NINETY-NINTH REPORT

OF THE

NORTH CAROLINA

UTILITIES COMMISSION

ORDERS AND DECISIONS

ISSUED FROM
JANUARY 1, 2009 THROUGH DECEMBER 31, 2009

NINETY-NINTH REPORT
of the
NORTH CAROLINA UTILITIES COMMISSION

ORDERS AND DECISIONS

Issued from

January 1, 2009, through December 31, 2009

Edward S. Finley, Jr., Chairman

Robert V. Owens, Jr., Commissioner

Lorinzo L. Joyner, Commissioner

*Howard N. Lee, Commissioner

William T. Culpepper, III, Commissioner

*Bryan E. Beatty, Commissioner

*Susan W. Rabon, Commissioner

*ToNola D. Brown-Bland, Commissioner

North Carolina Utilities Commission
Office of the Chief Clerk
Ms. Renné Vance
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

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

*Howard N. Lee resigned March 31, 2009
*Bryan E. Beatty, appointed January 7, 2009, replacing James Y. Kerr, II
*Susan W. Rabon, appointed January 7, 2009, replacing Sam J. Ervin, IV
*ToNola D. Brown-Bland, appointed July 1, 2009, replacing Howard N. Lee

LETTER OF TRANSMITTAL

December 31, 2009

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, 2009, we hereby present for your consideration the report of the Commission's significant decisions for the 12-month period beginning January 1, 2009, and ending December 31, 2009.

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

Edward S. Finley, Jr., Chairman

Robert V. Owens, Jr., Commissioner

Lorinzo L. Joyner, Commissioner

William T. Culpepper, III, Commissioner

Bryan E. Beatty, Commissioner

Susan W. Rabon, Commissioner

ToNola D. Brown-Bland, Commissioner

Renné Vance, Chief Clerk

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DOCKET NO. A-100, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of Bald Head Island Transportation, Inc.,	)	
Davis Shore Ferry Service, LLC, Waterfront Ferry	)	ORDER ADOPTING
Service, Inc., and Morris Marina, Kabin Kamps &	)	FINAL RULE
Ferry Service, Inc., to Establish Guidelines or Rules	)	
to Implement a Fuel Cost Surcharge	)	

BY THE COMMISSION: On August 5, 2008, Bald Head Island Transportation, Inc. (BHIT), Island Transportation, Inc., Davis Shore Ferry Service, LLC., Waterfront Ferry Service, Inc., and Morris Marina, Kabin Kamps & Ferry Service, Inc. (Morris Marina) (collectively referenced to as the "Petitioners") filed a petition pursuant to G.S. 62-31, G.S. 62-32, and Commission Rule R4-4, or, in the alternative, pursuant to G.S. 62-136, requesting the Commission to establish a procedure to allow the Petitioners and other regulated ferry operators to implement a temporary adjustment to their rates due to increased fuel costs. In support of the request, the Petitioners stated that a significant portion of the costs of their ferry operations is the cost of the diesel fuel required to operate their ferryboats. For example, BHIT explained that it operates a fleet of four passenger ferryboats that make at least 17 round trips per day from Indigo Landing in Southport to Bald Head Island, and at least seven round trips per day from Deep Point in Brunswick County to Bald Head Island. On average, each BHIT ferry burns approximately 24 gallons of diesel fuel per hour of twin-engine operation. The Petitioners further noted that the cost of diesel fuel has tripled in the past five years, doubled in the past three years, and risen by more than 50% in the eight months preceding their August 2, 2008 filing. The Petitioners asserted that the unprecedented increase in diesel fuel costs directly and substantially impacts the cost of ferry operations and warrants the adoption of a procedure for temporary adjustments to relieve the resulting financial pressure and to allow ferry operators to continue to recover their costs of providing service.

The Petitioners maintained that requiring ferryboat entities to institute new general rate case proceedings in order to catch up with rapidly fluctuating fuel costs, would impose an unreasonable burden on the financial and managerial resources of the ferryboat entities and an administrative burden on the Commission and the Public Staff. Instead, the Petitioners proposed that the Commission should provide needed relief to ferry operators by extending to them the procedures available under the guidelines adopted in the Commission's Order dated January 18, 1991, in Docket No. M-100, Sub 121, for motor carriers. According to the petition, a temporary surcharge could involve the following variables and calculations:

A. Index Price per Gallon When Current Rates Were Established
B. Most Recent Diesel Price per Gallon
C. Price Per Gallon Increase from A to B (B minus A)
D. Gallons Purchased during last Fiscal Year
E. Annual Cost Increase of Gallons Purchased (C multiplied by D)
F. Total Tickets Used by Paying Passengers by Ferry during last Fiscal Year
G. Per Passenger Share of Cost Increase (E divided by F)

A procedure for implementing a temporary surcharge procedure was set forth in Appendix A attached to the petition. The Petitioners submitted that such a surcharge would be the maximum amount a ferry could charge, but would not be a mandatory amount. Upon approval by the Commission, a ferry operator implementing such a surcharge would file revised tariff schedules indicating the amount of the surcharge.

On November 7, 2008, the Commission issued an Order Establishing Procedures for Implementing and Modifying Fuel Charges in this docket. In that Order, the Commission concluded that the procedures and modifications recommended by the Public Staff should be incorporated into a provisional rule effective immediately upon issuance of the Order. The Order also outlined the accounting responsibilities and reporting obligations of a ferry operator seeking a change in its fuel surcharge. To ensure that all parties had a reasonable opportunity to be heard, the Commission provided all interested parties an opportunity to comment on the provisional rule adopted therein within 21 days after issuance of that Order.

On December 1, 2008, the Petitioners made a filing with the Commission in support of having the provisional rule previously adopted by the Commission adopted as a permanent rule for establishing a fuel surcharge procedure.

Based upon the foregoing, the Commission finds and concludes that good cause exists to adopt the Commission's provisional rule as a permanent rule for establishing a fuel surcharge procedure for ferry operators, with minor modification, such that the references to Exhibit A in Paragraph 3 and Exhibit B in Paragraph 6 of the provisional Rule R4-13 should be modified to include some additional clarifying language. Specifically, the Commission concludes that in both Paragraphs 3 and 6 at the end of the sentences ending with "Exhibit A" and "Exhibit B", respectively, the following language should be added: "of the Commission Order issued January 28, 2009, in Docket No. A-100, Sub 0, unless otherwise ordered by the Commission."

IT IS, THEREFORE, ORDERED as follows:

1. That the provisional Rule R4-13 for establishing a fuel surcharge procedure for ferry operators with minor modification, as set forth in Appendix A, attached hereto, be, and the same is hereby, adopted as a permanent Commission rule effective as of the date of this Order.

2. That the fuel surcharge and the fuel component of rates shall be computed using the formula set forth in Exhibit A.

3. That any ferry operator implementing a surcharge pursuant to Commission Rule R4-13 shall establish a fuel tracker account and shall file a quarterly fuel surcharge tracking report in the format set forth in Exhibit B within 45 days after the end of each calendar quarter.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of January, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Kc012809.01

*Chairman Edward S. Finley, Jr., Commissioner Lorinzo L. Joyner, and Commissioner Susan Rabon did not participate in this Order.

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Rule R4-13 PROCEDURE FOR DETERMINING FUEL SURCHARGES BY FERRY OPERATORS

1. Any passenger ferry operating as a common carrier as defined by G.S. 62-3(6) may apply pursuant to NCUC Rule 4-4 for approval of a fuel surcharge.

2. The application shall specify the fuel cost per gallon expressed to three decimal places that is proposed to be used as the basis of determining the fuel surcharge. In addition, although no single data point or price index will be mandated by this procedure, the application shall include documentation of its fuel prices during, at least, the previous six months and/or government or industry fuel cost forecasts in support of the fuel cost per gallon proposed by the applicant.

3. The surcharge shall be computed in the manner set forth in Exhibit A of the Commission's Order issued January 28, 2009 in Docket No. A-100, Sub 0, unless otherwise ordered by the Commission. The base period used for computing the surcharge shall be the calendar year 2004 or the test year from the ferry operator's most recent rate case, whichever is later. If calendar year 2004 is used, the base period cost shall be calculated by dividing the total annual expense for the purchase of fuel in calendar year 2004 to operate the ferries by the number of gallons purchased during that period.

4. Applications for a fuel surcharge increase may be filed no more frequently than every three months. Applications for a fuel surcharge shall be considered at the Commission's Staff Conference within two weeks of the date of filing. Upon approval of the surcharge, the ferry operator may implement the surcharge, effective the first day of the month following the ferry operator's filing the revised tariff rate schedules reflecting the surcharge with the Chief Clerk of the Commission.

5. If the ferry sells an annual pass or other approved means of paying for transportation that are not individual single- or round-trip tickets, the surcharge shall apply only to the price of such passes sold following the approval of any surcharge and shall be equivalent to the approved surcharge at the time of sale multiplied by the projected average number of trips per passholder in the class of such passholders during the valid period of the pass. For purposes of calculating the number of customers, it will be assumed that each passholder travels the average number of trips (to be reflected in the number of customers) by all passholders in the class of such passholders during the valid period of the pass, calculated using historic ridership data.

APPENDIX A
Page 2 of 2

6. Any ferry operator implementing a fuel surcharge shall establish a fuel tracking account to account for the difference between the amount of fuel costs collected from customers as compared to the amount of fuel costs incurred by the carrier. A quarterly report on the activity recorded in a fuel tracking account shall be filed with the Commission within 45 days after the end of each calendar quarter in the manner set forth in Exhibit B of the Commission's Order issued January 28, 2009, in Docket No. A-100, Sub 0, unless otherwise ordered by the Commission. The balance of the fuel tracking account shall be considered in determining the amount of the fuel surcharge after the initially approved fuel surcharge.

7. Applications or petitions for changes in the fuel surcharge may be filed by the ferry operator, the Public Staff, the Attorney General, or other interested parties.

8. Copies of any application for a surcharge and for change in the surcharge shall be served upon the Public Staff, the Attorney General, and other party requesting a copy. Persons desiring a copy who notify the Chief Clerk of the Commission in writing shall be placed on a service list.

EXHIBIT A

FORMULA TO DETERMINE FUEL SUCHARGE
AND FUEL COMPONENT OF RATES
FOR FERRY OPERATORS

FUEL SURCHARGE:

A. Proposed Fuel Cost per Gallon for Surcharge $____

B. Base Period Cost per Gallon $____

C. Increase in Fuel Cost per Gallon (A – B) $____

D. Gallons Purchased in Base Period ____

E. Annualized Increase in Cost of Gallons Purchased (C x D) $____

F. Balance in Fuel Tracking Account $____

G. Amount Used for Computing Surcharge (E + F) $____

H. Number of Customers in Base Period ____

I. Computed Surcharge per Customer (G/H) $____

FUEL COMPONENT OF RATES:

A. Proposed Fuel Cost per Gallon for Surcharge $____

B. Gallons Purchased in Base Period ____

C. Annualized Fuel Costs (A x B) $____

D. Balance in Fuel Tracking Account $____

E. Tracked Fuel Costs (C + D) $____

F. Number of Customers in Base Period ____

G. Fuel Cost Component of Rates (E/F) $____

EXHIBIT B

[Name of Ferry Operator]

Quarterly Fuel Surcharge Tracking Report

For the Reporting Quarter Ended ______________

A. Balance at the beginning of the quarter – Under (Over) Collection $______

B. Fuel costs paid to vendors:

1. Gallons purchased ______

2. Actual fuel costs paid $______

C. Fuel costs collected from customers:

1. Number of customers ______

2. Fuel cost component of rates X $______

3. Fuel costs collected $______

D. Under (Over) Collection of fuel costs for the quarter [B-C] $______

E. Balance at the end of the quarter – Under (Over) Collection [A+D] $______

CERTIFICATION

I hereby certify that the information contained in this report is true to the best of my knowledge and belief.

____
Authorized Signature and Title

____
Date

____
Contact Person (Print Clearly)

(____)________
Telephone Number

NOTE: Providing false information to the Commission is punishable by fine and/or imprisonment pursuant to G.S. 62-310 and 62-326.

DOCKET NO. E-100, SUBS 23 and 23A

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Safety of Certain Dams Owned in	)	ORDER REGARDING THE REQUIREMENTS
North Carolina by Electric Utilities	)	FOR FIVE-YEAR DAM SAFETY INSPECTION
	)	REPORTS AS OF JANUARY 1, 2010

BY THE COMMISSION: The Dam Safety Law (G.S. 143-215.23 et seq.) was enacted in 1967 "to provide for the certification and inspection of dams in the interest of public health, safety, and welfare...." Certain dams were exempted from this law, including dams used "in connection with electric generating facilities under the jurisdiction of the North Carolina Utilities Commission...." G.S. 143-215.25A(a)(4).

On April 5, 1976, the Utilities Commission (Commission) issued its Order Requiring Inventory and Inspection in Docket No. E-100, Sub 23. On October 11, 1976, the Commission issued an Order of Clarification as to the Order Requiring Inventory and Inspection, and on October 22, 1976, the Commission issued an Order Correcting Clerical Error. These 1976 Orders required each electric utility to file an inventory of all dams within North Carolina that are not covered by the Dam Safety Law of 1967, or by Federal Power Commission (now Federal Energy Regulatory Commission) license, or by previous Commission order regarding dam safety inspections. They also required that each electric utility file a schedule for periodic safety inspections to be done by an independent consultant at least once every five years for all utility-owned dams except dams subject to Federal Power Commission (now Federal Energy Regulatory Commission) jurisdiction and dams that are part of retired facilities and come within Environmental Management Commission jurisdiction.

