the existing line; the difficulty in paralleling or rebuilding the line to minimize these impacts; the interruption of electrical service to customers served by the existing line while it was being rebuilt; and the enhanced reliability offered by constructing a separate, new line rather than rebuilding the existing line. While the Intervenors asserted that no

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were advertised in the Whiteville News Reporter, the Wilmington Star-News, and the Loris-Tabor Tribune the week prior to the meetings. A news release was also sent to each newspaper two weeks before the meetings. The meetings included displays with information on project need, engineering, route alternatives, environmental management, and right-of-way. Representatives from PEC were present to address the public's concerns and solicit comments. A system map of the transmission lines and substations presently serving the study area and an iterative computer program illustrating future power expectations were provided to illustrate the need for the project. Potential routes for the proposed transmission line were depicted on aerial photographs and on USGS quadrangle maps. No preferred route had been selected at the time of the workshops. Photographs and drawings showing the types of structures that would be used for the project were displayed. Participants at the open house received a written questionnaire to communicate their opinions on the routing criteria, the segment locations, preferred route locations, and issues of concern regarding the project. Fifty-four completed questionnaires were returned to PEC. The principal concerns expressed in the responses were proximity to residences, maintaining reliable electric service, length across agricultural land and length along existing transmission lines. The public input was used in the evaluation through the weighting of the routing criteria and in making the final selection of the preferred route.

homes would be impacted by the rebuilding of the existing line, Ms. Wise testified that at least ten homes would be directly impacted by rebuilding – even more if the line were not repeatedly crossed back and forth over the existing line. Mr. Wilson further stated that a rebuild would require double circuiting the line at numerous places, an alternative PEC rejected because it could adversely impact reliability. The PEC witnesses further stated that, when faced with a choice of constructing a new line across open ground versus asking homeowners to abandon their homes, PEC prefers to construct the new line across open ground. Mr. Wilson noted that the proximity of the proposed transmission line to existing homes was the most important factor identified by the public.

Conflicting testimony was introduced regarding the impact of the proposed line on Mr. Strickland's airstrip. Mr. Strickland and a pilot testifying on his behalf, Arouna Kaloko, testified that there were two airstrips and that the new transmission line would directly cross what they referred to as the "secondary runway." PEC witness Hill, a pilot for PEC, testified that the area described by Messrs. Strickland and Kaloko was not a runway but rather a taxi area leading to the one and only true runway, stating that it would be very unusual to have a runway located under a transmission line. In any event, PEC witnesses Wise and Wilson explained that an existing 115 kV line near the airstrip and across the alleged "taxiway" has been in that location since before Mr. Strickland built his airstrip. They explained that the new transmission line would be built on the far side of the existing 115 kV line – away from the airstrip – and that would be no higher than the existing 115 kV line. Therefore, they concluded, the new line would not interfere with Mr. Strickland's use of his airstrip any more than the existing 115 kV line does. Mr. Hill also testified that the new 230 kV transmission line did not pose any higher risk to using the airstrip than the existing 115 kV transmission line.

Mr. Strickland argues that since electricity is an inherently dangerous substance, a company such as PEC supplying it owes a high degree of care and must exercise the utmost diligence consistent with the practical operation of its business. He cites Williams v. Carolina Power & Light, 296 N.C. 400, 250 S.E.2d 255 (1979), and argues that the current existing high voltage line and proposed high voltage line is in a place currently which must now be anticipated as an area that contact is likely and foreseeable. Mr. Strickland requests that PEC bury the transmission line if it is necessary to cross his property, offering to bear the expense of performing all necessary excavations by doing the excavation and backfilling himself. PEC witness Wilson, on redirect, testified that PEC has no other transmission lines underground and that the cost for underground burial is typically four to ten times more expensive than overhead. He also explained that there are significant costs associated with burying transmission lines in addition to simply the excavation costs. Mr. Wilson stated that there are substantial issues regarding the reliability of underground transmission lines and that the installation for underground transmission lines is technically complicated. It would be neither economically feasible nor reliable, argues PEC, to bury the proposed 230 kV transmission line underground.

Additional Objections Related to Condemnation

Lastly, Mr. Strickland requests that the Commission take judicial notice of G.S. 40A-3, the statute governing condemnation by public utilities. Mr. Strickland raises several additional issues in objection to the preferred route which are arguably relevant to any attempt by PEC to condemn specific right-of-way but not to the Commission's determination of need. Mr. Strickland argues, however, that to the extent PEC's proposed transmission line would cross a burial ground, garden or kitchen facility the Commission has no authority to issue the certificate requested by PEC.

In relevant part G.S. 40A-3 provides that PEC shall not be allowed to have condemned to it use, without consent of the owner, his "burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute." Mr. Strickland and others testified at the hearing regarding the presence of a family burial ground, slave or Indian burial ground, and a "kitchen" on Mr. Strickland's property.

In response, PEC witness Wise first explained that PEC attempts to avoid known historical and archaeological resources. She testified that a records search of the study area was conducted at the North Carolina Department of Cultural Resources, State Historic Preservation Office (SHPO), Office of Archives and History and Survey and Planning Branch, and that the search indicated that there were no known National Register of Historic Places (NRHP) listed or eligible archaeological sites or historical structures within 1,300 feet of the preferred route. Prior to construction, PEC formally consults with the SHPO to determine if there may be any additional sites or actions required to minimize cultural resource impacts. If any cultural resources are discovered during construction, PEC would stop construction at that location and immediately notify the SHPO.

With regard to the family cemetery, PEC argues that Mr. Strickland admitted that no bodies were buried there and that the only human remains in the area were the ashes of Mr. Bill Miller placed there after Mr. Miller was cremated in October 2001. In addition PEC notes that Mr. Strickland stipulated to the validity of receipts demonstrating that the grave markers in the alleged family cemetery were ordered and installed subsequent to PEC's survey and staking of the right-of-way for the proposed transmission line. With regard to the slave or Indian cemetery, Ms. Wise testified that during the background research no records of a slave cemetery or any other archaeological or cultural resource were found in the proposed area. Regarding the "garden and kitchen," Ms. Wise testified that a preliminary review of the study area involved identifying any potential constraints such as homes, agricultural land, hog farms, airstrips as well as identifying any social and environmental resources that may be impacted. Routes were then identified where most of the identified constraints would be avoided or mitigated. She further testified that when routes were developed and actual field site surveys were conducted no trailer ("kitchen") was located on Mr. Strickland's property near the proposed line. On cross-examination, Mr. Strickland admitted that the alleged "kitchen" was a mobile home "put there after May 23, 2003." Moreover, PEC notes that at its current location, the trailer is not within the proposed transmission line right-of-way and thus would not be impacted by the proposed new 230 kV transmission line.

Conclusions

After careful consideration, the Commission concludes that PEC has demonstrated that the proposed transmission line is necessary for an adequate and reliable supply of electric energy; that the proposed location is preferred, and in the public interest; that the costs associated with the proposed transmission line are reasonable; and that the environmental compatibility, public convenience, and necessity require the proposed line. The Commission finds that PEC has demonstrated that the proposed transmission line is required in order for PEC to continue providing reliable electric service to its customers and has satisfied its burden of proof under G.S. 62-105(a). In so finding, the Commission rejects the Intervenors' argument that PEC's testimony on redirect was an improper attempt to rebut testimony by the Intervenors' own expert witness and to provide additional testimony not contained within the Routing Study. The Commission is persuaded that the new transmission line is necessary to reliably accommodate the forecasted growth in the demand for electricity in the Columbus County area and to avoid service outages and interruptions for PEC's customers residing in this area. PEC appears to have complied with the siting statute and taken reasonable measures to inform the public of the proposed line and alternative routes, incorporating public opinion into its analysis for selecting the preferred route. Lastly, the Commission is persuaded that the concerns raised by Intervenor witness Moss were appropriately considered by PEC during the planning process and that the alternatives proposed by Mr. Moss were properly rejected.

The Commission further concludes that the burden of proof has not been met by the Intervenors, as required by G.S. 62-105(a), with regard to any alternative route for the transmission line. The Intervenors presented no evidence of the feasibility, cost, or reliability consequences of their proposals or the impact on other property owners. The Intervenors presented no evidence as to whether the homeowners or businesses located along the existing line would be willing to relocate. Nor is the Commission persuaded by the Intervenors' evidence regarding adverse consequences attributed to the siting of the transmission line. Specifically, the Commission finds, without regard to

the validity of the claim of a secondary runway, that based upon the testimony with regard to the location and height of the proposed line, the new line will not interfere with Mr. Strickland's use of his airstrip any more than does the existing 115 kV transmission line. The remaining issues regarding the valuation of land and the presence of burial grounds, gardens, and kitchens are issues which need not be resolved in the current certification proceeding but are left to be resolved, if necessary, in the final acquisition of right-of-way for the new transmission line.

As in previous cases, the Commission will require PEC to work with all of the affected landowners to construct the line in such a manner that it minimizes the impact on their land use. The Commission expects PEC and the affected landowners to work together in a cooperative manner to determine the most appropriate and least disruptive route across the respective landowners' properties.

IT IS, THEREFORE, ORDERED as follows:

1. That, pursuant to G.S. 62-102, a Certificate of Environmental Compatibility and Public Convenience and Necessity, which is attached as Appendix A, is issued.

2. That PEC shall work with all affected landowners to investigate reasonable alternatives to construct the line in a location that minimizes the disruption to the various landowners' use of their land.

ISSUED BY ORDER OF THE COMMISSION.
This the 15th day of November, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Ah111504.01

APPENDIX A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 839

Known to All Men by These Presents, That
PROGRESS ENERGY CAROLINAS, INC.

is hereby issued this
CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC CONVENIENCE AND NECESSITY PURSUANT TO G.S. 62-102

to construct approximately 14.3 miles of 230 kV transmission line
to be located in
Columbus County, North Carolina

subject to receipt of all federal and state permits as required by existing and future regulations prior to beginning construction subject to all other orders, rules, regulations and conditions as are now or may hereafter be lawfully made by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION
This the 15th day of November, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

ELECTRIC – COMPLAINT

DOCKET NO. E-7, SUB 726

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Mitsubishi Electric & Electronics USA, Inc., Complainant	)	
v.	)	ORDER RULING ON COMPLAINT
Duke Power Company, a division of Duke Energy Corporation, and Duke Energy Corporation, Respondents	)	

HEARD: Wednesday, August 6, 2003, and Wednesday, October 8, 2003, in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner James Y. Kerr, II, Presiding; Commissioner Sam J. Ervin, IV, and Commissioner Robert V. Owens, Jr.

APPEARANCES:

For Mitsubishi Electric & Electronics USA, Inc.:

Charles T. Francis and Alan Woodlief, Francis & Austin, PLLC, P.O. Box 164, Raleigh, NC 27602

For Duke Power and Duke Energy Corporation:

James C. Thornton, Parker, Poe, Adams & Bernstein L.L.P., P.O. Box 389, Raleigh, NC 27602-0389

BY THE COMMISSION: On March 27, 2003, Mitsubishi Electric & Electronics USA, Inc. (Mitsubishi) filed in this docket a formal complaint against Duke Power, a division of Duke Energy Corporation, and Duke Energy Corporation (collectively, Duke) regarding Mitsubishi's early termination of an electric service agreement with Duke. By order dated March 31, 2003, the Commission served the complaint on Duke.

On April 28, 2003, after having obtained an extension of time, Duke filed its answer to the complaint, and the Commission then issued an order serving the answer on Mitsubishi on April 30, 2003. On May 14, 2003, Mitsubishi filed a reply requesting a hearing.

By order dated May 20, 2003, this matter was scheduled for hearing on June 24, 2003. On June 13, 2003, Duke filed a motion to reschedule the hearing date to August 6, 2003, and Mitsubishi joined in the motion. The motion to reschedule was allowed by the Commission, and this matter came on for hearing on August 6, 2003. The hearing was not concluded on that day, and it was resumed and concluded on October 8, 2003.

At the hearing, Mitsubishi presented the testimony of witnesses Bruce Brenizer, Robert D. Teer, Jr., Alan Olschwang, Michael Szeremi, Leslie Moore, and Mike Campbell. Duke presented the testimony of witnesses Michael Szeremi, Barbara Yarbrough, Jeffrey A. Benson, Steve Cranfill, and Lara Nichols.

Based upon consideration of the pleadings, testimony and exhibits received into evidence at the hearing, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Duke Power, a division of Duke Energy Corporation, is a public utility providing electric utility service to customers in North Carolina subject to the jurisdiction of this Commission and pursuant to the rates and tariffs approved by this Commission.

2. Mitsubishi is a Delaware corporation with its principal place of business in Cypress, California. From approximately 1985 until April 2001, Mitsubishi (or one of its predecessor companies) owned and operated a semiconductor manufacturing facility at Three Diamond Lane in Durham, North Carolina (the Durham plant). The Durham plant received electric service from Duke.

3. In 1997, Mitsubishi informed Duke that it wanted Duke to install new distribution equipment at the Durham plant to meet Mitsubishi's unique electric service requirements beyond the standard service. This equipment included custom manufactured switchgear, a concrete encased duct bank, new underground cable, alternative circuit capacity, multiple check meters, and transformers.

4. Duke installed the switchgear, duct bank, and other customer-requested equipment pursuant to Mitsubishi's specifications, at an installed cost of $1,547,692. Leaf M of Duke's Service Regulations provides for Duke to recover the cost of providing such non-standard service by charging an additional amount per month beyond that charged for standard service. This charge is known as an extra facilities charge.

5. The monthly extra facilities charge is determined by taking the difference between the cost to install standard service to meet the customer's load requirements from one meter, at one voltage, at one delivery point, and the cost to install the customer-requested equipment and multiplying the cost difference by 1.7%. The 1.7% rate has been approved by the Commission and is also contained in Leaf M of Duke's Service Regulations.

6. Pursuant to Leaf M, electric service agreements containing the extra facilities clause shall have a minimum original term of five years and shall continue from year to year thereafter. The extra facilities charge is designed to recover the incremental costs to Duke of providing and maintaining the non-standard facilities, including operation and maintenance, insurance, depreciation, taxes, and a return on the investment over the life of the assets. Duke continues to own the facilities.

7. On August 22, 1997, Duke entered into a five-year electric service agreement with Mitsubishi (the 1997 Agreement) for the sale and delivery of electric service to the Durham plant pursuant to Duke's Rate Schedule OPT(NC), which was Duke's optional time-of-use schedule. The 1997 Agreement obligated Duke to provide contract demand of 8,300 kW. The 1997 Agreement obligated Mitsubishi to pay minimum bills consisting of a basic facilities charge and a demand charge of no less than $51,559.57 per month for the four summer months and $29,377.07 per month during all other months. Mitsubishi was also obligated to pay an extra facilities charge of $26,310.76 per month.

8. Duke delivered electric service to the Durham plant pursuant to the 1997 Agreement from August 22, 1997, until January 21, 1999.

9. In 1998, Mitsubishi informed Duke that it would be reducing operations at the Durham plant and looking for a buyer for the facility. In response, Duke presented Mitsubishi with three options, including renegotiating the 1997 Agreement. Mitsubishi elected to renegotiate the 1997 Agreement.

10. Duke and Mitsubishi renegotiated the 1997 Agreement, reducing the contract demand under Rate Schedule OPT(NC) to 1,000 kW and eliminating certain extra facilities items. This renegotiation resulted in a substitute electric service agreement effective January 21, 1999, with a new five-year term (the 1999 Agreement). The 1999 Agreement included a reduction in the minimum bill. The 1999 Agreement provided for minimum bills consisting of a basic facilities charge and a demand charge of no less than $6,526.07 per month for the four summer months and $3,856.07 per month during all other months. The 1999 Agreement also provided for a reduction of the extra facilities charge to $19,682.84 per month (based upon an extra facilities cost of $1,157,814).

11. In mid-March 2001, Mitsubishi informed Duke that it intended to sell the Durham plant and to terminate its contractual obligations under the 1999 Agreement prior to the end of the five-year term. Mitsubishi informed Duke that the closing would take place on March 30, 2001, and requested that Duke provide a termination payment amount. Mitsubishi acknowledged that it was obligated to make a termination payment for breaching the 1999 Agreement.

12. Duke calculated two termination payment options and presented them to Mitsubishi by means of an e-mail from Michael Szeremi to Bruce Brenizer on March 27, 2001. The e-mail began, "Pursuant to our service regulations on file with and approved by the North Carolina Utilities Commission, the first of the two options is…." Duke told Mitsubishi that it could pay the lesser of the two amounts, and this was consistent with Duke's practice and procedure in such cases.

13. The first option was a calculation based upon a buyout of the remainder of the five-year term of the 1999 Agreement (contract buyout). This amount was $855,918.81. The second option was a calculation based upon the loss to Duke due to the early retirement of the facilities installed to meet Mitsubishi's level of service (LDER). This amount was $805,876. (Duke subsequently discovered an error in its LDER calculation and corrected this amount, as discussed in Finding of Fact No. 28.)

14. After Duke presented the calculations to Mitsubishi, Mitsubishi objected to the amount of the termination payment. Mitsubishi maintained that it should only have to pay for the remaining extra facilities charges, but it did not request additional details regarding Duke's calculations and did not contact the Commission or the Public Staff to inquire as to whether the calculations were authorized by the Commission.

15. The prospective buyer of the Durham plant was Teer & Associates, d/b/a Jersey Durham (Teer). Teer acquired the property as a real estate investment. Teer planned to maintain it for the purpose of preserving its value and showing it to prospective purchasers or tenants. The buildings would be vacant until sold or leased. Teer never planned to operate the plant as an industrial or commercial facility, and Teer wanted the flexibility to sell or lease the property as one parcel or in parts.

16. The 1999 Agreement provided for a 1,000 kW monthly contract demand under Rate Schedule OPT(NC) and extra facilities charges for the equipment needed to provide eight delivery points, with all of these provisions consolidated into a single contract. Teer determined that it would be better served with eight individual contracts of 60 kW demand each for the eight delivery points (totaling 480 kW contract demand) on Rate Schedule G, which was Duke's schedule for general service. Teer did not need or wish to pay for the extra facilities installed to serve Mitsubishi. Teer did not wish to assume the 1999 Agreement and required Mitsubishi to terminate the 1999 Agreement as a condition precedent to Teer's purchase of the Durham plant.

17. During the last few days before the sale of the Durham plant closed, a number of issues, including possible assumption of the 1999 Agreement and the appropriate termination payment, were still being negotiated. Duke and Mitsubishi exchanged a number of communications regarding these matters. Mitsubishi general counsel Alan Olschwang was under the impression that

Duke had threatened to deny service to Teer unless Mitsubishi made the termination payment that Duke was demanding, and this impression was conveyed to Duke by e-mail on March 29, 2001.

18. Duke did not threaten to deny electric service to Teer unless Mitsubishi made the termination payment, and Duke advised Mitsubishi before the sale closed that it could not deny service to Teer on such grounds. Duke counsel Lara Nichols had a telephone conversation with Mitsubishi counsel Leslie Moore on March 28, 2001, in which she told him that Duke could not deny electric service to Teer.

19. The sale of the Durham plant closed on March 30, 2001. Mitsubishi paid Duke the LDER amount of $805,876 on that date in order to close the sale on schedule. At the same time, Mitsubishi made clear that the payment was being made under protest, and Mitsubishi requested that Duke refund $164,228.73 of this payment. Mitsubishi claimed that it should only be required to pay the extra facilities charges for the remainder of the contract term, a total of $641,451.27 (an amount representing total unpaid extra facilities charges reduced to present value plus sales tax).

20. Duke denied the refund request, and Mitsubishi commenced a civil action against Duke in Wake County Superior Court on May 23, 2001. That civil action led to a ruling by the trial court that the Utilities Commission has exclusive jurisdiction as to Mitsubishi's contract claims. The North Carolina Court of Appeals refused to disturb the Superior Court's decision. Mitsubishi then filed its complaint with this Commission.

21. Duke did not engage in any coercion or willful misconduct in its dealings with Mitsubishi.

22. Duke is entitled to collect payment from Mitsubishi for the early termination of the 1999 Agreement as discussed hereinafter. It was just and reasonable for Duke to offer Mitsubishi a termination payment consisting of the lower of the contract buyout amount or the LDER amount, properly calculated.

23. The contract buyout calculation is based upon the amounts due for minimum bills and extra facilities charges for the 34 months that remained on the five-year term of the 1999 Agreement at the time of breach.

24. Duke was obligated to use reasonable diligence to minimize its loss from the breach of the 1999 Agreement. Duke entered into substitute agreements with Teer for providing electric service to the Durham plant property, and the amount that Duke is due from Mitsubishi under the contract buyout calculation must be reduced since Duke was able to avoid some of its loss by making these substitute arrangements and continuing to serve the property.

25. Teer continued to receive electric service from Duke at the Durham plant property for the 34 months remaining on the term of the 1999 Agreement. The minimum bills provided in Teer's contracts with Duke over these 34 months equal a total of $26,764.80, and this is the only appropriate measure of mitigation in evidence in this case.

26. The contract buyout calculation includes future payments or cash flows which should be adjusted to present value using a discount rate equal to Duke's net-of-tax overall cost of capital as determined by the Commission in Duke's most recent general rate case proceeding, which equals 9.07%.

27. The LDER calculation is a cost-recovery methodology for the retirement of equipment before the end of its useful life. The LDER calculation is based upon the original cost of the equipment, less accrued depreciation and salvage value, plus the cost of removal.

28. Duke calculated the LDER for Mitsubishi in a matter of days in March 2001 because time was short before the scheduled closing on March 30, 2001. In August 2003, Duke learned that it had made an inadvertent error in its original calculation of the LDER amount. Upon discovering this error, Duke made a refund to Mitsubishi of $44,646.90 (including interest).

29. The LDER calculation includes a component for depreciation. In Duke's last general rate case proceeding, the Commission issued an order addressing, among other things, the appropriate useful life to be used for classes of utility assets. See the November 12, 1991 Order Granting Partial Rate Increase in Docket E-7, Sub 487 (the 1991 Rate Order). The Commission's 1991 Rate Order established the useful life of distribution assets at 30 years. Pursuant to the 1991 Rate Order, Duke is required to use a 30-year life for such assets in the calculation of depreciation as a component of all rates charged to retail customers unless specifically authorized by Commission order.

30. Duke's extra facilities rate of 1.7% in Leaf M was approved by the Commission. The rate incorporates a 30-year useful life for distribution facilities as required by the 1991 Rate Order.

31. The LDER calculation as used to compute a termination payment for early termination of an electric service agreement is an alternative rate calculation; therefore, the 30-year useful life of distribution assets set in the 1991 Rate Order is applicable to determining the loss due to early retirement of such assets, including those at issue in this matter.

32. Duke is entitled to recover from Mitsubishi either the contract buyout amount as adjusted for mitigation and present value, or the revised LDER amount, whichever is lower. Duke shall recalculate the contract buyout as directed herein and shall file the adjusted calculation with the Commission. Mitsubishi shall be given an opportunity for review, and the Commission will issue a final order specifying the amount of the actual termination payment and directing the appropriate adjustment, if any, consistent with this Order.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 THROUGH 10

The evidence in support of these findings of fact is found in the testimony of Mitsubishi witness Brenizer and Duke witnesses Yarbrough and Szeremi, as well as exhibits presented by both parties.

Duke is a public utility organized and existing under the laws of the State of North Carolina and subject to the jurisdiction of this Commission. Duke's rates and tariffs are regulated by this Commission, and this proceeding is properly before the Commission pursuant to the complaint jurisdiction of the Commission under G.S. 62-73.

Mitsubishi (or one of its predecessors) owned and operated a semiconductor manufacturing plant in Durham from about 1985. At Mitsubishi's request, Duke installed non-standard distribution equipment at the Durham plant in 1997. Duke's cost of installing this equipment was $1,547,692. In its April 17, 1984 Order Revising Extra Facilities Charges, issued in Docket E-7, Sub 338 and 356, the Commission held that customers requesting non-standard service must bear the costs associated with such extra facilities so as "to avoid subsidization by other customers of a service which said other customers do not use or benefit from." Leaf M of Duke's approved tariffs authorizes an extra facilities charge to recover the incremental costs to Duke for providing and maintaining such non-standard facilities, including operation and maintenance costs, insurance, depreciation, taxes, and return on the investment. Duke continues to own the facilities and is responsible for their continued operation.

On August 22, 1997, Duke entered into a 5-year agreement with Mitsubishi for electric service to the Durham plant (the 1997 Agreement) on Rate Schedule OPT(NC). The 1997 Agreement obligated Duke to provide contract demand of 8300 kW and obligated Mitsubishi to

pay minimum bills consisting of a basic facilities charge and a demand charge of no less than $51,559.57 per month for the four summer months and $29,377.07 per month during all other months. Mitsubishi was also obligated to pay a monthly extra facilities charge of $26,310.76. Duke started delivering service to the Durham plant pursuant to the 1997 Agreement on August 22, 1997.

In 1998, Mitsubishi informed Duke that it would be reducing its operations at the Durham plant and looking for a buyer. Mitsubishi wanted to reduce the contract demand and eliminate some of the extra facilities. Mitsubishi and Duke successfully renegotiated the 1997 Agreement and agreed to a new electric service contract with a new 5-year term, effective January 21, 1999 (the 1999 Agreement). The 1999 Agreement included a reduction in both the minimum bill and the extra facilities charge. The 1999 Agreement provided for minimum bills consisting of a basic facilities charge and a demand charge of no less than $6,526.07 per month for the four summer months and $3,856.07 per month for the other months. The 1999 Agreement provided for extra facilities charges of $19,682.84 per month (based upon an extra facilities cost of $1,157,814). By the 1999 Agreement, Mitsubishi assumed a 5-year obligation to pay both monthly minimum bills and monthly extra facilities charges.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 11 THROUGH 22

The evidence in support of these findings is found in the testimony of Mitsubishi witnesses Olschwang, Brenizer, Teer, Moore, and Campbell and Duke witnesses Benson, Szeremi, Yarbrough, and Nichols, as well as exhibits presented by both parties.

In mid-March 2001, Mitsubishi informed Duke that it was selling the Durham plant to Teer and that the closing would take place on March 30, 2001. Mitsubishi requested that Duke provide a termination payment amount to Mitsubishi. Duke calculated two payment options and presented them to Mitsubishi on March 27, 2001. The first option was a calculation based upon a buyout of the remainder of the five-year term of the 1999 Agreement (contract buyout). The amount of the contract buyout calculated by Duke equaled $855,918.81. The second option was a calculation based upon the loss to Duke due to the early retirement of the facilities installed to meet Mitsubishi's level of service (LDER). The amount of the LDER was calculated at $805,876.00 (subsequently corrected to $764,344 in August 2003). Consistent with its practice and procedure in cases of early contract termination, Duke told Mitsubishi that it could pay the lesser of the two amounts.

Mitsubishi witness Bruce Brenizer acknowledged that Mitsubishi understood that, in terminating the 1999 Agreement before the end of its term, Mitsubishi was breaching the agreement and owed Duke a termination payment. When presented with the termination payment calculations by Duke, Mitsubishi objected to the amount of the termination payment and maintained that it should only have to pay for the remaining extra facilities charges. Mitsubishi did not ask Duke for any additional details regarding the calculations and did not contact the Commission or Public Staff regarding Duke's authority to offer the contract buyout or LDER as termination payment options.

Mitsubishi witnesses Brenizer and Leslie Moore testified that Mitsubishi preferred to assign the 1999 Agreement to Teer. However, Teer planned to purchase the property as a real estate investment and to maintain the facility in "caretaker status" and show it to prospective buyers or tenants. Teer wanted the flexibility to sell or lease the property as one parcel or several. Teer discussed with Duke Teer's planned use of the Durham plant property and various rate options, and Teer determined that it was not in Teer's interest to take assignment of the 1999 Agreement. The Amended and Restated Purchase and Sale Agreement between Mitsubishi and Teer required Mitsubishi to terminate the 1999 Agreement and resolve outstanding issues related to the termination prior to closing.

Duke and Mitsubishi presented numerous issues of law and fact based upon these events, and the Commission will address each in turn. First, however, it is appropriate to address jurisdiction.

Both the rate schedules pursuant to which Duke served Mitsubishi and the form of the contract itself were approved by the Commission. Although the method for calculating a termination payment was not specifically addressed in either the tariffs or the contract, the appropriate payment necessarily involves matters within the Commission's jurisdiction and expertise. The Commission concludes that the appropriate payment is a "rate" as defined in G.S. 62-3(24) and that determination of the appropriate payment for Mitsubishi's early termination of the 1999 Agreement is a matter within the Commission's jurisdiction over public utilities under G.S. 62-30, -131(a), -132, -136(a), and -139(a). Cf., State ex rel. Utilities Comm. v. Thrifty Call, Inc., 154 N.C. App. 58, 70 (2002), dis. rev. den., 357 N.C. 66 (2003).

Turning to arguments presented by Duke, Duke alleges as affirmative defenses in its answer filed on April 28, 2003, the doctrines of waiver and "accord and satisfaction/compromise and settlement and payment." In each instance, Duke alleges as a bar to the complaint that Mitsubishi made a voluntary payment to Duke. The evidence shows that Mitsubishi had been trying to sell the Durham plant property for at least two years, that Mitsubishi paid the LDER amount of $805,876 to Duke on March 30, 2001, because "it was greater priority for us to sell the property than it was to rangle over $169,000 or so at that point in time," and that Mitsubishi simultaneously reiterated objections raised earlier and requested that Duke refund $164,228.73 of this payment on grounds that Mitsubishi should only be required to pay the remaining extra facilities charges. Brenizer's March 30, 2001 e-mail concluded by asking that Duke "promptly refund to us the excess we are paying you over the $641,451.27 which we believe is the correct amount." It is clear that Mitsubishi paid the LDER amount to Duke in order to keep the closing on schedule, but that Mitsubishi did not agree with the amount of the payment and intended to – and in fact did -- continue to press its claim that a lesser amount was appropriate.

In light of the evidence in this case, the Commission finds neither a compromise and settlement nor an accord and satisfaction. These concepts are closely related, the primary difference being that compromise and settlement must involve a disputed claim while accord and satisfaction may involve an undisputed claim. Bizzell v. Bizzell, 247 N.C. 590, 601 (1958); Lumber Co. v. Kincaid Carolina Corp., 4 N.C.App. 342 (1969). In a compromise and settlement, a substituted performance is accepted instead of what was previously claimed to be due. Lumber Co., 4 N.C.App. at 349 (citing G.S. 1-540); 15A Am.Jur.2d Compromise and Settlement §1 (2000). An accord and satisfaction is an agreement, followed by execution, to discharge a demand by giving and accepting something different from what the creditor is, or considers himself to be, entitled to. Allgood v. Trust Co., 242 N.C. 506, 515 (1955); 1 Am.Jur.2d Accord and Satisfaction §§1-4 and 14 (1994). Here, there was no compromise and settlement and no accord and satisfaction because the evidence shows that Duke did not agree to any substitute performance. Duke received from Mitsubishi exactly what it claimed to be due. Further, compromise and settlement and accord and satisfaction are both contractual; they both depend upon mutual assent or a meeting of the minds. Prentzas v. Prentzas, 260 N.C. 101, 103-4 (1963); Casualty Co. v. Teer Co., 250 N.C. 547, 550 (1959); 15A Am.Jur.2d Compromise and Settlement §§ 9-11 (2000); 1 Am.Jur.2d Accord and Satisfaction §§5 and 14 (1994). Whether the parties intended an accord and satisfaction is usually a question of intent to be decided by the finder of facts. Allgood, 242 N.C. at 516-7. Here, it is clear from the evidence that Mitsubishi did not agree with the payment it was making and intended to pursue the matter after the closing. Under these circumstances, there was no compromise and settlement and no accord and satisfaction. For the same reasons, there was no waiver by Mitsubishi. Waiver is an intentional surrender of a known right or privilege. Hospital v. Stancil, 263 N.C. 630 (1965). Waiver is usually a question of intent. Adder v. Holman and Moody, Inc., 288 N.C. 484 (1975).

Duke also alleges payment as a defense. Payment differs from accord and satisfaction and compromise and settlement in that payment is not a new contract but the performance of an existing contract according to its terms. 1 Am.Jur.2d Accord and Satisfaction §4 (1994); 60 Am.Jur.2d Payment §3 (2003). However, like accord and satisfaction and compromise and settlement, payment depends upon a mutual intention to discharge a debt. 60 Am.Jur.2d Payment §§1-2 (2003). In this

case, Mitsubishi paid the amount Duke claimed due for breach of the 1999 Agreement, but Mitsubishi made clear at the time that it believed a different amount was due and that it intended to pursue its claim. The evidence does not support the defense of payment.

Duke presented evidence that it gave up considerable revenues when it renegotiated the 1997 Agreement without requiring any termination payment at that time. Duke contends that it has been more than fair to Mitsubishi and that it made this concession in the renegotiations with the understanding that Mitsubishi would make an appropriate termination payment if Mitsubishi could not find a buyer to operate the Durham plant as Mitsubishi had operated it. Mitsubishi responds that the renegotiation of the 1997 Agreement was a voluntary business decision by Duke, that there was no agreement by Mitsubishi to make a termination payment in the future, and that Mitsubishi's obligations must be found in the language of the 1999 Agreement or tariffs, or not at all. Duke acknowledges that there is an "entire agreement" clause in the 1999 Agreement which provides that, except for the contract and applicable tariffs, "there are no other agreements, written or oral between the parties as of the date of the signing of this document." The Commission agrees with Mitsubishi on this point and does not rest its decision herein upon any equity or unwritten understanding arising from the renegotiation of the 1997 Agreement.

Turning to Mitsubishi's arguments, Mitsubishi cites language in the 1999 Agreement to the effect that the extra facilities charges will continue "as long as service is provided" and argues that it had no obligation to Duke after it canceled electric service. The Commission disagrees. The 1999 Agreement provided for payment of monthly extra facilities charges for the 5-year term of the contract. This is consistent with Leaf M of Duke's Service Regulations, which requires a minimum 5-year term for contracts with extra facilities charges. See also Commission Rule R8-25(c). The language cited by Mitsubishi obligated Mitsubishi to continue paying the extra facilities charge if it continued to receive electric service after the original 5-year term of the 1999 Agreement. The language does not mean that Mitsubishi's obligation to pay extra facilities charges would simply expire if Mitsubishi breached the contract during the 5-year term. Indeed, Mitsubishi witness Brenizer conceded that Mitsubishi owed Duke a termination payment and on March 30, 2001, proposed an amount equal to the extra facilities charges for the remainder of the contract term, adjusted to reduce the required payment to its present value, plus sales tax.

The 1999 Agreement also provided for payment of minimum monthly bills. This is consistent with Rate Schedule OPT(NC), which provides for minimum bills and for a contract period of at least 1 year and "for a longer original term of years where the requirement is justified by the circumstances." Mitsubishi points to language in the 1999 Agreement to the effect that the customer will pay for all power used "until the Customer has given the Company written notice and reasonable opportunity to discontinue service." This language does not mean that Mitsubishi could cancel the contract during its 5-year term and pay nothing for the breach of contract. Such an interpretation would be inconsistent with the tariff provision allowing Duke to require a term of years on the 1999 Agreement and would defeat the purpose of the tariff provision.

Mitsubishi contends that Duke engaged in several forms of coercion and willful misconduct in its dealings leading up to the termination payment.[1] First, Mitsubishi contends that Duke represented that the termination payment and the calculations for the payment were in Duke's approved tariffs and service regulations and that Mitsubishi relied upon this representation because time was short. The Commission does not believe that Mitsubishi has shown coercion or misrepresentation. In alleging misrepresentation by Duke, Mitsubishi primarily relies upon a March 27, 2001 e-mail from Duke witness Michael Szeremi setting forth the two termination payment options that Duke had calculated. The e-mail begins, "Pursuant to our service regulations on file with and approved by the

[1] Mitsubishi cites G.S. 62-139(b) which generally provides that any public utility "which shall willfully charge a rate" in excess of that prescribed by the Commission -- and does not refund the same within 30 days after notice and demand -- shall be liable for double the overcharge plus a daily penalty.

North Carolina Utilities Commission, the first of the two options is ...." The Commission does not believe that this phrase, in the context of the full e-mail, constitutes misrepresentation, coercion or a violation of Duke's duty to act fairly and reasonably. Although the contract buyout calculation is not set forth in Duke's tariffs, Duke was entitled to a termination payment by virtue of general principles of contract and damages law, and the application of these general principles necessarily implicate the terms of the 1999 Agreement and Duke's tariffs. The reference to Duke's tariffs in the e-mail did not misrepresent the situation because both the 1999 Agreement and Duke's tariffs were relevant to the amount of the termination payment. Further, Mitsubishi had legal counsel to research and advise it as to Duke's tariffs. It is true that time was short, but time was not critical. The scheduled closing was still three days away when the termination payment options were presented. The Commission concludes that Mitsubishi has not carried its burden of proof in this regard.

Next, Mitsubishi contends that Duke coerced payment by threatening to withhold electric service to Teer unless Mitsubishi made the termination payment as calculated by Duke. Mitsubishi's basis for this contention is in the testimony of its witness Alan Olschwang, Mitsubishi's general counsel. He testified that he recalled that Teer's attorney for the closing, Jeffery Benson, stated in a conference call that Duke had threatened to deny electric service to Teer unless Mitsubishi made the termination payment to Duke. This testimony is not convincing evidence that any such threat was made. No witness testified that Duke actually made such a threat. Duke witness Szeremi testified that he did not threaten to deny service to Teer unless Mitsubishi made the termination payment. Teer testified that he was not aware of any such threat. Benson, Teer's attorney in the closing with Mitsubishi, testified that he was not aware of Duke's making any threat to deny electric service. Olschwang merely testified that he recalled Benson's stating in a conference call that Duke had threatened to deny electric service to Teer; however, Olschwang never spoke with any Duke representative prior to the closing, and Benson denied making this statement. Benson testified that he could not have made this statement since he was not aware of any such threat. The Commission has previously concluded that Mitsubishi's payment was made under protest because it did not agree with the amount; however, the Commission does not believe that Mitsubishi carried the burden of proof that Duke coerced the payment by threatening to deny electric service to Teer. The evidence shows that Mitsubishi had been trying to sell the plant property for a long time and was anxious to conclude the sale, that Teer required Mitsubishi to terminate the 1999 Agreement before closing, and that Mitsubishi made the payment to Duke in order to keep the closing on schedule and pursue its disagreement with Duke afterwards. The evidence does not show a threat by Duke to deny service to Teer.

Mitsubishi next contends that even if Duke did not threaten to deny service to Teer, Mitsubishi understood that such a threat had been made and conveyed this understanding to Duke before the closing and Duke did not affirmatively tell Mitsubishi that it had not threatened to deny service. Thus, Mitsubishi contends that even if Duke did not make the threat, Duke took advantage of Mitsubishi's understanding that the threat had been made in order to coerce the termination payment. Mitsubishi cites a March 29, 2001 e-mail from Brenizer of Mitsubishi to Szeremi of Duke in which Brenizer states, "However, because we understand that Duke Power will not provide [sic] agree to provide services to our purchaser without [Mitsubishi's] acceptance of one of the two options you have provided, [Mitsubishi] hereby agrees to terminate the contract via the $805,000 LDER 'buy-out.'" Szeremi responded to the e-mail the next day, but did not address this understanding. The Commission concludes that the record does not support Mitsubishi's claim of misconduct. Witness Lara Nichols, Duke's counsel, testified that she had a telephone conversation with Leslie Moore, Mitsubishi's counsel, on March 28, 2001, in which she stated that Duke could not deny service to Teer based upon a contract dispute with Mitsubishi. She testified, "As the lawyer, I understood except in some very narrow circumstances, we are not allowed to deny service to a new occupant of a premises for a debt owed by a prior occupant. I needed to talk to my business people before I stated on behalf of Duke Power what exactly was happening, but I wanted to let him know that was not something we were permitted to do." The Commission accepts this testimony, and finds that Duke's legal counsel sufficiently communicated to Mitsubishi's legal counsel on

March 28, 2001, that Duke could not coerce payment from Mitsubishi by denying service to Teer. In light of this finding, the Commission concludes that Mitsubishi did not carry its burden of proof that Duke allowed Mitsubishi to believe that it would deny service to Teer in order to coerce the termination payment.

Mitsubishi contends that Duke willfully overcharged it by miscalculating the LDER amount. Duke originally used the wrong in-service date for some equipment in the depreciation calculation for the LDER. Mitsubishi states that the in-service dates should have been readily apparent to Duke, and Mitsubishi dismisses Duke's claim that this miscalculation was inadvertent. Mitsubishi also contends that Duke did not take Mitsubishi's protests of the termination payment seriously and stubbornly refused to reexamine the calculations prior to the hearing before the Commission. Finally, Mitsubishi contends that Duke acted willfully because Duke knew that provisions for the termination payment were not in the 1999 Agreement or in Duke's tariffs, but Duke would not acknowledge this fact to Mitsubishi. The Commission concludes that Mitsubishi did not carry its burden of proof as to any such willful misconduct on Duke's part. "Willful" imports knowledge and stubborn resistance. In re Matherly, 149 N.C.App. 452 (2002). As to the miscalculation, Duke discovered in August 2003 that it had made a mathematical error in calculating the LDER amount. Duke witness Steve Cranfill testified that this error occurred due to the quick turnaround required by Mitsubishi in March 2001. An LDER calculation is complex and typically takes several weeks to compute, but Cranfill testified that Duke calculated the LDER for Mitsubishi in a matter of days and that this led to an error. Upon discovering the error, Duke promptly refunded Mitsubishi the amount of the error plus interest, a total of $44,646.90. The Commission accepts Cranfill's explanation and concludes that the miscalculation in the LDER amount was an inadvertent error and that it did not constitute intentional or willful conduct on Duke's part. Mitsubishi objected to the LDER amount, but its primary objection was the mistaken belief that the LDER included a charge for minimum monthly usage rather than a specific claim that the amount had been calculated incorrectly as the result of a mathematical error. Mitsubishi witness Brenizer raised this objection in his e-mails to Szeremi on March 27 and 29, 2001. Mitsubishi did not ask Duke to re-check the accuracy of the inputs or the math of the calculation. As to the other alleged misconduct, the Commission concludes, for reasons already discussed, that Duke did not misrepresent that the termination payment was in Duke's service regulations. Although Duke's methods for calculating payment for early contract terminations are not explicitly set forth in Duke's tariffs or in the 1999 Agreement, and although the Commission has concluded that some recalculations are in order, Duke was due payment for early termination and the amount of the termination payment necessarily implicates the terms of the 1999 Agreement and Duke's tariffs. Duke's reference to these documents in connection with the termination payment was not willful misconduct.

In conclusion, Mitsubishi breached the 1999 Agreement by terminating it prior to the end of its 5-year term, and neither the contract nor Duke's tariffs specified the amount of the payment required for early termination. This does not mean, however, that no termination payment is due. It is not uncommon for contracts to be silent as to the remedy for breach. In such a case, the general principles of contract and damages law provide the appropriate remedy, and that is the case here. The Commission now turns to a discussion of the appropriate termination payment.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 23 THROUGH 26

The evidence in support of these findings is found in the testimony of Mitsubishi witnesses Brenizer, Teer, and Campbell and Duke witnesses Szeremi and Yarbrough, as well as exhibits presented by both parties.

Under North Carolina law, the injured party in a breach of contract action "is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed," Service Co. v. Sales Co., 259 N.C. 400,

415 (1963); Strader v. Sunstates Corp., 129 N.C.App. 562, 571 (1998), less any mitigation as hereinafter discussed. The first option that Duke presented to Mitsubishi, the contract buyout calculation, was based upon the amounts set out in the 1999 Agreement for minimum bills (basic facilities charges and demand charges) and extra facilities charges for the 34 months which remained on the 1999 Agreement when it was terminated early by Mitsubishi. Before terminating the 1999 Agreement, Mitsubishi had been making monthly payments to Duke for energy consumption and actual demand charges (based on actual use but no less than the minimum bills), plus the monthly extra facilities charges of $19,682.84. At a minimum, Mitsubishi was contractually obligated to pay the minimum bills under Rate Schedule OPT(NC) plus the extra facilities charges for the remainder of the five-year term. If the 1999 Agreement had been fully performed, Duke would have received payment of the minimum bills and the extra facilities charges for the 34 remaining months of the full term of the contract. Duke calculated this amount as $855,918.81. Duke referred to this as the contract buyout calculation. This is the same as the general measure of damages provided by the Service Co. and Strader cases, and it was just and reasonable for Duke to employ this calculation as a rate option, modified as discussed below.

The amount of the termination payment under the contract buyout calculation is subject to mitigation as provided by law. The duty to mitigate damages arises after a breach of contract. Strader, 129 N.C.App. at 575. "The seller must use reasonable diligence to minimize damages." Service Co., 259 N.C. at 416. In a case of breach of contract, the non-breaching party is under a duty to use reasonable effort to minimize the loss occasioned by the other party's breach of contract. Monger v. Lutterloh, 195 N.C. 274, 279 (1928); Isbey v. Crews, 55 N.C.App. 47, 51 (1981). In the case at hand, Duke entered contracts with Teer to provide electric service to the Durham plant property, and the termination payment under the contract buyout calculation must be reduced by the amount of the loss that Duke was able to avoid by making these substitute arrangements with Teer. There is evidence that Teer signed eight contracts with Duke which provided for total minimum bills of less than $1000 per month; however, Teer testified that the actual bills for electric service to the property (by which we conclude that he meant the actual, bottom-line amount that Teer paid Duke) consistently exceeded the minimum bills in the 1999 Agreement with Mitsubishi (which consisted of only basic facilities charges and minimum demand charges). The 1999 Agreement provided for minimum bills of $6,526.07 per month for the four summer months and $3,856.07 per month during all other months. Teer's actual bills were not introduced in evidence. Both Duke and Mitsubishi recognize the principle of mitigation of damages, but they differ as to how it should be applied.

Duke would reduce the contract buyout amount by the amount of the minimum bills that Teer contracted to pay multiplied by the remaining 34 months of the 1999 Agreement's term.[1] Duke puts this figure at $26,764.80, leaving a contract buyout amount of $829,154.01. Duke contends that mitigation based upon Teer's minimum bills (which included only a basic facilities charge and a minimum demand charge) is appropriate because Teer's actual usage could not have been ascertained at the time Mitsubishi breached the 1999 Agreement, because Duke was only guaranteed Teer's minimum bills for its service to the property, and because Teer's actual usage was unexpected. Further, Duke calculated the contract buyout based upon Mitsubishi's minimum bills (not Mitsubishi's anticipated usage based upon its history), and Duke therefore contends that it is appropriate to calculate mitigation based exclusively upon the minimum bills that Teer was obligated to pay Duke. Mitsubishi, on the other hand, would mitigate the contract buyout amount by the actual amounts that Duke received from Teer for service to the Durham plant property during the remaining 34 months of the contract term. In other words, Mitsubishi would use the total of Teer's monthly bills -- each of which includes a basic facilities charge, demand charges, and energy usage charges – as a reduction to the contract buyout amount.

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[1] There is evidence in the record (Mitsubishi Exhibit 18) that Teer signed only 1-year contracts with Duke; however, the parties appear to agree that Teer continued to receive service from Duke under similar arrangements for the entire 34 months remaining on the 1999 Agreement.

As a general proposition (and when the evidence supports it), the Commission believes that it would be appropriate to mitigate the payment required under the contract buyout calculation based upon the net value that Duke received pursuant to its contracts with Teer for electric service to the Durham plant property during the remainder of the term of the 1999 Agreement. There are a number of cases dealing with broken leases, and they provide a helpful analogy to the situation here. In the case of a broken lease, "it is [the landlord's] duty to use reasonable diligence to find a new tenant, or otherwise to do what reasonable prudence requires, in order to lessen his damages." Monger, 195 N.C. at 280. "If the landlord does mitigate by reletting, his recovery will consist of what he would have received had the lease been performed, less the net value of what he did receive from reletting during the relevant contract period." Isbey, 55 N.C.App. at 51. Mitigation must be based upon the net value received under the new contract, not the total amount received. In the case of a lease, it would be appropriate, for example, to net out any expenses that the landlord incurred in connection with the reletting, such as advertising costs to attract a new tenant. In the case at hand, it would be appropriate to net out all expenses that Duke incurred in serving Teer over and above what Duke would have incurred in serving Mitsubishi at the minimum demand level provided in the 1999 Agreement.[1]

In this case, the 34 months remaining on the 1999 Agreement have passed (as of January 2004), but there is little evidence of what Duke received from Teer. Teer's actual bills are not in evidence. Further, even if Teer's actual bills were in evidence, there is no evidence which the Commission could use to calculate the amount that would need to be netted out of Teer's actual bills, i.e., there is no evidence of Duke's expenses in serving Teer over and above what it would have cost Duke to serve Mitsubishi at the minimum demand level provided in the 1999 Agreement. No party introduced such evidence. There is, therefore, an insufficient evidentiary record to support mitigation based upon the standard set forth in Isbey.

The burden of proof as to mitigation was upon Mitsubishi. "The party charged with responsibility for breach of the contract has the burden of showing matters in mitigation of damages; for in the absence of such proof, nothing else appearing, save the wrongful breach of the agreement, prima facie the [non-breaching party] would be entitled to recover the amount fixed by the terms of the lease." Monger, 195 N.C. at 280; Isbey, 55 N.C.App. at 51. Damages must be shown with reasonable certainty and may not be based on mere speculation or conjecture. Pike v. Trust Co., 274 N.C. 1, 17-18 (1968); Ward v. Zabady, 85 N.C.App. 130, 135 (1987). In this case, Mitsubishi did not carry the burden of presenting the evidence necessary to calculate the net value that Duke received pursuant to its contracts with Teer for electric service to the Durham plant property during the remainder of the term of the 1999 Agreement. There is, however, some relevant evidence. Mitsubishi introduced its Exhibit 18, a letter from Duke counsel Nichols written shortly after closing. This letter states, "Based upon the rate option outlined above for Teer, if Teer operates the Durham Plant as anticipated for 34 months, Duke would expect to collect $26,764.80 in revenue." This number was based upon the minimum bills that Teer was obligated to pay under its contracts, and Duke itself concedes that it is appropriate

[1] For example, Mitsubishi's minimum bills reflected no electric usage, but Teer consumed considerable electricity. Duke's fuel and variable operating and maintenance costs to generate the electricity used by Teer would therefore have to be netted out of Teer's actual bills in order to calculate the net value amount appropriate for mitigation purposes. There may be other expenses that would have to be subtracted as well; for example, if Teer's demand in a given month exceeded the minimum demand in the 1999 Agreement with Mitsubishi, Duke would arguably have incurred additional capacity costs.

to reduce the contract buyout amount by this amount.[1] Based upon this record, the Commission concludes that it is appropriate to mitigate the termination payment under the contract buyout calculation by the minimum bills that Teer paid during the remaining 34 months of the 1999 Agreement.

In addition, recovery of future losses must be limited to present cash value. Faison v. Cribb, 241 N.C. 303 (1954); Lamont v. Hospital, 206 N.C. 111 (1934). Duke did not include a present value adjustment in its contract buyout calculation. When Duke presented Mitsubishi the option of paying the lower of either Duke's contract buyout calculation (which equals $855,918.81) or Duke's LDER calculation (which originally equaled $805,876, but was revised to equal $764,344), Mitsubishi countered with a proposal to pay Duke an amount of $641,451.27. Mitsubishi calculated this amount by multiplying the monthly extra facilities charge of $19,682.84 by the 34 remaining months of the 1999 Agreement, adjusted for present value at a discount rate of 5%, and then adding 3% sales tax. One of Mitsubishi's witnesses testified that Mitsubishi discounted the 34 months of extra facilities charges to recognize that Duke was obtaining all the money at one time and was not entitled to the full sum of payments. Even though Mitsubishi clearly raised the present value issue in the record, Duke never addressed the issue.

The contract buyout calculation was performed by Duke by adding the monthly minimum bill ($6,526.07 per month for a summer month and $3,856.07 per month for a winter month) to the monthly extra facilities charge ($19,682.84) for each of the 34 remaining months of the 1999 Agreement, adjusted for sales tax at a rate of 2.83%. The purpose of the contract buyout calculation is to determine the amount of the loss suffered by Duke because Mitsubishi ceased service and would not be making the remaining 34 months of payments owed under the 1999 Agreement. At the time Duke performed the contract buyout calculation, it simply added each of the monthly payments or cash flows it would have received in the future under the 1999 Agreement. However, the contract buyout calculation includes cash payments to be received over future periods of time. In such situations, it is generally accepted that future cash flows should be discounted to present value, and Duke made no compelling argument, if any, to the contrary. Therefore, based upon the record, the Commission concludes that Duke should be required to revise the contract buyout calculation and to discount the remaining payments or cash flows to present value as of the end of March 2001.

As to the discount rate to be used, the only evidence in the record is the 5% discount rate used by Mitsubishi. However, Mitsubishi provided no explanation of why it used a rate of 5%. The Commission concludes that the proper discount rate is Duke's net-of-tax overall cost of capital as determined by the Commission in Duke's most recent general rate case proceeding, Docket No. E-7, Sub 487, using the state and federal income tax rates in effect in 2001, which equals 9.07%. The Commission takes judicial notice of its decision in Docket No. E-7, Sub 487, pursuant to G.S. 62-65(b) for the purpose of using this discount rate. See State ex rel. Utilities Comm. v. Edmisten, 291 N.C. 575, 583 (1977).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 27 THROUGH 31

As noted above, the other payment option offered by Duke to Mitsubishi for early termination of the 1999 Agreement is referred to as the LDER. Duke witnesses Yarbrough, Szeremi, and Cranfill and Mitsubishi witnesses Brenizer and Campbell testified on various matters concerning the LDER methodology and calculation.

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[1] In its proposed order submitted after the hearing, Duke asks the Commission to mitigate the amount of the termination payment under the contract buyout option by Teer's minimum bills and to conclude that under the contract buyout option "Duke's damages for Mitsubishi's early termination of the 1999 Agreement are $855,918.81 less $26,764.80, totaling $829,154.01."

Duke witness Barbara Yarbrough testified that the LDER methodology is contained in Leaf L of Duke's Service Regulations, which have been approved by the Commission, and were incorporated into the 1999 Agreement by reference. Witness Yarbrough explained that Leaf L is the methodology normally used by Duke to calculate charges for temporary service, but that it has been Duke's long-standing practice to also apply the LDER methodology to calculate a payment option for customers in early contract terminations. In essence, if at any time a customer applied for service had known and informed Duke that the service would be for a period less than the minimum contract term, then the customer's charges would have been calculated pursuant to Leaf L. Therefore, Duke calculates what the charges would have been had it known service to the customer was temporary, and gives the customer who is breaching the contract the benefit of paying the amount calculated by the LDER methodology if that amount is lower than the amount calculated by the contract buyout methodology.

The purpose of the LDER calculation in early contract termination situations is to determine the amount of unrecovered investment in the total facilities installed by Duke to provide service to the breaching customer. In this regard, the LDER calculation is performed by taking the original cost of all facilities installed to serve the customer, subtracting accumulated depreciation and any salvage value, and adding the cost of removal of the facilities. On March 27, 2001, Duke originally calculated the amount of the LDER payment option for Mitsubishi as $805,876. On March 30, 2001, Mitsubishi paid this amount. However, in late August 2003, Duke reviewed the LDER calculation and discovered that an inadvertent error had been made in the original calculation. When corrected, the revised LDER amount equals $764,344. Duke witness Cranfill testified that the error was inadvertent and occurred because the original LDER calculation used the wrong in-service dates in calculating depreciation for certain equipment. Witness Cranfill explained that the LDER calculation typically requires a couple of weeks to perform, but in March 2001, Duke performed the calculation on an expedited basis within a matter of days in an effort to satisfy Mitsubishi's request. Upon discovering the error, Duke refunded Mitsubishi the amount of the error, plus interest, which equaled $44,646,90.

Through the testimony of its witnesses and cross-examination, Mitsubishi challenges Duke's LDER calculation on several grounds. First, several Duke witnesses testified that the extra facilities charge rate of 1.7% contained in Leaf M incorporates a useful life of 30 years for depreciation and that Duke uses a useful life of 30 years for depreciation in the LDER calculation. Mitsubishi witness Campbell argued that Duke should have used a shorter depreciation life of either 7 or 20 years based on the depreciation life for such assets established by the Internal Revenue Service for income tax purposes. Through his testimony, it was established that a shorter depreciation life lowers the result of the LDER calculation. However, as pointed out by Duke witness Yarborough and in Duke Exhibit 12, the Commission issued an Order dated November 12, 1991, in Docket No. E-7, Sub 487, Duke's most recent general rate case, in which the Commission required Duke to use a 30-year depreciation life for distribution assets in all rates and charges to retail customers. Duke is not free to disregard a Commission-established depreciation rate, and the testimony offered by witness Campbell in support of using tax-based depreciation rates was not persuasive.

Mitsubishi also argues that Duke's LDER calculation fails to include the extra facilities charges paid by Mitsubishi prior to the termination of the 1999 Agreement. Therefore, Mitsubishi believes that Duke's LDER calculation failed to recognize that Duke has already been allowed to recapture some, if not all, of its investment in the extra facilities. However, as explained by Duke witnesses, the extra facilities charge in the 1999 Agreement was determined by multiplying the total cost of extra facilities by a factor of 1.7%. The 1.7% factor contained in Leaf M of Duke's Commission-approved Service Regulations is designed to generate an amount of monthly revenue sufficient to allow Duke to recover all costs associated with the extra facilities including depreciation, taxes, return, operation and maintenance expenses, etc. Duke's LDER calculation includes accumulated depreciation and thereby recaptures that portion of the extra facilities payments made by Mitsubishi to Duke for the purpose of capital recovery. Mitsubishi's argument incorrectly assumes

that the extra facilities charge payments which it made under the 1999 Agreement were determined and paid for the sole purpose of capital recovery, which the Commission concludes is clearly incorrect.

Mitsubishi also argues that Duke's LDER calculation inappropriately includes all the equipment installed to serve Mitsubishi, not just extra facilities. Duke witnesses Szeremi and Yarbrough confirmed that the LDER calculation does include the total cost of all facilities installed to serve Mitsubishi, but that Mitsubishi was given a credit for the facilities that would normally have been supplied to calculate the extra facilities charge in the 1999 Agreement. The Commission concludes that Duke appropriately included the total cost of facilities in the LDER calculation to recover all capital invested to serve Mitsubishi. Mitsubishi's argument incorrectly assumes that the LDER calculation should include only the cost of the extra facilities that are the basis of the extra facilities charge in the 1999 Agreement and, in doing so, Mitsubishi mixes apples and oranges.

Finally, Mitsubishi argues that Duke's LDER calculation includes removal costs that have not been, and may never be, incurred. The Commission believes that it is appropriate to include the removal or dismantling costs of the facilities in the LDER calculation because Duke is presumably liable for such costs and the inclusion of such costs is consistent with Leaf L of Duke's Service Regulations.

The Commission concludes that the LDER calculation is a cost recovery methodology for the retirement of equipment before the end of its useful life. Unlike the contract buyout calculation, the purpose of the LDER calculation is to determine the amount of unrecoverable investment and there is no contemplation of any future cash flows under contract. Therefore, the present value issue is not relevant to the LDER calculation. The Commission also concludes that the LDER calculation, as used to compute a payment for early termination of an electric service agreement, is an alternative rate calculation which requires Duke to employ the 30-year useful life of distribution assets for depreciation as determined by the Commission in Duke's most general rate case. Finally, the Commission concludes that the revised LDER amount of $764,344 was correctly calculated.

Duke witness Yarbrough testified that it is Duke's practice to use the LDER calculation in cases of early contract terminations and that Duke allows the customer to pay the LDER amount if it is lower than the contract buyout amount. Yarbrough testified that Duke's offering this option is fair to the customer and "it's lower and we feel like it appropriately recovers our cost." Although the LDER is not the general measure of damages provided by case law, a customer only pays the LDER amount when the customer has breached a contract and the LDER amount is lower than the general measure of damages. In such a case, it is to the customer's advantage to pay the lower amount, the customer is not prejudiced by paying the LDER amount, and Duke is adequately compensated. The Commission concludes that the LDER calculation as used by Duke is a just and reasonable rate option.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 32

In summary, the Commission has examined Duke's contract buyout calculation and concluded that it should be adjusted to properly account for mitigation and present value. Therefore, Duke must recalculate the contract buyout calculation as described herein. Duke shall recalculate the amount of the contract buyout by subtracting the amount of the minimum bill that Teer contracted to pay from the amount of the minimum bill and extra facilities charge that Mitsubishi was obligated to pay under the 1999 Agreement, for each of the 34 months remaining when the 1999 Agreement was breached, and shall adjust each monthly difference for gross receipts tax at a rate of 2.83%. Duke shall then discount each of the 34 monthly amounts to the end of March 2001, using a discount rate equal to Duke's net-of-tax overall cost of capital as determined by the Commission in Duke's most recent general rate case proceeding, using the state and federal income tax rates in effect in 2001, which equals 9.07%. Duke shall total the discounted 34 monthly amounts, and the sum of the

discounted 34 monthly amounts will equal the amount of the adjusted contract buyout calculation. Duke shall file this adjusted calculation with the Commission, and Mitsubishi shall have an opportunity for review as herein provided.

The Commission concludes that the contract buyout calculation, adjusted as required by the Commission, and the revised LDER calculation are reasonable methods of calculating an appropriate payment for the early termination of the 1999 Agreement and that Mitsubishi should be required to pay Duke the lower amount of these two calculations. If the amount of the adjusted contract buyout calculation is lower than the revised LDER amount of $764,344 paid by Mitsubishi, Duke will be required to refund the difference, with interest at a rate of 10% per annum, to Mitsubishi.

IT IS, THEREFORE, ORDERED as follows:

1. That Duke is entitled to recover from Mitsubishi either the contract buyout amount adjusted for mitigation and present value or the revised LDER amount, whichever is lower;

2. That Duke shall recalculate the amount of the contract buyout by subtracting the amount of the minimum bill that Teer contracted to pay from the amount of the minimum bill and extra facilities charge in the 1999 Agreement for each of the remaining 34 months when the 1999 Agreement was breached, adjusting each monthly difference for gross receipts tax at a rate of 2.83%, then discounting each of the resulting 34 monthly amounts to the end of March 2001, using a discount rate equal to Duke's net-of-tax overall cost of capital as determined by the Commission in Duke's most recent general rate case proceeding, which equals 9.07%, and then totaling the discounted 34 monthly amounts to determine the amount of the adjusted contract buyout;

3. That, should the amount of the adjusted contract buyout be lower than the revised LDER amount of $764,344 paid by Mitsubishi, Duke shall also calculate the interest on any such difference at a rate of 10% per annum for the period from March 31, 2001, to twenty (20) working days after the date of this Order;

4. That Duke shall make a filing in this docket within ten (10) working days from the date of this Order which contains the calculations required in Ordering Paragraphs Nos. 2 and 3 above and displays all inputs and sufficient details necessary for review of the calculations;

5. That Mitsubishi shall have ten (10) working days after Duke makes the filing required in Ordering Paragraph No. 4 to review the calculations and file comments; however, such comments shall be limited to whether Duke has complied with the directions of this Order and whether Duke's calculations are mathematically correct; and

6. That the Commission will then issue a further order specifying the amount of the appropriate termination payment and any refund to be paid.

ISSUED BY ORDER OF THE COMMISSION.
This the 22nd day of April, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Ah042204.01

DOCKET NO. E-7, SUB 726

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Mitsubishi Electric & Electronics USA, Inc., Complainant	)	
v.	)	ERRATA ORDER
Duke Power Company, a division of Duke Energy Corporation, and Duke Energy Corporation, Respondents	)	

BY THE COMMISSION: The Commission has discovered that the Order Ruling on Complaint issued in this docket on April 22, 2004, contains an inadvertent error that should be corrected. In the description of the calculation that Duke is ordered to make and file with the Commission, the Commission twice uses the phrase "gross receipts tax at a rate of 2.83%." This phrase is found in the first paragraph of the Evidence and Conclusions for Finding of Fact No. 32 and in the second ordering paragraph of the Order Ruling on Complaint. The Commission intended to use the phrase "sales tax at a rate of 2.83%," and the Order Ruling on Complaint is hereby corrected.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 23rd day of April, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Ah042304.01

DOCKET NO. E-7, SUB 726

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Mitsubishi Electric & Electronics USA, Inc., Complainant	)	
v.	)	FINAL ORDER REQUIRING REFUND
Duke Power Company, a division of Duke Energy Corporation, and Duke Energy Corporation, Respondents	)	

BY THE COMMISSION: The complaint in this docket involves the appropriate payment for Mitsubishi's early termination of an electric service agreement with Duke. On April 22, 2004, the Commission issued its Order Ruling on Complaint.

The Order Ruling on Complaint concluded "that the contract buyout calculation, adjusted as required by the Commission, and the revised LDER calculation [which Mitsubishi had paid under protest] are reasonable methods of calculating an appropriate payment for the early termination of the 1999 Agreement and that Mitsubishi should be required to pay Duke the lower amount of these two

calculations." The Order directed Duke to recalculate the contract buyout amount and to file its calculation, and the Order gave Mitsubishi time to review it and file comments "limited to whether Duke has complied with the directions of this Order and whether Duke's calculations are mathematically correct." The Order Ruling on Complaint provided that the Commission would then issue a further order specifying the amount of the appropriate termination payment and any refund to be paid. Duke filed the calculation as directed on May 4, 2004, and Mitsubishi did not file any comments on the calculation.

The Order Ruling on Complaint stated, "If the amount of the adjusted contract buyout calculation is lower than the revised LDER amount of $764,344 paid by Mitsubishi, Duke will be required to refund the difference, with interest at a rate of 10% per annum, to Mitsubishi." Duke's calculation of the adjusted contract buyout amount was $731,931.95, which is $32,412.05 lower than the revised LDER amount paid by Mitsubishi. Duke calculated interest of $10,167.62 through May 20, 2004. The Commission finds good cause to order that Duke shall refund $32,412.05 to Mitsubishi with interest at a rate of 10% per annum to the date on which the refund is made.

IT IS, THEREFORE, ORDERED that Duke shall refund $32,412.05 to Mitsubishi, plus interest at a rate of 10% per annum to the date on which the refund is made, and shall advise the Commission by letter when the refund is made.

ISSUED BY ORDER OF THE COMMISSION.
This the 25th day of May, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Ah052404.03

DOCKET NO. E-7, SUB 737

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Phillip D. Hicks, 3886 Hartford Street,
Winston-Salem, North Carolina 27106,
Complainant
v.
Duke Power, a Division of Duke Energy
Corporation,
Respondent

RECOMMENDED ORDER
DENYING COMPLAINT

HEARD: Tuesday, March 9, 2004, Winston-Salem City Hall, Council Chambers, 101 N. Main Street, Winston-Salem, North Carolina at 10:00 a.m.

BEFORE: Corrie Foster, Commission Hearing Examiner

APPEARANCES:

FOR THE COMPLAINANT:
Phillip D. Hicks, *Pro se*, 5680 Bull Run Road,
Winston-Salem, North Carolina 27106

FOR THE RESPONDENT:
Lawrence B. Somers, Senior Counsel, Duke Power,
P.O. Box 1244, Charlotte, North Carolina 28201-1244

FOSTER, HEARING EXAMINER: On November 3, 2003, Phillip D. Hicks (Complainant) filed a formal complaint with the Commission against Duke Power, a division of Duke Energy Corporation (Respondent) for a high bill at his rental property located at 1021 Louise Road in Winston-Salem, North Carolina.

On November 4, 2003, the Commission served Respondent with a copy of the formal complaint and Respondent filed an answer with the Commission on November 24, 2003.

The Commission served Respondent's answer on Complainant on November 25, 2003, and requested a reply by December 8, 2003. No other filings were made and Complainant did not respond.

On December 15, 2003, the Commission issued an order dismissing the complaint and closing docket. On January 2, 2004, Complainant made a filing with the Commission requesting that it reconsider its order dismissing the complaint. Complainant alleged that there was a misunderstanding with the paperwork he was mailed. He believed that he was going to get a hearing because a formal complaint had been filed and he was unable to resolve his dispute with the Respondent.

The Commission reconsidered its order and scheduled a hearing for March 9, 2004, at 10:00 a.m., in the Winston-Salem City Hall, Council Chambers, 101 N. Main Street, Winston-Salem, North Carolina. At the hearing, Complainant presented his testimony, and Respondent presented the testimony of Barbara G. Yarbrough, including exhibits. At the conclusion of the hearing, the Hearing Examiner requested that each party submit proposed orders and/or briefs, no later than 20 days from date of hearing.

Based upon the pleadings and testimony at the hearing and the record as a whole, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Duke Power is duly organized as a public utility company under the laws of the State of North Carolina and therefore subject to the jurisdiction of the Commission. Duke Power is engaged in the business of generating, transmitting, and selling electric power to the public in North Carolina.

2. Complainant had two accounts with Duke Power. The first account was for rental property he owned at 1021 Louise Road, Winston-Salem, North Carolina, account # 14832994012. The second account was at his personal residence at 3886 Hartford Street, Winston-Salem, North Carolina.

3. On January 4, 2003, the tenant at 1021 Louise Road moved out and had the service discontinued. Complainant had the service reconnected in his name on January 7, 2003. The initial meter reading was 4610.

4. According to Complainant, the rental property was vacant from January 7, 2003, until April 1, 2003.

5. For the billing period of January 7, 2003, to January 20, 2003, the meter at 1021 Louise Road read 4645 for a 13 day period. A total of 35 kWh was used resulting in a bill of $5.70 plus $.17 sales tax, totaling $5.87.

6. For the billing period of January 20, 2003, to February 21, 2003, the meter read 6728 for a 32 day period. A total of 2083 kWh was used resulting in charges of $156.34, $4.69 sales tax, and a balance carryover of $5.87, totaling $166.96.

7. On or about February 28, 2003, the Winston-Salem area was hit with freezing rain and ice. Complainant was contacted by a neighbor of the 1021 Louise Road residence and informed that a tree fell and damaged the utility meter at the rental property.

8. Complainant contacted Duke Power on March 1, 2003, and made a request to have service at 1021 Louise Road suspended. That same day Duke Power technicians de-energized the line to the residence so that the Complainant could have the meter base repaired.

9. On or about March 22, 2003, Complainant retained Mountain Air Service to repair the meter base, conduit, and weatherhead at 1021 Louise Road. The technicians also hung the breaker panel and connected the service entrance cable. This was the second time the meter base had been repaired. It had been repaired in December 2002, after it was damaged in an ice storm.

10. On March 18, 2003, Complainant requested that Duke Power reread the meter. A reading of 6756 was taken on March 20, 2003.

11. For the billing period of February 21, 2003, to March 28, 2003, the meter read 6761 but was pro rated back to March 21, 2003, the normal read day, for a 6754 reading for a 28 day period. A total of 26 kWh was used resulting in a total bill of $9.92.

12. Service to 1021 Louise Road was reactivated on March 26, 2003.

13. Complainant's final bill for the rental residence covering March 21, 2003, to April 3, 2003 read 6865 for a thirteen day period. A total of 111 kWh was used. The service was actually only energized for eight days, the line was not energized from March 1, 2003, to March 26, 2003.

14. On April 3, 2003, a new customer established service and the charges accrued on the rental property from January, 2003, to April 3, 2003, were transferred to Complainant's residential account at 3886 Hartford Street.

15. At Complainant's request, Duke Power tested the meter on April 22, 2003, and it registered 99.9% at full load and 100.0% at light load. The meter reading at the time of the test was 8116.

EVIDENCE AND CONCLUSIONS

According to Commission rules, a complaint may be made by any person(s) having an interest, either directly or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation, or rate heretofore established or fixed by or for any law or of any order or file of the Commission, or that any rate, service, classification, rule, regulation, or practice is unjust and unreasonable. In most cases, the burden of proof rests with the Complainant who brings forth the charge. G.S. 62-75.

In this case, the burden of proof rests squarely on the Complainant. The evidence in support of the findings of fact can be found in the testimony of the witnesses and exhibits submitted into evidence.

Complainant alleges that Respondent over billed him for service at his rental property. Complainant argues that during the time when he received the high bill for service no one resided in

the rental home and that there were no major appliances on in the residence. In the alternative, Complainant argues that Respondent's meter is defective and while in its defective state, he should not be held liable for the charges accrued at the house.

Respondent, on the other hand, argues that Complainant is the owner of the property and had the utilities connected in his name. Because it is his property and service was connected in his name, he is responsible for paying the utility bill. Moreover, Respondent argues that it is only responsible for delivering the energy to Complainant's meter but the owner is responsible once that service is delivered.

Based on the evidence, law and hearing, the Hearing Examiner agrees with the Respondent. In his pleadings and testimony, Complainant placed significant emphasis that there were no tenants in the rental property at the time the bill was accrued. Specifically, he alleged that from January 7, 2003, to April 1, 2003, the rental property was vacant. At the hearing, he even presented a handwritten note from a neighbor that alleged that Complainant was not a resident of the rental property. If the Hearing Examiner were to take the note at face value, it only states that Complainant was not residing in the rental property. That does not establish that no one else was there at any given time. Complainant did not present an actual eye-witness to testify as to the condition of the property or possible traffic in or out of the home. Did the Complainant show the home to potential renters? What about other person(s) with keys visiting the property? Although the Hearing Examiner did consider the neighbor's note, considerable weight was not given to it because it does not address the issue of someone other than Complainant having access to the property such as past residents or prospective tenants.

Complainant also alleges that there were no major appliances in the home. As proof of the equipment in the rental home, Complainant offers a copy of a rehabilitation specification analysis report from 1999. In the Hearing Examiner's opinion, the rehabilitation report adds little to the record. It fails to address the whether the home was built to be energy efficient or equipped with special devices to conserve energy. Moreover, there is no direct evidence that Complainant purposefully took steps to conserve by turning off all equipment that consumes energy. This is unlike the case of James D. Robertson, D/B/A/ Robertson Optician v. Carolina Power & Light Company, E-2, Sub 785 (2001), where the Hearing Examiner found that the Complainant in his residence had undertaken several steps to conserve energy. Specifically, during a visit the CP&L service representative noticed that Complainant had literally unplugged all equipment not in use, did not turn on the air conditioner, used only a small fan, in the winter the Complainant relied on solar power, and Complainant had switched off the circuit breaker to the electric water heater. The Complainant in this docket merely asserts that he did not have any large items which would cause such a large energy drain.

Complainant further alleges that the meters which Respondent uses are defective. He relies on a WRAL consumer report in which he alleges that individuals were excessively billed by Respondent through the use of its new remote read meters. Complainant did not present any evidence of any possible malfunction of the meter. Moreover, his statements regarding the WRAL report are hearsay at best and not supported with any credible evidence. That is not to say that malfunctioning meters are not possible, however, the Hearing Examiner needs to consider credible evidence. Complainant did not present any credible evidence to support his allegation that the meter at his rental property was defective.

In fact, in April, 2003, Complainant did request that Respondent test the meter. A meter test by Respondent's technician showed that the meter registered 99.9% at full load and 100.0% at light load which is within 2% plus or minus of the Commission's guidelines. The meter was a remote read meter installed in August, 2002.

Even based on the billing history at the rental property there was no evidence that the meter had previously malfunctioned or that it was either fast or slow. The readings prior to and in between the repair of the meter base were consistent. According to the Respondent's Direct Examination Exhibit #1, the first repair was performed on December 11, 2002, and a second repair on March 22, 2003. Both times, the meter base had been dislodged from the house. From January 7, 2003, until January 20, 2003, the bill was for a 13 day cycle equaling about $5.70 of usage. This January date is after the repair in December, 2002. There was no unusual spike or surge in usage. There was no evidence that the actual meter itself was damaged. Complainant paid Mountain Air Service to repair the meter base on March 22, 2003. At that time according to Complainant's documents, the meter base, conduit and weather head were repaired. The technicians also hung the breaker panel and connected the service entrance cable. After the first storm in December, 2002, there were no unusual surges in utility usage.

The evidence which Complainant did present was sparse and did not convince the Hearing Examiner. Based on the evidence present in this record and testimony given to the Hearing Examiner, Complainant fails to meet the burden of proof required under the Commission's rules.

IT IS, THEREFORE, ORDERED that the complaint filed in this docket should be, and hereby is, denied.

ISSUED BY ORDER OF THE COMMISSION.
This the 3rd day of June, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Ah060204.05

DOCKET NO. E-7, SUB 743

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Drew M. Dixon, 1930 Dunmore Lane,)
Clemmons, North Carolina 27012, et al.,)
Complainants)
v.) ORDER DENYING COMPLAINT
Duke Power, a Division of Duke Energy)
Corporation,)
Respondent)

HEARD: Tuesday, July 27, 2004, at 10:00 a.m., and Wednesday, July 28, 2004, at 9:30 a.m., Winston-Salem City Hall, 101 N. Main Street, Winston-Salem, North Carolina

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Commissioner Lorinzo L. Joyner and Commissioner Michael S. Wilkins

APPEARANCES:

For the Complainants:
John Runkle, Attorney at Law, Post Office Box 3793, Chapel Hill, North Carolina 27515

For Respondent:

Lawrence B. Somers, Assistant General Counsel, Duke Power, a division of Duke Energy Corporation, Post Office Box 1244, Charlotte, North Carolina 28201-1244

Robert W. Kaylor, Law Office of Robert W. Kaylor, P.A., 225 Hillsborough Street, Suite 480, Raleigh, North Carolina 27603

For the Intervenors:

Harry R. Luther, *Pro Se*, 2184 Harper Road, Clemmons, North Carolina 27012;
William C. Sides, Jr., *Pro Se*, 2190 Harper Road, Clemmons, North Carolina 27012;
Jerry D. Taylor, *Pro Se*, 2186 Harper Road, Clemmons, North Carolina 27012; and
Robert Dalton, Jr. *Pro Se*, 2180 Harper Road, Clemmons, North Carolina 27012.

BY THE COMMISSION PANEL: On January 8, 2004, Brenda J. Smith filed a formal complaint against Duke Power, a division of Duke Energy Corporation (Respondent or Duke Power), objecting to its siting of the Peace Haven Road 100kV transmission line (Peace Haven line) and substation. This complaint was served on the Respondent on January 9, 2004.

Prior to the Respondent filing an Answer, Complainant Smith filed an Amended Complaint on January 15, 2004. The Commission served the Amended Complaint on Respondent by Order of January 21, 2004. Subsequent formal complaints objecting to the siting of the Peace Haven line and substation were filed by Richard Minichbauer on January 16, 2004; Thomas W. Brown on January 20, 2004; and Drew M. Dixon on January 21, 2004. On January 22, 2004, the Commission issued an Order Joining and Serving Complaints on Respondent.

On January 22, 2004, the following homeowners filed formal complaints against Duke Power: David E. Smith, Donna Pedroso, Ernest A. Lertola (Waterford Homeowners Association, Inc.), Mary DeZellar, and Dr. David P. Miller. On January 23, 2004; Tom Odom also made a filing against Duke Power. Richard and Katheryn Holt, also homeowners, filed complaints on January 28, 2004, and Haywood and Ann Gibbs filed complaints with the Commission on January 29, 2004.

On January 29, 2004, Duke Power filed a Motion to Dismiss and Answer to the Complaint and Amended Complaint of Brenda J. Smith with the Commission that included voluminous documents and information about the siting process and the proposed Peace Haven line. Duke Power's motion to dismiss asserted that the Commission lacked jurisdiction over this matter and that the complaints failed to state a claim upon which relief can be granted since Respondent had provided the information requested by Complainant in its Answer.

On January 30, 2004, the Commission issued an Order Joining Parties and Serving Complaints on Respondent.

On January 30, 2004, Duke Power filed Motions to Dismiss and Answers to the Complaints of Thomas W. Brown, Drew M. Dixon and Richard Minichbauer.

On February 9, 2004, Duke Power filed Motions to Dismiss and Answers to the Complaints of Dr. David P. Miller, Tom Odom, David E. Smith, Donna Pedroso, Ernest A. Lertola, Mary DeZellar, Haywood and Ann Gibbs, and Richard and Katheryn Holt.

On February 20, 2004, the Commission issued an Order Denying Duke Power's Motions to Dismiss and Serving Duke Power's Answer on Complainants.

On March 5, 2004, Complainants filed their Reply to the Answer and Request for a Public Hearing and Second Amended Complaint in which they proposed their own route for the Peace Haven line, which they labeled "Route Q." The Commission served the Second Amended Complaint on Duke Power by Order issued March 10, 2004.

On March 22, 2004, Duke Power filed its Motion to Dismiss and Answer to Second Amended Complaint.

On March 25, 2004, the Commission issued an Order Denying Duke Power's Motion to Dismiss, Serving Duke Power's Answer to Second Amended Complaint, and Scheduling Expedited Hearing for April 28, 2004, at the Winston-Salem City Hall.

On March 30, 2004, Complainants' counsel contacted Commission Staff and made an oral request to continue the hearing. On April 20, 2004, the Commission issued an Order Granting Complainants' Motion to Continue Hearing Pending Further Order.

On April 22, 2004, Duke Power filed a request to schedule a pre-hearing conference.

On April 23, 2004, Complainants' counsel filed a Consent Motion to Withdraw as Counsel which was granted by the Commission on April 29, 2004.

On May 19, 2004, the Commission issued an Order Scheduling Docket for Hearing for July 27, 2004, at 10:00 a.m. at the Winston-Salem City Hall, Winston-Salem, North Carolina.

On June 14, 2004, the Commission issued an Order Requiring Pre-filed Testimony.

On July 2, 2004, Complainants pre-filed the testimony and exhibits of the following witnesses: Brenda Smith, Thomas W. Brown, Drew Dixon, David Eric Smith (Homeowners); Pastor Scott Wilkinson, Senior Pastor of New Hope Presbyterian Church; John C. Larson, Vice President of Restoration, Old Salem, Inc.; Robert F. Thomas, Jr., Vice President of Progressive Engineering Consultants, Inc.; and Peter H. DeVries, Project Geologist with Geoscience & Technology, P.A.

On July 13, 2004, Duke Power pre-filed the testimony and exhibits of the following: Daltrum H. Poston, Vice President of Power Delivery, Engineering Standards and Process Management for Duke Power; Stephen R. Cranfill, General Manager of Engineering and Reliability for Duke Power's Northern Region; Dwight Hollifield, General Manager of the Facilities Planning and Siting Department of Framatome ANP; Dawn M. Reid, Vice President of Archaeological Consultants of the Carolinas; Scott Fletcher, Manager of Regulatory and Scientific Services for Devine Tarbell & Associates; and Barbara Yarbrough, Duke Power's Manager, Regulatory Interface.

On July 15, 2004, several concerned homeowners from Clemmons, who identified themselves as the Coordinating Committee of Those Opposed to Duke Power Company's Alternate Route Q, filed a motion to intervene.

On July 21, 2004, the Commission issued an order allowing Robert L. Dalton, Jr., Harry R. Luther, William C. Sides, Jr., and Jerry D. Taylor to intervene in their individual capacities, and accepted the statement filed with their motion to intervene as Intervenors' pre-filed testimony. The Commission also ordered Duke Power to provide Intervenors with the information requested in the motion to intervene, which was provided to Mr. Luther by letter dated July 20, 2004.

On July 23, 2004, Duke Power pre-filed the testimony of Robert Livengood, owner of the Harper-Bullard House.

On July 26, 2004, Complainants pre-filed the rebuttal testimony of Thomas W. Brown.

The case came on for hearing on July 27, 2004, and continued on July 28, 2004. Complainants presented the pre-filed testimony of their witnesses, who were subject to cross-examination by Respondent and Intervenors. Respondent Duke Power presented the pre-filed testimony of its witnesses, who were then subject to cross-examination by Complainants and

Intervenors. Intervenors Harry R. Luther, William C. Sides, and Jerry D. Taylor presented their pre-filed testimony and were then subject to cross-examination by Complainants. Intervenors also presented the testimony of Gordon Hendrix.

At the conclusion of the hearing, the parties were given two weeks from the mailing of the transcript to submit proposed orders. Complainants submitted late-filed Complainants' Exhibits 1-3 on August 4, 2004, and Duke Power submitted late-filed Hollifield Exhibit 8 on August 5, 2004.

Based upon consideration of the pleadings, testimony, and exhibits received into evidence at the hearing, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Respondent Duke Power, a division of Duke Energy Corporation, is a public utility with a public service obligation to provide electric utility service to customers in its service area in North Carolina and is subject to the jurisdiction of the Commission.

2. Complainants Drew M. Dixon, Richard Minichbauer, Thomas W. Brown, Brenda J. Smith, Dr. David P. Miller, Tom Odom, David B. Smith, Donna Pedroso, Ernest A. Lertola, Mary DeZellar, Haywood and Ann Gibbs, and Richard and Katheryn Holt are residents of Clemmons, North Carolina, who live in the vicinity of the selected route for Duke Power's proposed Peace Haven line, and have organized themselves into an unincorporated association known as the Blue Ridge Environmental Defense League, Inc., Friends of Blanket Creek Wetlands Chapter. Duke Power's surveyed right of way for the Peace Haven line will not actually cross the property of all of the Complainants, but instead will only cross the property of Complainants Thomas W. Brown and Brenda J. Smith.

3. Intervenors Robert L. Dalton, Jr., Harry R. Luther, William C. Sides, Jr., and Jerry D. Taylor are residents of Clemmons, North Carolina, and they intervened to oppose Complainants' proposed Route Q and to support Duke Power's selected route for the Peace Haven line. Each of these Intervenors live along Complainants' proposed Route Q, and Intervenor Sides' property is also crossed by Duke Power's selected route for the Peace Haven line.

4. In the fall of 1988, Respondent conducted its annual system capacity study that determined the need for a new transmission line and substation between Lewisville and Clemmons. The study indicated that a substation located at the intersection of Peace Haven and Harper Roads was ideally situated to allow new electrical circuits to be connected to existing ones and to accomplish electrical load relief at each of the four surrounding substations: Lewisville/Clemmons, Griffith Road, Advance, and Hawthorne Road Substations.

5. The electrical load growth in the area to be served by the new substation is approximately 6% per year, compared to the Respondent's system average of approximately 2% per year.

6. Duke Power plans to build a new 100kV substation near the intersection of Peace Haven and Harper Roads in Clemmons and purchased the substation property in the fall of 2002. The new Peace Haven Road substation is critically needed by the fall of 2005 to meet the high load growth in the Lewisville/Clemmons area. Without it there will be a serious degradation in power quality and service reliability in the area.

7. Duke Power plans to construct a 100kV transmission line, to be known as the Peace Haven Road 100kV Tap Line, from its existing Lewisville-Idols Tap 100kV Transmission line to the new Peace Haven Road substation. From the existing Lewisville Substation, Duke Power plans to build a 1.99-mile segment of this line to a point on its existing, unoccupied Lewisville-Idols

transmission line right of way, and then from there the Peace Haven line will connect to it and run 2.84 miles to the new substation.

8. Complainants are challenging Duke Power's planned location for the Peace Haven Road Substation and Peace Haven line and seek an Order preventing Duke Power from constructing the Peace Haven line along its selected route and requiring Duke Power to construct the Peace Haven line along Complainants' proposed Route Q.

9. The Commission has jurisdiction over this complaint pursuant to the Public Utilities Act. Although Duke Power does not have to seek a certificate from the Commission pursuant to G.S. 62-100 et. seq. since the Peace Haven line is less than 161kv, its actions surrounding its involvement with the public and its actions leading up to its construction are within the Commission's complaint jurisdiction.

10. The standard of review in complaints involving transmission line siting cases is whether the Respondent acted in an arbitrary and unreasonable manner in locating the transmission line and substation.

11. In April 2002, Duke Power contracted with Framatome ANP, Inc. (Framatome), to conduct a comprehensive siting study for the Peace Haven line. Framatome utilized the Duke Power Transmission Line Siting Process that has been used and continuously improved since 1989 to collect an array of environmental, engineering, land use, community, cultural resource, and regulatory data for an approximately 50-square mile initial study area. The study area was eventually narrowed to a 10.4 square-mile final study area and sixteen alternate routes were developed and considered.