The requirements of these 1976 Orders are still in effect, and both Duke Energy Carolinas, LLC (Duke) and Carolina Power & Light Company, dba Progress Energy Carolinas, Inc. (Progress), submit on-going Five-Year Dam Safety Inspection Reports to the Commission.

The General Assembly recently enacted and, on July 31, 2009, the Governor signed into law Session Law 2009-390. This legislation rewrites G.S. 143-215.25A(a)(4) and significantly impacts the Commission's responsibility as to the safety of dams used in connection with electric generating facilities under the jurisdiction of the Commission. As rewritten, G.S. 143-215.25A(a)(4) provides that those dams used "in connection with electric generating facilities regulated by the Nuclear Regulatory Commission" will be exempt from the Dam Safety Law as of January 1, 2010.

Of the dams currently subject to the inspection and reporting requirements of the 1976 Orders, only those dams used in connection with Duke's McGuire nuclear facilities and Progress's Harris nuclear facilities will be exempt from the Dam Safety Law and will still be subject to the inspection and reporting requirements of the 1976 Orders as of January 1, 2010. Effective January 1, 2010, all other dams for which Duke and Progress have been providing dam safety inspection reports to the Commission will be exempt from the requirements of the 1976 Orders.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of September, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

kh092909.01

DOCKET NO. E-100, SUB 126

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Investigation of Integrated Resource Planning in North Carolina	)))))	ORDER ALLOWING COMMENTS ON PROPOSED AMENDMENT TO COMMISSION RULE R8-60 AND SCHEDULING PRESENTATIONS REGARDING SMART GRID TECHNOLOGY PLANS

BY THE COMMISSION: On December 18, 2009, the Commission issued an Order in Docket No. E-100, Sub 123, in which it declined to adopt four federal standards, one of which involved electric utility investments in smart grid technologies. In that Order the Commission found and concluded that it would be appropriate to require investor-owned electric utilities to include a description of their smart grid technology plans as part of their biennial Integrated Resource Plan (IRP) filings. Therefore, the Commission finds good cause to open a new docket to consider amending Commission Rule R8-60 Integrated Resource Planning and Filings to include such a requirement. (The Commission's proposed amendment to its IRP rules is attached as Appendix A.) The Commission further concluded that the State's investor-owned electric utilities should appear before the Commission and make presentations regarding their smart grid technology plans.

IT IS, THEREFORE, ORDERED as follows:

1. That parties to Docket No. E-100, Sub 124 shall be made parties to this new docket without need to petition for intervention;

2. That interested persons may petition to intervene in this docket on or before February 12, 2010;

3. That parties may file comments regarding the proposed IRP smart grid provisions attached as Appendix A on or before February 12, 2010; and

4. Investor-owned electric utilities shall appear before the Commission at 9:30 AM on January 26, 2010, in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury

Street, Raleigh, North Carolina, and present information regarding their smart grid technology plans.

ISSUED BY ORDER OF THE COMMISSION.
This the 28th day of December, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Commissioners Robert V. Owens, Jr. and Susan Warren Rabon did not participate in this decision.

kh122809.03

APPENDIX A

Proposed Addition to Rule R8-60 Integrated Resource Planning and Filings

(i) *Contents of Reports*. Each utility shall include in each biennial report, revised as applicable in each annual report, the following:

...

(10) Smart Grid Technology Plan. -- Each investor-owned electric utility shall provide its smart grid technology plan.

Smart grid technologies shall include those that (1) use digital information and controls technology to improve reliability, security and efficiency of the electric distribution or transmission system; (2) optimize grid operations dynamically; (3) improve the integration of distributed and/or intermittent generation sources, energy storage, demand response, demand-side resources and energy efficiency; (4) provide real-time, automated, interactive technologies that optimize operation of consumer devices and appliances, including metering of customer usage; (5) provide utility operators with data concerning the operations and status of the distribution and/or transmission system, as well as automating some operations; and/or (6) provide customers with usage information and control options.

The plan shall include:

(A) Technology to be installed.

(B) Description of customer impacts by class, including functions/services to be provided, cost recovery plans, and anticipated tariff changes.

(C) Approximate timing and size of capital expenditures.

(D) Cost-benefit analyses for installations that are planned to begin within the next year.

(E) Description of existing equipment, if any, to be rendered obsolete by the new technology, and its anticipated book value at time of retirement.

(G) Status of pilot projects and projects to be funded at least partially with government grants.

DOCKET NO. G-100, SUB 87

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Rulemaking Proceeding to Revise Commission Rule R1-17(k)(4)(c), Company Use and Lost and Unaccounted For	)))	ORDER REVISING COMMISSION RULE R1-17(k)

BY THE COMMISSION: On May 12, 2009, the Commission issued an Order Instituting Rulemaking Proceeding to receive comments and to consider modifications to Commission Rule R1-17(k)(4)(c). That order came about as a result of testimony received in Docket Nos. G-5, Sub 497, and G-9, Sub 554. In those dockets, witnesses for Public Service Company of North Carolina, Inc. (PSNC) and Piedmont Natural Gas, Inc. (Piedmont), respectively, and the Public Staff testified to a problem in the manner of calculating the annual true-up of Company Use and Unaccounted For gas -- which is also commonly referred to as "Company Use and Lost and Unaccounted For" (CU&LUAF) gas -- pursuant to the existing Rule. The Commission's May 12, 2009 Order made PSNC and Piedmont parties to this docket. Other persons wishing to participate were invited to file petitions to intervene on or before June 12, 2009. Parties were invited to file comments on or before June 12, 2009, addressing whether the Commission should modify Commission Rule R1-17(k)(4)(c) and, if so, what such a modified rule should be. Reply comments were due on or before June 26, 2009.

On May 22, 2009, the Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene. On June 6, 2009, the Commission issued an order allowing the intervention by CUCA.

On June 12, 2009, PSNC, Piedmont, and the Public Staff (the Parties) filed Joint Comments. The Parties stated that in Docket No. G-5, Sub 497, PSNC witness Paton testified that the existing true-up process did not result in the recovery of the actual gas costs incurred as provided in G.S. 62-133.4. That statute requires in part that "[t]he Commission. . .shall compare the utility's prudently incurred costs with costs recovered from all the utility's customers. . .and shall permit the utility to recover any deficiency through an increment in its rates." The Parties stated that witness Candace Paton testified that Rule R1-17(k)(4)(c) as written does not allow PSNC to recover 100% of its CU&LUAF gas costs because the true-up is based on the presumed level of cost recovery and not on the actual level of cost PSNC recovers from its customers.

The Parties further commented that in Docket No. G-5, Sub 497, Public Staff witness James Hoard agreed, stating that the Rule is inaccurate and that the Rule as written does not allow PSNC to recover 100% of its prudently incurred costs as intended by Rule R1-17(k). Witness Hoard recommended that, subsequent to the review period at issue in that case, the commodity true-up be modified in such a manner that the annual CU&LUAF true-up would be eliminated because the CU&LUAF true-up would be incorporated into the monthly commodity true-up. He further suggested that the monthly commodity true-up entry to the deferred accounts be modified such that the amount actually collected for gas supply costs from customers -- based on the volumes delivered to customers -- is compared to the actual amount of incurred gas supply

costs. The Parties stated that witness Hoard recommended that -- consistent with Commission rulings that all customers, including transportation customers, should bear the cost responsibility for CU&LUAF gas costs -- the entry should be apportioned between the Sales Customers Only and the All Customers Deferred Accounts based on the relationship of sales to purchased dekatherms. He also recommended that the Sales Customers Only Deferred Account should be apportioned a share of the commodity true-up based upon the ratio of sales to purchased dekatherms and that the All Customers Deferred Account should be apportioned the residual portion of the entry, which will represent the CU&LUAF portion of the commodity true-up entry. The Parties commented that witness Hoard suggested that the Commission undertake this Rulemaking proceeding to modify Rule R1-17(k) and the gas cost adjustment procedures consistent with the practice described above and that the Commission agreed with the Public Staff's recommendations in that docket.

The Parties commented that in the 2008 annual review of Piedmont's gas costs in Docket No. G-9, Sub 554, Public Staff witness Hoard recommended that the Commission follow the same approach as in Docket No. G-5, Sub 497. Piedmont witness David R. Carpenter agreed, and the Commission again accepted the Public Staff's recommendations.

The Parties commented that because the commodity true-up was modified in such a manner that the annual CU&LUAF true-up was eliminated in Docket Nos. G-5, Sub 497, and G-9, Sub 554, it is appropriate to eliminate in its entirety paragraph (4)(c) of Rule R1-17(k). Paragraphs (2)(g), (4)(a), and (4)(b) of Rule R1-17(k) should be modified to reflect the change in the commodity true-up approved in those proceedings. The Parties recommended modifications as shown in Appendix A of this Order. Appendix B is a revised version of paragraphs (2)(g), (4)(a), and (4)(b) of Rule R1-17(k) of the Commission's Rules and Regulations, after these modifications have been made.

No other comments were filed. No reply comments were filed.

The comments received by the Commission in this docket stated that Rule R1-17(k)(4)(c) as written does not allow an LDC to recover 100% of its CU&LUAF gas costs as provided G.S. 62-133.4 because the true-up is based on the presumed level of cost recovery and not on the actual level of cost recovered from the customers. The Parties recommended that the Commission modify its rules as shown in Appendix A. The Commission agrees and therefore concludes that its Rules should be changed as recommended by the Parties in Appendix A and that the effective date for the revisions should be the date of this Order.

IT IS, THEREFORE, ORDERED as follows:

1. That Rule R1-17(k)(4)(c) is rescinded;

2. That paragraphs (2)(g), (4)(a), and (4)(b) of Rule R1-17(k) of the Commission's Rules and Regulations are hereby revised as set forth in Appendix A attached hereto and are hereby, as revised in Appendix B, incorporated into said Rules and Regulations effective as of the date of this Order; and

3. That the Chief Clerk shall mail a copy of the Order to all the natural gas companies operating in North Carolina.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of July, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Commissioners Susan Rabon and ToNola Brown-Bland did not participate.

mb070709.01

APPENDIX A
PAGE 1 OF 2

Rule R1-17 FILING OF INCREASED RATES; APPLICATION FOR AUTHORITY TO ADJUST RATES

....

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

(2) Definitions. As used in this Section (k) of Rule R1-17, the following definitions shall apply:

(g) "Demand Charges and Storage Charges" shall mean all Gas Costs which are not based on the volume of gas actually purchased or transported by an LDC and any other gas costs determined by the Commission to be properly recoverable from customers~~, including company use and unaccounted for~~.

....

(4) True-up of Gas Costs.

(a) Demand Charges and Storage Charges. On a monthly basis, each LDC shall determine the difference between (a) Demand Charges and Storage Charges billed to its customers in accordance with the Commission-approved allocation of such costs to the LDC's various rate schedules and (b) the LDC's actual Demand Charges and Storage Charges. This difference shall be recorded in the LDC's deferred account for demand and storage charges. Increments and decrements for ~~Demand Charges and Storage charges~~ this deferred account, including the portion of the Commodity and Other Charges true-up calculated under Section (4)(b) and apportioned to this deferred account, flow to all sales and transportation rate schedules. Where applicable, the percentage allocation to North Carolina shall be the percentage established in the last general rate case. ~~For purposes of this true up, company use and unaccounted for costs will be excluded since they are subject to a true-up under Section (4)(c).~~

(b) Commodity and Other Charges. On a monthly basis, each LDC shall determine with respect to gas sold (including company use and unaccounted for)

during the month the ~~per unit~~ difference between (a) ~~the Benchmark Commodity Gas Costs most recently approved and (b)~~ the actual Commodity and Other Charges incurred and (b) the actual Commodity and Other Charges billed to customers. ~~The product of the actual volumes multiplied by the per unit~~ This difference shall be apportioned each month to ~~recorded in~~ the LDC's deferred account for commodity and other charges based on the ratio of volumes sold to the volumes purchased for that month. The residual portion of the difference

APPENDIX A
PAGE 2 OF 2

not apportioned to the LDC's deferred account for commodity and other charges shall be apportioned each month to the LDC's deferred account for Demand Charges and Storage Charges. Increments and decrements for Commodity and Other Charges flow to all sales rate schedules.

(c) Repealed. ~~Company Use and Unaccounted For. Each LDC will true-up Gas Costs associated with company use and unaccounted for volumes annually. This shall be done by comparing the actual North Carolina company use and unaccounted for volumes during the true-up period with the rate case approved North Carolina company use and unaccounted volumes used to establish rates during the twelve-month true-up period. Where there is more than one approved company use and unaccounted for volumes during the true up period, the average monthly level will be used. The resulting volumes will be multiplied by the average of the Benchmark Commodity Gas Costs at the end of each month of the true-up period, and the resulting amount will be recorded in the deferred account.~~

APPENDIX B
Page 1 of 1

Rule R1-17 FILING OF INCREASED RATES; APPLICATION FOR AUTHORITY TO ADJUST RATES

....

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

....

(2) Definitions. As used in this Section (k) of Rule R1-17, the following definitions shall apply:

(g) "Demand Charges and Storage Charges" shall mean all Gas Costs which are not based on the volume of gas actually purchased or transported by an LDC and any other gas costs determined by the Commission to be properly recoverable from customers.

....

(4) True-up of Gas Costs.

(a) Demand Charges and Storage Charges. On a monthly basis, each LDC shall determine the difference between (a) Demand Charges and Storage Charges billed to its customers in accordance with the Commission-approved allocation of such costs to the LDC's various rate schedules and (b) the LDC's actual Demand Charges and Storage Charges. This difference shall be recorded in the LDC's deferred account for demand and storage charges. Increments and decrements for this deferred account, including the portion of the Commodity and Other Charges true-up calculated under Section (4)(b) and apportioned to this deferred account, flow to all sales and transportation rate schedules. Where applicable, the percentage allocation to North Carolina shall be the percentage established in the last general rate case.

(b) Commodity and Other Charges. On a monthly basis, each LDC shall determine with respect to gas sold (including company use and unaccounted for) during the month the difference between (a) the actual Commodity and Other Charges incurred and (b) the actual Commodity and Other Charges billed to customers. This difference shall be apportioned each month to the LDC's deferred account for commodity and other charges based on the ratio of volumes sold to the volumes purchased for that month. The residual portion of the difference not apportioned to the LDC's deferred account for commodity and other charges shall be apportioned each month to the LDC's deferred account for Demand Charges and Storage Charges. Increments and decrements for Commodity and Other Charges flow to all sales rate schedules.

(c) Repealed.

DOCKET NO. G-100, SUB 87

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Rulemaking Proceeding to Revise	)	
Commission Rule R1-17(k)(4)(c),	)	ERRATA ORDER
Company Use and Lost and Unaccounted	)	
For	)	

BY THE CHAIRMAN: On July 8, 2009, the Commission entered an Order Revising Commission Rule R1-17(k) in this docket. The Commission discovered the existence of two errors affecting sections (2)(g) and (4)(b) of Rule R1-17(k) as set forth in the Appendices to that Order. For that reason, the Chairman finds good cause to issue this Errata Order to correct those errors. Revised Appendices A and B are attached hereto.

IT IS, THEREFORE, ORDERED as follows:

1. That paragraphs (2)(g), (4)(a), and (4)(b) of Rule R1-17(k) of the Commission's Rules and Regulations are hereby revised as set forth in Appendix A attached hereto and are hereby, as revised in Appendix B, incorporated into said Rules and Regulations effective as of the date of this Order.

2. That the Chief Clerk shall mail a copy of the Order to all the natural gas companies operating in North Carolina.

3. That the natural gas companies operating in North Carolina shall file tariffs and Rules and Regulations to comply with this Order within ten days from the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the 17th day of July, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

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APPENDIX A

Rule R1-17 FILING OF INCREASED RATES; APPLICATION FOR AUTHORITY TO ADJUST RATES

....

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

(2) Definitions. As used in this Section (k) of Rule R1-17, the following definitions shall apply:

(g) "Demand Charges and Storage Charges" shall mean all Gas Costs which are not based on the volume of gas actually purchased or transported by an LDC and any other gas costs determined by the Commission to be properly recoverable from customers~~, including company use and unaccounted for costs~~.

....

(4) True-up of Gas Costs.

(a) Demand Charges and Storage Charges. On a monthly basis, each LDC shall determine the difference between (a) Demand Charges and Storage Charges billed to its customers in accordance with the Commission-approved allocation of such costs to the LDC's various rate schedules and (b) the LDC's actual Demand Charges and Storage Charges. This difference shall be recorded in the LDC's deferred account for demand and storage charges. Increments and decrements for ~~Demand Charges and Storage charges~~ <u>this deferred account, including the portion of the Commodity and Other Charges true-up calculated under Section (4)(b) and apportioned to this deferred account,</u> flow to all sales and transportation rate

schedules. Where applicable, the percentage allocation to North Carolina shall be the percentage established in the last general rate case. ~~For purposes of this true up, company use and unaccounted for costs will be excluded since they are subject to a true up under Section (4)(c).~~

(b) Commodity and Other Charges. On a monthly basis, each LDC shall determine with respect to gas sold (including company use and unaccounted for) during the month the ~~per unit~~ difference between (a) ~~the Benchmark Commodity Gas Costs most recently approved and (b)~~ the actual Commodity and Other Charges incurred and (b) the actual Commodity and Other Charges billed to customers. ~~The product of the actual volumes multiplied by the per unit~~ This difference shall be apportioned each month to ~~recorded in~~ the LDC's deferred account for commodity and other charges based on the ratio of volumes sold to the volumes purchased for that month. The residual portion of the difference not apportioned to the LDC's deferred account for commodity and other charges shall be apportioned each month to the LDC's deferred account for Demand Charges and Storage Charges. Increments and decrements for Commodity and Other Charges flow to all sales rate schedules.

(c) Repealed. ~~Company Use and Unaccounted-For. Each LDC will true up Gas Costs associated with company use and unaccounted for volumes annually. This shall be done by comparing the actual North Carolina company use and unaccounted for volumes during the true up period with the rate case approved North Carolina company use and unaccounted volumes used to establish rates during the twelve month true up period. Where there is more than one approved company use and unaccounted for volumes during the true up period, the average monthly level will be used. The resulting volumes will be multiplied by the average of the Benchmark Commodity Gas Costs at the end of each month of the true up period, and the resulting amount will be recorded in the deferred account.~~

APPENDIX B

Rule R1-17 FILING OF INCREASED RATES; APPLICATION FOR AUTHORITY TO ADJUST RATES

....

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

....

(2) Definitions. As used in this Section (k) of Rule R1-17, the following definitions shall apply:

(g) "Demand Charges and Storage Charges" shall mean all Gas Costs which are not based on the volume of gas actually purchased or transported by an LDC and any other gas costs determined by the Commission to be properly recoverable from customers.

....

(4) True-up of Gas Costs.

(a) Demand Charges and Storage Charges. On a monthly basis, each LDC shall determine the difference between (a) Demand Charges and Storage Charges billed to its customers in accordance with the Commission-approved allocation of such costs to the LDC's various rate schedules and (b) the LDC's actual Demand Charges and Storage Charges. This difference shall be recorded in the LDC's deferred account for demand and storage charges. Increments and decrements for this deferred account, including the portion of the Commodity and Other Charges true-up calculated under Section (4)(b) and apportioned to this deferred account, flow to all sales and transportation rate schedules. Where applicable, the percentage allocation to North Carolina shall be the percentage established in the last general rate case.

(b) Commodity and Other Charges. On a monthly basis, each LDC shall determine with respect to gas sold (including company use and unaccounted for) during the month the difference between (a) the actual Commodity and Other Charges incurred and (b) the actual Commodity and Other Charges billed to customers. This difference shall be apportioned each month to the LDC's deferred account for commodity and other charges based on the ratio of volumes sold to the volumes purchased for that month. The residual portion of the difference not apportioned to the LDC's deferred account for commodity and other charges shall be apportioned each month to the LDC's deferred account for Demand Charges and Storage Charges. Increments and decrements for Commodity and Other Charges flow to all sales rate schedules.

(c) Repealed.

DOCKET NO. G-100, SUB 88

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Consideration of Certain Standards for Natural Gas Utilities Regarding Energy Efficiency Planning and Rate Design Modifications to Promote Energy Efficiency Investments Pursuant to the Energy Independence and Security Act of 2007

ORDER ON ENERGY INDEPENDENCE AND SECURITY ACT OF 2007 STANDARDS

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on Tuesday, July 28, 2009, at 9:30 a.m.

BEFORE: Commissioner William T. Culpepper, III, Presiding; Chairman Edward S. Finley, Jr.; Commissioner Robert V. Owens, Jr.; Commissioner Bryan E. Beatty; Commissioner Susan Warren Rabon; and Commissioner ToNola D. Brown-Bland

APPEARANCES:

For Public Service Company of North Carolina, Inc.:

Mary Lynne Grigg, McGuire Woods, LLP, 2600 Two Hannover Square, Raleigh, North Carolina 27601

For Piedmont Natural Gas Company, Inc.:

James H. Jeffries IV, Moore & Van Allen PLLC, Bank of America Corporate Center, 100 N. Tryon Street, Suite 4700, Charlotte, North Carolina 28202-4003

For the Using and Consuming Public:

Gina C. Holt, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

Margaret A. Force, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602

BY THE COMMISSION: On December 19, 2007, the President of the United States signed into law the Energy Independence and Security Act of 2007 (EISA), Section 532 of which amends the Public Utility Regulatory Policies Act of 1978 (PURPA) by adding two new standards for natural gas utilities relative to Energy Efficiency and Rate Design Modifications to Promote Energy Efficiency Investments. EISA requires each state regulatory authority, with respect to each gas utility for which it has ratemaking jurisdiction, to conduct a hearing regarding these two new standards for the purpose of determining whether or not it is appropriate to adopt and implement such standards pursuant to its authority under applicable state law.

On April 14, 2009, the Commission issued its Order Scheduling Hearing and Requiring Public Notice. This Order established a hearing date of Tuesday, July 28, 2009, and set dates for the filing of prefiled testimony. This Order also made Piedmont Natural Gas Company, Inc. (Piedmont); Public Service Company of North Carolina, Inc. (PSNC); Frontier Natural Gas Company, LLC (Frontier); and Toccoa Natural Gas (Toccoa) parties of record, and required each company to give notice to its customers of the hearing.

On June 10, 2009, Frontier and Toccoa filed their affidavits of publication. On June 23, 2009, Piedmont filed its affidavit of publication. On June 29, 2009, PSNC filed its affidavit of publication.

On June 24, 2009, Piedmont filed a Motion for Extension of Time to Prefile Testimony and Exhibits. On June 26, 2009, the Commission issued its Order Granting Extension of Time extending the deadline for parties to prefile testimony and exhibits.

On June 24, 2009, the Attorney General filed his notice of intervention.

On July 2, 2009, Piedmont filed the direct testimony of Pia K. Powers, Manager of Regulatory Affairs; PSNC filed the direct testimony of Julius A. Wright, President, J.A. Wright & Associates, Inc.; and the Public Staff filed the joint testimony and exhibits of Jeffrey L. Davis, Director, Natural Gas Division, and James G. Hoard, Assistant Director, Accounting Division.

On July 21, 2009, PSNC filed, on behalf of PSNC, Piedmont, Toccoa, Frontier, and the Public Staff, a Joint Motion to Limit Hearing to Public Witness Testimony. On July 23, 2009, the Commission issued its Order Excusing Expert Witnesses, waiving the cross examination by all parties and excusing all witnesses who prefiled testimony from appearing at the scheduled hearing, leaving the hearing for receipt of non-expert public witness testimony only.

On July 28, 2009, the matter came on for hearing as scheduled and all prefiled testimony and exhibits were admitted into evidence. No public witnesses appeared to testify at the hearing.

Based on the testimony and exhibits received into evidence and the Commission's records as a whole, the Commission makes the following:

FINDINGS OF FACT

1. PSNC, Piedmont, Frontier, and Toccoa are "public utilities" within the meaning of G.S. § 62-3(23) and "gas utilities" within the meaning of 15 U.S.C. § 3202(2), and collectively they constitute all of the gas utilities operating within the state of North Carolina over which the Commission has ratemaking authority.

2. The processes and procedures established and conducted in this docket satisfy the procedural notice and hearing requirements of EISA.

3. Section 303(b)(5) of PURPA, as amended by EISA, requires the Commission to consider adoption of the following energy efficiency standards for natural gas utilities subject to its ratemaking authority:

ENERGY EFFICIENCY – Each natural gas utility shall –

(A) integrate energy efficiency resources into the plans and planning processes of the natural gas utility; and

(B) adopt policies that establish energy efficiency as a priority resource in the plans and planning processes of the natural gas utility.

4. The Commission has authority under existing law to consider and implement, as it deems appropriate, the energy efficiency standards set forth in Section 303(b)(5) of PURPA.

5. It is not appropriate to adopt in this proceeding the federal energy efficiency standards set forth in Section 303(b)(5) of PURPA with respect to the natural gas utilities subject to the Commission's jurisdiction. Some of these standards have already been implemented; others are more appropriately considered in discrete company-specific proceedings.

6. Section 303(b)(6) of PURPA, as amended by EISA, requires the Commission to consider adoption of the following rate design standards for natural gas utilities subject to its ratemaking authority:

> RATE DESIGN MODIFICATIONS TO PROMOTE ENERGY EFFICIENCY INVESTMENTS –
>
> (A) IN GENERAL – The rates allowed to be charged by a natural gas utility shall align utility incentives with the deployment of cost-effective energy efficiency.
>
> (B) POLICY OPTIONS – In complying with subparagraph (A), each state regulatory authority and each nonregulated utility shall consider – (i) separating fixed-cost revenue recovery from the volume of transportation or sales service provided to the customer; (ii) providing to utilities incentives for the successful management of energy efficiency programs, such as allowing utilities to retain a portion of the cost-reducing benefits accruing from the programs; (iii) promoting the impact on adoption of energy efficiency as one of the goals of retail rate design, recognizing that energy efficiency must be balanced with other objectives; and (iv) adopting rate designs that encourage energy efficiency for each customer class.