12. The Duke Power Transmission Line Siting Process is a comprehensive, three-phase siting process that utilizes cutting-edge technology and public involvement to make siting decisions. Phase I of the siting process focuses on collecting land use, environmental, cultural, and aesthetic data that should influence the development of alternative routes. Phase II of the siting process entails a data weighting procedure to evaluate and compare the alternative routes on a quantitative and qualitative basis, and to score the alternate routes to determine which ones will minimize impacts across the broadest range of the comparative siting factors. This phase includes providing opportunity for public input in the form of workshops and surveys. The final part, Phase III of the process, involves conducting additional studies, obtaining licensing and seeking agency review, if required.

13. At the beginning of the site selection process, Framatome surveyed an initial fifty square mile area to determine the potential routes for the transmission line that would have the least impact on the community and, at the same time, would be economical for Respondent. Framatome looked at a long list of factors and land uses. Framatome used information primarily from readily available databases to create map layers to determine which areas should be excluded from further consideration.

14. Respondent used the National Wetlands Inventory (Wetlands Inventory) prepared by the U.S. Fish and Wildlife Service in determining the existence of wetlands near proposed routes. The Wetlands Inventory is based on high altitude aerial photography. The Wetlands Inventory did not have the precise location of the Blanket Creek Wetlands.

15. Respondent's transmission line siting process not only involves compilation of data from the Wetlands Inventory, but also uses satellite imaging from Digital Globe, Inc. The Wetlands Inventory database is inclusive of a vast amount of information, such as area property lines, FEMA flood zones, land use zones, and restricted airspace, to name a few. This information is very detailed and provides a basic overview of the area and its viability as a transmission line site location.

16. As part of the siting process, Respondent invited all property owners of record in the study area. Specifically, Respondent sent out 1,532 invitations for the first workshop. Two hundred fifty nine individuals attended the workshop on July 24, 2003, and two hundred eighty five surveys were completed and returned to Respondent. For the second workshop on September 25, 2003, Respondent sent out 1,656 invitations. Four hundred ninety six people attended the second workshop. The invitations included a map of the siting study and a community questionnaire that was used to gain insight into community priorities, concerns, and general information about any factor anyone believed should be considered in the siting study. During the community workshops, Respondent's representatives discussed the need for the project, the transmission line siting process, the data gathered from public and other sources, and also sought and incorporated input from the community as to factors that should be considered in the siting process.

17. After conducting its comprehensive siting process, Respondent selected the route for the Peace Haven line. Duke selected alternate Route D, which ranked first in the siting study and second in the cost analysis, out of the sixteen alternate routes.

18. Once Respondent learned that Complainants did not agree with its use of the Wetlands Inventory information, it encouraged them to submit information to be used for consideration.

19. Complainants paid to have a wetland delineation report completed and used in the transmission line siting process. Respondent received the report after the second community workshop. This information was placed in Respondent's database listing and applied in the Phase II line siting evaluation of the alternative routes. The revised weighting process utilizing Complainants' wetlands delineation report did not rule Route D out of consideration; instead it remained the highest ranked route.

20. Complainants' own witness, geologist Peter DeVries, who prepared their wetland delineation report, admitted that no bog turtles had been seen at the site. This confirmed what Respondent learned from its consultant Framatome. During the transmission line siting process, Framatome had researched rare, threatened, and endangered species and found none listed in the siting area, including bog turtles.

21. According to Respondent's engineering plans, no structures will be placed in the wetlands and the Peace Haven line will span the wetland area.

22. Respondent's plans have been reviewed by the U.S. Army Corps of Engineers and qualify for the Corps' Nationwide Permit No. 12 and its protective measures for wetlands. Respondent's expert, Scott Fletcher, testified before the Commission that there would be no environmental impact to the Blanket Creek Wetlands from the Peace Haven line and that there would be no direct or indirect impact to any potential bog turtle habitat.

23. Respondent's representatives met with elders from the New Hope Presbyterian Church to discuss their plans to build a recreational area. The church had no zoning or building permits for anything they proposed to build.

24. Respondent's policy for the information to be considered in the siting process is only to consider existing and approved land uses. As a result of this policy, Respondent did not assign constraint weights in its siting process for the church's proposed recreational area.

25. The Harper-Bullard Home Site (HB Home) includes a house, barn and corncrib and other acreage. The property on which these structures are located is owned by Mr. Robert Livengood. The HB Home property was, at one time, part of a larger 26.2 acre tract of land. At present, the HB Home site consists of 16.6 acres. The identified owners of this 16.6 acre tract are Mr. Robert

Livengood and Mr. and Mrs. Donald Byers. Mr. Livengood owns approximately five acres of the 16.6 acre tract and it is believed that the Byers own the remaining property.

26. Respondent and Framatome researched archaeological and architectural resources in the initial 50 square-mile study area. The HB Home had been surveyed in 1979 and was listed by the North Carolina Department of Cultural Resources – Office of Survey and Planning Branch as not eligible for the National Register. As a result, the HB Home was entered into the Respondent's siting database as "not eligible" for the National Register.

27. Thomas Brown submitted a National Register of Historic Places Study List Application for the HB Home to the State Historic Preservation Office on May 4, 2004, nearly six months after Respondent had selected Route D for the Peace Haven line and after the expedited hearing was continued at the Complainants' request.

28. Mr. Robert Livengood had not been consulted by Mr. Brown about his property being considered potentially eligible for the National Register. Mr. Livengood learned from the National Register that his property would be studied for further consideration. Mr. Livengood indicated that he did not want his property considered by the National Register. Mr. Livengood also testified at the hearing that Mr. Brown told him he wanted the HB Home added to the National Register study list simply to block Respondent from building the Peace Haven line across Brown's property.

29. Neither the surveyed Peace Haven line nor its right of way will cross the HB Home property owned by Mr. Livengood. The closest point to the HB Home will be approximately 126 feet away from the edge of the 68-foot-wide right of way. The proposed Peace Haven line does cross the larger 16.6 acre tract.

30. At the community workshops, the Complainants were free to view and photograph the data displayed at the workshop.

31. Respondent did not immediately respond to Complainants' request for additional information. Respondent was initially concerned about providing copies of the siting materials because it was the work product of its consultant, because smaller-scale versions of the data may not provide adequate detail, and because it did not want to distribute information to individuals who may not have the benefit of the explanations given at the community workshops.

32. Complainants' proposed Route Q was developed without consultation with any homeowners on that route. According to Respondent, the homeowners along Route Q, only learned of Complainants' proposal of using Route Q from the Commission's web-page. At no time did anyone visit their homes to inform them of the potential of the Peace Haven transmission line being installed in their area.

33. Respondent's initial comprehensive cost study for each alternate route shows that Route D's estimated costs of $3,231,090.00 ranked second lowest of all the alternate routes. According to Respondent, Route Q has estimated costs of $3,450,308.00, almost $219,218.00 higher than the selected Route D.

34. The Respondent's proposed scoring of the HB Home is reasonable and more realistic than the scoring proposed by the Complainants. In an attempt to address Complainants' concerns, Respondent also evaluated the alternative routes to reflect the revised status of the HB Home. When all appropriate revisions had been made to the scoring for Cultural and Natural Resource Factors for all routes and data from Complainants' wetland delineation report had been included, Route D possessed a total category score of 35.56 and Route Q possessed a total category score of 38.92. This placed Route D first in the siting study ranking while Route Q ranked seventh.

35. Respondent encountered a computer glitch while upgrading its software from ArcView to ArcGIS 8.3 Geographic Information System Software. This glitch impacted the scoring of historical resources on each of the alternate routes. Specifically, the software failed to properly transfer all electronically entered and stored cultural resource data to the evaluation step in the siting process where the original sixteen (16) alternate routes were compared and ranked on qualitative and quantitative basis. The result caused the scores of all the alternate routes in the Cultural and Natural Resources Factors evaluation category to be lower than they should have been.

36. Once Respondent became aware of the computer glitch, it repaired the problem and reran the scoring. Route D ranked first in the corrected siting analysis. The Commission finds no basis for the Complainants' contention that Respondent manipulated data to support the selection of Route D.

DISCUSSION AND CONCLUSIONS OF LAW

The Commission acknowledges that any public utility which intends to construct a transmission line does not have to seek a certificate of construction from the Commission if the transmission line is less than 161 kilovolts. G.S. 62-101. However, this does not mean that the size of the transmission line dictates whether the public utility's actions are necessarily outside the Commission's jurisdiction.

The Commission has long held that it has jurisdiction to hear and determine complaints against electric utilities involving the sitting of transmission and distribution lines under G.S. 62-42. In re State ex rel Util. Comm. v. Mountain Elect. Cooperative, 108 N.C. App. 283 (1992) (affirming denial of electric public utility's motion to dismiss for lack of jurisdiction over 69-kilovolt line siting dispute). See also, Crohn v. Duke Power Co., 78 N.C.U.C. 213 (1988) (affirming denial of electric public utility's motion to dismiss for lack of jurisdiction over 100-kilovolt line siting dispute); Gwynn Valley v. Duke Power Co., 78 N.C.U.C. 186 (1988) (same as to 44-kilovolt line siting dispute); Town of Kill Devil Hills v. Vepco, 73 N.C.U.C. 102 (1983). According to Commission precedent, the burden of proof in a complaint proceeding challenging a utility siting decision is upon the Complainants to show that Duke Power acted in an arbitrary and capricious manner in locating the new transmission line and substation on Peace Haven Road. Id. (See also Gwynn Valley, Inc. v. Duke Power, 78 N.C.U.C. 186 (1988); Town of Kill Devil Hills, v. Virginia Electric and Power Company, 73 N.C.U.C. 102 (1983).

Complainants argue that Respondent acted arbitrarily and unreasonably in its efforts to site a transmission line and substation in the Peace Haven area. Complainants claim that Respondent did not place sufficient weight on important community locations such as wetlands and historical sites, and that Respondent disregarded many significant landmarks in the Peace Haven area. The Complainants believe these factors would impact the route that was selected for the transmission line and substation, and they argue that, due to the Respondent's omission in considering important factors, its actions while undertaking the selection of Route D were arbitrary and capacious.

Complainants also allege that Respondent did not allow them a meaningful opportunity for input on the proposed alternative routes. They contend that Respondent had already made its decision on the route, without giving serious consideration to the Complainants' suggestions or other important factors in the community. As a result, the Complainants feel that the Commission should order Respondent to select another route other than Route D. In the alternative, Complainants argue that if the Respondent had applied the appropriate weights in its siting process, it would have found that Route Q was more appropriate than Route D.

Respondent, on the other hand, argues that it has gone above and beyond its duty to inform the Complainants of the options they have available to them. Respondent references the two meetings that were held to provide Complainants with insight concerning the siting plans, including

the area's need for the transmission line and substation and how it selected Route D. Moreover, Respondent indicates that it has been consistent in applying its criteria to the information it had available to it. Respondent denies any intentional effort to skew data in order to select one route over another and indicates that any oversight of later discovered information was inadvertent. Respondent argues that based on the scores from the final calculation, the route that it selected was appropriate.

The Intervenors, comprised of residents who reside along Route Q, argue that Route Q, if selected, would have much more detrimental impact on a greater number of people. The Intervenors agree with the Respondent's initial assessment that Route D is more appropriate. Intervenors understand that Complainants do not want the transmission line to cross their neighborhood and are attempting to get it placed in another area. Furthermore, the Intervenors argue that the Complainants' attempts to suggest Route Q as a more viable route are motivated by NIMBY (Not In My Back Yard) considerations and do not demonstrate genuine concern about the true impact that the transmission line and substation would have on a community.

Based on the evidence presented, including the testimony, reports, displays and pleadings, the Commission finds that Complainants have failed to meet their burden of proof. Specifically, the Complainants have not provided sufficient evidence to support their claim that Respondent's actions in siting the Peace Haven transmission line and substation in the proposed locations were arbitrary and capricious. Complainants have not even shown that they will be materially harmed by the project. Thus, it is clear that Respondent did not act arbitrarily and capriciously as to the process it followed in making the siting decision. On the contrary, Respondent followed a structured and rational decision-making process and reached a reasonable conclusion at the end.

Complainants have never disputed the need for the utility service in the relevant area. They recognized that due to the growth in southwestern Forsyth County there would be a need for expanded utility service. The need for the proposed facilities was confirmed by a 1998 system capacity study that indicated a need for a new transmission line and substation between Lewisville and Clemmons. The study indicated that the intersection of Peace Haven and Harper Roads was ideally situated to allow new electrical circuits to be connected to existing ones and to accomplish electrical load relief at each of the four surrounding substations: Lewisville/Clemmons, Griffith Road, Advance, and Hawthorne Road Substations. The electrical load growth in the area to be served by the new substation is approximately 6% per year, compared to the Respondent's system average of approximately 2% per year. Respondent determined that a delay in having the Peace Haven substation in operation by the fall of 2005 would result in serious degradation of power quality and service reliability to customers in the Lewisville/Clemmons area. As a result, the Commission finds that Respondent acted reasonably in determining its proposed location for the new route and substation.

Respondent has a transmission line siting process that it utilizes to determine which location it will utilize. This process is comprised of three phases that utilize cutting-edge technology and public involvement to make the siting decision. Phase I of the siting process focuses on collecting land use, environmental, cultural, and aesthetic data that should influence the development of alternative routes. Phase II of the sitting process entails a data weighting procedure to evaluate and compare the alternative routes on a quantitative and qualitative basis and to score the alternate routes to determine which ones will minimize impacts across the broadest range of the comparative siting factors. This phase involves conducting workshops to share information with the community. The final part, Phase III of the process, involves conducting additional studies, obtaining licensing and seeking agency review, if required.

According to the testimony, Respondent did not conduct the assessment itself. Instead, Respondent hired a consultant, Framatome ANP (Framatome), to conduct the siting process. The record establishes that Framatome first surveyed fifty square miles to determine the potential routes for the transmission line that would have the least impact on the community and at the same time

would be economical for Respondent. Complainants agree that Framatome looked at a long list of factors and land uses. Framatome used information primarily from readily available databases to create map layers to determine which areas should be excluded from further consideration. From its initial research, Framatome identified sixteen alternate routes which led to the substation. These routes were reviewed a second time and weights were assigned using the following categories: public visibility, FEMA flood zones, hydrography, wetlands, zoning, future land use, restricted airspace, cultural resources, potential cultural resources, land cover use, and occupied buildings. These routes were shown at the first community workshop and Respondent explained how it arrived at these possible transmission line routes. Respondent also further explained the transmission line siting process and encouraged resident participation through completing survey questionnaires and attending any future meetings. Respondent also forwarded questionnaires to residents along the routes that might be impacted. The questionnaires addressed issues such as environmental and community factors and requested that homeowners identify which were most important to them.

Once these proposed routes were further developed, Respondent held a second workshop to share its information with the community and to seek additional feedback. Respondent displayed maps and posters that highlighted the ranking of the alternate routes. At its second outreach meeting, Respondent displayed its route evaluation summary listing routes A-P. Homeowners were allowed to review the information and address the pertinent issues that they noticed. Several of the homeowners, who are now Complainants, realized that the route ranking highest on Respondent's siting plan passed through the general vicinity of their property. After receiving further explanation on how each route was selected, the Complainants alleged that Respondent neglected to consider certain factors as it related to the proposed Route D. Specifically, Respondent argued that additional weight should have been given to conditions along the proposed Route D such as the Blanket Creek Wetlands, which was not adequately delineated on Respondent's initial maps. Respondent encouraged the Complainants to submit all the information that they wanted Respondent to consider.

Complainants did submit supplemental information for Respondent's review and even proposed a seventeenth alternative, Route Q, which they claim would result in less environmental impact than Route D. After reviewing, Complainants' information and applying it in its Phase II evaluation, Respondent published a revised evaluation summary sheet with Route Q and corrections. This revised results still listed Route D as most favored and ranked Route Q seventh. In December 2003, Respondent announced that it would pursue Route D as its route for the transmission line siting. Soon after, Complainants charged that Respondent's process was fatally flawed and that it was arbitrary in its application of weights for the factors along the route.

Complainants took a specific look at Respondent's rankings of the routes and alleged that Respondent did not appropriately follow its weighting criteria. In Complainants' opinion, Respondent's failure to apply its weighting criteria consistently and to conduct adequate research on the factors in its process invalidates the ranking results. In support of its claims, Complainants identify several issues which they feel demonstrate how Respondent has not followed its own process and arbitrarily neglected to consider several factors along route D.

Complainants' first issue is that Respondent did not adequately consider the presence of the Blanket Creek Wetlands in its evaluation of the proposed Route D. Specifically, Complainants found fault with Respondent's use of the Wetlands Inventory, which is based on high altitude aerial photography and not designed to locate wetlands on the ground. According to Complainants, the Wetland Inventory was not accurate. It apparently did not have the Blanket Creek Wetlands accurately listed. It highlighted a pond and associated wetlands in the general area of Route D, but did not specifically show the entire Blanket Creek Wetlands area.

The Commission has reviewed Exhibit C submitted by Respondent regarding its transmission line siting process and has noticed that it not only involves compilation of data from the Wetlands Inventory, but also includes satellite imaging from Digital Globe, Inc. Although the information

considered by Framatome does not have the specific information pointed out by Complainants, it includes a vast amount of information such as area property lines, FEMA flood zones, land use zones, and restricted airspace areas, to name a few. This information is very detailed and provides a good overview of the area and its viability as a transmission line site location. The Commission concludes that Respondent's reliance on this source of information in the initial stages of the siting process was completely reasonable. Based on the information and its source, it would be unreasonable to expect Respondent to perform additional detailed wetland delineation reports on each proposed transmission line site at the very beginning of the process as Complainants have suggested. Moreover, the cost associated with such reports would be very high. It is reasonable for Respondent to rely on the information it obtained from the Wetlands Inventory and satellite imaging during the initial stage of the siting process.

Furthermore, Respondent accepted Complainants' wetland delineation report and used it in the transmission line siting process. Respondent received the report after the second community workshop. In order to adequately consider all the information available to it, Respondent placed the information its database listing and applied it in the Phase II line siting evaluation of the alternative routes. The revised weighting process did not rule Route D out of consideration; it remained the highest ranked route.

The Complainants further suggests that the Blanket Creek Wetlands along Route D is a potential habitat for the bog turtle. In spite of this claim, Complainants present no evidence to confirm the presence of bog turtles or any other endangered species. Complainants' own witness, geologist Peter DeVries, who prepared their wetlands delineation report, admitted that no bog turtles had been seen at the site. This confirmed what Respondent learned from its consultant Framatome. During the transmission line siting process, Framatome had researched rare, threatened, and endangered species and found none listed in the siting area, including bog turtles. Based on the testimony of Complainants' witness and the initial research conducting by Framatome, the Commission would not expect the Respondent to avoid an area that has not been proven to contain any protected wildlife.

Assuming that potential protected habitat did exist in the Blanket Creek Wetlands, Respondent's goal is to avoid any significant environmental disruption. Respondent's expert, Scott Fletcher, testified before the Commission that there would be no environmental impact to the Blanket Creek Wetlands from the Peace Haven line and that there would be no direct or indirect impact to any potential bog turtle habitat. Respondent on several occasions has indicated that, based upon its line surveying and preliminary line engineering, no structures will be placed in the wetlands. Instead, the Peace Haven line will span the wetlands area. Moreover, Respondent indicates that the project has been reviewed by the U.S. Army Corps of Engineers and qualifies for the Corps' Nationwide Permit No. 12 and its protective measures for wetlands. Thus, the Commission concludes that Respondent reasonably considered the wetlands and related information in the siting process.

The second issue raised by Complainants is that Respondent did not properly consider the New Hope Presbyterian Church (the church) and its plans for a recreational area in its criteria for selection. Complainants argue that the area owned by the church along Route D should have been excluded as noted in Respondent's weighing criteria. Instead, Respondent did not exclude the route and gave the church no weight in the site selection process. Complainants argue that, because no weight was applied to the church's plans, the property would still be considered as a potential route when it should not have been.

The Respondent had several meetings with church officials to discuss their proposed plans for a recreational area. However, the church had no clear timetable on start of construction or completion. Respondent researched the county's records and learned that no zoning or building permits had been sought by the church. Respondent's policy for inclusion in the siting process is to consider only existing and approved land uses. As a result of this policy, Respondent did not assign

constraint weights in its siting process for the church's proposed recreational area, which is the only portion of the church's property crossed by the proposed line. By not excluding the church property from consideration, Respondent followed its long standing policy not to assign constraint weights to development plans that have not been approved by local jurisdictions in the siting process.

The Commission views this as a reasonable policy. Respondent should not be expected to alter its established weighting process based on unconfirmed plans. No evidence was presented to suggest that the church or its congregation would be harmed or prejudiced if the transmission line was to go along Route D. The church has the option to build or not to build on that land. The line that would run along Route D is planned to cross the corner of the softball fields rather than the actual church and there is no reason to believe that the proposed line will unduly interfere with the church's use of its property.

The third issue raised by Complainants is that Respondent did not adequately consider the historical significance of the HB Home Site in its siting process. The original HB Home Site included 26.2 acres of woodland; however, the entire tract is no longer owned by a single owner. At present, the HB Home site consists of 16.6 acres. The identified owners of this 16.6 acre tract are Mr. Robert Livengood and Mr. and Mrs. Donald Byers. Mr. Livengood owns approximately five acres of the 16.6 acres and it is believed that the Byers own the remaining 11.6 acres. The structures identified as the Harper-Bullard house, barn, and corncrib are owned by Mr. Livengood.

According to Complainants, because the entire 16.6 acre HB Home Site is considered a potential historic site, any route which passes through it should be excluded from consideration. Specifically, this means that Route D would not even be ranked.

The Commission recognizes that the HB Home Site only recently became an area eligible for listing on the National Register of Historical Places. On May 4, 2004, Thomas Brown, a Complainant, submitted a National Register of Historic Places Study List Application for the HB Home Site to the State Historic Preservation Office. This was nearly six months after Respondent had selected Route D for the Peace Haven line and after the expedited hearing was continued at the Complainants' request.

The record reflects that Respondent's assessment of the HB house was appropriate at the time it was conducted. As part of the siting process, Respondent and its consultant researched archaeological and architectural resources in the initial 50-square-mile study area. Their results show that the HB house had been surveyed in 1979 and was listed by the North Carolina Department of Cultural Resources – Office of Survey and Planning Branch as not eligible for the National Register. As a result, the HB home was entered into the Respondent's siting database as "not eligible" for the National Register. Based on that reliable information, Respondent had no reason to consider the HB home of any historical significance.

The facts and circumstances show that the HB Home Site has just recently been identified as a potential historic site. Mr. Livengood, the owner of the HB house, was unaware that his property was under consideration for historical recognition. Mr. Brown had not consulted by Mr. Livengood about his property being considered potentially eligible for the National Registry. Mr. Livengood learned about this recognition in a letter from the National Registry that his property would be studied for further consideration. Mr. Livengood had previously expressed to Mr. Brown that he did not want his property placed on the National Registry. Mr. Livengood even testified before the Commission that Mr. Brown had his own motive for seeking to get the entire HB Home Site listed as historical. Specifically, he wanted the site added to the National Registry study list simply to block Respondent from building the Peace Haven line across Brown's property.

The Commission finds that Respondent's reliance upon the data from the North Carolina Department of Cultural Resources during the site selection process was reasonable. The entire

purpose of the siting process is to permit the making of appropriate decisions based on reasonably available information, which is what Respondent did in this instance. Moreover, the Complainants have not specified how the historical atmosphere of the HB house, barn and corncrib area would be disturbed or injured if Route D is selected. Respondent does point out that neither the surveyed Peace Haven line nor its right of way will cross the HB tract owned by Mr. Livengood. The closest point to the HB house will be approximately 126 feet away from the edge of the 68-foot wide right of way. As indicated in the record, only a small area of the HB Home Site has allegedly historic structures on it. The rest of the area is woodlands. Respondent will have to work with the agencies with jurisdiction over cultural resources to ensure that the proposed line will not harm the HB Home site before actually building the line. Thus, Respondent did not act unreasonably in dealing with the HB Home site.

The fourth issue raised by Complainants is that Respondent did not provide adequate opportunity for community input. Complainants claim that Respondent only allowed a week to submit information regarding the alternate routes, did not act quickly with respect to their requests for additional information and unduly burdened them with having to have wetland reports and other route studies performed to submit to Respondent for consideration in the transmission line siting process.

According to the record, at no time were any of the Complainants denied an opportunity to voice their concerns about the proposed route. On the contrary, Respondents held two meetings open to the Complainants. The first community workshop was held on July 24, 2003, and the second on September 24, 2003. Respondent sent out 1,532 invitations for the first workshop. Two hundred fifty nine individuals attended the first workshop. Respondent also received two hundred eighty five questionnaires. For the second workshop, Respondent sent out 1,656 invitations. Four hundred ninety six people attended the second workshop.

At both workshops, Respondent's staff discussed the project need, the study area, the siting process, homeowner concerns, and displayed an array of data that was mapped as part of the siting study. The Complainants were free to view and photograph the data displayed at the workshop. The testimony provided by Complainant Brenda Smith was that she stopped taking photos because she believed she would be able to get additional information from Respondent at a later date, not because of any action by Respondent. Although Complainant Smith had some difficulty getting individual copies of information, the Complainants ultimately received all information necessary to prosecute this complaint. Complainants do not now contend that they lacked adequate information to present their case.

The evidence shows that the siting evaluation process allows homeowners to address concerns they may have, particularly, if they feel a vital piece of information has been left out or overlooked. One of the most effective resources used by Respondent is the questionnaire which it sends out to the community. In this case, questionnaires were sent out with the invitations to the community workshops. Their overall purpose was to gain insight into community priorities, concerns, and general information about any factor anyone believed should be considered in the siting study.

It is obvious that the Complainants did not like Respondent's line siting process. Complainants, in their questionnaires, alerted Respondent that Route D crossed the Blanket Creek Wetlands. The information provided by Complainants was used in the transmission line siting process evaluation. This information about the Blanket Creek Wetlands was considered and placed in Respondent's database listing and applied in the Phase II line siting evaluation of the alternative routes. Contrary to Complainants' belief, the revised weighting process did not rule Route D out of consideration. In fact, it remained the highest ranked route. As noted above, Respondent acted reasonably upon receipt of this information.

Complainants appear to be upset because they had to invest funds in getting information such as wetlands delineation maps and other community information which they felt Respondent was responsible for producing. However, Complainants' responsibility in opposing the proposed transmission line is to show why Respondent's information is wrong or its evaluation process is faulty. This could mean that Complainants might have to rely on and fund studies and reports to support their allegations and share the information with Respondent and the Commission. Therefore, the Commission finds that it is not unreasonable for Respondent to expect Complainants provide information, if they really want the information considered and included in the transmission line siting process. Respondent should not be expected to conduct individual studies on each issue raised by Complainants, especially when it has relied on information that takes those factors into consideration early in the process and used that information in a consistent and reasonable way.

The fifth issue raised by Complainants is that Respondent considered too many potential routes and thereby caused disruption to many residents and the community. On the contrary, the Commission finds that Respondent's process has been adequate. The transmission line siting process calls for consideration of several potential routes. This process, in essence, exhausts the possible routes in order to provide an open view of how a route is evaluated and selected. Moreover, it gives residents some insight on how the process works and an opportunity to put forth an alternative route if they are not happy with the route selected by Respondent. This is just what Complainants did after learning that Respondent believed Route D was the best possible selection.

They reviewed the weighting criteria and proposed Route Q as a more appropriate route than Route D. Route Q apparently shares most of the segments of Respondent's Route C. This was a favored route supported by the Complainants, who claim it would have been found to be the most appropriate route had the Respondents properly weighted criteria in its siting process. Needless to say, Respondent's results score Route Q as third and Route D as first, while Complainants rank Route Q as first and Route D as sixth. Essentially, the Complainants suggest that if the Blanket Creek Wetlands and HB Home site were given sufficient weight, Route Q and Route C would have been equally good choices with considerably less impact on a number of the siting factors than Route D.

Complainants proposed Route Q without having consulted any homeowners on that route. According to Respondent, the homeowners along Route Q only learned of Complainants' proposed Route Q from the Commission's webpage. At no time did anyone visit their homes to inform them of the potential of the Peace Haven transmission line being built across their neighborhood.

The Commission finds that Respondent's use of sixteen alternative routes as reasonable. Any siting procedures should include multiple alternatives to ensure a reasonable decision. Considering sixteen routes provides Respondent several options if the initial Route D becomes no longer viable or the route is successfully opposed by Complainants. Moreover, by having an increased number of proposed routes, Respondent had open participation with the residents that were potentially impacted by the proposed routes. This opened the door to inclusion for the homeowners to get to review and comment on the transmission siting plans. The surveys and workshops provided the public with the ability to get involved and have an impact on which route was eventually selected. It is also reasonable for Respondent to consider its costs in selecting a route to place the transmission line. The Commission would not expect Respondent to pay to build a structure without considering its financial commitment to a project.

Lastly, the Complainants even suggest that Respondent manipulated the data in order to support its selection of Route D. Respondent admitted that it did encounter a computer anomaly during a software upgrade of ArcView 3.3 that impacted the scoring of historical resources on each of the alternate routes. Specifically, the software failed to properly transfer all electronically entered and stored cultural resource data to the evaluation step in the siting process where the original sixteen (16) alternate routes were compared and ranked on qualitative and quantitative basis. The result caused the scores of all the alternate routes in the Cultural and Natural Resources Factors evaluation

category to be lower than they should have been. However, once the problem was detected, Respondent repaired it and reran the scoring. Respondent's selected Route D still ranked first in the siting analysis. The Commission finds that Respondent acted reasonably in using a geographic information database to store and to evaluate its data. The evidence also supports a finding that Respondent acted appropriately in detecting it had a problem with the software and working expeditiously to get it resolved.

In its research, Respondent considered sixteen alternative routes. The evidence shows that Respondent carefully and diligently evaluated numerous routes prior to its selection of Route D. Respondent did seek feedback from the workshops. Respondent distributed and accepted completed surveys from all property owners of record in the study area and held discussions at the community workshops. Respondent followed up on the information it received from the community and incorporated it into the siting evaluation process. The data used demonstrates that the Respondent considered all of the concerns that were raised by the Complainants. Although Respondent was slow to respond to Complainants' request for information, there was no evidence that the Respondent was purposefully deceitful in any way. The reported rankings reasonably led the Respondent to the belief that Route D provided the least negative impact on the environment and community and was not expensive to build.

In an attempt to address Complainants' concerns, Respondent also evaluated the alternative routes using additional information provided by Complainants and weighted them in an appropriate manner. The Commission concludes that the treatment afforded to the HB Home site in Respondent's revised calculations is more appropriate than the scoring proposed by the Complainants. After implementing appropriate revisions on Cultural and Natural Resource Factors for all routes and the inclusion of data from Complainants' wetland delineation report, Route D possessed a total category score of 35.56 and Route Q possessed a total category score of 38.92. This placed Route D first in the siting study ranking while Route Q was listed as seventh. When Respondent ran the numbers under the initial evaluation, without revisions, it ranked Route D first, and Route Q was ranked third. Respondent also considered the costs associated with pursuing specific routes. Respondent's initial comprehensive cost study for each alternate route shows that Route D's estimated costs of $3,231,090.00 ranked second lowest of all the alternate routes. According to Respondent, Route Q has estimated costs of $3,450,308.00, almost $219,218.00 more expensive than the selected Route D. Thus, Route D remains the most appropriate even when the Complainants' contentions are appropriately considered.

Based on the above findings the Commission concludes that Complainants have failed to meet their burden of proof and that Respondent did not act arbitrary and unreasonable during its transmission line siting process for the Peace Haven line.

IT IS, THEREFORE, ORDERED that the complaints filed in this docket should and hereby are, denied.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of October, 2004.

NORTH CAROLINA UTILITIES COMMISISON
Gail L. Mount, Deputy Clerk

Ah102604.01

DOCKET NO. E-7, SUB 743

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Drew M. Dixon, 1930 Dunmore Lane, Clemmons, North Carolina 27012, et al., Complainants	)	ORDER DENYING COMPLAINANTS' MOTION FOR RECONSIDERATION
v.	)	
Duke Power, a Division of Duke Energy Corporation, Respondent	)	

BY THE COMMISSION: On November 22, 2004, Complainants in the above identified docket made a filing with the Commission, requesting that the Commission reconsider its Order Denying Complaint filed October 26, 2004. In the alternative, the motion requests that the Commission amend the language in its Findings of Fact Nos. 21, 22 and 28.

On November 30, 2004, Duke Power filed a response in opposition to Complainants' motion for reconsideration. This was followed by a filing by Complainants submitted on December 3, 2004, replying to Duke Power's response to their motion for reconsideration.

Absent any new evidence or argumentation in this docket, the Commission will not rescind, alter or amend its ruling. The Complainants, in this matter, have not submitted any new information or argumentation for the Commission to consider. Instead, the Complainants have simply argued on a conclusory basis that the Commission erred when it decided this matter. Given the absence of any specific allegation of error in the Commissions' initial order, the Commission sees no reason to reconsider its decision.

Alternatively, the Complainants have requested that the Commission place some requirements upon Duke Power to ensure that it complies with the assertions in its pleadings. The Commission does not intend to dictate the exact manner which Duke Power builds its transmission line and substation. However, Duke Power has made certain representations to the Commission in this docket. The Commission expects Duke Power to comply with any representation which it has made in the absence of good cause for doing otherwise. In the event that Duke Power feels unable to construct the proposed facilities consistently with the representations made to the Commission in this proceeding, it should immediately inform the Commission of that fact.

Furthermore, the Commission's order does not absolve Duke Power from complying with its various legal obligations in building its transmission line and substation. Specifically, if Duke Power has to comply with any environmental, historic preservation, or other legal obligations, the Commission's decision should not be construed as exempting Duke Power from complying with any such requirements. On the contrary, the Commission expects Duke Power to obtain any necessary permits needed to support construction of the proposed facilities and assumes that the agencies responsible for issuing those permits will take any necessary enforcement action. The Commission will not, for this reason, attempt to prescribe what actions Duke Power must take to comply with other regulatory regimes or to superintend Duke Power's compliance with rules and regulations administered by other agencies.

After reviewing these filings and the applicable law, the Commission denies Complainants' motion to reconsider order denying complaint. The Commission also denies Complainants' request to amend Findings of Fact Nos. 21, 22 and 28.

IT IS SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 23rd day of December, 2004.

NORTH CAROLINA UTILITIES COMMISISON
Gail L. Mount, Deputy Clerk

Ah122104.11

DOCKET NO. E-22, SUB 411

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Herbert S. Corey, 313 Scottish Court, Greenville, North Carolina 27858, Complainant	)	RECOMMENDED ORDER DENYING COMPLAINT
v.	)	
Dominion North Carolina Power, Respondent	)	

HEARD ON: Tuesday, December 16, 2003, at 10:00 a.m. in Room B, Sheppard Memorial Library, 530 Evans Street, Greenville, North Carolina

BEFORE: Hearing Examiner Sam Watson

APPEARANCES:
For Herbert S. Corey:
No attorney of record

For Dominion North Carolina Power:
William H. Baxter II, McGuireWoods LLP, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030

WATSON, HEARING EXAMINER: On September 22, 2003, Herbert S. Corey (Complainant) filed a Complaint against Dominion North Carolina Power (Dominion) requesting that Dominion delete an entry concerning a Dominion account from his credit report, refund the sum of $2,007.00 that he had paid on this Dominion account, and issue him a written apology. On October 15, 2003, Dominion filed an Answer and Motion to Dismiss. Dominion's Answer was served on the Complainant, who requested a hearing.

The case came on for hearing, as ordered, on December 16, 2003. The Complainant testified on his own behalf; Sandy Craft testified on behalf of Dominion.

Based upon the pleadings, testimony and exhibits received into evidence at the hearing, and the record as a whole, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Respondent, Dominion, is a public utility providing electric utility service to customers in North Carolina subject to the jurisdiction of the Commission.

2. Mr. Corey contacted Dominion in August 2000 and requested that it provide electric service in his name to rental property he owns at 1054 Country Club Drive, Williamston, North Carolina 27892.

3. On or about August 29, 2000, Dominion turned on electric service at the property and established a billing account in Mr. Corey's name.

4. Shortly after electric service was turned on, Mr. Corey rented the property to Ms. Glendora Lee.

5. Mr. Corey asked the tenant, Ms. Lee, to contact Dominion to have the billing account for electric service transferred into her name.

6. Ms. Lee did not contact Dominion to have the billing account for electric service transferred, and it remained in Mr. Corey's name.

7. There was nothing preventing Mr. Corey from contacting Dominion to ensure that the billing account for electric service at the property had been transferred to Ms. Lee's name.

8. During the period of Ms. Lee's tenancy, Mr. Corey was aware, through visits to the property to collect rent, that Dominion was providing electric service at the property.

9. Ms. Lee failed to make timely payments on the electric bills. As a result, Dominion sought to disconnect the service on several occasions.

10. Each time Dominion sought to disconnect service for nonpayment, Ms. Lee would contact the utility, agree to a payment plan, and make a partial payment on the delinquent account. Based upon her actions, Dominion continued to provide service to the property.

11. On or about July 13, 2001, after Ms. Lee vacated the property, Mr. Corey contacted Dominion and requested that it turn off electric service.

12. Dominion turned off electric service at the property on or about July 24, 2001, as requested by Mr. Corey.

13. Dominion mailed Mr. Corey a final bill showing the payment history and amount due on the 1054 Country Club Drive account, which he received.

14. The final balance due for electric service at the property from August 2000 to July 2001 was $2,007.74, of which Mr. Corey paid $2007.00 on or about August 26, 2003.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

The evidence in support of the findings of fact is found in the testimony and exhibits of the Complainant and Dominion witness Craft.

In his Complaint, Mr. Corey alleges that Dominion erred as follow: (1) "continu[ing] to provide power beyond the one week request"; (2) "not sending the bill to the person and address requested in the beginning as they had in the past"; (3) "discussing the bill with someone who said she was my wife with no identification except an account number which was provided by the power company by sending the bill to the wrong address"; and (4) "violating its own policy of going beyond the cut-off date when a bill reached an unbelievable amount." As relief, Mr. Corey requests that Dominion: (1) "remove the entire entry from Equifax and on line collections"; (2) "return my

$2007.00"; and (3) provide "some form of written apology for the actions taken and for the 100's of hours I have spent on this matter."

It is uncontroverted that in August 2000, in order to prepare his property for rental, the Complainant contacted Dominion and requested that it turn on electric service at 1054 Country Club Drive. The Complainant soon thereafter rented the property to Ms. Glendora Lee without a written lease. The Complainant did not intend the rental amount to include electric service, and asked his new tenant to contact Dominion to have the account placed in her name. Ms. Lee, however, did not contact Dominion as requested. Thus, the account for electric service at the property remained in the Complainant's name. Ms. Lee fell behind in her payments, both to Dominion and to the Complainant, and ultimately vacated the property. Upon re-entering the property in July 2001, the Complainant found the unpaid electric bills and contacted Dominion to discontinue service. The final balance due on this account was $2,007.74, of which the Complainant later paid $2007.00 when the issue was raised in connection with an unrelated credit transaction.

Turning to the primary issue in this case, the Complainant testified that when he requested electric service in August 2000 he specifically requested that Dominion only provide service "for one week." Thus, the Complainant argues that Dominion should be held responsible for any bills after the date at which it should have, at his request, discontinued service. On cross-examination, the Complainant admitted that although there was nothing preventing him from contacting Dominion to confirm that the account for electric service had been transferred to Ms. Lee's name, he did not contact Dominion regarding electric service during the period of Ms. Lee's tenancy.

Dominion witness Craft testified that Dominion has no record of any request for limited service by the Complainant. Ms. Craft testified that Dominion established the billing account in the Complainant's name as he initially requested. Because no one contacted Dominion to transfer the account to Ms. Lee's name, the Complainant remained responsible for this account. Dominion argues that by asking Ms. Lee to contact Dominion and by not contacting Dominion himself, the Complainant assumed the risk that Ms. Lee would not contact Dominion to have the account transferred to her name and, therefore, that the Complainant would continue to be responsible for payments on the account. Ms. Craft further testified that on previous occasions when the Complainant was preparing the property to rent and had contacted Dominion for electric service, service remained on for more than one week. Thus, argues Dominion, it is not reasonable to believe that the Complainant would have in fact requested that service be provided for only such a short time on this occasion.

It is axiomatic that a utility customer is responsible for paying for the electricity actually consumed on his or her account. See, e.g., Recommended Order Denying Complaint, In the Matter of Ginny and Ed Dudek, Docket No. E-7, Sub 635 (1999). As stated in Section II.B of Dominion's service regulations approved by the Commission, an applicant for service, "by accepting electricity, agrees to . . . [b]e bound by the applicable rate schedule(s) and terms and conditions which are currently on file with the Commission." Section XIV.C further provides that "[e]lectricity is supplied by the Company and purchased by the Customer." The Commission's Rules and Regulations state that "bills for utility service are due and payable as of the billing date [or] upon receipt," Rule R12-9, and provide for disconnection upon nonpayment. Rule R12-11.

In a similar complaint case before the Commission, a landlord argued first that he contacted the utility and requested that the service be transferred to an account in the name of his new tenant and second that, even without such a request, the utility should look to the tenant for payment once a lease is signed. Recommended Order Denying Complaint, In the Matter of Brian Carr, Docket No. E-7, Sub 606 (1997). The Hearing Examiner in that case concluded that the complainant had not established that the call was in fact made and that a lease by itself only establishes a relationship between the landlord and the tenant. The lease "does not establish the relationship between Duke [the utility] and its customers; that relationship must be established by applications for service and disconnections made to Duke."

In the instant case, the Hearing Examiner similarly concludes that the Complainant has failed to carry his burden of proof and that the Complaint should be denied. First, the Complainant has not established to the Hearing Examiner's satisfaction that Dominion was requested to discontinue electric service after only one week at the time service was initially requested in August 2000. Dominion contends that it has no record of the Complainant's request that the electricity be turned on only for such a limited period of time. Moreover, the billing history for 1054 Country Club Drive indicates that the Complainant often took service for more than one week between tenants. Second, the Hearing Examiner concludes that it is a landlord's responsibility to ensure that the utility is notified in the event rental property is leased and the new tenant is to be obligated to pay for electric service. Where, as in this case, the landlord relies upon the tenant to notify the utility, he does so at his own risk that the tenant will fail to do so. Until so notified, the utility has no way of knowing that the property has been leased or that the customer who originally applied for service is no longer responsible for payment. In this case, the Hearing Examiner finds that the Complainant should have contacted Dominion and requested that service in his name be terminated or at least followed up with the utility to ensure that his tenant had done so. The Complainant failed to do so in this case and, therefore, remains responsible for paying for the electric service at 1054 Country Club Drive.

The Hearing Examiner similarly finds little merit in the Complainant's remaining contentions. First, even had Dominion sent the Complainant's bills to the property being served rather than the Complainant's home address in error, it is incumbent upon the Complainant to inquire as to why he has not been billed after a reasonable period of time. The Complainant cannot avoid paying for electricity actually consumed because of such an error. Second, although Dominion may have been deceived as to the identity of the caller (or not fully inquired) when disconnection notices were addressed and payment plans established, the Hearing Examiner is reluctant to fault the utility for attempting to work with one of its customers to make payment arrangements and avoid disconnection. Had the Complainant properly contacted the utility at the beginning of the lease, he could have avoided any obligation for the continued electric service at the property.

Thus, the Hearing Examiner agrees with Dominion that because no one contacted the utility to transfer the account for 1054 Country Club Drive to Ms. Lee's name, the Complainant remains responsible for payment on this account. By asking Ms. Lee to contact Dominion and by not contacting Dominion himself, the Complainant assumed the risk that Ms. Lee would not contact Dominion to have the account transferred to her name. The Complainant, therefore, remains responsible for paying the Dominion account in his name for electric service at 1054 Country Club Drive.

IT IS, THEREFORE, ORDERED that the Complaint filed by Herbert S. Corey against Dominion North Carolina Power in this proceeding be, and the same hereby is, denied.

ISSUED BY THE ORDER OF THE COMMISSION
This the 14th day of May, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Ah051404.01

DOCKET NO. E-7, SUB 751

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application of Duke Power for Authorization to Share Net Revenues from Certain Wholesale Sales) ORDER APPROVING SHARING ARRANGEMENT

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

BY THE COMMISSION: On May 17, 2004, Duke Power, a division of Duke Energy Corporation (Duke Power or Company), filed an application for approval, pursuant to G.S. 62-133.6(e)(2), of a proposal to share an amount equal to 50% of a North Carolina retail allocation of net revenues derived from certain of its wholesale sales of bulk power as follows: (1) $5 million per year through Duke Power's Share the Warmth, Cooling Assistance, and Fan-Heat Relief programs and the Community and Technical College Challenge Grant Fund for worker retraining and (2) the remainder through a reduction in the kWh rate for each block in rates charged Duke Power's industrial customers in North Carolina. This proposal is referred to in the application as the Sharing Arrangement. Details of the proposed methodology are shown on Exhibit 2 of the application. A proposed Adjustment for Net Revenues from Wholesale Sales Rider is attached to the application as Exhibit 3. On May 25, 2004, Duke Power filed Exhibit 3 Revised. The Rider is applicable to customers served under Duke Power's Schedules I, IT, OPT, MP, HP, or PG in establishments classified as "Manufacturing Industries" by the Standard Industrial Classification Manual published by the United States Government and where more than 50% of the electric energy consumption is used for manufacturing processes.

In its application, Duke Power states that it filed the application pursuant to G.S. 62-133.6(e)(2) because the reduction in industrial rates might be viewed as a change in base rates that would otherwise be impermissible under the rate freeze provisions of the Clean Smokestacks Act. G.S. 62-133.6(e)(2) permits the Commission, consistent with the public interest, to "[a]pprove any reduction in a rate or rates applicable to a customer or class of customers during the rate freeze period [under the Clean Smokestacks Act], if requested to do so by an investor-owned public utility that is subject to the emissions limitations in G.S. 143-215.107D."

Duke Power refers to wholesale sales under its authority to engage in wholesale power transactions at market-based rates as Bulk Power Marketing or BPM Sales. To date, such sales are made on a short-term non-firm basis to wholesale customers inside and outside Duke Power's retail service area. For purposes of the Sharing Arrangement, Duke Power defines BPM Net Revenues as follows:

Gross revenues from BPM Sales,

Less

Incremental Costs, defined as incremental costs associated with the BPM Sales, as determined by a post event dispatch model that assigns the lowest cost generation to serve retail and cost-based wholesale load. The incremental costs shall include the fuel costs, variable O&M costs, and emissions allowance costs as determined by the post event dispatch model, the transmission costs associated with said sales, an allocation of wholesale business personnel costs, and the net impact of any hedges entered into on behalf of said transactions.

By its application, Duke Power proposes to determine BPM Net Revenues available for rate reductions for North Carolina industrial customers using the following formula:

> Amount Available for Sharing = (0.5 X BPM Net Revenues X allocation factor for NC Retail Customers) – ($5,000,000 X number of months in the Net Revenue Calculation Period/12).

Thus, if BPM Net Revenues are less than or equal to zero, no rate reductions will occur. If the North Carolina allocation of 50% of BPM Net Revenues is more than zero but less than or equal to $5 million, no rate reductions for industrial customers will occur. If the North Carolina allocation of 50% of BPM Net Revenues is greater than $5 million, industrial customers will receive rate reductions based on the remainder of the North Carolina allocation.

BPM Net Revenues on BPM Sales made beginning January 1, 2004, and continuing until the earlier of January 31, 2007, or the effective date of any rates approved by the Commission after a general rate case under G.S. 62-134 or G.S. 62-136, will be subject to the Sharing Arrangement. This period is referred to as the Net Revenue Calculation Period. The Sharing Arrangement will be implemented through contributions to the community assistance and worker training programs and a rate decrement that will begin initially with the next calendar month that occurs 60 days after the order approving the Rate Adjustment Rider and thereafter six months after the conclusion of each applicable Net Revenue Calculation Period. This period is referred to as the Sharing Period. If the sharing arrangement is terminated prior to December 31, 2007, the Net Revenue Calculation Period will continue until the date of termination and will be shared through the applicable Sharing Period.

In support of its application, Duke Power states that the lingering effects of the economic downturn have resulted in significant losses of manufacturing jobs and business in the two Carolinas and this has affected Duke Power's sales of electricity in the two states. Duke Power has initiated programs to stimulate new industrial development in its service area and now seeks to help established industries and save jobs by providing some relief to industrial customers during the recovery period, believing that a healthy industrial base is good for all of its customers. In addition, the Sharing Arrangement will enhance relief already being provided through community assistance and will give needed impetus to job training. Duke Power further states that the Sharing Arrangement is consistent with the public interest as it will bring a measure of relief to industry in the State and will foster an environment that will encourage Duke Power to promote BPM Sales and participate in the competitive wholesale energy market.

On May 28, 2004, the Carolina Utility Customers Association, Inc. (CUCA) filed a Petition to Intervene and Protest in this docket. CUCA's petition to intervene was allowed by Order dated June 1, 2004. By its protest, CUCA requested that the Commission schedule an evidentiary hearing and request comments and reply comments from interested parties to identify the scope and types of issues to be addressed in an evidentiary hearing.

Letters in support of Duke Power's proposal were filed with the Chief Clerk by representatives on behalf of the Manufacturing Business Alliance of the Charlotte Chamber, Parkdale Mills, Gulistan Carpet, American & Efird, Inc., Barnhardt Manufacturing Company, Goulston Technologies, and Carolina Mills, Inc.

The Commission considered this matter at the Regular Commission Conference held on June 1, 2004. The Public Staff set forth a detailed explanation of the application in its written agenda item. The Public Staff noted that the application is silent on the amount of BPM Net Revenues that Duke Power may derive during a particular year, as the volume of such sales depends on a number of variables. By way of example, however, Duke Power has indicated to the Public Staff that a North Carolina allocation of BPM Net Revenues of $20 million will result in an average reduction in industrial rates of approximately 2.2%. According to Duke Power, if the $20 million were shared

with all customers on a per kWh basis, the reduction for a residential customer using 1000 kWh per month would be approximately 0.51% or $4.65 per year.

According to the Public Staff, Duke has represented that the industrial rate reduction under the Sharing Arrangement will not affect jurisdictional retail revenues reported in Duke Power's quarterly ES-1 reports. However, the application indicates that Duke Power will report BPM Net Revenues separately from jurisdictional retail operations in its quarterly ES-1 Reports beginning with the report for the twelve months ended March 31, 2004. In other words, 100% of what would otherwise have been a North Carolina retail allocation of BPM Net Revenues will be reported as wholesale revenues. This manner of reporting differs from the way Progress Energy Carolinas and Dominion North Carolina Power have consistently reported short-term market-based wholesale transactions, as well as the way Duke Power reported such transactions in 2003. Pursuant to discussions with the Public Staff, in which the Public Staff objected to the exclusion of BPM revenues from revenues reported for all jurisdictions, Duke Power previously agreed, beginning in 2003, to change its reporting prospectively.

The Public Staff stated that it does not agree with the present reporting change but, because of the Sharing Arrangement, will withhold opposition until the end of the Net Revenue Calculation Period, noting that the Commission retains the ability to include BPM Net Revenues in jurisdictional retail operations for purposes of calculating Duke Power's earned rate of return.

With respect to the distribution of BPM Net Revenues up to $5 million per year, the Public Staff stated that it recognizes the uniqueness and voluntary nature of the Sharing Arrangement and believes that a distribution in the form of charitable contributions is not unreasonable in this instance. The Public Staff notes that Duke Power does not intend to treat these charitable contributions as utility operating expenses for ratemaking purposes. In the application, Duke Power leaves to the Commission's discretion the allocation of the $5 million of BPM Net Revenues between community assistance and job training programs. The Public Staff recommended the allocation of $2 million annually to the Share the Warmth, Cooling Assistance, and Fan Relief programs and $3 million annually to the Community and Technical College Challenge Grant Fund, or a pro rata share if the North Carolina allocation of BPM Net Revenues is less than $5 million per year. This will greatly increase the funds available to local agencies to assist low-income customers, while accelerating the development of worker training by community and technical colleges in Duke Power's service area. The Public Staff stated that it believes that such an allocation is particularly appropriate given the challenges facing North Carolina's labor force in today's economy.

The Public Staff recommended that an Order be issued approving the Sharing Arrangement, with the first $5 million per year of the North Carolina allocation of BPM Net Revenues allocated to community assistance and job training programs as described above. The Public Staff further recommended that the Order state that the approval is granted because Duke Power is subject to the rate freeze imposed by the Clean Smokestacks Act and should not be interpreted as the endorsement of the unique provisions of the sharing proposal in any other context.

Ms. Margaret Force, Assistant Attorney General, appeared on behalf of the North Carolina Department of Justice at the Regular Commission Conference to express three points. First, the Attorney General's Office believes that, should the Commission grant the application, the Order should make clear that the mechanism does not set a precedent for future proceedings concerning the reporting change Duke has proposed. Second, the arrangement also should not set a precedent concerning the percentage of such BPM revenues that are properly shared with ratepayers. Third, when the Commission considers how to distribute the first $5 million in ratepayer money, the Attorney General's Office notes that utility bill assistance and weatherization programs are related to utility service and would therefore be appropriate to fund with ratepayer money.

James P. West appeared as counsel for CUCA in opposition to the application and the Public Staff's recommendation. Mr. West reiterated and discussed the points set forth in CUCA's petition to intervene and protest.

Robert W. Kaylor appeared as counsel for Duke Power in support of the Company's application.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission finds good cause to approve Duke Power's application as filed, subject to the Public Staff's recommendation to allocate $2 million annually to the Share the Warmth, Cooling Assistance, and Fan Relief programs and $3 million annually to the Community and Technical College Challenge Grant Fund, or a pro rata share if the North Carolina allocation of BPM Net Revenues is less than $5 million per year. The Commission hereby approves the application for the reasons put forth by the Company, the Public Staff, and the Attorney General in their written and oral presentations regarding this matter. The Commission finds no basis to grant the relief requested by CUCA because CUCA has not raised compelling issues in support of its protest and request for an evidentiary hearing.

Duke Power's proposal, which has the general support of the Public Staff, the Attorney General, and several of the Company's industrial customers, is fair and reasonable. It will offer significant rate relief to Duke Power's industrial consumers in North Carolina as well as significant benefits to low-income consumers and workers in need of training to promote economic development in North Carolina and Duke Power's service area in particular. Thus, the Commission believes that Duke Power's application is in the public interest and should be approved as filed.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 9th day of June, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Ah060904.02

DOCKET NO. E-7, SUB 751

CHAIRMAN JO ANNE SANFORD, AND COMMISSIONERS SAM J. ERVIN, IV, LORINZO L. JOYNER, AND JAMES Y. KERR, II, CONCURRING: Although we fully concur in the Commission's decision, we write separately to address a number of issues that we believe to be important to a proper decision in this proceeding. At the beginning, however, we wish to express our strong support for Duke's proposal. Duke's filing seeks to accomplish a number of worthy objectives, including providing heating and cooling assistance for lower income customers, enhancing job training opportunities in the Company's franchised service territory, and reducing industrial rates at a time when North Carolina's manufacturers and their employees are suffering from significant economic hardship. We strongly support efforts to achieve all of these objectives and join our colleagues in voting to approve Duke's innovative and timely proposal.

Our decision to support Duke's proposal is significantly affected by the impact of the Clean Smokestacks Act on the Commission's regulatory authority. The Commission cannot adequately decide this proceeding without due attention to this important legislation, which is intended to result

in major reductions in the amount of oxides of nitrogen and sulfur dioxide emitted into our atmosphere from coal-fired generating units financed by a rate freeze. CUCA essentially urged us to reject Duke's proposal in the implicit hope that the Commission would eventually convene a general rate case and reduce Duke's industrial rates at the conclusion of such a proceeding. This alternative, however, suffers from a serious practical limitation. Under the Clean Smokestacks Act, Duke's base electric rates are frozen until December 31, 2007, unless Duke consents to a rate reduction pursuant to G.S. 62-133.6(e)(2) or one of the other exceptions to the rate freeze set out in G.S. 62-133.6(e) becomes applicable. Although G.S. 62-133.6(e)(1)d allows the Commission to reduce Duke's base rates in the event that the Company "persistently earns a return substantially in excess of the rate of return established and found reasonable . . . in the . . . utility's last general rate case," any attempt to involuntarily reduce Duke's base rates under this "overearnings" exception is likely to be seriously contested and involves all of the uncertainties associated with protracted litigation. As a result, any attempt to achieve rate reductions under G.S. 62-133.6(e)(1)d is unlikely to produce near-term relief for Duke's customers. Thus, approval of Duke's proposal strikes us as the most expeditious way of lowering rates for Duke's North Carolina retail industrial customers and obtaining other customer benefits.

In addition, we are not convinced that approval of Duke's proposal would significantly affect the ability of CUCA or any other interested party to seek reductions in Duke's rates pursuant to G.S. 62-133.6(e)(1)d. According to representations Duke made to the Attorney General and the Public Staff and on the record before the Commission, Duke's quarterly earnings reports will continue to provide sufficient information to permit interested parties to calculate Duke's return both with and without consideration of the Company's BPM revenues. The Commission has not rendered an opinion concerning the substantive appropriateness of excluding these revenues from the calculation of Duke's return for purposes of any regulatory proceeding except this one. Furthermore, nothing in the Commission's order alters the burden of proof applicable to any filing under G.S. 62-133.6(e)(1)d or any other relevant statutory provision. As a result, CUCA and other interested parties retain the right and the unimpaired ability to make a filing with the Commission seeking any rate adjustment authorized by law following the issuance of this order.

Finally, we see no need to convene an evidentiary hearing for the purpose of evaluating Duke's proposal. As far as we can tell, the extent to which this matter should be set for an evidentiary hearing is a matter committed to the Commission's sound discretion. G.S. 62-134(b). As a general proposition, we agree with CUCA that the decision as to whether to convene an evidentiary hearing should depend upon the extent to which material factual issues must be resolved in order to decide this proceeding. After carefully reviewing the list of issues that CUCA submitted in seeking the convening of an evidentiary hearing, we agree with our colleagues that these issues involve questions of regulatory policy that can be decided on the basis of the existing record rather than a set of factual disputes of the sort typically considered in the context of an evidentiary hearing. Thus, we see no need to convene an evidentiary hearing as a prerequisite for considering Duke's proposal on the merits.

Our strong support for Duke's proposal should not, however, obscure our position with respect to certain important questions. As a result, we would like to make the following comments with respect to Duke's proposal and the Commission's acceptance of that proposal without in any way prejudging any issue that may come before us in the future, so that all interested parties are properly apprised of our thinking concerning these issues as we go forward with the implementation of Duke's proposal:

1. As has already been noted, the Commission has not approved Duke's proposed method for future reporting of BPM revenues separate and apart from the other components of the current filing. In the absence of the current rate freeze and based on currently-available information, we believe that the manner in which Duke included these BPM revenues in its 2003 quarterly reports, which is consistent with the manner in which both Dominion and Progress Energy Carolinas have

reported such revenues to the Commission, appropriately reflects Duke's jurisdictional revenues. As a result, we are inclined to believe that Duke should include 100% of these BPM revenues in determining its North Carolina retail jurisdictional revenues in all ES-1 quarterly reports filed with the Commission after the conclusion of the Sharing Period.

2. Duke acknowledged to the Commission that it had agreed with the Public Staff and the Attorney General that Duke's quarterly reports would contain sufficient information to permit a determination of Duke's North Carolina retail returns both with and without the inclusion of BPM revenues in the calculation of those returns. In the event that future Duke quarterly reports fail to provide sufficient information to permit the Commission and other interested parties to determine the returns that Duke earns on service to its North Carolina retail customers both with and without these BPM revenues, the Commission has the authority to require Duke to provide this information and should not hesitate to do so.

3. We do not understand anything in the Commission's decision to impair the right of any party to seek any appropriate rate reduction under G.S. 62-133.6(e)(1)d or any other applicable provision of law. As we have already noted, the Commission's decision does not contain a substantive determination as to the manner in which BPM revenues should be considered in resolving any proceeding brought pursuant to the "overearnings" exception to the rate freeze imposed by the Clean Smokestacks Act. In addition, the Commission's decision does not alter the burden of proof applicable to proceedings conducted pursuant to G.S. 62-133.6(e)(1)d. Thus, the Commission's decision should not be understood to adversely affect any party's rights in any future "overearnings" proceeding.

4 Finally, we note that the Commission retains the authority to revisit the matters at issue in this proceeding pursuant to G.S. 62-80. According to G.S. 62-80, the Commission may reconsider any decision at any time, either at the request of a party or on its own motion. In the event that Duke's proposal fails to achieve the goals described in the Company's application or otherwise become inappropriate, the Commission should not hesitate to reexamine the result reached here and adopt some other approach to address the concerns that motivated Duke's filing for implementation on a prospective basis. As a practical matter, no such reexamination should be initiated for at least one year in order to give the approach adopted in this order a chance to succeed.

Thus, for all of these reasons and subject to these understandings, we concur in the Commission's decision to approve the proposal submitted by Duke in this proceeding.

\s\ Jo Anne Sanford
Chairman Jo Anne Sanford

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

\s\ Lorinzo L. Joyner
Commissioner Lorinzo L. Joyner

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

DOCKET NO. E-22, SUB 412

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Dominion North Carolina Power –	)	ORDER ALLOWING PETITION,
Investigation of Existing Rates and	)	ESTABLISHING INVESTIGATION,
Charges	)	AND SETTING HEARING

BEFORE: Chairman Jo Anne Sanford and Commissioners J. Richard Conder, Robert V. Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II, and Michael S. Wilkins

BY THE COMMISSION: On January 29, 2004, the Public Staff – North Carolina Utilities Commission (Public Staff) filed a Petition requesting that the Commission (1) institute an investigation pursuant to G.S. 62-130(d), -133, -136(a), and -137 into the existing rates and charges in effect for Dominion North Carolina Power (NC Power or Company) for the purpose of determining if they are unjust and unreasonable and, if they are determined to be unjust and unreasonable, determine the just and reasonable rates that NC Power should be allowed to charge thereafter; (2) require NC Power to file, no later than May 1, 2004, a Rate Case Information Report (NCUC Form E-1) for the 12 months ended December 31, 2003; (3) require NC Power to appear before the Commission and show cause, in the form of prefiled testimony and exhibits to be submitted no later than May 1, 2004, why its existing rates and charges should not be found unjust and unreasonable and reduced on service rendered thereafter; and (4) take such further action as the Commission deems just and proper.

On February 2, 2004, NC Power filed a pleading requesting that it be allowed until March 3, 2004, to file its response to the Public Staff's Petition. By Order dated February 4, 2004, the Commission allowed NC Power's request.

On March 1, 2004, Attorney General Roy Cooper (Attorney General) filed his notice of intervention and motion in support of the Public Staff's Petition.

On March 3, 2004, NC Power filed its response to the Public Staff's Petition.

Public Staff's Petition

As noted by the Public Staff in its Petition, G.S. 62-130(d) provides as follows:

> The Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility.

Further, as noted by the Public Staff, G.S. 62-136(a) provides:

> Whenever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint of anyone directly interested, finds that the existing rates in effect and collected by any public utility are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force, and shall fix the same by order.

After quoting the foregoing statutes, the Public Staff, in further support of its Petition, commented as follows:

> 2. By order issued February 26, 1993, in Docket No. E-22, Sub 333, the Commission approved rates and charges designed to allow NC Power the opportunity to earn a return of 11.8% on the common equity component of its North Carolina retail rate base. The test period used in that case consisted of the twelve months ended December 31, 1991, updated for certain known changes based upon circumstances and events occurring up to the close of the hearing on January 20, 1993. As discussed below, the Public Staff has conducted an informal review and analysis of NC Power's earnings and rate base, using as a test period the twelve months ended December 31, 2002, updated to reflect certain known changes occurring in 2003. The results of this analysis indicate that NC Power's revenues under existing rates exceed the level that would be found just and reasonable in a general rate case held today.

3. According to NC Power's E.S.-1 reports submitted to the Commission, the Company's achieved returns on common equity (ROEs) have exceeded its authorized return for the twelve months ended in 15 of the last 19 quarters. These returns are shown below:

QUARTER	ROE %
03/31/99	12.41
06/30/99	11.88
09/30/99	11.88
12/31/99	11.10
03/31/00	10.76
06/30/00	11.26
09/30/00	12.07
12/31/00	12.26
03/31/01	12.40
06/30/01	12.62
09/30/01	12.11
12/31/01	10.92
03/31/02	12.16
06/30/02	13.43
09/30/02	13.45
12/31/02	18.17
03/31/03	16.11
06/30/03	15.94
09/30/03	13.56

In September 2003, NC Power experienced major damage throughout its system as a result of Hurricane Isabel, the worst storm in the Company's 100-year history. However, after expensing the majority of its Hurricane Isabel storm costs in the month these costs were incurred, NC Power still achieved a 13.56% ROE for the twelve months ended September 30, 2003.

4. Because weather can have a significant impact on reported earnings, NC Power provided to the Public Staff weather-normalized returns on equity for the following twelve-month periods:

Twelve Months Ended	ROE - E.S.-1	ROE - Weather Normalized
December 31, 1998	10.20%	11.40%
December 31, 1999	11.10%	12.30%
December 31, 2000	12.26%	12.80%
December 31, 2001	10.92%	13.30%
December 31, 2002	18.17%[1]	16.30%[1]
March 31, 2003	16.11%[1]	14.30%[1]
June 30, 2003	15.94%[1]	14.10%[1]

These data show that NC Power's equity returns adjusted for normalized weather consistently exceeded the Company's 11.8% authorized return from 1999 through the first six months of 2003.

[1] On October 15, 2003, NC Power submitted revised E.S.-1 reports for December 2002, March 2003, and June 2003. The corrected ROEs were approximately 50 basis points (i.e., 0.50%) higher than originally submitted. The Public Staff imputed that correction for the weather-normalized ROEs.

5. Other factors can also have a significant impact on earnings. In 2001 and 2002, NC Power instituted an overall decrease in depreciation rates for its generation, transmission, and distribution plant.[1] For 2002, at least a portion of these changes were included in reports to the financial community but were not reflected for E.S.-1 reporting purposes until NC Power's fourth quarter 2002 report. If reported in the same manner for E.S.-1 purposes as for financial purposes, the decrease in depreciation expense resulting from these changes would have increased the returns on equity reported in the E.S.-1 in other quarterly periods during 2002. For example, if adjusted to reflect the effect of the depreciation rate reductions excluded by NC Power, the ROE reported in the E.S.-1 for the twelve months ended September 30, 2002, would increase from 13.45% to an estimated 14.28%.[2]

6. In its September 30, 2003, E.S.-1 report, NC Power lists several significant costs that will be incurred in the fourth quarter of 2003 and will reduce the Company's ROE for the 2003 calendar year. These costs include the buyout of non-utility generation (NUG) contracts and Hurricane Isabel costs incurred in October 2003. Including these costs, net of the 2003 NUG capacity payments savings, in the financial data for the twelve months ended September 2003 would result in a return on equity of approximately 11.50%. However, the Public Staff's rate analysis . . . includes test period adjustments that would be made in a general rate case to bring abnormalities in revenues and expenses to a representative level. These adjustments include taking into account the reduction in 2004 for NUG capacity payments associated with the 2003 NUG buyout and amortizing both the 2003 NUG buyout costs and Hurricane Isabel costs. The Public Staff also amortized NC Power's demand-side management overrecoveries of approximately $6,000,000, with interest, over a three-year period.

7. The Public Staff accepted NC Power's depreciation rates in calculating depreciation expense and, based on the Company's most recent Decommissioning Cost and Funding Report filed on May 1, 2003, in Docket No. E-100 Sub 56, accepted NC Power's adjustment to set decommissioning expense at zero. This report indicates that NC Power's North Carolina retail decommissioning expense should be ($593,400) [i.e., a negative $593,400 annual amount due to past over accrual] instead of the $1,843,000 found appropriate in the Company's last rate case. One of the reasons for

[1] Depreciation rate changes associated with life extension of NC Power's nuclear plants were implemented in 2001 for financial reporting purposes, resulting in a total company annual decrease in depreciation expense of approximately $72,000,000. In 2002, NC Power extended the estimated lives of most of its fossil fuel stations as well as its transmission and distribution plant. As discussed in Virginia Electric and Power Company's 2002 Form 10-K, these changes in estimated useful lives reduced depreciation expense by approximately $40,000,000 in 2002 and approximately $64,000,000 annually thereafter.

[2] Estimated by the Public Staff based on information provided by NC Power.

the significant change in decommissioning expense relates to life extension for NC Power's nuclear plants.[1]

8. The Public Staff's analysis indicates that, after pro forma adjustments, NC Power's ROE under existing rates is approximately 16.03%. . . . [T]he revenues produced by NC Power's existing rates exceed those necessary to enable the Company to earn an 11.8% return by approximately $17.2 million. Current economic conditions, as the Commissions knows, are different from those that prevailed in 1992-93, and an ROE in the range of 10.0% to 11.5% could be found just and reasonable in a general rate case today. Assuming an ROE of 10.7% . . . NC Power's revenues under its existing rates would exceed the just and reasonable level by approximately $21.7 million. Thus, the Public Staff believes that NC Power's existing rates are, and will continue to be, unjust and unreasonable unless reduced by the Commission.

9. Regulatory Condition No. 18 of the Commission's October 18, 1999, Order Approving Merger in Docket No. E-22, Sub 380, authorizing NC Power to engage in a business combination with Consolidated Natural Gas Company, provides that none of NC Power's base retail electric rates shall be increased until after December 31, 2005, except for the following reasons: (1) annual fuel adjustment proceedings, (2) to reflect the financial impact of governmental action having a substantial impact on the electric industry, or (3) to reflect the financial impact of major expenditures associated with force majeure. However, nothing in this order prevents the Commission from ordering that NC Power's rates be reduced if the Commission, after investigation, finds that such rates are unjust and unreasonable.

10. As demonstrated by NC Power's E.S.-1 reports and the results of the Public Staff's review and analysis, circumstances require that a general rate case investigation be instituted to determine whether NC Power's existing rates are just and reasonable. Such an investigation should be declared a general rate case under G.S. 62-137 and conducted pursuant to G.S. 62-133 on the basis of a Rate Case Information Report, NCUC Form E-1, using twelve months' historical operating experience. If at the conclusion of the investigation, the Commission determines that NC Power's existing rates are unjust and unreasonable, the Commission must, under G.S. 62-136(a), determine the just and reasonable rates to be effective thereafter.

Thus, based on the foregoing, the Public Staff requested that the Commission enter an order: (1) instituting an investigation into the existing rates and charges in effect for NC Power; (2) requiring NC Power to file, no later than May 1, 2004, NCUC Form E-1 for the 12 months ending December 31, 2003; (3) requiring NC Power to appear before the Commission and show cause, in the form of prefiled testimony and exhibits to be submitted no later than May 1, 2004, why its existing rates and charges should not be found unjust and unreasonable and reduced for service rendered thereafter; and (4) taking such further action as the Commission deems just and proper.

Attorney General

The Attorney General asserted that the Public Staff's analysis discussed in its Petition showed strong support for a rate investigation. Further, the Attorney General stated that he supports the Public Staff's Petition and joins in the request that the Commission enter an order requiring NC

[1] Pursuant to the guidelines established in Docket No. E-100, Sub 56, NC Power filed a Report and Recommendation on Nuclear Decommission Costs and Funding on December 31, 2003. In this Report, NC Power recommended that the decommissioning funding amount for its North Carolina retail customers remain at the present level. The Public Staff will review the Report and file its recommendations by March 1, 2004. NC Power will then have 30 days to respond.

Power to file information, testimony, and exhibits as requested in the Petition.

NC Power's Response

In its response to the Public Staff's Petition, NC Power requested that the Petition be dismissed. In support of that request, the Company stated as follows:

I.

Dominion North Carolina Power's Most Recent 12-Month Return on Equity Is Below its Authorized Level and Annual Returns Show Reasonable Earnings Levels

When the Public Staff filed its petition, it noted that Dominion's then most recent reported return on equity ("ROE") for the twelve months ended September 30, 2003, as reported in the Company's ES-1, was 13.56 percent, above the last authorized level of 11.8 percent set by the Commission in 1993. That information is no longer current. The latest ROE, as reported in the Company's ES-1 filed with the Commission on February 24, 2004, reports a ROE for the twelve months ended December 31, 2003, of 9.53 percent, well below the Company's authorized level. Stated differently, for calendar year 2003, Dominion underearned from the level authorized by this Commission, and the reported ROE is the lowest ROE for a twelve-month period reported in an ES-1 since the Company earned a return of 10.92 percent for calendar year 2001.

As the Commission is aware, a Company's ROE as filed through ES-1 reports often varies significantly from one quarter to another, because the ROE is for a rolling twelve-month period. Dominion's returns in some ES-1 reports have fluctuated for a variety of reasons, such as weather, which the Public Staff acknowledges can have a significant impact on reported earnings. Petition at 2. For example, the higher returns experienced in some of the ES-1 reports for 2002 and 2003 on which the petition focuses were each inflated by approximately 180 basis points due to abnormal temperatures. See petition at 3. Dominion had reported the abnormal weather and its impact to the Commission with its ES-1 filing of March 5, 2003. The Company explained to the Commission as follows:

> Weather variation was a significant factor affecting the reporting results for this period. In the Company's North Carolina service territory, the summer of 2002 was significantly hotter than normal. For the year, the Company experienced 18% more cooling degree days than normal. The impact on the 2002 ROE for the extreme weather is approximately 180 basis points.

In time, such anomalies cease to affect the ROE in the ES-1 reports. Other factors can have similar positive or negative impacts on reported earnings, such as is now the case with the hurricane restoration costs, increased tax expense, non-utility generation buyout costs and more normal weather influencing the latest reported ROE, which is substantially below the authorized level.

When the Company's reported ROEs in recent years are reviewed on a consistent, annual basis, they demonstrate an earnings pattern quite different from that portrayed in the petition. The Company's annual returns in North Carolina, as filed through ES-1 reports for each of the past eleven calendar years, were as follows:

Year	Return on Equity (for 12 mos. ending Dec. 31)
2003	9.53%
2002	18.17
2001	10.92
2000	12.26
1999	11.10
1998	10.23
1997	8.46
1996	10.23
1995	10.45
1994	10.51
1993	10.63

As the foregoing data shows, in the eleven calendar years since the authorized level was set, the Company has earned above the authorized ROE in only two years, and below it in nine. For the latest calendar year of 2003, Dominion earned well below its authorized return. For 2002, it reported a return significantly above the authorized level, and in calendar year 2001, it earned below the benchmark. The fact is that 2002 was an abnormal year due to weather and other factors which skewed some of the quarterly filings, but what is significant is that, if one focuses just on the last three years as the Public Staff purports to do, the Company underrecovered in two of those years, including the latest year. Going back further shows the Company slightly above its authorized ROE in 2000, below in 1999, well below in 1998, and even further below in 1997. Indeed, an "apples to apples" view of returns shows that the Company sometimes earns above and other times below the authorized level and that there is no pattern of over-earning over any significant period of time but, more often than not, under-earning. Indeed, the average calendar year ROE from 1993 through 2003 is 11.14 percent, below the authorized level for this period.

By focusing on selected quarterly-reported ROEs the petition distorts the overall earning position for the Company. It reports, for example, that the Company has "exceeded its authorized return for the twelve months ended in 15 of the last 19 quarters." Petition at 2. By the same measure, since the Company's authorized ROE of 11.8 percent was established, the Company has reported ROEs below the authorized level in 25 quarterly ES-1 reports and above the benchmark in only 18. By the logic of the petition, Dominion has been in a predominately under-earning situation over most of the last 11 years, suggesting that a rate increase would be appropriate. Statistics can be instructive as well as misleading, and the selected data used in the petition presents an inaccurate view of the Company's earnings. Viewed fairly, the earnings record of Dominion has balanced out over time, and there clearly has not been any pattern of over-earning as the Public Staff alleges.

The petition also failed to acknowledge that, prior to the just reported ROE of 9.53%, the Company's ROEs as reported in the ES-1 were falling. There was a trend of declining returns for the last three quarterly filings of ROE data, and the latest reported ROE now marks the fourth consecutive report of a declining ROE. Undoubtedly, reported ROEs will fluctuate in the future, as they do for all companies, but the latest data as well as the data over the last decade clearly demonstrate that the petition lacks merit and should be dismissed.

II.
A Short Term Rate Adjustment Would Be Inconsistent with the Commission's Long Term Rate Cap

In 1999, as part of the Commission's consideration of the merger of Dominion Resources, Inc. ("DRI") (Dominion North Carolina Power's parent) and Consolidated Natural Gas, Inc. in Docket No. E-22, Sub 380, it imposed a number of regulatory conditions to the merger. Condition No. 18, which had been advanced by the Public Staff and agreed to by DRI, provided that none of the Company's base retail electric rates could be increased above the level then in effect until after December 31, 2005, except for certain limited exceptions, such as hurricanes and other acts of nature. While North Carolina law provides utilities with an opportunity to seek base rate increases where justified, a moratorium on any increases for a period of approximately five years was agreed upon. The Public Staff in testimony stated that the condition,

> is designed to protect NC Power's North Carolina retail electric ratepayers from increases in base rates because of the merger and to ensure that NC Power is not allowed any general rate increases for a substantial time after the merger, except under very unusual circumstances[1] (emphasis added)

While DRI and the Company acceded to this condition, it should be recognized that the Company gave up an important statutory right and has been subjected to potentially significant financial exposure. The rate cap has presented formidable but reasonable challenges to Dominion over a period of years, and is consistent with the Commission's long-term view of returns by utilities.

A critical flaw in the Public Staff's argument is its short-term view of earnings, as vividly demonstrated by the drop in the Company's ROE for the twelve months ending 2003. This often misleading focus on a few quarters contrasts starkly with the Commission's long-term view in implementing a multi-year cap. When rates are capped for several years, the Commission necessarily assumes that there will be some fluctuation in returns that might have otherwise resulted in rate increases or rate decreases in a world of annual rate cases. Unless there is a consistent and pervasive pattern of earnings in excess of the authorized ROE, as opposed to the actual history of under-earnings in some years and higher earnings in others, the Commission must have understood that the advantages of rate predictability and stability outweighed whatever could be attained through more frequent rate cases. Consequently, having instituted the long term view inherent in a multi-year rate cap, it is simply not a consistent approach to react to a few quarters of higher ROEs and propose a rate reduction. The Company's sharply lower ROE for calendar year 2003 is a clear reminder of the pitfalls of taking a short-term view.

Negotiated rate caps for specified periods of time should rarely, if ever, be breached in the manner suggested by the Public Staff. Customers have had, and continue to have, the benefits of the cap through base rate certainty and stability, with Dominion assuming significant financial risk over an extended period of time and, in fact, under-earning during portions of the capped rate period. A key element of the risk to the Company of the rate cap is whether the Company can attain the efficiencies necessary to maintain its financial health during such a period and, as the Company's experience shows, there are outside factors that can affect the Company's financial results regardless of its excellent operating performance. Lowering rates when there is

[1] Joint Testimony of Messrs. Farmer, Maness and Salib, Docket No. E-22, Sub 380 (Sept. 8, 1999) at pp. 22-23.

no consistent pattern of overearning and where a utility bears the risk of investing longer-term to attain efficiencies would send a very negative economic signal about trying to achieve those efficiencies. Given that Dominion does not have a history of repeatedly earning above its authorized level, it should be allowed to continue to operate under the existing cap which provides a measure of rate certainty and stability conducive to more efficient operation which, ultimately, benefits customers. To do otherwise would establish a dangerous precedent for all electric utilities in North Carolina where general rate cases have been unnecessary for extended periods and where, in Dominion's case, the Commission has approved a rate cap for a given time period, and the history of earnings levels has remained reasonable. Under these circumstances, the Commission should maintain its longer-term perspective and the balanced nature of the rate cap by allowing it to operate as intended.

III.

The Petition's Suggested Return on Equity and Other Adjustments Would Be Unreasonable and Would Unjustly Penalize the Company

In order to reach its calculated reduction of $21.7 million in the Company's rates, the Public Staff utilizes a ROE of 10.7 percent, 110 basis points below the current authorized return. At the current authorized level of 11.8 percent, Dominion already has a return significantly below those of other investor-owned electric utilities in North Carolina. For example, if the Company's return were set at the same level as Progress Energy, the Public Staff's suggested reduction would shrink to approximately $12 million based upon the equity issue alone.

This would be an inappropriate time to consider lowering equity returns for electric utilities. While there are differences between utilities which may justify some modest difference in authorized returns, the Public Staff points to "current economic conditions" that are allegedly different from the early 1990s, and this rationale could be applied to all utilities operating in North Carolina. The facts militate strongly against any lowering of authorized returns for electric utilities, including Dominion. The reported earned returns for companies already reflect any lower cost of debt that may have resulted from the economic downturn of the last several years. As for the cost of equity, the petition does not even mention the turmoil that has existed in the energy markets over the last several years and the significant increase in risk that has affected all market participants, including electric utilities. This increased risk is apparent in the current scrutiny of electric companies by rating agencies, and operational performance, financial strength, regulatory environment, competitive position, and other factors are much more important in today's assessments. Dominion, like other utilities, faces significant challenges in this regard, with its major retail markets in Virginia going through a transition period and opening to retail competition, as well as other changes and requirements at the state and federal level, such as increasing environmental costs and nuclear-related expenditures. Indeed, the increased risks faced by utilities might well justify an increase in authorized ROE levels.

Reducing the authorized return at this time would also be unreasonable because the interest rate environment, upon which the Public Staff appears to heavily rely, is at or near a historical low point and is not likely to remain at this level over the longer term. Indeed, equity markets now react to even a hint of an increase in short-term interest rates, and dividend-yielding stocks are vulnerable to higher interest rates. Given the fact that authorized return levels are changed infrequently and the Company has not sought an increase in its base rates in many years, it would be unreasonable to lower electric rates based on unusually low, and likely temporary, interest rate levels. Such an approach applied to the industry would increase financial risk even further

and would be injurious to electric utilities already exposed to higher risk in today's environment.

Certain of the adjustments suggested in the petition further inflate the proposed revenue reduction. For example, the Public Staff proposes a five-year amortization of the costs associated with Hurricane Isabel. While some of the restoration costs involved new infrastructure which is being capitalized and will be depreciated over its useful life, most expenditures, such as repair costs, are immediate and have directly impacted the Company financially. There is no legitimate basis to "postpone" recognition of these out-of-pocket costs needed to restore service to North Carolinians.

In a rate proceeding as proposed by the Public Staff, the Company also would propose adjustments of its own which would further reduce the Public Staff's proposed reduction or justify a rate increase. For example, the calculated reduction in the petition fails to reflect significant investments that Dominion has been making since June 30, 2003, which was the update period used by the Public Staff. During the last six months of 2003, the Company placed into service approximately $1 billion of plant assets. A major component was the $370 million investment in a new combined cycle facility at the Possum Point Power Station. The Company also placed into service an additional $275 million of environmental upgrades.

IV.

Dominion Has Incurred Significant Storm-Related Damage and Associated Costs in the Past Fifteen Months

Hurricane Isabel was the worst storm in the Company's 100-year history. It hit Dominion's service area on September 18, 2003, and knocked out power to 1.8 million of the Company's customers, including 91 percent of those in North Carolina. Responding to the devastation, Dominion immediately increased the size of its work force by adding more than 6,000 line contractors and mutual aid off-system resources; approximately 1,100, or 18 percent of them, were assigned to Dominion's North Carolina service area. The concentration of resources in North Carolina allowed the restoration there to proceed at a rapid pace. Within a week, 84 percent of the affected customers were back in service, despite the devastation. This trend continued throughout the restoration period, as North Carolina customers got their power back on at a faster pace than the system as a whole. The cost of the restoration was significant. Total system pretax expenses of $129 million and $68 million were incurred in the third and fourth quarters of 2003, respectively. Earlier, Dominion had experienced damage to its electrical system in North Carolina during the December 2002 ice storm, and Dominion's customers were restored to service at a cost in excess of $2.4 million. Dominion has not sought cost recovery from customers for either the hurricane or ice storm expenses.

V.

Dominion Continues to Make Substantial Investments to Maintain and Improve Service to Customers

In addition to the significant costs associated with the restoration of service after Hurricane Isabel, the Company has made and continues to make major investments on behalf of its North Carolina customers. Customer growth remains strong in the eastern area of the state where the Company provides service (50% of growth is in the Outer Banks), and significant investment in both transmission and distribution is required to maintain and enhance reliable service to customers. In the 2000-2003 period, the Company invested over $8 million for load-related transmission projects, including $7.7 million for the Shawboro 230 kV ring bus (2064 line). [The terminology "2064 line" is the name or circuit designation for the 230 kV line between

Shawboro and Kitty Hawk]. Another $2.5 million was spent on transmission for reliability improvement, including lightning protection. An additional $16.5 million was spent on the distribution side for new circuits and other upgrades and reliability improvements. During 2003, the Company made a significant investment in new metering technology in North Carolina. The Company converted nearly half of its customer meters in North Carolina to an automated meter reading (AMR) system. Over 53,000 of Dominion's North Carolina customers are now having their meters read remotely, which yields customer benefits including: (i) more accurate meter reading and billing, and (ii) less intrusion, as meter readers do not have to enter a customer's property. Other improvements have focused on outage management and response.

The Company's investments and operational efforts have resulted in service improvements for customers. Adjusted to exclude major storms, from 1999 through the third quarter of 2003, there has been a steady increase in reliability for customers, with the average interruptions per customer and average minutes out per customer both declining throughout this period.

Major transmission and distribution projects for North Carolina continue. In 2003, Dominion received approvals from the Virginia State Corporation Commission and this Commission for construction of a second 230 kV circuit from Fentress Substation in Virginia to Shawboro in the Outer Banks. This project, estimated to cost $11.7 million, represents a significant network improvement for the benefit of North Carolina customers which will enhance service reliability. Likewise, a second 115 kV line from Kitty Hawk to Collington is planned, at an estimated cost of $7 million, and circuit additions and a new transformer at Kitty Hawk are slated, at a cost of $1.9 million. Also, post-hurricane analysis indicates a need for reconstruction of the 64 line [i.e., the 115 kV line between Windfall and Trowbridge] at a planned cost of $19 million.

The 2004-2007 projection of capital expenditures by the Company includes approximately $32.8 million for customer connects for the over 17,600 new customers expected during the period. Distribution and transmission projects total $16.5 million and $43.8 million, respectively. On a system-wide level, the Company also will be making major expenditures for environmental upgrades. Other costs challenges include inflation, rising pension and medical costs, replacement of aging infrastructure, security costs and rising interest rates. While contending with these risks and challenges, Dominion is committed to maintaining and enhancing high levels of service reliability and to attaining operational efficiencies, and it is making the capital expenditures in North Carolina to attain these goals for the benefit of its customers.

VI.
Conclusion

Dominion is not in an over-earning position. Its most recent 12 month ROE is 9.53 percent. In two of the last three calendar years it has earned below its authorized return. Since the Commission established the Company's authorized return at 11.8 percent in 1993, the Company, on a calendar year basis, has experienced lower than authorized returns in nine of eleven years. The allegation that the Company is persistently over-earning is totally without merit.

Reopening the Company's rate cap, which the Public Staff itself proposed and the Commission approved to extend through December 31, 2005, and reducing base rates by lowering the authorized return and imposing ratemaking adjustments, has no

basis in the reported ROEs viewed in a consistent manner and would constitute bad public policy. Customers continue to benefit from the cap through rate certainty and stability, and the Company has, at times, under-earned and has borne and continues to bear considerable risk in operating under a cap. The Commission should continue its longer-term view of earnings and not be swayed by an unreasonable short-term focus on a few quarters of data which, as history shows, is subject to significant fluctuation. Moreover, for many years Dominion has operated under an authorized return that is the lowest of the investor-owned electric utilities in North Carolina, and the Public Staff has singled-out Dominion for rate scrutiny even though for 2003 it earned well below even the low ROE that the petition utilizes. The Public Staff's position also ignores the increased risk faced today by electric utilities, and the impact of industry conditions on the financial health of utilities.

Dominion continues to make significant investments system-wide and in North Carolina, in particular, to maintain and improve service reliability to customers, with positive results. Major transmission and distribution projects for service to North Carolina customers are underway. Effectively serving the increasing number of customers in North Carolina remains a top priority for the Company, and subjecting it to a rate reduction investigation while it is undertaking these major projects under a rate cap, with no pattern of over-earning, would be untimely and inappropriate.