7. The Commission has authority under existing law to consider and implement, as it deems appropriate, the federal rate design standards established in Section 303(b)(6) of PURPA.

8. It is not appropriate to adopt in this proceeding the federal rate design standards set forth in Section 303(b)(6) of PURPA with respect to the natural gas utilities subject to the Commission's jurisdiction. Some of the standards have already been implemented; others are more appropriately considered in discrete company-specific proceedings.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding is jurisdictional and is supported by G.S. § 62-3(23), 15 U.S.C. § 3202(2), the Commission's records and prior findings, and certificates of public convenience and necessity previously issued to PSNC, Piedmont, Frontier, and Toccoa, and is uncontroverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

Under 15 U.S.C. § 3203(a), as amended, this Commission is required, not later than December 19, 2009, and with respect to each natural gas utility over which it has ratemaking authority, to provide public notice and to conduct a hearing to determine whether to adopt the

energy efficiency and rate design standards set forth in new Sections 303(b)(5) and 303(b)(6) of PURPA.

On April 14, 2009, the Commission issued its Order Scheduling Hearing and Requiring Public Notice in which it initiated this proceeding; made PSNC, Piedmont, Frontier, and Toccoa parties to this docket; required publication of notice to the public; and established a hearing for July 28, 2009.

The record in this proceeding reflects that notice to the public was provided as directed by the Commission and that a hearing in this matter was conducted on July 28, 2009, as scheduled.

The Commission concludes, as a result of the foregoing and the conclusions set forth herein, that it has complied with the requirements of EISA.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3 THROUGH 5

The evidence supporting these findings of fact is contained in the testimony of Public Staff witnesses Hoard and Davis, PSNC witness Wright, and Piedmont witness Powers.

Public Staff witnesses Hoard and Davis testified that it is not appropriate for the Commission to adopt Section 532 as a whole because "[m]any of the standards have already been adopted by the Commission, but others have not and perhaps should not be adopted except in the context of a proceeding in which the impact of a particular standard may be fully evaluated." With respect to the energy efficiency standards set forth in Section 303(b)(5), Public Staff witnesses Hoard and Davis testified that each of the local distribution companies subject to the Commission's ratemaking authority already currently integrates energy efficiency into its respective plans and planning processes and that energy efficiency is afforded priority treatment by these companies because it takes precedence over the acquisition of new pipeline and storage resources. Witnesses Hoard and Davis also noted that PSNC and Piedmont have already initiated conservation programs which promote the efficient use of gas by their customers.

PSNC witness Wright testified that, in his view, adoption of the federal energy efficiency standards by this Commission is unnecessary because "[s]tate policies, along with the rules and various prior orders of this Commission, have promulgated and supported activities that meet and exceed the proposed ... standards." With respect to the proposed energy efficiency standard, Dr. Wright concluded that North Carolina should not bind itself to a federal energy efficiency standard which may not meet the needs and concerns of North Carolina. Dr. Wright further testified that the resource planning policies of North Carolina, along with the rules of the Commission, adequately address the same resource planning policies addressed by the federal standard, and he explained how PSNC complies with these requirements.

Piedmont witness Powers testified that while Piedmont is supportive of many of the principles set forth in the federal standards, it does not support formal adoption of those standards in this proceeding with respect to the federal energy efficiency standard. Ms. Powers noted that Piedmont already takes into account the effects of energy efficiency in its plans and

planning processes and that it is an active sponsor of several conservation programs designed to promote energy efficiency.

No other party provided testimony on the possible adoption of the federal energy efficiency standard set forth in Section 303(b)(5) of PURPA.

Based on the testimony of the Public Staff, PSNC, and Piedmont, and on its own evaluation of the federal energy efficiency standard, the Commission concludes that it is neither necessary nor appropriate to adopt the federal energy efficiency standard set forth in Section 303(b)(5) of PURPA in this proceeding. The Commission further concludes that it has the authority to adopt elements of that standard, as appropriate, for the natural gas utilities subject to its jurisdiction, consistent with the best interests of the State of North Carolina and the citizens thereof.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6 THROUGH 8

The evidence supporting these findings of fact is contained in the testimony of Public Staff witnesses Hoard and Davis, PSNC witness Wright, and Piedmont witness Powers.

Public Staff witnesses Hoard and Davis testified that the Commission has adopted part of the federal rate design standard set forth in Section 303(b)(6) in the form of decoupling tariffs for PSNC and Piedmont, but that wholesale adoption of Section 303(b)(6) of PURPA is not appropriate. Specifically, the Public Staff witnesses expressed concerns about the public interest inherent in straight fixed-variable rates and utility incentives for successful management of energy efficiency programs.

PSNC witness Dr. Wright testified that it is unnecessary for the Commission to adopt the rate design standard set forth in Section 303(b)(6) because PSNC's approved customer usage tracker mechanism, in conjunction with PSNC sponsored conservation programs, already achieves the goal of the proposed standard. Dr. Wright did testify that PSNC supports several of the rate design principles included in the federal standard but does not support formal Commission adoption of that standard.

Piedmont witness Powers similarly testified that the Commission has already adopted the functional equivalent of the first rate design principle included in the federal standard when it approved margin decoupling tariff mechanisms for PSNC and Piedmont. Ms. Powers also testified that while Piedmont is supportive of some of the other rate design principles contained in the federal standards – such as economic incentives for the effective implementation of utility energy efficiency programs – it is Piedmont's position that these principles should be examined under state law in discrete company-specific proceedings before the Commission.

No other party presented evidence on the proposed adoption of the federal rate design standard set forth in Section 303(b)(6) of PURPA.

Based on the foregoing, the Commission concludes that it is not appropriate to adopt the federal rate design principles at issue in this proceeding. As noted by the witnesses, the

Commission has already adopted parts of these principles under its own authority and believes that full or partial adoption and/or implementation of the remaining principles is most appropriately considered in individual proceedings before the Commission under state law.

IT IS, THEREFORE, ORDERED that this Order be issued as the Commission's consideration and determination pursuant to Section 532 of EISA.

ISSUED BY ORDER OF THE COMMISSION.
This the 16th day of September, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

kh091509.01

DOCKET NO. P-100, SUB 58a

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition to Change Reporting Requirements for Monthly Access Line Reports	)))	 ORDER AMENDING MONTHLY ACCESS LINE REPORTS

BY THE COMMISSION: On March 30, 2009, the North Carolina Telecommunications Industry Association, Inc.[1] (NCTIA) filed a Petition to Amend Filing Requirements Relating to the Station Development Report (SDR). The NCTIA noted that the SDR has been provided monthly to the Commission's Public Staff by incumbent local exchange carriers (ILECs) for many years. The NCTIA also noted the Public Staff does not object to its proposal.

On April 2, 2009, the Commission issued its *Order Seeking Comments*, requesting that the Public Staff, Attorney General, and any other interested party file comments by April 17, 2009, with reply comments, if any, from the NCTIA by April 24, 2009.

On April 17, 2009, the Public Staff filed comments.

No reply comments were filed in this proceeding.

THE PETITION

The NCTIA stated that it has been unable to locate an Order or Memorandum issued by the Commission which established the requirement that the SDR be filed. The NCTIA further stated that the relevant correspondence that the NCTIA has located begins with a Memorandum dated April 16, 1964, reminding ILECs to provide information for the monthly SDR by class of service. Since that time there have been several requests from the Commission revising the reporting requirements in various ways. The NCTIA asserted that there is no continued need for the reporting of line access information on a monthly basis given the present day dynamics of the telecommunications industry.

The NCTIA pointed out that in 2002, which represents the most recent activity in this docket, Verizon requested that the Commission treat its monthly SDR as "confidential" because it contained proprietary and commercially sensitive information. The NCTIA commented that the Public Staff filed comments dated April 25, 2002, regarding Verizon's Petition for Confidential Treatment, stating the Public Staff's view of the importance of these reports, as follows:

---

[1] NCTIA regulated ILEC members include AT&T North Carolina, Citizens Telephone, Ellerbe Telephone Company, Embarq, LEXCOM Telephone Company, MebTel Communications, North State Communications, Pineville Telephone Company, Randolph Telephone Company, TDS Telecom, Verizon South, Inc., Windstream North Carolina, Windstream Concord and Windstream Communications., Members of the NCTIA not regulated by the Commission include Atlantic Telephone Membership Corporation, Piedmont Telephone Membership Corporation, Randolph Telephone Membership Corporation, Skyline Telephone Membership Corporation, Star Telephone Membership Corporation, Surry Telephone Membership Corporation, Tri-County Telephone Membership Corporation, Wilkes Telecommunications, and Yadkin Valley Telephone Membership Corporation.

> The fourth factor involves the business value of the information at issue. The information in Verizon's monthly reports is valuable to the Commission, the Public Staff and the general public for regulatory and informational purposes. For example, often one of the determinants of the rates for Extended Area Service (EAS) and Expanded Local Service is the number of access lines in each of the affected exchanges.

The NCTIA argued that any value in reporting this data on a monthly basis has diminished considerably and, accordingly, asks the Commission to modify the frequency with which ILECs must file the SDR.

According to the NCTIA, there are only three ILECs that depend on an EAS matrix to calculate EAS rates when necessary. Because most ILECs have zero rated their expanded local calling bands, or are in the process of doing so, the NCTIA has noticed a significant decline in the requests for new EAS routes. The NCTIA stated that, in the event the Public Staff is in need of access line counts for particular exchanges for an EAS calculation, the NCTIA companies can certainly provide that information to the Public Staff upon request.

The NCTIA further commented that the Public Staff uses the information in the SDRs to prepare three published reports that, it appears, would require only quarterly and end of year access line data, rather than monthly data. The NCTIA proposed to the Commission that the ILECs be allowed to provide the SDR on a quarterly and an annual basis in order for the Public Staff to compile the information for the reports it publishes.

Specifically, the NCTIA suggested the following changes to the SDR:

A. For each calendar quarter, ILECs will provide access line totals by exchange, including connects and disconnects, for each month in the quarter. This report will be provided by the 20th day of the month following the end of each calendar quarter.
B. ILECs will provide an annual report showing access line details, by exchange, based upon December 31 access line counts as is currently being provided today on a monthly basis. This information will be provided by January 30th of each year.

The NCTIA commented that it believes that its proposal is fair and will continue to provide the Commission with adequate information. The NCTIA further stated that, if the Commission or the Public Staff should require more current access line information for a particular issue at any given time, members of the NCTIA will provide that information upon request.

The NCTIA asserted that this change to allow quarterly, rather than monthly, filings of the SDR will not be harmful to any stakeholder and will continue to provide this information on sufficiently frequent basis to meet the Commission's needs and those of the Public Staff. The NCTIA maintained that preparation of the SDRs require manual processes for some NCTIA member companies and the NCTIA believes that it is appropriate to request this change at this time.

Lastly, the NCTIA stated that some of its members have met with representatives of the Public Staff regarding the proposal as outlined, and the Public Staff does not object to the proposal.

PUBLIC STAFF'S COMMENTS

The Public Staff stated that it does not oppose the modifications to the SDR filing requirements proposed by NCTIA. The Public Staff acknowledged that for years, each ILEC has furnished a monthly SDR and that during that time the Commission has been required to issue numerous orders addressing the SDR filing requirements and the attendant confidentiality issues. After reviewing the proposed modifications to the SDR filing requirements, the Public Staff believes that those proposed modifications would not impede its ability to produce the three reports it generates, provided that ILECS supplied access line counts for rate-verification purposes on an "as-needed" basis.

The Public Staff agreed that the NCTIA's proposed SDR filing formats and schedule would generally satisfy the needs of the Commission and Public Staff, with only slight modifications in the alignment of the quarterly report column headings. In summary, the Public Staff commented that it does not object to the NCTIA proposal, with minor changes as reflected in Attachment A to its comments, and subject to the condition that ILECs would be expected to provide confidential monthly access line data as needed by the Commission or Public Staff.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

Based upon the foregoing, the Commission concludes that good cause exists to grant the NCTIA's Petition. However, Attachment A of the NCTIA's Petition should be modified as outlined by the Public Staff in its comments. A copy of the approved format is attached to this Order as Appendix A. This approval is subject to the condition that LECs are expected to provide monthly access line data upon request and as needed by the Commission or the Public Staff.

IT IS, THEREFORE, SO ORDERED:

ISSUED BY ORDER OF THE COMMISSION.
This the 12th day of May, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

kh051109.01

REPORT TO THE NORTH CAROLINA UTILITIES COMMISSION ON TELEPHONE DEVELOPMENT

Quarter Ending 00/00/0000
Month: ________

Company	Local Access Lines In Service End of Month	Total Access Lines					Held Orders
		In Service First of Month	During the Month			In Service End of Month	
			Connects	Disconnects	Net Gain		
COMPANY NAME							
Exchange 1							
Exchange 2							
Exchange 3							
Total Company							

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 AMENDING RULE R9-8(h)
Petition to Amend Customer Notification	)	
Requirements for Directory Assistance Refunds	)	

BY THE COMMISSION: On May 8, 2009, the North Carolina Telecommunications Industry Association, Inc. (NCTIA), filed a Petition requesting that the Commission modify its existing requirements as to customer notification for directory assistance refunds. The modification to Rule R9-8(h) is to eliminate the bill insert requirement and instead to allow the use of bill message, direct mail, or email (when affirmatively selected by the customer).

The NCTIA is a trade association representing incumbent local exchange companies (ILECs) certified by the Commission to provide telecommunications services to the citizens of North Carolina.[1] In addition, many of the ILEC members of the NCTIA are affiliated with competing local providers (CLPs) who are also certified by the Commission.

Rule R9-8(h) currently reads:

> Carriers are required to provide DA refunds, upon request, for an incorrect 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.

NCTIA stated that members have complied with this requirement since it became effective on July 1, 2004, and have included annual bill inserts in customer telephone bills regarding DA refunds. While not providing specific language, the NCTIA in substance requested that the Commission amend the second sentence of Rule R9-8(h) to read:

> Carriers are further required to provide annual notification to customers either by bill message, direct mail, or email (when email is affirmatively selected by the customer) informing them of the uniform DA refund policy and to publish the

[1] NCTIA regulated ILEC members include AT&T North Carolina, Citizens Telephone, Ellerbe Telephone Company, Embarq, LEXCOM Telephone Company, MebTel Communications, North State Communications, Pineville Telephone Company, Randolph Telephone Company, TDS Telecom, Verizon South, Inc., Windstream North Carolina, Windstream Concord Telephone and Windstream Communications. Members of the NCTIA not regulated by the Commission include Atlantic Telephone Membership Corporation, Piedmont Telephone Membership Corporation, Randolph Telephone Membership Corporation, Skyline Telephone Membership Corporation, Star Telephone Membership Corporation, Surry Telephone Membership Corporation, Tri-County Telephone Membership Corporation, Wilkes Telecommunications and Yadkin Valley Telephone Membership Corporation.

uniform DA policy permanently in the directory assistance section of the local telephone directory.

The NCTIA noted that a similar request had been made by the NCTIA in Docket P-100, Sub 140 (Petition filed May 12, 2007) and that request was approved by the Commission on February 28, 2008. The change approved therein allowed ILECs and CLPs to send disconnect notification via bill message, bill insert, direct mail or email (when affirmatively selected by the customer). The NCTIA added that recently introduced legislation (HB 686) would allow the Do Not Call annual insert requirement to be changed to a bill message, direct mail or email. HB 686 was ratified on June 11, 2009, and has since been entered as Session Law 2009-122.

The NCTIA maintained that these alternative means of communication will be just as effective as the previously required bill insert and will provide a means of notification that customers have come to expect and appreciate. The NCTIA also represented that the alternative means of communication allowed by the NCTIA's proposal will also save ILECs and CLPs money and allow them to make choices as to which alternative means of communication is best for them.

The NCTIA stated that its members have met with representatives of the North Carolina Utilities Commission – Public Staff and made the Public Staff aware of their proposal. The Public Staff did not file any objections to the NCTIA's proposal.

On May 12, 2009, the Chairman issued an Order Seeking Comments, concluding that the NCTIA's proposal has sufficient merit that it would likely be approved if no significant protests were received from interested parties.

The Commission has received no protests regarding this matter from any interested party.

WHEREUPON, the Commission concludes that good cause exists to amend the second sentence of Rule R9-8(h) to read as follows:

> Carriers are further required to provide annual notification to customers either by bill message, direct mail, or email (when email is affirmatively selected by the customer) informing them of the uniform DA refund policy and to publish the uniform DA policy permanently in the directory assistance section of the local telephone directory.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 6th day of July, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Pb070109.01

DOCKET NO. P-100, SUB 140

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition by the North Carolina Telecommunications Industry Association, Inc., to Amend Rule R12-9(d)	)))	ORDER DENYING REVISIONS TO COMMISSION RULE R12-9(d)

BY THE COMMISSION: On July 24, 2008, the North Carolina Telecommunications Industry Association, Inc. (NCTIA)[1], a trade association representing incumbent local exchange companies (ILECs) (including ILECs affiliated with competing local providers or CLPs), filed a Petition to Amend Rule R12-9(d), which allows North Carolina regulated utilities to "apply a late payment, interest, or finance charge" on past due accounts at a rate of no more than 1% per month. NCTIA stated that this late payment charge (LPC) has been in effect since November 24, 1972. By its Petition, the NCTIA proposed to amend Rule R12-9(d) to read as follows:

Rule R12-9. Uniform billing procedure.

> (d) Finance charges. – No interest, finance, or service charge for the extension of credit shall be imposed upon the customer or creditor if the account is paid within twenty-five (25) days from the billing date. No utility shall apply a late payment, interest, or finance charge to the balance in arrears at the rate of more than 1% per month; <u>provided, however, that Local Exchange Companies (LECs) and Competing Local Providers (CLPs) may apply a rate of 1½%. Alternatively, LECs and CLPs may assess a flat charge not to exceed five dollars ($5.00) on accounts having an outstanding balance of less than one hundred dollars ($100.00), and a flat charge not to exceed ten dollars ($10.00) on accounts having an outstanding balance of one hundred dollars ($100) or more, for any payment past due for 30 days or more, provided, in no case shall the late charge exceed the outstanding principal balance. If a late payment charge, using this flat charge structure, has been once imposed with respect to a late payment, no late charge shall be imposed with respect to any further payment which would have been timely and sufficient but for the previous default.</u> The bill shall clearly state the interest rate or the amount that would be due if not paid within the allowed amount of time, including the interest, finance, or service charge. All utilities which are required to file tariffs and which apply an interest, finance, or service

[1] NCTIA regulated ILEC members include AT&T North Carolina, Citizens Telephone, Ellerbe Telephone Company, Embarq, Lexcom Telephone Company, MebTel Communications, North State Communications, Pineville Telephone Company, Randolph Telephone Company, TDS Telecom, Verizon South, Inc., and Windstream North Carolina, Windstream Concord, and Windstream Communications. Members of the NCTIA not regulated by the Commission include Atlantic Telephone Membership Corporation, Piedmont Telephone Membership Corporation, Randolph Telephone Membership Corporation, Skyline Telephone Membership Corporation, Star Telephone Membership Corporation, Surry Telephone Membership Corporation, Tri-County Telephone Membership Corporation, Wilkes Telecommunications, and Yadkin Valley Telephone Membership Corporation.

charge must file tariff provisions to that effect. ~~All utilities must apply the appropriate interest, finance, or service charge on a uniform basis.~~

On July 28, 2008, the Commission issued an Order allowing interested parties to file comments no later than September 26, 2008, and allowing the NCTIA to file reply comments no later than October 17, 2008.

On September 24, 2008, the NCTIA made a filing indicating that it had incorrectly attributed a quotation in its initial petition by stating that the Public Staff of the North Carolina Utilities Commission (Public Staff) had proposed an increase in the late payment charge in 1995. According to the NCTIA, this quotation was contained in reply comments filed by BTI in this docket instead.

On September 25, 2008, Duke Energy Carolinas LLC (Duke) filed comments. Additional comments were filed in this docket on September 26, 2008, by the Public Staff, the Attorney General, and Progress Energy Carolinas, Inc. (PEC).

On September 30, 2008, the Public Staff filed a motion to strike the comments submitted by Duke and PEC. In its comments, Duke supported the NCTIA proposal provided that the proposal is extended to cover all regulated utilities under Rule R12-9(d). PEC supported the proposal as long as any new rule was made applicable to electric utilities subject to regulation by the Commission. On October 1, 2008, the Commission issued its *Order Striking the Comments by Duke and Progress Energy*, stating that neither Duke nor PEC are interested parties as far as the original proposal put forth by the NCTIA is concerned, but, depending on the outcome in this proceeding, were "free to consider their prospects going forward and apply for relief to be extended to them at some later date."

On October 10, 2008, the NCTIA filed a *Motion for Extension of Time* to file reply comments until November 7, 2008. On October 15, 2008, the Commission granted an extension of time to NCTIA to file reply comments until November 7, 2008. On November 7, 2008, NCTIA filed reply comments with the Commission in this matter.

THE PETITION

The NCTIA stated that Rule 12-9(d) currently allows North Carolina regulated utilities to "apply a late payment, interest, or finance charge" on past due accounts at a rate of no more than 1% per month. This LPC rate has been in effect since November 24, 1972.

The NCTIA noted that the Commission's Order approving the existing LPC provision concluded that, as an alternative to the threat of disconnection, a reasonable finance and service charge directly assessable against those customers who delay payment of utility bills beyond the time during which the majority of customers pay such bills and beyond the billing cycles reasonably required by the utilities' bookkeeping and billing procedures, was appropriate and should be implemented. Furthermore, the Commission concluded that the charging of an interest, finance, or service charge by a public utility whose books and billing procedures are set up in such manner as to make such a charge feasible is a just and reasonable means of attempting

to recoup a portion of the costs resulting from any late payments attributable to those customers. The NCTIA stated that, with the advent of competition, many competitors are able to assess and do assess a higher LPC than regulated utilities are able to assess.

The NCTIA pointed out that the only amendment to this rule was approved in response to a petition filed by BTI in 1995. The NCTIA stated that, in response to that Petition, the Commission issued an Order on May 23, 1996, amending Rule R12-9(d) to allow certificated intrastate interexchange carriers (IXCs) to apply a rate of 1½% per month to non-residential accounts if such carriers did not bill their end users through a local exchange carrier. However, as pointed out by the NCTIA, this language was rendered obsolete by the passage of Senate Bill 814 on May 30, 2003, which deregulated toll and long distance service. As a result, in an August 16, 2007 Order, the Commission removed this language from Rule R12-9(d).

The NCTIA stated that, since 1995, local competition has increased dramatically and that there are now approximately 200 CLPs and a variety of unregulated entities providing local service. NCTIA commented that "the Industry feels it is now time to update this rule to reflect a late payment charge more in keeping with other businesses in North Carolina."

The NCTIA asserted that the current 1% LPC limit puts local exchange companies and CLPs at a significant disadvantage when compared to their competitors with respect to the timely collection of payment from end-user customers. The NCTIA stated that unregulated companies and competitors such as wireless and cable companies typically impose a minimum administrative late payment fee of $5-$10 per month or a finance charge of 1½% per month, whichever is greater, on past due account balances.

The NCTIA submitted an attachment to its filing purporting to show that many businesses that provide services to consumers on a daily basis charge late fees that are higher than the 1% LPC allowed by Commission Rule R12-9(d).[1] The NCTIA stated that the timely payment of bills by consumers is often directly related to the penalty incurred if the bills are paid late. Furthermore, given this wide discrepancy in treatment, it is not surprising that a customer would be inclined to pay bills with the higher finance charges first – ahead of his or her telephone bill, which may carry only a $.50 late fee.

The NCTIA stated that its proposal to assess a 1½% late fee or, alternatively, a flat charge not to exceed $5.00 on accounts having an outstanding balance of less than $100 and a flat charge not to exceed $10.00 on accounts having an outstanding balance of $100 or more, is consistent with G.S. 24-11. The NCTIA also pointed out that the vast majority of states allow utilities to charge 1½% or more of the unpaid balance as a monthly late payment charge and that many states allow a minimum finance charge. An attachment which NCTIA submitted contained late payment charges approved for use by AT&T, Embarq, and Verizon in a host of

[1] Attachment A to the NCTIA filing, while excluding credit card companies, listed LPCs for municipal utilities, city/county governments, cable/satellite companies, apartment complexes, mortgage companies, daycare centers, parks and recreation centers (i.e., for children's sports leagues), public libraries, and universities.

states.[1] The NCTIA commented that changes to this rule are long overdue given the passage of time and the state of competition in the industry.

COMMENTS

Attorney General: The Attorney General stated that the NCTIA's proposed changes to R12-9(d) should not be approved. The Attorney General observed that, in a down economy, consumers who are having trouble paying their mortgages and otherwise making ends meet do not need the additional burden of increased late payment charges for local telephone service.

The Attorney General further argued that the NCTIA has not shown why it is necessary or in the public interest for the Commission to give local phone companies the ability to impose the requested increases in late fees, and the Attorney General viewed the flat fee proposal to be "particularly onerous." The Attorney General stated that, under Rule R12-9(d), the late fee has long been, for good reason, calculated as a percentage instead of a flat fee. Calculating the late fee as a percentage more accurately reflects, on a proportionate basis, the size of the debt the consumer owes to the service provider. A flat fee, on the other hand, would enable a local company to impose a flat $5.00 late fee on all consumers, even those who are in arrears by only a very small amount. The Attorney General reasoned that allowing a flat fee late payment charge would result in inequitable late fees. The Attorney General stated that, given the computer technology available to the local phone companies, it should not be difficult to calculate late fees on a percentage basis.

The Attorney General also stated that allowing phone companies to impose a flat $5.00 or $10.00 late fee would result, in many instances, in extremely large increases (i.e., in proportional terms) over the late fees that local phone companies currently are allowed to impose. The Attorney General commented that, in some instances, the $5.00 flat fee might actually exceed the delinquent amount. The Attorney General stated that the NCTIA has not provided sufficient support for late fee increases of this type or magnitude.