For the reasons set forth above, NC Power argued that the Public Staff's Petition should be dismissed.

COMMISSION CONCLUSIONS REGARDING PUBLIC STAFF POSITION

The Public Staff's position in support of its request, in summary, is that NC Power's existing rates and charges are, or at the very least appear to be, excessive in view of the levels of earnings achieved by the Company over a significant number of past periods and in consideration of the forward-looking level of earnings the Public Staff has determined that NC Power can reasonably be expected to achieve for the reasonably foreseeable future under its existing rates and charges. More specifically, the Public Staff's position is based largely on the following:

(1) The ROEs actually realized by the Company, on a 12-month-to-date basis, for the 19 calendar quarters ending September 30, 2003.[1] According to the Public Staff, NC Power's ES-1 reports submitted to the Commission show that the Company has achieved ROEs in excess of its 11.8% authorized return, on a 12-month-to-date basis, in 15 of 19 consecutive calendar quarters ending September 30, 2003. With respect to those 15 periods the ROEs ranged from 11.88% to 18.17%.

(2) NC Power's weather-normalized ROEs for the calendar years 1998 through 2002 and for the 12-month periods ending March 31, and June 30, 2003. According to the Public Staff, these ROEs ranged from 11.40% to 16.30% and consistently exceeded the Company's 11.8% authorized return, i.e., six times out of seven with regard to the periods studied.

(3) The level of earnings, that is, the 16.03% ROE that the Public Staff has determined that the Company is likely to achieve in the reasonably foreseeable future under its existing rates and charges which, among other things, takes into account current economic conditions as compared to the economic conditions that existed at the time the existing rates and charges were fixed by the Commission in 1993. The 1993 Order approved rates and charges designed to allow NC Power the opportunity to earn an 11.8% ROE with respect to its common equity investment in its North

[1] Earnings data for the 12-month period ending December 31, 2003 was not available at the time the Public Staff filed its Petition. As indicated elsewhere herein and as discussed subsequently, NC Power reported an ROE of 9.53% for the 12-month period ending December 31, 2003.

Carolina retail rate base. According to the Public Staff, under current economic conditions, an ROE in the range of 10.0% to 11.5% could be found just and reasonable in a general rate case today.

Assuming a 10.7% ROE, which is the approximate mid-point of the foregoing range, would be found appropriate for use in a general rate case today, the Public Staff argued that NC Power's revenues under its existing rates would exceed the just and reasonable level by approximately $21.7 million on an annual basis for the reasonably foreseeable future. The Public Staff also argued that, assuming the 11.8% ROE found proper in 1993 continued to be appropriate for use in a general rate case today, NC Power's revenues under its existing rates would exceed the just and reasonable level by approximately $17.2 million annually for the reasonably foreseeable future.

The analysis performed by the Public Staff through which it determined that NC Power could reasonably be expected to realize a 16.03% ROE in the reasonably foreseeable future under its existing rates and charges was determined, according to the Public Staff, in a manner consistent with the provisions of G.S. 62-133.

It is a well-established fundamental principle of regulation that changes in public utility rates should be made effective on a prospective basis. It is also equally well-settled that, under rate base, rate-of-return regulation, the North Carolina General Statutes – principally G.S. 62-133 – require that a company's rates be determined on a pro forma basis, based on a 12-month historical test period.[1] Stated alternatively, the Commission, in setting prospective rates, in essence, must take into account a company's current level of operations adjusted for known and material changes in the levels of revenues and costs that the company can be expected to experience over a reasonably foreseeable period of time into the future.[2] Thus, rates to be charged prospectively are set, to a certain extent and within certain constraints, on the basis of revenue and cost expectations, including investor expectations regarding their return requirements, as opposed to simply setting prospective rates solely on the basis of actual historical operating experience.

The Commission concludes that, based on information of record, the Public Staff, in performing its forward-looking analysis, appears to have properly followed the statutorily mandated ratemaking methodology in determining that NC Power could reasonably be expected to realize a 16.03% ROE in the reasonably foreseeable future under its currently approved rates and charges.[3] That is not to say that the Commission necessarily agrees as to the propriety of each and every input embodied in the Public Staff's present cost of service/revenue requirement[4] analysis; the information

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[1] The statutes also require that the Commission consider certain evidence as may be offered after the test period based upon circumstances and events occurring up to the time the hearing is closed.

[2] See G.S. 62-133 for detailed provisions.

[3] Indeed, the overall methodology employed by the Public Staff in its revenue requirement analysis is virtually, if not exactly, the same as the approach that a company would follow in requesting an overall increase in its rates and charges in the context of a general rate case.

[4] The rates and charges a company is authorized to charge for its sales of service, in the context of a general rate case proceeding, are based on the company's cost of service, or synonymously, its revenue requirement. The cost of service, or revenue requirement, of an investor-owned public utility may be defined as the sum total of: (a) proper operating expenses; (b) depreciation expense; (c) taxes; and (d) a reasonable return on the net valuation of its property.

The reasonable return component of the cost of service referred to here is the investors' required, expected overall rate of return, or synonymously, the overall cost of capital associated with investment supported by capital supplied by the company's debt and equity investors, including that provided by or attributable to shareholders, i.e., investors in the company's common stock. The cost of common equity capital, i.e., the cost of capital provided by shareholders plus retained earnings, which is included in the overall cost of capital, and consequently in the cost of service, is in substance an allowance for shareholder profit.

of record is not adequate to allow such an assessment. Nevertheless, the Commission concludes that, on its face, the Public Staff's present analysis appears to be valid, has merit, and warrants investigation. The Commission further concludes that such an investigation should be conducted in the context of a general rate case pursuant to the provisions of G.S. 62-133, including an evidentiary hearing.

COMMISSION CONCLUSIONS REGARDING NC POWER'S RESPONSE AND MOTION TO DISMISS

The arguments propounded by NC Power in support of its response and motion to dismiss include those summarized and discussed below:

I. NC Power's most recent 12-month ROE is below its authorized level and annual returns show reasonable earnings levels: The Company's arguments in this regard included the following:

(1) Earnings information, that is, the 13.56% ROE for the 12-month period ending September 30, 2003, relied on by the Public Staff was no longer current;
(2) The 9.53% ROE for the 12-month period ending December 31, 2003, was well below the authorized return of 11.8%;
(3) ROEs reflected in ES-1 reports often vary significantly from one quarter to another for a variety of reasons;
(4) The ROEs reflected in ES-1 reports for the past 11 years exceeded the authorized ROE in only two calendar years, 12.26% in 2000 and 18.17% in 2002;
(5) Calendar year 2002 – the year in which the Company realized an 18.17% ROE - was an abnormal year due to weather and other factors which skewed some of the quarterly filings;
(6) If one focuses just on the last three years as the Public Staff purports to do, the Company underrecovered in two of those years on a calendar-year basis including the latest year;
(7) In the 1993 to 2000 timeframe, the Company's earnings were below, and at times were well below, the authorized ROE in all years except for 2000, and in that year, the ROE was only slightly above the authorized return.
(8) During the calendar years 1993 through 2003, ROEs fluctuated above and below the authorized return but, more often than not, were below the ROE authorized, with the average return for the 11-year period being 11.14%, which is below the 11.8% authorized return.
(9) By focusing on selected quarterly-reported ROEs, the Petition distorts the overall earnings position for the Company. It reports, for example, that the Company has "exceeded its authorized return for the 12-month period ending in 15 of the last 19 quarters." By the same measure, since the Company's authorized return of 11.8% was established, the Company has reported ROEs below the authorized level in 25 quarterly ES-1 reports and above the benchmark in only 18. Thus, by the logic of the Petition, NC Power has been in a predominately underearning situation over most of the last 11 years,
(10) Prior to the just reported ROE of 9.53%, the Company's ROEs as reported in ES-1 filings were falling. There was a trend of declining returns for the last three quarterly filings of ROE data, and the latest reported ROE now marks the fourth consecutive report of a declining ROE. Undoubtedly, reported ROEs will fluctuate in the future.

Both the Company and the Public Staff relied on historical data extensively in support of their respective positions. The Public Staff, in consideration of its findings, after having analyzed and evaluated the historical data, concluded that a further forward-looking detailed analysis was in order. In performing its further analysis, the Public Staff employed the same general methodology that is typically utilized by the Commission in general rate case investigations; that is, such analysis was accomplished consistent with the provisions of G.S. 62-133.

According to the Public Staff's forward-looking analysis, NC Power can reasonably be expected to earn a 16.03% ROE, annually, in the reasonably foreseeable future under its existing

rates and charges. In substance, the Public Staff further contended that a 16.03% ROE was excessive under current economic conditions - and suggested that the 11.8% authorized return was also excessive - and that, as such, NC Power's existing rates and charges were thus unjust and unreasonable.

NC Power did not directly challenge the propriety of the forward-looking approach utilized by the Public Staff in its determination of the 16.03% ROE, that is, other than to argue that in a general rate case the Company too would perform a pro forma revenue requirement analysis, which would include NC Power's own adjustments to the test-period level of operations. Moreover, NC Power did not offer a forward-looking analysis of its own but rather presented its argument in opposition to the Public Staff's Petition, among other things, based on the Company's view of certain historical data. In its argument in that regard, NC Power essentially averred that it was not necessary to make further inquiry, in the nature of the Public Staff's forward-looking analysis, since its relevant past earnings, in the vast preponderance of instances, were below the authorized ROE, which clearly showed that the Company's existing rates and charges are not excessive. The Commission disagrees.

The Commission concludes that the levels of the ROEs reported in the Company's quarterly ES-1 reports to the Commission for the 19 calendar quarters ending September 30 2003, and the weather-adjusted ROEs, as presented by the Public Staff, justified the need for and warranted the forward-looking analysis performed by the Public Staff - the arguments of the Company notwithstanding, including that made regarding the 9.53% ROE realized by NC Power for the 12-month period ending December 31, 2003. Additionally, the Commission concludes that the forward-looking analysis of the Public Staff appears to have been performed in a reasonable and appropriate manner and that the 16.03% ROE derived therefrom supports a decision to allow the Public Staff's Petition.

The appropriateness of the forgoing conclusion, as noted by the Public Staff, is further supported by the fact that the reasonableness and justness of the Company's existing rates and charges have not been examined and evaluated in the context of a general rate case since the 1992-1993 timeframe. The Order approving the Company's last general rate increase was issued February 26, 1993. The test-period in that proceeding was the 12-month period ending December 31, 1991, updated for certain known changes occurring up to the close of the hearing on January 20, 1993. The economic conditions at that time were vastly different from those which exist today.

The Company argued, among other things, that the ROE presented by the Public Staff for the 12-month period ending September 30, 2003, was outdated in consideration of the fact that it had been superseded by the ROE of 9.53% realized for the 12-month period ending December 31, 2003, as reflected in NC Power's most recent ES-1 report provided to the Commission. According to NC Power's ES-1 report for the quarter ending December 31, 2003 (hereafter, the fourth-quarter report), the decline in the ROE from 18.17% for calendar year 2002 to 9.53% for calendar year 2003, a drop of 864 basis points, resulted primarily from the following factors:

(1) The return of more normal weather;
(2) An increase in tax expenses stemming from the annual update in the apportionment factor used to determine state income tax liability;
(3) The significant expenses incurred during the effort to repair damage and restore power in the wake of Hurricane Isabel; and
(4) The Company's continuing efforts to reduce long-term costs by buying out above-market generation contracts.

It appears from the fourth-quarter report that two [Items (3) and (4)] of the four primary factors listed above contributing to the pronounced decline in the ROE are of such an extraordinary nature that the Company would not reasonably be expected to incur such levels of costs annually on a

continuing basis. Therefore, in determining the Company's forward-looking revenue requirement in a general rate case, assuming a 2003 test-period, items of cost of the subject nature would be normalized[1] to reflect a level of cost that the Company could reasonably be expected to experience on an ongoing basis for the reasonably foreseeable future. Also, a weather normalization adjustment would be made to the test-period level of operations, if required, to eliminate the effects of abnormal weather. The normalization of both revenues and costs is perfectly consistent with the General Statutes and the Commission's ratemaking practices and procedures. Further, the forward-looking methodology employed by the Public Staff, which includes normalization of extraordinary test-period revenue and cost items and other pro forma adjustments to reflect actual changes in costs occurring after the 2002 test period used by the Public Staff in its forward-looking model, is perfectly consistent with the methodology that would be employed by any rate base, rate-of-return regulated utility in seeking a general increase in its overall rates and charges before this Commission.

Therefore, it is logical, consistent, and proper that the Public Staff, being of the opinion that the Company's existing rates and charges were unjust and unreasonable, would request that the Commission initiate an investigation in the context of a general rate case. Plainly, if it is appropriate to use a forward-looking model to determine whether a general rate increase requested by a company is justified, and without question such an approach is correct, rationally, it must follow that the same approach should be employed in assessing the need for a rate decrease.

While the precise effects of Items (3) and (4) above cannot be determined from the record with absolute certainty in terms of their impact on the Company's 2003 ROE, it appears that their total impact would equate to hundreds of basis points. Of course, if that be the case, normalization of such costs in the context of a general rate case would also increase the test-period ROE by hundreds of basis points, that is, assuming a 2003 test period.

In its forward-looking analysis, among other things, the Public Staff appears to have included pro forma adjustments to normalize weather and to include the impacts of Hurricane Isabel and the Company's continuing efforts to reduce long-term costs by buying out above-market generation contracts – thereby taking into account three of the four items[2] cited by the Company, which are listed above, as the primary reasons for the 864 basis point decline in the 2003 ROE as compared to that for 2002.

Based on the foregoing and other information of record, the Commission concludes that the 16.03% ROE determined by the Public Staff from its forward-looking analysis, which utilized an updated 2002 test period, can appropriately be considered a reasonable approximation of the ROE NC Power would have experienced in 2003 absent the present extraordinary charges. The Public Staff has also asserted with credibility that the 16.03% ROE is indicative of the ROE that NC Power can reasonably be expected to realize in the reasonably foreseeable future under its existing rates and charges. For purposes of ruling on the Public Staff's Petition, the 16.03 % ROE is the best information available, particularly since NC Power did not submit a forward-looking analysis of the nature performed by the Public Staff in presenting its view of the ROE the Company could reasonably be expected to experience in the reasonably foreseeable future under its existing rates and charges. The Public Staff has demonstrated good cause in support of its position, based on information currently available, that the reasonableness of a ROE of 16.03% and the reasonableness

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[1] For ratemaking purposes, the costs in question, typically, would be, effectively, deferred and amortized over a reasonable period of time determined by the Commission, with the unamortized balance included in the rate base. Thus, recovery of costs of the present nature would be fully provided for in that manner.

[2] In a general rate case proceeding, it is likely that the remaining primary item (i.e., the increase in tax expenses stemming from the annual update in the apportionment factor used to determine state income tax liability) would be carefully examined in any assessment of the Company's annual revenue requirement, the outcome of which cannot be known with reasonable certainty at this time based on the information of record.

of the currently-authorized ROE of 11.8% should be investigated under current economic conditions in a general rate case type proceeding.

Thus, the Commission does not find NC Power's argument on this point to be persuasive.

II. A short-term rate adjustment would be inconsistent with the Commission's long-term rate cap. In approving the merger of DRI and Consolidated Natural Gas, Inc., the Commission imposed a number of regulatory conditions to the merger. Condition No. 18, which had been advanced by the Public Staff and agreed to by DRI, provided that none of the Company's base electric rates could be increased above the level then in effect until after December 31, 2005, except for certain limited exceptions, such as hurricanes and other acts of nature. In substance, NC Power now appears to take the position, for various reasons, that the "rate cap" should be treated by the Commission as a "rate freeze," at least in the context of the present Petition. The Commission disagrees. The rate cap, ostensibly, was intended to protect ratepayers from increases in base rates because of the merger, and not to protect the Company from rate decreases in the event the need for such reductions arose.

Therefore, the Commission does not find NC Power's argument on this point to be persuasive.

III. The Petition's suggested return on equity and other adjustments would be unreasonable and would unjustly penalize the Company. The Company, among other things, stated that its authorized return is already significantly below that of other investor-owned electric utilities in North Carolina; that the lower cost of debt capital resulting from the economic downturn of the last several years is already reflected in the reported earned returns; that, as for the cost of common equity capital, the Petition does not address the turmoil and significant increase in risk that has affected energy market participants, including utilities, in recent years; that the increased risks faced by utilities might well justify an increase in authorized ROE levels; that it would be unreasonable to lower electric rates based on unusually low, and likely temporary, interest rate levels; that the Petition inflates the proposed revenue reduction, in that it proposed a five-year amortization of the costs associated with Hurricane Isabel; and that, in a rate proceeding, the Company would propose adjustments of its own which would further reduce the Public Staff's proposed reduction or justify a rate increase.

The Commission concludes that the arguments presented above are of a nature such that assessment of their propriety, impropriety, and/or relevance and quantification of their impact on the Company's forward-looking cost of service/ROE requires an evidentiary hearing in the context of a general rate case, as proposed by the Public Staff, and that such arguments offer little, if any, substantive justification in support of the Company's position that the Public Staff's Petition should be dismissed.

The Commission, therefore, does not find NC Power's arguments on this point to be persuasive.

IV. Dominion has incurred significant storm-related damage and associated costs in the past fifteen months. The Company argued that it had not sought cost recovery from customers for either the cost of service restoration in the aftermath of Hurricane Isabel, which was incurred in the third and fourth quarters of 2003, or the December 2002 ice storm. According to the Company, the damage from Hurricane Isabel was devastating and the restoration expenses were significant. The Company further indicated that the cost of recovering from the ice storm was also significant.

Following extreme weather events, such as Hurricane Isabel and the December 2002 ice storm, which impose expenses of an extraordinary nature on a utility, it is not at all unusual for the affected utility to request and receive Commission approval to defer and amortize such costs over an

extended period of time, for example, several years. That is particularly true during those times when the magnitude of the present expenses are of such an extraordinary nature and the utility's annual revenues, or more specifically its then current annual level of earnings, are such that it would be unreasonable and unrealistic to conclude that the Company's existing rates and charges were adequate to allow the utility to absorb the expenses in question solely in the annual reporting period within which they were incurred.

Notwithstanding the fact that it was completely free to do so, NC Power did not seek deferral and amortization of the present expenses. Despite the restoration expenses associated with the December 2002 ice storm, the Company still reported an 18.17% ROE for 2002.

Regarding Hurricane Isabel, the Company chose not to seek deferral and amortization of expenses associated with that extraordinary weather event, even though those costs appear extraordinary in terms of magnitude. The Company strongly suggests that it considered the impact of such costs manageable under its existing rates and charges, without seeking the relief that deferral and amortization would have provided. Thus, it is reasonable for the Commission to investigate whether the Company's existing rates and charges are excessive, considering the fact that this extraordinary charge and at least one other extraordinary charge were taken into income in 2003 without the Company having requested deferral and amortization of such costs. When rates are fixed by the Commission, in the context of a general rate case, they are established, as previously explained, on a normalized basis. A company's rates and charges are not set at a level that contemplates, for example, that it will incur expenses of the magnitude and nature of those associated with Hurricane Isabel and the buyout of above-market generation contracts on a recurring annual basis.

In its forward-looking analysis, the Public Staff, in substance, provided for the recovery of extraordinary expenses of the nature associated with Hurricane Isabel by amortizing Isabel's costs over a five-year period. Such an approach is entirely consistent with the ratemaking practices of the Commission. The Public Staff determined in its forward-looking analysis that, even after taking into account amortization of the above-mentioned extraordinary costs, that is, the expenses associated with Hurricane Isabel and the buyout of above-market generation contracts, the Company can still reasonably be expected to achieve a 16.03% ROE in the reasonably foreseeable future under its existing rates and charges. The reasonableness of a ROE of 16.03% under current economic conditions should be investigated in a general rate case type proceeding.

For the reasons discussed above, the Commission does not find NC Power's argument on this point to be persuasive.

V. Dominion continues to make substantial investments to maintain and improve service to customers. The Company argued that it continues to make significant investments system-wide and in North Carolina, in particular, to maintain and improve service reliability to customers as well as to provide for growth in the number of customers served. According to the Company, subjecting it to a rate-reduction investigation while it is undertaking these major projects would be untimely and inappropriate. The Company also argued that it is being confronted with other cost challenges, including inflation, rising pension and medical costs, replacement of aging infrastructure, security costs, and rising interest rates.

Here again, the Commission is of the opinion, and so concludes, that the arguments presented above are of a nature such that assessment of their propriety, impropriety, and/or relevance and quantification of their impact on the Company's forward-looking cost of service/ROE requires an evidentiary hearing in the context of a general rate case, as proposed by the Public Staff, and that such arguments offer little, if any, substantive justification for the Company's position that the Public Staff's Petition should be dismissed.

Therefore, the Commission does not find NC Power's arguments on this point to be persuasive.

FINAL COMMISSION CONCLUSIONS

The Public Staff has requested that the Commission institute an investigation to determine whether NC Power's existing rates and charges are unjust and unreasonable, and it has requested that such an investigation be declared a general rate case under G.S. 62-137 and conducted pursuant to G.S. 62-133. NC Power opposes the Public Staff's request and moves that the Public Staff's Petition be dismissed. Simply stated, the question to be resolved by the Commission is as follows: Has the Public Staff in its Petition and in consideration of NC Power's response and motion to dismiss shown that good cause exists for the Commission to allow the Petition? The Commission concludes that the Public Staff has demonstrated good cause in support of its Petition.

Accordingly, the Commission will allow the Public Staff's Petition and undertake an investigation of the justness and reasonableness of the Company's existing rates and charges in the context of a general rate case pursuant to G.S. 62-130(d), -133, -36(a), and -137. The following seven factors support this decision: (1) the 18.17% ROE realized by NC Power in 2002; (2) the effect that extraordinary circumstances and/or events had on the Company's calendar year 2003 ROE; (3) absent a showing to the contrary, more recent historical data is typically more relevant and germane, and should be weighted more heavily, in making assessments of future conditions than less recent historical data; (4) NC Power's overall rates and charges have not been examined in the context of a general rate case since 1993, when the Company's currently authorized return of 11.8% was established; (5) economic conditions today are significantly different from those which existed in the 1992–1993 timeframe when the Company's authorized return of 11.8% was determined; (6) a credible assertion by the Public Staff that the Company can realistically be expected to achieve a 16.03% ROE in the reasonably foreseeable future; and (7) the non-persuasive arguments made by NC Power in opposition to the Public Staff's Petition.

For all of the reasons set forth herein and in consideration of the entire record, the Commission finds good cause to investigate the electric rates and charges currently being charged to consumers in North Carolina by NC Power. In setting this matter for hearing, the Commission has not made any determinations regarding the merits of the ultimate issues to be decided in this case. The Commission will render its final decision based solely on the evidence presented by the parties at the January 2005 evidentiary hearing.

The guidelines regarding discovery in this docket, subject to modification for good cause shown, are as follows:

1. Any deposition which a party desires to take shall be taken before the deadline for filing of Public Staff and Intervenor testimony. Notice of deposition shall be served on all parties at least seven days prior to the taking of the deposition.

2. Any motion for subpoena of a witness to appear at the evidentiary hearing shall be filed with the Commission before the deadline for filing of Public Staff and Intervenor testimony, shall be served by hand delivery or facsimile to the person sought to be subpoenaed at or before the time of filing with the Commission, and shall make a reasonable showing that the evidence of such person will be material and relevant to an issue in the proceeding. G.S. 62-62. Unless an objection is filed, the Chief Clerk shall issue the requested subpoena 24 hours after such motion is filed.

3. Formal discovery requests related to NC Power's prefiled direct testimony or other information and data provided by NC Power shall be served on the Company by hand delivery or facsimile not later than fourteen days prior to the deadline for filing of Public Staff and Intervenor testimony. NC Power shall have up to ten calendar days to file with the Commission objections to

the discovery requests on an item-by-item basis, but in no event shall objections be filed later than ten days prior to the deadline for filing of Public Staff and Intervenor testimony.

4. Formal discovery requests of the Public Staff or Intervenors shall be served by hand delivery or facsimile not later than three days after such testimony is filed. The party served shall have up to three calendar days to file with the Commission objections to the discovery requests on an item-by-item basis, but in no event shall objections be filed later than five days after that party's testimony was filed.

5. Formal discovery requests related to NC Power's prefiled rebuttal testimony shall be served on the Company by hand delivery or facsimile not later than two days after such testimony is filed. NC Power shall have up to two calendar days to file with the Commission objections to the discovery requests on an item-by-item basis, but in no event shall objections be filed later than three days after the rebuttal testimony was filed. Discovery related to rebuttal testimony shall be limited to new material introduced in such rebuttal testimony and will be carefully scrutinized upon objection that such discovery should have been sought during the initial period of discovery from the Company.

6. Discovery requests need not be filed with the Commission when served; however, any party filing objections shall attach a copy of the relevant discovery request to the objections. Each discovery request, or part thereof, to which no objection is filed, shall be answered by the time objections are due, subject to other agreement of the affected parties or other order of the Commission. Upon the filing of objections, the party seeking discovery shall have two days to file a motion to compel with the Commission, and the party objecting to discovery shall have one day thereafter to file a response. All objections, motions to compel, and responses shall be served on the other affected party by hand delivery or facsimile at or before the time of filing with the Commission.

7. A party shall not be granted an extension of time to pursue discovery because of that party's late intervention or other delay in initiating discovery.

The Commission recognizes that in the past most discovery has been conducted in an informal manner without the need for Commission involvement or enforcement, and that such has been generally successful. The above guidelines are without prejudice to the parties conducting informal discovery or exchanging information by agreement at any time with the understanding that such will not be enforceable by the Commission if outside the guidelines.

IT IS, THEREFORE, ORDERED as follows:

1. That the Public Staff's Petition filed herein on January 29, 2004, shall be, and hereby is, allowed;

2. That an investigation is hereby instituted pursuant to G.S. 62-130(d), -133, and -136(a). Further, the matter is declared to be a general rate case pursuant to G.S. 62-137, and is hereby set for investigation and hearing. NC Power shall comply with all provisions of Chapter 62 of the North Carolina General Statutes and the Rules and Regulations of the Commission for the hearing and determination of general rate cases;

3. That the hearing on this matter is hereby scheduled to begin on Tuesday, January 11, 2005, at 9:30 a.m., Commission Hearing Room 2115, Second Floor, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, and such hearing shall continue as required until completion. Testimony of public witnesses will be received first followed by testimony and cross-examination of witnesses for the Company, the Public Staff, and other Intervenors, respectively;

4. That the test period to be used by all parties in this proceeding shall be the 12-month period ending December 31, 2003, with appropriate adjustments;

5. That NC Power shall file, not later than Friday, July 16, 2004, a Rate Case Information Report (NCUC Form E-1) for the 12-month period ending December 31, 2003;

6. That NC Power shall show cause, in the form of prefiled testimony and exhibits to be filed no later than Friday, July 16, 2004, why its existing rates and charges should not be found unjust and unreasonable and reduced for service rendered thereafter;

7. That Intervenors and other parties having an interest in this matter shall, not later than Tuesday, November 16, 2004, file their protests or interventions in accordance with Rules R1-5, R1-6, and R1-19 of the Commission's Rules and Regulations;

8. That direct testimony and exhibits of Intervenors and the Public Staff shall be filed on or before Tuesday, November 16, 2004, and that the rebuttal testimony and exhibits, if any, of NC Power shall be filed on or before Tuesday, December 7, 2004 ; and

9. That the Commission shall address the matter of public notice for this proceeding by further Order. The Public Staff is hereby requested to consult with NC Power and the Attorney General to develop a proposed public notice, including recommendations regarding scheduling public hearings, which should be filed with the Commission for review and approval not later than Tuesday, June 1, 2004.

ISSUED BY ORDER OF THE COMMISSION.
This the 23rd day of April, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

dh041604.01

DOCKET NO. E-2, SUB 844
DOCKET NO. E-2, SUB 844A

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of Progress Energy Carolinas, Inc. to Revise its Code of Conduct and Eliminate or Revise Regulatory Conditions	))))	ORDER ADOPTING REVISED REGULATORY CONDITIONS AND CODE OF CONDUCT

BY THE COMMISSION: On September 15, 2004, in Docket No. E-2, Sub 844 the Commission issued its Order Revising Regulatory Conditions and Code of Conduct. That Order revised the previously-approved regulatory conditions and Code of Conduct of Carolina Power and Light Company, d/b/a Progress Energy Carolinas, Inc. (Progress). The Commission discussed and ordered many revisions and decisions, and the Order required the parties to "meet and ... produce a single, joint restatement of the regulatory conditions and Code of Conduct consistent with this Order, regrouping them as appropriate and reconciling all internal references and conflicts and renumbering...." The Order provided for this restatement to be filed "for Commission approval."

On October 15 and 19, 2004, Progress filed a restatement of the revised regulatory conditions and Code of Conduct in Docket No. E-2, Sub 844A. Progress stated that "all parties agree that the revised Regulatory Conditions and Code of Conduct contained herein represent a restatement of the Regulatory Conditions and Code of Conduct consistent with the Commission's order issued September 15, 2004...." No responses have been filed by any party.

The Commission has confirmed that the revised regulatory conditions and Code of Conduct as filed by Progress herein are consistent with the Order in Sub 844, and the Commission finds good cause to adopt them for Progress effective with the date of the present Order.

The present Order is being issued as the final order in Sub 844 and the initial order in Sub 844A. Future regulatory condition filings that do not involve advance notices shall be made in Sub 844A only, as provided in the September 15 Order and in revised Regulatory Condition No. 38.

IT IS, THEREFORE, ORDERED as follows:

1. That the revised regulatory conditions attached hereto as Appendix A should be, and hereby are, adopted;

2. That the revised Code of Conduct attached hereto as Appendix B should be, and hereby is, adopted;

3. That each of the revised regulatory conditions shall be interpreted within the context in which it was adopted; and

4. That the appropriate accounting for, and the quantification of, the costs and benefits associated with Progress' existing or future fuel management services is reserved for future determination, without prejudice to any party's position in the subsequent proceeding.

ISSUED BY ORDER OF THE COMMISSION.
This the 27th day of October, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Sk102704.01

APPENDIX A

REGULATORY CONDITIONS FOR CAROLINA POWER & LIGHT COMPANY, D/B/A PROGRESS ENERGY CAROLINAS, INC.

For purposes of the following Regulatory Conditions, the following definitions shall be applicable:

Affiliate: Any company or subsidiary, ten percent (10%) or more of the outstanding voting securities (and/or other measures of ownership interest) of which are owned, controlled, or held with power to vote, directly or indirectly, by Progress Energy, Inc., and is thus affiliated with both Progress Energy, Inc. and each of the Utilities.
Formation: The formation of Progress Energy, Inc. and the transfer of ownership of the Utilities and/or other Affiliates to Progress Energy, Inc.
Holding Company System: Progress Energy, Inc. and all of its Affiliates.
NCNG: The public utility operations, as defined in N.C.G.S. § 62-3(23), of North Carolina Natural Gas Corporation and/or its functional successor, (1) prior to acquisition by Piedmont Natural Gas Company; and (2) to the extent such operations have an effect upon PEC, subsequent to acquisition by Piedmont Natural Gas Company.
NCUC: The North Carolina Utilities Commission.
Nonpublic Utility Operations: All activities engaged in by one or more of the Utilities involving the sales of goods or services that are not regulated by the North Carolina Utilities Commission.
PEC: The public utility operations of Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc., as defined in N.C.G.S. § 62-3(23).
Progress Energy, Inc.: The holding company established to hold 100% of the stock of each of the Utilities (including each Utility's Nonpublic Utility Operations) and stock/ownership interests in other Affiliates.
PT: The public utility operations of Progress Telecom, LLC, as defined in N.C.G.S. § 62-3(23).
Service Company: An Affiliate that provides shared goods and services to Progress Energy, Inc., one or more of the Utilities, one or more of the other Affiliates, and/or one or more of the Nonpublic Utility Operations.
Utilities (collectively) or Utility (singly): The public utility operations of PEC and/or PT.

REGULATORY CONDITIONS

1. An amount equal to any net equity investment by Progress Energy, Inc., the Utilities, and/or any Affiliate in NCNG or Florida Progress Corporation, or their corporate or functional successors, will be eliminated from PEC's capital structure for regulatory reporting purposes, unless otherwise authorized by the NCUC.
2. None of PEC's base retail electric rates will be increased from the date of an order approving the merger until after December 31, 2004, except for the following reasons: (1) annual fuel cost adjustment proceedings pursuant to G.S. 62-133.2; (2) to reflect the financial impact of governmental action (legislative, executive or regulatory) having a substantial specific impact on the electric industry generally or on a segment thereof that includes PEC, including but not limited to major expenditures for environmental compliance; or (3) to reflect the financial impact of major expenditures associated with *force majeure*. For purposes of this condition, the term *force majeure* means an occurrence that is beyond the control of PEC and/or NCNG and not attributable to either's fault or negligence. Without limiting the foregoing, *force majeure* includes acts of nature, like earthquakes, cyclones, rain, tornadoes, hurricanes, flood, fire, acts of the public enemy, war, riots, strikes, mobilization, labor disputes, civil disorders, injunctions-intervention-acts, or failures or refusals to act by government authority; and other similar occurrences beyond the control of the party declaring force majeure which such party is unable to prevent by exercising reasonable diligence. To qualify as an exception, a force *majeure* event must be reported within 15 working days of its occurrence.

   Any request pursuant to these exceptions will include a specification of the reasons for the request and an accurate quantification of the financial impact of the request.
   In addition, PEC will not file for any cost deferral from the date of an order approving the merger until after December 31, 2004, except for major expenditures to restore or replace property damaged or destroyed by *force majeure*.

3. It is assumed, based on representations made by PEC, that the merger will not cause PEC to become a registered holding company under the Public Utility Holding Company Act of 1935 (PUHCA). If PEC or its affiliates engage in acquisitions or other actions (such as, but not limited to, the creation of

a parent of PEC) after the merger that create the possibility of PEC (or a parent) becoming a registered holding company under PUHCA, PEC will notify the NCUC 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. PEC will bear the full risk of any preemptive effects of the Federal Power Act and/or PUHCA. The previous sentence includes, but is not limited to, an agreement by PEC to take all such actions as the NCUC finds are necessary and appropriate to hold North Carolina retail ratepayers harmless from rate increases, foregone opportunities for rate decreases or other effects of such preemption, including filing with and obtaining approval from the SEC or the Federal Energy Regulatory Commission (FERC) for such commitments as the NCUC deems necessary to prevent such preemptive effects.

4. Neither PEC nor an Affiliate will begin the construction of natural gas facilities, including a pipeline, to serve an electric generating plant without filing a notice of intent with the NCUC. The notice of intent shall be filed well in advance of any construction-related activity, including the acquisition of any rights-of-way. Any application for a certificate of public convenience and necessity (CPCN) to construct an electric generating facility filed with the NCUC by PEC or an Affiliate shall incorporate details with respect to the routing of any new or expanded gas pipeline or other facilities required to serve the proposed electric generating plant and details about any proposed pipeline routing and specifications related to any new or expanded natural gas facilities needed to provide gas and/or transportation service to the proposed electric generating plant. Such notice shall not be construed as an admission or acknowledgment by PEC that NCUC approval is required prior to construction of such natural gas facilities.
5. With respect to any transaction that is subject to Section 13 of PUHCA, the following requirements and procedures shall apply:

   a. PEC shall not engage in any such transaction without first obtaining from the NCUC such decision as is required under North Carolina law accepting the contract that memorializes such a transaction and authorizing the payment of compensation or fees pursuant thereto. PEC shall submit each proposed contract to the Public Staff for informal review at least ten days before filing it with the NCUC.
   b. Any such contract shall provide that PEC:

      (i) may not make or incur a charge under any such contract except in accordance with North Carolina law and the rules, regulations and orders of the NCUC promulgated thereunder; and
      (ii) may not seek to reflect in rates any (A) cost incurred under such contract exceeding the amount allowed by the NCUC or (B) revenue level earned under such contract less than the amount imputed by the NCUC.

   c. PEC shall certify that neither PEC, Progress Energy, Inc., nor any Affiliate thereof has made any fling with the SEC inconsistent with such contract. Such certification shall be repeated annually on the anniversary of the first certification.
   d. The SEC shall have found that such contract is not inconsistent with PUHCA, except that no such finding by the SEC shall be required if no SEC authorization of such contract is required under PUHCA.

6. Neither PEC, Progress Energy, Inc., nor any Affiliate thereof shall assert in any forum, with respect to any transaction to which PEC 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 PEC and from disallowing costs or imputing revenues, related to such commitment, to PEC. Should any other entity so assert, PEC, its 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.
7. PEC shall not seek to recover from its retail customers any costs that exceed fair market value for any service provided to PEC from an Affiliate.
8. With respect to any financing transaction entered into between and/or among PEC and Progress Energy, Inc. and/or any one or more of its other Affiliates, any contract memorializing such transaction shall provide that PEC:

a. may not enter into any such financing transaction except in accordance with North Carolina law and the rules, regulations and orders of the NCUC promulgated thereunder; and
b. may not reflect in rates the effect of any capital structure or debt and/or equity costs except as allowed by the NCUC.

9. Neither PEC, Progress Energy, Inc., nor any other Affiliate thereof shall assert in any forum, with respect to any financing transaction with which PEC is involved and which is subject to PUHCA, that PUHCA in any way preempts the NCUC from exercising any lawful authority it may have over such financings or that the NCUC is precluded from setting rates based on the capital structure, corporate structure, debt costs, or equity costs that it finds to be appropriate for ratemaking purposes. Should any other entity so assert, PEC, its affiliated holding company and other Affiliates shall not support any such assertion and shall, upon learning of such assertion, so advise and consult with the NCUC and the Public Staff regarding such assertion.
10. Any filing with the SEC in connection with asset transfers involving PEC shall request that the SEC include the following language in its approval order(s):

   Approval of this application in no way precludes the North Carolina Utilities Commission from scrutinizing and establishing the value of the asset transfer for purposes of determining the rates for services rendered to PEC's retail customers. It is the SEC's intention that the North Carolina Utilities Commission retain the right to review and determine the value of such asset transfer for purposes of determining retail rates.

11. Neither PEC, Progress Energy, Inc., nor any Affiliate thereof shall assert in any forum, with respect to any asset transfer transaction to which PEC is involved and which is subject to PUHCA, that PUHCA in any way preempts the NCUC from (a) exercising such authority as it may have under North Carolina law to mandate, approve or otherwise regulate a transfer of assets by or to PEC, or (b) scrutinizing and establishing the value of the asset transfers for purposes of determining the rates for services rendered to PEC's customers. Should any other entity so assert, PEC, Progress Energy, Inc. or other Affiliates shall not support any such assertion and shall, upon learning of such assertion, so advise and consult with the NCUC and the Public Staff regarding such assertion.
12. With respect to the Affiliate transactions, asset transfers, and financings described in the preceding conditions, PEC, Progress Energy, Inc. and any Affiliates thereof shall bear the full risk of any preemptive effects of PUHCA. The previous sentence includes, but is not limited to, agreement by PEC, Progress Energy, Inc., and all Affiliates to take all such actions as may be reasonably necessary and appropriate to hold North Carolina ratepayers harmless from rate increases, foregone opportunities for rate decreases or other effects of such preemption. Such actions include, but are not limited to, filing with and making every effort to obtain approval from the SEC of such commitments as the NCUC deems reasonably necessary to prevent such preemptive effects.
13. If PUHCA is amended or replaced by future legislation, representatives of PEC, and Progress Energy, Inc. shall meet with the Public Staff promptly after the passage of such legislation and negotiate in good faith whether and how these conditions have been affected by such legislation and whether they should be revised or removed. In the event the parties are unable to reach agreement within a reasonable time after passage of such legislation, the unresolved issues shall be submitted to the NCUC for resolution.
14. Subject to future orders of the NCUC, and to the extent they affect PEC's costs of providing public utility service, all administrative and general expenses of Progress Energy, Inc., the Utilities, other Affiliates, and the Nonpublic Utility Operations shall be distributed for North Carolina retail ratemaking purposes by either direct assignment, allocation, or such other means as the NCUC may determine are necessary to assure that the relationships between and among Progress Energy, Inc., the Utilities, other Affiliates, and the Nonpublic Utility Operations are consistent with the Code of Conduct approved by the NCUC (or any subsequent replacement thereof).
15. With regard to services provided by the Utilities to capital projects, Progress Energy, Inc., any of the other Utilities, other Affiliates, and/or the Nonpublic Utility Operations:

   a. Each of the Utilities shall keep on file with the NCUC its current cost allocation manual. Each cost allocation manual shall describe how all direct, indirect, and other costs will be charged to capital projects, Progress Energy, Inc., any of the other Utilities, other Affiliates, and/or the Nonpublic Utility Operations. In that connection, each of the Utilities will perform a detailed

review of the common costs to be allocated and allocation factors to be used.

b. Changes will be made, if and when necessary, to the required cost allocation manuals, and shall be filed with the NCUC. None of the Utilities can make any change to their respective cost allocations, cost allocation methodologies, or related accounting entries associated with goods and services provided to capital projects, Progress Energy, Inc., any of the other Utilities, other Affiliates, and/or the Nonpublic Utility Operations until the affected Utilities have given ten days notice to the NCUC of the proposed changes.

c. Each of the Utilities shall keep on file with the NCUC a list of items considered to be the shared services of the Utilities and the basis for each determination. PEC shall file with the NCUC in this docket annually on or before March 31 the list of services it intends to provide to Progress Energy Services and/or other Affiliates during that year. Any interim modifications by PEC to this list of services shall be filed with the NCUC at the time PEC decides to adopt said modifications.

d. If the organization of any of the Utilities' public utility operations changes, the affected Utilities will file with the NCUC any resulting changes to their cost allocation manuals and lists of services ten days prior to the proposed effective date of such changes.

16. With regard to goods or services provided by any Service Company, any other Affiliate, Progress Energy, Inc. (should Progress Energy, Inc. provide any such goods or services) or any Nonpublic Utility Operation to any of the Utilities:

a. Each of the Utilities shall keep on file with the NCUC a cost allocation manual for each Service Company, any other Affiliate, or any Nonpublic Utility Operation providing goods and services to any of the Utilities, and for Progress Energy, Inc., should Progress Energy, Inc., provide any such goods or services. Each cost allocation manual shall describe how all direct, indirect, and other costs of such provider of goods and services will be charged between and among Progress Energy, Inc., each of the Utilities, other Affiliates, and the Nonpublic Utility Operations, and shall include a detailed review of the common costs to be allocated and the allocation factors to be used.

b. Changes will be made, if and when necessary, to the required cost allocation manuals, and shall be filed with the NCUC. None of the Utilities can make any change to their respective cost allocations, cost allocation methodologies, or related accounting entries associated with goods and services provided by a Service Company, any other Affiliate, any Nonpublic Utility Operation, or Progress Energy, Inc., until the affected Utilities have given ten days notice to the NCUC of the proposed changes.

c. Each of the Utilities shall keep on file with the NCUC a list of the services and goods that are provided or are anticipated to be provided shortly thereafter by a Service Company, other Affiliate, Progress Energy, Inc., or a Nonpublic Utility Operation. PEC shall file with the NCUC in this docket annually on or before March 31 the list of services it elects to take from a Service Company, any Affiliate, a Nonpublic Utility Operation, or Progress Energy, Inc. Any interim modifications by PEC to the selection of services shall be filed with the NCUC at the time PEC gives written notice to the service provider(s).

d. If the organization of any of the Utilities changes, the affected Utilities will promptly file with the NCUC any resulting changes to any affected cost allocation manual and lists of services ten days prior to the proposed effective date of such changes.

17. PEC is required to seek out and buy all goods and services from the lowest cost provider of comparable goods and services. To this end, PEC must conduct periodic market price studies for goods and services it receives from Progress Energy, Inc., any Service Company, another Affiliate, or a Nonpublic Utility Operation, which allows assessment of whether it could have acquired the services at a lower market cost from nonaffiliated providers, or whether it could have provided the service itself at lower cost.

18. Any affected Utilities shall file notice with the NCUC 90 days prior to the initial transfer or any subsequent significant transfer of any services, functions, departments, employees, rights, obligations, assets, or liabilities relating to and/or potentially affecting the Utilities' public utility operations from any of the Utilities to a Service Company, Progress Energy, Inc., another Affiliate, or a Nonpublic Utility Operation.

19. PEC shall file an annual report of affiliated transactions with the NCUC in a format prescribed by the NCUC. The report on affiliated transactions shall be filed on or before March 31 of each year, for

activity through December 31 of the preceding year. Changes may be made, if and when deemed necessary, to the required affiliated transactions reports and submitted to the NCUC for approval.

20. Transactions between and among each of the Utilities, Progress Energy, Inc., other Affiliates, and the Nonpublic Utility Operations shall be reviewed at least triennially by the Utilities' internal auditors. The Utilities shall make available for review by the Public Staff and the NCUC all workpapers relating to these internal audits and all other internal audit workpapers, if any, related to affiliate transactions, and shall not oppose Public Staff and NCUC requests to review relevant external audit workpapers.
21. PEC will file with the NCUC revisions to its electric cost of service manual to reflect any changes to the cost of service determination process made necessary by the Formation, any subsequent alterations in the organizational structure of Progress Energy, Inc., the Utilities, other Affiliates, or the Nonpublic Utility Operations, or other circumstances that necessitate such changes.
22. In accordance with North Carolina law, the NCUC and the Public Staff will continue to have access to the books and records of each of the Utilities, Progress Energy, Inc., other Affiliates, and the Nonpublic Utility Operations.
23. For North Carolina electric retail cost of service/ratemaking purposes, wherever such costs would affect the determination of Harris Purchased Capacity and Energy Costs calculated pursuant to the Power Coordination Agreement with the North Carolina Eastern Municipal Power Agency -

    a. all costs of the merger with NCNG, the Formation of Progress Energy, Inc., and the merger with FPC, and all direct and indirect corporate cost increases, if any, attributable to those events shall be excluded from PEC's utility accounts and/or costs. For purposes of this condition, the term "corporate cost increases" is defined as costs in excess of the level that PEC (i) would have incurred using prudent business judgment or (ii) would have had allocated to it, had the mergers and/or Formation not occurred. "Corporate cost increases" shall also include any payments made under change-of-control agreements, salary continuation agreements, and/or other severance- or personnel-type arrangements that are reasonably attributable to the mergers and/or Formation; and
    b. subject to future orders of the NCUC, all administrative and general expenses of Progress Energy, Inc, the Utilities, other Affiliates, and the Nonpublic Utility Operations shall be distributed for North Carolina retail ratemaking purposes by either direct assignment, allocation, or such other means as the NCUC may determine are necessary to assure that the relationships between and among PEC, Progress Energy, Inc., other Affiliates, and the Nonpublic Utility Operations are consistent with the Code of Conduct approved by the NCUC (or any subsequent replacement thereof).

24. The Utilities, other Affiliates, the Nonpublic Utility Operations, and Progress Energy, Inc., shall be bound by the Code of Conduct approved by the NCUC in Docket Nos. E-2, Subs 753 and 760, P-708, Sub 5, E-2, Sub 844, and as it may be amended in subsequent dockets. The Code shall be considered the minimum conditions to which the Holding Company System is agreeing and shall not preclude the NCUC from amending the Code later to incorporate additional conditions. If necessary, the Code will be modified if there is a change in the organizational structure of Progress Energy, Inc., the Utilities, other Affiliates, and/or the Nonpublic Utility Operations, changes in the structure of the electric or natural gas industry, or if other changes occur that warrant such amendments.
25. PEC's Nuclear Decommissioning funds shall not be used in full or in part for the purpose of the merger with NCNG, the Formation of Progress Energy, Inc., the merger with Florida Power Corporation, or any other purpose other than providing financial assurance for decommissioning the Harris, Brunswick, and Robinson nuclear power stations owned by PEC.
26. Progress Energy, Inc., the Utilities, other Affiliates, and the Nonpublic Utility Operations shall keep their respective accounting books and records on an on-going basis in a manner that will allow all components of the cost of capital to be identified easily and clearly for each of the Utilities on separate bases.
27. To the extent the cost rates of any of the Utilities' long-term debt (more than one year), short-term debt (one year or less) or preferred stock are or have been adversely affected, through a downgrade or otherwise, by the merger with NCNG, the Formation of Progress Energy, Inc., the merger with Florida Progress Corporation, or subsequent downgrades of any acquired companies, a replacement cost rate to remove the effect will be used for all purposes affecting any of PEC's rates and charges. This replacement cost rate will be applicable to all financings, refundings, and refinancings. This procedure will be effective through PEC's next general rate case. As part of PEC's next general rate case, any

future procedure relating to a replacement cost calculation will be determined. This condition does not indicate a preference by any party for any specific debt rating or preferred stock rating for any of the Utilities on current or prospective bases.

28. Each Utility will identify as clearly as possible long-term debt (of more than one year duration) that it issues with either (a) the assets that are or will be utilized to provide service to the respective Utility's regulated utility customers or (b) the respective Utility's existing debt to be replaced with the new debt issuance.

29. All cost of capital conditions included elsewhere herein shall also apply, for North Carolina retail cost of service/ratemaking purposes, in all instances in which the cost of capital affects the determination of Harris Purchased Capacity and Energy Costs calculated pursuant to PEC's Power Coordination Agreement with the North Carolina Eastern Municipal Power Agency.

30. The cost of capital conditions also will apply to PEC's determination of its maximum allowable AFUDC rate, the rate of return applied to any of PEC's deferral accounts and regulatory assets and liabilities that accrue a return, and any other component of PEC's cost of service impacted by the cost of debt and/or preferred stock.

31. With respect to all financings, the following shall apply:

a. For all types of financings (i) for which the Utilities and/or their subsidiaries are the issuers of the respective securities and (ii) from which any proceeds will be made available to the Utilities and/or their subsidiaries, the Utilities and/or their subsidiaries shall request approval from the NCUC in accordance with G.S. 62-160 through G.S. 62-169 and NCUC Rule R1-16. Generally, the format of these filings should be consistent with past practices. A "shelf registration" approach (similar to Docket No. E-2, Sub 738) may be requested.

b. (i) For all security issuances by Progress Energy, Inc. that are anticipated to occur on or after January 1 in any year, Progress Energy, Inc. shall file an advance confidential notice with the NCUC and serve such notice on the Public Staff on or before December 1 of the previous year beginning December 1, 2004. For 2004 an advance confidential notice shall be filed as soon as possible after an order is issued in this docket. This confidential notice shall include a description of all financings that Progress Energy, Inc. reasonably believes may occur during the applicable calendar year. A description for each financing shall include the best estimates of the following: type of security, estimate of cost rate (e.g., interest rate for debt); amount of proceeds, brief description of the purpose/reason for issue, and amount of proceeds, if any, that may flow to PEC.

(ii) If at any time material changes to the financing plans included in the filed notice appear likely, Progress Energy, Inc. shall file a revised 30-day advance confidential notice that specifically addresses such changes with the NCUC and serve such notice on the Public Staff. Actual issuances would not occur until 30 days after the advance confidential notice or revised notices are filed. In the event it is not feasible for Progress Energy, Inc. to file an advance confidential notice for a material change 30 days in advance, it must be filed by a date that allows adequate time for review or the issuance must be delayed to allow such review.

(iii) At the time of the confidential notice filings identified above, Progress Energy, Inc. also shall file a non-confidential or public notice that states that a confidential notice has been filed in compliance with Condition No. 31 in Docket No. E-2, Sub 844.

(iv) Based on the filings identified above, other information provided in response to discovery or otherwise, and filings by the Public Staff and other parties, the NCUC will decide whether or not approval is necessary in accordance with G.S. 62-160 through G.S. 62-169 and NCUC Rule R1-16.

(v) On or before April 15 of each year, Progress Energy, Inc. shall file with the NCUC a report on the actual financings that were executed for the previous calendar year. The actual reports should include the same information as required above for the advance notices plus the actual issuance costs.

c. When Progress Energy, Inc. files SEC documents with the NCUC, as required by other condition(s), its transmittal letters shall identify whether and which such documents relate to the financings in (a) and (b), above.

d. All securities issuances or financings that are associated with a merger, acquisition, or combination must be filed in conjunction with the information requirements (application or demonstration of no effect) and deadlines stated in Regulatory Condition 33.

32. These conditions do not supersede any orders or directives that have been or will be issued by the NCUC regarding the issuance of specific securities by the Utilities. Any issuance of securities in conjunction with the merger with NCNG, the Formation of Progress Energy, Inc., or the merger with Florida Progress Corporation does not restrict the NCUC's right to review, and if deemed appropriate, adjust the respective Utility's cost of capital for ratemaking purposes for the effect of these securities.
33. For all proposed mergers, acquisitions, or combinations involving Progress Energy, Inc., the Utilities, and/or other Affiliates, advance notification shall be filed with the NCUC within ten days of the signing of a contract, letter of intent, or other form of agreement and at least 90 days prior to the proposed closing date for the proposed merger, acquisition, or combination. For a merger, acquisition, or combination that is believed to have an effect on any of the Utilities, an application for approval pursuant to G.S. 62-111 shall be filed at least 180 days prior to the proposed closing date for such merger, acquisition, or combination. For a merger, acquisition, or combination that is believed to have no effect on any of the Utilities, a demonstration of no effect shall be filed at least 90 days prior to the proposed closing date for such merger, acquisition, or combination. A party must file an objection within 45 days of the filing of the demonstration of no effect. If the NCUC disagrees with the demonstration of no effect, the NCUC shall so rule as promptly as possible and no closing can occur until and unless the NCUC approves the proposed merger, acquisition or combination.
34. Consistent with North Carolina law, for any acquisition, combination or merger by or involving Progress Energy, Inc., a Utility, one or more of the other Affiliates, one or more of the Nonpublic Utility Operations, or another entity within the Holding Company System over which the NCUC has jurisdiction, the NCUC will have full authority to consider and reflect appropriately any cost savings, synergies, and/or other benefits, as well as take appropriate action with respect to any potential harm, to North Carolina retail customers resulting from such acquisition, combination, or merger.
35. The Utilities agree that the benefits, costs, and associated risks of the Formation and the operation of the Utilities under a holding company structure will continue to be subject to NCUC review as part of this docket or other proceedings. The NCUC retains the right to order lawful modifications to the structure or operations of Progress Energy, Inc., any Service Company, another Utility, another Affiliate, and/or a Nonpublic Utility Operation providing goods or services to the Utilities, and/or to take whatever action the NCUC deems necessary to protect the Utilities' North Carolina regulated customers.
36. Any approval by the NCUC of the transfer of the Utilities to Progress Energy, Inc. shall not be considered, cited, or argued to constitute any finding or predisposition by the NCUC that it is in the public interest for any future diversification, expansion, acquisition, combination, merger, or transfer of control by or involving Progress Energy, Inc., any Affiliate, any Nonpublic Utility Operations, or other entity within the Holding Company System to occur.
37. Neither Progress Energy, Inc., the Utilities, nor any other Affiliate shall assert, with respect to the merger with NCNG, the Formation of Progress Energy, Inc., or the acquisition of Florida Progress Corporation, that any party has waived its right in future proceedings to pursue cost savings, if any, that may be realized as a result of the mergers and/or the Formation.
38. Except to the extent a condition specifically provides otherwise, the following procedures apply with respect to all regulatory conditions:

    a. Filings pursuant to the regulatory conditions shall be made as follows:
        (i) Regulatory condition filings that do not involve advance notices shall be made in Docket No. E-2, 844A.
        (ii) Each filing that gives an advance notice shall be assigned a new, separate Sub docket. Such a filing shall state what condition and notice period are involved and whether other regulatory approvals are required and shall be in the format of a pleading, with a caption, a title, allegations of the activities to be undertaken, and a verification.

    b. Advance notices of activities to be undertaken shall not be filed until sufficient details have been decided upon to allow for meaningful discovery as to the proposed activities.
    c. The Chief Clerk shall distribute a copy of advance notice filings to each Commissioner and to appropriate members of the Commission Staff and Public Staff.
    d. PEC shall serve such advance notices on the parties to Docket No. E-2, Subs 740, 753, and 760, who wish to receive them, and these parties may participate in the advance notice proceedings without petitioning to intervene. Other interested persons will be required to follow the Commission's usual intervention procedures.

e. PEC, having previously been required to receive input from all interested parties and develop lists of pertinent information to be provided in each type of advance notice proceeding, shall serve this information on all parties at the time it serves the advance notices.

f. During the advance notice period, a free exchange of information is encouraged, and parties may request additional relevant information. If PEC objects to a discovery request, PEC and the requesting party shall try to resolve the matter. If the parties are unable to resolve the matter, PEC may file a motion for a protective order with the Commission within three business days of the discovery request.

g. The Public Staff shall investigate each notice of activities to be undertaken and file a response with the Commission before the notice period expires.

h. If the Public Staff or any other party files a timely objection to the activities to be undertaken by the utility, the utility shall not proceed until a Commission order is issued. The Public Staff shall place the matter on a Commission Staff Conference agenda as soon as possible, in no event later than two weeks after the objection is filed, and the Commission will decide how to proceed as to the objection. The objection shall allege grounds for a hearing, if such is desired.

i. If the Public Staff files no objection to the activities and no other party files an objection, the utility may proceed upon expiration of the advance notice period (unless the Commission orders otherwise on its own initiative). In such a situation, no Commission order will be issued, and the Sub docket in which the advance notice was filed may be closed.

j. If the Commission schedules a hearing on an objection, the party filing the objection shall bear the burden of proof at the hearing.

k. The precedential effect of advance notice proceedings, like most issues of resjudicata, is best decided on a fact-specific basis.

l. If some other Commission filing or Commission approval is required by statute, notice pursuant to a regulatory condition alone does not satisfy the statutory requirement.

m. The utility, the Public Staff or any party may move for a waiver if exigent circumstances in a particular case justify such.

39. PEC recognizes that the NCUC retains the right to order reasonable modifications to the structure and/or operations of PEC and/or its Affiliates, in accordance with the provisions of Regulatory Condition 35, as necessary to address changes in the electric industry consistent with North Carolina law.

40. PEC agrees to hold North Carolina retail customers harmless for any and all losses associated with or attributable to the six-year divestiture by PEC of capacity and energy, as committed to in the merger Application filed with the FERC by Progress Energy, Inc. and Florida Progress, and for any and all losses associated with or attributable to the 50 MW transmission path made necessary by that same Application.

41. All costs of the merger with NCNG, the Formation of Progress Energy, Inc., and the merger with Florida Progress Corporation shall be excluded from each of the Utilities' utility accounts, and all direct or indirect corporate cost increases, if any, attributable to those three events shall be excluded from utility costs for all purposes that affect each of the Utilities' regulated retail rates and charges. For purposes of this condition, the term "corporate cost increases" is defined as costs in excess of the level that each of the Utilities (a) would have incurred using prudent business judgment, or (b) would have had allocated to it, had the mergers and/or the Formation not occurred. "Corporate cost increases" shall also include any payments made under change-of-control agreements, salary continuation agreements, and/or other severance- or personnel-type arrangements that are reasonably attributable to the mergers and/or the Formation.

42. Any acquisition adjustments that result from the business combinations of PEC/Progress Energy, Inc. with NCNG or Progress Energy, Inc. with Florida Progress Corporation shall be excluded from PEC's utility accounts and treated for regulatory reporting and ratemaking purposes so that they do not affect PEC's North Carolina retail electric rates and charges. This does not prohibit PEC from filing additional information showing the acquisition adjustments.

43. PEC shall amend its North Carolina retail rate schedules as follows:
For calendar year 2004, PEC will implement a rider on a bills rendered basis applicable to its non-RTP customers that will provide a uniform decrement per kwh of usage totaling, in the aggregate for the class, $6 million. For calendar year 2005, PEC will implement a rider on a bills rendered basis

applicable to its non-RTP customers that will provide a uniform decrement per kwh of usage totaling, in the aggregate for the class, $6 million.

44. PEC will increase its annual contributions to economic development projects in eastern North Carolina by $75,000 for the time period June 1, 2000, through May 31, 2005.
45. With respect to the transfer by any of the Utilities, any Affiliate thereof, and/or a Nonpublic Utility Operation to any entity, affiliated or not, of the control of, operational responsibilities for, or ownership of any asset or portion thereof used (i) for the generation, transmission, distribution, or other provision of NCUC-regulated electric power and/or service to customers in North Carolina, or (ii) for the provision of NCUC-regulated telecommunications services to customers in North Carolina:

    a. the entity whose asset or assets are the subject of a proposed transfer shall file an application for approval with the NCUC at least 90 days in advance of the proposed transfer;
    b. the entity whose asset or assets are the subject of a proposed transfer shall not commit to or carry out such a transfer except in accordance with these conditions, all applicable laws, and the rules, regulations and orders of the NCUC promulgated thereunder; and
    c. No Utility may reflect in rates the value of any such transfer, subject to or not subject to PUHCA, except as allowed by the NCUC in accordance with North Carolina law.

46. Any contract and/or filing regarding PEC's membership in and/or withdrawal from an RTO must be contingent upon state regulatory approval.
47. PEC agrees to meet with and consult with the Public Staff, upon request, regarding plans for significant changes in PEC's, and/or Progress Energy, Inc.'s organization, structure (including RTO developments), and activities; the expected and/or potential impact of such changes on PEC's regulated rates, operations and service; and proposals for assuring that such plans do not adversely affect PEC's North Carolina retail electric customers. To the extent that proposed significant changes are planned for Florida Power Corporation's organization, structure (including RTO developments), and activities and the consequences of those plans could impact the rates, service and/or costs allocated to PEC's NCUC-regulated customers, then PEC's plans and proposals for assuring that those plans do not adversely affect its customers must be included in these meetings. Prior to any anticipated significant events occurring and/or changes being made, as described above, PEC agrees to inform the Public Staff promptly, in writing, of any such events and/or changes and initiate meetings when necessary.
48. The merger of Progress Energy, Inc. and Florida Progress and the resulting participation of PEC in the proposed System Integration Agreement filed with the FERC as part of the FERC merger Application may adversely affect the NCUC's traditional regulatory authority over PEC because of the potentially preemptive relationship between the Federal Power Act (FPA) and state law. The following requirements and procedures are intended to protect the NCUC's jurisdiction in that event:
    a. All future FERC-jurisdictional agreements, service schedules and similar arrangements entered into pursuant to the Integration Agreement (or comparable agreements), as well as any amendments to or replacements of the Integration Agreement (or comparable agreements) filed with the FERC, (a) to which PEC is a party or (b) which can affect PEC's costs and revenues, either directly or indirectly through allocation, shall contain the following language:
        (i) PEC's participation in this agreement is voluntary, and PEC is not obligated to make any purchases or sales pursuant to this agreement; and
        (ii) PEC may not make or incur a charge under this agreement except in accordance with North Carolina law and the rules, regulations and orders of the NCUC promulgated thereunder.

    b. PEC and Progress Energy, Inc. shall request that the following language be included in any order issued by the FERC approving or accepting a FERC-jurisdictional agreement and/or service schedule entered into pursuant to the Integration Agreement (or comparable agreement), or approving or accepting any amendments to or replacements of the Integration Agreement (or comparable agreements), to which PEC or any Affiliate thereof is a party:

       Approval or acceptance of this agreement and/or service schedule in no way precludes the North Carolina Utilities Commission from scrutinizing and disallowing charges incurred or

made of allowing or imputing a different level of such charges when setting retail rates for services rendered to customers of affiliated public utilities in North Carolina.

c. PEC shall certify to the NCUC that neither PEC, Progress Energy, Inc., nor any Affiliate thereof has made any filing with the FERC inconsistent with the foregoing. The first such certification shall be made within 30 days of the issuance of the NCUC's order approving the merger and shall be repeated annually thereafter on the anniversary of the first certification.

49. PEC, Progress Energy, Inc., and their Affiliates shall include in any application to the FERC for approval of any transfer described in Condition 45 the commitment set forth in that condition. PEC will not transfer the control of, operational responsibilities for, or ownership of any transmission asset to an Affiliate or non-Affiliate without first obtaining NCUC approval.

50. Any filing with the FERC in connection with any asset transfers involving PEC shall request that the FERC include the following language in its approval order(s):

> Approval of this application in no way precludes the North Carolina Utilities Commission from scrutinizing and establishing the value of the asset transfer for purposes of determining the retail rates for services rendered to PEC's customers. It is the FERC's intention that the North Carolina Utilities Commission retain the right to review and determine the value of such asset transfer for purposes of determining retail rates.

51. Neither PEC, Progress Energy, Inc., nor any Affiliate thereof shall assert or support the assertion in any forum, with respect to any asset transfer transaction described above to which PEC is involved and which is subject to the Federal Power Act ("FPA"), that the FPA in any way preempts the NCUC from exercising such authority as it may have under all applicable law to (a) review the reasonableness of any commitment entered into by PEC and mandate, approve or otherwise regulate a transfer of assets by or to PEC; and/or (b) disallow costs or impute revenues, related to such commitment, to PEC and scrutinize and establish the value of the asset transfers for purposes of determining the rates for services rendered to PEC's retail customers. Should any other entity so assert, PEC, Progress Energy, Inc., and/or other Affiliates shall advise and consult with the NCUC and the Public Staff regarding such assertion.

52. PEC, Progress Energy, Inc., and all Affiliates shall take all such actions as may be reasonably necessary and appropriate to hold North Carolina retail ratepayers harmless from rate increases, foregone opportunities for rate decreases, and/or other effects of the mergers with NCNG and Florida Progress, as well as the Formation of Progress Energy, Inc.

53. A copy of all Applications, reports, contracts, rate schedules, or other documents (including attachments, exhibits, and similar items) filed with the FERC by Progress Energy, Inc., any Service Company, the Utilities, other Affiliates, and/or a Nonpublic Utility Operation shall be filed contemporaneously by PEC with the NCUC and a copy shall be provided to the Public Staff at the time of the filing. PEC also shall file with the NCUC all orders issued by the FERC that directly or indirectly affect PEC's accounting practices, North Carolina-regulated rates, operations, and/or transfer prices or allocations.

54. PEC may not purchase electricity (and/or related goods and services) from an Affiliate under circumstances where the costs incurred (whether directly or through allocation) exceed fair market value for comparable service, nor may it sell electricity (and/or related goods and services) to an Affiliate for less than fair market value except for emergency interchange transactions.

55. PEC and its retail customers will continue to bear the cost responsibility for PEC's pre-merger system power supply resources and receive the revenues from those resources. PEC shall ensure that its retail native load customers receive the benefits associated with PEC's existing system generation assets, including those for which a certificate has been granted as of the closing date of the merger. PEC and/or any of its Affiliates shall give the NCUC and the Public Staff written notice 30 days prior to filing with the FERC proposed amendments, modifications, or supplements to the Integration Agreement (or comparable agreement) that change or affect that cost responsibility and/or receipt of revenues and/or could potentially have a negative effect on PEC's North Carolina retail native load customers.

56. The joint planning and coordinated dispatch of PEC system generation contemplated by the Integration Agreement (and/or future comparable agreements) shall ensure that PEC's retail native

load receives priority with respect to that generation and shall ensure that PEC's retail native load customers receive the benefits of PEC owned or controlled system generation resources. PEC shall continue to serve its retail native load customers in North Carolina with the lowest-cost power it can reasonably generate or purchase from other sources before making power available for off-system sales. To the extent PEC owned or controlled system generation is made available for off-system sales, the revenues realized by PEC from such sales shall continue to be used to reduce PEC's retail cost of service.

57. The following provisions shall apply to PEC's participation in the wholesale market since February 14, 2003:
   a. To the extent PEC has entered, or proposes entering into, wholesale power contracts that grant native load priority to the Public Works Commission of the City of Fayetteville, North Carolina; the Town of Waynesville, North Carolina; the City of Camden, South Carolina; the French Broad Electric Membership Corporation; the North Carolina Eastern Municipal Power Agency; and the electric membership cooperatives (EMCs) within PEC's control area, whether served through the North Carolina Electric Membership Corporation (NCEMC) or individually, PEC is not required to file an advance notice with the NCUC nor receive its approval, and, subject to the conditions set out in subsection (e) below, the retail native loads of these historically served wholesale customers shall be considered PEC's retail native load for purposes of Condition Nos. 55 and 56.
   b. Before granting native load priority to wholesale customers other than those listed in subsection (a) above and/or to other companies' retail customers, PEC must request an exception to the requirements in Condition Nos. 55 and 56 that its retail customers receive priority with respect to, and the benefits from, PEC's existing generation and receive approval from the NCUC. Such approval, if granted, may include the imposition of conditions as deemed appropriate by the NCUC. PEC will not assert before FERC or any federal or state court that the NCUC does not have the authority to impose conditions, but retains the right to challenge the lawfulness of specific conditions pursuant to G.S. 62-90, *et seq.*
   c. To the extent proposed wholesale power contracts or other sales of energy and capacity are at less than native load priority, then no notice is required and no approval by the NCUC is needed. For purposes of this condition "native load priority" is defined as power supply service being provided or electricity otherwise being sold with a priority of service equivalent to that planned for and provided by PEC to its native load retail customers.
   d. Notwithstanding the foregoing, the quarterly report to the Public Staff of anticipated wholesale sales required by the NCUC in Docket No. E-2, Sub 763, which PEC has previously agreed to serve on the Attorney General of North Carolina, the Carolina Industrial Group for Fair Utility Rates, and the Carolina Utility Customers Association, Inc., shall continue to be required and is not affected by this condition.
   e. With respect to any wholesale contract PEC, as seller, has entered into since February 14, 2003, and all future wholesale contracts, the following conditions apply:
      (i) The NCUC retains the right to assign, allocate, and make pro-forma adjustments with respect to the revenues and costs associated with PEC's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes.
      (ii) Entry into wholesale contracts that grant native load priority or otherwise obligate PEC to construct generating facilities and/or make commitments to purchase capacity and energy to meet those contractual commitments constitutes acceptance by PEC, Progress Energy, and any affiliates thereof of the risks that investments in generating facilities and/or commitments to purchase capacity and energy to meet such contractual commitments and maintain an adequate reserve margin throughout the terms of such contracts may become uneconomic sunk costs that are not recoverable from PEC's retail ratepayers. PEC agrees that, in a future NCUC retail proceeding in which cost recovery is at issue, (1) it will not claim that it does not bear this risk, and (2) the NCUC retains full authority under Chapter 62 to disallow such costs as not used and useful and/or to allocate and/or assign such costs away from retail customers. For purposes of this condition, capacity will be considered used and useful and not excess capacity to the extent the NCUC determines such capacity is needed by PEC to meet the expected peak load of PEC's retail customers in the near term future plus a reserve margin comparable to that currently being used or otherwise considered appropriate by the NCUC.

(iii) PEC will not assert before the FERC or any federal or state court that (1) transactions entered into pursuant to PEC's market-based rate authority and/or (2) the filing with, and/or acceptance for filing by, the FERC of any wholesale power contract imply a cost allocation methodology that is binding on the NCUC, require the pass-through of any costs or revenues under the filed rate doctrine, or preempt the NCUC's authority to assign, allocate, make pro-forma adjustments to, and/or disallow the revenues and costs associated with PEC's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes.

(iv) PEC will not assert before any federal or state court that the exercise of authority by the NCUC to assign, allocate, make pro forma adjustments to, and/or disallow the costs and revenues associated with PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes in itself constitutes an undue burden on interstate commerce or otherwise violates the Commerce Clause of the United States Constitution. However, PEC retains the right to argue that a specific exercise of authority by the NCUC violates the Commerce Clause.

(v) Except as provided in the foregoing conditions, PEC retains the right to challenge the lawfulness of any NCUC order issued in connection with the assignment, allocation, pro-forma adjustments to, and/or disallowance of the revenues and costs associated with PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes on any other grounds, including but not limited to the rights outlined in G.S. 62-94(b).

58. The costs of any resource additions that are allocated or assigned directly or indirectly to PEC must be treated for ratemaking purposes in accordance with all applicable laws and all NCUC orders, rules and regulations.

59. A copy of all applications, reports, or other documents filed with or submitted to the SEC or its Staff pursuant to PUHCA by Progress Energy, Inc., any Service Company, the Utilities, other Affiliates, and/or any Nonpublic Utility Operation shall be contemporaneously filed with the NCUC and provided to the Public Staff. PEC also shall file with the NCUC promptly upon receipt all orders issued by the SEC that directly or indirectly affect any of the Utilities' accounting practices, financings, operations, and/or transfer prices or allocations.

60. PEC shall not take services from nor provide services to Affiliates other than Progress Energy Services if comparable services can be provided more economically and efficiently by Progress Energy Services.

61. Any and all proposed changes to Progress Energy Services' contracts and service contracts between PEC and/or any of its Affiliates must be filed for approval by the NCUC contemporaneously with their being filed with the SEC.

62. PEC shall cooperate fully in any future investigation of power and natural gas marketing activities, including, but not limited to, how those activities are structured, how prices and costs are determined and whether these activities are being conducted in compliance with the relevant codes of conduct.

63. PEC's North Carolina retail customers shall be held harmless from all current and prospective liabilities of Florida Progress Corporation and its subsidiaries, including, but not limited to, the litigation involving Mid-Continent Life Insurance Company, pensions and other employee benefits, decommissioning costs, and taxes.

64. PEC shall provide to the Public Staff immediately upon execution and/or finalization the Tax Allocation Agreement, plans to consolidate employee benefits plans, and other similar agreements and plans.

65. Each of the Utilities will continue to take steps to implement and further their commitment to providing superior public utility service. To the extent Florida Power Corporation's quality of service practices are found to be superior to PEC's, PEC shall incorporate those practices into its own practices to the extent practicable. PEC will work with the Public Staff (a) to continue to monitor and improve service quality, and (b) to ensure the service quality indices are appropriate and to revise them if and when such revisions are necessary.

66. Progress Energy, Inc. shall maintain all Utility financial books and records in Raleigh, North Carolina.

APPENDIX B

CODE OF CONDUCT GOVERNING THE RELATIONSHIPS BETWEEN AND AMONG CAROLINA POWER & LIGHT COMPANY, D/B/A PROGRESS ENERGY CAROLINAS, INC., PROGRESS TELECOM, LLC, PROGRESS ENERGY, INC., AND THEIR AFFILIATES AND THEIR NONPUBLIC UTILITY OPERATIONS

I. Definitions

For purposes of this Code of Conduct, the terms listed below shall have the following definitions:

Affiliate: Any company or subsidiary, ten percent (10%) or more of the outstanding voting securities (and/or other measures of ownership interest) of which are owned, controlled, or held with power to vote, directly or indirectly, by Progress Energy, Inc., and is thus affiliated with both Progress Energy, Inc. and each of the Utilities.

Commission: The North Carolina Utilities Commission.

Confidential Systems Operation Information: Nonpublic information that pertains to Electric or Telecommunications Services provided by any of the Utilities.

Customer: Any retail electric customer of PEC located within PEC's electric service territory, and any regulated utility customer of PT.

Customer Information: Any and all customer specific information obtained by one or more of the Utilities, with regard to Customers.

Electric Services: Commission-regulated electric energy sales, generation, transmission, distribution and/or delivery, and other related services, including, but-not limited to, metering and billing.

Fully Distributed Costs: All direct and indirect costs, including overheads and an appropriate cost of capital, incurred in providing the goods and services in question.

Gas Marketing: The unregulated sale, arrangement, brokering, or management of gas supply, pipeline capacity, or gas storage.

Gas Marketing Affiliate: Progress Energy, Inc., a Progress Energy, Inc., business operation, or an Affiliate of PEC engaged in Gas Marketing.

Nonpublic Utility Operations: All activities engaged in by one or more of the Utilities, involving the sales of goods or services that are not regulated by the North Carolina Utilities Commission.

Personnel: An employee or other representative of PEC, Progress Energy, Inc., another Affiliate, or a Nonpublic Utility Operation who is involved in fulfilling the business purpose of that entity.

PEC: The public utility operations of Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc., as defined in N.C.G.S. § 62-3(23).

PEF: The public utility operations of Florida Power Corporation, d/b/a Progress Energy Florida, Inc.

Progress Energy: Progress Energy, Inc., the holding company established to hold 100% of the stock of each of the Utilities (including each Utility's Nonpublic Utility Operations) and stock/ownership interests in other Affiliates.

PT: The public utility operations of Progress Telecom, LLC, as defined in N.C.G.S. § 62-3(23).

Service Company: An Affiliate that provides shared goods and/or services to Progress Energy, one or more of the Utilities, one or more of the other Affiliates, and/or one or more of the Nonpublic Utility Operations.

Similarly Situated: Possessing comparable characteristics, such as, with regard to Electric Services, time of use, manner of use, customer class, load factor, and relevant Standard Industrial Classification.

Telecommunications Services: The conveying or transmitting of messages or communications by telephone, telegraph or any means of transmission to the extent those services are subject to regulation by the Commission.

Utilities (collectively) or Utility (singly): The public utility operations of PEC and/or PT.

II. Code of Conduct

This Code of Conduct, while not wholly inclusive or totally encompassing, establishes the minimum guidelines and rules that apply to the relationships between and among, and transactions involving, individually or in any combination, Progress Energy, each of the Utilities, one or more other Affiliates, and/or one or more of the Nonpublic Utility Operations, to the extent such relationships and transactions affect the Utilities' operations or costs of utility service. This Code of Conduct will become applicable on the date that it is approved by the Commission.

A. **GENERAL STANDARDS**

1. Equal Treatment - The Utilities, singly or in any combination, shall not show any preference to: customers of Progress Energy, another Utility, one or more Affiliates, and/or one or more of the Nonpublic Utility Operations; or requests for service from Progress Energy, another Utility, one or more Affiliates, and/or one or more of the Nonpublic Utility Operations, as compared to nonaffiliated entities and their customers.
2. Cross-subsidies involving either one or more of the Utilities and Progress Energy, one or more of the Utilities and one or more Affiliates, or one or more of the Utilities and one or more of the Nonpublic Utility Operations are prohibited.
3. Separation - Each of the Utilities, Progress Energy, and other Affiliates shall operate independently of each other (except for sharing of services under Section II.D.3). Each of the Utilities, Progress Energy, and each of the other Affiliates shall maintain separate books and records. Each of the Utilities' Nonpublic Utility Operations shall maintain separate records from those of each Utility's public utility operations to ensure appropriate cost allocations and any requirements of arm's length transactions. Each of the Utilities, Progress Energy, and each of the other Affiliates shall conduct business from physically separate offices located on different floors or in different buildings. However, one or more of the Utilities, Progress Energy, and one or more of the Affiliates may share offices to the extent necessary to perform those shared corporate functions permitted under Section 11.D.3 of this Code of Conduct.
4. Disclosure of Customer Information - Upon request, PEC shall provide electric Customer Information to Progress Energy, one or more of the other Utilities, one or more of the other Affiliates, and/or one or more of the Nonpublic Utility Operations under the same terms and conditions that such information is provided to nonaffiliates. Upon request, PT shall provide Telecommunications Customer Information to Progress Energy, one or more of the other Utilities, one or more of the other Affiliates, and/or one or more of the Nonpublic Utility Operations under the same terms and conditions that such information is provided to all nonaffiliates. Customer Information shall not be disclosed to any person or company without the Customer's consent except to the extent provided for in Section II.D.3. If disclosed, it must be done with advance public notification, in a manner determined by the Commission to ensure that the opportunity to receive the disclosed information is made available to nonaffiliates at the same time that it is made available to Progress Energy, any other Utility, any of the other Affiliates, and/or any of the Nonpublic Utility Operations. Notwithstanding the prohibitions established by this subsection, each of the Utilities may disclose Customer Information to a Service Company (or to PEC, subject to an affiliated services contract, prior to the Formation of the Service Company) without Customer consent and without making the information available to any other person or company in order to allow a Service Company (or, as conditioned above, PEC) to perform billing services for that Utility. Such Customer Information shall only be disclosed to those Service Company employees (or, as conditioned above, PEC employees) performing billing operations and shall be stored in such a manner that only the Service Company employees (or, as conditioned above, PEC employees) that perform billing operations and employees in a Service Company (or, as conditioned above, PEC employees) who are responsible for responding to Customer inquiries concerning Customer service and billing matters may access the information.
5. Disclosure of Confidential System Operations Information - Confidential Systems Operation Information of any of the Utilities shall not be disclosed to Progress Energy, another of the Utilities, another Affiliate, or a Nonpublic Utility Operation without approval from the Commission. Notwithstanding the prohibitions established by this subsection, the Utilities may disclose Confidential Systems Operation Information to a Service Company, but only pursuant to a service agreement filed with the Commission. Such Confidential Systems Operation Information shall only be disclosed to those Service Company employees performing the functions that utilize the information and the information shall be stored in such a manner that only the Service Company employees that utilize the information shall have access to the

information. Every effort must be made to prevent the use of such information in anticompetitive or otherwise inappropriate ways.

B. NONDISCRIMINATION AND INFORMATION STANDARDS

1. Each of the Utilities shall process all similar requests for Electric and/or Telecommunications Services in the same timely manner, whether requested on behalf of Progress Energy, another of the Utilities, another Affiliate, a Nonpublic Utility Operation, or a nonaffiliated entity. The Utilities shall apply the provisions of their tariffs equally to Progress Energy, the other Utilities, other Affiliates, Nonpublic Utility Operations and nonaffiliates.
2. None of the Utilities will represent to any Customer that Progress Energy, another of the Utilities, any other Affiliate, and/or any Nonpublic Utility Operation will receive any preference from any of the Utilities relative to providing Electric or Telecommunications Services over any nonaffiliated service provider, nor will any of the Utilities provide Progress Energy, another of the Utilities, any other Affiliate, and/or any Nonpublic Utility Operation with any preference over nonaffiliates in provision of Electric or Telecommunications Services.
3. None of the Utilities shall condition or otherwise tie the provision or terms of any Electric or Telecommunications Services to the purchasing of any goods or services from Progress Energy, another of the Utilities, another Affiliate, and/or any Nonpublic Utility Operation.
4. When any employee of one or more of the Utilities receives a request for information from or provides information to a Customer about services available from Progress Energy, another Affiliate, and/or a Nonpublic Utility Operation, the employee must advise the Customer that such services may also be available from nonaffiliated suppliers.

C. MARKETING STANDARDS

1. Progress Energy, one or more of the Utilities, one or more of the other Affiliates and/or one or more of the Nonpublic Utility Operations may engage in joint sales, joint sales calls, joint proposals, and/or joint advertising, subject to any conditions or restrictions that the Commission may hereafter establish, provided the participating Utilities agree to engage in similar activities with nonaffiliates under the same terms and conditions. However, PEC and a Gas Marketing Affiliate or a Nonpublic Utility Operation engaged in Gas Marketing may not engage in joint sales, joint sales calls, joint proposals, and/or joint advertising. The Utilities involved in joint marketing programs/calls shall post certain information regarding the joint marketing programs/calls on their respective internet web sites at least 14 days prior to commencing a joint marketing arrangement and the information shall remain posted on the web site for the duration of the arrangement. The information disclosed on the web site shall include a description and terms of the joint marketing arrangement. Posting of the terms for the joint marketing arrangement shall include an offer by each of the Utilities involved to engage in joint marketing on such terms with nonaffiliates.
2. Neither Progress Energy nor any of the nonregulated Affiliates may use any of the Utilities' names and/or logos in any communications unless a disclaimer is included that states the following:
   (a) "[Progress Energy/Affiliate] is not the same company as [Utility], and [Progress Energy/Affiliate] has separate management and separate employees;"
   (b) "[Progress Energy/Affiliate] is not regulated by the North Carolina Utilities Commission or in any way sanctioned by the Commission;"
   (c) "purchasers of products or services from [Progress Energy/Affiliate] will receive no preference or special treatment from [Utility];" and
   (d) "a customer does not have to buy products or services from [Progress Energy/Affiliate] in order to continue to receive the same safe and reliable [electric/telecommunications] service from [Utility].

   Nonpublic Utility Operations may not use any of the Utilities' names and/or logos in any communications unless a disclaimer is included that states the following:

(a) "[Nonpublic Utility Operation] is not part of the regulated services offered by [Utility] and is not in any way sanctioned by the North Carolina Utilities Commission;"

(b) "purchasers of products or services from [Nonpublic Utility Operation] will receive no preference or special treatment from [Utility]," and

(c) "a customer does not have to buy products or services from [Nonpublic Utility Operation] in order to continue to receive the same safe and reliable [electric/telecommunications] service from [Utility]."

The required disclaimer must be sized and displayed in a way that is commensurate with the name and/or logo so that the disclaimer is no smaller than the larger of one-half the size of the type that first displays the name and logo or the predominant type used in the communication.

3. Personnel of Progress Energy, any of the Utilities, another Affiliate, or a Nonpublic Utility Operation shall not give the appearance that Progress Energy, the Affiliate, or the Nonpublic Utility Operation speaks on behalf of any of the Utilities.

4. Personnel of Progress Energy, any of the Utilities, another Affiliate, or a Nonpublic Utility Operation shall not indicate to a third party that any advantage exists as the result of that third party dealing with Progress Energy, an Affiliate, or a Nonpublic Utility Operation as compared with a nonaffiliate.

D. COST ALLOCATION AND TRANSFER PRICING STANDARDS

1. As a general guideline, with regard to the transfer prices charged for goods and services, including the use and/or transfer of personnel, exchanged between and among Progress Energy, one or more of the Utilities, one or more of the other Affiliates, and/or one or more of the Nonpublic Utility Operations, to the extent such prices affect the Utilities' operations or costs of utility service, the following conditions shall apply:

   (a) For untariffed goods and/or services provided by any of the Utilities to Progress Energy, a nonregulated Affiliate, and/or a Nonpublic Utility Operation, the transfer price shall be the higher of market value or Fully Distributed Cost.

   (b) For goods and/or services provided by Progress Energy, a nonregulated Affiliate, and/or a Nonpublic Utility Operation to any of the Utilities, the transfer price charged by Progress Energy, the nonregulated Affiliate, and/or the Nonpublic Utility Operation to the affected Utilities shall be the lower of market value or Progress Energy's, the nonregulated Affiliate's, and/or the Nonpublic Utility Operation's Fully Distributed Cost. If the Utility does not engage in competitive solicitation and instead obtains the goods and/or services from Progress Energy, a nonregulated Affiliate, and/or a Nonpublic Utility Operation, the Utility shall implement adequate safeguards to ensure Utility Customers receive service at the lowest cost in each case.

   (c) Transactions between and among the Utilities for untariffed goods and/or services shall be priced at the lower of Fully Distributed Costs or market value. Subject to and in compliance with all conditions placed upon PEC by the Commission, including the Regulatory Conditions set forth pursuant to Docket No. E-2, Sub 844, untariffed goods and/or services provided by PEC to PEF or by PEF to PEC, which for a single item or a single transaction amount to $100,000 or less, shall be transferred at Fully Distributed Cost. Fully Distributed Cost pricing for such exchanges shall be limited to an aggregate annual amount of $7,500,000. Exchanges above either the single item/transaction limit or the aggregate annual limit shall be priced according to sections II.D.1(a) and II.D.1(b) of this Code of Conduct.

2. All permitted transactions between and among any of the Utilities and Progress Energy, the other Utilities, the other Affiliates, and/or the Nonpublic Utility Operations shall be recorded and accounted for in accordance with the affected Utilities' cost allocation manuals.

3. A Service Company may provide Progress Energy, one or more of the Utilities, one or more of the other Affiliates, and/or one or more of the Nonpublic Utility Operations with certain corporate services and functions on a joint basis. Such shared services shall

be charged among Progress Energy, the Utilities, the other Affiliates, and the Nonpublic Utility Operations. Shared services shall be those provided in response to Condition 15, subject to approval by the Commission.