The Attorney General commented that, while the proposed increase to the percentage limit set forth in Rule R12-9(d) – from 1% to 1½% -- is not objectionable, in part because it does not represent such a large increase (i.e., at least in terms of proportion), the NCTIA has still not provided a sufficient explanation of the reason that this increase is in the public interest, especially in the current state of the economy. The Attorney General stated that basic telephone service allows residents to communicate with family, friends, and health professionals and provides residents with the ability to access 911 service and the long distance provider of their choice. The NCTIA has not shown that it is in the public interest to increase late fees that are tied to a critical service in bad economic times.

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[1] Attachment C to the NCTIA filing listed LPCs for approximately 38 states and the District of Columbia that have LPC rates at or above 1½%, or, alternatively, flat LPC rates of varying amounts. The LPCs on Attachment C are listed for AT&T, Embarq and Verizon only; furthermore, it can not be determined if the LPCs shown on Attachment C are established based on a jurisdictional rule and regulation or are established in price plan agreements or similar arrangements.

The Attorney General also commented that the NCTIA also proposes eliminating the sentence in Rule R12-9(d) that requires all utilities to apply late fees to consumers on a uniform basis. The Attorney General stated that the elimination of this language would allow local telephone companies, as well as other utilities, to discriminate in the application of late fees and to charge different fee amounts to consumers in similar circumstances at the service provider's discretion. The Attorney General stated that the NCTIA has presented no compelling argument, indeed no argument at all, in support of changing the structure of the LPC. The Attorney General urged the Commission to deny the NCTIA petition and to decline to approve the proposed increases in late payment charges and the other proposed changes to Rule R12-9(d).

Public Staff: The Public Staff observed that the Commission, in its earlier rulemaking in Docket No. M-100, Sub 39, noted the lack of parity between past due dates and LPC provisions among the various utilities and found that the public interest required the elimination of confusing and misleading billing procedures and the tariff provisions establishing such procedures. Furthermore, the Public Staff stated that the Commission had found that LPCs levied in varying amounts were misleading, unreasonable, and discriminatory under G.S. 62-140.

The Public Staff pointed out that the Commission also recognized in the original rulemaking proceeding that non-regulated entities may have different past due dates or LPC provisions than those established in Rule R12-9(d). Specifically, the Commission noted that a municipality may, by virtue of an express legislative grant of authority found in G.S. 160A-314, establish a due and payable period of ten (10) days and may apply such interest charges or penalties as that municipality might establish.

The Public Staff stated that the Commission recognized in its initial 1972 decision implementing Rule R12-9(d) that LPCs differ between public utilities and non-regulated entities. For that reason, the Public Staff argued that, despite NCTIA's claim that these differences arose with the advent of competition in the telecommunications industry, such differences in LPCs had existed for a long time. The Public Staff noted that G.S. 24-11(a), which concerns the extension of credit under an open-end credit line or similar plan, incorporated the current 1½% rate when the Commission adopted Rule R12-9(d).

The Public Staff also noted that the LPC authorized in Rule R12-9(d) is a "rate" as defined in G.S. 62-3(24) rather than "interest" subject to G.S. 24-11. Thus, the finance or late payment increment of a rate charged by a public utility to its retail customers is a rate or charge subject to the jurisdiction of the Commission under its ratemaking authority.

The Public Staff acknowledged that the NCTIA is correct that the current 1% LPC has not been modified in a number of years, except for the increase permitted by the Commission in Docket P-100, Sub 72 in 1995. The Public Staff stated that the Commission's Order in that case was narrow in its scope in that the increase only applied to nonresidential accounts served by long distance carriers who did not bill end users through a local exchange carrier. The Commission's approval of an exception for such interexchange carriers stemmed from the fact that they possessed considerable coercive power over late payers, since local telephone service could be cut off for failure to pay long distance charges. In the instant case, the NCTIA seeks an increase in the LPC that is much broader in scope and would apply to both residential and

business customers served by all LECs and CLPs, without any evidence of a change in administrative burdens or costs that would warrant approval of the proposed increase.

The Public Staff noted the NCTIA's argument that customers will often withhold timely payment of their electric and telephone bills because the late fee associated with such bills is less than that associated with the provision of other services, such as cable TV or internet service. However, the Public Staff commented that the NCTIA has offered no evidence or support for this claim.

The Public Staff also commented that the NCTIA, without any explanation or justification, proposes to eliminate the last sentence of Commission Rule R12-9(d), which requires that the LPC be applied on a uniform basis by public utilities. The Public Staff further suggested that, based on NCTIA's wording, every public utility under the Commission's jurisdiction could lawfully charge one customer no LPC while charging another 1% per month. The Public Staff argued that eliminating the requirement for the uniform application of LPCs is clearly not in the public interest.

In summary, it was the Public Staff's view that the request by the NCTIA was unreasonable and was not in the public interest. In truth, the proposal represents little more than an attempt by the NCTIA to increase the overall revenues of the LECs and CLPs. The Public Staff stated that "the Commission should reject this proposal in its entirety."

REPLY COMMENTS

The NCTIA reiterated in its reply comments that the NCTIA's proposal to revise Rule 12-9(d) is fair, reasonable, and necessary in order to promote a more level playing field for the ILECs vis-à-vis their wireless and cable TV competitors, who are subject to no restrictions with respect to the imposition of late payment fees.

With respect to its proposal to remove the last sentence of Rule R12-9(d), stating that "all utilities must apply the appropriate interest, finance, or service charge on a uniform basis," the NCTIA temporized by saying that, after further consideration, it is not opposed to the retention of that language in order to avoid any concern about the possibility of utility discrimination among customers. The NCTIA claimed to have proposed the removal of this language only because of the alternative nature of the change to Rule R12-9(d) that the NCTIA had proposed, which would allow the service provider to assess an LPC of 1½% on an unpaid balance or, alternatively, an LPC consisting of a specified flat rate. The NCTIA stated that it was not its intent, as suggested by the Public Staff, to provide utilities the opportunity to discriminate by proposing the removal of this sentence.

The NCTIA observed that the comments filed by the Attorney General's Office expressed concern regarding the size of the proposed increase to the late payment fee given the current state of the economy. The NCTIA argued that, under the current rule, the consequences of a customer's failure to pay his or her phone bill is a relatively paltry 1% penalty – thus, there is little incentive for prompt payment. The NCTIA further commented that, as a final point concerning the Attorney General's observations about the current economic conditions, it must

be noted that current economic conditions do not just affect consumers, since the economy also directly impacts the utilities serving those customers.

The NCTIA stated that, when the Commission approved the current LPC in 1972, the Commission stated that it is "appropriate for a utility to attempt to recoup a portion of those costs by applying such interest, finance or service charges as may be reasonable and lawful." The NCTIA urged the Commission to increase the LPC to a reasonable level – one that will allow utilities to recoup a reasonable portion of those costs caused by customers that do not pay their bills when due.

The NCTIA commented that the Public Staff wants to focus on the history of the LPC by recounting that the Court of Appeals recognized that the LPC established in the Commission's *Order Establishing Uniform Billing Procedure Rule* is a rate and not an interest charge. However, the NCTIA observed that the Commission in that Order stated that "there are interest, finance and services costs directly attributable to those customers who" do not pay their utility bills when due.

The NCTIA stated that the Public Staff based its recommendation that the Commission deny the NCTIA petition on a lack of evidence of increased costs sufficient to support increasing the LPC. The NCTIA stated that the petition "sets forth the fact" that many of its members are seeing an increase in the number of customers not paying their bills on time. Furthermore, to the extent that the "current low LPC" is an incentive for consumers to delay paying their bills, and thereby trigger collection efforts, there is no doubt that the companies' administrative burden increases.

The NCTIA noted that the Public Staff criticized the NCTIA petition as only an attempt to raise overall revenues for its members by increasing the LPC. The NCTIA reiterated that the LPC should serve as an inducement to have consumers pay their telephone bills in a timely manner when due. The NCTIA stated that the Commission should be clear that the NCTIA's goal is not to receive more revenues in the form of late fees, but to induce consumers to pay their bills "on a timely basis."

The NCTIA argued that the current rule is outdated in today's marketplace and does not serve as an inducement to have customers pay their bills on time. The NCTIA stated that many businesses, such as those referenced in the original petition, are subject to the same economic pressures as those faced by NCTIA members and that they have chosen to encourage their customers to pay their bills in a timely manner by charging a higher late payment fee, thereby decreasing the number of customers who pay late and helping those businesses recoup a portion of the costs incurred in dealing with those customers.

The NCTIA repeated its argument that customers who pay their bills late cause additional problems to utilities because those customers increase the resources that must be devoted to collection efforts and increase the costs of pursuing collection. As stated by the NCTIA, no one can argue that the late payment fee has remained unchanged for 36 years and that the costs associated with collection functions, including labor expense, have not increased.

The NCTIA posited that any increase in the LPC "should at least incrementally" increase the number of customers who pay their bills when due. The NCTIA pointed out that the flat rate option provides a means of recovering the cost of collection on a more uniform basis, without regard to what the customer's unpaid balance may be; e.g., a customer with a past due balance of $25 would require the same level of collection resources as a customer with a $250 past due balance.

The NCTIA stated that approving an increase in the late payment fee to 1½% would result in the fee being uniform among all telecom service providers. Alternatively, the proposed flat rate charge not to exceed $5.00 on accounts having an outstanding balance of less than $100, and not to exceed $10.00 on accounts having an outstanding balance of $100 or more, would be consistent with fees being charged by providers of other types of services.

CONCLUSIONS

After careful consideration, the Commission concludes that the petition to amend Commission Rule R12-9(d) is not in the public interest as a matter of policy and should be denied for several reasons.

First, the intent of the LPC at its inception was to provide reimbursement of a portion of the cost incurred to track and manage accounts that are not paid in a timely manner. As such, the LPC charge was established by the Commission as a lawful rate and reimbursement mechanism to cover a portion of the operating expenses incurred by companies seeking to collect payment from such customers. The current LPC rate is deemed just and reasonable under G.S. 62-132. The Commission has not been persuaded by the arguments put forth by the NCTIA that the LPC should be increased or that it would be in the public interest to increase that rate at the present time. Furthermore, the Commission agrees with the Attorney General and the Public Staff that the NCTIA's alternative flat rate LPC proposal is even more objectionable in that it would, under certain circumstances, allow utilities to impose unreasonable LPCs, such as where, in particular, only small amounts are past due.

Second, the other arguments presented by the NCTIA were unpersuasive to the Commission. That the present LPC rate was established in 1972, or that other entities less regulated than ILECs, or not regulated at all, may charge more are not convincing arguments by themselves. Indeed, one of the NCTIA's principal arguments was simply that a higher rate would encourage more customers to pay their bills on time. While it is important that customers pay their bills promptly, it is also important to consider the reasons why some do not. Given the present economic tumult, it is unlikely that all of the customers who are not paying on time are doing so because the LPC was insufficiently high to discourage them from paying on time. Rather, it is at least as likely that these customers are experiencing challenging economic circumstances themselves. Nor does the Commission find persuasive the industry argument that, in effect, consumers will often withhold timely payment of their regulated utility bills because the LPC rate is less than that for other bills or services. Therefore, the Commission cannot find good cause to increase LPC burdens at the present time.

Lastly, the Commission believes that the uniform application of the LPC rate continues to be in the public interest in order to prevent any possibility of unreasonable discrimination among utility customers related to imposition of the LPC rate as required by G.S. 62-140.[1] The Commission also notes that both the Attorney General and the Public Staff strongly support the retention of the existing requirement for the uniform application of the LPCs by utilities.

Accordingly, the Petition to amend Commission Rule R12-9(d) is denied in its entirety.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 11th day of February 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Chairman Edward S. Finley, Jr. dissents.

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DOCKET NO. P-100, SUB 140

Chairman Finley dissenting: The current version of NCUC Rule 12-9(d) that requires a uniform late payment charge to be used by all the State's public utilities of not more than 1% per month arises from an extensive rulemaking evidentiary proceeding conducted in 1972, in Docket No. M-100, Sub 39. At that time, the Consumer Price Index was 42.5. Today the CPI is 210.3, a 394% increase. In 1972 the Commission's regulation over the various industries subject to its jurisdiction was relatively uniform as developments such as deregulation of the telecommunications industry were decades into the future. The petition at issue in this case arises from the request by incumbent and competitive providers of local telecommunications services for an increase in the late payment charge to help defray increased costs resulting from efforts to collect charges from customers who do not pay when their bills are due. The Petitioners also seek to discourage the practice the Petitioners have described under which customers delay payments for telecommunications services beyond the due date, instead paying bills for other services for which the sanction for nonpayment is much higher.

The Commission requested comments on Petitioners' requests. The Public Staff and the Attorney General filed comments opposing Petitioners' request. Among other arguments, these opposing parties alleged that the Petitioners have not satisfactorily proven that their allegations are true; and they alleged that subscribers who fail to pay their bills when due should not have to pay a greater late payment fee because this might be unduly burdensome. The Petitioners filed reply comments alleging that: (1) their current costs incurred to collect late payments

[1] The Commission recognizes that, in its reply comments, the NCTIA stated that, should the Commission decide to retain the last sentence of Rule R12-9(d), it would not be opposed to that decision.

substantially exceed the late payment fees; (2) the competition they face is not similarly restrained in the late payment fee it can charge; and (3) the arguments the consumer advocates advanced protect the financial interests of those who violate their obligations to the detriment of affected parties that comply with theirs.