4. The Utilities may participate with each other in joint purchases of goods and services. All joint purchases, including leases, shall be priced in a manner that permits clear identification of each Utility's portion of such purchases or leases. The Utilities shall not engage in joint purchases with Progress Energy, other Affiliates, and/or the Nonpublic Utility Operations, unless specifically permitted in advance by Commission order upon a finding that it is in the best interest of ratepayers. Subject to and in compliance with all regulatory conditions placed upon PEC by the Commission, including the Regulatory Conditions set forth pursuant to Docket No. E-2, Sub 844, PEC may participate with PEF in joint purchases of goods and services. All joint purchases, including leases, shall be priced in a manner that permits clear identification of both PEC's and PEF's portions of such purchases and leases to the extent feasible, and shall be reported in PEC's affiliated transaction reports filed with the Commission. If any of the goods or services purchased or leased jointly by PEC and PEF are transferred to or utilized by an Affiliate or Nonpublic Utility Operation within 12 months of the joint purchase or lease, PEC will file notification with the Commission.
5. Costs that any Utility incurs in assembling, compiling, preparing, and/or furnishing requested Customer Information or Confidential Systems Operation Information to Progress Energy, any other Utilities, other Affiliates, Nonpublic Utility Operations, and/or nonaffiliates shall be recovered from the requesting party pursuant to Section II.D.1 of this Code of Conduct.
6. Technology or trade secrets developed by any of the Utilities will not be transferred to Progress Energy, other Utilities, any of the other Affiliates, and/or any of the Nonpublic Utility Operations without just compensation, and the filing of notice with the Public Staff and Commission at least 60 days prior to the transfer.
7. The Utilities shall receive compensation from Progress Energy, other Affiliates, and/or the Nonpublic Utility Operations for intangible benefits, if appropriate.

E. **REGULATORY OVERSIGHT**

1. The State's existing requirements under N.C.G.S. 62-153 for reporting of affiliate transactions shall apply.
2. The books and records of Progress Energy, the Utilities, other Affiliates, and the Nonpublic Utility Operations shall be open for examination by the Commission, its staff, and the Public Staff consistent with the provisions of N.C.G.S. 62-34, 62-37, and 62-51.
3. All gas supply and/or transportation arrangements between and among PEC, Progress Energy, any other Affiliates, and/or any of the Nonpublic Utility Operations of more than two months shall be filed with the Commission in advance.

F. **COMPLAINT PROCEDURE** - Each of the Utilities shall establish complaint procedures to resolve potential complaints that arise due to the relationship of that Utility with Progress Energy, other Affiliates, and/or the Nonpublic Utility Operations. These complaint procedures do not affect a complainant's right to file a formal complaint with or otherwise address questions to the Commission. The complaint procedures shall provide for the following:

1. Verbal and written complaints shall be referred to a designated representative of the Utility.
2. The designated representative shall provide written notification to the complainant within 15 days that the complaint has been received.
3. The Utility shall investigate the complaint and communicate the results of the investigation to the complainant within 60 days of receiving the complaint.
4. The Utility shall maintain a log of complaints and related records for inspection by the Commission, its staff and/or the Public Staff.
5. If the complainant is not satisfied, the Utility shall inform the Commission, its staff and the Public Staff of the complaint.

G. **UTILITY BILLING FORMAT** - To the extent any bill issued by Progress Energy, one of the Utilities, another Affiliate, a Nonpublic Utility Operation, and/or a nonaffiliate includes any charges for Electric and/or Telecommunications Services, the charge for each type of regulated

Service shall be separated from the charges for all other regulated Services and from all charges for nonregulated services included on the bill. Additionally, the bill shall contain the following introductory notice in bold print: **None of the individual regulated Electricity or Telecommunications services included on this bill may be terminated for failure to pay for another regulated service or for any nonregulated service included on this bill. Failure to pay for a regulated service included on this bill affects only that specific regulated service.**

H. REVISIONS TO THIS CODE OF CONDUCT – PEC, other Affiliates, the Nonpublic Utility Operations, and Progress Energy, Inc., shall be bound by this Code of Conduct as approved by the Commission. This Code of Conduct provides minimum standards and is subject to such modification by the Commission as the public interest may require.

I. NATURAL GAS MARKETING STANDARDS

1. A Gas Marketing Affiliate and/or a Nonpublic Utility Operation engaged in Gas Marketing shall function independently of PEC, and Affiliate and Nonpublic Utility Gas Marketing personnel must be located in a facility that Is physically separate from that used by the PEC Personnel performing similar functions.
2. PEC Personnel may not perform any of the following functions on behalf of a Gas Marketing Affiliate or a Nonpublic Utility Operation engaged in Gas Marketing:
   (a) Purchase gas, pipeline capacity or storage capacity.
   (b) Market or sell gas and related services.
   (c) Price or administer products and services.
   (d) Hire and/or train Affiliate or Nonpublic Utility Gas Marketing personnel.
   (e) Offer consulting services regarding gas functions.
3. Notwithstanding the provisions of Subsections 1 and 2 of this Section, PEC may continue to fulfill any specific obligations of the Fuel Management Services Agreement in effect as of April 1, 2004, and may enter into similar agreements; provided however, the regulatory and accounting principles appropriate for governing the accounting for, and the quantification of, the costs and benefits associated with existing or future fuel management services remain subject to Commission review and approval, upon the Commission's own motion or the motion of any party.
4. An individual may be an officer or director of both PEC and a Gas Marketing Affiliate or Nonpublic Utility Operation engaged in Gas Marketing provided that the individual does not obtain or use knowledge of market-sensitive information for more than one of the entities.

DOCKET NO. G-5, SUB 454

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Public Service Company of North Carolina, Inc., for Annual Review of Gas Costs Pursuant to G.S. 62-133.4(c) and Commission Rule R1-17(k)(6)	) ORDER ON ANNUAL REVIEW) OF GAS COSTS

HEARD: Tuesday, August 10, 2004, at 10:00 a.m., in Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Lorinzo L. Joyner, Presiding, and Commissioners J. Richard Conder and Robert V. Owens, Jr.

APPEARANCES:

For Public Service Company of North Carolina, Inc.:
Mary Lynne Grigg, Womble Carlyle Sandridge & Rice, PLLC, Post Office Box 831, Raleigh, North Carolina 27602

For the Using and Consuming Public:
Vickie L. Moir, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For Carolina Utility Customers Association, Inc.:
James P. West, West Law Offices, PC, Suite 1735, 434 Fayetteville Street Mall, Raleigh, North Carolina 27601

BY THE COMMISSION: On June 1, 2004, Public Service Company of North Carolina, Inc. (PSNC or Company), filed the direct testimony and exhibits of William C. Williams, General Manager – Gas Supply & Sales, and Candace A. Paton, Coordinator of Rates and Regulatory Administration for PSNC, SCANA Services, Inc., in connection with the annual review of PSNC's gas costs pursuant to G.S. 62-133.4(c) and Commission Rule R1-17(k)(6).

On June 3, 2004, the North Carolina Utilities Commission (Commission) issued an Order scheduling a hearing on August 10, 2004, setting other procedural deadlines, establishing discovery guidelines, and requiring public notice.

The Attorney General filed a notice of intervention on June 9, 2004. On June 16, 2004, Carolina Utility Customers Association, Inc. (CUCA), filed a Petition to Intervene, which the Commission granted on June 18, 2004.

On July 26, 2004, the Public Staff filed the Joint Testimony and Exhibit of Thomas W. Farmer, Jr., Director of the Economics Research Division, David A. Poole, Staff Accountant, and Jan A. Larsen, Utilities Engineer, Natural Gas Division.

On August 3, 2004, PSNC filed a Motion for Admission to Practice and Statements of PSNC and B. Craig Collins pursuant to G.S. 62-84.1 seeking an order from the Commission allowing Mr. Collins to appear before the Commission in this proceeding. On August 6, 2004, the Commission issued an order granting PSNC's motion.

On August 9, 2004, PSNC filed its Affidavits of Publication.

The matter came on for hearing as scheduled. Witnesses Williams' and Paton's testimony and exhibits were entered into the record. The testimony and exhibits of Public Staff witnesses Farmer, Poole, and Larsen were also entered into the record.

Based on the testimony, exhibits, and the entire record in this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. PSNC is a corporation duly organized and existing under the laws of the State of South Carolina, having its principal office and place of business in Gastonia, North Carolina. PSNC operates a natural gas pipeline system for the transportation, distribution, and sale of natural gas to approximately 398,000 winter-peak customers in the State of North Carolina.

2. PSNC is engaged in providing natural gas service to the public and is a public utility as defined in G.S. 62-3(23), subject to the jurisdiction of this Commission.

3. PSNC has filed with the Commission and submitted to the Public Staff all of the information required by G.S. 62-133.4(c) and Commission Rule R1-17(k) and has complied with the procedural requirements of such statute and rule.

4. The review period for this proceeding is the twelve months ended March 31, 2004.

5. During the period of review, PSNC incurred gas costs of $352,576,795, composed of demand and storage charges of $59,790,537, commodity gas costs of $270,044,546, and other gas costs of $22,741,712.

6. In compliance with the Commission's order in Docket No. G-100, Sub 67, the Company credited 75% of the net compensation from secondary market transactions, which amounted to $4,838,194, to its All Customers Deferred Account.

7. PSNC properly accounted for its gas costs during the review period.

8. PSNC has adopted a gas supply policy which it refers to as a "best cost" supply strategy. This gas supply policy is based upon three primary criteria: supply security, operational flexibility, and the cost of gas.

9. PSNC has a portfolio of long-term and supplemental short-term supply agreements with a variety of suppliers including major oil and gas producers, independent producers, interstate pipeline marketing affiliates, and independent marketers.

10. PSNC's hedging activities during the review period were prudent.

11. At March 31, 2004, the Company had a debit balance of $1,878,451 in its Hedging Deferred Account.

12. It is appropriate to transfer the $1,878,451 debit balance from the Hedging Deferred Account to the Sales Customers Only Deferred Account.

13. The gas costs incurred by PSNC during the review period were prudently incurred.

14. The Deferred Gas Cost Account balances as of March 31, 2004, were $9,229,730 owed from the customers to the Company in the Sales Customers Only Deferred Account, which includes $1,878,451 of hedging costs, and $18,169,766 owed from the Company to the customers in the All Customers Deferred Account.

15. It is reasonable to permit PSNC to continue the temporary rate decrements applicable to the All Customers Deferred Account but not to implement a temporary rate increment for the Sales Customers Only Deferred Account at this time.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 AND 2

These findings are essentially informational, procedural, or jurisdictional in nature and were not contested by any party. They are supported by information in the Commission's public files and records and the testimony, schedules, and exhibits filed by the witnesses for PSNC and the Public Staff.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3 AND 4

The evidence for these findings of fact is contained in the testimony of PSNC witnesses Williams and Paton and Public Staff witnesses Farmer, Poole, and Larsen. The findings are based on G.S. 62-133.4 and Commission Rule R1-17(k)(6).

G.S. 62-133.4 requires that PSNC submit to the Commission information and data for an historical twelve-month review period, including PSNC's actual cost of gas, volumes of purchased gas, sales volumes, negotiated sales volumes, and transportation volumes. In addition to such information, Commission Rule R1-17(k)(6)(c) requires that PSNC file weather normalization sales volume data, work papers, and direct testimony and exhibits supporting the information filed.

Witness Williams testified that Rule R1-17(k)(6) requires PSNC to submit to the Commission on or before June 1 of each year certain information with supporting work papers based on the twelve-month period ending March 31. Witness Williams indicated that the Company had filed the required information. Witness Paton also indicated that the Company had provided to the Commission and the Public Staff on a monthly basis the gas cost and deferred gas cost account information required by Commission Rule R1-17(k)(5)(c). The Public Staff panel of witnesses (Public Staff witnesses or panel) stated that the Public Staff had reviewed the monthly deferred gas cost account reports.

The Commission concludes that PSNC has complied with the procedural requirements of G.S. 62-133.4(c) and Commission Rule R1-17(k) for the twelve-month review period ended March 31, 2004.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 5 THROUGH 7

The evidence supporting these findings of fact is found in the testimony of PSNC witness Paton and the Public Staff witnesses.

PSNC witness Paton's exhibits reflect demand and storage costs of $59,790,537, commodity costs of $270,044,546, and other gas costs of $22,741,712. The Public Staff witnesses agreed with these amounts, which result in total gas costs of $352,576,795 for the review period ended March 31, 2004.

The Public Staff witnesses stated that the Company earned $6,450,920 of margin on secondary market transactions, including buy/sell arrangements and capacity release transactions, during the review period. Of this amount, $4,838,194 (75% x $6,450,920) was credited to the All Customers Deferred Account for the benefit of ratepayers.

The Commission concludes that PSNC has properly accounted for its gas costs during the review period.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 8 THROUGH 14

The evidence for these findings of fact is found in the testimony of PSNC witness Williams and the Public Staff witnesses.

PSNC witness Williams testified that approximately 43% of PSNC's market is comprised of deliveries to industrial or large commercial customers that either purchase gas from PSNC or transport gas on PSNC's system. According to witness Williams, a majority of these customers have the capability to use a fuel other than gas and will use an alternate fuel when it is priced below natural gas. The remainder of the Company's sales is primarily to residential and small commercial customers. Electricity is PSNC's primary competition for these market segments.

Witness Williams testified that the most appropriate description of PSNC's historical gas supply policy would be a "best cost' supply strategy, which is currently based on three primary criteria: supply security, operational flexibility, and the cost of gas. Witness Williams indicated that security of supply is the first and foremost criterion. He stated that to maintain the necessary supply security for all of the Company's firm customers, PSNC has supply contracts with delivery warranties and storage service contracts with delivery rights that provide total gas deliveries to PSNC and facilitate the full utilization of PSNC's firm interstate pipeline transportation and storage capacity. The rationale for this practice is PSNC's commitment to serve its firm market.

PSNC witness Williams stated that the Company has long-term supply agreements and supplemental short-term agreements with a variety of suppliers, including major oil and gas producers, independent producers, interstate pipeline marketing affiliates, and independent marketers. He stated that PSNC has increased its security of gas supplies by developing a diversified portfolio of long and short-term suppliers.

Witness Williams testified that maintaining the necessary operational flexibility in its gas supply portfolio is the second criterion. Flexibility is required because of daily changes in market requirements related to weather, industrial customers' operating schedules, and their ability to switch to alternate fuels. He noted that while each of the supply agreements has different purchase and swing capabilities, the gas supply portfolio as a whole must be capable of dealing with the monthly, daily, and hourly changes in the Company's market requirements.

In regard to the third criterion, the cost of gas, witness Williams stated that PSNC is committed to acquiring cost-effective supplies at market-based prices while maintaining the necessary security and operational flexibility to serve the needs of its customers. He noted that storage and the Company's hedging program are also utilized to help mitigate price volatility.

Witness Williams noted that in last year's prudence review the Company indicated that it would continue to evaluate its hedging program to keep it aligned with the goal of mitigating price volatility. With that goal in mind, PSNC implemented two changes to its hedging program during this review period. First, in October 2003, with the approval of the SCANA Risk Management Committee, PSNC adjusted the defined volume to be hedged to 25 percent of the forecasted normalized sales volumes for the firm base rate customers in any given month. These volumes are adjusted to reflect the impact of storage and liquefied natural gas (LNG) injections and withdrawals. Previously, the Company defined the volume to be hedged as 15 percent of the normalized sales volumes for the firm base rate customers for any given month. Second, PSNC changed the hedging level from "Level 4" to "Level 3." Pursuant to its Hedging Program, "Level 4" hedgers are defined as conservative, meaning that the hedger at this level values hedges at the most favorable price(s), and will hold back as prices move in a favorable direction, possibly at the expense of hedging any allocated volumes. Hedgers at "Level 1" and "Level 2" are considered aggressive, and they value placing full volumes under a hedge, as quickly as is reasonable, possibly at the expense of favorable price movements. "Level 3" hedgers are moderate, or a mid-way compromise, between an aggressive and conservative hedger. These two changes to PSNC's hedging program provide a

higher probability of PSNC implementing and completing hedges. Witness Williams stated PSNC's program does not require each month to be fully hedged. He noted that while fully hedging each month may protect the hedger from higher prices, it might also increase the likelihood that the program will incur significant and unnecessary costs. Witness Williams testified that given that a prudent hedger will analyze the market, it follows that the analysis should include the possibility that not hedging, at times, is the best decision. The utilization of the hedging program is part of the Company's risk management program, with its primary goal being the smoothing of price volatility to firm customers.

Witness Williams stated that the greatest challenges facing the Company today are decisions that will affect the Company and its customers in the future, such as decisions regarding long-term gas supply, capacity, and hedging in an environment of regulatory, legislative and market uncertainty.

Witness Williams stated that the majority of PSNC's interstate pipeline capacity is obtained from Transcontinental Gas Pipe Line Corporation (Transco), the only interstate pipeline with which PSNC has a direct connection. The Company also has a backhaul transportation arrangement with Transco to redeliver gas, as well as storage service arrangements with Dominion Transmission (DTI); Columbia Gas Transmission Corporation; Cove Point LNG, LP; and Pine Needle LNG Company, LLC. He noted that PSNC also has upstream firm transportation (FT) agreements with Texas Gas Transmission Corporation and Transco, both of which feed into DTI. In November 2003, PSNC added firm transportation service with East Tennessee Natural Gas Company for 30,000 dekatherms (DT) per day and in August 2003, PSNC added 30,000 DT per day maximum withdrawal quantity (600,000 DT of maximum storage capacity) with Saltville Gas Storage Company, LLC.

In regard to the gas supply contracts that support the FT capacity, witness Williams indicated that PSNC has developed a portfolio gas supply strategy that includes the execution of long-term supply contracts, which support the Company's best-cost supply strategy. According to witness Williams, PSNC currently had approximately 248,000 DT per day under contracts with thirteen major producers and two interstate pipeline marketing affiliates as of November 1, 2003. He testified that the contracts all have provisions to ensure that the prices paid remain market sensitive.

Witness Williams testified that the gas supply and capacity portfolio that the Company has developed provides it the flexibility to meet its market requirements in a secure and cost-effective manner.

In addition, witness Williams testified to the following activities that PSNC has engaged in to lower gas costs while maintaining security of supply and delivery flexibility:

1. During the review period, PSNC renegotiated pricing terms associated with one of its long-term supply agreements to ensure that charges accurately reflect market conditions. PSNC also entered into agreements for either the winter season or for an annual term with six (6) new suppliers to replace service that expired during the review period;

2. As noted above with the execution of various precedent and service agreements, PSNC continually evaluated various firm transportation and storage capacity options to ensure that future peak day requirements will be met;

3. PSNC continued to pursue and capture opportunities for capacity release and other secondary market transactions;

4. PSNC actively participated in matters before the Federal Energy Regulatory Commission, whose actions could impact the interstate pipelines and storage services on which PSNC currently holds, or could potentially hold contracts, where such matters may impact PSNC's rates and services to its customers;

5. PSNC continued to work with its industrial customers to transport customer-owned gas. Transportation services on PSNC's system permit gas to remain competitive with alternative fuels and allow PSNC to maintain throughput without having to negotiate its regular rate schedules;

6. PSNC routinely communicated directly with customers, numerous suppliers, and other industry participants, and actively monitored the industry using a variety of sources including industry trade periodicals; and

7. PSNC had frequent internal discussions among members of its senior management and that of its parent concerning gas supply policy and major purchasing decisions.

The Public Staff panel stated that it has reviewed the Company witnesses' testimony and exhibits and PSNC's monthly deferred account reports, monthly financial and operating reports, gas supply, pipeline transportation and storage contracts as well as responses to the Public Staff's data requests. The panel testified that based upon its investigation, it believed that PSNC's gas costs during the review period were prudently incurred.

The Public Staff witnesses also addressed the Company's hedging program. They testified that the program has a stated goal of smoothing price volatility to firm residential and commercial customers. They further testified that PSNC utilizes the Kase HedgeModel, a proprietary product developed by Kase & Company, for guiding the hedging of natural gas purchases. The Kase HedgeModel attempts to fix prices when prices fall to historically low levels and protect against extremely high prices. Inputs to the software are adjusted based on quarterly update reports provided by Kase & Company. Other key elements of PSNC's hedging program are set forth in the "Risk Management Policies for PSNC's Hedging Program" manual and the "PSNC Risk Management Procedures" Manual. The panel stated that PSNC is authorized by the SCANA Risk Management Committee to enter into NYMEX-based natural gas futures contracts, options on futures contracts, synthetic calls, and over-the-counter basis swaps on all relevant pipelines serving the Company.

The panel testified that during the review period the Company incurred net costs of $1,878,451 in its Hedging Deferred Account. Hedging activity recorded during the review period included $2,379,670 of payments for option premiums, $7,880 of payments for related brokerage fees and interest, $535,000 of receipts from realized positions, and $25,901 of interest expense accrued on the Hedging Deferred Account. The Public Staff panel stated that PSNC's hedging costs were prudently incurred and, thus, should be recovered from ratepayers.

The panel further testified that while PSNC's hedging program achieves its stated purpose of reducing the volatility of gas costs, ratepayer interests require that hedging be conducted in a manner that provides adequate protection against high prices at a relatively low cost, and that PSNC's hedging program could be better aligned with those ratepayer interests. They stated that the Public Staff is in the process of preparing recommendations for the Company to consider in developing its hedging program and that they plan to work with PSNC on opportunities for improvement through an on-going dialogue with the Company.

The Commission agrees with the Public Staff that PSNC's hedging activities during the review period were prudently incurred and, therefore, should be recovered from ratepayers. Accordingly, it is appropriate for the Company to transfer the $1,878,451 debit balance as of March 31, 2004, in its Hedging Deferred Account to its Sales Customers Only Deferred Account. In addition, the Commission concludes that PSNC should continue to retain all documentation supporting its hedging decisions and should keep the Public Staff and Commission informed as to related decisions that may be either inside or outside the Kase HedgeModel guidelines.

The Commission further concludes that the gas costs incurred by PSNC during the test period ended March 31, 2004, were reasonable and prudently incurred and that the Company should be permitted to recover 100% of its prudently incurred gas costs.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

The evidence supporting this finding is found in the testimony of the Public Staff witnesses and PSNC witness Paton.

PSNC did not request any change in the temporary decrements applicable to the All Customers Deferred Account and did not request implementation of a temporary rate increment for the Sales Customers Only Deferred Account. The Public Staff did not oppose the request and also cited the fact that PSNC implemented temporary decrements in rates effective March 1, 2004, under Docket No. G-5, Sub 450, that are currently refunding the debit balance in the All Customers Deferred Account. The Public Staff also stated that the credit balance in the Sales Customers Only Deferred Account could be reduced by over-collections that may occur during the monthly commodity cost of gas true-ups.

Based upon the foregoing, the Commission concludes that it is reasonable to permit PSNC to continue the temporary rate decrements applicable to the All Customers Deferred Account but not to implement a temporary rate decrement to refund the over-collection of the Sales Customers Only Deferred Account.

IT IS, THEREFORE, ORDERED as follows:

1. That PSNC's accounting for gas costs for the twelve-month period ended March 31, 2004, is approved;

2. That the gas costs incurred by PSNC during the twelve-month period ended March 31, 2004, were reasonably and prudently incurred, and PSNC is hereby, authorized to recover its gas costs as provided herein;

3. That PSNC should transfer the $1,878,451 debit balance as of March 31, 2004, in its Hedging Deferred Account to its Sales Customers Only Deferred Account; and

4. That PSNC shall continue the current decrements in rates related to the All Customers Deferred Account.

ISSUED BY ORDER OF THE COMMISSION.
This the 30th day of September, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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DOCKET NO. G-9, SUB 492
DOCKET NO. G-21, SUB 455

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Piedmont Natural Gas Company, Inc., for Annual Review of Gas Costs Pursuant to G.S. 62-133.4(c) and Commission Rule R1-17(k)(6) In the Matter of Application of North Carolina Natural Gas for Annual Review of Gas Costs Pursuant to G.S. 62-133.4(c) and Commission Rule R1-17(k)(6)	))))))	ORDER ON ANNUAL REVIEW OF GAS COSTS

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on November 1, 2004

BEFORE: Commissioner James Y. Kerr, II, Presiding; Commissioner J. Richard Conder; and Commissioner Robert V. Owens, Jr.

APPEARANCES:

For Piedmont Natural Gas Company, Inc., and North Carolina Natural Gas:
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 Carolina Utility Customers Association, Inc.:
James P. West, West Law Offices, P.C., 434 Fayetteville Street Mall, Suite 1735, Raleigh, North Carolina 27601

For the Using and Consuming Public:
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BY THE COMMISSION: On August 2, 2004, Piedmont Natural Gas Company, Inc. (Piedmont), and North Carolina Natural Gas (NCNG) (hereinafter collectively referred to as the Company) filed testimony and exhibits relating to the annual review of their respective gas costs under G.S. 62-133.4(c) and Commission Rule R1-17(k)(6). The direct testimony and exhibits of Company witnesses Ann H. Boggs and Keith P. Maust presented the annual gas cost information required by Commission Rule R1-17(k)(6) and attested to the prudence of Piedmont's and NCNG's review period gas costs and gas purchasing policies.

On August 13, 2004, Carolina Utility Customers Association, Inc. (CUCA), filed its petition to intervene with the Commission.

On August 16, 2004, the Commission issued its Order Scheduling Hearing, Requiring Filing of Testimony, Discovery Guidelines and Requiring Public Notice. This Order established a hearing date of Tuesday, October 5, 2004, set prefiled testimony dates, and required the Company to give notice to its customers of the hearing on this matter.

On August 17, 2004, the Company filed supplemental schedules to witness Boggs' prefiled direct testimony, identified as Schedules 1A-4A and 7A- 9A, the stated purpose of which was to more clearly indicate the allocation of the aggregate gas costs, gas cost allocations and deferred account activity reflected on Schedules 1-4 and 7-9 as between Piedmont and NCNG.

On August 18, 2004, the Attorney General filed Notice of Intervention with the Commission. Also on August 18, 2004, the Commission issued an Order Granting Petition to Intervene of Carolina Utility Customers Association, Inc.

On September 10, 2004, the Public Staff filed a Motion to Reschedule Hearing. On September 13, 2004, the Commission issued an Order Rescheduling Hearing to November 1, 2004, and extending the date for filing testimony of the Public Staff and intervenors.

On October 15, 2004, the Public Staff filed the joint testimony and exhibits of James G. Hoard, Assistant Director of the Public Staff Accounting Division, Richard C. Ross, Utilities Engineer, Natural Gas Division, and Thomas W. Farmer, Jr., Director, Economic Research Division of the Public Staff. On October 19, 2004, the Public Staff filed Public Staff Panel Exhibit 2 revised

10/18/04, in order to correct the inadvertent exclusion of certain information from the version filed on October 15, 2004.

Also on October 19, 2004, Piedmont filed its Affidavits of Publication attesting that public notice of this proceeding was given as required by the Commission's August 16, 2004 Order.

On October 25, 2004, Company witness Boggs filed rebuttal testimony responding to certain proposed adjustments to Piedmont's accounting of its review period gas costs raised in the direct joint testimony of the Public Staff witnesses.

No other party filed testimony.

On November 1, 2004, the matter came on for hearing as scheduled and the testimony and exhibits of the aforementioned witnesses were admitted into evidence as filed without objection from or cross-examination by the parties.

Based on the testimony and exhibits received into evidence and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. The Company is a public utility as defined in Chapter 62 of the North Carolina General Statutes.

2. The Company is engaged primarily in the business of transporting, distributing and selling natural gas to customers in North Carolina, South Carolina and Tennessee.

3. In North Carolina, the Company currently operates under the names Piedmont Natural Gas Company and North Carolina Natural Gas pursuant to separate rates, terms, and conditions of service. Piedmont and NCNG also currently maintain and manage separate gas cost deferred accounts.

4. Piedmont and NCNG have filed with the Commission and submitted to the Public Staff all of the information required by G.S. 62-133.4(c) and Commission Rule R1-17(k) and have complied with the procedural requirements of such statute and rule.

5. The review period in this proceeding for Piedmont is the 12 months ended May 31, 2004. The review period in this proceeding for NCNG is the 8 months ended May 31, 2004.

6. During the period of review, the Company incurred aggregate total gas costs of $521,088,194. Of this total, Piedmont incurred $386,230,609 in gas costs and NCNG incurred $134,857,585 in gas costs.

7. At May 31, 2004, the Company had an aggregate credit balance of $9,975,240 in its deferred gas cost accounts consisting of the following: (a) a credit balance of $11,947,397 in the Piedmont commodity or Sales Only Customers' Deferred Account; (b) a credit balance of $13,445,762 in the Piedmont demand or All Customers' Deferred Account; (c) a debit balance of ($6,217,709) in the NCNG commodity or Sales Only Customers' Deferred Account; and (d) a debit balance of ($9,200,210) in the NCNG demand or All Customers' Deferred Account.

8. During the review period, the Company realized net compensation of $23,667,237 from total company secondary market transactions, $14,594,114 of which was credited to the Company's North Carolina customers as a reduction in gas costs in accordance with the Commission's Orders in Docket Nos. G-100, Sub 63 and Sub 67. Piedmont's customers' share of

this compensation was $11,326,022 whereas NCNG's customers' share of this compensation was $3,268,093.

9. Piedmont and NCNG properly reported and accounted for their respective gas costs during the applicable review periods.

10. Piedmont implemented and operated a gas cost hedging program on behalf of Piedmont's and NCNG's customers during the applicable review periods. This program was substantially identical to the hedging program presented to the Commission by Piedmont in Docket No. G-9, Sub 454.

11. At May 31, 2004, the Company had debit balances of ($1,440,447) and ($332,243) in its respective hedging program deferred accounts for Piedmont and NCNG.

12. It is appropriate to apply the ($1,440,447) debit balance in the Piedmont hedging program deferred account to the $11,947,397 credit balance in the Piedmont commodity or Sales Only Customers' Deferred Account.

13. It is appropriate to apply the ($332,243) debit balance in the NCNG hedging program deferred account to the ($6,217,709) debit balance in the NCNG commodity or Sales Only Customers' Deferred Account.

14. Piedmont and NCNG have transportation and storage contracts with interstate pipelines that provide for the transportation of gas to Piedmont's and NCNG's systems and long term supply contracts with producers, marketers and other suppliers.

15. Piedmont and NCNG utilized a "best cost" gas purchasing policy during the applicable review periods consisting of five main components: the price of gas, the security of the gas supply, the flexibility of the gas supply, gas deliverability, and supplier relations.

16. Piedmont's and NCNG's gas purchasing policy and practices during the review period were prudent and their respective gas costs during the review period were prudently incurred.

17. Piedmont and NCNG should be permitted to recover 100 percent of their prudently incurred gas costs.

18. The net credit balance in Piedmont's All Customers' Deferred Account as of May 31, 2004 should be refunded to customers over a period of twelve months based on the fixed gas costs apportionment percentages approved for each of Piedmont's rate schedules in the Commission's October 29, 2002 Order Approving Rate Increase in Docket No. G-9, Sub 461.

19. Effective for service rendered on and after January 1, 2005, Piedmont shall implement the temporary rate decrements set forth on Public Staff Panel Exhibit 2 in order to refund the May 31, 2004 credit balance in Piedmont's All Customers' Deferred Account.

20. The net credit balance in Piedmont's Sales Only Customers' Deferred Account as of May 31, 2004, should be refunded to customers over a period of twelve months based on the sales volumes established in Piedmont's last general rate case proceeding in Docket No. G-9, Sub 461.

21. Effective for service rendered on and after January 1, 2005, Piedmont shall implement the temporary rate decrements set forth on Public Staff Panel Exhibit 2 in order to refund the May 31, 2004 credit balance in Piedmont's Sales Only Customers' Deferred Account.

22. Consistent with past Commission practice relating to the management of NCNG's gas cost deferred accounts, and the Commission's Order in Docket No. G-21, Sub 454, no increments or decrements should be implemented in NCNG customer rates as a result of this proceeding.

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

The evidence supporting these findings is contained in the official files and records of the Commission and the testimony of Company witnesses Maust and Boggs. These findings are essentially informational, procedural or jurisdictional in nature and are based on uncontested evidence.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4-5

The evidence supporting these findings is contained in the testimony of Piedmont witness Maust, the joint testimony of Public Staff witnesses Hoard, Ross and Farmer, the Commission's Rules, and the Commission's prior order dated November 25, 2003, in Docket Nos. G-9, Sub 470; G-21, Sub 439; and E-2, Sub 825.

G.S. 62-133.4 requires that each natural gas utility submit to the Commission information and data for an historical 12-month review period concerning its actual cost of gas, volumes of purchased gas, sales volumes, negotiated sales volumes, and transportation volumes. Commission Rule R1-17(k)(6)(a) establishes May 31, 2004, as the end date for the review period for Piedmont in this proceeding. Commission Rule R1-17(k)(6)(c) requires the filing by Piedmont of certain information and data showing weather-normalized sales volumes, work papers, and direct testimony and exhibits supporting the information. By order issued on June 26, 2003, in Docket Nos. G-9, Sub 470; G-21, Sub 439; and E-2, Sub 825, the Commission approved Piedmont's acquisition of NCNG. That transaction closed September 30, 2003, and effective October 1, 2003, Piedmont assumed all responsibility for NCNG's activities, including its gas purchasing activities. In an order issued in Docket Nos. G-9, Sub 470; G-21, Sub 439; and E-2, Sub 825 dated November 25, 2003, the Commission directed that the next gas cost reviews for Piedmont and NCNG would be conducted concurrently based on a review period ending May 31, 2004.

Witness Boggs testified that the Company filed with the Commission and submitted to the Public Staff throughout the review period complete monthly accountings of the computations required by the Commission Rule R1-17(k)(6)(c). Witness Boggs included the annual data required by Commission Rule R1-17(k)(6)(c) in schedules attached to her direct testimony as Exhibit AHB-1. Public Staff witnesses Hoard, Ross and Farmer confirmed that the Public Staff had reviewed the filings and monthly reports filed by the Company. No other party filed testimony or presented evidence on this matter.

The Commission, therefore, concludes that the Company has complied with all of the procedural requirements of G.S. 62-133.4(c) and Commission Rule R1-17(k) for the review period.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6-9

The evidence supporting these findings is contained in the testimony of Piedmont witness Boggs and Public Staff witnesses Hoard, Ross, and Farmer.

In her prefiled direct testimony, witness Boggs testified that during the review period the Company incurred total aggregate gas costs of $521,088,194, consisting of the sum of Piedmont review period gas costs of $386,230,609 and NCNG review period gas costs of $134,857,585. In the joint prefiled direct testimony of Public Staff witnesses Hoard, Ross, and Farmer, they concurred with these figures.

In her prefiled direct testimony, Company witness Boggs testified that, as of May 31, 2004, the Company had an aggregate credit balance of $8,315,201 in its deferred gas cost accounts. This credit balance resulted from the following respective balances in the Piedmont and NCNG deferred gas cost accounts: (a) a credit balance of $11,636,444 in the Piedmont commodity or Sales Only Customers' Deferred Account; (b) a credit balance of $11,966,215 in the Piedmont demand or All Customers' Deferred Account; (c) a debit balance of ($6,167,244) in the NCNG commodity or Sales Only Customers' Deferred Account; and (d) a debit balance of ($9,120,214) in the NCNG demand or All Customers' Deferred Account.

In their prefiled direct testimony, Public Staff witnesses Hoard, Ross, and Farmer recommended certain adjustments to the Company's various end-of-period deferred account balances. The adjustments recommended by the Public Staff included changes to: (1) the commodity true-up, (2) collections and refunds through various rates, (3) the lost-and-unaccounted-for true-up, (4) interest on accumulated deferred income taxes, (5) NCNG's beginning deferred account balances, (6) accrued interest, and (7) various other items. These adjustments resulted in the following end-of-period deferred account balances:

	Piedmont	NCNG
Sales Only Customers	$11,947,397	($6,217,709)
All Customers	$13,445,762	($9,200,210)

In her prefiled rebuttal testimony, Company witness Boggs indicated that she had reviewed the Public Staff's adjustments and end-of-period deferred account balances and agreed with both.

Witness Maust testified that the amount of $14,888,689, representing 75% of the net compensation attributable to North Carolina from secondary market transactions, was properly treated as a reduction in gas costs for the benefit of Piedmont's and NCNG's customers in accordance with procedures established in Docket No. G-100, Sub 63 and Docket No. G-100, Sub 67. The Public Staff witnesses adjusted that figure slightly, to $14,594,114, in their testimony and allocated $11,326,022 to Piedmont and $3,268,093 to NCNG. That minor revision was not opposed by Piedmont. No other party filed testimony or presented evidence on this matter. Based on this evidence, the Commission concludes that the appropriate credit to the Piedmont All Customers' Deferred Account associated with review period secondary market transactions is $14,594,114.

Piedmont witness Boggs and Public Staff witnesses Hoard, Ross, and Farmer all testified that, with the adjustments proposed by the Public Staff and accepted by the Company, Piedmont and NCNG properly accounted for their gas costs during the review period. No other party filed testimony or presented evidence on the Company's review period accounting of its gas costs or its deferred account balances.

Based on the foregoing, the monthly filings by Piedmont pursuant to Commission Rule R1-17(k)(5)(c), and the findings and conclusions set forth above, the Commission concludes that Piedmont has properly accounted for its gas costs during the review period and that the deferred account balances as reported above are correct.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 10-13

The evidence supporting these findings is contained in the testimony of Piedmont witnesses Maust and Boggs and Public Staff witnesses Hoard, Ross, and Farmer.

In his direct prefiled testimony, witness Maust indicated that Piedmont continued to utilize its natural gas hedging program during the review period and that upon Piedmont's acquisition of NCNG, Piedmont applied it hedging program to the gas supply activities of NCNG. According to witness Maust, the net results of the Company's hedging programs during the review period have been recorded in two special purpose deferred accounts and that as of May 31, 2004, the balance in

those respective accounts were a debit in the Piedmont account of ($1,440,447) and a debit in the NCNG account of ($332,243). Witness Boggs confirmed these end of review period hedging deferred account balances in her direct testimony and recommended that these balances be applied to the credit balance in the Piedmont Sales Only Customers' Deferred Account and to the debit balance in the NCNG Sales Only Customers' Deferred Account, respectively.

Public Staff witnesses Hoard, Ross, and Farmer confirmed the net hedging deferred account balances provided by the Company and agreed that these amounts should be applied against the net balances in Piedmont's and NCNG's Sales Only Customers' Deferred Accounts.

No other party filed testimony or presented evidence on the Company's review period hedging plan or its operations thereunder.

Based on the uncontroverted testimony presented by the Company and the Public Staff, the Commission concludes that Piedmont's and NCNG's end-of-period hedging deferred account debit balances of ($1,440,447) and ($332,243) are correct and that these balances should be applied to the end-of-period balances in the Piedmont and NCNG Sales Only Customers' Deferred Accounts.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 14-17

The evidence supporting these findings is contained in the testimony of Piedmont witness Maust and Public Staff witnesses Hoard, Ross, and Farmer.

Witness Maust testified that the Company's gas purchasing policy is best described as a "best cost" policy. This policy consists of five main components: price of gas, security of gas supply, flexibility of gas supply, gas deliverability, and supplier relations. Witness Maust stated that all of these components are interrelated and that Piedmont considers and weighs each of these five factors in establishing its entire supply portfolio.

Witness Maust further testified that the Company purchases gas supplies under a diverse portfolio of contractual arrangements through the spot market and through long-term contracts. Long-term gas supplies are purchased under contracts ranging in term from one year (or less) to terms extending through March 2005. Spot gas contracts provide for little or no supply security because they are interruptible and short-term in nature. Long-term firm supplies are usually more expensive; however, firm supplies are the most reliable and secure source of gas. Some of these firm contracts are for winter service only and some provide for 365-day service.

Witness Maust described how the interrelationship of the five factors affects the Company's construction of its gas supply portfolio under its "best cost" policy. The long-term contracts, supplemented by long-term peaking services and storage, generally are aligned with the firm market; the short-term spot gas generally serves the interruptible market. In order to weigh and consider the five factors, Piedmont and NCNG must be kept informed about all aspects of the natural gas industry. Piedmont and NCNG therefore stay abreast of current issues by intervening in all major proceedings affecting pipeline suppliers, maintaining continuous contact with existing and potential suppliers, monitoring gas prices on a real-time basis, attending conferences, and subscribing to industry literature.

Witness Maust stated that the Company's greatest obstacle in applying its "best cost" policy is in dealing with future uncertainties in a dynamic national and regional energy market. Future demand for gas is affected by economic conditions, weather patterns, customer conservation efforts, regulatory policies, and industry restructuring in the energy markets. Future availability and pricing of gas supplies is affected by overall demand, domestic oil and gas exploration and development, pipeline expansion projects, and regulatory policies and approvals. Witness Maust further stated that

the Company did not make any changes in its "best cost" gas purchasing policies or practices during the year.

Witness Maust also indicated that Piedmont and NCNG had taken several additional steps to help stabilize gas prices for its customers including actively participating in proceedings at the Federal Energy Regulatory Commission (FERC), actively renegotiating its supply arrangements when possible, promoting efficient use of its system, and seeking to utilize its existing supply and capacity rights in as efficient a manner as possible.

Public Staff witnesses Hoard, Ross, and Farmer testified that they had reviewed the Company's gas supply, pipeline transportation and storage contracts as well as additional information relating to Piedmont's gas purchasing practices, system planning, and dispatching. Based on this review, Public Staff witnesses Hoard, Ross, and Farmer testified that, in the Public Staff's opinion, Piedmont's review period gas costs were prudently incurred.

No other party filed testimony or presented evidence on these matters.

Based on the foregoing, the Commission concludes that the Company's gas purchasing policies and practices during the review period were prudent and that its gas costs during the review period were reasonably and prudently incurred and should be recovered.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 18-22

The evidence supporting these findings is contained in the testimony of Company witness Boggs and Public Staff witnesses Hoard, Ross, and Farmer.

In her testimony and schedules, Company witness Boggs calculated decrements designed to refund the net credit balances in Piedmont's All Customers' and Sales Only Customers' Deferred Accounts over a period of 12 months beginning with the first billing cycle of the month following the Commission's Order approving these decrements. Consistent with the Commission's prior practices and its order in Docket No. G-21, Sub 454, no changes in increments and/or decrements is proposed with respect to NCNG's rates.

These temporary rate increments and decrements were calculated on the basis of the fixed gas cost apportionment percentages approved in Piedmont's last rate case for the All Customers' Deferred Account and on the sales volumes included in Piedmont's last general rate case for the Sales Only Customers' Deferred Account.

The testimony of Public Staff witnesses Hoard, Ross, and Farmer indicated agreement with the Company's proposal for no change in NCNG rates; however, the Public Staff proposed adjustments to witness Boggs' proposed rate decrements for Piedmont customers. These revised rate decrements are the result of the Public Staff's changes to the Company's deferred account balances, discussed above, and are not opposed by the Company. No other party filed testimony or presented evidence on this issue.

Based on the foregoing, the Commission concludes that the temporary decrements reflected on Public Staff Panel Exhibit 2 should be implemented for service rendered on and after January 1, 2005.

IT IS, THEREFORE, ORDERED as follows:

1. That Piedmont and NCNG's accounting for gas costs during the respective twelve- and eight-month periods ended May 31, 2004, under review in this proceeding, is approved;

2. That Piedmont and NCNG are authorized to recover 100% of their respective gas costs incurred during the periods of review covered in this proceeding;

3. That Piedmont shall implement, effective for service rendered on and after January 1, 2005, the temporary decrements shown on Public Staff Panel Exhibit 2 in order to refund the end of period credit balances in Piedmont's All Customers' and Sales Only Customers' Deferred Accounts;

4. That no changes shall be made in the rates of NCNG as a result of this proceeding;

5. That effective for service rendered on and after January 1, 2005, the existing temporary decrements and increments applicable to Piedmont's All Customers' and Sales Only Customers' Deferred Accounts, as approved in Piedmont's last annual prudence review proceeding shall be discontinued; and

6. That the Company shall give notice to all of its customers of the changes in rates approved in this order by appropriate bill insert beginning with the first billing cycle that includes the changes in rates approved herein.

ISSUED BY ORDER OF THE COMMISSION.
This the 22nd day of December, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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DOCKET NO. G-21, SUB 443

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition by North Carolina Natural Gas Corporation to Deposit Supplier Refunds in Expansion Fund	)))	 ORDER APPROVING DEPOSIT OF SUPPLIER REFUNDS

BY THE COMMISSION: On February 27, 2003, North Carolina Natural Gas Corporation (NCNG) filed a request to deposit supplier refunds held in escrow totaling $5,453,628.80, plus interest, into its expansion fund. The Commission issued an order on March 19, 2003, requiring public notice and allowing for comments. Comments were filed in May 2003 by the Attorney General (AG), the Carolina Utility Customers Association, Inc. (CUCA), and two consumers.

The AG stated that it was appropriate to use supplier refunds for expansion when gas rates were stable and rate increases were moderate, but that commodity prices are now volatile and gas rates have increased significantly. Further, the AG noted that NCNG had a pending request for a general rate increase and that unemployment and economic decline are putting additional pressure on consumers. The AG asserted that the supplier refunds held by NCNG are not needed for current expansion projects and should be refunded to customers, similar to the refund ordered by the Commission in the winter of 2000-2001.

CUCA stated that there are no unserved counties in NCNG's territory and that NCNG's request did not explain how it would use the supplier refunds for expansion. CUCA urged that NCNG's supplier refunds be refunded to retail customers.

Two consumers wrote letters complaining of recent rate increases and objecting to paying for new expansion.

The Greenville Utilities Commission and the Cities of Monroe, Rocky Mount, and Wilson petitioned to intervene in order to comment that "the municipal gas systems and their retail customers should not be discriminated against" if the Commission orders a refund.

Recognizing that an application by Piedmont Natural Gas Company (Piedmont) to acquire NCNG was pending, the Commission issued an order on June 24, 2003, allowing Piedmont to file a response to these comments. Following completion of the acquisition, Piedmont filed a response in December 1, 2003, in which it stated that while natural gas prices are higher than the long-term average price of gas, they were below the levels cited in the comments of the AG and CUCA. Further, Piedmont argued that Rule R6-83 does not require proof of a specific expansion project in order to justify deposit of money into the expansion fund and that Piedmont is updating its evaluation of potential projects in the NCNG territory. Piedmont asked the Commission either to approve the original request or, in the alternative, to hold the request in abeyance pending Piedmont's filing of its biennial expansion report for NCNG, due March 1, 2004.

The AG filed reply comments on December 12, 2003, arguing that gas prices continue to be volatile, that storage will not moderate bills as in the past, and that the Commission had just approved a rate increase for NCNG. The AG said that it would be premature to put these supplier refunds into the expansion fund "when neither NCNG nor Piedmont has explained how the funds would be used...."

NCNG's biennial expansion report was filed in Docket No. G-21, Sub 448 on March 1, 2004. In the report, NCNG identified ten potential economically-infeasible expansion projects under consideration. NCNG stated that it will continue to analyze these potential projects and that

decisions and relative priority will be based upon the economics and the availability of funds. One potential project, a 46-mile extension to Troy in Montgomery County, is listed with the comment that "it is anticipated that the supplemental funding needed to make this project economically feasible could be in excess of $40 million."

G.S. 62-158 provides for supplier refunds (monies returned to LDCs by their wholesale suppliers of natural gas as a result of rate proceedings at the federal level) to be used as one source of funding for natural gas expansion funds. The Commission has discretion to decide how to use supplier refunds in the public interest. Before enactment of G.S. 62-158, the Commission routinely ordered that supplier refunds be returned to the LDCs' customers; since enactment of G.S. 62-158, the Commission has generally required that supplier refunds be used for natural gas expansion, and much has been accomplished thereby. Over $25.3 million in supplier refunds have been deposited in NCNG's expansion fund, and it has made possible the expansion of natural gas infrastructure to many areas where it was not economically feasible for NCNG to serve. NCNG's latest biennial expansion report lists potential projects in other unserved areas of its territory where expansion is still economically infeasible. Without deciding the merits of any potential project, the Commission believes that the public interest would be best served by depositing the current supplier refunds in NCNG's expansion fund. The Commission does not take lightly the economic hardship that many NCNG customers face; however, returning the present supplier refunds to customers would result in only a one-time credit, and the Commission believes that it would be better to hold this money for possible use toward future expansion projects that would provide a greater good for the area and State. The Commission notes that Commission Rule R6-83(f) provides for the return of any remaining monies to customers upon dissolution of an expansion fund consistent with G.S. 62-158. The Commission concludes that NCNG's request to deposit $5,453,628.80, plus interest through the date of the transfer of the deposit, into its expansion fund in the Office of the State Treasurer should be approved.

IT IS, THEREFORE, ORDERED that NCNG is hereby authorized to deposit into its expansion fund the sum of $5,453,628.80, said sum composed of the supplier refunds as set forth in NCNG's February 27, 2003 request in this docket, plus applicable interest through the date of the transfer of the deposit.

ISSUED BY ORDER OF THE COMMISSION.
This the 15th day of April, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

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Chair Jo Anne Sanford concurs.
Commissioners Sam J. Ervin, IV, and Lorinzo L. Joyner dissent.

DOCKET NO. G-21, SUB 443

CHAIRMAN JO ANNE SANFORD, CONCURRING: I concur in the majority's decision to approve NCNG's request to deposit supplier refunds held in escrow ($5,453,628.80, plus interest) into its expansion fund. While I also concur in the reasoning set forth by the majority in support of this decision, I find much merit in the dissenting opinion and believe that my colleagues in the minority do us a great service by challenging us to respond to clearly changed circumstances in the natural gas arena. This is a close question, but on balance I believe that the better course of action at this time is to approve NCNG's request. Nevertheless and to be clear, I reserve the right to revisit this issue in the future should the facts support a different result, particularly if gas prices continue into the future at their currently high levels.

Beginning in 1991, the General Assembly began enacting natural gas expansion legislation (G.S. 62-158 and -159). The purpose was to facilitate the construction of infrastructure and the extension of natural gas service into unserved areas of the State where it is economically infeasible to

expand with traditional funding methods. The goals were to serve residential and commercial customers and to enhance industrial recruitment and economic development efforts. To date, the Commission has approved the use of expansion funds and natural gas bond funds for 11 projects, totaling approximately $313 million. There are currently only four counties in North Carolina that do not have natural gas service available or in progress. Clearly, much has been done to encourage the availability of natural gas service throughout the State and the General Assembly's vision is being realized.

In the interim, we have seen extraordinary increases in the price of natural gas. In combination with cold winters, these price escalations have undermined the ability of some customers to afford to retain access and have undoubtedly deterred others from switching to natural gas as a source of energy. The old mantra that it is a "clean and cheap" source of energy is only half-true at present and it follows that some of the traditional arguments that supported subsidized expansion efforts should be re-examined in light of the current (and foreseeable) radically changed cost structure.

Recognizing both the successes of North Carolina's undertaking and the current realities of gas prices, I write this concurring opinion primarily to suggest that the local distribution companies (LDCs), the Commission, the Public Staff, the Attorney General, and other stakeholders should now develop a mechanism to determine whether any of the natural gas expansion projects approved by the Commission which have been completed and in service for some time have become economically feasible. This investigation, which should be ongoing and not just a one-time study, should be undertaken for two reasons. First, if a project has in fact become economically feasible, the Commission has the discretion pursuant to G.S. 62-158(c) to require the LDC to remit the expansion funds related to such a project, plus reasonable interest, to either the expansion fund or customers. Thus, monies may either be restored to expansion funds for use in conjunction with other expansion projects or refunded to customers, or both. Second, such an investigation will undoubtedly provide informative data as to the usefulness of expansion funds in stimulating both economic development in North Carolina and service to residential and commercial consumers. An objective assessment as to whether completed expansion projects have in fact attracted customers and economic development, as projected when the projects were approved, will be useful to all members of the Commission as we decide whether it is better to deposit future supplier refunds in expansion funds or refund those monies to consumers. Such assessment will likely be of interest to members of the General Assembly as well.

In conclusion, I am pleased with the progress made to date in expanding the availability of natural gas which is a highly-valuable element of infrastructure in North Carolina. That said, it is time to investigate and study the completed expansion projects to understand more about their actual results in terms of economic feasibility.

\s\ Jo Anne Sanford
Chairman Jo Anne Sanford

DOCKET NO. G-21, SUB 443

COMMISSIONERS SAM J. ERVIN, IV AND LORINZO L. JOYNER, DISSENTING:

We respectfully dissent from the Commission's decision to deposit $5,453,628.80 in supplier refunds, plus interest, now held in escrow into North Carolina Natural Gas' expansion fund. We readily concede that this application presents a close question and reasonable people can legitimately disagree about its proper resolution. We also agree that reserving those monies for natural gas expansion would be in the public interest. However, given the significant rate increases that NCNG's customers have experienced in recent years and the minimal likelihood that the supplier refunds in question will actually be used for expansion-related purposes in the near future, we believe that the public interest would be best served by returning these monies to NCNG's ratepayers.

As the majority correctly notes, "[t]he Commission has discretion as to how to use supplier refunds in the public interest." G.S. 62-158(b); Commission Rule R6-83(b). Although the Commission has generally required that supplier refunds be deposited into local distribution company expansion funds rather than returned to customers since the enactment of G.S. 62-2(9) and G.S. 62-158 in 1991, we have not invariably acted in that manner. Consistently with Commission Rule R6-83(b), the Commission has decided whether to order the deposit of supplier refunds into a particular local distribution company's expansion fund or to order that such refunds be returned to customers on a case-by-case basis. In several previous instances since the passage of the expansion fund legislation, the Commission has ordered that supplier refunds be returned to customers rather than held for expansion-related purposes in order to offset the effect of high commodity gas costs. In re Piedmont Natural Gas Company, Inc., Order Approving Offset of Gas Cost Increase, Docket No. G-9, Sub 332, Eighty-Third Report of the North Carolina Utilities Commission: Orders and Decisions 410 (1993) (gas cost increase offset by unencumbered supplier refund balance held for expansion purposes); In re Petition of Carolina Utility Customers Association, Inc., and In re Piedmont Natural Gas Company, Inc., Docket Nos. G-100, Sub 82, and G-9, Sub 439, Order Requiring Credit to Customers, Ninetieth Report of the North Carolina Utilities Commission: Orders and Decisions 21 (2000) (interim partial supplier refunds returned to customers to offset higher gas costs); In re NUI Corporation, Docket No. G-3, Sub 228, Recommended Order Denying Application and Requiring Refunds, Ninety-First Report of the North Carolina Utilities Commission: Orders and Decisions 374 (2001), aff'd, In re NUI Corporation, Docket No. G-3, Sub 228, Final Order Overruling Exceptions and Affirming Recommended Order, Ninety-First Report of the North Carolina Utilities Commission: Orders and Decisions 380 (2001), aff'd, State ex rel. Utilities Commission v. NUI Corporation, 154 N.C. App. 258, 572 S.E.2d 176 (2002) (NUI expansion fund decision) (proposal to establish an expansion fund for a particular local distribution company rejected, at least in part, because of the existing high level of natural gas prices). As a result, the issue before the Commission is whether the public interest would be best served by depositing the supplier refunds at issue here into NCNG's expansion fund or refunding those monies to customers.

From a rate perspective, the last several years have not been kind to NCNG's customers. After a late winter season price spike in February, 2003, the wholesale commodity cost of gas has remained over $4.50 per dekatherm for most of the past year. By comparison, the spot price of commodity gas for most of 2002 was in the $3.00 to $4.00 per dekatherm range. Unlike the situation that followed the high wholesale natural gas prices experienced during the winter of 2000-2001, additional drilling has failed to increase the supply of natural gas sufficiently to return wholesale prices to the levels seen in 2002 and earlier years. Moreover, the continued use of natural gas as the fuel of choice for new electric generation, the return of more "normal" winter weather, and the necessity for the industry to achieve ever higher levels of storage fill during the summer to ensure winter deliverability has placed upward pressure on natural gas prices throughout the year. The forecasts with which we are familiar suggest that significant reductions in the price of wholesale natural gas are unlikely to occur in the near future.

As is appropriately authorized by North Carolina law, NCNG has sought and obtained Commission approval to increase its sales rates to reflect these significantly higher commodity gas costs. Prior to the late February, 2003, price spike, the benchmark commodity cost of gas included in NCNG's rates was $4.25 per dekatherm. After the February, 2003, spike, the Commission allowed NCNG to increase its benchmark commodity cost of gas to $5.75 per dekatherm in March, 2003, and to $6.50 per dekatherm in April, 2004. The current benchmark commodity cost of gas included in NCNG's sales rates is $5.75 per dekatherm, a level that has been in effect since November, 2003. By contrast, the benchmark commodity cost of gas contained in NCNG's sales rates for most of 2002 was $4.00 per dekatherm or less. Although the purchased gas adjustment procedures approved for North Carolina local distribution companies serve to reduce the rate impact of commodity gas cost fluctuations by reducing the volatility of the cost recovery process, they can also affect customer rates by virtue of the fact that the affected local distribution company is entitled to recoup or may be required to refund the balances in its gas cost deferred accounts pursuant to G.S. 62-133.4(c). As a

result of this "true-up" mechanism, NCNG's customers currently owe the Company $11,542,055.25, because NCNG's actual commodity costs have exceeded the amount of commodity costs collected through rates in recent years. Thus, NCNG is entitled to maintain its current rates longer than would otherwise be the case in the event that gas costs decline or to increase its existing rates even further as a result of this gas cost undercollection.

Aside from authorizing NCNG to pass along these increases in the commodity cost of gas, the Commission has approved two base rate increases for NCNG customers in recent years. On September 23, 2002, the Commission authorized NCNG to increase its rates by 2.64% to allow the Company to collect costs associated with major pipeline projects completed since its last general rate case and to rebalance rates to more accurately reflect the cost of serving the Company's various customer classes. As a result of that decision, residential rates rose by slightly more than 6% when compared to the revenue levels approved by the Commission in NCNG's last general rate case. On October 30, 2003, the Commission entered an order awarding NCNG a 5.41% general rate increase, including a 9.99% increase for the Company's residential customers, effective November 1, 2003. As a result of the combined effect of these increases in the benchmark commodity cost of gas and these base rate increases, NCNG's rates are significantly higher than they were three years ago despite the fact that overall inflation has been relatively low throughout this entire period. Neither of us has seen any indication that these trends are likely to reverse themselves any time soon.

At the same time that NCNG's rates have increased, NCNG customers face the difficulties associated with current economic conditions. According to the Employment Security Commission, unemployment in North Carolina remained around 6% during February, 2004, despite the best efforts of both government and private industry.[1] Although our relative position vis a vis other states appears to have improved in the past year, the Employment Security Commission indicates that North Carolina's unemployment rate is above the national average of 5.6 %. Aside from the problems created by these job losses, our impression (supported by a review of the wage and hour data compiled by the Employment Security Commission) is that income improvements for those still employed in manufacturing and similar occupations have not kept pace with NCNG's rate increases. Finally, many of our fellow citizens, including some NCNG customers, continue to live in relative poverty or on fixed incomes. All of these factors have served to increase the difficulties North Carolinians experience in attempting to pay their utility bills at the same time that NCNG's rates have appropriately been allowed to significantly increase. As a result, we believe that NCNG's customers need whatever relief the Commission can lawfully provide.

Clearly, this case posits two equally compelling policy considerations: Do we provide some direct, albeit one-time, relief to NCNG's customers or do we order the monies put aside for possible future expansion projects? The Commission majority has concluded that the public interest is best served by depositing these supplier refunds in NCNG's expansion fund to support future economically infeasible service extensions. Disposition of the refunds in this manner will serve the public interest, however, only to the extent that the construction of additional natural gas infrastructure results in the creation of new jobs or the preservation of existing jobs in newly served areas in the relatively near term. There is no question but that state government has long sought and continues to seek increased economic development throughout North Carolina and that this is a worthy and important goal. There is also no question but that the expansion fund legislation at issue here was enacted, in large part, to facilitate economic development in areas of the State lacking natural gas infrastructure. In essence, the proponents of the original expansion fund legislation believed that all citizens would benefit if an obstacle to economic development faced by areas without natural gas service was to be removed. In this case, the benefits resulting from the accomplishment of this goal will, however, be of a long term rather than an immediate

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[1] The unemployment rates for the MSAs that encompass NCNG's service territory varied widely in February, 2004, ranging from a low of 5.0% in the Fayetteville MSA to a high of 8.8% in the Rocky Mount MSA.

nature.[1] For two different, albeit related reasons, we are not convinced that the Commission's decision will produce any significant economic development benefits for the foreseeable future.[2]

The extent to which any economic development benefits accrue from the Commission's decision hinges upon the existence of eligible expansion projects and the availability of sufficient monies to permit the construction of those expansion projects in a timely manner. In apparent recognition of that fact, the Commission delayed deciding the issues raised by NCNG's petition until after Piedmont filed the biennial expansion report for NCNG's service territory required by G.S. 62-36A(a). An examination of this biennial expansion report indicates that Piedmont is considering ten different economically infeasible expansion projects in NCNG's traditional service territory. The biennial report provides no evidence that Piedmont has developed detailed net present value analyses sufficient to support disbursing money from NCNG's expansion fund to facilitate construction of any of these projects, a fact that would make it difficult for Piedmont to obtain supplemental funding in connection with those projects in the near future. Wholly aside from this problem, it is not entirely clear that existing Commission expansion policies would permit the use of expansion funds to support the vast majority of these projects. Of the ten economically infeasible expansion projects described in the biennial report, six appear to involve extending service to specific universities, industrial customers, or military facilities, rendering those projects possibly ineligible for expansion fund support pursuant to Commission Rule R6-81.[3] In re Rulemaking Proceeding to Implement G.S. 62-158, Order Adopting Commission Rules R6-81 to R6-88, Docket No. G-100, Sub, 57, Eighty-Second Report of the North Carolina Utilities Commission: Orders and Decisions 11 (1992) (expansion fund monies not available for infill projects). Of the remaining four expansion projects discussed in the biennial report, three appear to involve the extension of service to municipalities or other areas in counties that already have significant natural gas infrastructure,[4] a fact that might render those projects ineligible for expansion fund support pursuant to the Commission's logic as upheld by the Court of Appeals in the NUI expansion fund proceeding (no error in failing to order the establishment of an expansion fund for a particular local distribution company where the areas to be served were relatively small, the areas in question were located within a county that already had significant gas infrastructure, economic conditions within the affected area were relatively strong, there were alternative avenues available to facilitate the extension of service to those areas, and mitigating the effect of high commodity prices on customer bills would make natural gas a more attractive product in the future).[5] Thus, the available evidence may be subject to the interpretation that only one of the ten uneconomic service extension projects mentioned in the biennial expansion report, which involves the extension of service from existing NCNG facilities in Rockingham County to Candor and Troy in Montgomery County, is eligible for expansion fund

[1] As noted in Chair Sanford's concurrence, the persistence of high natural gas prices raises legitimate questions about the extent to which economic development benefits will result from the extension of natural gas service to the few remaining unserved areas in North Carolina.

[2] The aims of the expansion fund and expansion bond legislation enacted by the General Assembly and, in the latter case, approved by the electorate, have essentially been achieved. At the time of the passage of the original expansion fund legislation, 34 of North Carolina's 100 counties lacked significant natural gas infrastructure. At present, such service is now available in or definitely planned for all but four of North Carolina's counties. As a result of the successful implementation of these two programs, the beneficial impact of additional uneconomic natural gas expansion projects on North Carolina citizens may arguably be relatively limited.

[3] The Pfeiffer University, Duplin County/Kenansville, MCAS Cherry Point, PCS Phosphate-Aurora, Weyerhaeuser-New Bern, and Weyerhaeuser-Plymouth projects appear to fall into this category.

[4] The Duplin County/Wallace, Angier, and Pitt County projects appear to fall into this category.

[5] Aside from the issue mentioned in the text, the Pitt County project described in the report may not involve the extension of service to a county, city, or town "of which a high percentage is unserved." Commission Rule R6-81(b)(5).

support.[1] As a result, it is not clear to us that there are a significant number of service extension projects in NCNG's service territory eligible for expansion fund support.

According to the biennial report, construction of the Rockingham/Montgomery Counties project would require supplemental funding in an amount in excess of $40,000,0000. Information collected at our request by the Commission staff suggests relatively little reason to believe that sufficient supplier refunds will be accumulated in NCNG's expansion fund to permit the construction of this particular expansion project in the near future.[2] The majority of the supplier refunds that have been deposited into local distribution company expansion funds and used to support economically infeasible expansion projects result from the resolution of Transco general rate cases. In addition, other supplier refunds amounting to approximately 15% to 18% of the monies derived from Transco rate cases tend to become available for expansion purposes during the total period between such rate cases. As a general proposition, Transco tends to seek general rate relief at three to four year intervals. A typical interstate pipeline rate case is concluded about three years after filing if it is fully litigated and in about one year if it is settled. The most recent Transco rate case was essentially resolved on June 13, 2002, by settlement and produced $4,400,000 in refunds for NCNG and $6,300,000 for Piedmont. Of this total, the $6,300,000 in supplier refunds returned to Piedmont has already been deposited in the Company's deferred account in accordance with the Commission's decision in In re Piedmont Natural Gas Company, Inc., Order Granting Petition Regarding Supplier Refunds, Docket No. G-9, Sub 459 (2002), effectively returning this money to customers. In addition, the $4,400,000 in supplier refunds received by NCNG as a result of that settlement is included in the expansion fund deposit approved by the Commission in this proceeding. For that reason, we assume that $6,200,000 in supplier refunds, consisting of the nearly $700,000 currently in NCNG's expansion fund plus the $5,500,000 deposited in NCNG's expansion fund as a result of this decision, will be available as a base from which to support construction of the Rockingham/Montgomery Counties project. The next Transco rate case is scheduled to be filed in 2006. Assuming that supplier refunds made to both NCNG and Piedmont can be used to facilitate expansion in NCNG's territory, history would suggest that approximately $11,000,000 in supplier refunds will become available following each Transco general rate case and that an additional amount of slightly less than $2,000,000 in additional refunds from other suppliers and other Transco proceedings will become available for expansion purposes in the interval between such general rate cases. Assuming further that all Transco rate cases are decided by settlement rather than litigation and are filed at three rather than four year intervals, this would tend to suggest that sufficient monies to provide the $40,000,000 in supplemental funding needed to permit construction of the Rockingham/Montgomery Counties project might not become available until approximately 2013.[3]

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[1] Obviously, neither of us expresses any definitive opinion as to the eligibility of any of these projects for expansion fund support given that this issue is not directly before us and given that we lack the benefit of a complete record upon which to base such a decision.

[2] The calculation described in the text assumes that refunds collected from Piedmont's traditional customers can lawfully be used to support service extensions in NCNG's traditional service territory. This issue has not been directly presented to or resolved by either the Commission or the appellate courts to the best of our knowledge. As a result, we do not wish the textual discussion to be construed as an expression of opinion about the proper resolution of this issue, about which we both have an open mind. Instead, the textual discussion is an attempt to determine when sufficient supplier refunds might become available to permit the construction of the Rockingham/Montgomery Counties project under a "best case" scenario.

[3] The calculation described in the text assumes that $6,200,000 is available to support the Rockingham/Montgomery Counties project as a result of the present order; that an additional $2,000,000 is received between now and the resolution of the next Transco general rate case in 2007; that an additional $11,000,000 becomes available as the result of the settlement of a Transco rate case in 2007; that an additional $2,000,000 becomes available between 2007 and the resolution of the next Transco rate case in 2010; that an additional $11,000,000 becomes available as the result of the settlement of a Transco rate case in 2010; that an additional $2,000,000 becomes available between 2010 and the resolution of the next Transco rate case in 2013; and that an additional $11,000,000 becomes available as

As a result, assuming a "best case" scenario, current information tends to suggest that sufficient supplemental funding may not be available to support the construction of the Rockingham/Montgomery Counties project for almost a decade, further suggesting that any economic development benefits realized by depositing the supplier refunds at issue here into NCNG's expansion will not bear fruit for many years to come.

An old proverb suggests that a journey of a thousand miles must begin with a single step. It can be said that the supplier refunds at issue here represent that first step. However, we are of the view that the combination of the desirability of immediate rate relief for NCNG's customers and the amount of time that will necessarily lapse before these dollars are likely to be used for expansion-related purposes suggests that, barring some change in the relevant statutory language or the Commission's expansion fund policies, the beginning of that journey should be postponed for a reasonable period of time. Admittedly, a number of steps are being taken or have been proposed to increase the supply of natural gas and reduce wholesale prices, including encouraging the importation of liquefied natural gas and providing incentives for additional drilling. Available anecdotal information, however, suggests that these measures are unlikely to increase available supply and decrease wholesale prices for some period of time. Under that set of circumstances, we believe that the public interest would be best served by granting some immediate relief to NCNG's customers and would therefore return these supplier refunds to them.

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

\s\ Lorinzo L. Joyner
Commissioner Lorinzo L. Joyner

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the result of the settlement of a Transco rate case in 2013. At that point, assuming that none of this money is expended for any other purpose, approximately $45,200,000 should be available to support construction of the Rockingham/Montgomery Counties project. Admittedly, this calculation does not take into account any interest that may be earned on the supplier refunds on deposit between now and the accumulation of sufficient funds to permit the construction of the Rockingham/Montgomery Counties project; however, such precision is unnecessary given that any such earnings are unlikely to advance the date upon which sufficient monies have been accumulated in NCNG's expansion fund to support the construction of the Rockingham/Montgomery Counties project by an appreciable amount.

DOCKET NO. P-55, SUB 1013

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION.

In the Matter of Application of BellSouth Telecommunications, Inc. for, and Election of, Price Regulation	)))	ORDER RULING ON MOTION TO HOLD ANNUAL PRICE PLAN FILING IN ABEYANCE

Before: Chairman Jo Anne Sanford and Commissioners J. Richard Conder, Robert V. Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II, and Michael S. Wilkins

BY THE COMMISSION: On April 15, 2004, BellSouth Telecommunications, Inc. (BellSouth or Company) filed a motion in this docket whereby the Commission was requested to hold in abeyance the annual price plan filing which BellSouth is currently required to make by May 10, 2004. In support of its request to hold the annual filing in abeyance, BellSouth noted that it had, on February 26, 2004, filed proposed revisions to its current price regulation plan and asked the Commission to issue a procedural order that ensured that the merits of the revised plan could be heard as early as mid-August. BellSouth further noted that as it awaits the opportunity to present evidence to the Commission in support of its revised plan, the Company is required by the current plan to make an annual filing forty-five days prior to the anniversary of the plan's effective date. Since the plan's anniversary date is June 24, BellSouth would need to make its annual filing by May 10, 2004. The annual filing provides a means to update the Service Price Index (SPI) and Price Regulation Index (PRI) for all services categories, except the Non-Basic 2 and Non-Basic 2A Services Categories, based on the change in the Gross Domestic Product Price Index (GDP-PI) over the preceding year minus the applicable productivity offset. Since the inception of its plan, BellSouth stated that its annual filing has produced recurring rate reductions year-over-year of more than $43 million since 1997. This year will be no exception to the rule if BellSouth is required to make its annual filing. According to BellSouth, productivity offsets that have driven these rate reductions – established by the Commission as a surrogate for competition – continue to remain in place exactly as they were eight years ago even though the telecommunications market in 2004 in no way resembles the market in 1996.

BellSouth further stated that the pending requested revisions to its price plan include the removal of the productivity offsets that have driven rate reductions each year since the inception of the current plan. BellSouth also stated that if the Commission, after hearing, concludes that the current productivity offsets should be continued or reduced rather than eliminated, and BellSouth either accepts the revised plan or reverts to the current plan, BellSouth will retroactively reduce its rates back to June 24, 2004, with interest. Finally, BellSouth stated that holding the annual filing in abeyance will conserve the resources of the Commission and the Public Staff while preserving the ability of the Commission to ask BellSouth to reduce rates in accordance with the current or revised offset structure. According to BellSouth, it is reasonable for the Commission, while it is considering the elimination of productivity offsets, to refrain from ordering reductions caused by the current offset structure that BellSouth has asked the Commission to eliminate.

On April 23, 2004, the Public Staff filed a response to BellSouth's motion to hold the Company's annual filing in abeyance. The Public Staff stated its recognition that the annual filing under BellSouth's current price plan will produce rate reductions because the productivity offset is greater than the change in the GDP-PI over the previous year. Specifically, the change in GDP-PI for 2003 is 1.62%, while the productivity offsets in the Basic and Non-Basic 1 Services Categories are 2% and 3%, respectively. Based on some preliminary studies, the Public Staff further stated that it also recognized that a case can be made for reducing these productivity offsets to reflect a narrowing of the difference between productivity in the telecommunications industry and productivity in the industrial sector of the economy as a whole. Thus, according to the Public Staff, it is entirely possible that the Commission may, after hearing from the parties, conclude that the productivity offsets in BellSouth's price plan should be reduced. Until a hearing is held and such a determination

is made, however, BellSouth is subject to an annual filing requirement and rate reductions based on productivity offsets that may no longer be appropriate.

While the Public Staff stated that it appreciated BellSouth's proposal to reduce rates retroactively if the Commission concludes that the productivity offsets should not be eliminated, the Public Staff said that it was concerned that implementing such reductions would be extremely complicated, particularly if the Commission also concludes that the price plan should be revised in other respects. For example, if the Commission concludes that certain services should be reclassified or that rate element constraints should be revised or eliminated, it would be very difficult to implement those changes retroactively as well. For this reason, the Public Staff stated that it could not recommend approval of BellSouth's request to hold its annual price plan filing in abeyance.

Under the circumstances, the Public Staff recommended that BellSouth should be required to proceed with its annual filing on May 10, 2004, but be allowed, in this filing only, to use productivity offsets equal to the change in GDP-PI instead of those prescribed in its current price plan, so that the filing, aside from adjustments affecting existing headroom, is revenue neutral. The Public Staff also recommended the same productivity factor adjustment for the other three price plan companies (Carolina, Central, and Verizon) with June 24 plan anniversary dates with regard to their annual filings in the current cycle. The Public Staff further stated that if the Commission approves this approach for these companies, the Public Staff would not oppose similar treatment of the other price plan companies (ALLTEL, Concord, Mebtel, and North State) in the 2004 filing cycle if the change in GDP-PI for the quarter normally used in their annual filings is below the productivity factor of their plans.

The Public Staff concluded its response by noting that on April 21, 2004, the Commission announced an independent study by RTI International of the status of telecommunications competition within the State. The Public Staff is hopeful that the study will enable all parties to obtain an accurate understanding of the competitive environment. However, the results of the study are not expected to be available until mid-October. Inasmuch as the competition that BellSouth is facing is one of the main bases for its request for deregulation of most of its telecommunications services, the Public Staff stated a belief that it would be appropriate to schedule the hearing on BellSouth's requested price plan revisions so as to allow sufficient time for all parties to review the study in preparing their testimony. In the meantime, the productivity factor adjustment recommended by the Public Staff should alleviate BellSouth's concerns over further revenue reductions pending a decision on the merits of its proposed revised price plan.

BellSouth filed a reply to the Public Staff's response on April 28, 2004. In its reply, BellSouth stated that it agreed that the Public Staff's proposal was a good compromise of the competing positions given the present status of the Company's current price regulation plan. BellSouth further stated that, depending on the timing of the Commission's decision regarding this matter, it may require additional time to complete its annual filing which is now due on May 10, 2004.

On April 29, 2004, Verizon South, Inc. (Verizon) and ALLTEL Carolina, Inc. (ALLTEL) filed responses in support of the Public Staff's recommendation. Both Verizon and ALLTEL stated that the current state of the industry results in nonexistent productivity gains for incumbent local exchange companies. Adopting the Public Staff's recommendation is an acceptable interim compromise measure that moves the Commission's productivity factor closer to the current status exhibited in the telecommunications industry today. Adopting this recommendation would be a move in the right direction because a productivity factor is no longer necessary to constrain prices in today's competitive telecommunications marketplace. Furthermore, Verizon stated that it intends to file a proposal in the near future that would permanently eliminate the productivity factor.

On April 30, 2004, AT&T Communications of the Southern States, LLC (AT&T) and MCImetro Transmission Services, LLC and MCI WorldCom Communications, Inc. (collectively, MCI) filed comments in opposition to the BellSouth proposal. AT&T and MCI requested that the Commission reject BellSouth's request to hold the annual price plan filing in abeyance and require the use of the offset for Toll Switched Access to reduce the Toll Switched Access category pursuant to the requirements of the current price plan. According to AT&T and MCI, the current offset for the Toll Switched Access category is 2.5%. Based upon the Public Staff's calculation that the GDP-PI for 2003 is 1.62%, a reduction in the toll switched access rates would be required by BellSouth pursuant to the current price plan. The Commission should ensure that the providers of toll service receive the access reduction as set forth in the price plan.

On May 3, 2004, Carolina Telephone and Telegraph Company and Central Telephone Company (collectively, Sprint) filed comments in support of the Public Staff's proposal. Sprint asserted a belief that under present market conditions the productivity offsets currently in plans for price-regulated companies should be removed in their entirety. Sprint stated that it had previously filed testimony (subsequently withdrawn) to do so in Docket Nos. P-7, Sub 825 and P-10, Sub 479 in the context of conducting a review of Sprint's plan. The Public Staff's proposal represents a reasonable compromise among the parties affected by this issue in light of the declining subscription to regulated services that the price-regulated companies experienced over the year 2003. These declines are a matter of record before this Commission.

Sprint stated that the intended purpose of the productivity offset was to account for increased efficiencies that price-regulated companies were anticipated to achieve relative to the industrial sector of the economy as a whole. One factor that historically produced increased efficiencies for price-regulated companies was the economies of scale that the price-regulated companies realized through a growing demand for services brought about by a strong economy coupled with a relatively low number of alternative service providers. However, during 2003, neither of these factors existed, and the result was a significant decline in the number of access lines served by price-regulated companies in North Carolina. This reduction in access lines during 2003 produced declining, not increasing, economies of scale for price-regulated companies which clearly support elimination of productivity offsets. As referenced by the Commission in the Order issued on May 2, 1996, in this docket, productivity offsets require companies to share efficiency gains with consumers. However, as a result of the access line reductions that occurred throughout 2003, the economies of scale that traditionally produced these gains did not materialize. Consequently, by maintaining the productivity offsets at levels established in 1996, price-regulated companies will be forced to share theoretical efficiency gains that were not actually experienced in 2003. The Public Staff's revenue neutral proposal to set the productivity factor, not to zero, but equal to the change in GDP-PI is therefore a reasonable compromise and is fair to all affected parties.

Sprint further stated that to require significant revenue reductions based upon productivity gains that were never realized would be a disservice to the economy of North Carolina, to the price-regulated companies themselves, and, ultimately, to the customers that they serve.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission finds good cause to allow BellSouth to hold its annual price plan filing, which is now due to be filed on May 10, 2004, in abeyance on the following conditions. First, BellSouth must agree that, if the Commission, after hearing, concludes that the current productivity offsets should be continued or reduced rather than eliminated, and BellSouth either accepts the revised plan or reverts to the current plan, the Company will retroactively reduce its rates back to June 24, 2004, with interest.[1] Second, BellSouth must agree to maintain the status quo under its current price plan by waiving the opportunity to propose any rate and/or revenue increases or

[1] In fact, BellSouth itself proposed this condition in its filing of April 15, 2004.

decreases which the Company would otherwise be entitled to file. These two conditions will remain in place until the Commission enters a final ruling on BellSouth's proposed revisions to the Company's current price plan and BellSouth either accepts the revised plan or reverts to the current plan.

In view of the fact that issues related to the continued viability of productivity offsets will be decided based on the evidence offered at the hearing which the Commission will convene to consider BellSouth's proposed revisions to the Company's current price plan, the Commission has found it more appropriate to allow BellSouth to hold its annual filing in abeyance subject to the conditions set forth above rather than approve either the Company's proposal as filed or the Public Staff's alternative proposal. In some ways, both proposals seem to prejudge at least one of the ultimate and most important issues, which the Commission is reluctant and unwilling to do without a full evidentiary record. There is no evidence in the current record which would allow the Commission to reduce or eliminate productivity offsets and there is no evidence in the current record regarding how the various integrated parts of BellSouth's price plan function as a whole. The Commission must be careful not to prejudge, in any way, any of the issues in BellSouth's pending price plan review case for fear of causing unintended consequences or unanticipated and unjustified ripple effects. Thus, the Commission believes that the decision set forth herein is entirely reasonable and fair and that it is the best decision which can be rendered on the basis of the record as it currently exists.

Under both the BellSouth and Public Staff proposals, BellSouth would retain the flexibility to propose rate adjustments (increases and decreases) within baskets which were revenue neutral and/or based upon headroom flexibility while being allowed to forego having to make revenue and rate reductions which would normally be required by productivity offsets.[1] Therefore, the Commission concludes that BellSouth should be required to agree to relinquish some of the pricing flexibility under its current plan for a limited period of time in return for the ability to hold its annual price plan filing and the resulting revenue and rate reductions in abeyance. Maintaining the status quo, as discussed above, requires BellSouth to waive the opportunity to propose rate and/or revenue adjustments which are unrelated to productivity offsets in order to ensure a fair and equitable result for both consumers and the Company alike.

Accordingly, not later than May 10, 2004, BellSouth shall either (1) file a statement accepting the conditions set forth above in order to hold its annual price plan filing in abeyance or (2) make the currently-required annual price plan filing. Due to the close proximity of the May 10 filing date, the Commission will, if necessary and upon request, grant BellSouth a brief extension of time to make this filing.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 4th day of May, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

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[1] The Commission estimates that, under the annual price plan filing now due on May 10, 2004, BellSouth would be required to propose revenue reductions totaling approximately $7.2 million.

DOCKET NO. P-55, SUB 1013

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of BellSouth Telecommunications, Inc.	)	ORDER DENYING MOTION
for, and Election of, Price Regulation	)	FOR RECONSIDERATION

Before: Chairman Jo Anne Sanford and Commissioners J. Richard Conder, Robert V. Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II, and Michael S. Wilkins

BY THE COMMISSION: On April 15, 2004, BellSouth Telecommunications, Inc. (BellSouth or Company) filed a motion in this docket whereby the Commission was requested to hold in abeyance the annual price plan filing which BellSouth was required to make by May 10, 2004. The annual filing is a requirement of BellSouth's currently existing price regulation plan which was approved in 1996 and which remains in force (with some modifications over time) to date. Under the price plan, the annual filing effectively serves as a means by which to adjust rates of the preceding year based on the change in the Gross Domestic Product Price Index (GDP-PI) over the preceding year minus the applicable productivity offset established in the current price plan. For example, if on the date the annual filing is due (May 10, 2004) the change in the GDP-PI over the preceding year is less than the established productivity offset, BellSouth would be required to return a formulaic portion of its preceding year's revenues to its North Carolina customers, effectively reducing its rates for the preceding year.

It is in fact the case that as of May 10, 2004, the change in the GDP-PI was less than the productivity offset. Therefore, BellSouth's customers are presently entitled to a rate reduction effective June 24, 2004, according to the price plan now in effect. By seeking to delay or hold the annual filing in abeyance, BellSouth has requested the Commission to suspend the operation of this part of the price plan and to deny the already earned rate reduction in the event the Commission is ultimately persuaded that the productivity offset should be eliminated, as BellSouth proposed in its filed requested revisions to its price plan.

Because BellSouth believes that its unrevealed evidence to be produced at a hearing in the future will convince the Commission to eliminate the offset from its price plan on a going forward basis, BellSouth found it reasonable to seek relief from its present obligation to reduce its rates—even though the productivity offset (without regard to whether it is appropriate in the future) was in force and not eliminated as of May 10, 2004. Thus, the Commission was asked to speculate as to a future decision and to apply that speculative determination (elimination of the productivity offset) to alter the way the existing plan has already operated with respect to a time and situation in the past.

On April 23, 2004, the Public Staff filed a response to BellSouth's motion to hold the Company's annual filing in abeyance. In its response, the Public Staff recommended that BellSouth should be required to proceed with its annual filing on May 10, 2004, but be allowed, in this filing only, to use productivity offsets equal to the change in GDP-PI instead of those prescribed in its current price plan, making the filing, aside from adjustments affecting existing headroom, revenue neutral. In other words, the productivity offset applicable to the May 10, 2004 filing would be lowered to eliminate the earned rate reduction currently due by the terms of the plan as they existed on May 10th. The Public Staff viewed its recommendation as a reasonable compromise based on "preliminary studies," not available to the Commission, that might justify lowering (not eliminating) the productivity offset. The Public Staff also recommended the same productivity factor adjustment for the other three price plan companies (Carolina Telephone and Telegraph Company (Carolina), Central Telephone Company (Central) and Verizon South, Inc. (Verizon)) with June 24 plan anniversary dates with regard to their annual filings in the current cycle. The Public Staff further

stated that if the Commission approves this approach for these companies, the Public Staff would not oppose similar treatment of the other price plan companies (ALLTEL Carolina, Inc. (ALLTEL), Concord Telephone Company (Concord), Mebtel, Inc. (Mebtel) and North State Communications (North State)) in the 2004 filing cycle if the change in GDP-PI for the quarter normally used in their annual filings is below the productivity factor of their plans.

BellSouth filed a reply to the Public Staff's response on April 28, 2004. In its reply, BellSouth stated that it agreed that the Public Staff's proposal was a good compromise of the competing positions given the present status of the Company's current price regulation plan.

On April 29, 2004, Verizon and ALLTEL filed responses in support of the Public Staff's recommendation. Both Verizon and ALLTEL stated that the current state of the industry results in nonexistent productivity gains for incumbent local exchange companies. Adopting the Public Staff's recommendation is an acceptable interim compromise measure that moves the Commission's productivity factor closer to the current status exhibited in the telecommunications industry today. Adopting this recommendation would be a move in the right direction because a productivity factor is no longer necessary to constrain prices in today's competitive telecommunications marketplace.

On April 30, 2004, AT&T Communications of the Southern States, LLC (AT&T) and MCImetro Transmission Services, LLC and MCI WorldCom Communications, Inc. (collectively, MCI) filed comments in opposition to the BellSouth proposal. AT&T and MCI requested that the Commission reject BellSouth's request to hold the annual price plan filing in abeyance and require the use of the offset for Toll Switched Access to reduce the Toll Switched Access category pursuant to the requirements of the current price plan. By letter filed May 5, 2004, AT&T and MCI subsequently notified the Commission that they were withdrawing their April 30, 2004 comments.

On May 3, 2004, Carolina and Central (collectively, Sprint) filed comments in support of the Public Staff's proposal. Sprint asserted a belief that under present market conditions the productivity offsets currently in plans for price-regulated companies should be removed in their entirety.

No pleadings were verified and no affidavits or evidentiary offerings have been made by any party in this docket.

<u>**May 4, 2004 Order Ruling on Motion to Hold Annual Price Plan Filing in Abeyance**</u>

On May 4, 2004, the Commission entered an Order in this docket finding good cause to allow BellSouth to hold its annual price plan filing in abeyance on both of the following two conditions which were designed to grant some relief while maintaining fairness and balance. First, BellSouth was requested to agree that, if the Commission, after hearing, concludes that the current productivity offsets should be continued or reduced rather than eliminated, and BellSouth either accepts the revised plan or reverts to the current plan, the Company will retroactively reduce its rates back to June 24, 2004, with interest. Second, BellSouth was requested to agree to maintain the status quo under its current price plan by waiving the opportunity to propose any rate and/or revenue increases or decreases which the Company would otherwise be entitled to file. The Commission further stated that these two conditions would remain in place until the Commission enters a final ruling on BellSouth's proposed revisions to the Company's current price plan and BellSouth either accepts the revised plan or elects to continue to operate under the current plan. BellSouth was required, not later than May 10, 2004, to either (1) file a statement accepting the conditions set forth above in order to hold its annual price plan filing in abeyance or (2) make the currently-required annual price plan filing, thus maintaining the pricing flexibility provided for in its existing plan.

<u>**BellSouth's Motion for Reconsideration**</u>

On May 6, 2004, BellSouth filed a Motion for Reconsideration wherein the Company stated that it accepted the first condition concerning retroactive reduction of rates under the circumstances it described in its April 15, 2004 filing and as outlined in the Commission's May 4 Order. However, BellSouth further stated that it was convinced that, given the significantly lower productivity gains

experienced across the entire industry brought about by a sluggish economy, coupled with substantial reductions in access lines, the Commission will not conclude that productivity offsets are appropriate for inclusion in BellSouth's price plan after the evidentiary hearing in this matter. Importantly, no other state in BellSouth's region uses a productivity offset formula such as the one contained in BellSouth's current North Carolina plan.

According to BellSouth, there have been numerous articles relative to the economic downturn impacting the entire telecommunications industry. More significantly, the substantial and steady decline in access lines, as documented through the station development reports that BellSouth files monthly with the Public Staff, has had a significant impact on productivity due to declining economies of scale. According to BellSouth, these facts alone are clear proof that productivity has markedly declined from the offset levels that were established eight years ago. Nevertheless, in BellSouth's view, should the Commission disagree and BellSouth continues forward with a plan that contains productivity offsets, acceptance of the first condition will ensure that no consumer harm will result from the Commission's granting of BellSouth's abeyance request. If consumers were entitled to receive revenue reductions, they will, in fact, receive them once the Commission orders, and BellSouth agrees to, revised or existing productivity offsets. If consumers were not entitled to receive revenue reductions based solely upon productivity offsets, then the Commission will decide that as well. Thus, BellSouth argued there is no harm to consumers by holding BellSouth's annual filing in abeyance.

However, BellSouth further stated that it strenuously objected to and was asking the Commission to reconsider its second condition, in which it concluded that "BellSouth should be required to agree to relinquish some of the pricing flexibility under its current plan for a limited period of time in return for the ability to hold its annual price plan filing and the resulting revenue and rate reductions in abeyance." Instead of relinquishing "some" of the pricing flexibility it possesses under its current plan, BellSouth argued that, under this condition, it would relinquish all ability to adjust rates on a revenue-neutral basis until some unknown point in the future when the Commission issues a final ruling on BellSouth's proposed revisions to its current plan.

BellSouth argued that this is unreasonable. BellSouth stated that it has been entitled to adjust rates on a revenue-neutral basis since the plan's inception in 1996. Thus, far from maintaining the "status quo under its current price plan" as reasoned by the Commission, this condition grossly upsets the status quo, and for no rational purpose. To disallow rate rebalancing (raising some rates while lowering others) on a revenue-neutral basis makes it impossible for BellSouth to compete on any level, much less on anything remotely resembling a level playing field. To remove that ability now – particularly given the state of competition in BellSouth's service area – is unjust and unreasonable and compromises the ability of an incumbent carrier of last resort like BellSouth to compete in any manner. To date, approximately 12 percent of residential lines in BellSouth's North Carolina territory are served by alternative providers (since January 2004, approximately 50,000 BellSouth customers decided to change service providers) while over 40 percent of its business lines are using alternative providers, and the losses continue to grow. BellSouth asserted that it cannot agree to be effectively paralyzed during the next six to nine months (or however long it takes) while the Commission reaches a decision on plan revisions that BellSouth filed on February 26th of this year. BellSouth observed that 69 days have elapsed since it asked the Commission to simply issue a procedural order setting BellSouth's plan revisions for a hearing to conclude no later than August 15, 2004. Given the time the Commission has taken to even issue its first procedural order in this docket, BellSouth cannot agree to the Commission's unwarranted demand that BellSouth effectively put its ability to respond to competitive threats on ice for an indefinite period of time.

BellSouth asserted that there are few, if any, businesses in the world that operate in a competitive market that can survive for a nine-month period with their rates absolutely frozen. It is important to note that BellSouth is not even requesting the ability to increase revenues, but is merely asking to adjust rates on a revenue neutral basis, as it has been able to do for the last eight years.

Imposing a limitation such as that ordered by the Commission will not only have a serious and negative impact on BellSouth's ability to compete, but it could also impact BellSouth's ability to continue to operate as the carrier of last resort.

BellSouth stated that there were no comments filed in direct opposition to BellSouth's Motion other than those filed by AT&T and MCI, which have been withdrawn. According to BellSouth, the Public Staff did propose an alternative which may be the most acceptable to all parties in that it addresses concerns expressed both by the Commission as well as by many of the price regulated companies in North Carolina, who face similar economic challenges. The Public Staff recommended that BellSouth be required to proceed with its annual filing but be allowed, in this filing only, to use productivity offsets equal to the change in GDP-PI instead of those prescribed in its current plan. This proposal does not recommend elimination of productivity offsets, as BellSouth proposed in its plan revisions filed with the Commission on February 26. However, the Public Staff's proposal merely takes into account evidence gathered in its own "preliminary studies", recognizing that a "case can be made for reducing these productivity offsets to reflect a narrowing of the difference between productivity in the telecommunications industry and productivity in the industrial sector of the economy as a whole." Although BellSouth stated that it was anxious to present evidence that supports total elimination of productivity offsets, the Company indicated that the Public Staff's recommendation is an acceptable compromise for all parties in that it allows them to have additional time for the Commission to complete its study on the status of telecommunications competition in the state, and for all parties to comment on the study, without unfairly burdening BellSouth with additional revenue reductions that would likely not have been necessary had the Commission been able to hear BellSouth's case in a more timely manner. As also pointed out by the Public Staff, this compromise also eliminates any need for retroactive adjustments in rates that could prove difficult if the Commission concludes that certain services should be reclassified or that rate element constraints should be revised or eliminated.

For the reasons set forth in its motion, BellSouth stated that it agrees to the first condition outlined in the Commission's May 4 Order, but cannot agree to the second condition and requested the Commission, on reconsideration, to remove it.

Public Staff's Response and Request for Clarification

On May 10, 2004, the Public Staff filed a response to BellSouth's motion for reconsideration and a request for clarification. In its filing, the Public Staff stated a concern that the conditions imposed by the Commission's May 4 Order may have unintended and very undesirable consequences for BellSouth's subscribers. Neither BellSouth's proposal nor the May 4 Order speaks to what will happen if the Commission finds, after hearing, that the productivity offsets should be reduced to levels that are below the change in GDP-PI. Since BellSouth's price plan would allow increases in each rate category in which the productivity offset is below the change in GDP-PI, a retroactive adjustment back to June 24, 2004, could arguably involve retroactive increases to subscribers.

The Public Staff stated that its compromise proposal filed April 23, 2004, was based in part on the expectation that, if the annual filing is held in abeyance, any price plan revisions that are finally approved and accepted by BellSouth would allow increases rather than require decreases in the Basic, Non-Basic 1 and Interconnection categories. This proposal – that BellSouth be required to proceed with its annual filing but be allowed, in this filing only, to use productivity offsets equal to the change in GDP-PI instead of those prescribed in its current plan – would have allowed BellSouth to avoid revenue reductions immediately, but it would also have avoided retroactive increases if the plans are held in abeyance. It would also have avoided difficult questions that are left open by the May 4 Order regarding the effect on the annual filing of any changes in the rate element and category constraints and service classifications that are finally approved by the Commission and accepted by BellSouth. Holding the annual filing in abeyance creates the potential for all parameters of the current plan to be replaced on a retroactive basis by the parameters approved after an evidentiary

hearing. Neither BellSouth's proposal nor the Commission's conditional acceptance of it addresses how any new parameters will be incorporated into a delayed annual filing.

The Public Staff stated that it continues to believe that its original proposal is a fair and reasonable compromise between continuing the annual filings without regard to known changes in productivity (as reflected in part by access line losses that are a matter of record) and a retroactive incorporation of revised offsets, constraints, and classifications in an annual filing that could lead to overall increases rather than overall decreases. It also addresses the upcoming annual filings of the other price plan companies, which may seek comparable relief.

Nevertheless, the Public Staff further stated that it recognized the Commission's desire not to prejudge an important issue without a full evidentiary record. Therefore, the Public Staff requested that the Commission clarify the conditions of its May 4 Order so as to preclude any retroactive increases in rates.

<u>Response of AT&T and MCI</u>

On May 10, 2004, AT&T and MCI filed comments in opposition to BellSouth's Motion for Reconsideration. AT&T and MCI stated that in their letter filed on April 30, 2004, they requested that the Commission reject BellSouth's request to hold the annual price plan filing in abeyance, and instead require the use of the offset for Toll Switched Access to reduce the Toll Switched Access category pursuant to the requirements of the current price plan. Last year the Commission, however, granted BellSouth's request to move switched access into the Basic Services category. Hence the factual assertion in the April 30, 2004 letter that switched access was in a separate, non-basic category was incorrect. Consequently, because of this mistaken factual assertion, AT&T and MCI withdrew their letter – not, as BellSouth implies in its motion, because they had somehow acceded to BellSouth's request.

According to AT&T and MCI, the underlying premise of their letter, however, remains valid. Since the current offset for the Basic Services category is GDP-PI (which Public Staff calculates for 2003 at 1.62%) and the productivity offset for the Basic Services category is 2%, a net reduction in the Basic Services category would be required by BellSouth pursuant to the current price plan. While BellSouth under the plan may reduce individual access and/or other "basic" rates, either reduction would provide benefit to BellSouth's customers, and the Commission should ensure that BellSouth's customers receive the reduction as set forth in the price plan.

AT&T and MCI stated that the better use of the reduction, given the need to create a sustainable competitive market in North Carolina that can provide price constraints on BellSouth, would be to lower BellSouth's intrastate switched access charges. Those charges (1) are above cost, (2) are greater than the local interconnection and other rates that are imposed by BellSouth for terminating traffic from wireline and wireless carriers, and (3) are increasingly anti-competitive, particularly as both BellSouth and the IXCs are competing for long distance *and* local customers. In providing access, BellSouth, like the other RBOCs, enjoys "a large and growing cost advantage over the long distance players because of [the] ownership of the last mile." In part this is because, as prices for interLATA services fall more rapidly, access comprises a larger portion of total interLATA spending by long distance carriers, and is facilitating retail discounting by the RBOCs as they market to the IXCs' in-region customers. At the same time, one and a half years after obtaining in-region intraLATA authority for the group of five states that includes North Carolina, BellSouth now enjoys a total mass market long distance penetration of 35.7% in those states.

Hence, AT&T and MCI asserted that BellSouth's Motion must fail. Not only is there no *evidence* in the record to support BellSouth's bald assertions that the telecommunications market is increasingly competitive, ostensibly justifying elimination or reduction of productivity offsets, but rather the market data indicates that BellSouth is increasingly dominant in the sensitive and critical mass market. Moreover, the price plan was adjudicated by the Commission following an evidentiary

hearing. On the basis of one statistic – recent loss of access lines - BellSouth argues that productivity offsets are irrelevant and that its obligation under the plan should be held in abeyance. BellSouth has the burden of establishing the evidence for modification of the Commission's order. *See State ex rel. Utilities Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 132 S.E. 2d 249 (1963). *See also* G.S. 62-75. BellSouth has not met that burden and there is no legal basis for changing the terms of the plan without a hearing and giving interested parties an opportunity to provide testimony and comments.

Further, AT&T and MCI stated that BellSouth's Motion misses the mark. The issue is not, as BellSouth characterizes it, whether the Commission's conditions for granting abeyance are just and reasonable. An application for reconsideration of a previously issued order is addressed to and rests in the discretion of the Commission. *State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.*, 132 N.C. App. 625, 514 S.E. 2d 276 (1999). BellSouth is currently obligated under the price plan to submit its annual filing, while the Commission is not obligated to modify the price plan in the absence of an evidentiary record. Indeed, in the absence of evidence modification of the Commission's order is not warranted. *State ex rel. Utilities Comm'n v. North Carolina Gas Service*, 128 N.C. App. 288, 494 S.E. 2d 621, *review denied* 348 N.C. 78, 505 S.E.2d 886 (1998). Since BellSouth has not produced any evidence, the Commission is within its discretion in denying BellSouth's request.

Therefore, for the reasons set forth in their comments, AT&T and MCI requested that the Commission deny BellSouth's Motion.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to deny BellSouth's Motion for Reconsideration. The Commission believed that the May 4 Order and the decision set forth therein was reasonable and justified given the circumstances existing at the time that it was issued and has not been provided with any basis for approving a different result now.

The nub of the Commission's difficulty in approving BellSouth's original proposal or the Public Staff variant is that they both assume what must be proved – that the productivity offsets should be eliminated or reduced without offering either evidence or persuasive argumentation for doing so. The record remains devoid of any evidentiary support of even the most rudimentary sort, such as affidavits, for suspending the implementation of rate reductions due customers on June 24th pursuant to the price plan now in effect, which those customers have a right to expect.[1]

As to argumentation, BellSouth argues that the level of competition in its service territory is sufficient to constrain prices without the need for a productivity offset. But the level of competition in and of itself says nothing definitive about the level of productivity being achieved by BellSouth, and the level of competition is itself the subject of a study recently commissioned by the Commission. The loss of lines argument advanced by Sprint earlier and BellSouth more recently is simply a variant of the competition argument and is hardly dispositive of the question of the wisdom of discarding the productivity offset.

Nevertheless, the Commission on May 4th made what it believed to be a reasonable offer to BellSouth. First, BellSouth was requested to agree that if the Commission, after hearing, concluded that the current productivity offsets should be continued or reduced rather than eliminated and BellSouth either accepts the revised plan or reverts to the current plan, it would reduce rates retroactive to June 24, 2004, with interest. Second, BellSouth was requested to agree to maintain the

[1] It should be noted that the rate reduction is scheduled to take effect prior to BellSouth's original requested hearing date of no later than August 15, 2004, and thus prior to the most optimistic date by which an order could have been issued based upon an August hearing date.

status quo under the current plan by waiving the opportunity to propose any rate or revenue increase or decrease which it would otherwise be entitled to file. If it did not like these conditions, BellSouth could make the currently required annual price plan filing. BellSouth accepted the first condition but denounced the second as imposing a pricing straitjacket.

This is not exactly the case. The Commission did not impose mandatory pricing restrictions on BellSouth; instead it offered the Company a choice between (1) refraining from making the annual filing, which would lead to a required rate reduction effective June 24, 2004, conditioned in part on temporarily maintaining the status quo with respect to rate and revenue changes, and (2) making the annual price plan filing, utilizing the current productivity offset required by the price plan as it presently exists. The fact of the matter is that, if BellSouth's motion to hold the annual filing in abeyance were granted without the temporary status quo condition, BellSouth would have at its disposal two ways of increasing or reallocating its revenues. By not being required to apply the productivity offset, BellSouth would temporarily, and possibly ultimately avoid having to make rate reductions to those who are otherwise entitled to them, and, by remaining free to rebalance rates, it could impose higher rates on some portions of its customer base.

So, the Commission asked BellSouth to choose. Would elimination of the productivity offset be more desirable to BellSouth or would the right to rate rebalance be more desirable? Not both, but either. BellSouth has the flexibility of choice. If it deems rate rebalancing to be the more desirable option, all it needs to do is forgo the early elimination of the productivity offset by making its annual filing as scheduled.

BellSouth's price plan is an integrated whole. It is therefore difficult to determine how BellSouth's proposal will affect the operation of the plan as a whole, especially insofar as it may impact ratepayers. Understandably, BellSouth targets the productivity offset mechanism for early reformation, seeking a reprieve from the rate reduction obligation it faces in June, while fully retaining the pricing and other revenue-enhancing and market-response capabilities that are of benefit to it. Yet, despite understanding the goals and anticipating future argument and evidence, the Commission cannot avoid the fact that the Company's eagerness to advance the requested result contrasts starkly with the absence of any evidence that would allow BellSouth's proposal to be adequately assessed. It would be ill-advised for the Commission, based upon assertions made without proof, to make a decision that could have unintended consequences or cause unfair results. The Commission notes that three other price plan companies, Verizon, Carolina and Central, have made their annual price plan filings on a timely basis; thus, this decision properly addresses the only issue before the Commission, the BellSouth matter.

Accordingly, the Commission finds good cause to deny BellSouth's motion for reconsideration. Therefore, not later than Friday, June 4, 2004, BellSouth shall either (1) file a statement accepting the conditions[1] set forth in the May 4 Order in order to hold its annual price plan filing in abeyance or (2) make the currently-required annual price plan filing.

[1] In its May 10 filing, the Public Staff requested that the Commission clarify the conditions of its May 4 Order so as to preclude any retroactive increases in rates. The Commission's intent in the May 4 Order was consistent with the Public Staff's filing; i.e., BellSouth would not be allowed any retroactive rate/revenue increases. This is also consistent with the plain language of BellSouth's April 15 motion, which spoke only to retroactive rate decreases.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 28th day of May, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

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Commissioner James Y. Kerr, II, concurs.
Commissioners J. Richard Conder, Robert V. Owens, Jr., and Michael S. Wilkins dissent.

DOCKET NO. P-55, SUB 1013

COMMISSIONER JAMES Y. KERR, II, CONCURRING: I support the majority opinion and write separately to specifically address the Public Staff's proposed compromise resolution of the issues raised by BellSouth's motions. The Public Staff's proposal asks this Commission not to hold the productivity offset in abeyance pending resolution of BellSouth's price plan review, but rather to set a new productivity offset and to otherwise leave the current price plan unchanged. As to the new productivity offset, the Public Staff recommends setting the productivity offset equal to the change in GDP-PI, effectively eliminating the effect of the productivity offset. The Public Staff's proposal extends similar treatment to the other price plan companies. I appreciate the effort by the Public Staff to put forth this proposal; it proved acceptable to the price plan companies and presented this Commission with an expedient option for resolving this matter. However, due to the complete absence of evidentiary support for this proposal, the Commission simply cannot adopt it.

To adopt the Public Staff's proposal would be contrary to the Commission's statutory obligation. The proposal asks the Commission to decide issues of fact, not law or policy, without proof of the pertinent facts. Proponents of this proposal ask the Commission to decide at least six principal factual issues: 1) that the appropriate productivity offset for the 2004 annual filing is an amount equal to the change in GDP-PI; 2) that the same productivity offset that is appropriate for BellSouth is also appropriate for Verizon, Central, Carolina, ALLTEL, Concord, MebTel, and North State; 3) that a productivity offset remains appropriate for BellSouth beyond 2004; 4) that a productivity offset beyond 2004 also remains appropriate for Verizon, Central, Carolina, ALLTEL, Concord, MebTel, and North State; 5) that productivity gains for price plan companies have declined and are declining; and, 6) that after a hearing on BellSouth's requested price plan revisions, the Commission will substantially lower the productivity offset applicable to future annual price plan filings. It is entirely possible that ultimately, based on information known to the Public Staff, BellSouth, and the other price plan companies, these factual determinations might be made. However, as stated by the Majority, the Commission cannot, no matter how expedient it might be, assume what must be proven. Evidence necessary to decide, much less agree to, the issues raised by the Public Staff's proposal has not been made part of this record and is not available to the Commission. Accordingly, the proposal must be rejected. I am certain that, had the Commission been invited to adopt an increased productivity offset on a similarly deficient record, BellSouth and the other price plan companies would approve of the Majority's refusal to accept such an invitation to speculate as to facts unsupported by evidence.

Unable to adopt the Public Staff's proposal based on a non-existent evidentiary record, the Commission is left to address the original filing made by BellSouth, which raises essentially a policy, not a factual, issue. As set forth by the Majority, the Commission has made its best effort to do so.

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

DOCKET NO. P-55, SUB 1013

COMMISSIONER J. RICHARD CONDER AND COMMISSIONER ROBERT V. OWENS, JR., DISSENTING: The majority has turned what should have been a relatively simple request into a punitive exercise. In its original request, BellSouth simply asks for a delay in its annual filing until the Commission deals with BellSouth's petition to revise its price plan which it filed on February 26th and upon which the Commission has so far failed to act. The revisions BellSouth seeks would significantly alter the annual filing and its effects. Assuming we are going to consider the requested revisions sometime, it makes logical sense to determine whether BellSouth will get the revisions it seeks and therefore must significantly revise its annual filing before requiring it to make a filing which could well be irrelevant.

Judicial and administrative economy for the company, for the Public Staff and for the Commission would best be served by simply granting BellSouth's request. Instead, the majority has apparently decided to punish BellSouth for having the temerity to first ask for a revision in its price plan and then having the audacity to ask us to consider their request before making them file what could be an annual filing that is improperly costly to BellSouth. Further, the imposition of what would amount to a complete freeze of BellSouth's rates is not only unreasonable, it is punitive and arbitrary. It removes any ability BellSouth might have to compete in an increasingly competitive business for ever how long we take to make a decision on BellSouth's requested revisions.

We cannot argue with the imposition of the first condition which would hold consumers harmless by making any rate reductions retroactive to the date they would ordinarily have been effective. And we can see the merit in rejecting the Public Staff's "compromise" since that would require accepting as fact the assertions of the Public Staff and the company about the state of competition before there is evidence presented on the record with a chance for all interested parties to challenge that evidence by cross-examination and presentations of their own. The status quo ought to be preserved if we are going to wait. But let's not, under the pretense of preserving the status quo, completely hamstring BellSouth by preventing it from making even revenue neutral revisions to its rates. If we can hold consumers harmless, why must we punish BellSouth? The logic for doing so escapes us. We therefore respectfully and vigorously dissent.

\s\ J. Richard Conder
Commissioner J. Richard Conder

\s\ Robert V. Owens, Jr.
Commissioner Robert V. Owens, Jr.

DOCKET NO. P-55, SUB 1013

COMMISSIONER MICHAEL S. WILKINS DISSENT: I, Commissioner Michael S. Wilkins respectfully dissent from the majority on this issue of BellSouth's Motion for Reconsideration. The Commission's May 4, 2004 order on Docket No. P-55, Sub 1013 in my opinion is flawed. Upon further study and consideration I sincerely believe that the second condition of that order which states that BellSouth must agree "to maintain the status quo under its current price plan by waiving the opportunity to propose any rate and/or revenue increases or decreases which the company would otherwise be entitled to file" is not in the best interest of the consumers, this Commission or any of the telecommunication companies. The order states that the status quo must be maintained until the Commission rules on the BellSouth Price Plan. The RTI study on the competitiveness of the Telecommunications Industry is projected to be completed by October 15, 2004 and it is likely that the hearing for the BellSouth Price Plan cannot be scheduled for hearing before January of 2005. As we all know from experience these dates are most volatile and it could easily be well into spring of 2005 before an order can be issued on BellSouth's price plan. In the ever changing conditions of the telecom market I am sure that no company would agree to hold the status quo on its pricing for this length of time. Any company that would accept such a condition would be viewed as "wounded prey" for the competition who would quickly move in for the "kill".

Furthermore the Telecoms have been able to make price adjustments since the passage of the 1996 Act and I don't think that by compromise agreement this Commission should take that right away from any company. Companies should be able to react to changes and competition in the market place when it is necessary and expedient.

I concur with the first condition of the Commission order stating that the May 10, 2004 filing would be held in abeyance and subject to true-up upon ruling by the Commission on BellSouth's Price Plan.

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

DOCKET NO. P-775, SUB 8

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996) ORDER CONCERNING LINE SHARING

BY THE COMMISSION: On August 12, 2004, BellSouth Telecommunications, Inc. (BellSouth) and DIECA Communications, Inc., d/b/a Covad Communications Company (Covad) filed a letter which, among other things, requested the Commission to allow them to file legal briefs on the following legal question:

Is BellSouth obligated to provide Covad access to line sharing after October 2004?

Pending a Commission decision, the parties agreed to hold the proceeding in this docket in abeyance. They furthermore undertook, with respect to the above legal question, not to include jurisdictional arguments, which they have addressed and will continue to address in other forums. BellSouth, however, did not waive its right to raise jurisdictional challenges in any second phase of the docket, and Covad did not object to this. On August 13, 2004, the Commission issued an Order Scheduling Briefs on Legal Question and Otherwise Holding Proceeding in Abeyance.

Before summarizing and examining the arguments of the parties, it is useful to review the background of the line sharing unbundled network element (UNE). Briefly stated, line sharing is the process through which a competing local provider (CLP) accesses the high frequency portion of the loop (HFPL) while the incumbent local exchange carrier (ILEC) provides voice service over the lower frequency portion of the loop. Sections 251 and 271 of the Telecommunications Act of 1996 (TA96) are relevant to this question. Section 251 requires all ILECs such as BellSouth to interconnect with CLPs such as Covad and provide unbundled access to network elements in accordance with the rules established by the Federal Communications Commission (FCC) when the CLPs would be impaired without such access. *See,* Sections 251(c)(3) and 251(d(2). Section 271 provides a list of requirements—the "competitive checklist"—that Bell Operating Companies (BOCs), such as BellSouth, must meet in order to be authorized to provide in-region, interLATA long distance service. More specifically, Checklist Item No. 4 provides that the BOC must provide "[l]ocal loop transmission from the central office to the customers' premises, unbundled from local switching or other services." No reference is made to impairment as in Section 251.

In its *Line Sharing Order* issued on December 9, 1999, the FCC found that CLPs were impaired without access to the high frequency spectrum of the local loop as a network element, and it

therefore required ILECs to provide CLPs with unbundled access to line sharing. However, in its August 21, 2003, *Triennial Review Order (TRO)*, the FCC concluded that CLPs *were not* impaired without access to line sharing as a UNE. Thus, the FCC found that ILECs no longer had to provide line sharing to CLPs; but, because of the potential disruption to the CLPs and end users, the FCC included provisions to gradually phase out line sharing as a Section 251 UNE. While *U.S. Telecomm. Ass'n v. FCC, 359 F. 3d 554* (D.C. Cir. 2004) *(USTA II)* vacated certain rules in the *TRO*, the FCC's rulings regarding line sharing were unaffected. Significantly, the *TRO* recognized the existence of Section 271 UNEs separate and apart from Section 251 UNEs. However, such UNEs would be applicable only to BOCs, and the pricing standard is "just and reasonable" rather than TELRIC. The USTA II decision also affirmed the FCC's decisions regarding Section 271 UNEs.

The parties do not appear to disagree concerning Section 251 line sharing requirements or their demise. Rather the dispute centers around Covad's contention that BellSouth is obligated to make line sharing available to *new* customers on or after October 2, 2004, the first anniversary of the effective date of the *TRO*. More specifically, the question is whether line sharing is included in Checklist Item No. 4 of Section 271 and is thus a separate and independent obligation from Section 251.

BellSouth, Covad, and the Public Staff each submitted briefs as summarized below:

BellSouth denied that line sharing constituted a Section 271 UNE and argued that its only obligation to provide line sharing is pursuant to the FCC transitional mechanism. Thus, BellSouth is not required to provide access to line sharing for new customers after October 1, 2004. In support of its position, BellSouth relied on the following major arguments:

First, BellSouth argued that the plain language of Checklist Item No. 4 refers to the provision of a "loop," not subloops, portions of loops (high frequency or otherwise), or isolated functionalities. Notably, the FCC decided in its *Line Sharing Order* to designate the high frequency portion of the loop as a UNE separate and apart from the loop itself, and it continued this mode of analysis in the *TRO*. In the *TRO* the FCC noted that the line sharing requirement had distorted the competitive incentives in favor of CLPs purchasing only the HFPL as compared to the whole loop and skewed CLPs toward providing only broadband service rather than bundled voice and DSL. The FCC said the line sharing requirement had discouraged innovative arrangements between voice CLPs and data CLPs and that there was substantial intermodal competition existing in broadband. Thus, the FCC concluded there was no impairment under any circumstances in the Section 251 context.

Second, BellSouth argued that various Section 271 decisions, in which the FCC granted long distance authority to various BOCs, do not support the inclusion of line sharing as a Checklist Item No. 4 UNE. For example, BellSouth noted that in the *Bell Atlantic New York Order* (December 22, 1999), issued after the *Line Sharing Order*, Verizon was not required to comply with line sharing. The FCC reached a similar conclusion in the *SWBT Texas Order* (June 30, 2000). While it is true that certain other decisions contain references to line sharing provisioning in support of an affirmative Checklist No. 4 finding (e.g., *SBC Illinois/Indiana/Ohio* (October 15, 2003) and *Qwest Arizona* (December 3, 2003)), BellSouth contended that it is readily apparent that the FCC's analysis relating to "hot cut provisioning, and line sharing, and line splitting" is not based upon the requirements of Checklist Item No. 4 but upon the FCC's rules. With respect to line sharing specifically, the rule in question is the FCC's rule that required line sharing pursuant to Section 251.

Third, BellSouth contended that the *TRO* itself does not support the view that line sharing is required as a Section 271 obligation. In Para. 654 of the *TRO*, the FCC made clear that Checklist Item Nos. 4, 5, 6 and 10 only "impose access requirements regarding loops, transport, switching, and signaling...." The FCC never mentions line sharing as a checklist item. And, while it is certainly true that the *TRO* recognizes the existence of Section 271 UNEs, there is nothing to suggest that *line sharing* is a Section 271 UNE. There is in fact no mention of line sharing within the fifteen paragraph discussion of Section 271 obligations in the *TRO*.

Lastly, BellSouth argued that various state decisions about the Self-Effectuating Enforcement Mechanism Plan, Verizon's wholesale tariffs, or the FCC's Notice of Proposed Rulemaking issued August 20, 2004, do not provide support for line sharing being considered a Section 271 UNE, nor can Covad reasonably rely upon state law to circumvent federal rules.

Covad argued strenuously that line sharing falls under Checklist Item No. 4 and, therefore, BOCs subject to Section 271 must provide access to it. Covad cited the *Massachusetts 271 Order* (April 16, 2001) in which the FCC stated that the *Line Sharing Order* had defined the high frequency portion of local loops as a UNE that "must be provided to requesting carriers on a nondiscriminatory basis pursuant to Section 251(c)(3) of the act, and thus, checklist items 2 and 4 of Section 271." The *TRO* removed line sharing from Checklist Item No. 2, but it did not remove line sharing from Checklist Item No. 4. Nor was the FCC's statement in the *Massachusetts 271 Order* anomalous, since in every FCC 271 Order granting BellSouth—or for that matter, any other BOC—long distance authority, the FCC has placed line sharing in Checklist Item No. 4. It therefore follows that because line sharing is a Checklist Item No. 4 element, BellSouth remains obligated to provide access to line sharing pursuant to the competitive checklist despite the FCC's unbundling determination under Section 251. This is clear from the FCC's analysis in the *TRO* where it recognized the existence of Section 271 UNEs.

In anticipation of BellSouth's argument regarding the "plain language" of Checklist Item No. 4 with its reference to "local loop transmission" as being a reference to "a whole loop, nothing more and nothing less," Covad stated that the FCC had issued a clarifying definition of "loop" in regards to Checklist Item No. 4 in *SBC Illinois/Indiana/Ohio* as a "transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer's premises." In the *TRO*, the FCC defined the HFPL used to provide line sharing as a "complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises." It is therefore clear that, because the HFPL is a "complete transmission path" over the loop, it constitutes a form of "loop transmission facility" for purposes of the FCC definition of Checklist Item No. 4 elements. In fact, BellSouth routinely uses the HFPL transmission channel to provide xDSL services.

In addition, Covad maintained that line sharing had not been removed from Checklist Item No. 4 in the *TRO*. It suggested that BellSouth had missed the point that, while all the checklist items are considered as separate UNEs in the unbundling analysis, they are lumped together under their general checklist description in Section 271 analysis. Covad also took issue with BellSouth's distinction between support for line sharing as a Checklist Item No. 4 element being based on FCC rules as opposed to statute. FCC rules means those rules governing the provision of the Section 271 network elements in question. Covad noted that the *Massachusetts 271 Order* identified the *UNE Remand Order* as one source of FCC rules, and that same Order lists line sharing among the loop types required under Checklist Item No. 4, as well as expressly identifying line sharing as a Checklist Item No. 4 element.

Public Staff maintained that BellSouth's "whole loop" argument was faulty. Noting that the *Kansas/Oklahoma Order* had provided, with particular reference to Checklist Item No. 4, that the "BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested," the Public Staff argued that the FCC had clearly indicated in the Kansas/Oklahoma Order that compliance with Checklist Item No. 4 requires BellSouth to do more than simply provide a whole loop to a CLP. The Kansas/Oklahoma Order even goes so far as to require the BOC to perform line conditioning if necessary. The North Carolina Utilities Commission noted the FCC's requirements spelled out in the Kansas/Oklahoma Order in its Advisory Opinion concerning BellSouth's request for 271 Authority. BellSouth's contention that line sharing is not part of Checklist Item No. 4 is inconsistent with its filings before the Commission and the FCC. BellSouth

addressed line sharing in connection with its compliance obligation under Checklist Item No. 4, and it addressed line sharing it its brief filed with the FCC in support of its Five-State Application for 271 Authority.

Based on the above, the Public Staff urged the Commission to find that line sharing is part of the Checklist No. 4 obligation of BellSouth. Such determination should reflect that BellSouth has a Section 251 obligation to provide line sharing to existing customers on a grandfathered and transitional basis as well as an on-going Section 271 obligation to make line sharing available to new customers of CLPs on and after October 2, 2004.

Lastly, the Public Staff stated that the above does not require the Commission to determine the appropriate rates for line sharing. With respect to rates under Section 271, the FCC's Sections 201 and 202 standards for just and reasonable rates would apply.

Decisions and Recommendations in Other States. The parties have filed copies of decisions and recommendations in other states. On September 7, 2004, BellSouth filed a decision from the **Maine Public Utilities Commission**, noting in Footnote 38 that the Maine PUC found that "[n]either the *TRO* or *USTAII* directly addressed whether an ILEC's continuing unbundling obligations under Section 271 include continued access to line sharing with the ILECs, and we will not reach that issue in this Order." The Maine PUC did rule in favor of line sharing on the basis of state authority. On September 24, 2004, Covad and BellSouth both filed a copy of the recent recommendation from the **Florida Public Service Commission Staff** in a docket parallel to this one. Although the Florida Staff recommended that the Commission find that "line sharing is not a 'local loop transmission from the central office to the customer's premises' as required by checklist item 4," Covad provided the recommendation because of what it believed to be the "manifest legal error" contained in it—that error being that line sharing never was a Checklist Item No. 4 element. On September 28, 2004, Covad filed the Final Recommendation from the **Louisiana Public Service Commission Administrative Law Judge** ruling in favor of Covad's position and finding that BellSouth should be required to provide access to line sharing under Section 271 of the Act. On October 1, 2004, BellSouth made a filing in response to Covad's submission of the Florida Staff recommendation and the Louisiana Administrative Law Judge's recommendation and attached a copy of the **brief of the United States Telecom Association** filed on January 28, 2004. BellSouth also cited to the **FCC brief** filed with the D.C. Circuit in connection with the *USTA II* decision where it stated that it had "also removed all existing unbundling obligations with respect to packet switching, and, subject to grandfather provisions and a transition, *eliminated ILEC line sharing duties.*" (emphasis added by BellSouth). BellSouth also noted that in **Georgia**, the Public Service Commission had adopted a staff recommendation deferring consideration of Covad's 271 argument to a separate docket, but, pending resolution, ordered BellSouth to continue to provide new line sharing arrangements after October 1, 2004. BellSouth stated that the basis for this decision was unclear.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that at this time it should decline to decide whether BellSouth is obligated to provide Covad access to line sharing after October 2004.[1]

The legal status of line sharing is highly confused at this time. In the *TRO*, the FCC made clear the existence of Section 271 UNEs; but, in specifically removing line sharing as a Section 251 UNE, it did not make plain whether it was a Section 271 UNE instead. Significantly, the FCC in its

[1] BellSouth is required to provide line sharing for a period of time on behalf of existing CLP customers after October 2004 as a Section 251 UNE pursuant to the FCC's transition plan.

August 20, 2004, *Order and Notice of Proposed Rulemaking* outlining interim unbundling rules also stated in Footnote No. 38 that "because we have received petitions regarding the details of independent Section 271 unbundling obligations, we seek comment on whether these obligations need to be clarified or modified in light of *USTA II.*" Based on at least two reports in the trade press this week it appears that significant confusion exists concerning whether the FCC has, or will soon, decide this issue. Given this state of affairs, we resist the invitation to join the confusion by rendering a substantive decision and instead call upon our colleagues at the federal level to provide much needed clarity to the situation, and to do so sooner rather than later. We strongly encourage the FCC to take the opportunity in this rulemaking or in the context of other relevant dockets to make a definitive ruling about whether or not line sharing is a Section 271 UNE, and to do so as soon as possible.

In the meantime, we encourage the parties--and interested CLPs and ILECs generally--to enter into commercial agreements that provide for line sharing if they can arrive at mutually agreeable terms. That this is possible is evidenced by the fact that Covad itself has recently entered into line sharing arrangements for varying lengths of time with Verizon, SBC, and Qwest. It is also in accord with what the FCC has been encouraging carriers to do.

The practical effect of our ruling is that it does not disturb the status quo—that is, that BellSouth must provide line sharing to existing customers of CLPs under the FCC's transition plan but there is no present requirement, other than any such requirement contained in the current interconnection agreement between BellSouth and Covad, that BellSouth provide line sharing to new customers. We hope and expect that the FCC will soon finally rule on and clarify the status of line sharing as a Section 271 UNE and that the parties may be able to enter into mutually acceptable commercial agreements that will ameliorate concerns. Accordingly, we will not close this docket, and we will closely monitor the legal and commercial developments related to this issue. In the event that the FCC does not provide greater clarity concerning this issue within a reasonable period of time, we reserve the right to take action on motion by any party or on our own motion.

Finally, the Commission notes that, in Florida, BellSouth and Covad agreed at a meeting held on October 5, 2004, that BellSouth will continue to provide Covad access to new line sharing arrangements until December 19, 2004 (the day the existing interconnection agreement between BellSouth and Covad expires). The Commission further notes that the current interconnection agreement between BellSouth and Covad, which became effective on December 19, 2001, and expires on December 19, 2004, applies to all nine BellSouth states. Since the current interconnection agreement between BellSouth and Covad applies to Florida as well as North Carolina, the Commission finds it appropriate to encourage BellSouth and Covad to reach a similar agreement in North Carolina (specifically that BellSouth will continue to provide Covad access to new line sharing arrangements until December 19, 2004).

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of October, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

dl102004.01

DOCKET NO. T-4176, SUB 1
DOCKET NO. T-4176, SUB 2

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. T-4176, SUB 1 In the Matter of Weathers Bros. Transfer Co., Inc., d/b/a Weathers Moving and Distribution, Complainant v. Movers at Demand, Inc., Respondent and DOCKET NO. T-4176, SUB 2 In the Matter of Movers at Demand, Inc., P. O. Box 25518, Fayetteville, North Carolina 28314 – Application for Certificate of Exemption	ORDER RULING ON COMPLAINT AND GRANTING TEMPORARY CERTIFICATE OF EXEMPTION WITH CONDITIONS

HEARD: Wednesday, December 10, 2003, at 9:15 a.m., in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Commissioners Lorinzo L. Joyner and James Y. Kerr, II

APPEARANCES:

For Respondent/Applicant:
Larry S. Height, Attorney at Law, P.O. Box 27931, Raleigh, North Carolina 27611-7931

For Complainant and Protestants:
James C. Thornton, Parker, Poe, Adams & Bernstein, L.L.P., P.O. Box 389, Raleigh, North Carolina 27602-0389

BY THE COMMISSION: This matter first came before the Commission on March 25, 2003, when Weathers Bros. Transfer Co., Inc., d/b/a Weathers Moving & Distribution (Weathers or Complainant), filed in Docket No. T-4176, Sub 1, a complaint against Movers at Demand, Inc. (Movers at Demand or Respondent).

By order dated March 27, 2003, the complaint was served on Respondent, and Respondent was directed to satisfy the demands of the complaint or to file an answer on or before April 16, 2003. The Respondent did not file any response by that date.

On July 29, 2003, the Commission Staff sent a memorandum to Captain George E. Gray, North Carolina State Highway Patrol (NCSHP), Motor Carrier Enforcement, requesting an investigation into the complaint. On August 12, 2003, the Commission received a copy of a letter from Major C. J. Carden, Section Director, NCSHP, Motor Carrier Enforcement Administration, written to the Federal Motor Carrier Safety Administration (FMCSA). In the letter to the FMCSA, Major Carden attached the Commission's memorandum to Captain Gray and requested the assistance of the FMCSA.

On August 14, 2003, Respondent filed a motion for extension of time in which to respond to the complaint filed with the Commission on March 25, 2003. By order of August 15, 2003, an extension of time until September 2, 2003, was granted.

On September 2, 2003, Respondent filed the following motions in Docket No. T-4176, Sub 1: Answer of Respondent, Movers At Demand, Inc., and Motion to Dismiss; Motion for an Expedited Hearing; and Motion for Hearing to be Heard by a Panel of Three Commissioners. On September 10, 2003, Complainant filed responses to Respondent's three motions, and Respondent filed a reply on September 11, 2003.

On August 14, 2003, Movers at Demand (Applicant) filed an Application for Certificate of Exemption to Transport Household Goods in Docket No. T-4176, Sub 2.

On August 27, 2003, a Protest and Petition to Intervene was filed in Docket No. T-4176, Sub 2, on behalf of Weathers Brothers Transfer Company of N.C., Inc., Fayetteville, North Carolina; Covan World Wide Moving, Inc., Fayetteville, North Carolina; Fayetteville Moving & Storage, Inc., Fayetteville, North Carolina; Patterson Storage Warehouse Company, Inc., Fayetteville, North Carolina; M. M. Smith Storage Warehouse, Inc., Fayetteville, North Carolina; Triple A Moving & Storage, Inc., Lumberton, North Carolina; and James G. Dunnagan, d/b/a Dunnagan's Moving & Storage, Wilmington, North Carolina (Protestants).

On September 10, 2003, Protestants filed a letter in Docket No. T-4176, Sub 2, correcting the name of Weathers Brothers Transfer Company of N.C., Inc., to Weathers Bros. Transfer Co., Inc., d/b/a/ Weathers Moving & Distribution.

On September 12, 2003, the Chair entered an Order Consolidating Dockets, Scheduling Hearing, and Denying Motion to Dismiss Complaint. By this order, the Commission consolidated the Sub 1 complaint and the Sub 2 application for purposes of hearing, scheduled the consolidated cases for an expedited hearing before a single Hearing Commissioner on October 1, 2003, and denied Respondent's motion to dismiss the complaint.

On September 18, 2003, Applicant/Respondent filed a Motion to Continue, Objection to Consolidation of the Dockets, and Request for Reconsideration. On September 23, 2003, Complainants and Protestants filed a Response. On September 24, 2003, Applicant/Respondent filed a Reply, Request for a Ruling on Motion for Hearing by a Panel Filed on September 10, 2003, and Motion to Recuse.

On September 26, 2003, the Hearing Commissioner entered an order granting Applicant/Respondent's motion for a continuance "to a date to be later announced" and stating that a further order would be issued ruling on the other outstanding motions in the dockets.

On October 14, 2003, the Commission entered two orders. First, the Hearing Commissioner assigned by the Chair denied Applicant/Respondent's motion that he recuse himself and not participate in the hearing. Second, the Chair assigned the consolidated cases for hearing by a panel of three Commissioners (with the former single Hearing Commissioner presiding) and rescheduled the hearing for October 29, 2003. The Chair explained that the cases had originally been assigned to a single Hearing Commissioner to accommodate Applicant/Respondent's request for an expedited hearing (a panel not being available on such an expedited basis), but that Applicant/Respondent had subsequently moved for a continuance, and that, upon revisiting the matter, there was merit in the request to assign the cases to a panel of three Commissioners since the cases involve the application of new rules and standards recently adopted by the Commission.

On October 16, 2003, the Commission (i.e., the panel assigned by the Chair) issued an order overruling Applicant/Respondent's objection to consolidation filed on September 18, 2003, and denying Applicant/Respondent's request for reconsideration filed on the same date.

Applicant/Respondent had objected to consolidation on grounds that it would prejudice an orderly presentation of the cases. The Commission ruled that "the parties and Commission can accommodate [the different burdens of proof in the two proceedings], and that no prejudice will result from consolidation." Applicant/Respondent had requested reconsideration of the denial of its earlier motion to dismiss the complaint on several procedural grounds. The Commission discussed its reasoning on each point and denied reconsideration.

By order of October 22, 2003, the Commission, acting on a joint oral motion of the parties, rescheduled the hearing to December 10, 2003.

Complainant and Protestants filed two requests for subpoenas on December 1, 2003, seeking certain documents. The two subpoenas were issued by the Chief Clerk of the Commission on December 4, 2003. One of the subpoenas was directed to Applicant/Respondent. On December 8, 2003, Applicant/Respondent filed a motion to continue the hearing, arguing that the documents requested from it were voluminous and that it needed more time to comply. Complainant and Protestants filed a response on the same date, in which they limited the scope of their request to Applicant/Respondent. The Commission issued an order on December 8, 2003, denying the motion to continue, but limiting the documents to be produced pursuant to the subpoena and giving Applicant/Respondent until the beginning of the hearing to produce them.

A Prehearing Order was issued by the Commission on December 9, 2003, setting forth the burdens of proof and the order of testimony for the hearing.

The hearing was convened as scheduled on December 10, 2003. At that time, Applicant/Respondent renewed its motion to dismiss the complaint, and this motion was ruled upon as hereinafter discussed. Applicant/Respondent also moved to quash the subpoena directed to it, and this motion was argued and denied as reflected in the transcript of the hearing. The decision with respect to Applicant/Respondent's motion to quash contained in the transcript is incorporated herein by reference. Applicant/Respondent then produced documents pursuant to the subpoena, and the hearing proceeded.

Applicant/Respondent presented the testimony of its Vice-President Marshall Williams and of Claude M. Bogues and Clarence Mann. Complainant and Protestants presented the testimony of Allen Hopson and Matthew Smith.

Based upon a careful consideration of the testimony and evidence, and the entire record in this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. Movers at Demand is a North Carolina corporation located in Fayetteville, North Carolina. Its corporate officers are Darren Parker, Marshall Williams, and David Coleman.

2. On November 26, 2001, Movers at Demand filed an application with the Commission for common carrier authority to transport Group 18-A, household goods, statewide.

3. By letter dated November 27, 2001, the Commission acknowledged receipt of the application and advised Applicant that it could not lawfully operate within North Carolina until the Commission issued an order granting the application. The application was protested, and it was scheduled for hearing. The Commission was at that time conducting an investigation in Docket No. T-100, Sub 49, to consider whether to exempt from regulation the transportation of household goods within North Carolina, and, on motion of the Applicant, the hearing on the November 26, 2001 application was continued to a date to be set at a later time.

4. The Commission issued its Order Ruling on Household Goods Transportation in Docket No. T-100, Sub 49, on February 22, 2002 (the February 22, 2002 Order). The February 22, 2002 Order became effective as of January 1, 2003 (see the Final Order in the docket dated November 1, 2002). The February 22, 2002 Order provided that the Commission would begin issuing certificates of exemption to motor carriers of household goods in intrastate commerce in North Carolina with certain terms and conditions attached to the certificate of exemption. Moving services within local commercial zones of municipalities, which had previously been authorized by certificates of exemption issued by the North Carolina Division of Motor Vehicles (DMV), became subject to the provisions of the February 22, 2002 Order as of January 1, 2003.

5. By letter dated February 26, 2002, the Commission informed Applicant of the February 22, 2002 Order in Docket No. T-100, Sub 49. Enclosed with the letter was an application for a certificate of exemption for Applicant to complete and return to the Commission.

6. Applicant did not return the application for a certificate of exemption enclosed with the February 26, 2002 letter to the Commission, and Applicant notified the Commission that it did not wish to proceed with its protested November 26, 2001 application for authority to transport household goods. By letter dated March 22, 2002, the Commission confirmed Applicant's decision and advised Applicant that the effective date of the February 22, 2002 Order would be delayed a few months. The letter again advised the Applicant that it could not lawfully provide moving services within North Carolina outside the local commercial zone territory authorized by an exemption certificate issued by DMV.

7. Applicant never obtained an exemption certificate from DMV. As of January 1, 2003, moving services within local commercial zones of municipalities became subject to the certificates of exemption issued by the Commission.

8. On March 25, 2003, Weathers filed its complaint with the Commission in Docket No. T-4176, Sub 1, alleging that Movers at Demand was engaging in illegal moving activities by performing moves in North Carolina without obtaining a certificate from the Commission and by advertising to the public that it was fully licensed and insured to perform local or long distance moving operations, when it was not. Weathers requested that the Commission take appropriate action against Movers at Demand to prohibit its illegal moving activities.

9. By Order dated March 27, 2003, the complaint was served on Respondent. Movers at Demand did not respond to the complaint filed by Weathers. By memorandum dated July 29, 2003, the Commission requested the Motor Carrier Enforcement Section of the NCSHP to investigate the matter. A copy of this memorandum was sent to Movers at Demand.

10. Respondent retained counsel, and an answer to the complaint was filed on September 2, 2003.

11. On August 14, 2003, Movers at Demand filed an application with the Commission for a certificate of exemption in Docket No. T-4176, Sub 2.

12. Movers at Demand's application for a certificate of exemption was filed 18 months after it was informed by the Commission in February 2002 that it needed to file an application for a certificate of exemption, 17 months after it informed the Commission in March 2002 that it did not intend to proceed with obtaining authority and was instructed by the Commission that it could not lawfully transport household goods without proper authority, and 5 months after Weathers filed the complaint with the Commission in March 2003 alleging illegal moving activities.

13. By letter dated August 15, 2003, the Commission acknowledged receipt of Movers at Demand's application for a certificate of exemption and once again specifically advised Applicant

that it could not lawfully operate as a mover of household goods within North Carolina until its application was approved by the Commission.

14. Movers at Demand has performed unauthorized moves of household goods since it began operating about two and a half years ago. Prior to January 1, 2003 (which was the effective date of the Commission's February 22, 2002 Order in Docket No. T-100, Sub 49), Applicant performed moves within the local commercial zone of Fayetteville without an exemption certificate from the DMV and intrastate moves in North Carolina without authority from this Commission. Since January 1, 2003, Applicant has performed moving services in intrastate commerce in North Carolina without a certificate of exemption from this Commission and interstate moving services without authority from the FMCSA.

15. Records from Ryder Transportation reflect that for the period of January 1, 2003, to November 30, 2003, Applicant rented Ryder trucks 114 times. Applicant used rental trucks, instead of its own truck, for making its moves.

16. Between August 15, 2003 (the date of the Commission's last letter), and the date of the hearing, Applicant conducted 10 to 12 moves per month. These moves were charged on an hourly rate for Cumberland County and on a flat rate for moves outside of Cumberland County.

17. On August 21, 2003, Applicant performed a move for Linda Smith from Fayetteville, North Carolina, to Troutville, Virginia. Ms. Smith's property was damaged during that move, and she filed a lawsuit against Applicant in Cumberland County District Court to seek recovery of property damages. The Court ordered Applicant to pay Ms. Smith's property damages. The record contains no other evidence tending to show damage to customer property or other direct harm to customers as a result of Applicant's unauthorized moving activities.

18. Applicant's Vice-President Williams knew that Applicant could not lawfully provide moving services in North Carolina, but Applicant did so nonetheless because such activities were the owners' source of income. Mr. Williams testified that mistakes were made, but that he had tried to comply with regulations.

19. Applicant advertises its moving services in a variety of ways, including the Fayetteville Sprint Best Red Yellow Pages, the Fayetteville Talking Phone Book Yellow Pages, the Talking Phone Book website, flyers and brochures, television, and radio. Applicant received business from these advertisements. Applicant advertised its services through these sources even though it knew that it was not authorized to perform the advertised services.

20. A full-page advertisement published in the June 2003 edition of the Fayetteville Talking Phone Book Yellow Pages containing the name "M.A.D. Moving" and "Movers at Demand" contained language in the body of the advertisement referring to the Applicant as providing "Local and Long Distance" moving and referring to its services as "Fully Insured." Applicant knew it did not have authority to perform the advertised moves when it placed this advertisement it, but it placed the advertisement anyway.

21. Applicant published a flyer that was provided to referral sources, such as local real estate agents, in which it advertised itself as "Fully Licensed and Insured" and as a "Proud Member of the Better Business Bureau of Coastal Carolina." Applicant was not licensed and insured and had dropped its membership with the Better Business Bureau organization.

22. Mr. Williams has eight years of experience in the moving industry. In addition to his involvement with Applicant, Mr. Williams was a part-time employee of Andrews Mini Storage in Fayetteville.

23. Applicant leases a 24-foot Ford box truck from Mr. Williams and pays $350 per month to lease this truck. As of the hearing, Applicant had $3,000 to $4,000 in cash.

24. Applicant does not charge rates in accordance with the Commission's Maximum Rate Tariff No. 1 (MRT) and does not provide the shipper a bill of lading. As a result, the shipper is not given important information about how it is charged or what the shipper's contractual rights are concerning the moving services provided by Applicant.

25. Applicant filed the required liability and cargo insurance coverage with the DMV and the required certificate of general liability insurance with the Commission prior to the hearing.

26. Claude M. Bogues is a self-employed Certified Public Accountant. He performed a financial compilation for Applicant on November 30, 2003, based upon financial information provided by Applicant. Based upon this compilation, Mr. Bogues testified that, in his opinion, Applicant is financially solvent and comparably situated to other applicants he has reviewed.

27. Clarence Mann is an agent for Lanstar Logistics, a transportation and distribution corporation. He has worked in the industry for over 20 years and has previously worked for Bekins Van Lines and North American Van Lines as transportation distribution manager for household goods operations and logistics. Mr. Mann conducted a 90-minute interview with two of Applicant's corporate officers, Marshall Williams and David Coleman. Mr. Mann did not visit Applicant's location and he did not observe them performing a move. He did not review any paperwork or records of the Applicant. Based upon Mr. Mann's interview, he found the Applicant to be, in his opinion, very competent in household goods moving.

28. Allen Hopson is President of Weathers located in Fayetteville, North Carolina. Weathers is a family-owned moving business, and Mr. Hopson has worked in the moving business his entire life.

29. Mr. Hopson testified that he was concerned about Respondent's unauthorized moving operations, including misleading advertising, and its resulting negative impact on the public and other certificated movers. He stated that without proper authority from the Commission, the general public cannot seek relief from the Commission against moving companies through its claims process if something goes wrong with a move.

30. Mr. Hopson testified he had additional concerns about Applicant's fitness and ability to properly perform moving services. These concerns included Applicant's failure to have any insurance in place during its years of operation, failure to use a bill of lading, failure to operate under the required Commission tariff, and failure to have any workman's compensation insurance. In addition, he testified that movers who operate without any cargo insurance place the public at risk in the event of a catastrophic event such as the complete loss of all of their possessions.

31. Mr. Hopson testified that, in his opinion, Applicant's continued unlawful moves, despite repeated instructions from the Commission, make it unfit to properly perform moving services.

32. Matthew Smith is President of M. M. Smith Storage Warehouse, Inc. (M. M. Smith), which provides household goods transportation in North Carolina under Certificate No. C-594. Mr. Smith has worked at M. M. Smith for over 40 years.

33. Mr. Smith testified that, in his opinion, Applicant is not fit to properly perform moving services. Further, he testified that his company has lost revenue to the Applicant and other illegal movers because illegal movers do not have the overhead expenses associated with complying with the Commission's rules and regulations, such as using bills of lading and following the required tariff.

34. Mr. Hopson and Mr. Smith both testified that there are numerous resources easily available to Applicant to learn how to properly perform moving services. These include the North Carolina Movers Association and the American Moving and Storage Association (AMSA). Mr. Smith is on the board of directors of AMSA and stated that membership is not required to obtain information about moving operations.

DISCUSSION OF EVIDENCE AND CONCLUSIONS REGARDING THE COMPLAINT

Docket No. T-4176, Sub 1, involves the complaint filed by Weathers in which it is alleged that Movers at Demand has performed moving operations in North Carolina without obtaining a certificate of exemption from the Commission and has advertised that it was fully licensed and insured to perform such moves when it was not. Findings of Fact Nos. 1 through 21 deal with this complaint. The evidence in support of these findings is found primarily in the testimony of Complainant's witnesses Hopson and Smith and Respondent's witness Williams.

The Commission concludes that it has complaint jurisdiction as to Respondent. The Commission has authority to regulate motor carriers of household goods as "public utilities." G.S. 62-3(23)a.4. Public utilities are generally required to obtain a certificate of public convenience and necessity from the Commission before beginning operation. G.S. 62-110(a). Since January 1, 2003, movers of household goods in intrastate commerce in North Carolina have been required to get a certificate of exemption from the Commission pursuant to G.S. 62-261(8) before beginning to provide such services. The status of an entity as a public utility does not depend upon whether it has obtained operating authority from the Commission, but rather upon whether it is in fact operating a business defined as a public utility by the General Statutes. State ex rel. Utilities Commission v. Carolina Telephone and Telegraph Co., 267 N.C. 257 (1966); State ex rel. Utilities Commission v. Mackie, 79 N.C.App. 19 (1986), modified and aff'd, 318 N.C. 686 (1987). "If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission notwithstanding the fact that it has failed to comply with G.S. 62-110 before beginning its operation." Mackie, 79 N.C.App., at 32. The same conclusion applies when an entity is required to obtain a certificate of exemption from the Commission, but fails to do so. In this case, Respondent does not hold a certificate of public convenience and necessity from the Commission to engage in moving operations or a certificate of exemption; however, there is uncontroverted evidence that Respondent has moved household goods for the public for compensation in North Carolina. As a result, Respondent is properly before the Commission with respect to the complaint filed by Weathers.

At the beginning of the hearing on December 10, 2003, Respondent renewed its motion "to dismiss the complaint based on the Commission's Rule R1-4(c)," stating that "it's the same motion to dismiss as contained in the answer that was filed back on September 7. I just wanted to go on the record." After argument by the parties, the Commission denied the renewed motion on grounds that "we have ruled on those motions, and that we do not wish to revisit our decision any further and that the reasoning for our decision was set out in the October 16, 2003 order." The Commission indicated that it would make a more formal ruling on the renewed motion at a later time. The Commission has given further consideration to the renewed motion to dismiss the complaint and again finds good cause to reaffirm the rationale for denial of the motion set forth in the October 16 order. The Commission believes that the October 16 order adequately explains the ruling and that the legal principles cited in the October 16 order fully support denial of the motion to dismiss the complaint. The language of the October 16 order is incorporated by reference herein.

The evidence presented at the hearing showed that Respondent had engaged in unauthorized moving operations. At the hearing, Respondent's Vice-President Marshall Williams testified that his company had been in business for about two and a half years, that the company had performed an average of 10 to 12 moves a month from May 2003 until the time of the hearing, that most of the moves were intrastate local moves, that it performed about two moves to other states without any federal authority, and that it used rental trucks for the moves because "we can't even get plates until

we get our certificate." Exhibits in the record reflect that for the period of January 1, 2003, to November 30, 2003, Respondent rented Ryder trucks 114 times. There is evidence that Respondent was advised in writing by the Commission on at least three occasions, as early as November 2001 and as recently as August 2003, that it needed proper operating authority to provide moves within North Carolina. Even so, Respondent continued to provide moves without any proper authority. Witness Williams testified as follows:

> Q. When you received this [August 15, 2003 letter], was there any question in your mind what the meaning of that paragraph meant that you could not lawfully operate as a mover of household goods?
>
> A. No, sir.
>
> ....
>
> Q. And you knew at that time that you did those moves that you did not have authority to do those moves?
>
> A. Yes.
>
> Q. And you did them anyway?
>
> A. Yes.
>
> ....
>
> Q. You knew when you got this letter that you couldn't do any moves until you had that certificate?
>
> A. Right.
>
> Q. So your moves were done knowingly and willful, weren't they?
>
> A. Right.

Witness Williams repeatedly admitted that he knew his company was not authorized to conduct these moves, but he testified that the company performed them anyway because this was the owners' source of income. Williams stated, "Bills have to be paid, and that's why we continued." Another time, he testified, "Yes, we did illegal moving, but we had no choice to do illegal moving because ... we had to make a living. We had everything already set up. We couldn't stop."

The evidence presented at the hearing also shows that Respondent placed a Yellow Pages advertisement in the Fayetteville area stating that Respondent can perform "Local and Long Distance" moves and is "Fully Insured." There was also evidence that Respondent distributed promotional brochures to real estate agents in the Fayetteville area stating that Respondent is "Fully Licensed and Insured" and that Respondent is a "Proud Member of the Better Business Bureau of Coastal Carolina." The brochure indicated that "[w]e pride ourselves in providing the best service at the best possible rates in town . . ." and that "Movers At Demand out-bids 99% of the competition in Cumberland County and all surrounding counties because of low overhead and high business volume." Witness Williams admitted that Respondent did not have authority from the Commission to perform moves as advertised and that Respondent had dropped its membership with the Better Business Bureau of Coastal Carolina. Further, the evidence tends to show that, until recently, Respondent carried neither general liability insurance covering damage to a shipper's premises nor cargo insurance covering a shipper's possessions during transit.

Witness Williams testified that Respondent tried to comply with the Commission's regulations; however, the Commission concludes that the evidence does not reflect any significant, good faith effort to comply until after the complaint was filed in March 2003. In November 2001, Respondent filed its original application for authority to transport household goods, which was protested. The hearing on the protested application was continued on Applicant's own motion. In March 2002, Respondent was given the opportunity to proceed with its protested application since the Commission's new regulations in Docket No. T-100, Sub 49 (the docket exempting the transportation of household goods within North Carolina from regulation) would not become effective for several months, but Respondent chose not to do so. The Commission mailed Respondent a letter in

March 2002, acknowledging its decision and specifically instructing Respondent that it could not lawfully operate outside the intracity territory without authority from the Commission. At the time of that letter, the provision of moving services within the local commercial zones of municipalities was subject to an exemption certificate issued by DMV; however, Williams testified at the hearing that Respondent did not even have an exemption certificate from DMV authorizing moves within Fayetteville. Even after the complaint was filed in March 2003, Williams testified that Respondent did not realize that there was a time limit for responding to the complaint and did not take any action to clarify the situation. It took Respondent until August 2003 to find counsel and apply for a certificate of exemption from the Commission.

The intrastate transportation of household goods in North Carolina is subject to the regulation of this Commission pursuant to G.S. 62-3(23)a4, G.S. 62-110(a), and G.S. 62-261(8), and one must have the requisite authority from the Commission to engage in such an operation. The Commission concludes by the greater weight of the evidence that Movers at Demand violated North Carolina law and Commission orders, rules, and regulations by performing numerous intrastate moves without possessing the proper certificate from the Commission. Respondent's Vice-President admitted performing these moves, but argued that they were done out of financial necessity and while his company was attempting to learn about the Commission's regulations and comply with them. After Respondent filed its first application with the Commission in November 26, 2001, it continued to operate even after receiving a letter from the Commission dated November 27, 2001, acknowledging receipt of the application and specifically stating, "In addition, please be advised that you cannot lawfully operate as a regulated, for-hire motor carrier within North Carolina under the authority requested until the Commission has considered the application and other matters of record in this docket and issued an order granting the application." The Commission concludes that Respondent's unauthorized moving operations were not performed out of lack of knowledge or negligence, but resulted from willful disregard for the law. Further, the Commission concludes by the greater weight of the evidence that Respondent disseminated advertising that was false and misleading and that Respondent placed these advertisements even though it knew that they were false at the time that it placed them. One who, without the proper certificate from the Commission, advertises himself to the public as a licensed and insured mover of household goods and derives business thereby is, by that, engaged in an unauthorized transportation operation. Although there was evidence of only one damage claim at the hearing and although Respondent contends that it provides good service, such does not justify illegal operation or the dissemination of misleading advertising.

As a result of these violations of statute and Commission orders, rules, and regulations, the Commission finds good cause to order that Respondent forfeit and pay a penalty pursuant to G.S. 62-310(a) for its unauthorized moving operations. G.S. 62-310(a) provides that public utilities that violate the Public Utilities Act or the rules or regulations of the Commission shall pay up to $1,000 for each offense. The evidence in this case supports a finding that Respondent has performed well over 25 unauthorized intrastate moves. The Commission finds and concludes that the evidence of unauthorized intrastate moves fully supports a finding that Respondent has committed at least 25 violations of North Carolina law under G.S. 62-310(a) and that a penalty of $25,000 is just and reasonable in this case.[1] Despite its arguments to the contrary, Respondent must be held responsible for its willful disregard for the requirements of the law and the amount of the penalty found appropriate in this order adequately reflects the seriousness of Respondent's activities. Still, the Commission is aware that this penalty is a large amount for a small business, and it is not the intent of the Commission to completely impair Respondent's operations or to force it out of business.

[1] Although the Commission has also concluded that Respondent has engaged in false and misleading advertising in several different forms (including the Fayetteville Yellow Pages and promotional brochures distributed to real estate agents), and although the Commission will consider Respondent's advertising in connection with the fitness requirement of the Sub 2 application discussed hereinafter, the Commission, in its discretion, imposes this $25,000 penalty based upon Respondent's unauthorized moves and will impose no additional monetary penalty based upon false and misleading advertising.

Therefore, the Commission will allow Respondent to pay this penalty by making voluntary monthly payments of at least $416.66 each over a period of five (5) years until the full amount is paid. The first such payment shall be due 30 days from the date of this order, and a like payment shall be due each 30 days thereafter until the full amount is paid. However, two years after the entry of this order, Respondent may move the Commission to review its payment record and its moving operations and, if the results of such a review are favorable, the Commission may, in its discretion, suspend the unpaid remainder of the penalty.

Respondent's payment of this penalty as ordered shall be made a condition of the authority granted in the Sub 2 application proceeding, as discussed hereinafter. If at any time Respondent fails to make a monthly payment on schedule, the Commission, in the exercise of its discretion, may institute an action in the Superior Court of Wake County pursuant to G.S. 62-310(a) to recover at once the full amount of the $25,000 penalty still outstanding at that time, or may institute a show cause proceeding pursuant to G.S. 62-112(b) to suspend or revoke Respondent's authority to engage in moving operations, or may institute a proceeding for injunctive relief pursuant to G.S. 62-279, or may pursue any appropriate combination of such remedies.[1]

DISCUSSION OF EVIDENCE AND CONCLUSIONS REGARDING THE APPLICATION

Docket No. T-4176, Sub 2, involves the application filed by Movers at Demand for a certificate of exemption to transport household goods within North Carolina. Findings of Fact Nos. 1 through 34 deal with this application, and the evidence in support of these findings is found in the testimony of Applicant's witnesses Williams, Bogues, and Mann and Protestants' witnesses Hopson and Smith.

The application proceeding is governed by G.S. 62-261(8) and the Commission orders issued in Docket No. T-100, Sub 49. Effective January 1, 2003, the Commission exempted the transportation of household goods from traditional motor carrier regulation but required that all movers of household goods within the state apply for and obtain a certificate of exemption from the Commission. The following terms and conditions, as allowed by G.S. 62-261(8), are attached to the standard certificate of exemption, and the Applicant must prove compliance with these terms and conditions prior to being issued a certificate of exemption: (a) Applicant must be fit, willing, and able to properly provide the transportation of household goods in intrastate commerce by having a reasonable and adequate knowledge of the moving industry; (b) Applicant must be financially solvent and able to furnish adequate service on a continuing basis, including adequate insurance protection, maintenance of safe, dependable equipment, and the financial ability to settle any damage claims for which it is liable; (c) Applicant must maintain minimum limits of liability and cargo insurance coverage as set forth in Commission Rule R2-36 and/or Division of Motor Vehicles insurance requirements; and (d) Applicant must maintain a minimum amount of $50,000 general liability insurance coverage and provide proof of this coverage to the Commission. If, as was the case herein, a protest from an existing mover of household goods or other interested party is filed based upon the applicant's fitness and financial solvency, the application is scheduled for public hearing. The burden of proof is on the Applicant to show by the greater weight of the evidence that the Commission should issue the requested certificate of exemption.

In this case, Applicant contends that it has met all the terms and conditions required by the Commission for the issuance of a certificate of exemption. Applicant's Vice-President Williams testified that Applicant has provided good service since beginning operations and receives referrals from satisfied customers. Witness Williams stated that Applicant does not use a bill of lading, but that he is trying to become more knowledgeable about the Commission's MRT. In addition, Applicant presented two witnesses in support of its application. Witness Bogues, a CPA, conducted a

[1] G.S. 62-310(a) specifically provides that the penalty authorized therein is "in addition to the other penalties prescribed in this Chapter...."

financial compilation from data provided by Applicant. He testified that, in his opinion, Applicant is financially solvent and has a financial status similar to that of other applicants recently granted a certificate of exemption. Witness Mann, who has 20 years of experience with logistics and moving companies, conducted an interview with two of Applicant's corporate officers. He testified that, in his opinion, they were very competent in household goods moving. The evidence also reflects that Applicant has filed with the Commission and DMV all the required insurance filings for liability, cargo, and general liability insurance coverage. In addition, Applicant has purchased one vehicle to be used for household goods transportation and rents vehicles from Ryder Transportation. Applicant has three full-time employees and employs part-time employees as needed.

Protestants contend that Applicant's unlawful operations, after being advised by the Commission in three separate letters that it could not lawfully provide moves without a certificate from the Commission, and Applicant's false and misleading advertising render Applicant unfit to provide moving services and that the application should be denied. In addition, Protestants contend that Applicant lacks knowledge regarding bills of lading and the MRT and that Applicant's lack of knowledge renders Applicant unfit.

Protestants' objections go to the first condition set forth above, i.e., whether Applicant has shown itself to be fit, willing, and able to properly provide the transportation of household goods in intrastate commerce by having a reasonable and adequate knowledge of the moving industry. The Commission concludes that Applicant has carried its burden of proof as to the other conditions of a certificate of exemption. The Commission finds and concludes from the evidence that Applicant is financially solvent and able to furnish adequate service on a continuing basis, that Applicant has the minimum limits of liability and cargo insurance coverage, and that Applicant has a minimum of $50,000 general liability insurance coverage. However, the Commission cannot reach such a conclusion at this time as to the fitness condition.

The Commission has carefully weighed the evidence as to fitness. There is evidence that Applicant has made numerous unauthorized moves and that it continued to do so even after receiving three letters from the Commission. In addition, the record contains evidence tending to show that Applicant has disseminated misleading advertising materials as discussed hereinabove. Witness Williams explained that the owners needed the income; however, this is not an adequate justification for disregarding the law, and it does not explain why the owners did not do the necessary research and get the necessary approvals before starting up the business. Witness Williams testified that he tried to comply with the Commission's regulations, but this testimony must be weighed against evidence that the company had been in business about two and a half years as of the hearing, that the company filed an application for a certificate in November 2001 but did not pursue it, that the Commission provided an application for a certificate of exemption in February 2002 but Applicant did not return it, and that Applicant does not charge the rates in the MRT or provide shippers with a bill of lading. On the other hand, there is evidence that Applicant has provided good service and has had only one court claim for damages filed against it.

On this record, the Commission cannot conclude at this time by the greater weight of the evidence that Applicant is fit, willing, and able to properly provide household goods transportation services. However, this does not mean that the Commission must completely deny the application. The Commission need not approve or reject an application as filed and may attach reasonable terms, conditions, and limitations to a certificate. State ex rel. Utilities Comm. v. Carolina Coach Co., 260 N.C. 43 (1963). The Commission has considerable discretion to regulate its own procedures within broad limits, to suspend or waive its rules, and to extend a hearing and hold open the record in order to receive further evidence. State ex rel. Utilities Comm. v. Conservation Council, 64 N.C.App. 266, 270-1 (1983), modified on other grounds on rehearing, 66 N.C.App. 456, rev'd in part, 312 N.C. 59 (1984). In this case, the Commission will give Applicant an opportunity to prove itself.

The Commission concludes, in the exercise of its discretion, that granting Applicant temporary operating authority, rather than simply denying its request for the issuance of a certificate of exemption, is appropriate for several reasons. First, the evidence establishes that Applicant has generally provided good quality moving services during the time it has been in business. Despite the appearance of a significant number of protestants, including companies doing business in the Fayetteville area, the record contains little evidence that Applicant has damaged customer property, failed to honor its agreements with customers, or otherwise provided substandard moving service. The absence of any significant customer complaints coupled with the testimony of witness Mann (which rested on limited information and did not comprehensively address the service quality issue) adds credibility to Applicant's claim to have provided good service to its customers. Secondly, Applicant was completely candid with the Commission about the nature and extent of its activities. The Applicant's candor in this respect enhances the credence that the Commission is inclined to give Movers at Demand's service quality contentions and suggests that Applicant should be given an opportunity to demonstrate the genuineness of its commitment to operate in a lawful manner in the future. Finally, the Commission must acknowledge the new environment that has existed since January 1, 2003, when the rules and regulations adopted in Docket No. T-100, Sub 49, went into effect. At the time that it adopted those new rules and regulations, the Commission realized that there would have to be a transition period during which all participants in the household goods moving business would adapt to the changed nature of the Commission's regulation of this industry. As part of that process, the Commission recognized that it would need to do two different, and not completely consistent, things. On the one hand, the Commission acknowledged that it would need to do a better job of enforcing existing regulations than had been done in the past. On the other hand, the Commission understood that some accommodation would have to be given to those industry participants that had not previously been subject to the Commission's jurisdiction or that had attempted to evade the Commission's jurisdiction but were otherwise qualified to move household goods. The changing nature of the Commission's regulation of the moving industry provides further justification for the Commission's decision to exercise its discretion by giving Applicant a further opportunity to meet the fitness requirement. As a result of these considerations, the Commission concludes that Applicant should be given a chance to prove that it is, in fact, able to properly provide household goods moving services through an award of a temporary certificate of exemption subject to compliance with certain stringent conditions. The Commission will now describe the conditions under which it grants a temporary certificate of exemption to Applicant.

The Commission has addressed Applicant's unauthorized moves by imposing a $25,000 penalty in the companion complaint docket. The Commission believes that this penalty will impress the importance of the Commission's regulatory authority upon Applicant and that Applicant's payment of this penalty will go far to establish Applicant's good faith and its desire to comply with Commission orders, rules, and regulations. As to Applicant's knowledge of the MRT and use of bills of lading, the Commission regularly conducts seminars for carriers, and these seminars can help educate Applicant's officers as to proper rates and procedures for movers in North Carolina. An audit by the Public Staff will verify whether Applicant is maintaining the books and records of its moving activities in good order. As a result, the Commission will further condition this grant of a temporary certificate of exemption upon full attendance at one of these seminars and the absence of the discovery of material non-compliance with the Commission's rules and regulations during the Public Staff's audits of Applicant's operations. Thus, the Commission finds good cause to hold the record in this docket open and to allow Applicant to come back at some point with further evidence of its fitness and knowledge after it has had an opportunity to comply with the conditions set out in this order. For now, the Commission will allow Applicant a temporary certificate of exemption so that it may operate in the interim.

The Commission therefore concludes that Applicant should be granted a temporary certificate of exemption subject to the following conditions: (1) that, before the end of 2004, all of Applicant's corporate officers shall fully attend at least one MRT seminar conducted by the Commission; (2) that Applicant shall forfeit and pay the $25,000 penalty in Docket No. T-4176, Sub 1, according to the

schedule set forth hereinbefore; and (3) that the Public Staff shall audit Applicant's books and records after six months of operations under the temporary certificate and every 12 months thereafter until a permanent certificate is granted, and the Public Staff shall file the results of the audits with the Commission, with such filings to bring any material non-compliance with the Commission's rules and regulations to the Commission's attention. Two years after the entry of this order, Applicant may file a motion seeking the suspension of the unpaid remainder of the penalty payment obligation set out above, the removal of the audit condition imposed by this order, and the issuance of a permanent certificate of exemption. Upon the filing of such a motion, the Commission will conduct appropriate proceedings and render a further decision with respect to Applicant's application.

If all of Applicant's officers do not fully attend a seminar as ordered, if Applicant fails to make a monthly payment of the penalty on schedule, or if any audit conducted by the Public Staff pursuant to this order reveals material non-compliance with the Commission's rules and regulations, the Commission, in the exercise of its discretion, may institute an action in the Superior Court of Wake County pursuant to G.S. 62-310(a) to recover at once the full amount of the $25,000 penalty still outstanding at that time, or may institute a show cause proceeding pursuant to G.S. 62-112(b) to suspend or revoke Applicant's authority to engage in moving operations, or may institute a proceeding for injunctive relief pursuant to G.S. 62-279, or may pursue any appropriate combination of remedies.

IT IS, THEREFORE, ORDERED as follows:

1. That, pursuant to G.S. 62-310(a), Movers at Demand shall pay a penalty of $25,000 in the Sub 1 proceeding for violating North Carolina law and Commission orders, rules, and regulations as hereinbefore discussed, and that Movers at Demand may make voluntary monthly payments of at least $416.66 over a period of five (5) years, with the first such payment due 30 days from the date of this order and a like payment due each 30 days thereafter until the full penalty is paid;

2. That Movers at Demand is hereby granted a temporary certificate of exemption in the Sub 2 proceeding authorizing the transportation of household goods between all points and places in North Carolina subject to the following conditions: (1) that, before the end of 2004, all of Movers at Demand's corporate officers shall fully attend at least one MRT seminar conducted by the Commission; (2) that Movers at Demand shall pay the $25,000 penalty assessed in the Sub 1 proceeding according to the schedule set forth in Decretal Paragraph No. 1 above; and (3) that the Public Staff shall audit Movers at Demand's books and records after six months of operations under this temporary certificate and every 12 months thereafter until a permanent certificate is granted and shall file the results of these audits with the Commission, with any material non-compliance with the Commission's rules and regulations on the part of Movers at Demand found to exist during these audits to be brought to the Commission's attention in such filings;

3. That, no earlier than two years after the entry of this order, Movers at Demand may file a motion seeking the suspension of the unpaid remainder of the penalty payment obligation set out in Decretal Paragraphs Nos. 1 and 2 above, the removal of the audit condition set forth in Decretal Paragraph No. 2 above, and the issuance of a permanent certificate of exemption;

4. That, at any time, if all of Applicant's officers do not fully attend a seminar as ordered in Decretal Paragraph No. 2 above, if Applicant fails to make a monthly payment of the penalty on the schedule set out in Decretal Paragraphs Nos. 1 and 2 above, or if any audit conducted by the Public Staff pursuant to Decretal Paragraph No. 2 above reveals material non-compliance with the Commission's rules and regulations, the Commission, in the exercise of its discretion, may institute an action in the Superior Court of Wake County pursuant to G.S. 62-310(a) to recover at once the full amount of the $25,000 penalty still outstanding at that time, or may institute a show cause proceeding pursuant to G.S. 62-112(b) to suspend or revoke Movers at Demand's authority to engage in moving

operations, or may institute a proceeding for injunctive relief pursuant to G.S. 62-279, or may pursue any appropriate combination of such remedies;

5. That Movers at Demand shall maintain its books and records in such a manner that all of the applicable items of information required in the prescribed Annual Report to the Commission can be used by Movers at Demand in the preparation of such Annual Report (a copy of the Annual Report form shall be furnished upon request made to the North Carolina Utilities Commission – Public Staff, Transportation Rates Division);

6. That Movers at Demand shall maintain its books and records in such a manner that all of the applicable items of information requested in its prescribed quarterly Public Utilities Regulatory Fee Report can be used by Movers at Demand in the preparation of such report and payment of quarterly regulatory fee (any questions regarding the regulatory fee report and/or regulatory fee should be directed to the Commission's Finance and Budget Group at (919) 733-5265);

7. That Movers at Demand's household goods moving operations are governed by Maximum Rate Tariff No. 1, and Movers at Demand shall comply with all rules and regulations set forth in Maximum Rate Tariff No. 1;

8. That all vehicles, whether owned or leased, used by Movers at Demand in its household goods moving operation must be identified with Movers at Demand's name, city, state, and temporary certificate of exemption number on both sides of each vehicle in letters not less than three (3) inches; and

9. That this order shall constitute a temporary certificate of exemption until a formal temporary certificate of exemption has been issued and transmitted to Movers at Demand along with a copy of Maximum Rate Tariff No. 1.

ISSUED BY ORDER OF THE COMMISSION.
This the 11th day of May, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Ah051004.01

DOCKET NO. T-4181, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
James G. Dunnagan d/b/a Dunnagan's Moving & Storage, 1827 Burnett Blvd, Wilmington, NC 28402, Complainant	)	FURTHER ORDER ON COMPLAINT AND NOTICE OF RECONSIDERATION
v.	)	
All Pro Movers, 304 Spartenburg Ave., Carolina Beach, NC 28428, Respondent	)	

HEARD: Tuesday, September 30, 2003, at 10:00 a.m. in the Oak Room, New Hanover County Public Library, Northeast Regional Branch, 1241 Military Cutoff Road, Wilmington, North Carolina

BEFORE: Commissioner James Y. Kerr, II, Presiding; Commissioners Sam J. Ervin, IV, and Michael S. Wilkins

APPEARANCES:

For Dunnagan's Moving & Storage:
No Attorney of Record

For All Pro Movers:
No Attorney of Record

For the Using and Consuming Public:
Robert B. Cauthen, Jr., Staff Attorney, Public Staff - N. C. Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On March 17, 2003, the Commission issued a Notice of Decision in the above-captioned docket ruling on an August 20, 2002, complaint filed by James G. Dunnagan d/b/a Dunnagan's Moving & Storage (Dunnagan) against All Pro Movers (All Pro) alleging that All Pro had provided intrastate moving services without first having been properly certificated by the Commission. The Commission subsequently issued an Order Ruling on Complaint on May 29, 2003, setting forth more fully its reasoning in the Notice of Decision. Signed certified mail receipts were returned to the Commission indicating actual delivery and receipt of each of these Orders.

All Pro had responded to Dunnagan's initial complaint arguing that it merely assists individuals in moving their own belongings. All Pro had asked the Commission to approve or recognize its "self-help moving system" as a new way for people to move household goods in North Carolina, and one which is not subject to the Commission's regulatory jurisdiction. In its Notice of Decision, the Commission stated:

> Specifically, unless it obtains the appropriate certification, All Pro shall cease and desist from all actions which have the effect of holding itself out as a certificated mover of household goods. To that end, All Pro must:
>
> (1) Prohibit its employees from operating the motor vehicles rented by its clients or used to transport its clients' property.
>
> (2) Remove the advertising brochures that have been placed in truck rental companies, self-storage businesses, and apartment complexes in the Wilmington, North Carolina area and which cause the general public to infer or think that All Pro is in fact a household goods mover certificated by the Commission.
>
> (3) Place any future Yellow Pages advertisement under the "Moving Services - Labor & Materials" section and remove its advertisement from the "Movers" section of the Yellow Pages.

In its May 29, 2003, Order, the Commission substantially repeated the above requirements of All Pro and added the following:

> (4) Not advertise, or promote, or hold its business out in any manner which might cause a reasonable consumer to believe that it was operating subject to the Commission's jurisdiction and in compliance with the Commission's statutes, Rules and Regulations.

On April 7, 2003, April 15, 2003, May 16, 2003, and May 30, 2003, Dunnagan filed additional letters with the Commission alleging that All Pro had violated the Commission's Notice of Decision by not removing its brochures from all truck rental companies, by continuing to take control of rental trucks, by continuing to hold itself out as a certificated mover in classified advertising in the Wilmington newspaper, and by not removing its advertisement from the "Movers" section of the Yellow Pages.

On June 9, 2003, All Pro filed a letter with the Commission stating that it had stopped driving customers' rental trucks in March. All Pro further stated that it does not currently own, lease, rent, operate, or drive any trucks and, therefore, is no longer under the jurisdiction of the Commission. All Pro maintained that it "has never operated illegally" because citizens have a "constitutional right to rent/operate his own truck to move his own household goods and to sign on anyone he deemed acceptable to be his additional driver," and stated that it would be appealing the Commission's decision.

The four additional letters of complaint filed by Dunnagan were served on All Pro by Commission Order dated June 20, 2003.

On July 9, 2003, All Pro filed a response to the Commission's June 20, 2003, Order and to Dunnagan's letters reiterating the statements made in its June 9, 2003, filing: (1) that it has not owned, leased, rented, operated, or driven any trucks since March, and (2) that it has amended its operation to only load and unload rental trucks.

On July 9, 2003, Dunnagan filed a letter in response to All Pro's June 9, 2003, letter restating his allegations that "All Pro Movers has willfully disobeyed" the Commission's decision and requesting the Commission "to direct the enforcement of the [North Carolina Department of Motor Vehicles] to take direct action to issue a 'ticket' to this operation and bring All Pro Movers into compliance."

On July 15, 2003, Dunnagan filed a letter in response to All Pro's July 9, 2003, filing complaining that All Pro continues to hold itself out as a mover "in direct competition with legal movers" and requesting that the Commission "enforce the findings" of its decision in this case.

All Pro's July 9, 2003, response was served on Dunnagan by Order dated July 15, 2003.

On July 18, 2003, Dunnagan filed a response to the Commission's July 15, 2003, Order indicating that All Pro's response to Dunnagan's allegations that it had violated the Commission's prior orders in this case was not satisfactory. Noting that "All Pro Movers has defied the Commission's order and continues to offer moving services to the public competing with legal certified movers across the state," Dunnagan requested that the Commission enforce its decision pursuant to North Carolina law, which "allows an injunction for unlawful operations" and "authorizes the Commission to prescribe penalties for refusal to obey an order."

On August 29, 2003, the Commission issued an Order scheduling a hearing on Dunnagan's further letters of complaint and requesting that the Public Staff participate as a party to this proceeding. On September 4, 2003, the Public Staff filed notice of its participation.

At All Pro's request, the hearing was rescheduled for Wilmington, North Carolina by Order dated September 16, 2003.

A hearing was held as scheduled on September 30, 2003, in Wilmington, North Carolina on Dunnagan's further allegations. James G. Dunnagan, President of Dunnagan's Moving & Storage, Todd Eberhardt of Two Men and a Truck of Wilmington, Gordon Wayne Ray of Coastal Carriers, Inc., and William Cauley of The Move Makers, Inc. testified on behalf of Dunnagan. Gary Cleaveland, President of All Pro, and J.J. Grannan, a member of the public who had utilized All Pro's services, testified on behalf of All Pro.

On October 7, 2003, All Pro filed a Motion to Dismiss for Want of Jurisdiction stating, "All Pro Movers do not transport household goods for compensation," a type of operation not regulated by the Commission. All Pro further stated, "[W]e do not hold ourselves out to the public to be a common carrier through our advertising." For these reasons, All Pro requested that the Commission dismiss all complaints and further proceedings against it.

On October 13, 2003, Dunnagan filed a response to All Pro's Motion to Dismiss noting, first, that All Pro had not properly appealed or objected to the Commission's May 29, 2003, Order.

Dunnagan requested that the Commission deny All Pro's Motion and impose penalties based on All Pro's initial violation of North Carolina law, as found by the Commission, and its subsequent willful defiance and violation of the Commission's Order.

Dunnagan filed a post-hearing brief on October 27, 2003. At the request of the Commission, the Public Staff filed a Statement of Position and Recommendations on November 20, 2003. No brief was filed by All Pro.

Based upon the pleadings, the testimony and exhibits received into evidence and the record as a whole, the Commission makes the following

FINDINGS OF FACT

1. Despite being aware of the Commission's Notice of Decision, on at least one occasion, Mr. Cleaveland or an employee of All Pro operated a truck rented by an All Pro client.

2. Despite being aware of the Commission's Notice of Decision regarding Yellow Pages advertising prior to the deadline for removing its advertisement, All Pro advertised its services under the "Movers" section of the Wilmington Bellsouth Yellow Pages for 2003-04.

3. All Pro's actions were clear, knowing violations of the Commission's Notice of Decision.

4. The revised All Pro brochure would not cause the general public to infer or think that All Pro is in fact a household goods mover certificated by the Commission.

5. The Complainant has not proven that All Pro is otherwise advertising, promoting, or holding its business out in any manner which might cause a reasonable consumer to believe that it was operating subject to the Commission's jurisdiction and in compliance with the Commission's statutes, Rules and Regulations.

DISCUSSION AND CONCLUSIONS

Violations of the Commission's Notice of Decision

I. Operation of Customers' Trucks

Dunnagan, in his additional letters of complaint, alleged that All Pro had violated the Commission's Notice of Decision by continuing to take control of its customers' rental trucks. Specifically, Dunnagan alleged that in turning in a rental truck All Pro parked it in the woods behind the rental agency. In addition, Dunnagan witness Cauley testified that his wife saw All Pro employees driving a rental truck while she was at a storage facility, but that they were gone before he could meet her with a camera.

All Pro witness Cleaveland admitted in his direct testimony and in response to questions by the Commission that All Pro drove a truck for an "elderly gentleman" after issuance of the Commission's Notice of Decision.[1] He denied, however, that All Pro employees were driving the truck in the instance alleged by Mr. Cauley, stating that he and his partner drove their personal cars on that day and simply unloaded the rental truck – driven and parked by the customer – into a storage space.

[1] In response to questions by Commissioner Kerr, Mr. Cleaveland testified as follows:

Q. You testified in response to Mr. Cauthen's questions that on at least one occasion, since the issuance of our notice of decision on March 17th of this year, that you or an employee of your business has operated a motor vehicle in furtherance of the moving of household goods for hire?

A. Yes, sir.

Tr. at 155.