Based on the comments filed, the Commission majority has denied the petition in its entirety, accepting the allegations and arguments of the Public Staff and the Attorney General. In my view the Petitioners have alleged facts, that if true, and intuitively I would be greatly surprised if they are not, justify a more thorough review of the 36-year old rule and the significant policy issues raised than the majority has been willing to accord them. The majority has not acted in accordance with existing law in the procedure it has followed and has ordered a practice inconsistent with longstanding, sound regulation.

Procedurally, the majority has endorsed the position of the Public Staff and the Attorney General that the Petitioners have not proved their case. Late payment charges under Rule R12-9(d) are deemed to be a rate for service rendered, and the Petitioners have asked to increase them to offset some, but not all, of the increased costs to enforce payment and to discourage the practice by recalcitrant subscribers of not paying bills when due, thus making the service provider serve as a banker, making below-market loans for subscribers of these telecommunications services.

In response, the Public Staff alleged and argued that "NCTIA seeks an increase in the LPC that is much broader in scope and would apply to both residential and business customers of all LECs and CLPs, without any evidence of a change in administrative burdens or costs that would warrant an increase in the LPC." Also, "no support or basis for [the claim that competitors can charge a higher LPC to Petitioners' disadvantage] has been provided or offered by NCTIA."

The Attorney General alleged and argued similarly, "the NCTIA has not provided sufficient support for late fee increases of this type and magnitude" and "the NCTIA has still not provided sufficient support as to why this increase is in the public interest, especially in this type of economy."

In response, the Petitioners have alleged:

> The NCTIA's Petition sets forth the fact that many of its members are seeing an increased incidence of consumers choosing not to pay their phone bills when due. In this regard, can anyone seriously dispute the fact that administrative burdens directly correlate with the number of past due accounts, i.e., as the number of past due accounts increase, a company's administrative burden of dealing with these past due accounts increases. To the extent that the current low LPC is an incentive for consumers to delay paying their phone bills, and thereby trigger an ILEC or CLP's collection efforts, there can be no doubt that the companies' administrative burden increases.

Also,

> No one can argue that even though the late payment fee has remained unchanged for 36 years, the costs associated with collection activities, which includes labor expense, have not increased.

The Commission has resolved these material issues of fact over whether the Petitioners' costs to enforce timely payment exceed the authorized fees and over whether the subscribers are engaged in arbitrage by ruling that the Petitioners have not proven their case: In its "conclusions" consisting of a mere three paragraphs without any findings of fact, the majority addresses the allegations and the contested issues of fact raised by the allegations with statements such as "the other evidence presented by the NCTIC was unpersuasive to the Commission." As the majority has dismissed the petition without any evidence - no verified pleadings, no affidavits, no testimony, no exhibits – the question raised is to what evidence does the majority refer? Also, "the NCTIA has not adequately demonstrated to the satisfaction of the Commission that the amounts realized by its members under the current 1% per month LPC are insufficient to recoup a reasonable portion of their LPC-related expenses or that it would be in the public interest to increase the rate at the present time." The majority has denied any opportunity to Petitioners to quantify the amount realized under the 1% vis-à-vis what their expenditures were. Without providing this opportunity and without findings of fact in response thereto, the Commission is not in a position to make an informed judgment on the policy issue of where the public interest lies.[1] In the parlance of the procedure of the General Court of Justice, the essence of which is codified in G.S. § 62-79, the majority has ruled that the responsive pleadings fail to raise an issue of material fact and the Intervenors are entitled to judgment as a matter of law. In my view such holding is erroneous as a matter of law. Surely, if Petitioners' expenses incurred to pursue late collections substantially exceed revenues under the 1% rate, and, if the existing practice is pervasive and competitively harmful, the public interest provides a remedy.

Not only do these allegations and the Intervenors' denial of them raise issues of fact that the Commission must resolve, a generic rulemaking proceeding, where no evidentiary record is developed, is not the appropriate proceeding.

The resolution of ratemaking disputes in a rulemaking proceeding is only permissible when three criteria are met: (1) the rate adjustment at issue affects all utilities uniformly; (2) a large number of utilities are affected, making individual hearings for all inappropriate; and (3) no adjudicative-type facts are in dispute so as to require a trial-type hearing for each individual utility. State ex rel. Utilities Commission v. Nantahala Power & Light Co. 326 N.C. 190, 203, 388 S.E.2d 118, 126 (1990).

In this case, adjudicative-type facts are very much in dispute. Likewise, Petitioners alleged that unlike the situation in 1972, when uniformity across all regulated industries was

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[1] Contrast the procedure followed here with that followed in Docket No. M-100, Sub 139 in 1972. "The Commission heard evidence and received exhibits. Intervenor does not contend that any findings of fact are not supported by evidence." State ex rel. Utilities Comm'n v. North Carolina Consumers Council, 18 N.C. App. 717, 719, 198 S.E.2d 98, 99 cert. denied, 284 N.C. 124, 199 S.E.2d 663 (1973).

appropriate, the pervasive competition in the telecommunications industry, in general, and the local exchange market, in particular, justifies a differentiation in the applicability in the late payment requirements.

The policy argument adopted by the majority is that current adverse economic conditions militate against increasing late payment fees at this time because the increase would exacerbate financial hardship on subscribers who are unable to pay their telephone bill on time. While there is merit in the argument that the fee should be no higher than reasonably necessary and that appropriate consideration be afforded those who delay payment for legitimate reasons, failure to increase the fee to rectify the situation described by the Petitioners cannot be appropriately dismissed for the reasons given. If some subscribers do not pay on a timely basis, they drive up the cost of service to the detriment of those who do pay in a timely fashion, many of whom are in financial distress, but nevertheless sacrifice elsewhere to pay the phone bill on time.

For utilities whose rates are established through traditional rate base, rate of return regulation, late payment fees are regulated revenues. In rate cases, if regulated revenues during the test year are too low because the approved late payment fees are too low, rate increases to all ratepayers are higher than they otherwise would be. The expense incurred by the utility to enforce collection from late payers is a test year cost of service that, if not defrayed by appropriately established late payment fees, drives up rates to all consumers. Cash working capital is a rate base component. To the extent the utility incurs the cost of service more quickly in advance of receiving revenues from consumers than would be the case when consumers pay on time, cash working capital requirements and thus rate base increase, again driving up the cost to those who pay on a timely basis. Where a lax late payment policy increases uncollectable accounts, this also drives up the cost of service to those who pay on time. For many of the Petitioners whose rates are established on the basis of price regulation, the mechanism for establishing rates is different but the principles are the same. Customers who do not pay on time drive up rates to others or deprive the service provider of revenues to which it should legitimately be entitled.

> Its effect [of late payment charges] is to require delinquent ratepayers to bear, as nearly as can be determined, the exact collection costs that result from their tardiness in paying their bills. The appellant's argument actually means in substance not that the utility company be prevented from collecting excessive interest but that its customers who pay their bills promptly be penalized by sharing the burden of collection costs not of their making.

Consumers Council, 18 N.C. App. at 721, 198 S.E.2d at 100, citing Coffelt v. Ark. Power & Light Co., 248 Ark. 313, 317, 451 S.W.2d 881 (1970).

A fundamental principle of public utility rate regulation is that the class of customers which causes the utility to incur a particular expense should be the class responsible for reimbursing that cost through rates. The majority has deviated from that policy here without a justifiable reason.

Most of the Petitioners are operating in an increasingly competitive environment vastly different from the monopolistic environment of 1972 before the break up of the old AT&T and before the Telecommunications Act of 1996. The Petitioners have raised a significant policy issue as to whether a uniform late payment rule, binding for all companies in all industries, is now appropriate. The petition in this case raises a substantial issue of whether the same late payment rule is appropriate for carriers subject to meaningful competition as for utilities that are not. For price regulated companies, it may be a better policy to exempt them from the requirement of this rule and address late payment fees and charges in a different manner.

As the Public Staff notes in its comments the Commission found in its 1972 order that the "finance or late payment increment of a rate charged by a public utility to its North Carolina retail customers is a rate or charge subject to the jurisdiction of this Commission under G.S. 62-130 through 62-140." All but four[1] of the regulated ILEC Petitioners are now price regulated companies, and Lexcom has a petition pending for price regulation. Pursuant to G.S. § 62-133.5(g), price regulated companies are exempted from the requirements of G. S. §§ 62-130, 131, 132, 133, 134, 135, 136, 137 and 139.[2] In affirming the Commission's authority to approve the 1% per month charge in Rule 12-9(d), the North Carolina Court of Appeals placed particular reliance on G.S. § 62-133(b)(3), a statutory provision from which price regulated companies are now exempted. Consumers Council, 18 N.C.App. at 720, 198 S.E.2d at 100. These exemptions substantially undercut the current pertinence of the 1972 rulemaking for price regulated companies and indeed raise substantial questions as to whether Rule 12-9(d) is even enforceable against price regulated companies at all.

Reports submitted by the Petitioners show a continuous and significant decrease in access lines as a result of competition, and the Commission has sought to react responsibly to the changes these carriers confront in other contexts. In my view, the Commission has deviated from this policy in this instance.

The majority has unlawfully denied Petitioners' petition without permitting evidence on material contested issues, has refused to apply the law as established by the North Carolina appellate courts that requires delinquent ratepayers to bear "the exact connection costs that result from their tardiness in paying their bills" and has resolved this dispute under the erroneous understanding that late payment fees are "rates" under statutes such as G.S. §§ 62-130, 133, 134, 135, and 139 for price regulated carriers. I would have permitted Petitioners a procedurally appropriate opportunity to support their allegations with evidence so that an informed decision on important public interest issues could be made through application of existing law.

\s\ Edward S. Finley, Jr.
Chairman Edward S. Finley, Jr.

[1] Citizens Telephone, Ellerbe Telephone, Lexcom Telephone Company and Pineville Telephone Company.
[2] The majority states in its opinion that "the current LPC rate is deemed just and reasonable under G.S. 62-132." Obviously, for each of the Petitioners regulated under G.S. 62-133.5, this statement is in error.

DOCKET NO. T-100, SUB 69

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Petition by Movin' On Movers, Inc. to	)	ORDER DENYING MOTION FOR
Amend Rule R2-8.1 Applications for	)	RECONSIDERATION AND COMMENTS
Certificates of Exemption; Transfers; and	)	AND AMENDING SUBMITTAL
Notice	)	PROCEDURE FOR CRIMINAL RECORDS
	)	CHECK

BY THE COMMISSION: On August 29, 2008, the Commission issued an Order Amending Rule R2-8.1 And Allowing Additional Comments in the above identified docket. In that Order, the Commission denied Petitioner Movin' On Movers, Inc.'s request that the Commission expand Rule R2-8.1(a)(3) to include the following:

e. That the applicant has a current, valid North Carolina Driver's License;

f. That the applicant (or any of its principals) has not been convicted of, or been incarcerated following a conviction for, a felony crime within ten years prior to filing the application; [and]

g. That the applicant is a United States citizen.

However, upon consideration of all the comments submitted from the Petitioner, other interested household goods (HHG) movers, and the Public Staff, the Commission found that some expansion of the requirements of Rule R2-8.1 was warranted in order to protect the using and consuming public and the integrity of the HHG moving industry. The Commission concluded that it would achieve this objective by making certain modifications to Rule R2-8.1 and by requiring that certain additional information be provided in conjunction with the filing of annual reports.

First, the Commission determined that it is appropriate to require that an applicant for a certificate of exemption be required to certify that any persons that the applicant employs to operate a vehicle used to transport household goods will have an active, valid driver's license. Second, the Commission decided that it is important to ascertain from the applicant whether the applicant or any of its partners/principals have been convicted of any crime that might reflect on that person's fitness to engage in the HHG moving business. Third, the Commission found that it is appropriate to require that all applicants, their partners/principals or owners, disclose their legal status in the United States and, if not a United States citizen, to provide evidence of some form of employment authorization indicating lawful presence in the United States. Additionally, the Commission concluded that to the extent that the public interest is served by requesting this information to be provided by new applicants, the public interest is also served by requiring that this information be obtained in the context of an application to transfer a certificate of exemption. Similarly, the Commission further concluded that since the Commission retains a continuing obligation to protect the public interest after a certificate of exemption has been granted, including the authority to revoke such certificate in appropriate circumstances pursuant

to G.S. 62-261(8), this additional information should be required of operators who currently hold certificates of exemption and should be obtained at the first reasonable opportunity. Accordingly, by its August 29, 2008 order, the Commission amended Rule R2-8.1 as set out in Appendix A attached to the Commission's order and further ordered each current holder of a certificate of exemption pursuant to G.S. 62-261(8) to provide the information required by Rule R2-8.1(a)(3) e-g, as amended, in connection with the certificate holder's first annual report following the Commission's order.