In defense of All Pro's actions, however, Mr. Cleaveland testified that All Pro had fourteen jobs booked at the time the Commission's Notice of Decision was issued, and that it had agreed to drive the customer's rental truck in a number of these jobs. Mr. Cleaveland further testified that All Pro was able to "rework" all but one of the jobs, and added:

> I understand that it was in direct violation of what the Commission has ordered us to not take control but I'm hoping for some type of leniency because we had booked that job before the Commission's ruling came out and since that job have not driven a single truck. Our company no longer provides that service. In fact, we ceased altogether to drive any citizens' rental trucks. Tr. at 122.

Based upon All Pro's own admission, the Commission concludes that on at least one occasion All Pro knowingly and intentionally violated the Commission's Notice of Decision and "transport[ed] ... household goods by motor vehicle[] ... for the public for compensation." G.S. 62-3(23)a.4. There does not appear to be sufficient evidence, however, to conclude that All Pro employees drove the rental truck in the instance alleged by Mr. Cauley.

2. Yellow Pages Advertising

All Pro witness Cleaveland further admitted that All Pro advertised its services under the "Movers" section of the Wilmington BellSouth Yellow Pages for 2003-04, and that All Pro did not pull or move its Yellow Pages advertisement to another section after receiving the Commission's Order.[1]

In defense of All Pro's actions, Mr. Cleaveland testified that the deadline for submitting a Yellow Pages advertisement and receiving a proof was March 18, 2003 – the day after issuance of the Commission's Notice of Decision. Mr. Cleaveland stated that the Commission's decision to include a restriction on All Pro's ability to advertise in the Yellow Pages was entirely unexpected, and that he did not have time to change his advertisement before meeting with his Yellow Pages representative the next morning.[2]

In response to questioning, Mr. Cleaveland admitted that he could have pulled the Yellow Pages advertisement or had it moved to another section at any time before April 2, 2003. Mr. Cleaveland further testified, however, that to run the advertisement under the "Labor" section of the Yellow Pages he would have changed it entirely, but that he had no time to do so and receive a proof. Thus, given the choices of running his advertisement unchanged or not running an advertisement at all, he chose to run the advertisement under the "Movers" section of the Yellow Pages as planned.

Based upon All Pro's own admission, the Commission concludes that All Pro knowingly and intentionally violated the Commission's Notice of Decision by not removing its advertisement from

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[1] In response to questions by Commissioner Kerr, Mr. Cleaveland testified as follows:

> Q. And you don't dispute that with knowledge of our order of March 17th, you placed an advertisement for your business in the movers section of the BellSouth Yellow Pages for '03-'04?
>
> A. Yes, sir, I did. I believe that's my right.

Tr. at 155.

[2] Cleaveland testified that he telephoned Commission Staff on March 17, 2003, to find out if his proposed Yellow Pages advertisement would be legal in light of the Commission's Order and not considered as holding All Pro out to be a common carrier. He stated that the response he received from Commission Staff, upon faxing a copy of his proposed advertisement, was: "[W]e can't decide it right now. You're free to advertise in the 'Movers' section and if they say, 'No, you can no longer,' then it will apply to next year." Tr. at 139 (punctuation added).

the "Movers" section of the 2003-04 Yellow Pages after receipt of the Commission's Notice of Decision despite ample opportunity to do so.

3. Advertising Brochures

Dunnagan presented evidence at the hearing that All Pro brochures remained available in and around Wilmington stating that All Pro will "professionally move your belongings." Dunnagan further argued that the word "Movers" in All Pro's name and advertising violates the Commission's order by "caus[ing] the general public to infer or think that All Pro is in fact a household goods mover certificated by the Commission."

All Pro witness Cleaveland testified, however, that "[w]ithin one week" of the Commission's Notice of Decision, "all of the brochures in Wilmington had been replaced by the new brochures" indicating that All Pro only loads and unloads trucks. He testified that he did not know how many versions of the brochure were created, but that

> Every time I found something in the brochure that could possibly, possibly construe us as a common carrier I've gone back and changed it and replaced the brochures with our new ones. The ones you see around town right now say that we load and unload trucks. And if there are old brochures around town I don't know how they could still be there because I went to all the places we advertise, I pulled all our old brochures and I replaced them with the new ones. Tr. at 140.

Mr. Cleaveland further disagreed with the Complainant's assertion that the Commission's Order prohibits All Pro from placing any brochures, stating that he replaced the old brochures with new ones clearly stating that All Pro is not a certificated carrier but that it only assists customers in loading and unloading rental trucks. Mr. Cleaveland testified that the public appears to have recognized this distinction based upon the fact that his call volume has reduced significantly and that he is now receiving calls only from customers who need All Pro's limited service.

After careful consideration, the Commission concludes that Dunnagan has failed to prove that All Pro's current brochure is in violation of the Commission's Notice of Decision or that the brochure would cause the general public to infer or think that All Pro is in fact a household goods mover certificated by the Commission. The Commission concurs with All Pro that it has not prohibited All Pro from placing brochures or from otherwise advertising its lawful operations, and finds that All Pro has made a good faith effort to modify its brochure to eliminate troublesome language and to replace its older, potentially misleading brochures. Lastly, the Commission does not agree with Dunnagan that All Pro is misleading the public simply by calling itself a "mover," noting that other movers testified that a part of the services they offer is identical to that offered by All Pro.

4. Other Advertising or Promotion

The Commission's May 29, 2003, Order further required that All Pro "[n]ot advertise, or promote, or hold its business out in any manner which might cause a reasonable consumer to believe that it was operating subject to the Commission's jurisdiction and in compliance with the Commission's statutes, Rules and Regulations." Dunnagan alleged that All Pro's classified advertising violated the Commission's Order using substantially the same arguments as those made regarding the brochure. All Pro witness Cleaveland strongly disagreed, testifying, "[W]e don't hold ourselves out to be a common carrier through our advertising. ... Our advertising doesn't say anything like that."

Based upon a review of the evidence, the Commission concludes that Dunnagan has not carried its burden of proof that All Pro is otherwise advertising, promoting, or holding its business out as functioning in any manner which might cause a reasonable consumer to believe that it was operating subject to the Commission's jurisdiction and in compliance with the Commission's statutes, Rules and Regulations. For example, as with All Pro's brochures, the Commission does not agree with Dunnagan that All Pro's use of the word "movers" is sufficient to mislead a reasonable consumer. Neither is the Commission persuaded by Dunnagan's additional arguments on this issue.

Determination of Appropriate Penalties or Sanctions

Having found that All Pro knowingly and intentionally violated the Commission's Notice of Decision, the Commission must determine whether, and if so, what penalties or sanctions should accompany such actions. G.S. 62-310(a) provides, in pertinent part:

> Any public utility which violates any of the provisions of this Chapter or refuses to conform to or obey any rule, order or regulation of the Commission shall, in addition to the other penalties prescribed in this Chapter forfeit and pay a sum up to one thousand dollars ($1,000) for each offense.

Dunnagan has requested that the Commission impose a penalty, and the Public Staff recommended that the Commission fine All Pro $1,000 for each of the violations noted, for a total of $2,000.

As stated in G.S. 62-310(a), the Commission is limited to imposing such fines on "public utilities." The Commission has jurisdiction in this case to impose fines on All Pro under G.S. 62-310(a) because All Pro, by its actions, has operated as a de facto public utility, as held in the Commission's May 29, 2003, Order in this docket.

It is uncontroverted that All Pro did, in fact, violate the Commission's Notice of Decision (1) by continuing to drive, on at least one occasion, a rental truck on behalf of its customer, and (2) by not removing its advertisement from the "Movers" section of the Yellow Pages despite ample opportunity to do so. Nevertheless, All Pro has requested leniency on the part of the Commission based on its actions since issuance of the Commission's Notice of Decision.

First, with respect to the operation of motor vehicles, All Pro indicated that it made every effort to "rework" its outstanding contracts upon receipt of the Commission's Notice of Decision in which it had agreed to drive the customer's truck. Furthermore, Mr. Cleaveland testified:

> You've told me what I needed to do to not be regulated and I've done it. ... We changed our entire operation to abide by the ... Commission's Rules and Regulations. We stopped driving trucks. We can no longer be signed on as an additional driver. Tr. at 124-25.

As a starting point in its analysis, the Commission does not believe that All Pro should be allowed to engage in unlawful conduct and profit therefrom. Nevertheless, the Commission recognizes that All Pro has altered its operations in an attempt to comply with the Commission's orders in this case. After considerable deliberation, the Commission concludes that All Pro should be required to file a copy of all documentation relating to the customer's move for which All Pro admittedly drove the rental truck after issuance of the Commission's Notice of Decision and assessed a penalty in the amount of $250 or twice the total amount charged to the customer, whichever amount is greater (subject to a $1,000 total limit). The Commission believes that this penalty is appropriate to deter All Pro from engaging in such unlawful activity in the future.

Second, with respect to the Yellow Pages advertising, All Pro continues to maintain that it has a right to advertise in the "Movers" section of the Yellow Pages. Moreover, All Pro contends that it competes with regulated movers for the business of loading and unloading rental trucks and should be allowed to advertise in the same section of the Yellow Pages as regulated movers. With regard to this admitted violation of the Commission's Notice of Decision, the Commission concludes that the fine imposed for unlawfully driving a rental truck is a sufficient penalty for this offense as well. The Commission, therefore, concludes that no additional penalty should be imposed for All Pro's failure to remove its advertising from the "Movers" section of the Wilmington Yellow Pages. In addition, as discussed further below, the Commission will provide all parties an opportunity to be heard regarding whether the Commission should reconsider the limitations previously imposed on All Pro's Yellow Pages advertising.

All Pro's Motion to Dismiss

All Pro, in its October 7, 2003, Motion to Dismiss, argued that the Commission should dismiss all complaints and further proceedings against All Pro because it neither transports household goods for compensation subject to the Commission's jurisdiction nor holds itself out to the public to

be a common carrier through its advertising. For the reasons generally set forth by Dunnagan in his October 13, 2003, response, the Commission concludes that All Pro's Motion to Dismiss should be denied. Dunnagan, in his filing, requested that the Commission deny All Pro's Motion and impose penalties based on All Pro's initial violation of North Carolina law, as found by the Commission in its Notice of Decision and May 29, 2003, Order, and All Pro's subsequent willful defiance and violation of the Commission's Orders. Thus, while All Pro may no longer be engaged in jurisdictional activities, the current proceeding involves All Pro's prior actions which, after hearing, were found to be subject to the jurisdiction of the Commission.

Notice of Reconsideration of Limitations on Yellow Pages Advertising

As noted previously, All Pro argues that its right to advertise in the Yellow Pages, in whatever section it chooses, is protected under the First Amendment of the United State Constitution. For example, All Pro witness Cleaveland stated at the hearing, "I believe the ... Commission is violating my First Amendment rights by attempting to tell me where I can and cannot place my advertisement." At the hearing, Mr. Cleaveland repeatedly, both in his own testimony and through cross-examination of the Complainant's witnesses, sought to persuade the Commission that the public turns to the "Movers" section of the Yellow Pages when attempting to find a company to perform the services offered by All Pro. Mr. Cleaveland concluded his testimony by stating:

> I believe I have the right to advertise wherever I choose. My advertising is not libelist [sic], fraudulent or misleading. It's my constitutional right under the First Amendment to advertise wherever I'd like to advertise. If I feel it would be beneficial for me to advertise in the movers section or the movers labor section I believe that's my choice. Tr. at 155-56.

Under North Carolina law, the Commission has the authority to rescind, alter or amend a prior order or decision.[1] Mr. Cleaveland indicated in numerous filings that he intended to appeal the Commission's decision, but testified at the hearing that he did not understand there was a 30-day limit to appeal. He then asked the Presiding Commissioner if he could file a motion to reconsider.

Although All Pro was not allowed to make a motion for reconsideration at the hearing nor introduce testimony challenging the Commission's prior decisions in this case, the Commission finds good cause to now issue this notice of reconsideration pursuant to G.S. 62-80 and to allow all parties, including the Public Staff, an opportunity to file comments on whether the Commission should reconsider its decision to require All Pro to place any future Yellow Pages advertisement under the "Moving Services -- Labor & Materials" section and remove its advertisement from the "Movers" section of the Yellow Pages. The Commission is particularly interested in receiving comments on whether its previously ordered prohibition on All Pro's Yellow Pages advertising, which is not otherwise misleading, is proper under applicable law[2]

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[1] G.S. 62-80, entitled "Powers of Commission to rescind, alter or amend prior order or decision," provides as follows:

> The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

[2] See North Carolina State Board of Certified Public Accountant Examiners v. Central Tel. Co., Docket No. P-89, Sub 64, Order Finding No Reasonable Grounds to Proceed with Complaint (1999) (use of CPA designation by non-CPA a violation of State law; Yellow Pages advertiser in better position than telephone utility or Yellow Pages publisher to know whether requested listing would be in violation of State law or the rules imposed on the advertiser's profession).

IT IS, THEREFORE, ORDERED as follows:

1. That on or before April 6, 2004, All Pro shall file with the Commission a copy of all documentation in its possession relating to the customer's move for which All Pro admittedly drove the rental truck after issuance of the Commission's Notice of Decision.

2. That on or before April 6, 2004, All Pro shall pay a penalty in the amount of $250 or twice the total amount charged to the customer for whom All Pro admittedly drove the rental truck after issuance of the Commission's Notice of Decision, whichever amount is greater (subject to a $1,000 total limit), for knowingly and intentionally violating the Commission's Notice of Decision.

3. That All Pro shall be assessed no additional penalty for its failure to remove its advertising from the "Movers" section of the Wilmington Yellow Pages in violation of the Commission's Notice of Decision.

4. That All Pro's October 7, 2003, Motion to Dismiss for Want of Jurisdiction shall be denied.

5. That the Public Staff and other parties in this proceeding shall have up to and including April 16, 2004, within which to file comments on the Commission's notice of reconsideration of that portion of the Notice of Decision and May 29, 2003, Order that prohibits All Pro from advertising in the "Movers" section of the Yellow Pages.

6. That All Pro shall continue to comply with all other provisions of the Commission's Notice of Decision and May 29, 2003, Order.

ISSUED BY ORDER OF THE COMMISSION.
This the 17th day of March, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Ah031704.05

DOCKET NO. T-4181, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
James G. Dunnagan, d/b/a Dunnagan's Moving & Storage, Post Office Box 471, Wilmington, North Carolina 28402, Complainant	)	ORDER ASSESSING PENALTY AND RECONSIDERING ADVERTISING RESTRICTION
v.	)	
All Pro Movers, 304 Spartanburg Avenue, Carolina Beach, North Carolina 28428, Respondent	)	

BY THE COMMISSION: On March 17, 2004, the Commission issued its Further Order on Complaint and Notice of Reconsideration in the above-captioned docket ordering Respondent, All Pro Movers (All Pro), to file with the Commission on or before April 6, 2004, a copy of all documentation in its possession relating to a customer's move for which All Pro admittedly drove the rental truck after issuance of the Commission's Notice of Decision on March 17, 2003; and to pay a penalty in the amount of $250 or twice the total amount charged to the customer for whom All Pro admittedly drove the rental truck, whichever amount is greater (subject to a $1,000 total statutory limit). In addition, the Commission requested the Public Staff and other parties in this docket to file

comments on the Commission's notice of reconsideration of that portion of the Notice of Decision and May 29, 2003, Order Ruling on Complaint that prohibits All Pro from advertising in the "Movers" section of the Yellow Pages.

Documentation and Penalty

In its March 17, 2004, Order, the Commission found, based upon All Pro President Gary Cleaveland's own admission, that on at least one occasion, despite being aware of the Commission's March 17, 2003, Notice of Decision, Mr. Cleaveland or an employee of All Pro operated a truck rented by an All Pro client in violation of North Carolina law and the Commission's prior orders in this docket. As a result, the Commission assessed against All Pro a penalty in the amount of $250 or twice the amount charged to the customer (subject to a $1,000 total statutory limit), whichever is greater. The Commission further ordered All Pro to provide documentation relating to the customer's move so that the "greater of" amount of the penalty could be determined.

The Commission's official files indicate that All Pro received the March 17, 2004, Order on March 24, 2004. The Commission allowed All Pro until April 6, 2004, to file the documentation and pay the penalty. All Pro failed to comply with the Commission's March 17, 2004, Order by not filing the required documentation or paying the penalty.

G.S. 62-310(a) provides, in pertinent part, as follows:

> Any public utility which violates any of the provisions of this Chapter or refuses to conform to or obey any rule, order or regulation of the Commission shall, in addition to the other penalties prescribed in this Chapter forfeit and pay a sum up to one thousand dollars ($1,000) for each offense.

Having previously determined that the Commission has jurisdiction in this case under G.S. 62-310(a) to impose fines on All Pro because All Pro has operated as a de facto public utility, the Commission is of the opinion that All Pro should be assessed a final penalty in the amount of $1,000, the statutory limit, in view of All Pro's failure to file the documentation necessary for a determination of a lesser penalty. In the absence of such documentation, the Commission cannot compare the total of twice the amount charged by All Pro for the illegal move to $250 or to $1,000. If All Pro fails to pay this final $1,000 penalty within ten (10) days from the date of this order, the Commission may institute an appropriate enforcement action against All Pro as provided for by statute.

Reconsideration of Limitations on Yellow Pages Advertising

In its March 17, 2003, Notice of Decision, the Commission ordered All Pro to "[p]lace any future Yellow Pages advertisement under the 'Moving Services-Labor & Materials' section and remove its advertisement from the 'Movers' section of the Yellow Pages." In its subsequent Order Ruling on Complaint issued May 29, 2003, the Commission concluded that All Pro's Yellow Pages advertisement in the "Movers" section potentially misleads the general public since the "Movers" section contains listings for movers certificated by the Commission. In addition, the Commission noted that All Pro's advertisement contains no reference to the purported difference in the type of service it provides and the type of service provided by other movers. The Commission, therefore, ordered All Pro to place any further Yellow Pages advertisement under the "Moving Services-Labor & Materials" section and to remove its advertisement from the "Movers" section.

In its March 17, 2004, Further Order on Complaint and Notice of Reconsideration, the Commission disagreed with the Complainant that All Pro is misleading the public simply by calling itself a mover, and noted that other movers testified that a part of the services they offer is identical to that offered by All Pro, i.e., packing, loading, unloading. Therefore, the Commission concluded that it should allow all parties in this proceeding, including the Public Staff, an opportunity to file comments on whether the Commission should reconsider its decision to require All Pro to place any further Yellow Pages advertisement under the "Moving Services-Labor & Materials" section and remove its advertisement from the "Movers" section of the Yellow Pages. The Public Staff is the only party that filed comments.

In its comments filed on April 16, 2004, the Public Staff noted that the Commission rejected the proposition that All Pro is misleading the public simply by calling itself a mover. The Public Staff further stated that in its opinion, if being categorized as a "mover" is not inherently misleading, then being listed under that heading in the Yellow Pages seems to be innocuous. The Public Staff also submitted that the constitutionality of a blanket order proscribing any placement of listings in the "Movers" section by non-certificate holders would be problematic. Furthermore, the Public Staff stated that if the contents of a particular advertisement are misleading, i.e., the contents would lead the reader to believe that the company advertised is regulated by the Commission, then there is no constitutional protection and the Commission may assert jurisdiction. On the other hand, stated the Public Staff, if the contents of the advertisement are not misleading, i.e., the company is not holding itself out as one regulated by the Commission, then the Commission presumably lacks jurisdiction and the order would be improper on that basis. In light of the Commission's limited jurisdiction, the Public Staff offered a proposed draft notice for placement at the beginning of the "Movers" section of the Yellow Pages, and recommended that the Commission request that publishers of the various telephone directories include the notice with their Yellow Page listing of movers and that the notice be given as much media attention as possible.

Based upon the entire record in this proceeding, the Commission is of the opinion that it should rescind its condition strictly prohibiting All Pro from advertising in the "Movers" section of the Yellow Pages. As long as All Pro's Yellow Pages advertisement is not false and does not lead the public to believe that All Pro can provide moves in the same manner as a mover certificated by the Commission, then it can place such advertisements in the "Movers" section of the Yellow Pages. The Commission will, however, continue to monitor advertising placed in the Yellow Pages and assert jurisdiction over any moving companies that place misleading advertisements. In particular, Commission Rule R2-48.2(c) requires that all movers of household goods within North Carolina display their certificate of exemption number in any paid print or other visual form of advertising.

With regard to the Public Staff proposal that a notice be placed at the beginning of the "Movers" section of the Yellow pages, the Commission is of the opinion that such a proposal may have merit, but that the matter is best handled by the publishers of the various telephone directories and the moving industry. Both the Commission Staff and the Public Staff currently encourage the moving public to contact the Commission, either by telephone or the Commission Internet web site, to determine if a moving company is properly certificated by the Commission.

IT IS THEREFORE ORDERED as follows:

1. That, pursuant to G.S. 62-310(a), All Pro Movers is hereby assessed a penalty in the amount of $1,000 for violating North Carolina law and Commission orders as discussed herein, and that All Pro Movers shall make payment of this penalty to the Commission within ten (10) days from the date of this order.

2. That the advertising condition imposed upon All Pro Movers in the Notice of Decision issued on March 17, 2003, and the subsequent Order Ruling on Complaint issued on May 29, 2003, prohibiting All Pro from advertising in the "Movers" section of the Yellow Pages is hereby rescinded, and that All Pro Movers may continue to advertise in the "Movers" section of the Yellow Pages as long as its advertising is not false or misleading.

ISSUED BY ORDER OF THE COMMISSION.
This the 9th day of September, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Ah090804.05

DOCKET NO. T-4181, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
James G. Dunnagan, d/b/a Dunnagan's Moving & Storage, Post Office Box 471, Wilmington, North Carolina 28402, Complainant	)	ORDER DENYING REQUEST FOR RECONSIDERATION
v.	)	
All Pro Movers, 304 Spartanburg Avenue, Carolina Beach, North Carolina 28428, Respondent	)	

BY THE COMMISSION: On September 9, 2004, the Commission issued an order in this docket rescinding an earlier condition (contained in an order dated May 29, 2003) strictly prohibiting All Pro Movers (All Pro) from advertising in the "Movers" section of the Yellow Pages. The relevant part of the Commission's order stated as follows:

> As long as All Pro's Yellow Pages advertisement is not false and does not lead the public to believe that All Pro can provide moves in the same manner as a mover certified by the Commission, then it can place such advertisements in the "Movers" section of the Yellow Pages. The Commission will, however, continue to monitor advertising placed in the Yellow Pages and assert jurisdiction over any moving companies that place misleading advertisements.

On September 28, 2004, James G. Dunnagan, d/b/a Dunnagan's Moving & Storage (Dunnagan) filed a letter with the Commission advising of his disagreement with the Commission's decision in the advertising portion of the September 9 order, and requesting that the Commission reconsider this matter. Dunnagan stated that the general public has the right to assume that when selecting professional services from the Yellow Pages, companies listed under the titled named sections should indeed be legitimate lawfully licensed companies.

Prior to reaching its decision to rescind the advertising condition, the Commission requested comment from the Public Staff and all parties in this docket by order dated March 17, 2004. Comments were filed by the Public Staff.

In consideration of the entire record in this matter, the Commission is of the opinion that no new or compelling arguments have been presented by Dunnagan in his September 28, 2004, letter; that this matter has been thoroughly reviewed; and that the request for reconsideration should, therefore, be denied.

IT IS, THEREFORE, ORDERED as follows:

That the request by James G. Dunnagan, d/b/a Dunnagan's Moving & Storage for the Commission to reconsider its decision of the advertising portion of the order issued on September 9, 2004, be, and the same is hereby, denied.

ISSUED BY ORDER OF THE COMMISSION.
This the 2nd day of December, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bs120104.01

DOCKET NO. W-354, SUB 257

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Dr. Albert Gersing, M.D. and Shull's Mill Properties, Inc., c/o Stephen L. Palmer, Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., Post Office Drawer 1470, Hickory, North Carolina 28603, Complainants	)	RECOMMENDED ORDER ON COMPLAINT
v.	)	
Carolina Water Service, Inc. of North Carolina, Respondent	)	

HEARD: Thursday, March 13, 2003, at 10:00 a.m. in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Hearing Examiner Sam Watson[1]

APPEARANCES:

For Dr. Albert Gersing, M.D. and Shull's Mill Properties, Inc.:
Stephen L. Palmer, Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., Post Office Drawer 1470, Hickory, NC 28603

For Carolina Water Service, Inc.:
Edward S. Finley, Jr., Hunton & Williams, Post Office Box 109, Raleigh, North Carolina 27602

For Hound Ears Club, Inc.:
Robert W. Kaylor, Attorney at Law, 225 Hillsborough Street, Suite 480, Raleigh, North Carolina 27603

For the Using and Consuming Public:
Robert B. Cauthen, Staff Attorney, Public Staff – Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

WATSON, HEARING EXAMINER: On August 19, 2002, Dr. Albert Gersing, M.D. and Shull's Mill Properties, Inc. (Complainants) filed a complaint against Carolina Water Service, Inc. of North Carolina (Carolina Water) regarding the extension of wastewater treatment service to certain property owned by Dr. Gersing in Watauga County, North Carolina. The complaint was served upon Carolina Water, which filed an answer on September 9, 2002. The answer was served upon the Complainants by Order dated September 12, 2002.

On September 25, 2002, the Complainants filed a response stating that Carolina Water's answer was not satisfactory and requesting that a public hearing on the complaint be scheduled. By Order dated October 4, 2002, the Commission scheduled a hearing on the complaint for

[1] By Order Reassigning Hearing Examiner issued July 31, 2003, Commission Staff Attorney Sam Watson was assigned to review the record and decide the case as Hearing Examiner. The hearing officer who presided at the hearing was Larry S. Height.

December 3, 2002, in Raleigh. At the request of the Commission, the Public Staff noted its participation in this matter on the same date.

On November 14, 2002, Hound Ears Club, Inc. (Hound Ears) filed a Petition to Intervene, which was granted by Order dated November 20, 2002.

After two continuances, the complaint came on for hearing as ordered on March 13, 2003, with all parties present and represented by counsel. Dr. Gersing and David F. Ramsey testified on behalf of the Complainants; James T. Highley testified on behalf of Carolina Water; and Ronald W. Hawkins, Jimmy Woodie, and Jack Floyd testified on behalf of Hound Ears.

On or about May 27, 2003, proposed orders and briefs were field by the Complainants, Carolina Water, Hound Ears, and the Public Staff.

On September 15, 2003, Hound Ears filed a Motion for Late Filed Exhibit and Judicial Notice requesting the Commission to take judicial notice of the September 8, 2003, judgment of the Superior Court of Watauga County in the civil action of "Dr. Albert Gersing, M.D. and Shull's Mill Properties, Inc., Plaintiff, v. Hound Ears Club Limited Partnership, Defendant," Civil Action No. 01-CVS-777. Having received no objection, Hound Ears' Motion is allowed.

Based upon the pleadings, the testimony and exhibits received into evidence and the record as a whole, the Hearing Examiner makes the following

FINDINGS OF FACT

1. Dr. Albert Gersing, M.D., a retired cardiologist now residing in Banner Elk, North Carolina, is the owner of an approximately 44-acre tract of land previously known as "the Fussell Farm" located in Watauga County, North Carolina.

2. Shull's Mill Properties, Inc. (Shull's Mill), a corporation organized and existing under the laws of the State of North Carolina, was incorporated by Dr. Gersing and three associates, including David Ramsey, to facilitate development of the Fussell Farm property.

3. Carolina Water is a corporation duly organized and existing under the laws of the State of North Carolina that has been authorized by the Commission to provide water and/or wastewater (sewer) service in numerous service areas throughout the State of North Carolina, including at various locations within Watauga County, North Carolina. Carolina Water is a public utility subject to the Commission's jurisdiction pursuant to G.S. 62-3(23)a.2.

4. Hound Ears is a corporation organized and existing under the laws of the State of North Carolina with a principal place of business located in Watauga County.

5. The Hound Ears development is a 750 acre residential community initially developed as Hound Ears Lodge and Club by Grover and Harry Robbins in Watauga County, North Carolina. The water and wastewater systems serving the Hound Ears development were originally constructed in the 1970's.

6. In July 1984 the Robbins sold to Elk River Development Corporation (Elk River), a North Carolina corporation, "those subdivision lots and tracts of land in that certain subdivision known as Hound Ears Lodge & Club, and in addition, those certain tracts of land owned by Grantor outside the boundary of said subdivision in Watauga County."

7. Carolina Water acquired the water and wastewater systems serving the Hound Ears development from Elk River through a purchase agreement dated October 28, 1986 (1986 Purchase Agreement).

8. Article V, Section 1 of the 1986 Purchase Agreement provides:

> Purchaser covenants and agrees with Seller that the herein described water and sewer systems shall exclusively serve customers in the Hound Ears Club community. No outside customers shall be connected to the systems without the prior written approval of Seller.

9. The 1986 Purchase Agreement identified the water and wastewater systems as those "installed to provide service to residences constructed or to be constructed in the Hound Ears Subdivision, located in Watauga County, North Carolina, containing approximately 750 acres of land, and more fully described on Exhibit 'A' attached." Exhibit "A" attached to the 1986 Purchase Agreement identifies the property as:

> Being generally the property described and shown on that certain composite plat entitled "Hound Ears Club, Blowing Rock, North Carolina, scale 1" = 200'" conveyed to Seller in that certain deed dated July 17, 1984 from Hound Ears Lodge and Club, Inc. recorded in Deed Bock 250 at Page 227, Watauga County Registry, a copy of said map is attached hereto as Exhibit "A-1" and is incorporated herein by reference.

10. Carolina Water was granted a franchise to provide water and wastewater service in the Hound Ears development by Commission Order dated February 11, 1987, in Docket No. W-354, Sub 55. The Certificate of Public Convenience and Necessity (CPCN) identifies the service area as "Hound Ears Subdivision, Watauga County, North Carolina."

11. In 1987, Elk River sold the Hound Ears development to Hound Ears Club, Ltd. d/b/a Hound Ears Club Limited Partnership (HECL), a Florida limited partnership owned by Ed Claughton and Susie Schmidt.

12. In 1997, HECL and Dr. Gersing entered into discussions concerning Dr. Gersing's purchase and development of the Fussell Farm property. The property, which Dr. Gersing ultimately purchased in November 1997, is located immediately adjacent to and shares a common property line with the Hound Ears development. The seller, Helen Fussell, was represented by the Hound Ears Club Real Estate Office.

13. In connection with Dr. Gersing's purchase, Mr. Claughton, as President of HECL, executed a document dated November 7, 1997, allowing Dr. Gersing to connect to the Hound Ears wastewater system, as follows:

> Hound Ears Club will allow Sewer Plant usage to be obtained by you, at your expense, by a line extending through our property to the Fussell Line. Location, and grading plan to be submitted prior to beginning of construction and approval made in writing by Hound Ears. A surety bond for completion of the sewer line must be posted in favor of Hound Ears in the amount of $300,000.00 prior to construction to assure completion of same to the Fussell line.

14. Other provisions in the November 7, 1997, document provided for the Hound Ears Club Real Estate Office to be the exclusive agents for the sale of lots and homes in the proposed development. In exchange, HECL would allow up to twenty (20) prospective buyers to apply for Hound Ears golf memberships. In addition, HECL reserved the right to review use of the name "Hound Ears." This document was recorded in the Watauga County Registry on November 10, 1997.

15. In July 1998, the Watauga County Planning Board approved plans for Dr. Gersing's Stonebridge development, the name given to the Fussell Farm property, subject to the condition that Carolina Water provide water and wastewater service to the tract. The initial development plan for the Stonebridge development included 102 townhouses and 32 lodge rooms.

16. On November 6, 1998, Mr. Ramsey and Charles Clement, Dr. Gersing's attorney, met with Jim Highley of Carolina Water to discuss the possibility of Carolina Water providing water and wastewater service to the Stonebridge development using the Hound Ears water and wastewater facilities and presented Mr. Highley with the recorded November 7, 1997, document, which he understood to constitute HECL's consent as required by the 1986 Purchase Agreement.

17. On November 25, 1998, Mr. Highley wrote to Mr. Clement and committed on behalf of Carolina Water to provide water and wastewater service to the Stonebridge development. Carolina Water indicated that it had sufficient sewer capacity available to serve the proposed townhouses and lodge rooms.

18. On March 27, 1999, Carolina Water entered into an agreement with Dr. Gersing to provide water and wastewater utility service to the Stonebridge development (1999 Service Agreement). The property to be served was the approximately 44 acres acquired from Mrs. Fussell and described as Exhibit 1 to the Agreement.

19. The 1999 Service Agreement required Dr. Gersing to install the water distribution and sewer collection facilities and to construct an interconnection with the existing Hound Ears collection system so as to provide a transmission path to the wastewater treatment plant.

20. Under the 1999 Service Agreement, Dr. Gersing was required to pay a sewer connection fee because the sewer capacity was to be provided through Carolina Water's Hound Ears wastewater treatment plant capacity. As Dr. Gersing was to provide the well capacity, he was not required to pay a water connection fee.

21. Between November 1997 and July 1999, the relationship between Dr. Gersing and HECL deteriorated.

22. By letters dated July 15, 1999, and September 16, 1999, Anthony di Santi, the attorney for HECL, informed Mr. Highley that HECL, as successor to Elk River, did not consent to the use of the Hound Ears facilities to serve Dr. Gersing's Stonebridge development, invoking Article V, Section 1 of the 1986 Purchase Agreement.

23. Mr. di Santi further wrote Dr. Gersing on July 15, 1999, asserting that Dr. Gersing acknowledged to representatives of HECL "more than a year ago that [he] did not intend to honor the terms of the [November 7, 1997] document" and that the document, therefore, "has had no force or effect for more than a year." In his letter, Mr. di Santi alleged that Dr. Gersing had failed to allow HECL to approve the location and grading plan relative to the sewer line for the property, had committed an anticipatory breach relative to the exclusive listing provision, and had used the name "Hound Ears" without prior approval.

24. By letter dated October 12, 1999, Mr. di Santi informed Joseph Furman of the Watauga County Department of Planning and Inspections that, under the 1986 Purchase Agreement, HECL, as successor to Elk River, has not approved the use of the Hound Ears facilities to serve Dr. Gersing's Stonebridge development.

25. Mr. di Santi further wrote counsel for Carolina Water on October 12, 1999, indicating that Carolina Water's responses to his earlier letters had been unsatisfactory. Mr. di Santi stated that HECL was aware of the 1999 Service Agreement between Dr. Gersing and Carolina Water. Mr. di Santi further stated that Dr. Gersing had breached the November 7, 1997, agreement, adding as an additional ground for breach that Dr. Gersing had assigned his right under the November 7, 1997, agreement without HECL's consent. Lastly, Mr. di Santi indicated that HECL considered service to the Stonebridge development by Carolina Water to violate the terms of the 1986 Purchase Agreement.

26. On October 15, 1999, Carolina Water responded to Mr. di Santi's October 12, 1999, letter informing him that Carolina Water had entered into the 1999 Service Agreement in reliance on the November 7, 1997, document. Carolina Water stated that it would not permit an interconnection to the Hound Ears wastewater treatment plant until the collection system for the Stonebridge development, for which Carolina Water was not responsible for constructing, was complete and ready for service.

27. On December 23, 1999, Mr. Highley wrote to Dr. Gersing reiterating that Carolina Water's Hound Ears wastewater treatment plant "has more than ample capacity" to meet the needs of the Stonebridge development and committing to hold this capacity in reserve "for the duration of" the 1999 Service Agreement.

28. By letter dated January 26, 2000, Mr. di Santi informed counsel for Carolina Water that Dr. Gersing had requested that the November 7, 1997, document be mutually rescinded. Mr. di Santi indicated that HECL was willing to do so upon the assurance by Carolina Water that it would not provide service to the Stonebridge development without the prior written approval of HECL.

29. On February 3, 2000, Carolina Water informed counsel for HECL that if the November 7, 1997, document were rescinded by mutual agreement between Dr. Gersing and HECL, Carolina Water would not provide service to Dr. Gersing pursuant to the 1999 Service Agreement without prior written approval of HECL. Carolina Water further requested written acknowledgment executed by Dr. Gersing and HECL that the November 7, 1997, document had been rescinded.

30. In response to HECL's objections, Watauga County has refused to issue the erosion control permit needed to begin construction of the sewer collection facilities in the Stonebridge development required by the 1999 Service Agreement. Consequently, no construction has begun on the proposed development and the property remains unimproved.

31. On January 8, 2002, Hound Ears acquired from HECL the assets and unsold land comprising the Hound Ears development.

32. On September 3, 2003, Watauga County Superior Court Judge E. Penn Dameron, Jr., entered judgment after a jury verdict against Dr. Gersing and Shull's Mill in Civil Action No. 01-CVS-777, "Dr. Albert Gersing, M.D. and Shull's Mill Properties, Inc., Plaintiff, v. Hound Ears Club Limited Partnership, Defendant." In response to specific questions, the jury found (1) that by signing the November 7, 1997, document, Dr. Gersing and HECL did not enter into a contract; (2) that HECL did not, without justification, withdraw its consent for Dr. Gersing to have access to the Hound Ears wastewater treatment facility, take steps to interfere with the issuance by Watauga County of an erosion control permit, or threaten to sue Carolina Water; and (3) that Dr. Gersing used the November 7, 1997, document to secure a contract with Carolina Water despite having already repudiated and breached that document.

POSITIONS OF THE PARTIES

Complainants' Position

The Complainants first argue that the Stonebridge development is within Carolina Water's Hound Ears service area and that Carolina Water, therefore, has an obligation to serve the Stonebridge development. Carolina Water's service area is designated in the CPCN as the "Hound Ears Subdivision," and the Complainants argue that the ownership history of the Stonebridge development indicates that it lies within that service area. The Complainants note that two sections of the development, a 13.25 acre tract and a 3.72 tract, were at one time owned simultaneously by a predecessor in interest to Hound Ears, that these two tracts are contiguous with property undisputable within the "Hound Ears Subdivision" and currently owned by Hound Ears, and that the two tracts were owned by a predecessor in interest to Hound Ears at the same time when the Hound Ears

development was served by the wastewater treatment facility now owned and operated by Carolina Water. The Complainants further argue that an additional indicator that the Stonebridge development is within Carolina Water's service area is the fact that Carolina Water did not file either a notice of contiguous extension or an application for a new CPCN with the Commission upon entering into the 1999 Service Agreement The fact that Carolina Water made neither filing demonstrates that Carolina Water itself considered the Stonebridge development to be within its service area. Lastly, the Complainants cite to Currituck County v. Carolina Water Service, Inc. of North Carolina, Docket No. W-354, Sub 231, Order Requiring Provision of Service Subject to Conditions (2001) (Currituck), and argue that even if the Stonebridge development was not within Carolina Water's original Hound Ears service area it has become so by contiguous extension pursuant to G.S. 62-110(a). The Complainants note that the Stonebridge development is immediately adjacent to the Hound Ears development and that they share a common property line uninterrupted by any geographic feature. In addition, the Complainants argue that Carolina Water has accepted responsibility for serving the Stonebridge development, as demonstrated by the 1999 Service Agreement in which Carolina Water agreed "to supply all customers within the property with adequate and customary water and sanitary wastewater utility service." Thus, argue the Complainants, Carolina Water is obligated to serve the Stonebridge development because it is either within the original Hound Ears service area based upon the ownership history of the tract or has become so by contiguous extension as in Currituck.

Secondly, the Complainants argue that, as in Currituck, the provision of the 1986 Purchase Agreement permitting Hound Ears to determine who Carolina Water may serve is void as contrary to public policy. Just as the Commission found in Currituck that the developer's "existing contractual right to exercise control over Carolina Water's provision of water and sewer utility service creates a fundamental uncertainty in the availability of water and sewer service within the [service] area" and interfered with Carolina Water's ability to carry out its public utility functions, so, too, should the provision in this case allowing Hound Ears to exercise control over who may be served by Carolina Water be declared by the Commission to be unenforceable. Whether or not the Stonebridge development is within Carolina Water's service area, the consent provisions of the 1986 Purchase Agreement would still be equally violative of public policy. The Complainants note that one of the stated policies of North Carolina is "[t]o promote adequate, reliable and economical utility service to all of the citizens and residents of the State," G.S. 62-2(a)(3), and argue that the contiguous extension provision in G.S. 62-110(a) promotes this policy because it allows service to be readily extended to citizens and residents who otherwise would not receive such service. Consent provisions such as those found in the 1986 Purchase Agreement eliminate the public utility's ability to use this tool to further the stated policy of the State, substitute the judgment of private, less objective, third parties for that of the public utility, and result in incidents, such as the present case, where citizens and residents of the State will be denied utility service. Such a result by definition is contrary to the public policy of North Carolina. Thus, as in Currituck, the offending provision should be declared unenforceable and Hound Ears ordered not to interfere with Carolina Water's provision of service to the Stonebridge development.

Carolina Water's Position

In response to Dr. Gersing's complaint, Carolina Water's states that it committed to provide service in 1999 with the understanding that the owner of the undeveloped property within the Hound Ears service area at that time, HECL, had consented to Dr. Gersing's request to receive service from the facilities. Carolina Water's standard operating procedure is to reserve for developers all capacity constructed and contributed by that developer that will be needed at full buildout. For this reason, Carolina Water agreed to the consent provision in the 1986 Purchase Agreement. Were Carolina Water unwilling to make this commitment, developers would be unwilling to contribute facilities to Carolina Water on reasonable terms. Had there been no such provision in the 1986 Purchase Agreement, Carolina Water nevertheless would have consulted with the original Hound Ears developer to make sure that any capacity Carolina Water made available to Dr. Gersing would not have been required by the initial developer or its successor. When Dr. Gersing requested service and presented the November 7, 1997, document, Carolina Water proceeded with the understanding that

HECL had consented to Carolina Water doing so. Based upon the facts (1) that many of the existing residences in the Hound Ears community received service through septic tanks, (2) that no sewer collection system had been installed in such areas, and (3) that it was not likely that a sewage collection system would not be extended into these areas, Carolina Water reasonably determined that sewage treatment capacity was available for the Stonebridge development without depriving the developers at Hound Ears of future capacity they would need.

Carolina Water states that it has neither reneged on its commitment to Dr. Gersing made in 1999 nor disregarded the provision in the 1986 Purchase Agreement. After entering into the 1999 Service Agreement with Dr. Gersing, Carolina Water was informed that HECL did not consent to Dr. Gersing's receiving service from the Hound Ears sewer facilities. Dr. Gersing still maintained that he had HECL's consent. In 1999, when Carolina Water committed to provide service, Carolina Water was unaware that HECL maintained that its consent had been withdrawn. At that time, no development had been undertaken in the Stonebridge development. Carolina Water does not construct collection facilities and had not committed to do so for Stonebridge. At the time Carolina Water learned of the dispute between HECL and Dr. Gersing in 1999, Carolina Water knew that Dr. Gersing or Shull's Mill Properties would need State and county permits before a collection system in Stonebridge could be installed. Carolina Water knew that it would not be called upon to comply with any commitment in the 1999 Service Agreement until the permits had been obtained and the collection system installed. In other words, the disagreement between HECL and Dr. Gersing over the validity of the November 7, 1997, consent would have to be resolved before permits were obtained, and Carolina Water's willingness to comply with the 1999 Service Agreement would not be the factor that determined whether the Stonebridge development would proceed. Carolina Water sought to remain neutral but agreed to abide by any resolution, voluntary or otherwise, the parties reached.

Carolina Water further argues that the Complainants' reliance on Currituck as support for their position that the provision in the 1986 Purchase Agreement is void as inconsistent with public policy is misplaced. With respect to both the development at issue in Currituck and Hound Ears, both initial developers (1) expected to undertake future development and conveyed the water and sewer facilities to Carolina Water at no or nominal cost before development was complete; (2) negotiated language in the agreements with Carolina Water in an attempt to protect against an effort by Carolina Water to make capacity they paid for available to others so as to deprive the contributing developers of such capacity for their future use when they needed it; (3) sought to invoke the provisions to prevent Carolina Water from using their capacity to serve subsequent developers; and (4) maintained that their future development plans would be harmed if Carolina Water were required to use capacity in existing facilities to serve the second developer. Carolina Water argues, however, that there are fundamental differences between the Currituck and Hound Ears situations. In both cases the parties disputed whether the property being developed by the complainant was located within Carolina Water's franchised service area. In Currituck, the Commission determined that the complainant's property was within Carolina Water's service area and, therefore, that Carolina Water bore an obligation to serve to the extent it owned capacity that would not be needed by the initial developer at full buildout. Had the complainant's property not been in Carolina Water's service area, there would have been no obligation to serve, and, theoretically, the Commission would not have been called upon to address the issue of the enforceability of the provision allowing the initial developer to block Carolina Water's extension of service. With respect to the current situation, Carolina Water is unaware of a case where the facts relied upon by Dr. Gersing support the conclusion that the Stonebridge development lies within Carolina Water's certificated service area. If the Stonebridge development is not part of Carolina Water's service area and Carolina Water has no statutory obligation to serve, Dr. Gersing will be unable to obtain an order from the Commission requiring service, so the issue of the enforceability of the provision of the 1986 Purchase Agreement is not reached.

Lastly, Carolina Water argues that if the Commission were to determine that the Stonebridge development is within Carolina Water's Hound Ears service area, the next issue that must be resolved is whether the Hound Ears developer needs all of the capacity in the existing treatment plant at full development. The Commission in Currituck and in Ocean Club Ventures, L.L.C. v. Carolina Water Service, Inc. of North Carolina, Docket No. W-354, Sub 236, Order Requiring Provision of Service Subject to Conditions (2001) (Ocean Club), determined that Carolina Water should not be required to construct capacity to serve in newly developed areas and that a developer that contributes capacity should be entitled to rely upon the future availability of the contributed capacity for full buildout of its development. In this case, Hound Ears has indicated that the existing capacity is insufficient to meet its needs at full buildout. In addition, the Hound Ears wastewater treatment plant discharges effluent into the Watauga River, which is classified as Class A waters. Substantial questions exist as to whether the State would allow a modification of the discharge permit to allow an expansion of the plant capacity and an increase in the effluent discharge into such waters. If the Commission determines that the Stonebridge development is within Carolina Water's service area and that the provision in the 1986 Purchase Agreement should not be enforced, cannot be enforced by the current owners of the property, or that the right to invoke the provision has been waived, the Commission must determine whether Hound Ears is entitled to the full 140,000 gpd of existing wastewater capacity or whether all or a portion of this capacity is available for Dr. Gersing's use.

Hound Ears' Position

Hound Ears agrees with Carolina Water (1) that the Stonebridge development is not within Carolina Water's service area, (2) that the provision in the 1986 Purchase Agreement allowing it control over the use of the wastewater facility it built to serve its own development is reasonable, enforceable, and not against public policy, and (3) that Carolina Water should not be allowed to serve the Stonebridge development using the existing Hound Ears wastewater treatment capacity, were it in any way obligated to do so, because the capacity will be required for full buildout of the Hound Ears development. Hound Ears agrees with Carolina Water that the Commission's decision in Currituck is not applicable to this case and further argues that Currituck is distinguishable because Currituck involved a county – a public entity – and not private developers. In addition, Hound Ears maintains that the provision in the 1986 Purchase Agreement is logical because developers provide funding and establish a plan for development and should not risk losing the capacity to others in the future. Otherwise, there is a diminution in the value of their property.

Lastly, Hound Ears maintains that at full buildout of the Hound Ears development there will be insufficient capacity if the Stonebridge development is permitted to interconnect. Hound Ears maintains that limitations exist on how much wastewater can be processed in the treatment plant and how much wastewater can be released from individual homes. Hound Ears maintains that property owners that have made a substantial investment in the community should have access to the facility, which is on their property and that, as yet, has not served anyone else. Hound Ears maintains that there has never been service to any structure not located on the Hound Ears property. Presently, there is no dwelling on the Gersing property. Hound Ears maintains that it would be inappropriate for Dr. Gersing to connect to the Hound Ears wastewater system and use one-third or more of the capacity to develop his property.

Public Staff's Position

The Public Staff agrees that the threshold issue in this proceeding is whether the Stonebridge development lies within Carolina Water's Hound Ears franchised service area and is thus entitled to be served by Carolina Water's Hound Ears wastewater treatment plant. This is a question of fact on which Complainants have the burden of proof. On the basis of the evidence, the Public Staff believes that the Commission should find that the Complainants have failed to carry that burden of proof and that the property is not within the Hound Ears service area.

If the Commission finds that the development is within the service area, Carolina Water has an obligation to provide service to the extent that its facilities are adequate. The Public Staff states,

however, that no authority has been cited for the proposition that an unwilling utility may be compelled to extend service beyond its franchised service area. A corollary would be that a utility does have the right to enter contracts limiting expansion beyond its service area and that such contracts (such as the 1986 Purchase Agreement) are not for that reason contrary to the public interest.

Lastly, the Public Staff notes that the Complainants have also asserted a contractual right to service based on the 1999 Service Agreement between Carolina Water and Dr. Gersing and the November 7, 1997, agreement between Hound Ears and Dr. Gersing. As this contract dispute is the subject of a civil action currently pending in Watauga County Superior Court, the Public Staff recommends that the Commission not exercise its jurisdiction but rather hold this matter in abeyance and await the outcome of the civil action.[1]

DISCUSSION AND CONCLUSIONS

The Commission in this case is again being called upon to resolve a dispute between two real estate developers in which the franchised water and sewer utility has apparently been caught in the middle. Unfortunately, what began with so much hope and promise, the development of a complementary community adjacent to the existing Hound Ears development, has resulted instead in so much animosity and litigation. Despite the apparent complexity of the facts and the history in this case, however, the issues that must be resolved may be simply stated as follows:

(1) Whether Carolina Water is required to serve Dr. Gersing's property because it is included within Carolina Water's Hound Ears service area;
(2) If not, whether Carolina Water is prohibited from serving Dr. Gersing's property from the facilities serving the Hound Ears development because of Article V, Section 1 of the 1986 Purchase Agreement; and
(3) If not, whether Carolina Water is required to extend service to Dr. Gersing's property under G.S. 62-42(a).

Based upon a review of the facts in this case and Commission precedent, the Hearing Examiner concludes that each of these issues must be answered in the negative.

Commission Precedent

As noted by the parties, several of the Commission's prior water cases have dealt with the issues present in this case.

In Currituck County v. Carolina Water Service, Inc. of North Carolina, Docket No. W-354, Sub 231, the County filed a complaint against Carolina Water alleging that the utility had unlawfully failed to provide water and sewer utility service to an area owned by the County in Carolina Water's service territory. In its March 23, 2001, Order Requiring Provision of Service Subject to Conditions (Currituck), the Commission first concluded that the County's property was contained within Carolina Water's Corolla Light service territory by contiguous extension, having found (1) that the property "is immediately adjacent to" Carolina Water's Corolla Light service area, (2) that the property is not separated from Carolina Water's Corolla Light service area by any major geographical feature, (3) that Carolina Water admitted responsibility for serving the property in communications with others, and (4) that Carolina Water had actually served portions of the property in recent years. In considering that portion of the agreement between Carolina Water and the developer of Corolla Light that granted the developer the right to veto the use of the water production and sewer treatment facilities to serve anyone outside the existing Corolla Light area, the Commission found that it interfered with Carolina Water's ability to carry out its public utility function and was contrary to the

[1] The Hearing Examiner notes that since the filing of briefs in this case, the litigation referred to by the Public Staff has been concluded and a judgment rendered on the basis of a jury verdict in that case.

public interest. The Commission, therefore, ordered that the agreement be modified to eliminate the developer's ability to control the performance of Carolina Water's utility function. Lastly, having found that the County's property was within Carolina Water's service territory and that the contractual provision allowing the developer of Corolla Light control over Carolina Water's use of the utility facilities was unenforceable, the Commission ordered Carolina Water to extend service to the County's property under certain reasonable terms and conditions as set forth in that Order. In so doing, however, the Commission noted that the County was responsible for providing sufficient capacity for its own needs and would not be allowed to utilize capacity provided by the Corolla Light developer to serve its own customers at full buildout.

Similarly, in Ocean Club Ventures, L.L.C. v. Carolina Water Service, Inc. of North Carolina, Docket No. W-354, Sub 236, a complaint was filed requesting that the Commission order Carolina Water to provide water and wastewater service to a new development within its service territory from facilities in the adjacent Monteray Shores development notwithstanding a contractual provision limiting the use of those facilities to lots within the Monteray Shores development. In its March 20, 2001, Order Requiring Provision of Service Subject to Conditions (Ocean Club), the Commission first concluded, as in Currituck, that the complainant's property was within Carolina Water's Corolla Light service territory by contiguous extension, having found that the property at the time of the extension was part of a larger tract for which construction had begun on facilities designed to serve the entire tract. Next, the Commission, as in Currituck, found that the portions of the agreement between Carolina Water and the developer of Monteray Shores "which deprive [Carolina Water] of the right to control the provision of water and sewer utility service within its franchised service territory are not in the public interest and that the Agreement ought to be modified to eliminate any opportunity for [the developer of] Monteray Shores to exercise unilateral control over the provision of service in the relevant portions of Carolina Water Service's franchised service territory." Lastly, as in Currituck, having found that the complainant's property was within Carolina Water's service territory and that the contractual provision allowing the developer of Monteray Shores control over Carolina Water's use of the utility facilities was unenforceable, the Commission ordered Carolina Water to extend service to the complainant's property under certain reasonable terms and conditions as set forth in that Order.

Most recently, in its February 17, 2004, Final Order Requiring Application for Franchise or Transfer of System and Service to Lot 5A, in Mountain Acreage, Ltd., Docket No. W-1202, Sub 0 (Mountain Acreage), the Commission ordered a water utility to seek approval from the North Carolina Department of Environment and Natural Resources (DENR) to extend service to a subdivided lot (Lot 5A) located within the development served by the utility but not contemplated within the utility's existing DENR permit. Although Lot 5A was not held to be within the utility's existing service territory, the Commission nonetheless found that Lot 5A was within the subdivision served by the utility and that it could "reasonably be served" under G.S. 62-42 because "the water system likely has sufficient capacity to serve Lot 5A without jeopardizing the ability of the system to serve the existing 35 lots and without further expansion of the system."

Carolina Water's Hound Ears Service Area

The Hearing Examiner agrees with the parties that the first issue to be decided in this case is whether Carolina Water is required to serve Dr. Gersing's property because it is included within Carolina Water's Hound Ears service area. Carolina Water, Hound Ears, and the Public Staff argue that the Stonebridge development is not included within Carolina Water's Hound Ears service area and that Carolina Water, therefore, has no obligation to serve. The Complainants maintain that the approximately 44-acre Stonebridge development is part of Carolina Water's Hound Ears service area because a portion of the tract at one time, prior to 1986, was owned by those who were developing the Hound Ears "community." The Hearing Examiner concludes that even though a portion of the 44 acres may at one time have been part of the tract owned by former owners of Hound Ears, this is insufficient to establish that any part of the Stonebridge development is within Carolina Water's certificated service area. No part of the current Stonebridge development was a part of the 750 acres

identified as the "Hound Ears Subdivision" in the 1986 Purchase Agreement between Elk River and Carolina Water which formed the basis of Carolina Water's request for transfer of the CPCN. The Hearing Examiner notes that HECL, at the time it purchased the Hound Ears development, also acquired certain tracts located "outside the boundary of said subdivision." It is irrelevant whether these additional tracts are located adjacent to the Hound Ears development or several miles away in determining that they are not within the specific service area for which Carolina Water sought to provide water and sewer service. No service was in fact provided to any property within the Stonebridge development, as was found in Currituck. Nor were the tracts ultimately included in the Stonebridge development ever considered in the development plans for the Hound Ears development, as was found in Ocean Club. The language of the 1986 Purchase Agreement specifically defines the "Hound Ears Subdivision" with reference to "750 acres" and a recorded composite plat. Thus, there is no competent evidence to support a conclusion that any part of the Stonebridge development was contemplated by Carolina Water or the Hound Ears developer to be within Carolina Water's service area.

Secondly, the Hearing Examiner does not agree with the Complainants' contention that the Stonebridge development has been subsequently added to Carolina Water's service area by contiguous extension. The Commission addressed this issue in both Currituck and Ocean Club, finding in both cases that the complainants' property had become a part of Carolina Water's service area by contiguous extension. For example, in Currituck, the Commission recited the following summary of the law and application of the relevant facts:

> The Commission must first consider the extent, if any, to which the Whalehead Club property is contained within Carolina Water Service's Corolla Light service territory. The undisputed evidence indicates that Carolina Water Service has never formally applied for or received a franchise for the Whalehead Club property, which is located on Currituck Sound immediately adjacent to Corolla Light. As a result, the only basis upon which the Whalehead property could properly be deemed included within Carolina Water's franchised service territory is through the application of the contiguous extension provisions of G.S. 62-110(a). ...
>
> According to G.S. 62-110(a), the certification requirements otherwise imposed upon public utilities do not apply "to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business." As a result, a public utility need not obtain a separate certificate from the Commission in the event that it seeks to extend facilities into territory adjacent to that in which it already provides service. ...
>
> Although the relevant statutory language does not spell out the terms and conditions necessary for the inclusion of a particular area within a utility's franchised service territory by way of contiguous extension, the Commission has had occasion to expound upon the standards which ought to be applied in determining whether particular areas were contiguous to each other for purposes of G.S. 62-110(a). In In re Rulemaking Proceeding to Implement Rules Governing Contiguous Extensions, Docket No. W-100, Sub 17, Order Adopting Rules R7-38 and R10-25 and New and Revised Application Forms, Eighty-Fifth Report of the North Carolina Utilities Commission: Orders and Decisions 185, 188 (1995), the Commission stated that the "contiguous extension" provisions of G.S. 62-110 "should be narrowly and conservatively interpreted;" that "[a] contiguous extension should be into territory immediately adjacent to territory already occupied by the utility;" that, "[i]n order to be immediately adjacent, the territory of the contiguous extension should share a significant common boundary line;" that, although "[t]here may be a geographic feature such as a roadway or stream along this boundary," "there must not be intervening land or a substantial body of water;" that "[t]he territory of the contiguous extension must be immediately adjacent to territory that is already occupied by the

utility," with such occupation having occurred when it has "plant in the territory;" and that "[a] contiguous extension may not be made across unoccupied territory that will not be served by the extension, whether franchised to the utility or not." The Commission concludes that these standards are consistent with the obvious purpose of the contiguous extension provisions of G.S. 62-110(a), which is to avoid the wasted effort which would be involved in obtaining a separate certificate for adjacent territory occupied by a utility which already serves adjoining areas. As a result, the Commission concludes that this standard should be applied in determining whether the Whalehead Club territory is properly includable in Carolina Water Service's Corolla Light service territory.

After carefully examining the record evidence and the arguments advanced by the parties, the Commission concludes that the Whalehead Club property is a part of Carolina Water's Corolla Light franchised service territory under a contiguous extension theory. The undisputed record evidence indicates that Carolina Water already serves the Whalehead Club building, the construction trailers, and the yard hydrant. In addition, Carolina Water utilizes the drainfield on the Whalehead Club property to serve its existing Corolla Light service territory. As a result, Carolina Water plainly operates facilities within the Whalehead Club property to provide water and sewer utility service as contemplated by G.S. 62-110(a). The Whalehead Club property is immediately adjacent to the Corolla Light development and is not separated from it by any major geographical feature. The fact that Carolina Water acknowledged during its discussions with the Public Staff that the Whalehead Club property was part of its service territory is also relevant to this determination. Although the notification which Carolina Water Service filed at that time only covered a portion of the Whalehead Club property and although the maps upon which Public Staff witness Floyd based his opinions differed from those submitted at the time of Carolina Water's original application for a CPCN, the simple fact of the matter remains that, as a result of those discussions, Carolina Water admitted responsibility for serving the Whalehead Club property in communications with others and has served portions of that property in recent years. As a result, the Commission concludes that the Whalehead Club tract is contained within Carolina Water's Corolla Light service territory by contiguous extension.

Similarly, in applying the law to the facts in Ocean Club, the Commission found as follows:

The undisputed record evidence establishes that the Monteray Shores area, which, at that time, included the Corolla Shores development, was located adjacent to Carolina Water Service's Corolla Light service territory at the time that the contiguous extension allegedly occurred. The record further indicates that Carolina Water Service had begun to operate in the Corolla Light area at that time. Although the contiguous extension did not result in the immediate constructor of lines into what is now the Corolla Shore[s] area, it was accompanied by the construction and operation of water production and water treatment facilities which were, at that time, intended to be available to serve all three phases of Monteray Shores. Although the Corolla Shores area was not occupied at the time of the contiguous extension, the relevant area for purpose of this analysis is the entire Monteray Shores area rather than a single phase of the contemplated subdivision. Monteray Shores was immediately adjacent to Corolla Light. There is no evidence of any major geographic barrier between the Corolla Light and Monteray Shores areas. As a result, the Commission concludes that the Corolla Shores area is contained within Carolina Water Service's Corolla Light service territory by way of contiguous extension.

In applying the law to the facts in this case, the Hearing Examiner first notes that Dr. Gersing's Stonebridge development "is immediately adjacent to" Carolina Water's Hound Ears service area and not separated by any major geographical feature. Moreover, Carolina Water was

actually providing service in the Hound Ears development at the time it entered into the 1999 Service Agreement. However, as Carolina Water argues, the act of contiguous extension remains a voluntary undertaking on the part of the utility. The analysis performed in Currituck, Ocean Club, and, necessarily, in this case is an attempt to identify facts which would support a conclusion that the utility actually intended to serve the adjacent development in the absence of a formal filing with the Commission. Thus, even if the 1999 Service Agreement could be construed as Carolina Water admitting responsibility for serving the Stonebridge development, there is no evidence that Carolina Water has actually served any portion of the property, as was found in Currituck, or that any construction has begun on facilities designed to serve any part of the Stonebridge development, as was found in Ocean Club. Thus, Carolina Water cannot be held in this case to have actually extended service into the contiguous area. The Hearing Examiner finds this to be a more reasonable explanation of why Carolina Water never made any filings with the Commission for a contiguous extension or a CPCN to serve the Stonebridge development than that suggested by the Complainants. Therefore, based upon the facts of this case, the Hearing Examiner concludes that the Stonebridge development is not within Carolina Water's Hound Ears service area.

Contractual Agreement Prohibiting Use of Facilities

As the Complainants point out, however, a finding that the Stonebridge development is not within Carolina Water's Hound Ears service area is not dispositive of the issues in this case. The Hearing Examiner must next consider whether Carolina Water may nevertheless extend service if it so chooses, or whether it is prohibited under Article V, Section 1 of the 1986 Purchase Agreement from serving Dr. Gersing's property using the facilities serving the Hound Ears development. The validity of such contract provisions which purport to allow the developer to exercise control over the utility's use of water or wastewater facilities also has been addressed by the Commission in its prior decisions. Although, as Carolina Water and Hound Ears correctly point out, Currituck and Ocean Club are distinguishable from the current case in that the Commission found in each of those cases that the property to be served was, in fact, within Carolina Water's service territory by contiguous extension, the Commission's treatment of nearly identical contractual provisions is relevant. For example, in Currituck the Commission stated:

> The next question the Commission must resolve is the enforceability of that portion of the existing agreement between Outer Banks and Carolina Water providing that Outer Banks has the right to veto the use of the water production and sewer treatment facilities which it built for the Corolla Light area to serve anyone outside the existing Corolla Light area. Public utilities such as Carolina Water Service do not have an unfettered right to enter into contracts with other entities. Under clearly established North Carolina law, "[p]ublic utilities have the right to enter into contracts between themselves or with others, free from the control or supervision of the State, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties." Halifax Paper Company, Inc. v. Roanoke Rapids Sanitary District, 232 N.C. 421, 429, 61 S.E.2d 378 (1950). "The authority to regulate includes the prerogative to recognize private agreements that may have been entered into between parties with respect to the operation of a public utility, as such agreements may be 'in the interest of the public.'" In re Application of C & P Enterprises, Inc., 126 N.C. App. 495, 499, 486 S.E.2d 223 (1997), dis. rev. den., 347 N.C. 136, 492 S.E.2d 36 (1997). Although contracts between utilities and other entities "are enforceable in the courts" "[u]ntil abrogated or modified by the Commission," "the Commission is not required to recognize these private agreements and such contracts are subject to modification or abrogation upon a showing that the contracts do not serve the public welfare." [Id.] The parties do not contend that the Commission has previously approved the disputed provisions of the Agreement between Outer Banks and Carolina Water. As a result, the Commission has the authority to recognize, abrogate, or modify contracts between public utilities and other parties in order to protect the public interest. ...

> The Commission concludes that those portions of the existing Agreement between Outer Banks and Carolina Water which allow Outer Banks to control Carolina Water's provision of public utility service are contrary to the public interest and that the Agreement should be modified to eliminate Outer Banks' ability to control the performance of Carolina Water's utility functions. Outer Banks' existing contractual right to exercise control over Carolina Water's provision of water and sewer utility service creates a fundamental uncertainty in the availability of water and sewer service within the Corolla Light area. The record evidence indicates that Mr. Brindley had gone "back and forth" as to whether he would consent to the County's request for service to the restrooms. Mr. Brindley acknowledged this, testifying that he changed his mind after the County refused to sign the agreement proposed by Outer Banks. The evidence further shows that while Outer Banks has, in the past, consented to Carolina Water serving the 11 residential lots laid out on the Whalehead Club property, Mr. Brindley has now informed the County that he no longer consents to Carolina Water serving the lots still owned by the County. ...
>
> The Commission is even more concerned by the fact that this contractual provision interferes with Carolina Water's ability to carry out its public utility functions. The ultimate duty of a public utility is to provide adequate service to the public within its franchised service territory. The provisions of the Agreement, which deprive Carolina Water of complete control over the provision of water and sewer utility service within its franchised service territory, allow developers such as Outer Banks the ability to influence the extent to which utility service that would otherwise foster the public interest ought to be provided within the certificated utility's franchised service territory. Such a result is clearly not conducive to the provision of efficient utility service. As a result, the Commission concludes that the provisions of the existing Agreement between Outer Banks and Carolina Water which deprive Carolina Water of the right to control the provision of water and sewer service within its franchised service territory are not in the public interest and that the Agreement ought to be modified to eliminate any opportunity for Outer Banks to exercise unilateral control over the provision of service in the relevant portions of Carolina Water's franchised service territory.

Therefore, although Currituck is distinguishable in that Carolina Water had already undertaken a contiguous extension prior to the Commission's order, the policy considerations are equally applicable here. In fact, were Carolina Water to still desire to extend service to the Stonebridge development, the distinctions drawn between this case, Currituck, and Ocean Club would be practically eliminated. For example, in this case, as in Currituck, HECL first gave its consent for Carolina Water to use the wastewater facilities to serve the Stonebridge development and then withdrew its consent. Such "back and forth" has "create[d] a fundamental uncertainty in the availability of water and sewer service within the [Hound Ears] area." Moreover, "this contractual provision interferes with Carolina Water's ability to carry out its public utility functions" and "is clearly not conducive to the provision of efficient utility service." Were Carolina Water to choose to serve the Stonebridge development and were there capacity available in the Hound Ears system (see discussion below), the contractual provision at issue would frustrate Carolina Water's efforts to utilize its utility facilities in the most efficient manner for the benefit of all of its customers. Nor is the Hearing Examiner persuaded by Carolina Water's argument that such provisions are necessary to enable the utility to provide service without the necessity of making extensive investments in rate base water production and wastewater treatment assets. As discussed further below and addressed in Currituck and Ocean Club, the Commission's rules concerning the extension of water and sewer service adequately provide protection for developers and the investment they make in public utility facilities installed to serve lots within their developments. Thus, having concluded that the Stonebridge development is not currently within Carolina Water's Hound Ears service area, the Hearing Examiner nevertheless further concludes that the provision within the 1986 Purchase

Agreement that allows Hound Ears to exercise control over Carolina Water's use of its utility facilities is contrary to the public interest and unenforceable.

Extension of Service Under G.S. 62-42(a)

The Hearing Examiner notes that the final analysis required in this case continues to lead us further from the precedent established in Currituck and Ocean Club, where the Commission concluded that the complainants' properties were within Carolina Water's service area and that Carolina Water, therefore, had an obligation to provide service under reasonable terms and conditions. However, the Hearing Examiner must consider as a third issue in this case whether Carolina Water is nevertheless required to extend service to Dr. Gersing's property under G.S. 62-42(a).[1]

First, the decision whether to serve property outside of a water or sewer utility's franchised service territory has historically been one left to the utility. As the Public Staff states, no authority has been cited in this case for the proposition that an unwilling utility may be compelled to extend service beyond its franchised service area. Carolina Water, in addition, argues that it cannot be forced to provide service through contiguous extension: "Unless acreage is within the boundaries of the franchised service territory, the certified public utility bears no responsibility to extend its facilities into new areas outside of the boundaries." On February 17, 2004, however, the Commission pursuant to G.S. 62-42(a)[2] ordered the water utility in Mountain Acreage to seek approval from DENR to extend service to a subdivided lot located within the development served by the utility but not contemplated within the utility's existing DENR permit. In Mountain Acreage, the Commission stated:

> In this case, Dr. Carlson has filed a complaint with the Commission asking that the Respondent be required to provide water utility service to Lot 5A. [The Public Water Supply Section (PWSS) of DENR] has approved the water system for only 35 lots configured as shown in the revised subdivision plan on file with the PWSS under serial number 97-13599, and Lot 5A is in addition to the 35 lots approved by the PWSS. Nevertheless, the evidence in this case indicates that the current water system likely has capacity to serve in excess of 35 lots and that water distribution facilities have been installed adjacent to Lot 5A. Therefore, the Commission concludes that Lot 5A may reasonably be served and that good cause therefore exists, pursuant to G.S. 62-42(a), to require the Respondent public utility to petition the PWSS for approval to serve Lot 5A. The Commission is of the opinion that the water system likely has sufficient capacity to serve Lot 5A without jeopardizing the ability of the

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[1] Whether Carolina Water elects to honor its commitments made in the 1999 Service Agreement in light of the outcome of the Superior Court litigation is a matter between Carolina Water and Dr. Gersing and is not an issue required to be decided in this case.

[2] Section (a) of G.S. 62-42, entitled "Compelling efficient service, extensions of services and facilities, additions and improvements," provides, in part:

> (a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:
>
> (1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or
>
> (2) That persons are not served who may reasonably be served, or
>
> (3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or
>
> (4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or
>
> (5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity,
>
> the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order.

system to serve the existing 35 lots and without further expansion of the system. Nor is there any indication that serving Lot 5A will create a public health or safety risk. Because Lot 5A is wholly within the Cowee Mountain Subdivision, it is equitable and fair to require the Respondent public utility to make service available so long as such service can be accomplished on a reasonable basis, that does not jeopardize service to the other 35 lots, through a petition filed with PWSS seeking the necessary approval and authority to provide such service.

After carefully considering this recent case, the Hearing Examiner concludes that it is distinguishable in a number of significant respects from the current case. For example, the Commission in Mountain Acreage did not order the utility to extend service from an existing subdivision to an adjacent new development. Rather, the lot ordered to be served in Mountain Acreage was newly formed within the subdivision and had no other alternative, including a private well, for obtaining water except from the utility. In addition, the evidence in Mountain Acreage tended to show that the utility system had sufficient capacity to accommodate all planned lots at full buildout as well as the new subdivided lot. As discussed more fully below, there is considerable disagreement in the current case as to whether the wastewater treatment plant serving Hound Ears has any capacity available beyond that needed for full buildout in the Hound Ears development. Thus, the Hearing Examiner concludes that the Commission's decision in Mountain Acreage does not support a requirement that Carolina Water extend service to Dr. Gersing's Stonebridge development pursuant to G.S. 62-42(a).

However, the requirement in Mountain Acreage that the utility extend service under G.S. 62-42(a) based on the fact that the existing facilities appeared to have sufficient capacity in excess of that required for full buildout raises an additional question relevant in the current case that was also previously addressed by the Commission in Currituck: whether the Complainants may utilize at this time the capacity in the wastewater treatment plant which is in excess of the current needs of the Hound Ears development. In Currituck, the parties agreed that there was unused capacity in the existing utility facilities "for the immediate future," but disagreed about whether the facilities were adequate to serve all prospective customers in the original development at full buildout plus the future planned needs of the complainant's property. In resolving this issue, "the extent to which the County should be allowed access to existing water production and wastewater treatment facilities for purposes of serving the [its] tract regardless of the impact of such a decision on Carolina Water's ability to serve Corolla Light at full buildout," the Commission stated:

> The general principle which underlies this Commission's decisions concerning the responsibility for the construction of water production and sewage treatment facilities over the past two decades is relatively clear. As was noted by Carolina Water, the Commission has consistently indicated its belief that developers should be responsible for the construction of the necessary facilities, which should, upon completion, be turned over to and operated by the utility. The advantage of this approach is that it minimizes both the size of the utility's rate base and significantly reduces the risk that utilities would become involved in the construction of excess capacity. A clear corollary to this general principle is that every developer required to construct water production and wastewater treatment facilities for subsequent ownership and operation by a utility should be responsible for providing sufficient capacity to serve its own customers or its own needs and not those of another developer. Put another way, the Commission does not believe that it is "reasonable" for purposes of G.S. 62-42 and the Commission's service extension rules for one developer to be required to construct water production and wastewater treatment facilities which are then made available to another developer where there is some risk that sufficient capacity will not be available to serve the original developer's customers at full buildout. As a result, the Commission concludes that it is not reasonable for the County to obtain access to the existing water production and sewage

treatment facilities constructed by Outer Banks and operated by Carolina Water in the event that those facilities may be inadequate to serve Corolla Light at full buildout. Such a result would require the earlier developer to provide facilities for the use of another at the risk of being unable to ensure the provision of adequate service to its own customers.

Evidence in the current case similarly suggests that while there may currently be excess capacity available in the Hound Ears wastewater treatment plant, the capacity of the plant is not adequate to serve all prospective customers in the Hound Ears development plus the future planned needs of Dr. Gersing's property. Witnesses for Hound Ears testified that as new owners, they are looking to improve the utility infrastructure and develop the remaining undeveloped property within the development. Projections of the future needs under the new owner's plans indicate that the existing wastewater treatment plant may not even be sufficient to serve the Hound Ears development at full buildout. Witnesses for Hound Ears also pointed out that many of the septic tanks serving lots within the Hound Ears development are 30 to 40 years old and potentially subject to failure. Thus, with approximately 185 homes currently connected to the sewer system, the approximately 200 single-family connections which remain available at state design flow levels are approximately 47 connections short of that needed to accommodate even the existing homes in the Hound Ears development if they were all connected to the sewer system – and substantially less than that required under the plans proposed for full buildout of the Hound Ears development. Given the amount of undeveloped land remaining in the Hound Ears development, the apparent eagerness of the new owners to improve and expand the development, and the likelihood that a number of homes now served by aging septic tanks may need to be connected to the wastewater system, the Hearing Examiner finds that it is not unreasonable to assume that the Hound Ears development will utilize the entire 140,000 gpd capacity of the existing wastewater treatment plant at full buildout. Thus, unlike in Mountain Acreage, where the Commission found that the existing system appeared to have sufficient capacity to serve all of the utility's prospective customers plus one more, the Hearing Examiner concludes that Carolina Water should not be required under G.S. 62-42(a) to serve the Stonebridge development using the apparently fully committed wastewater treatment facility in the Hound Ears development.

Finally, the Hearing Examiner notes that the Complainants rely, in part, on Carolina Water's assertion that there is sufficient capacity to serve both the Hound Ears and Stonebridge developments. This assertion was disputed by witnesses for Hound Ears, however. In addition, the Hearing Examiner notes that Carolina Water's position is that its statements were made with the assumption that HECL had determined in granting its consent that there would be adequate wastewater treatment capacity. The Hearing Examiner concludes that the Complainants' argument is circular in that there is no basis for Carolina Water's assertion without HECL's consent, an issue that was litigated in Watauga Superior Court. Carolina Water's statements, therefore, are insufficient to support a finding that excess capacity exists in the wastewater treatment plant beyond full buildout of the Hound Ears development which must be made available for Dr. Gersing's use.

IT IS, THEREFORE, ORDERED as follows:

1. That Dr. Gersing's Stonebridge development is not a part of Carolina Water's Hound Ears franchised service territory.

2. That Article V, Section 1 of the 1986 Purchase Agreement, which allows Hound Ears to determine the extent to which Carolina Water is allowed to extend service to others using the utility facilities serving the Hound Ears development, is not in the public interest and, therefore, is deemed unenforceable.

3. That Carolina Water shall not be required to extend service to the Stonebridge development pursuant to G.S. 62-42(a).

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of February, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

rw022604.01

DOCKET NO. W-354, SUB 257

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Dr. Albert Gersing, M.D. and Shull's Mill Properties, Inc., c/o Stephen L. Palmer, Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., Post Office Drawer 1470, Hickory, North Carolina 28603, Complainants	)	ERRATA ORDER
v.	)	
Carolina Water Service, Inc. of North Carolina, Respondent	)	

BY THE HEARING EXAMINER: It has come to the attention of the Hearing Examiner that in the official copy of the Recommended Order On Complaint issued on February 26, 2004, and mailed to the parties, a line of text was inadvertently omitted between pages 8 and 9.

The Hearing Examiner, therefore, finds good cause to issue this errata order correcting the apparent sentence beginning at the bottom of page 8 with "For this reason" and ending at the top of page 9 with "on reasonable terms" with the following two sentences:

> For this reason, Carolina Water agreed to the consent provision in the 1986 Purchase Agreement. Were Carolina Water unwilling to make this commitment, developers would be unwilling to contribute facilities to Carolina Water on reasonable terms.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 1st day of March, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Ah030104.01

DOCKET NO. W-354, SUB 171
DOCKET NO. W-354, SUB 256

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Notification by Carolina Water Service, Inc. of North Carolina, to Begin Operations in an Area Contiguous to Present Service Area Providing Sewer Utility Service in Covington Cross Subdivision, Phases 1 and 2, in Wake County, North Carolina, and for Approval of Rates and Carolyn Okoroji, 203 Aqua Marine Lane, Knightdale, North Carolina 27545, Complainant v. Carolina Water Service, Inc. of North Carolina, Respondent	)	ORDER ON MOTION FOR SURCHARGES

BY THE COMMISSION: Docket No. W-354, Sub 171 originated as a notice by Carolina Water Service, Inc. of North Carolina (CWS) of its intent to begin operations in a contiguous area. For present purposes, the pertinent history began on June 18, 2001, when the Commission entered an Order Requiring Bond and Requiring Refunds in Sub 171 (the June 18 Order). The June 18 Order required that "all gross-up collected by [CWS] on CIAC received after June 12, 1996, shall be refunded to the current property owner, with 10% interest compounded annually." (Emphasis added.) CWS moved for reconsideration, arguing that such refunds would be a windfall to property owners and that CWS should be allowed to retain the funds as CIAC. The Commission denied reconsideration by an order issued on February 27, 2002, and the Commission again ordered that the refunds be made "to the current owner."

CWS subsequently filed a refund plan on March 19, 2002. In a cover letter accompanying this filing, CWS stated that the refunds would be made "to the current customer." The Public Staff recommended that the Commission approve the plan. On April 19, 2002, the Commission issued an Order Approving Refund Plan (the April 19 Order). The April 19 Order did not note the fact that the plan provided for refunds to "customers" rather than "the current property owner."

Soon thereafter, property owner Carolyn Okoroji filed a complaint in Docket No. W-354, Sub 256, complaining that she had been denied her refund in Sub 171 and that CWS had erroneously given the refund to the CWS customer who was renting her property. The Commission scheduled an oral argument on the issue of whether CWS had complied with the Commission's orders. At oral argument, CWS once again disagreed with the decision to require refunds to property owners, describing that as "bad public policy" and "sort of a silly way to do business...." The Public Staff conceded that it had not caught the discrepancy in the refund plan filed by CWS, noting that it was stated in only one sentence in a cover letter. A Commission-order investigation revealed four instances where the property owner was different from the CWS customer who had been given a refund.

On August 20, 2003, the Commission issued its Order Consolidating Dockets and Requiring Refund (the August 2003 Order). That Order modified the refund plan to make it consistent with the June 18 Order and the order denying reconsideration. The August 20 Order specifically required CWS to make refunds to four property owners who should have received a refund under the previous orders but had not in fact received their refund because CWS sent refunds to customers instead of property owners. This Order included the following provisions:

Both the June 18 Order and the order denying reconsideration required that refunds be made "to the current property owner." If Carolina Water was confused as to provisions of these orders, the proper course of action was to file a motion for clarification. If Carolina Water disagreed with the provisions of these orders, the proper course of action was to file a new motion for reconsideration or to appeal. Instead, Carolina Water submitted a refund plan that provided for refunds to customers, rather than property owners, because it had a customer list at hand. Doubtless, Carolina Water found it easy to use its customer list for refunds, but convenience does not excuse non-compliance with the Commission's orders.

.... From the Commission's own records, it is apparent that Carolina Water chose to pursue a refund plan different from that ordered by the Commission and that Carolina Water's refund plan deviated from the Commission's orders requiring refunds to the current property owners in the Covington Cross Subdivision. ....

Carolina Water relies upon the Commission's April 19 Order approving the refund plan as submitted. .... The April 19 Order approved the refund plan, with one modification as to computation of interest, but the Commission did not thereby intend to change its original decision that refunds should be made to current property owners.

The issue of who should receive these refunds had been thoroughly litigated, and if the Commission had wanted to change its decision, it would have discussed and given reasons for such a change. The Commission had every reason to expect that any proposed change in the basic terms of the refund obligation as specified by the June 18 Order and the order denying reconsideration would be pointed out and argued by either Carolina Water or the Public Staff, or both. The Commission acted in reliance upon this expectation and did not note or intend to approve any change in the intended recipients of the refunds. To the extent the April 19 Order approved a refund to customers rather than to current property owners, the order was based on an error, and the terms of the June 18 Order and the order denying reconsideration will be enforced instead. Cf. State ex rel. Utilities Comm. v. Norfolk Southern Railway, 249 NC 477, 106 S.E.2d 681 (1959).

....

Any claim or remedy that Carolina Water may choose to pursue in order to recover refund payments made to the customers who were not current owners of property in the Covington Cross Subdivision is solely within the discretion of Carolina Water.

Motion for Surcharges and Responses

On October 28, 2003, CWS filed a Response to Order and Motion for Authorization to Recoup Misdirected Refunds. CWS asks the Commission to allow it to recover the refunds that it "improvidently" misdirected to four customers by imposing a monthly surcharge, spread out over 12 months, on the bills of those who are still CWS customers. Three of the four are still customers of CWS. The current customers and the proposed monthly surcharges are as follows: $100.59 for Bonita Davis, $90.17 for Sharil Hinnant, and $92.01 for Kalisha Thomas. As to the requirement that CWS make new refunds to four property owners, CWS reported that it had made refunds to two but had been unable to obtain addresses for the other two.

The Commission issued an order on November 13, 2003, providing notice of the motion to the customers upon whom the surcharges would be imposed and requiring CWS to report in detail on its efforts to locate the two property owners who had not been given refunds as required by the Commission's orders.

No customer filed a response. The Attorney General (AG) and Public Staff filed responses on December 5, 2003, and CWS filed a reply on January 6, 2004.

The AG's response argued three points. First, the AG says that CWS should not be allowed to surcharge a customer until the corresponding property owner has been located and given his refund. The AG contends that, until then, CWS "has not suffered any detriment that entitles it to surcharge..." Second, the AG says that CWS should not be allowed to surcharge any of the customers unless the Commission is satisfied that it is equitable to require the customers to repay the refunds that CWS sent them. The AG argues that CWS should have the burden of showing that the customers had no reasonable basis for believing that they were entitled to the monies sent to them. The AG wants the Commission to inquire into any statements or information made by CWS when it delivered the refunds to the customers and "[i]f the Commission finds that CWS provided any information which would lead the customers to believe that the refunds were sent to them in compliance with an order of the Commission, then it would be inequitable for CWS to recover the refunds by way of a surcharge on the customers' utility bills." Third, the AG says that if a surcharge is allowed, CWS should not be permitted to charge any interest or late fee, or to terminate utility service due to a customer's failure to pay the surcharge, and that this should be stated prominently on a notice and on each monthly bill.

The Public Staff agrees with the AG. The Public Staff also argues that if CWS cannot find the two remaining property owners who are entitled to refunds by December 1, 2004, the Commission should require CWS to treat any unmade refund amounts as cost-free capital.

CWS replies to the AG's arguments, agreeing with the first point and disagreeing with the second and third. CWS argues that the burden of proof advocated by the AG is unrealistic and inequitable. CWS states that it told the customers that the refunds were being made pursuant to a Commission order and that it could not simply send a check without any explanation. CWS objects to the proposed bar to termination of service for non-payment and says that "without the threat of an enforcement mechanism," the surcharge would be unenforceable and repayment would be voluntary. In its reply, CWS gives more details on its efforts to find the two property owners who have not yet been sent refunds. CWS now says that, upon information and belief, one of the remaining property owners lives with one of the customers who was given a refund. CWS says that this refund was therefore made "to the correct household" and that no further refund or surcharge is necessary as to this property.

Conclusions

There is an initial question as to whether the Commission has authority to grant the request for surcharges. The request does not involve a billing dispute or correction of a billing error,[1] and the proposed surcharges are not charges for utility service to the customers. An order authorizing surcharges would amount to a decision that these customers have been unjustly enriched and must return the enrichment. Such an order would be equivalent to an award of monetary damages against the customers and in favor of the utility, and the Commission has consistently held that it has no jurisdiction to award compensatory damages or render a judgment for the payment of money. See State ex rel. Corporation Comm. v. Southern Railway, 147 NC 483, 61 SE 271 (1908).

In the alternative, assuming that the Commission has jurisdiction, the motion is clearly one within the discretion of the Commission to allow or deny. CWS argues that surcharges would be "an equitable mechanism..." The Commission disagrees, and the motion is denied in our discretion for the following reasons:

First there is the history to consider. CWS refers to the refunds made to customers as refunds "that the Commission subsequently has ruled were made to the wrong recipients," but that is not the

[1] The refunds to customers were made by check; they were not made by credits on the utility bills.

full story. Before these refunds were made, the Commission entered two orders directing that they be made to property owners. There had been a clear focus and argument on whether property owners should get the refunds, the issue had been decided, and CWS could not have misunderstood the decision. Despite that, CWS chose to give the refunds to customers. CWS refers to the refunds to customers as "misdirected," and that is a very appropriate description.

Second, although the Commission's April 19 Order approved the plan to give the refunds to customers, that approval was entered by mistake and CWS was largely responsible for that mistake. CWS did not follow proper procedures for contesting the Commission's decision to give refunds to property owners. CWS did not move for reconsideration or appeal. CWS instead filed a refund plan that deviated from the Commission's orders, and CWS made only passing mention of the deviation in a cover letter. Based upon the usual practice and courtesy observed before the Commission, the Commission had every reason to expect that such a material deviation from its orders would be pointed out as such and argued. Given the manner in which CWS proceeded, the Commission's April 19 Order, entered by mistake, provides CWS no basis now to invoke the discretion of the Commission in its collection efforts.

Third, an order allowing surcharges would reward CWS for its conduct. Such an order would send the wrong message to other parties as to the level of conduct expected in their practice before the Commission.

Fourth, CWS has other remedies to recover the misdirected refunds and those other remedies are more appropriate. CWS can pursue a court action to recover the refunds from customers, just like any other party who sends money to the wrong person. By seeking surcharges, CWS is trying to short-circuit the courts and to use the Commission to recover the misdirected refunds without ever obtaining a judgment. CWS effectively seeks an adjudication that these customers have been unjustly enriched and must return the enrichment, but such an adjudication should be made by the courts. CWS should not be allowed to circumvent the courts and the rights and safeguards that they afford litigants. If a utility had a dispute with one of its vendors that was unrelated to the utility's regulated service to the vendor, the Commission would never allow the utility to surcharge the vendor's utility bill to collect, and the Commission should not allow itself to be used as a collection agent -- without any court action or judgment -- in this case, either.

Fifth, use of the utility bill gives CWS unique leverage in its collection efforts. The presence of the charge on the utility bill, month after month, would essentially establish the debt (again, without a proper judgment ever being entered) and put pressure on the customer to pay. Even if disconnection of utility service for non-payment is disallowed, CWS would presumably feel free to use other collection procedures.

Sixth, the misdirected refunds cannot be considered regulated charges. Proper refunds made to the property owners as ordered by the Commission are regulated charges, but the misdirected refunds are not. Although some non-regulated charges are allowed on utility bills (see, e.g., Commission Rule R12-17), this is a matter within the authority of the Commission and, for all of the reasons stated herein, the Commission will not exercise its discretion to allow these proposed surcharges on the utility bill.

Turning to another matter, the Commission does not agree with CWS's position that in one case the refund it made to a customer is sufficient to satisfy its obligation to make a refund to the owner of the property where the customer lives. CWS says that it believes that the customer and property owner live at the same address, but CWS does not allege anything about the relationship between these two people, and it does not follow, without more, that a check made to one person is sufficient to satisfy a debt to another person just because the two people may live at the same address. This argument suggests that, despite all of the orders herein, CWS is still resisting the refund requirement ordered by the Commission. The Commission has not ordered refunds to certain

addresses or households anymore than it has ordered refunds to customers. The requirement is that CWS make refunds to property owners.

Finally, the cost-free capital issue raised by the Public Staff is premature since it is not yet certain that there will be unmade refunds. CWS has a continuing responsibility to find and make the refunds to property owners as ordered by the Commission. The Commission requires CWS to continue its efforts and to file a further report when the proper refunds are completed or by December 31, 2004, whichever comes first. The cost-free capital issue may be renewed at the end of 2004, if appropriate.

IT IS, THEREFORE, ORDERED as follows:

1. That the Motion for Authorization to Recoup Misdirected Refunds filed by CWS on October 28, 2003, should be, and hereby is, denied;

2. That CWS shall continue its efforts to make the refunds as ordered by the Commission in its August 20, 2003 Order Consolidating Dockets and Requiring Refunds; and

3. That CWS shall file a further report herein when the proper refunds are completed or by December 31, 2004, whichever comes first.

ISSUED BY ORDER OF THE COMMISSION.
This the 19th day of March, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

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Commissioner Sam J. Ervin, IV dissents.
Commissioner Robert V. Owens, Jr., did not participate.

DOCKET NO. W-354, SUB 171
DOCKET NO. W-354, SUB 256

COMMISSIONER SAM J. ERVIN, IV, CONCURRING IN PART AND DISSENTING IN PART: Although I agree with the Commission's decision (1) to reject CWS's contention that "the refund made to a customer is sufficient to satisfy its obligation to make a refund to the owner of the property" in the event that the "the customer and the property owner live at the same address" given the absence of any information "about the relationship between these two people" and (2) to defer deciding "the cost-free capital issue raised by the Public Staff" on the grounds that making such a decision would be "premature" [Order, p. 6], I am unable to concur in the remainder of the Commission's order, which totally rejects the imposition of any surcharge upon those who received "misdirected" refunds from CWS. I believe that a proper outcome requires a balancing analysis that considers the interest of CWS in recouping the "misdirected" refunds, the interest of the affected customers in avoiding undue economic hardship, and the nature of CWS's conduct. After undertaking such an analysis, I believe that the Commission should authorize CWS to recoup the "misdirected" refunds, which were erroneously paid to certain customers under a Commission-approved refund plan. On the other hand, I believe that the amount of the monthly surcharge that CWS seeks to collect from the affected customers is excessive. In addition, I agree with the Commission that some allowance should be made to reflect the history of this proceeding. As a result, while I would not grant the relief requested in CWS's original motion, I would allow a surcharge to be imposed over a different period of time than that suggested by CWS subject to certain appropriate terms and conditions and respectfully dissent from the Commission's complete rejection of CWS's request to surcharge those customers who received "misdirected' refunds.

The initial question raised by the majority's decision is the extent to which the Commission has the authority to grant the relief requested by CWS at all. [Order, p. 4]. According to well-established precedent, the Commission is a creation of the General Assembly and has no authority except that granted by the legislature. State ex rel. Utilities Commission v. Southern Bell Telephone and Telegraph Company, 307 N.C. 541, 299 S.E.2d 763 (1983). The General Assembly has, however, granted the Commission broad authority to compel regulated utilities to operate in accordance with the policies embodied in the Public Utilities Act. State ex rel. Utilities Commission v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), mod. and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987). The scope and extent of the Commission's authority depends upon whether the matter in controversy involves the performance of a public utility function rather than whether the entity involved in the controversy is a public utility. State ex rel. Utilities Commission v. Southern Bell Telephone and Telegraph Company, 326 N.C. 522, 391 S.E.2d 487 (1990). After reviewing the relevant statutory provisions, I do not share the majority's doubts about the Commission's authority to consider the merits of CWS's proposal.

The Commission questions whether it "has authority to grant the request for surcharges" on the grounds that the "request does not involve a billing dispute or correction of a billing error" and that "the proposed surcharges are not charges for utility service to the customers." [Order, p. 4].[1] The majority cites no authority to support its implicit conclusion that the Commission's ability to impose surcharges is limited to instances involving billing disputes or the correction of billing errors, and I know of none. In addition, the monies at issue here, while not direct charges for utility service, are intimately related to payments made in return for the right to connect to CWS's sewer system. As a result, neither of the justifications cited in support of this portion of the Commission's decision seem persuasive. On the contrary, allowing a surcharge of the type requested by CWS strikes me as an appropriate exercise of the Commission's supervisory jurisdiction over utility rates given the specific facts and circumstances at issue here.

The factual background underlying the present controversy is not stated in the Commission's order in any detailed manner, although it certainly appears in earlier filings by the parties in this proceeding. As always, a correct understanding of the relevant factual background is important to an evaluation of the correctness of the Commission's decision. After the enactment of the Tax Reform Act of 1986, the Commission required water and sewer utilities to use the full gross-up method in connection with amounts collected as contributions in aide of construction. [Comments of the Public Staff, p. 5]. CWS entered into a contract with Southern Gent Development on January 6, 1994, relating to the provision of sewer service in Covington Cross that provided for a $1,795 connection fee. [Comments of the Public Staff, p. 2]. A data request response provided by CWS to the Public Staff indicated that the Covington Cross connection fee included a uniform connection charge of $100, a uniform plant modification fee of $1,000, and $695 in gross-up. [Comments of the Public Staff, p. 2]. After the enactment of the Small Business Job Protection Act of 1996 restored the pre-1986 tax treatment of CIAC, the Commission ordered all water and sewer companies to cease collecting gross-up on connection fees received after June 12, 1996; required that any gross-up collected after June 12, 1996, be refunded to the contributor; and mandated that a notarized statement

[1] Although the present situation may not directly involve a billing error, it does involve the "misdirection" of Commission-ordered refunds to individuals not entitled to receive them. As a result, the present situation does involve an instance in which a Commission-ordered payment was made to the wrong person, a fact pattern that closely resembles a billing error. A billing error could, for example, involve undercharging customers because of the use of an erroneously low rate. In that event, the customer winds up with more money in his or her possession than would have been the case had the Commission's rules or the utility's Commission-approved tariffs been properly applied. "Most courts hold that a mistake in a bill for the amount of service, furnished by a public utility company, such as an electric company, does not preclude a recovery for a larger amount actually furnished." 64 Am Jur. 2d, Public Utilities § 57 (1992). I am not, in all candor, able to arrive at a principled distinction between a billing error of this nature and the situation at issue here. Thus, the Commission's claim that a surcharge might not be appropriate in this instance because no billing error is involved rests upon a distinction that does not involve a material difference.

of refunds made be filed within 60 days. [Comments of the Public Staff, p. 5]. CWS did not cease collecting the gross-up amount in Covington Cross and never filed the required refund statement. [Comments of the Public Staff, p. 5]. After the filing of comments and other proceedings following CWS's failure to comply with this requirement, the Commission ultimately issued an Order Requiring Bond And Requiring Refunds on June 18, 2001 (the June 18, 2001, order), that recognized CWS's contiguous extension into Covington Cross; ordered "[t]hat all gross-up collected by CWS on CIAC received after June 12, 1996, shall be refunded to the current property owner, with 10% interest compounded annually"; and instructed CWS to cease charging a grossed-up connection fee. [June 18, 2001, order, p. 4]. The present controversy stems from the manner in which CWS complied with the refund provisions of the June 18, 2001, order.[1]

The Commission has supervisory authority over public utility "rates." G.S. 62-32. According to G.S. 62-3(24), the term "rate" means "every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service[,] product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification." The original gross-up amount collected by CWS in Covington Cross unquestionably involved a "rate" as defined in G.S. 62-3(24), since those monies constituted a "charge" "collected" by a public utility that allowed the affected property to be connected to CWS's system and receive sewer service. As a result, given its status as a "rate," the Commission clearly has jurisdiction over the gross-up amount at issue in the June 18, 2001, order.

Among its other statutory obligations, the Commission is required to ensure that rates "shall be just and reasonable," G.S. 62-131(a), and that "any rate charged by any public utility different from those . . . established [by the Commission] shall be deemed unjust and unreasonable." G.S. 62-132. "Whenever the Commission . . . finds that the existing rates in effect and collected by any public utility are unjust, unreasonable, insufficient or discriminatory, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force." G.S. 62-136(a). "No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by any public utility than prescribed by the Commission, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed by the Commission." G.S. 62-139(a). In the event that "the Commission shall find that the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission may enter an order awarding such petitioner and all other persons in the same class a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the Commission to be just and reasonable, nondiscriminatory and nonpreferential, to the extent that such rates or charges were collected within two years prior to the filing of such petition." G.S. 62-132.[2] The Commission clearly held in the July 18, 2001, order that the gross-up amount collected by CWS in Covington Cross after July 12, 1996, constituted a "charge" "collected" by a public utility other than a "rate[] established by the Commission" and that this "rate" was "unjust

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[1] As the majority notes, CWS unsuccessfully sought reconsideration of the June 18, 2001, order on the grounds that the required refunds should be paid to current customers rather than to current property owners. [Order, p. 1]. Thus, there can be no doubt about the Commission's intentions with respect to the identity of the recipients of the refunds required by the June 18, 2001, order.

[2] G.S. 62-132 uses the word "petitioner" rather than the word "customer" or "ratepayer" in describing the persons or entities entitled to invoke the Commission's authority to rectify a problem resulting from the collection of rates other than those found to have been "just, reasonable, nondiscriminatory, and nonpreferential." The term "petitioner" would appear to be sufficiently broad to encompass any person injured by a violation of G.S. 62-132 or G.S. 62-139(a). Since a utility is capable of sustaining injury as the result of a violation of G.S. 62-132 or G.S. 62-139(a), the literal language of G.S. 62-132 suggests that a request for a surcharge in the event of an underbilling would be statutorily permissible.

and unreasonable" so that this gross-up amount was subject to refund pursuant to G.S. 62-132.[1] Assuming that the Commission had the authority to order refunds in this instance, then the existence of that authority would necessarily include the corollary right to ensure that the utility in question made the required refunds in a proper manner. Were that not the case, then the Commission also lacked the authority to correct the manner in which CWS complied with the refund requirements of the July 12, 2001, order by insisting that the refunds be made to property owners rather than customers in the August 20, 2003, Order Consolidating Dockets and Requiring Refund (the August 20, 2003, order). In the same vein, it appears to me that this implicit authority to ensure that a Commission-mandated refund obligation is carried out correctly includes both the authority to make sure that the appropriate individuals receive the correct refund amount and that no one receives a windfall due to an erroneously "misdirected" refund payment. A failure to recognize this right implies that the Commission lacks the authority to correct rate-related errors, a proposition that was squarely rejected in State ex rel. Utilities Commission v. Norfolk Southern Railway, 249 N.C. 477, 106 S.E.2d 681 (1959). As a result, I believe that G.S. 62-132 and G.S. 62-139(a) authorize the Commission to completely and fully correct an erroneous "misdirection" of properly-ordered refunds.

The Commission held in the August 20, 2003, order that CWS failed to comply with the Commission's initial refund order. As a result of this "misdirection" of the initial refund payments, certain individuals failed to receive refund payments to which they were entitled and others received refund payments to which they were not entitled. This "misdirection" clearly called for rectification. The Commission took the first step toward making matters right by ordering CWS to ensure that refunds were paid to the appropriate individuals. As the record reflects, I fully supported that decision. Unfortunately, the Commission now fails to complete the rectification process by establishing a procedure for CWS to collect a "just and reasonable" amount from those who inappropriately received "misdirected" refund payments. There is no principled difference between correcting a violation of G.S. 62-132 and G.S. 62-139(a) by requiring payment to an individual who should have received payment and did not get it and correcting a violation of G.S. 62-132 and G.S. 62-139(a) by requiring an individual who received payment in error to make repayment. If the Commission is unable to take the second of these two actions, it lacks the authority to take the first as well. As a result, I do not share the Commission's doubt that the duty to supervise the refund process under G.S. 62-132 and G.S. 62-139(a) incorporates complete authority to ensure that the refund process is conducted correctly, including both the right to require the payment of refunds to ratepayers who were improperly denied access to the money to which they were entitled and the right to surcharge ratepayers who improperly received refunds to which they were not entitled.

The Commission also expresses concern that granting a surcharge of the type requested by CWS "would be equivalent to an award of monetary damages against the customers and in favor of the utility, and that the Commission has consistently held that it has no jurisdiction to award compensatory damages or render a judgment for the payment of money." [Order, p. 4]. Although the Supreme Court of North Carolina clearly held in State ex rel. Corporation Commission v. Southern Railway Company, 147 N.C. 483, 489, 61 S.E. 271 (1908), that the "correct position" was that the Commission "has no power to render a judgment of the payment of money," "it is their duty to enforce their rules and orders. . . ." The scope of this limitation on the Commission's authority has never been clearly spelled out in the decisional law. Viewed logically, however, this limitation encompasses two distinct components, one procedural and one substantive. First, consistently with the actual holding in State ex rel. Corporation Commission v. Southern Railway Company, 147 N.C. 483, 61 S.E. 271 (1908), the Commission lacks the authority to directly enter a judgment requiring the payment of money enforceable through execution, supplemental proceedings, or some similar process. On the contrary, Commission orders requiring the payment of money are enforceable

[1] Although G.S. 62-132 includes a two year limitation on otherwise available refunds, CWS waived any right to rely on this limitation in the settlement agreement between the Company and the Public Staff memorialized in the June 23, 1997, letter from Edward S. Finley, Jr., to James D. Little attached as Exhibit A to the Comments of the Public Staff filed on January 5, 2001. As a result, consistent with its agreement with the Public Staff, CWS has never contended that the Commission lacked the authority to order the refunds in question on the basis of the two year limitation set out in G.S. 62-132. Instead, CWS simply contended that the Commission should not order these refunds on other grounds.

exclusively through actions in the Superior Court. G.S. 62-310; G.S. 62-312. As a result of the fact that CWS is not seeking a monetary judgment of the type described in State ex rel. Corporation Commission v. Southern Railway Company, 147 N.C. 483, 61 S.E. 271 (1908), the procedural component of this limitation on the Commission's authority poses no obstacle to the imposition of a surcharge of the type sought by CWS. Secondly, as a substantive matter, the Commission lacks the authority to adjudicate particular matters otherwise cognizable in the General Court of Justice simply because one of the parties to the dispute is a public utility. State ex rel. Utilities Commission v. Southern Bell Telephone and Telegraph Company, 326 N.C. 522, 391 S.E.2d 487 (1990). For example, the Public Utilities Act "does not confer upon the Utilities Commission jurisdiction to prevent or redress" a trespass to utility personal property. State ex rel. Utilities Commission v. National Merchandising Corporation, 288 N.C. 715, 725, 220 S.E.2d 304 (1975). Similarly, "[t]he present action, in so far as its purpose is to recover damages for injuries sustained and to restrain continuation of the wrongful act alleged in respect to the making and circulating of false statements as to plaintiff's business, undoubtedly presents matters beyond the power or jurisdiction of the Utilities Commission to afford adequate remedy." Burke Transit Company v. Queen City Coach Company, 228 N.C. 768, 773, 47 S.E.2d 297 (1984). The general principle embodied in these decisions is that "[a] public service commission does not have the power to adjudicate matters relating to damages for tortious acts on the part of a public utility . . . or for breach of contract." 73B C.J.S., Public Utilities § 66 (1983). Such liability, however, is not the sort of relief being requested here. CWS is not requesting the Commission to compensate it for a tort committed by a customer or to award compensatory damages for breach of contract such as those available through a civil action decided in the General Court of Justice. Instead, the Commission has been requested to adjust the "rates" paid by certain utility customers in order to permit the recoupment of "misdirected" refunds. The Commission does, in appropriate instances, have the authority to order the payment of money. State ex rel. Utilities Commission v. Thrifty Call, Inc., 154 N.C. App. 58, 571 S.E.2d 622 (2002), dis. rev. den., 357 N.C. 66, 579 S.E.2d 575 (2003) (interexchange carrier properly ordered to pay access charges owed to incumbent local exchange company under the latter's intrastate access tariff). See also: State ex rel. Utilities Commission v. Southern Bell Telephone and Telegraph Company, 88 N.C. App. 153, 363 S.E.2d 304 (1987) (requirement that interexchange carriers compensate incumbent local exchange companies for lost toll revenue not an impermissible award of damages). As I have previously demonstrated, the recoupment of "misdirected" refunds represents nothing more than an appropriate exercise of the Commission's authority to superintend a refund process instituted pursuant to G.S. 62-132 and G.S. 62-139(a). Thus, I do not share the Commission's concern that allowing the imposition of a surcharge like that proposed by CWS would amount to an impermissible award of compensatory damages.

After raising these two concerns, the Commission ultimately states that, "assuming that [it] has jurisdiction," the decision to grant or deny CWS's motion "is clearly one within the discretion of the Commission to allow." [Order, p. 4]. Although I would phrase the matter a bit differently, I essentially agree with the Commission's conclusion that the decision to grant or deny CWS's motion requires an exercise of the Commission's sound discretion.[1] In exercising its discretion, the Commission ultimately concludes that CWS's request should be rejected because it disregarded "two orders directing that [the refunds] be made to property owners" [Order, pp. 4-5]; that, while the Commission did "approve the plan to give the refunds to customers, that approval was entered by mistake and CWS was largely responsible for that mistake" [Order, p. 5]; that "an order allowing surcharges would reward CWS for its conduct," sending "the wrong message to other parties as to the level of conduct expected in their practice before the Commission" [Order, p. 5]; that "CWS has other remedies to recover the misdirected refunds," such as "a court action to recover the refunds from customers," which "are more appropriate" since the judicial branch would not allow CWS "to

[1] In view of my belief that the issue before the Commission is the proper manner in which to supervise a refund required by G.S. 62-132 and G.S. 62-139(a), it seems to me that the ultimate test to be applied in this instance is whether the rates paid by all persons are "just and reasonable." G.S. 62-131(a). Since there does not seem to be any more specific statutory standard for dealing with a situation like that before the Commission in this instance, I believe that, within limits, the decision that the Commission must make in light of CWS's motion essentially requires the making of a discretionary decision intended to ensure that all parties are treating "justly and reasonably." Thus, I do not seriously differ with the discretionary standard enunciated in the Commission's order.

circumvent . . . the rights and safeguards [that the courts] afford litigants" [Order, p. 5];[1] that "use of the utility bill gives CWS unique leverage in its collection efforts," "even if disconnection for non-payment is disallowed" [Order, p. 5]; and that "the misdirected refunds cannot be considered regulated charges" on the apparently contradictory grounds that proper refunds are regulated charges "but misdirected refunds are not." [Order, p. 5]. I do not believe that these arguments, taken individually or collectively, suffice to justify the complete rejection of CWS's request for a surcharge.

The Commission's initial arguments relate to CWS's failure to comply with the Commission's original refund orders. I must confess that my lack of enthusiasm for CWS's conduct strongly tempts me to join the majority's decision on the grounds that it works some sort of rough justice. After having been told on at least two occasions that the refunds should be made to the affected property owners instead of to current customers, CWS sought Commission approval for a refund plan that directly conflicted with the Commission's refund orders. Although the identity of the proposed recipients was disclosed in the cover letter that accompanied CWS's proposed refund plan, this deviation from the Commission's prior decisions was not highlighted or made the subject of a proper request for further reconsideration of the Commission's refund orders. I fully agree with the majority that, "[b]ased upon the usual practice and courtesy observed before the Commission, the Commission had every reason to expect that such a material deviation from its orders would be pointed out as such and argued" [Order, p. 5] and that "CWS did not follow proper procedures for contesting the Commission's decision to give refunds to property owners" by moving "for reconsideration" or noting an appeal. [Order, p. 5]. Although I share my colleagues' distaste for CWS's conduct, I do not believe that its actions justify a complete denial of CWS's request for a surcharge for two reasons. First, the Commission approved CWS's proposed refund plan. Although our mistake does not excuse the Company's conduct, the Commission had a chance to prevent this "misdirecting" of the required refunds and did not do so. As a result, at the time that it made the refund payments at issue here, CWS was acting in compliance with a Commission order, albeit one entered in error. Secondly, and more importantly, the Commission's decision allows certain individuals, who were clearly not entitled to refunds, to retain the money they received, providing an inappropriate windfall for those customers and effectively (and unfairly) requiring CWS to pay double refunds in some instances. As a result, while CWS's conduct is clearly relevant to the proper disposition of this matter and is reflected in the remedy that I have concluded is appropriate, I simply cannot agree with my colleagues that CWS's conduct justifies a complete refusal to allow any surcharge whatsoever.

The other arguments advanced by the majority do not justify the complete denial of CWS's motion either. As I demonstrated above, the Commission's conclusion that "misdirected" refunds "cannot be considered utility charges" is simply in error. The monies in question directly relate to payments made to ensure access to utility service and are "rates" subject to the Commission's jurisdiction. As has been previously indicated, I believe that the Commission has ample authority to supervise the implementation of a refund plan adopted pursuant to G.S. 62-132 and G.S. 62-139(a), with this authority including both the power to ensure that the right persons receive refunds and to ensure that no person receives and retains payment in error. In the event that the majority is correct in concluding that "misdirected" refunds paid to customers in error are not regulated charges, I have difficulty believing that we had the authority to order CWS to conform its refund plan to our prior orders and to require that CWS make additional refunds to the proper recipients. In other words, the Commission's authority works both ways rather than just one. As a result, contrary to the majority's

[1] The majority also argues in connection with this point that, "[i]f a utility had a dispute with one of its vendors that was unrelated to the utility's regulated service to the vendor, the Commission would never allow the utility to surcharge the vendor's utility bill to collect" the amount allegedly owed. [Order, p. 5]. The obvious flaw in this argument is that the amounts in question here, unlike the hypothetical debt mentioned in the Commission's example, arise directly from the provision of utility service to end-user customers and constitute "rates" subject to the Commission's regulatory jurisdiction.

conclusion, the Commission retains regulatory authority over the "misdirected" refunds paid to individuals that should not have received them.

The fact that remedies other than the proposed surcharge may be available to CWS does not, in my opinion, support a decision in favor of Commission inaction either. Although the Commission apparently thinks that CWS should seek redress from the courts, there is some risk that the judicial branch might hold that this dispute is within the exclusive jurisdiction of the Commission and refuse to provide CWS with any remedy.[1] Even if such a judicial remedy is available to CWS, requiring the Company to assert that remedy rather than seeking relief from the Commission provides the affected customers with limited additional protection. According to the Public Utilities Act, the Commission is required to act in the same general manner as a court in rendering its decisions. G.S. 62-60; G.S. 62-61; G.S. 62-63; G.S. 62-65; G.S. 62-71; G.S. 62-75; G.S. 62-78; G.S. 62-79.[2] Consistently with the relevant statutory requirements, the Commission has provided affected customers with notice of CWS's proposal and received extensive input from the Attorney General and the Public Staff, both of whom are statutorily charged with representing the using and consuming public. None of the affected customers have asked to be heard before the Commission in any way. Had any customer requested an evidentiary hearing or asked for any other procedural protections, the Commission would have undoubtedly given serious consideration to such a request. For that reason, I am simply unable to agree with the Commission that the affected customers would have received more significantly favorable treatment in the General Court of Justice than they have received here. In fact, I suspect that the affected customers are better off in this forum than they would be were they forced to defend against unjust enrichment actions brought by CWS in the General Court of Justice. Assuming that CWS initiated such litigation and prevailed, judgment would be rendered requiring the affected customers to pay the amount of the "misdirected" refunds plus interest in a lump sum. The entry of such a judgment would subject the customers' property to execution and adversely affect their credit ratings. In addition, the affected customers would have been required to pay for their own defenses rather than having the opportunity to rely on the effective advocacy of the Attorney General and the Public Staff. As a result, the Commission's reliance on the alleged availability of other remedies to justify inaction does not strike me as adequate justification for the majority's complete rejection of CWS's proposal.

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[1] As has been demonstrated at length above, the present issue ultimate revolves around the "justness and reasonableness" of CWS's rates. Ordinarily, the courts are not entitled to fix rates for a public utility. State ex rel. Utilities Commission v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972). The courts will not take original jurisdiction over matters confided to the Commission's exclusive jurisdiction. Atlantic Greyhound Corporation v. North Carolina Utilities Commission, 229 N.C. 31, 47 S.E.2d 473 (1948); Burke Transit Company v. Queen City Coach Company, 228 N.C. 768, 47 S.E.2d 297 (1948) ("However, in view of the comprehensive nature of the statutes creating and empowering the Utilities Commission, particularly in respect to the schedules and operation of motor buses on the highways and fares charged for the transportation of passengers, it would seem the plaintiff has ample remedy for its protection in these respects by complaint to the agency which the State has created for that purpose."). As a result, it is not at all clear to me that CWS has a judicial remedy in this instance.

[2] In fact, the only meaningful procedural protection utilized in the judicial system that is not available in Commission proceedings is the right to trial by jury. Although I would be the absolute last person on earth to denigrate the importance of the right to a jury trial, such trials are only available for the purpose of resolving factual disputes. Given that this situation does not appear to involve a significant factual controversy, it is not clear to me that a case between CWS and the affected customers revolving around the disputed refunds would ever come before a jury. Furthermore, the refund amounts at issue here are within the jurisdiction of the small claims court, in which magistrates rather than juries decide cases. Although a litigant can obtain a jury trial in an action initiated in small claims court by appealing from an adverse decision by the magistrate, exercising one's right to trial by jury in this instance involves considerable additional effort. As a result, it is not clear to me that there is a significant chance that any case arising from this particular controversy would ever come before a jury.

Finally, the fact that allowing the use of a surcharge set forth on a utility bill coupled with the right to assess late fees and disconnect service for nonpayment gives CWS "unique leverage" in its collection efforts does not support a refusal to approve any surcharge whatsoever.[1] As a regulated rate, any surcharge allowed by the Commission would have to appear on the bills CWS sends the affected customers. As CWS also notes, a failure to allow the assessment of late fees or disconnection for nonpayment removes any incentive for the affected customers to actually repay the "misdirected" refunds. The size and extent of the late payment fees that CWS is entitled to assess are regulated charges approved by the Commission and presumed to be "just and reasonable." G.S. 62-132. Although disconnection is clearly an extreme remedy, a number of Commission rules and regulations mitigate its severity. First, customers are entitled to notice prior to disconnection for nonpayment. In addition, the Consumer Services Division of the Public Staff is generally able to work out extended payment arrangements for those having trouble paying their bills. Furthermore, unlike the courts, the Commission has the discretion to structure any surcharge so as to minimize the likelihood of disconnection. Finally, as I pointed out in the preceding paragraph, the entry of a money judgment of the type apparently deemed more appropriate by the Commission subjects the customer to the hardships of the execution process and potential harm to his or her credit rating. The simple truth of the matter is that any remedy open to CWS to collect the "misdirected" refunds poses a risk of harm to the affected customer; the real question, which the Commission fails to directly address, is identifying the collection method that causes the least adverse impact to the affected customers. Thus, I do not believe that the availability of the right to include the surcharge amount on the customer's bill, to assess late payment fees, or to disconnect service for nonpayment justifies the issuance of an order totally banning a surcharge of any nature.

At bottom, the exercise of the Commission's discretion in determining the "justness and reasonableness" of the "rates" to be paid by the affected customers should be based upon all relevant facts and circumstances, including, but not limited to, the potential harm to CWS and the affected consumers from whatever outcome is deemed appropriate and the nature of the conduct which led to the "misdirection" of the refunds in question. In my mind, a proper evaluation of the relevant factors, some of which are discussed by the Commission and some of which the Commission barely mentions, requires a solution to the issues raised by CWS's request that falls somewhere in the middle between the position advocated by CWS and the position adopted by the Commission. Although the Commission makes much of the errors committed by CWS, it makes little mention of the harm done to CWS or the injustice that would result from allowing certain individuals to retain a windfall resulting from CWS's actions. In my opinion, all of these factors are entitled to some consideration in the ultimate balance, with the appropriate result being one in which CWS is given an opportunity to partially recoup the "misdirected" refunds without being fully made whole in recognition of its noncompliance with the Commission's refund order. A truly just result, in my opinion, would be one in which no customer is allowed to keep a windfall and in which CWS is not fully made whole for its loss. Such a balancing appropriately recognizes the nature of CWS's conduct, which the Commission fully considers, and the harm to CWS and the injustice of allowing the affected customers to retain the benefit of the windfall they received, neither of which merit much attention in the Commission's decision. As a result, rather than allowing CWS to collect the principal amount of the "misdirected" refunds over a single year, I would require the use of a five-year repayment period. In addition, I would deny CWS the right to collect any interest on the unpaid

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[1] Although there has been some suggestion that CWS should be prohibited from disconnecting service or charging interest or a late payment fee in the event that a customer fails to pay the surcharge amount in a timely manner, I am persuaded by CWS's argument that the imposition of such a limitation would virtually ensure nonpayment of the surcharge amount. Assuming that a surcharge is otherwise appropriate, CWS should not be prevented from collecting the surcharge amount from customers using the means ordinarily available for that purpose. As a result, I cannot agree with the Attorney General's suggestion that CWS should be prohibited from assessing interest or a late fee or disconnecting service for nonpayment in the event that a customer fails to pay the surcharge amount.

balance except as otherwise permitted by the Commission's rules as a remedy for late payment.[1] Finally, I would only allow CWS to collect such a surcharge on the express condition that it (1) not initiate any sort of civil litigation against those customers responsible for paying the surcharge unless and until they cease paying the monthly surcharge amount and that it (2) not make any adverse credit report to any credit reporting agency except in the event that the customer fails to pay the allowed surcharge amount in a timely manner. Such a result would, in my opinion, fairly balance the equities present here by allowing CWS to recoup a portion of the principal balance[2] while protecting the affected customers from the risk of being required to pay "unjust and unreasonable" rates. Any other result is unfair to CWS, potentially injurious to the relevant customers, and fails to accurately balance all competing considerations. As a result, I respectfully dissent from that portion of the Commission's decision that refuses to allow CWS to surcharge customers receiving "misdirected" refunds to which they were not entitled in the manner described above.[3]

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

DOCKET NO. W-354, SUB 236
DOCKET NO. W-354, SUB 262

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. W-354, SUB 236 In the Matter of Ocean Club Ventures, L.L.C., Complainant v. Carolina Water Service, Inc. of North Carolina, Respondent DOCKET NO. W-354, SUB 262 In the Matter of Gary W. Smith, 252 Indian Creek Drive, Mechanicsburg, Pennsylvania 17050 and James A. Stewart, 107 Angus Drive, Currituck, North Carolina 27929, Complainants v. Carolina Water Service, Inc. of North Carolina, Respondent	ORDER GRANTING MOTION TO RECONSIDER

[1] To be fair to CWS, I do not believe that it has sought to collect interest on the unpaid balances owed by the customers in question, since it made no mention collecting such interest in its motion requesting the right to impose the proposed surcharge.

[2] The Commission rightly expresses concern that CWS not be rewarded for its conduct. As a result of the fact that the remedy I believe to be appropriate would delay full principal repayment for five years and generally deny CWS the right to collect interest on the unpaid balance, adoption of my preferred approach would prevent CWS from recovering the full amount of the "misdirected" refunds due to the time value of money. That result would, it seems to me, discourage CWS from engaging in similar conduct in the future.

[3] The Attorney General also argues that CWS should not be allowed to collect any surcharge from the recipients of "misdirected" refunds in the absence of a showing that the recipients lacked a reasonable basis for believing that they were entitled to the payment in question. As a result of the fact that the payments in question were made pursuant to a Commission-approved refund plan, albeit one that the Commission approved in error, such a showing could never be made on the facts present here. Thus, the Attorney General's argument amounts to a claim that no surcharge should be authorized in this instance, a position with which I simply disagree for the reasons set forth above.

BY THE COMMISSION: On December 5, 2003, the Commission issued a Further Order on Complaints (December 5 Order) in the above-referenced dockets ordering Carolina Water Service, Inc. of North Carolina (Carolina Water) to

> immediately (1) rescind its letters to the County requesting that the building permits other than those issued to Landau, Galganski, and Bertocci be revoked, (2) reinstate the wastewater connection reservations for those lots in Monteray Shores and Buck Island for which non-"dry" building permits have been issued and for which the lot owners began construction prior to their permit's revocation, and (3) provide service connections, upon request, to those lot owners whose building permits have not been revoked.

In its Order, the Commission further stated:

> While the Commission recognizes that these additional connections may exacerbate the situation in Monteray Shores and Buck Island next season, it would not be fair to penalize those who had followed the established procedure for obtaining a building permit, had in fact been issued a building permit, and had in good faith relied to their detriment upon the issuance of the permit and begun construction on their lot.

CONSUMER LETTERS AND MOTION TO RECONSIDER

By letter dated December 15, 2003, Ronald and May Tom, who are not parties to this proceeding, requested that the Commission alter its decision regarding "dry" permits in the December 5 Order and "reinstate the building permit and effect the wastewater connection to Lot 31 on Buck Island." The Toms argue (1) that the "dry" permit issued for their lot should have automatically been converted to a non-"dry" permit on December 12, 2002, when the moratorium was lifted by the North Carolina Department of Environment and Natural Resources (DENR) and (2) that the permit for their lot "should be entitled to the same treatment as all the other 'non-dry' permits issued after the moratorium was lifted." In addition, the Toms note that Lot 345 in Monteray Shores, which was also granted a "dry" permit, has been connected to the wastewater system and question why it should be treated differently from their lot.

On December 31, 2003, Buck Island, Inc. (BII) filed a Motion to Reconsider also requesting that the Commission reconsider its decision in the December 5 Order to treat lots which were issued "dry" permits, including Lots 31 and 17 in Buck Island, differently from those that were not. BII attached to its filing a affidavit from Mr. and Mrs. Tom, the purchasers of Lot 31, and a copy of their December 15, 2003, letter to the Commission.

By letter dated January 12, 2004, John Tyler, who is also not a party to this proceeding, requested reconsideration of the Commission's December 5 Order to allow a wastewater connection to his lot, Lot 17 in Buck Island.

RESPONSES TO MOTIONS TO RECONSIDER

On January 12, 2004, Carolina Water filed a Response to BII's Motion to Reconsider, generally noting that allowing additional connections "will only exacerbate the harmful situation caused by flows in excess of capacity during the summer of 2004." Carolina Water confirmed that Lot 345 in Monterary Shores had been connected, stating that it was done after the moratorium was lifted and before it was reinstated. Carolina Water also stated that it installed a meter at Lot 31 in Buck Island in 1999, but that Lot 17 is not presently connected to the system. Finally, Carolina Water indicated that it determined that Lot 340 in Monteray Shores, a lot not referenced by Ms. Hodges or in the Commission's December 5 Order on which a model home had been built, had been connected to the wastewater with a meter not used by Carolina Water. Carolina Water discontinued service to Lot 340, but subsequently reconnected service at the request of Ambrosia Group.

On January 21, 2004, the Commission issued an Order allowing any party to this proceeding wishing to file a response to BII's Motion to Reconsider or the letters filed by the owners of Lots 31 and 17 in Buck Island to do so on or before Wednesday, January 28, 2004.

On January 28, 2004, the Public Staff filed a response noting that the Commission relied in reaching its decision concerning "dry" permits in the December 5 Order on Drusilla Hodges' testimony that the issuance of "dry" permits meant that lot owners could build at their own risk but could not hook up to water and sewer until the moratorium was lifted. Concluding that those who were issued "dry" permits "knew that they were not assured of receiving utility service and built solely at their own risk," the Commission stated that it was "not reasonable to provide connection to such lot owners and further jeopardize service to the other utility customers." The Public Staff argued that because both "dry" and non-"dry" permits were included in Ms. Hodges' running totals and because the Division of Water Quality's (DWQ) September 16, 2003, notice reinstating the moratorium makes no distinction between "dry" and non-"dry" permits, it would be reasonable to consider the holders of "dry" permits to be entitled to water and sewer service on a first come, first served basis along with lot owners who were issued non-"dry" permits before the moratorium was reinstated. Noting that the Toms and Mr. Tyler also followed the established procedure for obtaining a building permit, were issued a building permit, and in good faith relied to their detriment upon the issuance of the permit and began construction on their lots, the Public Staff recommends that the Commission reconsider and amend its December 5, 2003, Order as requested by BII and owners of Lots 31 and 17 in Buck Island.

On January 30, 2004, Monteray Shores, Inc. (MSI), filed a response stating, first, its belief that the Commission is simply unaware of the actual state of affairs regarding "dry taps" and that the result of the Commission's decision is to order Carolina Water to violate the DWQ imposed moratorium. MSI further argued that BII has used more than its allotted capacity and "that any and all capacity, if and when it exists, should go to the lot owners of Monteray Shores." Regarding Lot 345 in Monteray Shores, MSI stated that, while it was built during the moratorium while the equalization basin was under construction, a Certificate of Occupancy was issued for the house by the County shortly after the moratorium was lifted. MSI further states, however, that "[t]here is [a moratorium] in place now and MSI fails to understand how the Commission can override the DWQ and further fails to understand how BII can seek further connections to the system, now or ever." Lastly, MSI responded that Lot 340 in Monteray Shores was not on Ms. Hodges' list because it and several others were permitted prior to the imposition of the original moratorium and are not part of the equalization basin capacity.

On February 12, 2004, Carolina Water filed a further response stating that it has generally taken the position that DWQ's action applied to all potential connections except those for which permits had validly been issued at the time the moratorium was imposed. Recognizing the Commission's desire to authorize connections where to refuse to do so would cause hardship to lot owners who had undertaken construction of dwellings in anticipation that connections would be forthcoming, Carolina Water recommended that the Commission approve a general policy that those who have constructed dwellings on property within its Monteray Shores service area receive connections. Carolina Water indicated that if such a policy were implemented, the Toms and Mr. Tyler should receive service. Lastly, Carolina Water stated that it had received four requests, to which Currituck County has agreed, for approval of the transfer of existing approved connections and recommended that the Commission approve the same.

DISCUSSION AND CONCLUSIONS

G.S. 62-80 provides, in part:

> The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it.

After notice to the parties in this case and after careful consideration of the responses received, the Commissioner finds good cause to allow BII's Motion to Reconsider and to order Carolina Water to provide water and wastewater connections, as recommended by Carolina Water, to all property owners affected by the moratorium who had received building permits and who had begun construction on their property, including the owners of Lots 31 and 17 in Buck Island. Such a decision does not, as MSI suggests, require Carolina Water to violate the DWQ moratorium because, as the Public Staff correctly points out, the DWQ's letter reinstating the moratorium does not distinguish between "dry" and non-"dry" building permits.[1] It appears that at least one holder of a "dry" permit was able to connect to the utility systems between the lifting and the reimposition of the moratorium. While the Commission had attempted in its December 5 Order to limit the number of additional connections to the wastewater facility, the Commission now concludes that it would be unfair to penalize other lot owners in Monteray Shores and Buck Island who had began construction prior to their permit's revocation simply because their house was not ready for occupancy during that brief period of time when the moratorium had been lifted. Upon reconsideration, the Commission concludes that lot owners who had in good faith relied to their detriment upon the issuance of "dry" permits and begun construction on their property should similarly be connected to the utility's water and wastewater systems.

The Commission declines to rule on two additional issues raised by parties in their responses to BII's Motion to Reconsider but not raised in BII's Motion. First, MSI has complained that lots in Buck Island are utilizing more than the 22% of capacity agreed to in the contract between the developers of Monteray Shores and Buck Island. The Commission believes, as it has consistently throughout this case, that this issue is one between the developers and is not properly before this Commission. Secondly, Carolina Water has recommended that the Commission approve certain transfers of existing approved connections. Given that no complaints have been filed, the Commission believes that such matters should be handled by the utility, as appropriate, without the necessity of Commission intervention.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of March, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Ah030804.01

[1] As the Commission noted in its December 5 Order, DWQ's September 16, 2003, letter to MSI reinstating the moratorium on new connections to the wastewater treatment facilities serving Monteray Shores and Buck Island stated: "This reinstatement of the moratorium applies to any of the prior approved one hundred and ten bedrooms that do not have a building permit issued on or before the date of receipt of this notice."

DOCKET NO. W-947, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Governors Club Development Corporation, 130 Edinburgh South, Suite 204, Cary, North Carolina 27511, for Authority to Increase Its Rates for Providing Sewer Utility Service in Governors Club Subdivision in Chatham County, North Carolina	)	FINAL ORDER INCLUDING RULING ON EXCEPTIONS

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, August 4, 2004, 9:30 a.m.

BEFORE: Commissioner Sam J. Ervin IV, Presiding; and Commissioners J. Richard Conder, Robert V. Owens, Jr., Lorinzo L. Joyner, James Y. Kerr, II, and Michael S. Wilkins

APPEARANCES:

For Governors Club Development Corporation:
William E. Grantmyre, Attorney at Law, Post Office Drawer 4889, Cary, North Carolina 27519

For Governors Club Property Owners Association:
Edward S. Finley, Hunton & Williams, Post Office Box 109, Raleigh, North Carolina 27602

For the Using and Consuming Public:
Elizabeth D. Szafran, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On September 9, 2003, Governors Club Development Corporation (GCDC, Applicant, or Company) filed an application with the North Carolina Utilities Commission (Commission) seeking authority to increase its rates for providing sewer utility service in Governors Club Subdivision (Governors Club) in Chatham County, North Carolina.

On October 30, 2003, the Commission issued an Order Establishing General Rate Case, Suspending Rates, Scheduling Hearing, and Requiring Customer Notice. In said Order, the Commission declared GCDC's application to constitute a general rate case pursuant to G.S. 62-137; required the use of a test period consisting of the 12 months ending April 30, 2003; suspended the proposed rates for a period of up 270 days pursuant to G.S. 62-134; set GCDC's application for hearing; established deadlines for the submission of prefiled direct testimony by GCDC and the Public Staff of the North Carolina Utilities Commission (Public Staff) and rebuttal testimony by GCDC; and required appropriate public notice.

On October 31, 2003, the Governors Club Property Owners Association (the POA) filed an intervention petition. On November 5, 2003, the Commission issued an Order granting the petition to intervene of the POA. On November 19, 2003, GCDC filed a Certificate of Service indicating that public notice had been provided as required by the Commission's October 30, 2003 Order.

On December 1, 2003, David M. Rosenberg (Mr. Rosenberg) filed a petition to intervene as a property owner. The Commission allowed Mr. Rosenberg's intervention on January 5, 2005. On the same date, the Commission issued an Order Establishing Filing Schedule for Intervenors. In said Order, the Commission required that intervenor prefiled direct testimony be submitted on the same date as that established for the submission of the Public Staff's prefiled testimony. The intervention

and participation of the Public Staff has been previously recognized pursuant to G.S. 62-15(d) and Commission Rule R1-19(e).

On December 17, 2003, the Applicant filed the direct testimony of Dane L. Vincent. On January 21, 2004, the Public Staff filed a Notice of Affidavit and the Affidavit of Calvin C. Craig, III, Financial Analyst, Economic Research Division. The Public Staff also filed the testimony of Windley E. Henry, Staff Accountant, Accounting Division, and Gina Y. Casselberry, Utilities Engineer, Water Division. Also on January 21, 2004, the POA filed the testimony of John McInerney and Robert A. Ligett, Sr. Testimony was filed by Mr. Rosenberg on January 21, 2004.

The matter came on for public hearing before Commission Hearing Examiner Ronald D. Brown (the Hearing Examiner) on January 22, 2004, in the Fellowship Hall of the Mount Carmel Baptist Church in Chapel Hill for the purpose of receiving public witness testimony. Fourteen customers testified at the hearing.

The Public Staff received one written customer complaint concerning the magnitude of the proposed increase. A petition of protest signed by approximately 520 homeowners, property owners, and commercial customers was filed with the Chief Clerk of the Commission. The petitioners also objected to the magnitude of the proposed rate increase.

On February 4, 2004, the Applicant filed the rebuttal testimony of Dane L. Vincent, Joe Brinn, and Mark Ashness.

The hearing resumed in Raleigh on February 11, 2004, for the purpose of receiving customer testimony as well as the testimony and evidence of the parties of record. The Applicant offered the testimony and exhibits of Dane L. Vincent, Joe Brinn, and Mark Ashness. The POA offered the testimony and exhibits of John McInerney and Robert A. Ligett, Sr. The Public Staff offered the affidavit and testimony of Calvin C. Craig, III, the testimony and exhibits of Gina Y. Casselberry, and the testimony and exhibits of Windley E. Henry. David M. Rosenberg, a property owner intervenor, offered his own testimony. No public witnesses testified at the Raleigh hearing.

Following the hearing, the Hearing Examiner allowed all parties an opportunity to file briefs and proposed orders and requested the submission of other information in the form of late filed exhibits. Filings were made by the parties on April 1, 2004.

On June 8, 2004, the Hearing Examiner issued a Recommended Order Granting Partial Rate Increase (Recommended Order). In said Order, the Hearing Examiner approved the transfer of utility assets from GCDC to the Governors Club Limited Partnership (GCLP); substituted GCLP for GCDC as the Applicant in this matter; required GCDC to file an application to transfer its certificate of public convenience and necessity to GCLP; allowed the parties to operate under the Amended and Restated Wastewater Irrigation Agreement entered into as of December 16, 2003, between GCLP, Governors Club, Inc. (GCI), and the POA; approved the transfer of the golf course and spray fields from GCLP to GCI subject to certain conditions; allowed GCLP to increase its rates for wastewater service; and required appropriate public notice.

On June 23, 2004, the POA filed exceptions to the Recommended Order and requested oral argument pursuant to G.S. 62-78. On June 28, 2004, an Order was issued scheduling oral arguments on the POA's exceptions to the Hearing Examiner's Recommended Order. On June 25, 2004, GCDC filed a Motion for Interim Rates seeking authority to implement the rates approved in the Recommended Order on an interim basis subject to refund. On June 30, 2004, an Order was issued approving the interim rates requested by GCDC, requiring the Applicant to sign an Undertaking to Refund and requiring proper notice. On July 8, 2004, GCDC filed an executed Undertaking to Refund. On August 4, 2004, oral argument on the POA's exceptions was heard as scheduled.

Based on the foregoing, the evidence adduced at hearing, and the entire record in this matter, the Commission makes the following

FINDINGS OF FACT

General Matters

1. The Applicant is duly organized under the laws of North Carolina and is authorized to do business in the state. The Applicant is properly before this Commission seeking an increase in its rates for providing sewer utility service in Governors Club.

2. The test year appropriate for use in this proceeding is the 12 months ended April 30, 2003, updated for actual and known changes.

3. At the end of the test period, the Applicant provided sewer utility service in Governors Club Subdivision in Chatham County, North Carolina. The Applicant's sewer system serves approximately 1,250 residential customers and North Chatham Elementary School.

4. GCDC is a North Carolina corporation formed in 1987. The Estate of Truby G. Proctor, Jr., owns 100% of GCDC's stock. In 1990, GCDC received a franchise to provide sewer utility service for Governors Club and North Chatham Elementary School.

5. In 1992, Governors Club Limited Partnership (GCLP) was formed. GCDC has a 1% ownership interest in GCLP, is the sole general partner of GCLP, and serves as the managing partner of GCLP. The Estate of Truby G. Proctor, Jr., has 99% ownership interest in GCLP and is the sole limited partner of GCLP.

6. Governors Club, Inc. (GCI) is a non-profit corporation organized for the purpose of acquiring, owning, and operating a country club for the benefit, pleasure, and recreation of its members. GCI is owned by members of the club and is managed by the board of directors, none of whom appear to be connected with GCDC or GCLP. However, some officers of GCDC are members of GCI.

7. In 1992, GCDC transferred the utility assets to GCLP without seeking and obtaining Commission approval.

8. As the current owner of most of the utility assets, GCLP, rather than GCDC, is the appropriate Applicant in this proceeding.

9. On January 1, 1997, GCDC sold the golf course and all club facilities to GCI. The golf course includes spray irrigation fields that are an integral part of the sewer system serving Governors Club and North Chatham Elementary School and a vital utility asset. Prior to this sale, GCDC, GCI, and the POA executed the Governors Club Wastewater Irrigation Agreement dated January 1, 1996 (WIA). This agreement was never filed with the Commission for approval.

10. An Amended and Restated Wastewater Irrigation Agreement (ARWIA) was made and entered into as of December 18, 2003, by and between GCLP, GCI, and the POA. This agreement was never filed with the Commission for approval.

11. The Applicant's rates are reduced by $13,000 during the first year following the effective date of this Order for its disregard of North Carolina law and the Commission rules and regulations.

12. The Applicant's sewer system appears to be adequately maintained.

13. During the public hearing held on January 22, 2004, one customer complained about a foul odor coming from the wastewater treatment plant (WWTP).

14. The Applicant's monthly flat rates in effect prior to the interim rates approved on June 30, 2004, are as follows:

	Prior to Interim Rates	Approved Interim Rates
Residential, per single-family equivalent (SFE)	$26.00	$55.05
Commercial, per single-family equivalent (SFE)	$26.00	$55.05

15. The Applicant's proposed monthly flat rates are as follows:

Residential, per single-family equivalent (SFE)	$79.60
Commercial, per single-family equivalent (SFE)	$79.60

Rate Base

16. It is inappropriate to include in plant in service an amount for assets that could not be supported by a canceled check or an invoice.

17. It is appropriate to capitalize plant assets that the Applicant expensed during the test year.

18. The appropriate depreciation life for a grinder pump is five years.

19. The appropriate level of rate base for use in this proceeding is $468,812.

Operating Revenues

20. At the end of the test period, the Applicant had 630 sewer service customers and 593 availability customers.

21. Total operating revenues under rates in effect prior to the interim rates to be reflected in this proceeding are $274,368.

Operating Revenue Deductions

22. It is appropriate to include a portion of the increased Spray Irrigation Maintenance Fee in operating expenses.

23. It is appropriate to capitalize plant assets expensed during the test year as maintenance and repair and to remove water and non-utility expenses from maintenance and repair.

24. It is appropriate to include an hourly rate of $75 in calculating contract accounting expense and rate case expense for contract accounting services provided by Mr. Dane Vincent.

25. The Applicant's adjusted test year level of operating revenue deductions requiring a return (total operating expenses excluding regulatory fee, gross receipts tax, and income taxes) is $479,613.

Overall Rate of Return

26. The Applicant requested that the Commission establish rates in this general rate case pursuant to the operating ratio methodology as described in G.S. 62-133.1(a). All parties used the operating ratio methodology in their evaluations.

27. The overall fair rate of return which the Applicant should be allowed to earn on its operating revenue deductions requiring a return is 8.5%.

28. The 8.5% margin on expenses produces an operating ratio of 92.79%, including taxes, or 92.17%, excluding taxes.

Rates, Fees, and Other Matters

29. Sewer rates should be set to produce $565,753 of total operating revenues of which $427,743 relates to service revenues. This annual level of revenues will provide the Applicant the opportunity to earn a margin on expenses of 8.5%.

30. The attached Schedule of Rates is just and reasonable and will allow the Applicant a reasonable opportunity to earn the authorized rate of return on its operating revenue deductions requiring a return.

31. It is appropriate to increase the availability charge from $10 per month to $20 per month.

32. It is appropriate to increase the tap-on fee from $3,450 to $4,500.

33. It is appropriate to charge the actual cost for reconnection, instead of the existing $15 reconnection fee.

34. It is appropriate to implement a $25 returned check charge. The Applicant does not currently have such a charge.

35. It is appropriate to require the lot purchaser to be responsible for the initial purchase and installation of grinder pumps required for the system. Once the grinder pump is initially installed, it will be the responsibility of the utility to maintain, repair, and replace the grinder pump.

36. The Applicant's interim rates should be adjusted to reflect the rates authorized by this Order, and a refund to the customers should be required.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 THROUGH 6

The evidence for these findings of fact is contained in the Commission's official records, the verified application, the testimony of Public Staff witness Casselberry, and the testimony of Applicant witness Vincent and is uncontested.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 7 THROUGH 11

The evidence for these findings of fact is contained in the testimony of Applicant witness Vincent and the testimony of Public Staff witness Casselberry.

Ms. Casselberry testified that GCDC should have sought and obtained Commission approval pursuant to G.S. 62-111(a) prior to transferring the utility assets to GCLP. Ms. Casselberry testified that, since the Estate of Truby G. Proctor, Jr., is the ultimate owner of both GCDC and GCLP, the transfer of the utility assets without Commission approval is not as troublesome as it would be under different circumstances. She recommended that the Commission approve the transfer of the utility assets and that GCLP be substituted as the Applicant in this general rate case proceeding.

Public Staff witness Casselberry further testified that GCLP should have sought and obtained Commission approval, pursuant to G.S. 62-111(a), for the transfer of the golf course spray irrigation fields to GCI, as well as the ARWIA. Although she admitted under cross-examination by GCDC's counsel that G.S. 62-111(a) does not mention Commission approval of the transfer of golf courses or approval of effluent reuse agreements, Ms. Casselberry explained on redirect that the statute does not list specific utility assets that require Commission approval prior to transfer. As to the golf course spray irrigation fields, Ms. Casselberry testified that although the spray fields are only a part of the

sewer utility system, they are a vital utility asset. She testified that selling the golf course raises questions about the utility's ability to control the spray fields, maintain compliance with its non-discharge permit, and make prudent decisions in the best interest of the utility and the customers it serves. She further testified that this is a significant change from the unified sewer system, which included the golf course, that was the basis of the original franchise issued to GCDC in 1990, and the Public Staff believes there are grounds for disapproval of both the transfer of the golf course and the ARWIA.

As to the ARWIA, Ms. Casselberry testified that, by entering into this agreement, GCLP has placed itself in the position of having to acquire additional property at additional cost to its customers, and the Public Staff questioned the need for additional spray fields. She testified that, pursuant to the ARWIA, GCI receives reuse effluent for irrigating the golf course free-of-charge. Witness Casselberry noted that, without the ARWIA, GCI would have to purchase water from an alternate source or use water from its retaining ponds, and GCI would have the expense of maintaining its golf course and sprinkler system, which is paid by GCLP under the agreement. She testified that the ratepayers should not be burdened with the expense of maintaining GCI's golf course and sprinkler system. She also testified that the ARWIA provides for an increased Spray Irrigation Maintenance Fee of $75,000, and indicated that the Public Staff questioned the reasonableness of this fee increase. Ms. Casselberry testified that, despite its concerns, the Public Staff recognized that all of the utility customers are members of the POA, that the POA is a party to the ARWIA, and that GCI and the POA have agreed in Section 7 of the ARWIA not to oppose portions of the requested utility rates in this proceeding. Ms. Casselberry testified that, under the circumstances, the Public Staff does not oppose approval of the transfer of the golf course and spray fields to GCI provided (1) that approval of the transfer does not constitute approval of any of the fees payable by GCLP to GCI pursuant to the ARWIA for ratemaking purposes, and (2) that, if the Commission finds that any provision of the ARWIA adversely affects GCLP's ability to maintain its non-discharge permit and provide adequate utility service at a reasonable cost, such provision should be null and void.

Applicant witness Vincent testified that nowhere in G.S. 62-111(a) does it state that the Commission must approve the transfer of golf courses, and GCDC does not know of any case where the Commission approved of the transfer of a golf course that was used for effluent reuse. Mr. Vincent further testified that the obligation of GCDC to transfer the country club and golf course to GCI arose when GCDC executed the Governors Club Facilities Purchase Agreement dated June 27, 1989. He stated that this agreement obligated GCDC to convey to the members of GCI all of the country club's assets, including the golf course, on or before January 1, 1997, and the assets were transferred on January 1, 1997. Mr. Vincent testified that prior to this transfer, GCDC, GCI, and the POA executed the Governors Club Wastewater Irrigation Agreement dated January 1, 1996 (WIA), which provided GCDC the perpetual right and easement to spray irrigate on the golf course all the wastewater reuse effluent from the Governors Club Wastewater Treatment Plant for a $12,000 annual fee. Mr. Vincent testified that the opposition of GCI and the POA to the Governors Club wastewater permit renewal in 2002 and 2003 and the various issues raised by the same parties as to the ability of the golf course to absorb the spray irrigation reuse effluent in an environmentally safe manner and the amount of storage led to the negotiation of the ARWIA between GCLP, GCI, and the POA.

GCDC stated in Finding of Fact No. 54 in its Proposed Order that it is unnecessary in this proceeding for the Commission to approve the transfer of the certificate of public convenience and necessity to Governors Club Limited Partnership (GCLP), as GCDC has filed an application with the Commission, which is now pending, in Docket No. W-1233, Sub 0, to transfer the certificate of public convenience and necessity and all the wastewater utility assets to Governors Club Water Reclamation Company, LLC (GCWRC).

The Company admitted that it should have sought approval for the transfer of the utility system from GCDC to GCLP. Similarly, G.S, 62-111(a) clearly contemplates Commission approval

prior to transfer of significant utility assets. Finally, although Applicant witness Vincent testified that GCDC does not believe Commission approval of the AWRIA is required, he did not address the Commission's authority to review contracts. It is well settled that the Commission has the authority to review and, if necessary, modify contracts between public utilities and other parties in accordance with the public interest. In re Application by C & P Enterprises, Inc., 126 N.C. App. 495, 486 S.E. 2d 223, disc. rev. denied, 347 N.C. 136, 492 S.E.2d 36 (1997). Thus, the Hearing Examiner found that GCDC committed violations of North Carolina law during the years prior to the initiation of this case.

In that portion of the Recommended Order discussing the Evidence and Conclusions for Findings of Fact Nos. 7 and 8, the Hearing Examiner concluded that GCDC should have sought and obtained Commission approval prior to transferring the utility assets to GCLP, but that the transfer of the utility assets from GCDC to GCLP should be approved. The Hearing Examiner also concluded that GCLP should be substituted as the Applicant in this proceeding and be should required to file an application to transfer its certificate of public convenience and necessity to GCLP, as well as replacing the bond and surety that GCDC has posted with the Commission. An application for approval of the acquisition by GCWRC of all of the sewer utility assets of GCDC was filed in Docket No. W-1233, Sub 0, on April 27, 2004.

In the Recommended Order in the Evidence and Conclusions for Findings of Fact Nos. 9 and 10, the Hearing Examiner considered the foregoing evidence and concluded that GCLP should have sought and obtained Commission approval, pursuant to G.S. 62-111(a), for the transfer of the golf course spray irrigation fields to GCI, as well as approval of the WIA and the ARWIA. The Hearing Examiner further concluded that the transfer of the golf course and spray fields by GCLP to GCI should be approved provided (1) that approval of the transfer does not constitute approval of any of the fees payable by GCLP to GCI pursuant to the ARWIA for ratemaking purposes, and (2) that if the Commission finds that any provision of the ARWIA adversely affects GCLP's ability to maintain its non-discharge permit and provide adequate utility service at a reasonable cost, such provision should be null and void. The Hearing Examiner further concluded that the ARWIA should be deemed filed with the Commission pursuant to G.S. 62-153 and that the parties should be allowed to operate under its terms.

Further, the Hearing Examiner noted that, as discussed above, the WIA (and ARWIA) guaranteed the wastewater treatment plant the perpetual right and easement to spray irrigation on the golf course of all wastewater effluent from the plant. This is not an insignificant right, in that it ensures the treatment plant the capability of meeting the requirements of its non-discharge permit.

The POA filed an exception to the Hearing Examiner's Finding of Fact Nos. 7 and 8 which stated that the Hearing Examiner failed to consider the POA's argument for a rate adjustment to adjust for noncompliance with North Carolina law and Commission requirements. The POA argued that despite the fact that the POA made the argument for a rate adjustment to adjust for noncompliance with Commission requirements and cited supporting legal authority, the Hearing Examiner dismissed the argument without any discussion. During the oral argument, the POA stated that it did not ask for a severe punishment, only a phase-in.

The POA contended that there was evidence in the record that ownership of the sewer utility was transferred from GCDC to GCLP without Commission approval. The POA further asserted that the Hearing Examiner had not addressed the POA's argument that the Commission should impose, as a sanction, a reduction of $3 per customer per month for two years in the otherwise approved rate level. Additionally, the POA contended that the Hearing Examiner also ignored Commission precedent where penalties, such as refunds to customers, were imposed for action taken without Commission approval. The POA referenced the Application of Carolina Water Service, Inc. of North Carolina (Carolina Water), for a Certificate to Serve Raintree Subdivision. In particular, the Commission issued an Order on April 25, 1990, in Docket No. W-354, Sub 74 (Raintree docket),

which required Carolina Water to refund to its customers rates collected prior to the Commission's decision granting the certificate to serve.

It was the POA's contention that, in the Recommended Order, the Hearing Examiner took the position of "no harm, no foul" resulting in no rate reduction. The POA argued that there are times when that is an appropriate policy, but when that policy is viewed in the totality of this particular case, the POA asserted there has been substantial potential for harm in the way this Company operated.

GCDC admitted at the oral argument that the Company had made a mistake regarding the transfer of GCDC to GCLP without prior Commission approval. The Company further argued that the Estate of Truby Proctor owns GCDC and GCLP and that the transfer was from one legal entity to another. The Company claimed that the transfer was indeed a violation, but it was a technical violation. GCDC admitted that the transfer should have been presented to the Commission for approval.

Further, GCDC contended that there is a difference in this transfer versus the Raintree docket cited by the POA. According to GCDC, in the Raintree case Carolina Water began charging rates to the customers before there was ever a franchise issued to any party, and Carolina Water was charging rates that the Commission had never approved. GCDC continued its argument by stating that, unlike the Raintree case, GCDC continued to charge the Commission-approved rates without any change to said rates.

GCDC asserted that there were 26 customers in the Raintree docket, and that Carolina Water only billed these customers for 10 months of utility service. GCDC argued that the math shows the refund was approximately $5,000. GCDC then stated that there is a marked difference between the penalty proposed by the POA and the $5,000 refund in the Raintree docket. In response to Commissioner Joyner's question to the POA regarding the total amount of the sanction proposed by the POA, GCDC stated that a $3 reduction per customer per month for two years would be approximately $47,000.

Neither the Public Staff nor the Hearing Examiner recommended any rate adjustment of the nature recommended by the POA to penalize the Company for its noncompliance with Commission requirements in their Proposed Order or Recommended Order, respectively.

The Commission believes that failures to secure Commission approval (1) prior to transferring utility assets from GCDC to GCLP, (2) prior to transferring spray irrigation fields to GCI, and (3) prior to entering the WIA and ARWIA agreements are all examples of the Company's failure to comply with North Carolina law and the Commission's rules and regulations. As a result, the Commission agrees with the POA regarding its request for some form of a rate adjustment to account for the Company's noncompliance with Commission requirements.

The Commission is entitled to consider substandard service or similar factors in setting utility rates. State ex rel. Utilities Commission v. General Telephone Company of the Southwest, 285 N.C. 671, 208 S.E.2d 681 (1974) (reduction in approved rate of return due to inadequate service quality). State ex rel. Utilities Commission v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), adhered to on reh., 278 N.C. 235, 179 S.E.2d 419 (1970) (Commission need not close eyes to substandard service in setting rates). As a result, the Commission has the right to order what amounts to a "phase-in" in response to a utility's failure to meet its legal obligations.

The Commission has considered GCDC's argument that the Company has admitted it made a mistake regarding the transfer of GCDC to GCLP without prior Commission approval. The Commission also is aware of the Applicant's position that basically the Estate of Truby Proctor owns both GCDC and GCLP and that the transfer was from one legal entity to another, thus resulting in only a technical violation. Finally, the Commission is cognizant of the record and evidence

concerning the circumstances leading to the transfer of the golf course and spray fields and the execution of the ARWIA. The Commission has carefully reviewed all of the parties' positions regarding a sanction for the Company's disregard for the Commission's rules and regulations. As a result of the Company's failure to obtain approval of the transfer of the system from GCDC to GCLP, the Commission finds good cause to order that a $1,000 rate reduction be assessed for each year, or any portion of a year, that the Company did not seek Commission approval for the transfer of utility assets from GCDC to GCLP. There is evidence in the record that said transfer took place in 1992, which equates to approximately 13 years of operation following the transfer without Commission approval. This time frame covers the period from 1992 until 2004, the time at which the Company sought Commission approval for said transfer.

Although the Company has pointed to a number of mitigating factors in opposition to a rate reduction, the Commission concluded that those factors are insufficient to support rejection of the POA's exceptions directed to this issue. Those factors do, however, support a lessening in the amount of the rate reduction proposed. Because the Company had been newly established (April 24, 1990) and lacked the experience of a larger or more experienced utility and because there was limited injury to customers, the Commission believes it would be appropriate to order that the Applicant's rates be reduced by the $13,000 amount for a period of one year to signify to GCDC that the Commission will not tolerate such disregard for its rules and regulations.

Consequently, the Commission believes that it is appropriate to impose a total rate reduction of $13,000 for the Company's disregard of the Commission's authority under G.S. 62-111(a). The Commission believes that said penalty should be deducted over a period of 12 months from the final rates awarded to the Company in this proceeding. Given this rate reduction for the Applicant's failure to obtain approval of the transfer from GCDC to GCLP and the factors in mitigation noted above, the Commission will not require any additional rate reduction resulting from the transfer of the spray fields or the entry into the ARWIA without prior approval. The remainder of the Hearing Examiner's decision with respect to the issues rising from the transfer of the utility assets from GCDC to GCLP, the transfer of the golf course and spray fields, and the Applicant's entry into the ARWIA was not the subject of any exception filed by any party and remains in full force and effect.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 12 AND 13

The evidence for these findings of fact is contained in the testimony of Public Staff witness Casselberry, public witness Lepre, and Applicant witness Brinn.

Public Staff witness Casselberry testified that on December 12, 2003, Ms. Casselberry, Mr. Andy Lee, Director, Public Staff Water Division, Mr. Joe Brinn, Operations Manager, and Mr. Randy Jerid, Plant Operator, inspected the sewer system serving Governors Club. Based on the inspection, Ms. Casselberry testified that the system appeared to be adequately maintained.

Public witness Lepre testified at the January 27, 2004, public hearing that he lives across the street and several lots down from the WWTP, and that at times the odor from the treatment plant was "unbelievable, depending on how the wind blows."

Applicant witness Brinn testified that the WWTP was constructed before any houses were built and those individuals purchasing lots at Governors Club knew the proximity of the WWTP prior to buying a lot. He further testified that the Applicant has taken proactive steps to minimize odors at the WWTP by installing an air scrubber, covers over the splitter boxes, and a new cover for the equalization basin and the sludge holding tanks.

The Hearing Examiner carefully considered the foregoing evidence and concluded that it is difficult to eliminate odors completely from a WWTP and that the Applicant has taken the necessary steps to reduce odors from the WWTP. The Hearing Examiner further concluded that the Applicant is

adequately maintaining the WWTP serving Governors Club. No party excepted to the Hearing Examiner's decision concerning this issue, so that this portion of the Hearing Examiner's decision remains in full force and effect.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 14 AND 15

The evidence for these findings of fact is contained in the Commission's official records, the verified application, the testimony of Public Staff witness Casselberry, and is uncontested. No party excepted to this portion of the Hearing Examiner's decision concerning this issue, so that it remains in full force and effect.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 16 THROUGH 19

The evidence supporting these findings of fact is contained in the testimony of Applicant witnesses Vincent and Brinn, and the testimony and exhibits of Public Staff witnesses Casselberry and Henry.

The following table summarizes the position of the Public Staff in its Proposed Order:

Plant in service	$ 2,574,198
Accumulated depreciation	(548,209)
Contributions in aid of construction	(1,650,437)
Adjustment for capitalization of expenses	0
Net plant in service	375,552
Inventory	47,196
Working capital allowance	46,088
Original cost rate base	$ 468,836

The final recommendation of the Public Staff regarding rate base included adjustments to plant in service, accumulated depreciation, contributions in aid of construction, and adjustments for capitalization of expenses and working capital allowance. Neither the Public Staff nor the Intervenors proposed an adjustment to inventory. Neither the Applicant nor the Intervenors opposed any adjustment recommended by the Public Staff to contributions in aid of construction or the Public Staff's adjustment to reclassify to plant in service the capitalized expenses included by the Applicant on a separate line item. The Hearing Examiner, therefore, concluded that the amounts recommended by the Public Staff for contributions in aid of construction, adjustment for capitalization of expenses, and inventory are appropriate for use in this proceeding. Since no party excepted to the Hearing Examiner's determinations with respect to these adjustments, this portion of his decision remains in full force and effect.

PLANT IN SERVICE

The Intervenors did not oppose any adjustment recommended by the Public Staff for plant in service. In its rebuttal testimony, the Applicant took exception to adjustments recommended by the Public Staff to remove plant assets for lack of proper documentation and capitalize to certain maintenance and repair expenses.

Lack of Proper Documentation

In his prefiled testimony, Public Staff witness Henry removed $66,423 of assets from plant in service for lack of proper documentation. Mr. Henry stated that the Applicant provided general ledgers and workpapers generated by outside auditors in support of the cost of these plant items; however, in order to determine if plant items are utility assets, an invoice describing the item purchased, along with a canceled check, should have been provided to the Public Staff by the Applicant. Because the Applicant did not provide this documentation, Mr. Henry testified that he removed this amount from plant in service.

Applicant witness Vincent testified that GCDC previously provided the Public Staff with a copy of pages from its general ledger that provides evidence of capital expenditures for the spray irrigation system totaling $39,620 and $7,589 incurred in 1993 and 1997, respectively. Mr. Vincent disagreed with the Public Staff's adjustment, as he testified that GCDC has also previously provided documentation that reconciles the capital expenditures in its general ledger to the audited financial statements and income tax return. Mr. Vincent provided a copy of the original invoice for the $39,620 capital expenditure as an attachment to his rebuttal testimony, and indicated that he would later provide a copy of a check to support a capital expenditure of $8,511 instead of the $7,589 capital expenditure removed by Mr. Henry.

At the hearing, Mr. Henry revised his plant amounts to include the $39,620 capital expenditure discussed by Mr. Vincent in his rebuttal testimony. With this revision, the Public Staff's adjustment to remove items due to lack of documentation was $26,803.

The Hearing Examiner agreed with the Public Staff that it is inappropriate to include in plant in service assets that could not be supported by an invoice or canceled check. As stated throughout Mr. Henry's testimony, expenditures were improperly accounted for on the Applicant's books. Nonutility assets and assets belonging to another franchised utility were recorded on the books of the Applicant, plant assets were improperly expensed from 1998 through the end of the test year, and expenditures were posted twice to the same expense account. The Public Staff corrected each of these errors after careful examination of invoices and checks provided during its audit. The Applicant did not provide any evidence supporting the $7,589 expenditure, contrary to the assertion of Mr. Vincent in his rebuttal testimony, or any of the remaining cost removed from plant in service by the Public Staff. No party filed exceptions directed to this portion of the Hearing Examiner's decision. As a result, it remains in full force and effect.

Capitalization of Maintenance and Repair Expense

As discussed under Finding of Fact No. 23, the Hearing Examiner concluded that it is appropriate to capitalize plant assets expensed during the test year. Since no party excepted to this aspect of the Hearing Examiner's decision, it remains in full force and effect.

Cost of Moving Service Lines

In its exceptions, the POA maintained that there is evidence in the record that GCDC seeks to charge the ratepayers for the cost of moving service lines that should be borne by construction contractors. The POA asserted that said service lines were installed in the wrong place by the developer and that these costs should be excluded from cost of service.

GCDC responded by explaining that the Company had to raise one service line and lower one service line to work with the grinder pump to make sure it worked properly. The Company further informed the Commission that the cost of moving those service lines was $125 for one and $187 for the other. GCDC asserted that the Public Staff wanted to capitalize these costs whereas the Company wanted to expense said costs. The Applicant further stated that this particular issue was a normal disagreement that companies have with the Public Staff and certainly nothing for which penalties should be assessed or other action taken. The Public Staff's position to capitalize these expenditures was adopted by the Hearing Examiner and no party excepted to it.

The Commission concludes that the cost of moving service lines as reflected in the record should be included in the calculation of sewer utility rates. However, as is reflected elsewhere in this Order, these costs will be capitalized rather than expensed.

Other Plant in Service Issues

The POA filed an exception to the appropriate level of rate base for use in this proceeding. During the oral argument, the POA alleged that the Hearing Examiner had not considered all of issues raised in the POA's Brief. In its Brief, the POA asserted that GCDC requested that rates be

established on an operating ratio basis with depreciation expense being a significant element of expense to be recovered through rates and on which a return was sought by GCDC. The POA stated at the oral argument that GCDC has manifested its intent to recover its capital costs in sewer utility infrastructure through the sale of lots and therefore should not be permitted to recover these costs again through the rates GCDC charges its sewer utility customers.

At the oral argument, GCDC disputed the POA's claim regarding the Applicant's manifested intent to recover its capital costs in sewer utility infrastructure through the sale of lots. It noted that there was no evidence in the record to defend the POA's allegation in this regard. GCDC continued to argue that only the collection system was contributed plant.

The Commission agrees with GCDC with respect to the lack of evidence in this record regarding the Applicant's manifested intent to recover its capital costs in sewer utility infrastructure through the sale of lots. GCDC stated at the oral argument that the Applicant had not agreed to contribute any plant other than the collection system, which is the tap fees. The portions of the transcript cited by the POA in support of its argument support the Applicant's position. Therefore, the Commission concludes that the evidence in the record does not support the claim alleged by the POA that the Company's manifested its intent to recover its capital costs in sewer utility infrastructure through the sale of lots.

Based on the foregoing, the Commission concludes that the appropriate level of plant in service is $2,574,198.

ACCUMULATED DEPRECIATION

Grinder Pumps

The Applicant did not oppose any adjustment recommended by the Public Staff regarding accumulated depreciation. In her prefiled testimony, Public Staff witness Casselberry recommended a life expectancy of five years for grinder pumps. During cross-examination, and in response to questions by the Hearing Examiner, Ms. Casselberry testified that she compared grinder pumps to a pump of a similar size that would be situated in a well for drinking water. Witness Casselberry explained that the grinder pumps pump raw wastewater directly from the houses into the collection system after the pumps attempt to grind up rags and other things so they can get through the lines. The grinder pumps are housed in a tank with raw sewage or wastewater, which is a corrosive environment that would shorten the life of equipment. Ms. Casselberry further testified that, although she had not studied how often a grinder pump in Governors Club pumps, she assumed it is with some frequency. Applicant witness Vincent testified that the grinder pumps on average have five-year lives.

The Hearing Examiner carefully considered the foregoing evidence and concluded that a five-year life expectancy for grinder pumps was reasonable in this proceeding.

The POA argued in its exceptions that the Recommended Order was erroneous in failing to consider all of the evidence in determining that the appropriate depreciable life for a grinder pump is five years. The POA asserted that a twenty-year life expectancy is more appropriate for a grinder pump. The POA stated in its Brief and at the oral argument that the Hearing Examiner adopted the conclusions of Public Staff witness Casselberry without considering and evaluating other relevant evidence. The POA stated that the only actual engineering experience revealed by the record was that GCDC added approximately 60 homes in the fifth year prior to the test year and replaced only five grinder pumps in the test year. Thus, the POA contended that the number of actual pump replacements, when compared to the number of homes added to the system in the fifth year prior to the test year, is evidence that a twenty-year life expectancy is more appropriate. The POA argued that grinder pumps operate less frequently than pumps of a similar size that are found in wells.

The POA asserted that the Hearing Examiner failed to even consider this evidence or consider the POA's argument that grinder pumps operate less frequently than pumps of a similar size that are found in wells. The POA claimed that the Hearing Examiner should have considered all arguments made by the parties, weighed all evidence, and resolved all issues of fact, and that the failure to do so was erroneous as a matter of law.

GCDC stated at the oral argument that the Hearing Examiner agreed with the Public Staff with respect to the amount of depreciation expense based on the grinder pump's five-year life expectancy. GCDC agreed with the grinder pump's life expectancy used by the Hearing Examiner.

The Commission has carefully reviewed the evidence and argument presented by the POA as well as that of both the Public Staff and GCDC. The Commission agrees with the POA that some grinder pumps may last longer than five years, but on the other hand, the Commission believes that some grinder pumps may last less than five years. The evidence presented by the POA on this issue is simply insufficient to support a conclusion that the life expectancy of a grinder pump should be 20 years. Although only five pumps may have been replaced in the test year, it is unclear how many pumps may have been in need of being replaced in earlier years. Therefore, the Commission is not convinced by the POA's argument and accepts Public Staff witness Casselberry's expert opinion on this issue, especially without more complete historical data to justify changing from the five-year expectancy of said pumps recommended by GCDC and the Public Staff.

As a result, taking into consideration the newness of the grinder pump methodology, along with the lack of historical data or research regarding the life of said pump, the Commission concludes that relying on the Public Staff's expertise with respect to its recommended five-year life expectancy for the grinder pump is the most reasonable approach. In addition, the Commission is of the opinion that the use of a five-year recovery period allows the Applicant the opportunity to recover its grinder pump investment in a fair and just manner. Therefore, the Commission agrees with the Hearing Examiner's decision and concludes that the use of a five-year life expectancy for the grinder pump is appropriate.

WORKING CAPITAL ALLOWANCE

The Applicant and the Public Staff recommended different amounts for the working capital allowance as a result of having different levels of operating and maintenance expenses and certain taxes. Based on conclusions regarding the appropriate level of expenses, the Commission finds and concludes that the proper level of working capital allowance is $46,064.

RATE BASE

Based upon the foregoing, the Commission finds that the Hearing Examiner properly reflected the correct original cost rate base of $468,836, less an amount of $24 resulting from an availability adjustment that affects the working capital component of rate base.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 20 AND 21

The evidence supporting these findings of fact is contained in the verified application, the testimony and exhibits of Applicant witness Vincent, the testimony and exhibits of POA witness McInerney, and the testimony of Public Staff witness Casselberry.

Public Staff witness Casselberry testified that, at the end of the test period, the Applicant had 621 residential and 9 nonresidential sewer service customers, or 658 single-family equivalents. In their rebuttal testimony, neither the Applicant nor the Intervenors contested the number of sewer service customers; however, the parties disagreed as to the number of availability customers.

The verified application stated that the Applicant has 527 residential availability customers as of April, 2002. Applicant witness Vincent testified as to the status of availability lots in Governors Club and provided Late Filed Exhibit No. 1, which listed the status of each lot and whether or not

availability fees are being charged. This exhibit indicated that the Applicant has 526 availability customers. Mr. Vincent explained that the original Commission order granting the certificate of public convenience and necessity issued in Docket No. W-947 dated April 24, 1990, contained a stipulation between GCDC and the Public Staff that "[a]n availability fee of $10.00 is reasonable but is applicable only to lot purchasers who have contracted to pay this fee at the time of lot purchase." Mr. Vincent testified that it would be inappropriate for the Commission to now order these customers to pay availability fees or to impute availability fee revenues. Mr. Vincent testified that GCDC had not obtained subscription agreements from lot purchasers prior to obtaining its franchise as it did not know whether the Commission would approve the availability fee. He further testified that GCDC does not charge availability fees for owners who own more than one lot and who have built a home on one as GCDC believes that there will not be any additional dwelling built on the second lot, so that it would be inappropriate to charge an availability fee. Finally, Mr. Vincent testified that GCDC does not charge availability fees for lots remaining in the developer's inventory. Mr. Vincent explained that it is customary for availability fees not to be charged to vacant lots still owned by the developer.

The following chart shows the parties' positions with respect to total lots and categories of said lots for residential customers, prior to the oral argument.

LOTS STATUS BY CATEGORY – FOR RESIDENTIAL CUSTOMERS

Categories	Per Application	GCDC	Public Staff	Property Owners Assoc.	Hearing Examiner
Residential Customers	613	621	621	615	621
Availability Lots	526	528	573	574	565
Developer Inventory Lots	45	45			
Lots Never Existed	52	52	52	52	52
No Subscription Agreemt	23	22	22		23
Recombined Lots	7			7	7
Non-buildable Lots	5	5	5		5
Attributable to GCDC				24	
Other	2			1	
Total Lots	**1273**	**1273**	**1273**	**1273**	**1273**

Based upon the record in the proceeding, the Commission understands that there was no dispute at the oral argument with respect to the number of single-family residential sewer utility customers serviced by GCDC at the end of the test year period. All parties agree that 621 is the appropriate number of residential sewer utility customers for the test period. Since no party excepted to Hearing Examiner's conclusion that there are 621 residential sewer customers, that decision remains in full force and effect.

The Hearing Examiner concluded, based on the foregoing evidence; the Commission's Order dated April 24, 1990, in Docket No. W-947; and Commission Rule R10-23, that the correct number of availability customers for the 12-month period ending April 30, 2003, is 565, which would generate availability revenues of $67,800 under the Applicant's existing rates. The Hearing Examiner concluded that the number of availability lots should be determined based upon the following computation:

Total lot numbers	1,273
Residential sewer customers	- 621
Lots never existed	- 52
Lots/no subscription agreements	- 23
Lots recombined	- 7
Lots unbuildable	- 5
Total availability lots	**565**

The POA challenged the Hearing Examiner's decision with respect to the number of availability customers on two different bases: (1) the imputation of availability revenues for lots without

subscription agreements and (2) the inclusion of non-buildable lots in calculating the number of availability customers.

The POA asserted in its Brief that 23 lots listed as "Purchased Prior to Franchise Order" and one lot listed as "Other" (footnoted by GCDC as not having a subscription agreement) should be charged to GCDC. The POA maintained that GCDC could have obtained a subscription agreement subject to the anticipated franchise order and, therefore, availability fees should be imputed to these particular lots.

With respect to lots without subscription agreements, the POA argued that the subscription agreement should have been obtained by GCDC, subject to the anticipated franchise order. Commission Rule R7-36(b), Disclosure to Customer Required, states that

> Each utility shall first ensure that its customers have been given adequate disclosure of any availability rate, in accordance with the provisions of this rule, prior to accepting a customer's subscription to availability service or accepting the initial assignment of a contract for availability service.

The Commission realizes that 23 lots were listed in the Hearing Examiner's number of availability lots as having no subscription agreement. Moreover, since there were no subscription agreements obtained prior to the franchise order, the sewer utility customers without subscription agreements are not obligated to pay an availability fee. After careful consideration, the Commission is of the opinion that the 23 lots without subscription agreements, and excluded from the Hearing Examiner's number of availability lots, should be treated as availability customers for ratemaking purposes. As argued by the POA, the Applicant should have anticipated the outcome of the franchised order and obtained the necessary agreements. Therefore, the Commission believes that the 23 lots with no subscription agreements should be included in the calculation of the appropriate level of availability customers for the test year period.

The POA also excepted to the Hearing Examiner's decision declining to include five non-buildable lots in the number of availability customers. The Company listed these five lots as not buildable due to reasons such as drainage ditches, a partial combination, a disputed title, and steep topography. GCDC stated that these lots will be deeded to the POA as common open space. As of the present time of this writing, said lots have not been transferred to the intended party. The Developer has had ample opportunity to transfer title to these lots. The Commission agrees with the POA that, until such time that the lots are deeded to the POA, the lots should be considered as included in the Developer's inventory and charged an availability fee. Therefore, the Commission finds that the five non-buildable lots should be included in the total number of availability lots during the test period for purpose of this proceeding.

Based upon the foregoing, the Commission concludes that, at the end of the test period, the Applicant had 630 sewer service customers (621 residential and 9 nonresidential) and 593 availability customers, which would generate availability revenue of $71,160 under the Applicant's existing rates for purposes of this proceeding. The Commission concludes that the appropriate level of availability customers for this proceeding is 593 and should be determined in the following manner:

Total lot numbers	1,273
End of period residential customers	- 621
Lots never existed	- 52
Recombined lots	- 7
Total availability lots	**593**

The Commission further concludes, based upon the foregoing evidence, that the total operating revenues under rates in effect prior to the interim rates to be reflected in this proceeding are $274,368.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 22 THROUGH 25

The evidence supporting these findings of fact is contained in the testimony and exhibits of Applicant witnesses Vincent, Ashness, and Brinn; the testimony and exhibits of Public Staff witnesses Casselberry and Henry; and the testimony of Intervenor witness Rosenberg.

The following table summarizes the Commission's findings in this Order:

Operating and Maintenance Expenses:	
Purchased power	$ 32,903
Propane	403
Telephone auto dialers	7,221
Water utilities	1,457
Chemicals	21,914
Spray fee	60,550
Maintenance and repair	76,785
Insurance	30,553
Testing	4,050
Permit fees	1,090
Sludge removal	16,886
Plant operator	40,524
R&M contractual services	18,720
Operations manager expense	24,000
Annualization adjustment	3,263
Total operating and maintenance expenses	340,319
General Expenses:	
Contract accounting	32,403
Hydrology testing	0
Engineering fees	0
Legal fees	2,774
Telephone	2,384
Rent	5,886
Office supplies	6,033
Postage	5,942
Rate case expense	28,868
Total general expenses	84,290
Depreciation and Taxes:	
Depreciation and amortization	46,467
Property taxes	8,537
Payroll taxes	0
Regulatory fee	329
Gross receipts tax	16,262
State income tax	0
Federal income tax	0
Total depreciation and taxes	71,795
Total operating revenue deductions	$496,404

The final recommendation of the Public Staff regarding operating revenue deductions included adjustments for purchased power, chemicals, spray fee, maintenance and repair, testing, sludge removal, annualization adjustment, contract accounting, hydrology testing, engineering fees, legal fees, telephone, rent, office supplies, postage, rate case expense, property taxes, depreciation and amortization, regulatory fee and gross receipts tax. Neither the Public Staff nor the Intervenors recommended any adjustments to propane, telephone auto dialers, water utilities, insurance, permit fees, plant operator, R&M contractual services, operations manager expense, and state and federal income taxes. Neither the Applicant nor the Intervenors opposed any adjustment recommended by

the Public Staff for purchased power, chemicals, testing, sludge removal, annualization, hydrology testing, engineering fees, legal fees, telephone, rent, office supplies, postage, and property taxes. Therefore, the Hearing Examiner concluded that the amounts recommended by the Public Staff for purchased power, chemicals, testing, sludge removal, annualization adjustment, hydrology testing, engineering fees, legal fees, telephone, rent, office supplies, postage, and property taxes were appropriate for use in this proceeding. No party excepted to the Hearing Examiner's decision in these respects, so that it remains in full force and effect.

Spray Fee

Public Staff witness Casselberry testified that the ARWIA provided for an increased Spray Irrigation Maintenance Fee (Spray Fee) of $75,000, and indicated that the Public Staff questioned the reasonableness of this fee increase from the current fee of $12,360. Ms. Casselberry testified that, despite her concerns, which are set out in detail under the Evidence and Conclusions for Findings of Fact Nos. 9 and 10, the Public Staff recognized that all utility customers are members of the POA, that the POA is a party to the ARWIA, and that GCI and the POA have agreed in Section 7 of the ARWIA not to oppose portions of the requested utility rates in this proceeding, including an immediate increase in the monthly usage fee, not to exceed $9/month, to recover the costs of the increased Spray Fee. Ms. Casselberry testified that an increase in the usage rate of $9 per month will enable the Applicant to recover approximately $60,550 of the Spray Fee and she, therefore, recommended that this amount be included for ratemaking purposes in this case. Ms. Casselberry also recommended that the Applicant require invoices from GCI so that it can document the cost of maintaining the spray fields.

Intervenor witness Rosenberg testified that he opposed increasing the Spray Fee from $12,360 to $75,000, citing the same reasons as the Public Staff. He further testified that while all property owners are members of the POA, not all property owners are members of GCI, creating a conflict of interest between the members of the POA and GCI. Mr. Rosenberg further testified that property owners who are members of GCI would receive a benefit from the increased Spray Fee, while those who are not will only bear a burden as a result of the increased Spray Fee.

Applicant witness Ashness testified that GCI is responsible under the ARWIA for the operation and maintenance of the wastewater effluent spray irrigation system on the Governors Club golf course, its adjoining areas, and also under Duke Power lines. He also testified that operational and maintenance costs for future spray fields off the golf course are included in the $75,000 Spray Fee. He indicated that once the future spray fields were installed, GCI would need a full-time person dedicated to do all the mowing and maintenance, and would incur capital expenditures of approximately $38,000. He testified that there is extensive monitoring and record keeping related to the Governors Club's spray irrigation system. When asked if he had any documentation to justify these expenses and to show how much time was spent in the past on these activities, Mr. Ashness testified that, although he did not have a great level of detail in the form of written documentation, his testimony was based on his general knowledge of operating a reuse system, as well as his discussions with the former Governors Club golf course superintendent.

Applicant witness Vincent testified that the $75,000 Spray Fee was the result of an arms length negotiation. Although GCDC would have preferred to keep the old fee of $12,360 (adjusted for inflation), the WIA was not the result of an arms length negotiation as the same individuals executed the WIA and were in control of GCLP, GCI, and the POA. Mr. Vincent further testified that it was always the intent of the parties to the ARWIA that GCI and the POA would not oppose the increase in the annual Spray Fee from $12,360 to the newly negotiated $75,000. He stated that it was clearly the intent of the parties that the total amount of the $75,000 annual Spray Fee was to be included in monthly sewer rates, not only the $9/month recommended by the Public Staff. Mr. Vincent explained that it was the intent of the parties not to oppose the Spray Fee increase from $12,360 to $75,000, even though neither the original $12,000 Spray Fee, nor the inflation adjusted $12,360 Spray Fee, had been included in Commission approved rates for GCDC.

The Hearing Examiner agreed with the Public Staff's concerns, and concluded that the Public Staff's interpretation of the ARWIA was reasonable. Since the POA agreed not to oppose a $9 maximum increase in the monthly usage rate and since the $75,000 Spray Fee was clearly greater than the costs incurred by GCI for the services it performed because the Spray Fee included maintenance of future spray fields, the Hearing Examiner allowed $60,550 of the Spray Fee to be recovered in rates. Since no exceptions were advanced against the Hearing Examiner's conclusion with respect to this issue, that conclusion remains in full force and effect.

Maintenance and Repairs

In her prefiled testimony, Public Staff witness Casselberry adjusted maintenance and repairs to remove water expenses, to remove nonutility expenses, and to reclassify capital items to plant in service. In his rebuttal testimony, Applicant witness Brinn disputed some of Ms. Casselberry's adjustments. At the hearing, Ms. Casselberry made revisions to her testimony based on the Applicant's rebuttal testimony. With Ms. Casselberry's revisions, the Applicant and the Public Staff disagree on the following items:

	Amount
Cost of lowering or raising sewer lines	$ 312
Cost to locate and repair reuse line	1,250
Cost to rebuild control panel	13,845

Cost of Lowering or Raising Sewer Lines

Public Staff witness Casselberry testified that $187 for raising a sewer service line (Invoice 318) and $125 for relocating a service line (Invoice 221) should be reclassified to plant in service. Applicant witness Brinn disagreed with Ms. Casselberry and testified that the $125 from Invoice 221 should remain in maintenance and repairs since GCDC had to hire a contractor to lower the line to a lower grade to keep the service line from being cut by other utility contractors and also for the proper operation of the grinder pump. Mr. Brinn also testified that $187 from Invoice 318 should remain in this case as wastewater operating expense since it was necessary for GCDC to locate and raise the grade of the service line for the proper operation of the grinder pump.

The Hearing Examiner concluded that Public Staff witness Casselberry was correct to reclassify both $125 and $187 to plant in service for raising or lowering service laterals. Service laterals are installed when new service is requested and should be considered part of the grinder pump installation or tap fee. Raising or lowering the service lateral to assure that it is functioning properly is part of the installation process, not an annual event and, therefore, should be capitalized, not expensed. As a result of the fact that no exceptions were lodged against this portion of the Hearing Examiner's decision, it remains in full force and effect.

Cost to Relocate and Repair Reuse Line

Public Staff witness Casselberry removed $1,250 from maintenance and repairs. In his rebuttal testimony, Mr. Brinn testified that this amount, from Invoices 122 and 127, was incurred to locate and repair a cut wastewater effluent reuse line and should not have been removed from maintenance and repair expense. At the hearing, Mr. Brinn revised his testimony to state that these expenses were incurred to locate and permanently mark the wastewater effluent reuse line near holes 19 and 27 of the golf course as required by the state, not to locate and repair a cut line as stated on the invoices.

The Hearing Examiner concluded that Ms. Casselberry was correct to remove $1,250 from maintenance and repair expense. Under the ARWIA, GCI is responsible for maintaining the spray irrigation system as part of its maintenance fee. If the Applicant were allowed to include an additional $1,250 in maintenance and repair expense, it would be expensing these items twice. The Hearing Examiner was not persuaded by Mr. Brinn's revised testimony regarding this expense. Without questioning Mr. Brinn's sincerity, the Hearing Examiner found that his notation on the invoice at the time the expense was incurred was more reliable than his memory of the circumstances. Since no

exception was taken to this aspect of the Hearing Examiner's decision, it remains in full force and effect.

Cost to Rebuild Control Panel

Public Staff witness Casselberry reclassified $13,845 from maintenance and repairs to plant in service. In his rebuttal testimony, Applicant witness Brinn testified that $13,845 from Invoice 120105 should be expensed since it was necessary to rebuild and replace various parts of the control panel and associated equipment, and to rebuild the air baffles. Mr. Brinn further testified that the control panel was 15 years old and it had been necessary for GCDC to perform frequent repair work over the years.

The Hearing Examiner concluded that Public Staff witness Casselberry was correct in reclassifying $13,845 from maintenance and repair expense to plant and service. Ms. Casselberry testified that Phase II was completed in 2003. In reviewing invoice 120105, dated March 11, 2003, items such as rebuilding air baffles with controlled solenoid valves and check valves for cell 1 and 2, tying the air control system into the new plant, incorporating controls into cell 1 and 2 with lock out systems for single cell control, installing mudwell controls for two pumps, and replacing mudwell pumps are not routine maintenance and repair expense, which would occur on an annual basis, but plant modifications to either tie Phase I and Phase II together or extend the life expectancy of the existing plant.

Based on the foregoing, the Hearing Examiner concluded that the Public Staff's adjustment was appropriate and that the proper level of maintenance and repairs for use in this proceeding is $76,785. No party excepted to this portion of the Hearing Examiner's decision. As a result, this portion of the Hearing Examiner's decision remains in full force and effect.

Contract Accounting

As to contract accounting, the Applicant contested only the Public Staff's adjustment to the hourly rate for contract accounting services performed by Mr. Dane Vincent during the test year. The Intervenors did not contest any of the Public Staff's adjustments to contract accounting.

In his prefiled testimony, Public Staff witness Henry testified that GCDC provided a calculation of contract accounting fees that it failed to include on its application for its Chief Financial Officer (CFO)/General Manager, Dane Vincent. According to the Applicant's calculation, an additional annual cost of $15,000 should have been included on the application. This amount was arrived at by multiplying the estimated hours per year Mr. Vincent spends on utility operations by the hourly rate of $156.25 which he bills GCDC. Mr. Henry stated that, although the Applicant was unable to provide any documentation supporting the hours spent by Mr. Vincent on utility operations, they were not unreasonable or excessive.

Mr. Henry further testified as to his recommendation that Mr. Vincent's hourly rate for contract accounting and rate case assistance be reduced to a rate comparable to other regulated water and/or sewer utilities in the state. In addition to his duties as CFO/General Manager, Mr. Vincent is also treasurer and secretary of GCDC. Mr. Vincent is also a partner with Celebration Associates, LLC, which provides management and financial services to GCDC. Thus, Mr. Vincent's compensation reflects a much higher hourly rate for both his utility and nonutility duties and is two to three times greater than the hourly rate included in salaries and wages approved by the Commission for other regulated utilities in the state. Therefore, Mr. Henry included what he described as a more reasonable hourly rate of $75 in contract accounting related to Mr. Vincent's utility accounting duties.

In his rebuttal testimony, Mr. Vincent strongly disagreed with the Public Staff's recommended $75 hourly rate for his accounting services. Mr. Vincent stated that he is not a salaried employee of GCDC and does not receive any benefits, such as bonuses, pension, 401(k), group

medical, vacation, paid holidays, sick days, or other benefit type operating expenses normally associated with an employee. The $156.25 hourly rate charged to GCDC is the actual rate that Mr. Vincent charges to GCDC and GCDC actually pays. According to Mr. Vincent, the rate was negotiated at arms length, and is a 37.5% discount from his normal hourly rate of $200 per hour. Mr. Vincent testified that the reason for the discounted rate is the existence of a long-term contract between his company, Celebration Associates and GCDC.

Mr. Vincent stated that GCDC proposes to include in this case a total of $15,000 in annual expenses for all the duties he performs as Chief Financial Officer and General Manager, Treasurer and Secretary of GCDC. During the test year, Mr. Vincent was paid an average of $14,479 per month by GCDC. However, GCDC has allocated and included in this case eight hours per month for the utility functions of GCDC, for a total of $1,250 per month. The amount allocated represented approximately 9% of the hours and fees charged to GCDC by Celebration Associates for Mr. Vincent's services.

Mr. Vincent also testified that his full hourly rate of $200 per hour was established based upon market comparables for persons with his skill set which are a combination of development management expertise, operations management, supervisory and brokerage skills, and an experienced financial officer and CPA with over 22 years of experience. He indicated that it is not appropriate to reduce his hourly rate to the Public Staff's recommended $75 per hour rate, which is the rate for a 25-year-old CPA with minimal experience. Mr. Vincent recommended that the Commission should include the full $15,000 per year operating expense for his contract accounting services instead of the $7,200 allowed by the Public Staff.

On cross-examination, Mr. Henry testified that he compared the salary information in the last general rate cases for Hydraulics, Grandfather Golf and Country Club, Fearrington Utilities, Bald Head Island, Total Environmental Solutions, Inc., and Heater Utilities in arriving at his recommended rate of $75 per hour for Mr. Vincent. Mr. Henry also testified that he included benefits such as bonuses, pension, 401(k), group medical, paid holiday, sick leave, and other benefits normally associated with salaried employees in his $75 hourly rate for Mr. Vincent.

After careful examination of the testimony and exhibits presented in this proceeding, particularly the compensation levels for other regulated water and sewer utilities, the Hearing Examiner concluded that the hourly rate of $156.25 recommended by the Applicant for Mr. Vincent was excessive. Mr. Vincent's own testimony clearly showed that this rate was based in part on his nonutility skills and duties. As shown by the small percentage of time that Mr. Vincent spent on utility matters, his primary functions and skills related to the development operations of the Applicant, not to the utility's operations. Ratepayers should pay only reasonable costs for the provision of utility services, not costs that are abnormally high due to a company's nonutility operations. The Hearing Examiner concluded that the Public Staff's recommended hourly rate of $75, which is based on salary information for other utilities, would result in a reasonable level of expense for contract accounting services in this proceeding. Therefore, the Hearing Examiner concluded that the Public Staff's adjustment to reduce contract accounting fees by $7,800 was appropriate. Since no party excepted to this portion of the Hearing Examiner's decision, it remains in full force and effect.

Rate Case Expense

The Applicant and Public Staff disagreed on the level of rate case expense to include in this proceeding. The dispute is based solely upon the hourly rate to include in rate case expense for Mr. Dane Vincent's services. Having concluded that it is appropriate to include an hourly rate of $75 for contract accounting services performed by Mr. Vincent, the Hearing Examiner concluded that it was appropriate to use the same hourly rate in the calculation of rate case expense. Therefore, the Hearing Examiner concluded that the appropriate level of rate case expense to include in this proceeding was $28,868. As a result of the fact that no party excepted to this aspect of the Hearing Examiner's decision, it remains in full force and effect.

Depreciation and Amortization

The difference between the Applicant and the Public Staff regarding depreciation and amortization is a result of different plant balances and depreciation rates and is discussed previously in Evidence and Conclusions for Findings of Fact Nos. 16 through 19. On the basis of those conclusions, the Hearing Examiner concluded that the amount of depreciation and amortization presented by the Public Staff was reasonable and appropriate for use in this proceeding. As is indicated elsewhere in this Order, the Commission overrules the POA's objections to this portion of the Hearing Examiner's decision.

Regulatory Fee

The Applicant and the Public Staff recommended different amounts of regulatory fee expense due to the differing levels of operating revenues. The appropriate regulatory fee amount for purposes of this proceeding depends on the application of the statutory rate to the revenue requirement deemed appropriate by the Commission. Based upon the conclusions in this Order regarding the appropriate level of operating revenues, the Commission concludes that the appropriate level of regulatory fee for use in this proceeding is $329.

Gross Receipts Tax

The difference between the Applicant and the Public Staff as to gross receipts tax results from the application of the statutory rate to different levels of total operating revenues recommended by each party. Having determined the appropriate level of total operating revenues elsewhere in this Order, the Hearing Examiner concluded that the appropriate level of gross receipts tax for use in this proceeding was $16,262. Based upon the decisions described elsewhere in this Order, the Commission finds and concludes that the appropriate level of gross receipts tax is $16,462.

Based on the foregoing, the Commission finds and concludes that the appropriate level of operating revenue deductions under present rates is $496,404.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 26 THROUGH 28

The evidence for these findings of fact is contained in the testimony of Applicant witness Vincent, the affidavit and testimony of Public Staff witness Craig, and the testimony of POA witness Ligett.

Applicant witness Vincent testified that the Applicant requested that the Commission establish rates in this general rate case pursuant to the operating ratio methodology as described in G.S. 62-133.1(a). The Applicant, the POA, and the Public Staff all used the operating ratio method in determining the Applicant's revenue requirement in this case.

Public Staff witness Craig recommended that the Applicant be granted an 8.5% margin on expenses. Mr. Craig indicated in his affidavit that he derived a margin on expenses by identifying a risk-free rate and adding a 3.0% risk factor, and that this method yielded his recommended margin on expenses of 8.5%. Mr. Craig further stated in his affidavit that his methodology is consistent with the approach presented by the Public Staff and adopted by the Commission in Docket No. W-173, Sub 14. He indicated that his recommendation would produce operating ratios of 92.79%, including taxes, and 92.17%, excluding taxes, for sewer utility service. On cross-examination, Mr. Craig testified that he identified a risk-free rate by examining both historical and forecasted U.S. Treasury bond rates for various terms, and explained that his risk-free rate of 5.5% was based on this examination.

Mr. Vincent testified that the Applicant agreed with Mr. Craig's recommendation of an 8.5% margin on expenses. Mr. Vincent noted that the Commission has approved an 8.5% margin on expenses or an 8.5% return on rate base consistently over the past few years for wastewater utilities with monthly flat wastewater rates, and indicated that there is no reason to reach a different decision in this case. He testified that the Applicant is not requesting a risk factor greater than the 3.0% risk

factor normally allowed by the Commission, so long as the margin on expenses is 8.5%. Mr. Vincent further testified that if the Commission allowed a margin on expenses of less than 8.5%, the Applicant's ability to attract external financing to perform capital improvements would be adversely affected.

POA witness Ligett testified that he derived his proposed margin on expenses by adding a 3.0% risk factor to a risk-free rate and that this methodology yielded a margin of 6.95%. In performing his calculation of the appropriate margin on expenses, Mr. Ligett analyzed the five-year U.S. Treasury bond rates from July 1998 to December 1998, and determined that they averaged 4.75% for the period. Mr. Ligett then added .75 percentage points to the average U.S. Treasury bond rate and determined that the risk-free rate in 1998 was 5.5%. He next averaged the five-year U.S. Treasury bond rates from July 2003 to December 2003 and determined that they averaged 3.20% for the period. He then added .75 percentage points to the average U.S. Treasury bond rate and determined that the risk-free rate in 2003 was 3.95% and that the appropriate margin on expenses is 6.95%. Mr. Ligett testified that a risk factor of 3.0% should not be applied to sewer operations, and asserted that an unmetered sewer utility is less risky than an unmetered water operation. He contended that a 3.0% risk factor is too high for a sewer utility, and testified that he did not have a recommendation for a risk factor, just that it must be somewhat less than 3 percentage points. On cross-examination, witness Ligett conceded that the Commission has approved an 8.5% margin on expenses in several other dockets.

The Hearing Examiner concluded that the operating ratio methodology as described in G.S. 62-133.1(a) was reasonable for use in this proceeding. POA witness Ligett did not make a persuasive argument for a risk-free rate that was different from 5.5% or a risk factor that was different from 3.0%. Mr. Ligett provided no objective basis for examining U.S. Treasury bond rates in 1998 in order to determine a risk-free rate in 2003, nor did he provide any rational basis for adding .75 percentage points to the average U.S. Treasury bond rate and then adding an additional 3.0% risk factor to determine the appropriate margin on expenses. Furthermore, Mr. Ligett provided no justification for utilizing this approach to determine an appropriate margin on expenses. On the other hand, the Applicant agreed with the Public Staff's recommendation of an 8.5% margin. This margin is based on an evaluation of relevant historical and prospective interest rate information and has been approved by the Commission in recent cases. Therefore, the Hearing Examiner concluded that an 8.5% margin on expenses is just and reasonable in this case.

Finally, the Applicant agreed with the Public Staff's proposed operating ratios, which were based on its margin recommendation. Operating ratios that may have been implied by the POA's margin recommendation were not considered since its margin recommendation was rejected. The Hearing Examiner concluded that an operating ratio of 92.79%, including taxes, or 92.17%, excluding taxes, is appropriate for use in this proceeding. No exceptions were taken by any party to the Hearing Examiner's findings and conclusions with respect to the appropriate margin on expenses and operating ratio, so that aspect of the Hearing Examiner's decision remains in full force and effect.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 29 AND 30

The following schedules summarize the gross revenue and margin on operating revenue deductions requiring a return that the Applicant should have a reasonable opportunity to achieve based upon the increase approved in this Order. These schedules, illustrating the Applicant's gross revenue requirement, incorporate the Hearing Examiner's uncontested findings and conclusions and the findings and conclusions ordered by the Commission in response to the POA's exceptions in this Order.

Based upon the revenue requirement found reasonable in this Order, the Commission concludes that the rates contained in the attached Schedule of Rates are just and reasonable and should be approved.

SCHEDULE I

GOVERNORS CLUB LIMITED PARTNERSHIP
DOCKET NO. W-947, SUB 1
STATEMENT OF OPERATING INCOME FOR RETURN
For The 12 Months Ending April 30, 2003

Item	Rates Prior To Interim Rates	Increase Approved	After Approved Increase
Operating revenues:			
Service revenues	$ 205,298	$ 222,445	$ 427,743
Miscellaneous revenues	71,160	71,160	142,320
Uncollectibles	(2,090)	(2,220)	(4,310)
Total operating revenues	274,368	291,385	565,753
Operating revenue deductions:			
Operating & maintenance exp.	340,319	0	340,319
General expenses	84,290	0	84,290
Depreciation and amortization	46,467	0	46,467
Property taxes	8,537	0	8,537
Payroll taxes	0	0	0
Regulatory fee	329	350	679
Gross receipts tax	16,462	17,483	33,945
State income tax	0	3,555	3,555
Federal income tax	0	7,194	7,194
Total operating revenue deductions	496,404	28,582	524,986
Net operating income for return	$(222,036)	$ 262,803	$ 40,767
Operating revenue deductions requiring a return	$ 479,613		$ 479,613
Margin	-46.29%		8.50%

SCHEDULE II
GOVERNORS CLUB LIMITED PARTNERSHIP
DOCKET NO. W-947, SUB 1
STATEMENT OF ORIGINAL COST RATE BASE
For The 12 Months Ending April 30, 2003

	Amount
Plant in service	$ 2,574,198
Accumulated depreciation	(548,209)
Contributions in aid of construction	(1,650,437)
Adjustment for capitalization of expenses	0
Inventory	47,196
Working capital allowance	46,064
Total original cost rate base	$ 468,812

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 31

The evidence for this finding of fact is contained in the verified application, the testimony of Applicant witness Vincent, the testimony of Public Staff witness Casselberry, the testimony and exhibit of POA witness Ligett, and the testimony of POA witness McInerney.

In its Application, the Applicant proposed to increase its availability fee from $10 to $15 per month. Applicant witness Vincent testified that the existing availability fee of $10 was established in 1990. He testified that there have been significant cost increases for the maintenance of the wastewater utility system, which justified the applied for increase. Public Staff witness Casselberry testified that the Public Staff did not oppose increasing the availability fee from $10 to $15 per month.

The POA advocated that the percentage increase approved by the Commission be borne equally by the usage customers and the availability customers. POA witness Ligett testified that the

increase in the availability rate should be proportional to the increase for sewer service. On cross-examination, POA witness McInerney stated that the POA was asking the Commission to consider the alternative method for funding the sewer utility's rate increase, even though the availability customers have not been notified that there would be an increase greater than $15 per month.

The Hearing Examiner noted that the Notice to Customers, which was served on all usage and availability customers as a result of the Commission's October 30, 2002 Order Establishing General Rate Case, Suspending Rates, Scheduling Hearing, and Requiring Customer Notice stated that "[t]he Commission may consider additional or alternative rate design proposals which were not included in the original application and may order increases or decreases in the sewer schedule which differ from those proposed by the Applicant. However, any rate structure considered will not generate more overall revenues than requested."

The Hearing Examiner concluded that the POA had proposed an alternative rate structure that was reasonable and should be allowed. The approved percentage increase should be borne equally by both the usage customers and the availability customers. The availability fee should, therefore, be $20 per month. No party excepted to the Hearing Examiner's decision with respect to this issue, so it remains in full force and effect.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 32 THROUGH 34

The evidence for these findings of fact is contained in the Commission's official records, the verified application, the testimony of Public Staff witness Casselberry, and the testimony of Applicant witness Vincent, and are uncontested. No party excepted to this aspect of the Hearing Examiner's decisions, so it remains in full force and effect.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NO. 35

In its exceptions, the POA also asserted that there is evidence in the record that GCDC has assessed ratepayers a fee for the installation of grinder pumps at the time they apply for sewer service even though there is no Commission approved tariff authorizing the collection of such a fee.

At the oral argument, the POA pointed to the cross-examination of GCDC witness Vincent, who stated that GCDC assessed a fee for installing the grinder pumps. Mr. Vincent testified at the hearing that the utility provides the installation service. When asked by the POA as to who collects for said service, GCDC witness Vincent answered that the utility does. Mr. Vincent also was asked by the POA if a tariff exists regarding a grinder pump installation fee, but GCDC witness Vincent's response indicated that he was not aware of any such tariff.

The POA asserted that the Company has been assessing fees for grinder pumps without a tariff, and that the Recommended Order did not address this issue. The POA added that the Commission has never had a chance to assess the reasonableness of a grinder pump installation fee.

GCDC's response to the POA's contention with respect to the installation fee for grinder pumps was that there is nothing in the Commission's rules or regulations about grinder pumps. The Company continued by stating that the grinder pump process is a relatively new phenomenon which has been in operation for the last 10 to 15 years in regard to spray irrigation systems. GCDC asserted that Commission Rule R10-11(c) states that, "The customer shall furnish and lay the necessary pipe to make the connection from the property line nearest the utility sewer line to the point of use," which means that it is the customer's responsibility to install or to connect to the Company's sewer line at the property line. GCDC maintained that a grinder pump is on the customer's property, and it is the customer's property when a grinder pump is installed.

GCDC presented to the Commission a copy of the original franchise order in Docket No. W-947 issued by the Commission on April 24, 1990. The Commission's attention was drawn to Item

No. 8 in that particular Order concerning in the stipulations to which the Public Staff and the Applicant agreed at that time. Item No. 8 stated that the lot purchasers will be responsible for the initial purchase of grinder pumps required for the system. GCDC contended that the model and installation are to be in accordance with the standard set by the utility, and once a grinder pump is initially installed, it will be the responsibility of the utility to maintain, repair, and replace the grinder pump. These responsibilities, as well as the five-year expected life, were discussed in Item 12 of the stipulations in the original franchise Order. The Applicant explained that the customer will be liable for maintenance, repair, or replacement costs only if the damage is due to the customer's negligence. GCDC assured the Commission that the utility, however, is responsible for the replacement for an original grinder pump.

Commissioner Kerr asked the Company if the lot purchaser was responsible for the purchase of a grinder pump required by the system subject to the utility's specifications, and if at that time, in addition to the connection fee, GCDC also assessed the lot purchaser a fee for the installation of a grinder pump. The Company answered affirmatively to both questions. Commissioner Kerr asked GCDC to explain the justification for a grinder pump installation fee, since the lot purchaser had paid to hook up to the system. The Company explained that the lot purchasers are installing their own service line to the utility's line, and that a grinder pump is still part of the customer's service line, on the customer's property, and it is, according to the Commission's own rule, the customer's responsibility to install the customer's service line from the house to the utility's line. Commissioner Kerr then inquired if the utility actually installed a grinder pump for the customers. GCDC responded by stating that the utility contracts said work to independent contractors. The Company further explained that the customers pay the utility for the installation of the grinder pump, and the utility, in turn, pays the independent contractor.

Next, Commissioner Kerr questioned the Applicant with respect to the customers being able to purchase a grinder pump and to seek service from another independent contractor who meets the specifications to install said pump. The Company responded that the customers were allowed to seek service elsewhere with the understanding that all specifications set by GCDC are to be satisfied, and the customers would then be responsible for paying the independent contractor.

GCDC informed the Commission that grinder pumps are not installed at all houses at Governors Club. Such pumps are not installed for the 25 to 50 customers that have gravity sewer service. The Company explained that the only tariff that has been set is the tariff which relates to the original connection fee. GCDC further explained that the connection fee tariff is the same for all customers and does not cover grinder pumps. GCDC cited in its Proposed Order a number of instances of other services or fees charged by other utilities that are not regulated, such as internal wiring, maintenance protection plans, DSL lines, and several other such services. The Company contended that it is not necessary for the Commission to approve the grinder pump installation fee.

The Public Staff agreed with the Company with respect to the grinder pump installation fee. Public Staff witness Henry stated in his prefiled testimony, on Page 13, that grinder pump revenues are not regulated by the Commission. On Schedule 3-1 of Henry Exhibit I, grinder pump revenues of $41,362 were deducted from miscellaneous revenues.

The Commission has carefully considered the information in the record regarding the grinder pump installation fee. The Commission is aware of the original franchise Order and the stipulations set forth in that order. However, the Commission believes that the installation fee for grinder pumps is very similar to the connection fee, whereby the customer has to pay a one-time fee to connect to the Company's system. The Commission understands that the customer has to purchase a grinder pump as well as pay for the installation of said pump, which then becomes the property of the utility, in order to obtain sewer utility service. After the installation of a grinder pump, the utility becomes responsible for the maintenance, repairs, and the replacement of said pump.

Since grinder pumps become the property of the sewer utility, the Commission believes that a tariff should be created for the related installation fee. There is no significant difference between the grinder pump installation fee and the connection fee. The customers pay to both the connection fee and grinder pump installation fee to the sewer utility. Both fees must be paid by the customers before the sewer utility will provide sewer utility service to the customer.

The Commission finds and concludes that the grinder pump installation fee should be tariffed and should be included on the Schedule of Rates in this proceeding, effective upon the date of this Order. Based on the foregoing, the Commission is of the opinion that the Company should file a proposed fee for the installation of a grinder pump and a schedule of the underlying costs to be recovered. Thereafter, the Public Staff should review the reasonableness of said fee and the related expenses and report its findings and recommendations to the Commission.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NO. 36

The evidence for this finding is contained in the records for this proceeding. On June 25, 2004, the Company filed a Motion for Interim Rates seeking authority to implement the rates approved in the Recommended Order on an interim basis, subject to refund. In its June 30, 2004 Order, the Commission approved the requested interim rates, subject to refund, along with a required Undertaking to Refund and to provide proper notice to GCDC's customers.

The interim rates implemented were the recommended rates found to be reasonable by the Hearing Examiner in his Recommended Order. The rates approved by the Commission in this proceeding are less than the rates recommended by the Hearing Examiner. The difference is to be refunded to the customers by the Company, with 10% interest per annum.

The Applicant should provide to the Commission a calculation of the refund, the proper amount of interest, and the methodology in which it intends to utilized to refund the overcollection to its customers.

IT IS, THEREFORE, ORDERED as follows:

1. That the transfer of utility assets from GCDC to GCLP is approved, and GCLP is substituted for GCDC as the Applicant in this general rate case proceeding.

2. That GCDC shall file an application to transfer its certificate of public convenience and necessity to GCLP, as well as replacing the bond and surety GCDC has posted with the Commission (said application was filed in Docket No. W-1233, Sub 0, on April 27, 2004).

3. The ARWIA is deemed filed with the Commission pursuant to G.S. 62-153 and the parties are allowed to operate under its terms.

4. That the transfer of the golf course and spray fields by GCLP to GCI is approved provided (1) that approval of the transfer does not constitute approval of any of the fees payable by GCLP to GCI pursuant to the ARWIA for ratemaking purposes, and (2) that if the Commission finds that any provision of the ARWIA adversely affects GCLP's ability to maintain its non-discharge permit and provide adequate utility service at reasonable cost, such provision shall be null and void.

5. That the revenue requirement and resulting rates approved for the Company shall be reduced by $13,000 for the first year following the effective date of this Order for disregard of North Carolina law and Commission rules and regulation. The Schedule of Rates, attached hereto as Appendix A, reflects this rate reduction, and is approved for sewer utility service rendered by GCLP on and after the effective date of this Order.

6. That the Schedule of Rates, attached hereto as Appendix B, is approved for sewer utility service rendered by GCLP, after the 12-month period discussed in Ordering Paragraph 5. This schedule is deemed filed with the Commission pursuant to G.S. 62-138.

7. That a grinder pump installation fee shall be included on the Schedule of Rates. The Company shall file no later than 30 days after the date of this Order its proposed grinder pump installation fee and a schedule of the underlying costs to be recovered.

8. That the Public Staff shall review the Company's proposed grinder pump installation fee as well as the related expenses incurred by the Applicant, and shall file a report on the reasonableness of such proposal no later than 60 days after the date of this Order.

9. That a copy of the Notice to Customers, attached hereto as Appendix C, shall be mailed or hand delivered to all customers along with the next billing, and that the Applicant shall file the attached Certificate of Service within 20 days thereafter. Furthermore, a copy of this Notice to Customers shall be provided to each new customer at the time the customer requests sewer service.

ISSUED BY ORDER OF THE COMMISSION.
This the 13th day of October, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

pb101304.01

Chair, Jo Anne Sanford did not participate in this decision.
Commissioner Robert V. Owens, Jr. dissents.

APPENDIX A
PAGE 1 OF 2

SCHEDULE OF RATES
for
GOVERNORS CLUB LIMITED PARTNERSHIP
for providing sewer utility service in
GOVERNORS CLUB SUBDIVISION
Chatham County, North Carolina
RATES REFLECTING A $13,000 RATE REDUCTION
TO BE IMPOSED OVER A 12-MONTH PERIOD

Monthly Flat Rate:

Residential, per single-family equivalent (SFE)	$52.55
Commercial	$52.55
North Chatham Elementary School	14.30 SFE's x $52.55 = $751.47
Halfway House #05	0.18 SFE's x $52.55 = $ 9.46
Halfway House #15	0.18 SFE's x $52.55 = $ 9.46
Halfway House #25	0.18 SFE's x $52.55 = $ 9.46
Governors Club Gatehouse	1.00 SFE's x $52.55 = $ 52.55
Governors Club Clubhouse	11.26 SFE's x $52.55 = $591.71
Governors Club Fitness Center	1.45 SFE's x $52.55 = $ 76.20
Governors Club Maint. Facility	6.86 SFE's x $52.55 = $360.49
Governors Club Sales Center	1.60 SFE's x $52.55 = $ 84.08

Availability Rate:	$20.00 per month
Connection Charge:	$4,500
Return Check Charge:	$25.00

APPENDIX A
PAGE 2 OF 2

Reconnection Charge: Actual Cost (provided that the estimated cost to reconnect is listed on the notice to cut off)
Grinder Pump Installation: To be established by further Order
According to the original franchise Order, lot purchasers will be responsible for the initial purchase of grinder pumps required for the system; the model and installation are to be in accordance with the standards set by the utility. The customer may either contract with the utility for the installation of the grinder pump at the fee shown above or obtain installation from a qualified third party contractor. Once the grinder pump is initially installed, it will be the responsibility of the utility to maintain, repair, and replace the grinder pump. However, the customer will be liable for maintenance, repair, or replacement costs if the damage is due to customer negligence. The utility will remain responsible for those repairs.

Bills Due:	On billing date
Bills Past Due:	15 days after billing date
Billing Frequency:	Shall be monthly for service in arrears
Finance Charges for Late Payment:	1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date.

Issued in Accordance with Authority Granted by the North Carolina Utilities Commission in Docket No. W-947, Sub 1, on this the 13th day of October, 2004.

APPENDIX B
PAGE 1 OF 2

SCHEDULE OF RATES
for
GOVERNORS CLUB LIMITED PARTNERSHIP
for providing sewer utility service in
GOVERNORS CLUB SUBDIVISION
Chatham County, North Carolina

Monthly Flat Rate:

Residential, per single-family equivalent (SFE)	$54.20
Commercial	$54.20
North Chatham Elementary School	14.30 SFE's x $54.20 = $775.06
Halfway House #05	0.18 SFE's x $54.20 = $ 9.76
Halfway House #15	0.18 SFE's x $54.20 = $ 9.76
Halfway House #25	0.18 SFE's x $54.20 = $ 9.76
Governors Club Gatehouse	1.00 SFE's x $54.20 = $ 54.20
Governors Club Clubhouse	11.26 SFE's x $54.20 = $610.29
Governors Club Fitness Center	1.45 SFE's x $54.20 = $ 78.59
Governors Club Maint. Facility	6.86 SFE's x $54.20 = $371.81
Governors Club Sales Center	1.60 SFE's x $54.20 = $ 86.72

Availability Rate:	$20.00 per month
Connection Charge:	$4,500
Return Check Charge:	$25.00

APPENDIX B
PAGE 2 OF 2

Reconnection Charge: Actual Cost (provided that the estimated cost to reconnect is listed on the notice to cut off)
Grinder Pump Installation Fee: To be established by further Order
According to the original franchise Order, lot purchasers will be responsible for the initial purchase of grinder pumps required for the system; the model and installation are to be in accordance with the standards set by the utility. The customer may either contract with the utility for the installation of the grinder pump at the fee shown above or obtain installation from a qualified third party contractor. Once the grinder pump is initially installed, it will be the responsibility of the utility to maintain, repair, and replace the grinder pump. However, the customer will be liable for maintenance, repair, or replacement costs if the damage is due to customer negligence. The utility will remain responsible for those repairs.

Bills Due:	On billing date
Bills Past Due:	15 days after billing date
Billing Frequency:	Shall be monthly for service in arrears
Finance Charges for Late Payment:	1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date.

Issued in Accordance with Authority Granted by the North Carolina Utilities Commission in Docket No. W-947, Sub 1, on this the 13th day of October, 2004.

APPENDIX C
PAGE 1 OF 4

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH
NOTICE TO CUSTOMERS
DOCKET NO. W-947, SUB 1
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Notice is given that the North Carolina Utilities Commission has granted Governors Club Limited Partnership, successor to Governors Club Development Corporation (Applicant), a rate increase for sewer utility service in Governors Club Subdivision in Chatham County, North Carolina. The rates approved by the Commission are as follows and are effective for service rendered on and after the date of this Notice.

RATES REFLECTING A $13,000 RATE REDUCTION TO BE IMPOSED OVER A 12-MONTH PERIOD

Monthly Flat Rate:

Residential, per single-family equivalent (SFE)	$52.55
Commercial	$52.55
North Chatham Elementary School	14.30 SFE's x $52.55 = $751.47
Halfway House #05	0.18 SFE's x $52.55 = $ 9.46
Halfway House #15	0.18 SFE's x $52.55 = $ 9.46
Halfway House #25	0.18 SFE's x $52.55 = $ 9.46
Governors Club Gatehouse	1.00 SFE's x $52.55 = $ 52.55
Governors Club Clubhouse	11.26 SFE's x $52.55 = $591.71
Governors Club Fitness Center	1.45 SFE's x $52.55 = $ 76.20
Governors Club Maint. Facility	6.86 SFE's x $52.55 = $360.49
Governors Club Sales Center	1.60 SFE's x $52.55 = $ 84.08

Availability Rate: $20.00 per month
Connection Charge: $4,500

APPENDIX C
PAGE 2 OF 4

Return Check Charge: $25.00
Reconnection Charge: Actual Cost (provided that the estimated cost to reconnect is listed on the notice to cut off)
Grinder Pump Installation Fee: To be established by further Order
According to the original franchise Order, lot purchasers will be responsible for the initial purchase of grinder pumps required for the system; the model and installation are to be in accordance with the standards set by the utility. The customer may either contract with the utility for the installation of the grinder pump at the fee shown above or obtain installation from a qualified third party contractor. Once the grinder pump is initially installed, it will be the responsibility of the utility to maintain, repair, and replace the grinder pump. However, the customer will be liable for maintenance, repair, or replacement costs if the damage is due to customer negligence. The utility will remain responsible for those repairs.

Bills Due:	On billing date
Bills Past Due:	15 days after billing date
Billing Frequency:	Shall be monthly for service in arrears
Finance Charges for Late Payment:	1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date.

APPENDIX C
PAGE 3 OF 4

RATES EXCLUDING RATE REDUCTION TO BE IMPLEMENTED AFTER THE 12-MONTH RATE REDUCTION PERIOD

Monthly Flat Rate:

Residential, per single-family equivalent (SFE)	$54.20
Commercial	$54.20
North Chatham Elementary School	14.30 SFE's x $54.20 = $775.06
Halfway House #05	0.18 SFE's x $54.20 = $ 9.76
Halfway House #15	0.18 SFE's x $54.20 = $ 9.76
Halfway House #25	0.18 SFE's x $54.20 = $ 9.76
Governors Club Gatehouse	1.00 SFE's x $54.20 = $ 54.20
Governors Club Clubhouse	11.26 SFE's x $54.20 = $610.29
Governors Club Fitness Center	1.45 SFE's x $54.20 = $ 78.59

WATER AND SEWER – RATE INCREASE

Governors Club Maint. Facility 6.86 SFE's x $54.20 = $371.81
Governors Club Sales Center 1.60 SFE's x $54.20 = $ 86.72

Availability Rate: $20.00 per month
Connection Charge: $4,500
Return Check Charge: $25.00
Reconnection Charge: Actual Cost (provided that the estimated cost to reconnect is listed on the notice to cut off)
Grinder Pump Installation Fee: To be established by further Order

According to the original franchise Order, lot purchasers will be responsible for the initial purchase of grinder pumps required for the system; the model and installation are to be in accordance with the standards set by the utility. The customer may either contract with the

utility for the installation of the grinder pump at the fee shown above or obtain installation from a qualified third party contractor. Once the grinder pump is initially installed, it will be the responsibility of the utility to maintain, repair, and replace the grinder pump. However, the customer will be liable for maintenance, repair, or replacement costs if the damage is due to customer negligence. The utility will remain responsible for those repairs.

Bills Due: On billing date
Bills Past Due: 15 days after billing date
Billing Frequency: Shall be monthly for service in arrears
Finance Charges for Late Payment: 1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date.

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 No. W-947, Sub 1, and the Notice was mailed or hand delivered by the date specified in the Order.

This the ____ day of ________________ 2004.

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 No. W-947, Sub 1.

Witness my hand and notarial seal, this the ____ day of ______________ 2004.

____
Notary Public

____
Address

(SEAL) My Commission Expires: ______________________________
Date

DOCKET NO. W-274, SUB 465
DOCKET NO. W-200, SUB 45
DOCKET NO. W-177, SUB 50

In the Matter of

Joint Application for Approval of the Acquisition by Aqua America, Inc. of the Stock of Heater Utilities, Inc., by Way of Purchase from Allete Water Services, Inc.	))))	ORDER APPROVING JOINT STIPULATION AND TRANSFER OF STOCK

BY THE COMMISSION: On January 30, 2004, Aqua America, Inc. (Aqua), and Allete Water Services, Inc. (Allete), filed a joint application with the Commission seeking authority to transfer the stock of Heater Utilities, Inc. (Heater), and control of Heater and its wholly owned subsidiaries, LaGrange Waterworks Corporation (LaGrange) and Brookwood Water Corporation (Brookwood), from Allete to Aqua.

In their joint application, the Applicants stated that the transfer would have no immediate effect on the rates charged or service provided by Heater, LaGrange, and Brookwood. In addition, the Applicants expected the Heater operations to continue in much the same manner at present.

As part of the joint application, Aqua sought permission to account for the estimated Acquisition Premium of approximately $18 million by establishing on Heater's books an Acquisition Incentive Account, an Operation Savings Account and an Acquisition Adjustment Account, each of which would be equal to one-third of the Acquisition Premium.

On May 17, 2004, the Public Staff and the Aqua filed a joint stipulation in which they agreed to support the immediate granting of the transfer of the stock from Allete to Aqua without an evidentiary hearing. The terms of the stipulation are as follows:

a. Immediately following the stock transfer, Aqua will establish an Acquisition Incentive Account and an Acquisition Adjustment Account on Heater's books. The amount in the Acquisition Incentive Account will be equal to two-thirds of the Acquisition Premium, including transaction costs incurred by Aqua. It will be converted to rate base in connection with the acquisition and upgrade of nonviable systems in North Carolina as described below. The amount in the Acquisition Adjustment account will be equal to one-third of the Acquisition premium. It will be excluded from rate recovery and treated in accordance with Generally Accepted Accounting Principles.

b. The Acquisition Incentive Account may be converted to rate base in connection with the acquisition and upgrade of nonviable water and sewer systems in North Carolina. Heater will be active in pursuing the acquisition of such systems as identified by the Commission, the Department of Environment and Natural Resources (DENR) or the Public Staff. Nonviable systems are generally considered to be systems whose current owner(s) do not have the financial, technical, or managerial capacity to provide adequate service. Such systems may include, by way of illustration: (i) systems for which an emergency operator has been appointed; (ii) systems that have received repeated Notices of Violation from DENR; or (iii) systems needing significant capital improvements that are not economically feasible. The Acquisition Incentive Account will be used solely for acquisition of privately owned systems that would fall under regulation by the Commission. Except upon a finding by the Commission of exceptional circumstances, it will not be used for the acquisition of systems from municipalities and/or water and sewer districts. Neither will it be used for acquisitions Heater has planned in connection with the incentives established in its acquisitions of the Mid-South systems, which incentives will remain in place. Heater will consult with the Public Staff prior to entering into any contract to purchase a nonviable system to determine whether the system qualifies as nonviable for purposes of the Acquisition Incentive Account and whether the purchase price is reasonable.

c. It is the Public Staff's intention to recommend that the nonviable systems acquired by Heater be included in Heater's rate base and charged the uniform rates. However, the Public Staff reserves the right to propose stand-alone rates if the acquisition significantly impacts Heater's existing customers and to propose rate making mechanisms to protect existing Heater customers from the cumulative impact of additions to rate base from the Acquisition Incentive Account.

d. For every dollar that is spent by Heater following the stock transfer to acquire nonviable systems and that is allowed rate base treatment by the Commission, and for every dollar that is used by Heater following the stock transfer to upgrade such systems to state standards, Heater will be allowed to include one dollar from the first $9 million in the Acquisition Incentive Account up to a maximum $400,000 per system for water systems and $100,000 for sewer systems that are made part of Heater and up to a maximum of $100,000 per system for the water systems that are made part of LaGrange or Brookwood, with a 30-year amortization beginning at the time of the acquisition or when the capital improvement goes into service. After the first $9 million in the Acquisition Incentive Account has been included in rate base, Heater will be permitted to include one dollar from the remaining $3 million for every two dollars that is spent by Heater following the stock transfer to acquire and upgrade such nonviable systems, subject to the above conditions and limitations. The Public Staff will consider recommending to the Commission, on a case-by-case basis, that the maximum amount of incentive allowed for a particular system be increased.

e. Should the amount in the Acquisition Incentive Account be more or less than $12 million, the dollar for dollar match will be used for the first three-fourths of the balance in the account and the remaining one-fourth will be subject to the one dollar for two dollar match.

f. The Public Staff will recommend rate base treatment of any acquisition premium in the purchase price of a nonviable system only upon a showing by Heater that the purchase price is prudent and that both Heater's existing customers and the customers of the acquired utility would be better off (or at least no worse off) as a result of the transfer, including the rate base treatment of the acquisition premium. In addition to information supporting the reasonableness of the purchase price, such a showing will include:

(1) estimates of the impact of the acquisition adjustment on both the rates of Heater's existing customers and the rates of the acquired customers;
(2) a list of improvements that Heater will make to the system, the reasons for the improvements, when each improvement will be made, and the estimated cost for each improvement;
(3) estimates of the impact of the improvements on both the rates of Heater's existing customers and the rates of the acquired customers;
(4) an estimate of any other costs to the acquired customers resulting from the transfer caused by such things as higher tax rates, increased salaries, etc; and
(5) any other benefits to Heater's existing customers and the acquired customers resulting from the transfer.

g. At the end of thirty years from the date on which the Acquisition Incentive Account is established, Heater will no longer be entitled to convert any of the remaining balance to rate base, and such balance will be treated in accordance with Generally Accepted Accounting Principles.

h. The Public Staff and Aqua agree that this stipulation shall have no rate making implications, other than those discussed in paragraphs a-g. In addition, the Public Staff and Aqua agree that the benefits and costs to Heater of the stock transfer, including tax implications, may be at issue in future proceedings. The Public Staff and Aqua further agree that either party may assert any position on rate making or other regulatory issues with regard to these benefits and costs and that the Commission retains the right to take whatever action it deems necessary to protect the interests of Heater's customers in future proceedings.

i. The Applicants and the Public Staff agree that Aqua shall file a report of the action taken pursuant to the Commission's approval of this transfer within ten (10) days of the transfer. Such report shall include the date the acquisition took place, the actual price paid by Aqua for the stock of Heater, and the journal entries made to establish the Acquisition Incentive Account and the

Acquisition Adjustment Account on Heater's books. Aqua shall file this report with the Commission and serve a copy on the Public Staff.

j. The Public Staff and Aqua agree that Heater 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.

k. Aqua and the Public Staff agree to waive the right to file testimony in this docket, subject to the Commission's approval of the stipulation.

Aqua has agreed to file bonds in the amount of $5.2 million, $120,000 and $60,000 for Heater, LaGrange and Brookwood, respectively, secured by Aqua, in lieu of the bonds furnished by Allete on behalf of Heater, LaGrange and Brookwood. Said bonds will be issued on the effective date of the transfer and will be filed with the Commission within three business days of the consummation of the stock transfer.

After careful consideration, the Commission finds and concludes (a) that the Stipulation should be approved; (b) that, based on the Stipulation, the proposed stock transfer is justified by the public convenience and necessity and should be approved; (c) that replacement bonds should be issued on the date of the transfer; and (d) that customers should be given notice of the stock transfer.

IT IS, THEREFORE, ORDERED as follows:

1. That the Stipulation by and between Aqua and the Public Staff filed with the Commission in this matter is hereby approved.

2. That Allete is hereby authorized to transfer 100% of the outstanding stock of Heater to Aqua.

3. That the bonds in the amounts of $5.2 million, $120,000 and $60,000 furnished by Allete on behalf of Heater, LaGrange and Brookwood, respectively, shall remain in effect, however, Aqua is responsible for having issued replacement bonds in like amount immediately upon the effective date of the transfer.

4. That Aqua shall file a letter notifying the Commission within three business days of consummation of the stock transfer.

5. That Aqua shall file bonds in the amounts of $5.2 million, $120,000 and $60,000 on behalf of Heater, LaGrange and Brookwood within three business days of the consummation of the stock transfer.

6. That, upon receipt of acceptable replacement bonds from Aqua, the Commission will issue a further Order accepting and approving replacement bonds and releasing previously filed bonds to Allete.

7. That Heater shall mail a copy of the Notice attached as Appendix A to its customers including Brookwood and LaGrange, along with their next bills following consummation of the stock transfer.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of May, 2004.

NORTH CAROLINA UTILITIES COMMISSION
'Patricia Swenson, Deputy Clerk

rb052504.01

APPENDIX A

DOCKET NO. W-274, SUB 465
DOCKET NO. W-200, SUB 45
DOCKET NO. W-177, SUB 50

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Joint Application for Approval of the Acquisition by Aqua America, Inc. of the Stock of Heater Utilities, Inc., by Way of Purchase from Allete Water Services, Inc.) NOTICE TO CUSTOMERS

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission has issued an order approving the transfer of the stock of Heater Utilities, Inc. (Heater), and control of Heater and its wholly owned subsidiaries, LaGrange Waterworks Corporation (LaGrange) and Brookwood Water Corporation (Brookwood) from Allete Water Services, Inc. to Aqua America, Inc. (Aqua). Local management will remain in place, and operations are expected to continue in much the same manner at present.

Aqua is the largest publicly traded water utility holding company in the United States. In North Carolina, Aqua currently serves approximately 14,000 water and wastewater customers through its wholly owned subsidiaries, Aqua North Carolina, Inc., and five AquaSource companies. Heater and its subsidiaries currently serve approximately 54,000 customers in North Carolina.

ISSUED BY ORDER OF THE COMMISSION.
This the 26th day of May, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

DOCKET NO. W-1202, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Mountain Acreage, Ltd., Cowee Mountain Water System, Operating a Water Utility System without a Franchise	) FINAL ORDER REQUIRING) APPLICATION FOR FRANCHISE) OR TRANSFER OF SYSTEM AND) SERVICE TO LOT 5A

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on Tuesday, January 20, 2004, at 2:00 p.m.

BEFORE: Commissioner James Y. Kerr, II, Presiding; and Commissioners J. Richard Conder, Sam J. Ervin, IV, Lorinzo L. Joyner, and Michael S. Wilkins

APPEARANCES:

FOR THE RESPONDENT MOUNTAIN ACREAGE, LTD./ANNE MCDONOUGH:
None

FOR COWEE MOUNTAIN IMPROVEMENT ASSOCIATION, INC.:
William H. Coward, Attorney at Law, Post Office Box 1918, Cashiers, North Carolina

FOR DR. EDWIN C. CARLSON AND COWEE RIDGE CONSENSUS AND CONSERVANCY COMMUNITY, INC.:
Robert F. Page, Crisp, Page & Currin, L.L.P., Attorneys at Law, Suite 302, 1305 Navaho Drive, Raleigh, North Carolina 27609

FOR THE USING AND CONSUMING PUBLIC:
Antoinette R. Wike, Chief Counsel - Public Staff, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On August 5, 2002, the Commission received a letter from Dr. Edwin C. Carlson regarding a water utility system in Cowee Mountain Subdivision, Macon County, North Carolina. Dr. Carlson requested that the owner/operator of the water system, Mrs. Anne McDonough (Respondent), be declared a public utility and, as such, be compelled to provide water utility service to his subdivided lot in Cowee Mountain. The Commission requested the Public Staff to investigate the matter, and, on October 16, 2002, the Public Staff submitted a written report of its findings. Dr. Carlson responded to the Public Staff's report by letter to the Commission. The Commission received several additional letters from Cowee Mountain property owners.

Based on the correspondence it had received, including the Public Staff's report, the Commission issued an Order on March 27, 2003, requiring Mrs. McDonough to appear before the Commission and show cause why she should not be declared a public utility under G.S. 62-3(23)a.2. By Order issued April 1, 2003, the Commission requested the Public Staff's participation.

The matter came on for hearing on May 28, 2003, as scheduled, before a Commission Hearing Examiner.[1] The Cowee Mountain Improvement Association, Inc. (CMIA) and the Cowee Ridge Consensus and Conservancy Community, Inc. (CRCCC) intervened as parties of record. The intervention of the Public Staff was recognized pursuant to Commission rule. The following persons

[1] By Order entered July 31, 2003, the Commission assigned Staff Attorney ToNola D. Brown-Bland to review the record and decide the case as the Hearing Examiner. The original Hearing Examiner who presided at the hearing was Larry S. Height.

testified at the hearing: Mrs. McDonough; Dr. Carlson; Greg Ward, president of the CMIA; Richard Watson, treasurer of the CMIA; Charles Wolf, a member of the CMIA board of directors; and Dorothy K. McPherson, a resident of Cowee Mountain.

Late-filed exhibits were filed by Dr. Carlson on June 2, 2003, and by the Public Staff on July 8, 2003, and August 26, 2003.

On November 14, 2003, Hearing Examiner ToNola D. Brown-Bland entered a Recommended Order in this docket entitled "Recommended Order Requiring Application for Franchise or Transfer of System."

On December 1, 2003, Dr. Carlson filed certain exceptions to the Recommended Order and requested the Commission to schedule an oral argument to consider those exceptions. Dr. Carlson filed his exceptions on both his own behalf as the owner of Lot 5A in the Cowee Mountain Subdivision and on behalf of the CRCCC.

By Order dated December 10, 2003, the Commission found good cause to schedule this matter for oral argument on exceptions. Because this show cause proceeding was initiated based upon a complaint from Dr. Carlson, the Commission stated that Dr. Carlson would be allowed to argue his exceptions as the owner of Lot 5A, but that Dr. Carlson would not be allowed to represent and argue those exceptions on behalf of the CRCCC. The Commission noted that although Dr. Carlson was one of two members of the CRCCC, the CRCCC intervened in this docket as a formal party and was represented at the hearing by an attorney. The Commission stated that if the CRCCC wanted to participate further in this matter, it would have to be represented by counsel since Commission Rule R1-5(d) provides that pleadings filed on behalf of an association must be signed by a member of the Bar of the State of North Carolina admitted and licensed to practice as an attorney-at-law in this State. The oral argument to consider the exceptions to the Recommended Order filed by Dr. Carlson was scheduled for Tuesday, January 20, 2004, at 2:00 p.m.

The matter was thereafter called for oral argument at the appointed time and place and was heard by the Full Commission. All of the parties, except for the Respondent, were represented by counsel. Dr. Carlson was also allowed to briefly address the Commission.

Based on the foregoing, the evidence adduced at the hearing, and the entire record in this matter, the Commission now makes the following

FINDINGS OF FACT

1. Mountain Acreage, Ltd. (MA), is a limited partnership having approximately 20 members. Andrew and Anne McDonough were the general partners. Mrs. McDonough is the surviving general partner.

2. MA developed the Cowee Mountain Subdivision in 1975 and installed a community water system. The terrain in Cowee Mountain is hilly and rocky. It is difficult to place both a well and a septic tank on the same lot.

3. Under restrictive covenants filed and recorded on September 25, 1975, property owners became members of the CMIA and were obligated to contribute 1/34 of the cost for the maintenance of utilities and roads in the Cowee Mountain Subdivision, regardless of whether they were using the roads, utilities or consuming water from the community water system.

4. Mr. and Mrs. McDonough contemplated a subdivision with low density. As originally platted, Cowee Mountain Subdivision consisted of 34 lots of two or more acres each. The aforesaid restrictive covenants prohibited further subdivision without the consent of the developers, Andrew and Anne McDonough. Initially, the McDonoughs never held themselves out to provide utilities for more than 34 lots. The restrictive covenants imply that the developers might potentially provide

additional lots with utilities, but only as a result of exercising their right to consent to subdivision of the original lots. The right to subdivide lots was reserved solely unto the discretion of the developers.

5. In 1984, when the restrictive covenants were in force, the developers consented to subdivision of one lot, making a total of 35 lots in the Subdivision. After the said original lot was subdivided, the McDonoughs impliedly held themselves out as providing utilities for 35 lots. The Public Water Supply Section (PWSS) of the North Carolina Department of Environment and Natural Resources approved the Subdivision water system to serve only 35 lots. Water service has been provided to the 35th lot created by the subdivision to which the developers agreed. Following creation of the 35th lot, the members of the CMIA began contributing 1/35 of the cost of maintenance of utilities and roads in the Subdivision. Only 17 of the 35 lots are presently connected to and serviced by the Subdivision water system.

6. In 1994, it was determined that the original well was sufficient to serve only 23 lots. A second well was dug to ensure an adequate long-term water supply for 35 lots. Since there are currently only 17 connections, the second well is not on line.

7. The CMIA receives the property owners' contributions for the costs of the community water system. CMIA represents that it receives said contributions on behalf of Mrs. McDonough. In 1996, Mrs. McDonough attempted to charge a tap fee to pay for the cost of the second well, but property owners rejected it.

8. The aforesaid restrictive covenants expired in 2000 and the property owners have been unable to reach agreement on new restrictive covenants. As a result, presently any owner may subdivide his lot, since there is no existing restriction against subdivision. The last lot in the Subdivision was sold in June of 2001.

9. There are currently 22 property owners in Cowee Mountain Subdivision, some of whom own two or more of the 36 existing lots.

10. Cowee Mountain Subdivision is a seasonal community with a very small winter population.

11. Dr. Carlson purchased Lot 5 in 1993 when the restrictive covenants were still in force. After the restrictive covenants expired, Dr. Carlson lawfully subdivided Lot 5 to create Lot 5A. Water service has not been extended to Lot 5A.

12. There are already two septic system easements on Lot 5A. With a third septic system and repair area, there will be very little room for a small home and a driveway. If Lot 5A is to be used for a residential dwelling, access to a community water system is probably essential, because with two easements for septic systems servicing other tracts and a home, Lot 5A will likely be unable to support installation of a well to support a dwelling on Lot 5A within the space standards required by state regulations.

13. Dr. Carlson formed the CRCCC on August 17, 2000, and advised Mrs. McDonough that the CRCCC would pay its fair share of the maintenance fees. The CRCCC has two members: Dr. Carlson and the Edwin C. Carlson Family Trust. Only two assessments have been paid to the CMIA for Lot 5 since it was subdivided, and this assessment was adjusted downward by about $50 by Dr. Carlson. No assessment has ever been paid for Lot 5A.

14. The CMIA was a voluntary association following expiration of the covenants in 2000, until it was incorporated on June 18, 2001. Dr. Carlson asserts that he is not a member of the CMIA.

15. The CMIA is currently operating the Subdivision water system on behalf of MA and Mrs. McDonough, owner of the water system. The CMIA collects the annual assessments and pays the operating expenses of the water system, including the certified operator, electricity, and supplies.

The electric account is in the CMIA's name.

16. Mrs. McDonough's involvement with the Subdivision water system is limited to ownership, making sure that the water is tested, receiving and monitoring water quality reports, submitting the annual water quality report to the State, and paying the annual permit fee. She also pays the expenses of the second well.

17. The CMIA is willing to purchase the Subdivision water system and related easements from MA/Mrs. McDonough on the condition that it be allowed to operate the system for the original 35 lots and not be required to extend service to subdivided lots or neighboring or additional property. There is an executory agreement between the CMIA and Mrs. McDonough to convey the system, but the agreement is on hold.

18. Dr. Carlson represents that he is willing to be a member of the CMIA for water and easement purposes so that the CMIA can acquire the water system and be exempt from regulation as a public utility, provided that he first receives water service to Lot 5A.

19. Only one member of the CMIA board has voted to provide water service to Lot 5A, and that vote was cast in order to expedite the transfer of the Subdivision water system to the CMIA.

20. A committee made of members of the CMIA and Dr. Carlson has met with the engineer who designed the second well and developed recommendations for improving the operation of the water system.

21. According to the Public Water Supply Section of the North Carolina Department of Environment and Natural Resources, the two wells at Cowee Mountain will produce a total of 43 gallons per minute. If both wells were on line, it is believed that the current water system could serve more than 35 lots. However, the Public Water Supply Section has approved the Subdivision water system for only 35 lots configured as shown in a revised subdivision plan filed with said office.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

The term "public utility" is defined in the Public Utilities Act as follows:

> "Public utility" means any person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
>
> . . . .
>
> 2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation . . . ; provided, however, that the term "public utility" shall not include any person whose sole operation consists of selling water to less than 15 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 15 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 15 residential building lots shall be a public utility at the time of such planning or holding out to serve 15 or more building lots, without regard to the number of actual customers connected . . . .

N.C.G.S. 62-3(23)a.

In order to come within the definition of the term "public utility" in G.S. 62-3(23)a.2, Respondent MA/Mrs. McDonough must be providing service to the public for compensation. The Commission finds that MA/Mrs. McDonough constructed and presently own a water system that is serving the public for compensation. Specifically, 17 of the 35 lots certified for service by PWSS are

presently connected to and served by the Subdivision water system. Mrs. McDonough received compensation in years past by collecting assessments to cover the cost of maintaining the water system. To find that MA/Mrs. McDonough is a public utility, it is not necessary to find that they made a profit from the water system; reimbursement of expenses is sufficient compensation for purposes of the statute. Nor is it necessary that Mrs. McDonough be operating the water system and receiving compensation at present, if the system is being operated for compensation on her behalf. Thus, the record supports a finding that MA/Mrs. McDonough is a *de facto* public utility and, as such, is obligated to provide water service up to the limits of the system's capacity to all who apply and who are part of the currently approved service area or may reasonably be served by extension.

Therefore, on or before March 15, 2004, Mountain Acreage, Ltd./Anne McDonough shall either (1) file an application (Appendix A) for a franchise to provide water service to the Cowee Mountain Subdivision or (2) file application (Appendix B) to sell and transfer ownership of the Subdivision water system to a qualified entity, which could be an entity that qualifies for an exemption from regulation by the Commission.

Having found that the owner of the Cowee Mountain Subdivision water system is a *de facto* public utility, the Commission must next examine whether the public utility should be required to provide water service to Dr. Carlson's Lot 5A.

G.S. 62-42(a) provides, in pertinent part, as follows:

> . . .[W]henever the Commission, after notice and hearing had upon its own motion or upon complaint, finds. . .[t]hat persons are not served who may reasonably be served. . .the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time. . .

In this case, Dr. Carlson has filed a complaint with the Commission asking that the Respondent be required to provide water utility service to Lot 5A. PWSS has approved the water system for only 35 lots configured as shown in the revised subdivision plan on file with the PWSS under serial number 97-13599, and Lot 5A is in addition to the 35 lots approved by the PWSS. Nevertheless, the evidence in this case indicates that the current water system likely has capacity to serve in excess of 35 lots and that water distribution facilities have been installed adjacent to Lot 5A. Therefore, the Commission concludes that Lot 5A may reasonably be served and that good cause therefore exists, pursuant to G.S. 62-42(a), to require the Respondent public utility to petition the PWSS for approval to serve Lot 5A. The Commission is of the opinion that the water system likely has sufficient capacity to serve Lot 5A without jeopardizing the ability of the system to serve the existing 35 lots and without further expansion of the system. Nor is there any indication that serving Lot 5A will create a public health or safety risk. Because Lot 5A is wholly within the Cowee Mountain Subdivision, it is equitable and fair to require the Respondent public utility to make service available so long as such service can be accomplished on a reasonable basis, that does not jeopardize service to the other 35 lots, through a petition filed with PWSS seeking the necessary approval and authority to provide such service. Upon request, the Public Staff is hereby requested to provide assistance to the Respondent in seeking such approval from PWSS. Accordingly, Respondent shall, not later than April 1, 2004, file an appropriate petition with PWSS requesting authorization to serve Lot 5A in addition to the existing 35 lots. Once PWSS either approves or denies the request to connect Lot 5A to the system, the Respondent is hereby requested to file written notification of the PWSS's decision with the Commission.

Dr. Carlson shall be financially responsible for reimbursing the Respondent for all reasonable costs incurred by the Respondent in conjunction with seeking the necessary approval from the PWSS to provide water utility service to Lot 5A, whether such petition is approved or denied. If approved by the PWSS, Dr. Carlson shall also be financially responsible for paying the actual costs of physically connecting Lot 5A to the water system as well as the charges for ongoing water service.

Dr. Carlson is hereby requested to notify the Commission in writing not later than March 1, 2004, that he accepts these terms of financial responsibility as a condition precedent to the petition actually being filed with PWSS. Furthermore, the Public Staff is requested to review for reasonableness all costs to be billed by the Respondent to Dr. Carlson and, in the case of a dispute, any party may request a decision by the Commission as to the reasonableness of such costs.

IT IS, THEREFORE, ORDERED as follows:

1. That Respondent Mountain Acreage, Ltd./Anne McDonough is a public utility subject to the North Carolina Public Utilities Act and the rules and regulations of the North Carolina Utilities Commission that pertain to water companies.

2. That on or before March 15, 2004, Respondent Mountain Acreage, Ltd./Anne McDonough shall either (1) file an application (Appendix A) for a franchise to provide water service to the Cowee Mountain Subdivision or (2) file an application (Appendices B and C) to sell and transfer ownership of the Subdivision water system to a qualified entity, which could be either a regulated public utility or an entity that qualifies for an exemption from regulation by the Commission.

3. That Respondent Mountain Acreage, Ltd./Anne McDonough shall operate the Subdivision water system in accordance with the rules and regulations of the Commission pertaining to water companies, unless and until the system is sold to a qualified entity and such transfer of ownership has been finally concluded and approved by the Commission.

4. That Respondent Mountain Acreage, Ltd./Anne McDonough shall, not later than April 1, 2004, file an appropriate petition with PWSS requesting authorization to serve Lot 5A in addition to the existing 35 lots. Once PWSS either approves or denies the request to connect Lot 5A to the system under the conditions outlined above, the Respondent shall file written notification of the PWSS's decision with the Commission.

5. That Dr. Carlson shall be financially responsible for reimbursing the Respondent for all reasonable costs incurred by the Respondent in conjunction with seeking the necessary approval from the PWSS to provide water utility service to Lot 5A, whether such petition is approved or denied. If approved by the PWSS, Dr. Carlson shall also be financially responsible for paying the actual costs of physically connecting Lot 5A to the water system as well as the charges for ongoing water service. Dr. Carlson shall notify the Commission in writing not later than March 1, 2004, that he accepts these terms of financial responsibility as a condition precedent to the petition actually being filed with PWSS. The Public Staff shall review for reasonableness all costs to be billed by the Respondent to Dr. Carlson and, in the case of a dispute, any party may request a decision by the Commission as to the reasonableness of such costs.

ISSUED BY ORDER OF THE COMMISSION.
This the 17th day of February, 2004.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

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Sand Dollar Ferry Service, d/b/a; Barbour, Alicia Ann - A-38, SUB 5; A-62, SUB 0; Order Granting Withdrawal of Application and Canceling Certificate (01/21/2004)

Waterfront Ferry Service, Inc. - A-55, SUB 1; Order Approving Stock Transfer (09/17/2004)

FERRIES – Show Cause

Sand Dollar Ferry Service, d/b/a; Barbour, Dennis Braxton - A-38, SUB 6; Order Closing Docket (01/23/2004)

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BUS/BROKER – Cancel Certificate (Broker's License)

Pleasure Tours, d/b/a; Strickland, Barbara R. – B-626, SUB 1 (08/05/2004)
Summey Travel Services, Inc. - B-598, SUB 1 (04/27/2004)
Trans-Service, Inc. - B-411, SUB 5 (05/20/2004)
Travel Times of Salisbury, d/b/a; Purdy, Edith C. - B-367, SUB 1 (01/16/2004)
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ELECTRIC – Annual Fuel Charge Adjustment

(Orders Approving Fuel Charge Adjustment and Purchased Power Cost Rider)

Dominion North Carolina Power; Vir. Elec. & Power Co., d/b/a -- E-22, SUB 422 (12/21/2004)
Duke Power, a Div. of Duke Energy Corp. – E-7, SUB 746 (06/23/2004); E-7, SUB 752 (09/03/2004)
Progress Energy Carolinas, Inc.; CP&L Company, d/b/a -- E-2, SUB 851 (09/09/2004)
Western Carolina Univ. -- E-35, SUB 32 (04/15/2004)

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Dominion North Carolina Power; Virginia Electric & Power Co., d/b/a – E-22,
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SUB 739 (Complaint of Claude E. Mathis, Jr.) (01/22/2004)
SUB 740 (Complaint of Mikaw Corporation) (02/06/2004)
SUB 744 (Complaint of Florence Grantier) (05/14/2004)
SUB 747 (Complaint of Greg & Lynn Pope) (04/20/2004)
SUB 753 (Complaint of Gary Edwards) (07/15/2004)
SUB 754 (Complaint of Margaret Ann Madden) (10/25/2004)
SUB 761 (Complaint of Sherrill Faw) (11/12/2004)
SUB 765 (Complaint of Alicia Proctor) (11/10/2004)
SUB 766 (Complaint of James David O'Neal) (11/05/2004)
SUB 769 (Dorothy Swartz) (12/08/2004)

SUB 748 (Complaint of Chandreshwari Prasad Singh), Recom. Order Deny. Complaint (11/24/2004); Final Order Overrul. Except. & Affirm. Recom. Order (12/21/2004)
SUB 768 (Complaint of Angela Abdullah Pledger'Bey), Order Finding No Reasonable Grounds to Further Investigate Docket (12/17/2004)
Progress Energy Carolinas, Inc., d/b/a; Carolina Power & Light Company – E-2,
SUB 807 (Complaint of Steve Messer) (02/04/2004)
SUB 840 (Complaint of Charles Abiahu) (03/16/2004)
SUB 848 (Complaint of Ulous I. Lane) (03/16/2004)
SUB 853 (Complaint of Faith Campbell) (08/18/2004)
SUB 835; Recommended Order Denying Complaint (Richard Holford) (01/16/2004)
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SUB 762; Order Accept. Agreement for Filing & Allow. Oper. Pursuant to Terms (10/29/2004)
SUB 773; Order Accept. Agreement for Filing & Allow. Oper. Pursuant to Terms (12/16/2004)
Progress Energy Carolinas, Inc., d/b/a; CP&L Co. – E-2, SUB 836; Order Accept. Agreement for Filing and Allowing Payment. to Affiliate (04/26/2004)

<u>ELECTRIC - Filings Due per Order or Rule</u>
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SUB 750; Order Granting Authority to Issue Securities (05/28/2004)
SUB 772; Order Accept. Borrow. Arrangement for Filing and Permitting Operation Thereunder Pursuant to G.S.62-153 (12/29/2004)
NC Eastern Municipal Power Agency – E-48, SUB 5; Order Granting Certificate and Requiring Filing of Annual Report (08/06/2004)
Progress Energy Carolinas, Inc.; Carolina Power & Light Company, d/b/a – E-2,
SUB 834; Order Approving Meter-Related Programs Revision (03/26/2004)
SUB 847; Order Approving Program (02/26/2004)

<u>ELECTRIC – Miscellaneous</u>
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Progress Energy Carolinas, Inc.; CP&L Co., d/b/a – E-2, SUB 819; Order Approv. Rev. (12/16/2004)

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<u>ELECTRIC – Tariff</u>
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- SUB 18; Order Issuing Certificate of Public Convenience and Necessity (12/28/2004)
- SUB 19; Order Issuing Certif. of Envir. Compatibility and Public Conv. & Necess. (12/28/2004)
- SUB 20; Order Issuing Certif. of Envir. Compatibility and Public Conv. & Necess. (12/28/2004)

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Brunswick EMC – EC-40, SUB 19; Order Grant. Exempt. from Requirement to Obtain a Certificate of Envir. Compat. and Public Convenience and Necessity (12/16/2004)

Carteret-Craven EMC – EC-55, SUB 58; Order Grant. Exempt. from the Requirement to Obtain a Certificate of Envir. Compat. and Public Convenience and Necessity (04/26/2004)

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ELECTRIC MERCHANT PLANT – Cancellation of Certificate
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Rowan Generating Company, LLC – EMP-3, SUB 1 (07/22/2004)

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Fayetteville Generation, LLC – EMP-10, SUB 0; EMP 11, SUB 0 (10/11/2004
GenPower Earleys, L.L.C. -- EMP-4, SUB 0 (06/29/2004)
Mirant Gastonia, LLC -- EMP-9, SUB 0 (06/24/2004)
Rowan Generating Company, LLC -- EMP-3, SUB 0 (07/12/2004)
Still Pines Energy, LLC -- EMP-8, SUB 0 (08/16/2004)

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NATURAL GAS – Adjustment of Rates/Charges

Eastern North Carolina Natural Gas Company – G-44,
- SUB 12; Order Allowing Rate Changes Effective March 1, 2004 (03/03/2004)
- SUB 14; Order Allowing Rate Changes Effective December 1, 2004 (12/02/2004)

Frontier Energy, LLC – G-40,
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- SUB 53; Order Allowing Rate Changes Effective November 1, 2004 (11/04/2004)
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- SUB 454; Order Approving Rate Adjustments Effective August 1, 2004 (07/30/2004)
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Frontier Energy, LLC – G-40, SUB 3; Order Closing Docket (02/11/2004)

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Public Service Company of NC Inc. – G-5,
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SUB 455; Order Dismissing Complaint and Closing Docket (08/03/2004)
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Frontier Energy, LLC -- G-40, SUB 52; Order Approving Contract (08/06/2004)
Piedmont Nat. Gas Co. – G-9, SUB 491; Order Allow. Contract to Become Effective (09/03/2004)

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Cardinal Extension Co., LLC – G-39, SUB 7; Order Approving Depreciation Rates (11/29/2004)

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Public Serv. Co. of NC Inc. -- G-5, SUB 453, Order Grant. Authority to Issue Securities (05/25/2004)

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Harrington Street Associates, Inc. – G-47, SUB 0; Order Approving Master Metering (12/09/2004)
N.C. Nat. Gas Corp. – G-21, SUB 450; Recom. Order on Annual Review of Gas Costs (06/30/2004)
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North Carolina Natural Gas Corporation -- G-21, SUB 411; Order Closing Docket (03/24/2004)
Public Service Co. of NC Inc. -- G-5, SUB 451; Order Approving New Rate Schedule 115-Open Flame Gas Lanterns (04/01/2004)

NATURAL GAS – Reports

N. C. Natural Gas Corporation – G-21, SUB 451; Order Approving Negotiated Contract (10/14/2004)

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Piedmont Nat. Gas Co., Inc. -- G-9, SUB 493; Order Approv. a Two-For-One Stock Split (09/28/2004)

SHARED TENANT SERVICE

SHARED TENANT SERVICE - Cancellation of Certificate

UNC - Asheville -- STS-17, SUB 1; Order Canceling Certificate (10/29/2004)

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SMALL POWER PRODUCER – Certificate

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SMALL POWER PRODUCER - Electric Generation Certificate

Honey, Jr.; Thomas H. -- SP-144, SUB 0; Order Approving Certificate (11/04/2004)

SMALL POWER PRODUCER - Sale/Transfer

Advantage Invest. Group -- SP-143, SUB 0; Order Approving Transfer of Certificate (10/01/2004)
Clearwater Hydro Co. -- SP-31, SUB 1; SP-141, SUB 0; Order Approving Transfer of Certificate (04/26/2004)

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SPECIAL CERTIFICATE/PSP – Certificates Issued

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Anthony, Jr.; Clinzo	SC-1756, SUB 0	(06/25/2004)
Baker; Curry M.	SC-1740, SUB 0	(02/02/2004)
Bishop; Terry E.	SC-1759, SUB 0	(08/26/2004)
Blessed Hope Enterprises	SC-1771, SUB 0	(12/28/2004)
Clayton; Wallace B.	SC-1748, SUB 0	(03/30/2004)
Combined Public Communications, d/b/a Melody C. Weil	SC-1741, SUB 0	(03/05/2004)
Consolidated Cleaners, Inc.	SC-1733, SUB 0	(01/06/2004)
Cooper, David	SC-1766, SUB 0	(09/30/2004)
Dominguez; Fran	SC-1767, SUB 0	(10/18/2004)
EagleTel, Inc.	SC-1768, SUB 0	(11/22/2004)
Evergreens Senior Healthcare System, d/b/a; The Evergreens, Inc.	SC-1743, SUB 0	(02/17/2004)
Franklin Laundry, Inc.	SC-1750, SUB 0	(04/02/2004)
Higgins, Mark	SC-1746, SUB 0	(03/05/2004)
HSI Telecom, Inc.	SC-1770, SUB 0	(12/15/2004)
Infinity Prepaid Communications, Inc.	SC-1764, SUB 0	(09/29/2004)
J&R's Food, Inc.	SC-1749, SUB 0	(04/02/2004)
Mohr; Richard	SC-1747, SUB 0	(03/24/2004)
Moretz, Garrett W.	SC-1742, SUB 0	(02/10/2004)
Pay-Tel Hospitality Telecommunications, Inc.	SC-1745, SUB 0	(02/17/2004)
Prince, Michael L.	SC-1754, SUB 0	(05/27/2004)
Professional Counseling and Consultation Services	SC-1762, SUB 0	(09/08/2004)
Roaring River Properties, Inc., d/b/a Terrie Gentry	SC-1714, SUB 0	(01/06/2004)
SAVAC, Inc.	SC-1765, SUB 0	(09/29/2004)
SC Communications, LLC; d/b/a Seacoast Communications, LLC	SC-1757, SUB 0	(07/06/2004)
Self-Serv, Inc.	SC-1758, SUB 0	(07/20/2004)
SH&B, Inc.	SC-1739, SUB 0	(03/03/2004)
Smith, Dalphine A.	SC-1738, SUB 0	(01/20/2004)
Somers, Claude S.	SC-1761, SUB 0	(09/08/2004)
Symtelco, LLC	SC-1769, SUB 0	(11/22/2004)
Talton Communications, Inc.	SC-1751, SUB 0	(04/13/2004)
Tele-Connect, Inc.	SC-1755, SUB 0	(06/09/2004)
The Town of Fletcher	SC-1734, SUB 0	(01/06/2004)
Wired Communications	SC-1614, SUB 3	(09/08/2004)

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Austin; Dan C.	SC-135, SUB 1	(05/27/2004)
Bell, Zachary David & Runion, Landon, A General Partnership	SC-1624, SUB 1	(08/26/2004)
BellSouth Public Communications, Inc.	SC-1068, SUB 2	(03/26/2004)
Betsy Jeff Penn 4-H Center	SC-1735, SUB 1	(07/13/2004)
Birkdale Golf Associates, LLC	SC-1389, SUB 1	(11/02/2004)
Blowing Rock Assembly Grounds, Inc.	SC-287, SUB 1	(02/03/2004)
Broyhill Furniture Industries, Inc.	SC-1676, SUB 1	(03/03/2004)
Budtel Associates	SC-1684, SUB 1	(04/21/2004)
Cabin Creek Campground & Mobile Home Park	SC-1652, SUB 1	(10/13/2004)
Computer Electronic Telecom Services	SC-1301, SUB 1	(09/30/2004)
Computerized Payphone Systems	SC-332, SUB 5	(04/13/2004)
Daniel Payphones, Inc.	SC-277, SUB 3	(01/06/2004)
Faith Chapel of Lexington, Inc.	SC-1645, SUB 1	(07/29/2004)
Farr; Thomas Arthur	SC-1157, SUB 1	(06/17/2004)
Franklin, Jr.; Roger G.	SC-638, SUB 1	(07/27/2004)
G & B Communications; Gregory L. Hunter, d/b/a	SC-1696, SUB 1	(04/27/2004)
Hall, Jr.; I. Randall	SC-1016, SUB 1	(10/04/2004)
Harriger; Clyde	SC-632, SUB 1	(09/30/2004)
Henderson; Eric	SC-1560, SUB 1	(02/10/2004)
Hildreth; Anthony D.	SC-1502, SUB 1	(10/13/2004)
Houston; Rick	SC-1752, SUB 1	(11/02/2004)
Jet Industries, Inc.	SC-1602, SUB 1	(12/03/2004)
Koger: Douglas B.	SC-1493, SUB 1	(03/26/2004)
Locklear; Allen Curtiss	SC-1613, SUB 1	(02/03/2004)
LSAA, Inc.	SC-1612, SUB 2	(11/22/2004)
Mason Enterprises of MD, Inc.	SC-1700, SUB 1	(09/30/2004)
McFadden Communications; Brian McFadden, d/b/a	SC-1539, SUB 4	(01/14/2004)
Metrophone Telecommunications, Inc.	SC-1472, SUB 1	(01/09/2004)
Mount Mitchell Lands, Inc.	SC-1675, SUB 2	(10/29/2004)
Oh! Brian's; OB Triangle, Inc, d/b/a	SC-1728, SUB 1	(03/31/2004)
Paluck; David J.	SC-1071, SUB 2	(05/04/2004)
Princess Investments, Ltd.	SC-1763, SUB 1	(11/09/2004)
Promus Hotels, Inc.	SC-1753, SUB 1	(08/26/2004)
Qwest Interprise America, Inc.	SC-1659, SUB 1; SC-1357, SUB 1	(01/30/2004)
Raybon; Bobby	SC-124, SUB 1	(09/30/2004)
RPG Communications; Richard P. Gigante, d/b/a	SC-1147, SUB 1	(10/04/2004)
Snyder; Hal K.	SC-245, SUB 7	(07/27/2004)
Spectrum Dyed Yarns, Inc.	SC-1736, SUB 1	(08/13/2004)
Straight Talk Communications; Tony Wayne Evans, d/b/a	SC-1721, SUB 1	(02/10/2004)
Sualevai; Lisa A.	SC-1598, SUB 1	(07/29/2004)

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Kim, Han Kyung -- SC-1000, SUB 10; SC-1571, SUB 1 (05/20/2004)
MAH Communications/Utelecom, LLC -- SC-1000, SUB 10; SC-1653, SUB 1 (08/18/2004)
Major Communications Consulting, Inc. - SC-1556, SUB 1; SC-1000, SUB 9 (01/09/2004)
More Than One Son -- SC-1000, SUB 10; SC-1667, SUB 1 (08/18/2004)
Phillips & Brooks/Gladwin, Inc. -- SC-1704, SUB 1; SC-1000, SUB 9 (01/09/2004)
Statewide Communication - SC-1000, SUB 10; SC-1548, SUB 1 ((05/20/2004)
Symbiont,Inc. - SC-1000, SUB 10; SC-1578, SUB 2 (10/04/2004)
Taylor Maid Payphone Service - SC-1000, SUB 10; SC-754, SUB 3 (06/25/2004)
Wired Communications - SC-1000, SUB 10; SC-1614, SUB 2 (06/25/2004)

SPECIAL CERTIFICATE/PSP – Miscellaneous

(Orders Reissuing Special Certificates Due to:)

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Eagle Comm., d/b/a; Reynolds, David & Faye - SC-1686, SUB 1; Name/Address Change (03/03/2004)
Franklin Laundry, Inc. - SC-1750, SUB-0; Correct Zip Code (06/17/2004)
Hair Cuttery, d/b/a; Creative Hairdressers -- SC-1061, SUB 2; Address Change (11/09/2004)
Sara Lee Sock Co. - SC-1376, SUB 1; Address Change (05/20/2004)
SmartStop, Inc. - SC-1459, SUB 2; Address Change (05/27/2004); Errata Order (06/09/2004)
Sprint Comm. Co. - SC-1338, SUB 2; Address Change (02/26/2004)
Sprint Payphone Services - SC-1474, SUB 4; Address Change (02/26/2004)
Sprint, d/b/a; Carolina Telephone Co.- SC-1249, SUB 3; Address Change (02/26/2004)
Sprint, d/b/a; Central Telephone Co. - SC-1356, SUB 2; Address Change (02/26/2004)
TNT Enterp., d/b/a; Thacker, Johnathan M. - SC-1673, SUB 1; Name/Address Changes (02/03/2004)

TELECOMMUNICATIONS

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AccessLine Communications Corporation,	P-1343, SUB 0	(11/22/2004)
Advanced Tel, Inc., d/b/a Advanced Tel, Inc. of California	P-1330, SUB 0	(12/03/2004)
Advanced Telemanagement Group,	P-1342, SUB 0	(11/22/2004)
American Farm Bureau, Inc.	P-1041, SUB 1	(08/26/2004)
American Long Lines, Inc.,	P-602, SUB 5	(03/09/2004)
Andiamo Telecom, LLC	P-1317, SUB 0	(04/14/2004)
BalsamWest FiberNet, LLC,	P-1309, SUB 0	(02/05/2004)
Blonder Tongue Telephone, LLC,	P-1320, SUB 0	(05/04/2004)
Blonder Tongue Telephone, LLC	P-1320, SUB 1	(06/04/2004)
Charter Fiberlink NC-CCO, LLC	P-1299, SUB 1	(03/19/2004)
Charter Fiberlink NC-CCVII, LLC,	P-1300, SUB 1	(02/05/2004)
Computer Network Technology Corporation,	P-1285, SUB 0	(06/04/2004)
Computer Network Technology Corporation	P-1285, SUB 1	(03/16/2004)
ComTech21, LLC	P-995, SUB 3	(04/27/2004)
Consolidated Communications Network Services, Inc.,	P-1298, SUB 0	(01/23/2004)
DCT Telecom Group, Inc.	P-1312, SUB 0	(03/16/2004)
DELTEL, INC.	P-1302, SUB 0	(01/06/2004)

DIECA Communications, Inc., d/b/a Covad Communications,	P-775, SUB 7	(06/17/2004)
e-Polk, Inc., d/b/a Pangaea Internet	P-1315, SUB 0	(07/13/2004)
Esodus Communications, Inc.	P-1232, SUB 1	(03/19/2004)
EveryCall Communications, Inc.,	P-1278, SUB 1	(11/22/2004)
First Choice Technology, Inc.,	P-1326, SUB 0	(08/06/2004)
FONICA, LLC,	P-1323, SUB 0	(06/25/2004)
GlobalPhone Corp.,	P-1344, SUB 0	(12/03/2004)
GLOBCOM INCORPORATED ,	P-1264, SUB 1	(01/06/2004)
Image Access, Inc., d/b/a NewPhone,	P-908, SUB 1	(07/20/2004)
Industry Retail Group, Inc.	P-1328, SUB 0	(09/30/2004)
JCM Networking, Inc.	P-1308, SUB 0	(03/05/2004)
JCM Networking, Inc.	P-1308, SUB 1	(02/05/2004)
Lightyear Network Solutions, LLC,	P-1305, SUB 0	(01/23/2004)
Long Distance Consolidated Billing Co.,	P-1346, SUB 0	(12/20/2004)
LTS of Rocky Mount, LLC	P-930, SUB 2	(10/04/2004)
Managed Services, Inc.,	P-1334, SUB 0	(11/02/2004)
Midwestern Telecommunications, Inc.,	P-1215, SUB 1	(03/16/2004)
Nationwide Professional Teleservices, LLC,	P-1335, SUB 0	(10/13/2004)
Nautilus Telecommunications, Inc.	P-1331, SUB 0	(09/08/2004)
Nexus Communications, Inc., d/b/a TSI,	P-1310, SUB 0	(04/16/2004)
Phone1, Inc.	P-1329, SUB 0	(09/30/2004)
Saturn Telecommunication Services, Inc.,	P-1336, SUB 0	(11/22/2004)
SCANA Communications, Inc.	P-1318, SUB 0	(06/30/2004)
SCANA Communications, Inc.	P-1318, SUB 1	(04/22/2004)
South Carolina Net, Inc., d/b/a Spirit Telecom,	P-766, SUB 2	(05/04/2004)
Southern Digital Network, Inc., d/b/a FDN Communications,	P-1314, SUB 0	(04/13/2004)
Southern Digital Network, Inc., d/b/a FDN Communications,	P-1314, SUB 1	(05/04/2004)
Southwestern Bell Communications Services, d/b/a SBC Long Distance,	P-638, SUB 1	(04/21/2004)
Symtelco, LLC	P-1311, SUB 0	(04/13/2004)
Symtelco, LLC,	P-1311, SUB 1	(11/22/2004)
Synergy Communications Corporation,	P-1332, SUB 0	(11/30/2004)
Telecom Management, Inc., d/b/a Pioneer Telephone,	P-1316, SUB 0	(08/06/2004)
Telmex USA, LLC	P-1322, SUB 0	(06/03/2004)
Vertex Communications, Inc.,	P-1333, SUB 0	(10/25/2004)
VoiceNet Telephone, LLC	P-1321, SUB 0	(05/05/2004)
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RESALE OF WATER AND SEWER

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