On March 2, 2009, the North Carolina Movers Association (Association) made a filing in this docket requesting that the Commission reconsider its requirement for current certificate holders to submit criminal background checks as required by the Commission's August 29, 2008 order. Alternatively, the Association requested that the Commission allow a comment period for interested parties to file comments on this issue before any determination is made on the Association's request. In support of its Motion, the Association asserted that the initial Petition filed by Movin' On Movers, Inc. on August 28, 2007, was meant only to apply to new applicants for authority to operate as a common carrier of HHG. The Association also argued that current HHG movers did not have an opportunity to submit comments on whether the proposed amendments to Rule R2-8.1 should apply to current certificated holders.

Further, the Association observed that current HHG movers cannot complete the criminal record check as required by the Commission. At the present time, the Commission requires that an applicant or current HHG mover contact the Federal Bureau of Investigation (FBI) and have the criminal record check sent directly to the Commission. Apparently, the FBI has informed several Association members that it will not send a requested record directly to the Commission. Instead, the records will only be sent directly to the requesting individual.

Overall, the Association believes that the criminal record check requirement, as it relates to currently certificated HHG movers, is unnecessary because the Commission has a formal complaint procedure in place which subjects movers to revocation of their HHG mover's certificate and, if there was a question about a particular mover's criminal background, the Commission could request a background check at that time.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission has reviewed the Association's March 2, 2009 filing and considers it as a Motion for Reconsideration pursuant to G.S. 62-80.[1] After careful consideration of the facts and circumstances in this docket, the Commission finds and concludes that it should deny the Association's motion.

G.S. 62-261(8) imposes on the Commission both the right and the obligation to attach to certificates of exemption such reasonable terms and conditions as the public interest may

[1] G.S. 62-80 – Powers of Commission to rescind, alter or amend prior order or decision. Note 2.5 (An application for reconsideration of a previously issued order is addressed to and rests in the discretion of the Utilities Commission) See also State ex rel. Utilities Com'n v. MCI Telecommunications Corp., 132 N.C.App. 625, 514 S.E.2d 276 (1999).

require.[1] Additionally, G.S. 62-261(9) authorizes the Commission to obtain "...such information as the Commission deems necessary to carry out the provisions of this Article." Accordingly, the Commission concluded in its August 29, 2008 order that it was appropriate to expand the requirements of Rule R2-8.1 in order to obtain additional information relevant to the granting and maintenance of a certificate of exemption (emphasis supplied). The Commission stated therein its rationale that to the extent that the public interest is served by requiring such additional information be provided by new applicants, the public interest is also served by requiring that this information be obtained in other contexts as well. As noted above, this includes the context of current certificate holders in light of the Commission's continuing duty to protect the public interest after a certificate of exemption has been granted. The Commission specifically stated in its August 29, 2008 order that the obligation of existing certificate holders to provide a certified 10-year criminal record check with its first annual report following the issuance of said order will not be an ongoing requirement and will be limited to the first annual report filing. The Commission fails to see that this requirement places any undue burden on current certificate holders and continues to believe that same is in keeping with this Commission's statutory obligation to the using and consuming public.

Although the Commission sees no basis to revise its August 29, 2008 order, the Commission does recognize that the current process for accepting criminal record checks is problematic and, therefore, this procedure should be amended. The Commission's initial process was based upon an earlier representation and understanding that the FBI would allow an applicant or current HHG mover to request a criminal record check and to have that requested information sent directly from the FBI to any identified agency. Recently, the FBI has clarified its position and has informed the Commission that it will only send a criminal record check request directly to the requesting party, unless there is some applicable state statute in place which authorizes the FBI to send it directly to an agency or other employing entity. As a result of this clarification, the Commission finds that it is appropriate to modify the criminal background record check submittal procedure for complying with amended Rule R2-8.1 such that for the purpose of complying with the 2008 annual report requirement relating to criminal record checks, the FBI criminal record checks should be requested and mailed to (received by) the individual requesting his/her own record and then such individual should forward (mail or hand deliver) his/her FBI criminal record check to the Commission. Likewise, it is appropriate to revise the relevant information on the Commission's HHG mover application form for a certificate of exemption and the Commission's application form to sell, assign, pledge, lease, or otherwise transfer a certificate of exemption to reflect the appropriate criminal record check submittal procedure.

IT IS, THEREFORE, ORDERED as follows:

1. That the Motion filed by the North Carolina Movers Association on March 2, 2009, requesting that the Commission reconsider its requirement for current certificate holders to submit criminal background checks as required by the Commission's August 29, 2008 order or, in the alternative, the opportunity to file comments on the requirement is hereby denied.

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[1] In the Matter of Petition by Movin' On Movers, Inc., to Amend Rule R2-8.1 Applications for Certificates of Exemption, Transfers and Notice. - Order Amending Rule R2-8.1, And Allowing Additional Comments, Docket No. T-100, Sub 69, August 29, 2008, at 25.

2. That the Commission shall amend its submittal procedure related to the criminal background record check requirement of amended Rule R2-8.1 in accordance with the provisions of this Order.

3. That the Commission shall amend, as necessary, its transportation-related application forms and reporting documentation related to Rule R2-8.1, as amended, to reflect the change in the criminal record check submittal procedure.

4. That this Order shall be served upon all certificated household goods movers via first class prepaid postage.

ISSUED BY ORDER OF THE COMMISSION.
This the 31st day of March, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Kc033009.15

DOCKET NO. T-100, SUB 69

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition by Movin' On Movers, Inc. to Amend	)	ORDER RULING
Rule R2-8.1 Applications for Certificates of	)	ON ADDITIONAL
Exemption; Transfers; and Notice	)	COMMENTS

BY THE COMMISSION: On August 28, 2007, Movin' On Movers, Inc. (Movin' On Movers or Petitioner) filed a petition to initiate a rulemaking proceeding to change the requirements of the application for certificate of exemption to transport household goods (HHG) as set forth in Rule R2-8.1. Movin' On Movers proposed that the Commission adopt three additional requirements for applicants seeking authority to operate as common carriers transporting HHG. Specifically, the Petitioner proposed that Rule R2-8.1(a)(3) be expanded to include (1) that the applicant has a current, valid North Carolina Driver's License; (2) that the applicant (or any of its principals) has not been convicted of, or been incarcerated following a conviction for, a felony crime within 10 years prior to filing the application; and (3) that the applicant is a United States citizen.

On August 29, 2008, the Commission issued an Order Amending Rule R2-8.1 and Allowing Additional Comments. The Order amended Rule R2-8.1 to include (1) that the applicant shall certify that only persons possessing valid driver's licenses will operate the motor vehicles that will be used for transporting HHG; (2) that the applicant or all of its partners/principals shall submit a certified criminal history records check for the immediately preceding 10-year period; and (3) that the applicant or all its partners/principals shall certify that (a) he or she is a United States citizen or (b) if not a United States citizen, he or she shall submit

employment authorization document(s) proving legal status to work within the United States. In addition, the Order required that in connection with the submittal of its first annual report following issuance of said Order, each current holder of a certificate of exemption shall provide the aforementioned driver's license, criminal record, and citizenship/employment authorization information. Subsequently, on March 31, 2009, the Commission issued an Order that denied the North Carolina Movers Association, Inc.'s motion requesting that the Commission reconsider its requirement for current certificate holders to submit criminal record checks. The March 31, 2009 Order also amended the submittal procedure for criminal record checks.

The August 29, 2008 Order, in addition to amending Rule R2-8.1, requested that interested parties file comments on the following issues:

1. Are there ways in which the Commission can improve its requirements for certification and the process for obtaining a certificate such that they may be better understood by potential applicants who are interested in engaging in the intrastate HHG moving industry?

2. Are there ways in which the Commission can improve its enforcement of the requirements contained in existing statutes and Commission rules once an applicant is certified to ensure that the applicant remains compliant?

3. Are there ways in which the Commission can better identify, investigate, pursue, and obtain the prosecution of individuals or businesses that operate in violation of our statutes and rules?

Comments were filed by All American Relocation, Inc. (All American); City Transfer & Storage Co. (City T&S); James E. Dunnagan, d/b/a Dunnagan's Moving & Storage (Dunnagan's Moving); Movin' On Movers; the North Carolina Movers Association, Inc. (NCMA); the Public Staff – North Carolina Utilities Commission (Public Staff); and Todd Bentley Cummings, d/b/a Todd's Easy Moves (Todd's Easy Moves).

COMMENTS

__Issue No.1__ – Are there ways in which the Commission can improve its requirements for certification and the process for obtaining a certificate such that they may be better understood by potential applicants who are interested in engaging in the intrastate HHG moving industry?

All American did not offer any additional comments on this issue.

City T&S did not offer any additional comments on this issue.

Dunnagan's Moving opined that the Commission is too lenient in its review of applications in regard to whether applicants are financially solvent and able to furnish adequate service on a continuing basis. In support of its opinion, Dunnagan's Moving stated, "A recent study made concerning new certificate holders clearly indicates on average 33% of new operations failed within 18 months of being granted authority." Dunnagan's Moving asserted

that the Commission should, when reviewing applications, ensure the accuracy and authenticity of the information provided by the applicants. Dunnagan's Moving complained that applicants often do not fully complete the section of the application for reporting assets, liabilities, and shareholders' equity. Dunnagan's Moving also complained that the Commission is too lenient in its review of applications in regard to whether applicants have enough industry experience. Dunnagan's Moving argued that having three or more years of experience driving and loading HHG does not mean an individual with a high school or less educational background would be able to maintain any operation on a continuing basis. In fact, Dunnagan's Moving believes that it is likely that such individual would fall into the 33% group of failures.

Movin' On Movers stated that it is pleased with the three new conditions added to the certification process addressed in the August 29, 2008 Order, and it does not believe that the application process can be made any easier to understand.

The **NCMA** complained that the Commission's "fit" requirement is not being enforced in that the financial information (i.e., assets, liabilities, and shareholders' equity) that applicants submit with their applications is not reviewed carefully enough by the Commission. The NCMA argued that the financial information submitted by an applicant is often incomplete and often indicates that the company is not financially fit. The NCMA stated that unverified financial information makes it difficult for the Commission to make informed decisions. The NCMA suggested that a balance sheet prepared by a Certified Public Accountant (CPA) would help the Commission determine whether a business has the potential to be a successful business. The NCMA observed that since the Maximum Rate Tariff (MRT) became effective on January 1, 2003, 223 applications for a certificate of exemption have been filed. The NCMA observed further that of those 223 applications; 13 were withdrawn; 12 were closed by the Commission; one was protested where the result was that the application was denied; five are pending; 55 were granted, but the companies have since gone out of business; and 137 were granted and the companies are still in business. The NCMA maintained that start-up companies without resources quickly become failed companies. The NCMA further argued that a revolving door of moving companies does not benefit the public. The NCMA pointed out that even though G.S. 62-204 (also reflected in MRT Rule 52) gives consumers nine months to file a damage claim against a mover, if the mover is not in business, the consumer has little or no chance in getting their claim resolved.

The NCMA suggested that the Commission develop a one-stop webpage on its website, as the California Public Utilities Commission has done, which would make it easy for "potential movers" to learn everything they need to know about the HHG moving industry in North Carolina and the Commission's requirements. The NCMA recommended that such a webpage should have several links to other webpages that explain different aspects of the HHG moving industry.

The **Public Staff** suggested that a Frequently Asked Questions (FAQ) document should be developed and posted on the Commission's website. The Public Staff explained that the document could include information on how to satisfy the recent new application requirements and other requirements. The Public Staff stated that it has informally provided a draft version of a FAQ to Commission Staff for review.

Todd's Easy Moves stated that it would be good to require moving companies to do criminal background checks on their employees.

Issue No. 2 – Are there ways in which the Commission can improve its enforcement of the requirements contained in existing statutes and Commission rules once an applicant is certified to ensure that the applicant remains compliant?

All American commented that Issue Nos. 2 and 3 needed to be answered as one question. All American is of the opinion that there is currently very little prosecution and enforcement of the Commission's requirements and this is largely because neither the Public Staff nor the Commission Staff believes that they are responsible for enforcement.

City T & S combined Issue Nos. 2 and 3 and offered the following comments. City T&S stated that currently there can only be improvement in the areas of enforcement and prosecution. City T&S believes that enforcement and prosecution are two entirely different problem areas. City T&S questioned, "Is it criminal law to enforce and is it Commission rules and statutes to prosecute?" City T & S observed that by 2003, when the industry became partially deregulated with the implementation of the MRT, the General Assembly had already increased the fine which enforcement officials could assess from $75 to $1,000. At that time, according to City T&S, Industry understood that it would help to "police" HHG applicants and existing carriers. City T&S explained that industry representatives, upon learning of an impending violation, would inform DMV of dates, locations, and any evidence they had. City T & S recounted that in 2003, enforcement personnel issued citations totaling over $150,000. City T & S stated, however, that unfortunately there were not good mechanisms in place to collect unpaid fines or pursue for prosecution. City T&S stated that enforcement became an issue when DMV merged with the State Highway Patrol Motor Carrier Enforcement Administration Section of the North Carolina Department of Crime Control & Public Safety (State Highway Patrol). When that happened, City T&S remarked, there was very little if any enforcement for over a year. City T&S stated, "It was then [that] Industry came back to the Commission asking for clarification as to their responsibility to ensure Industry of enforcement and prosecution. Industry blamed the Commission, [t]he Commission blamed the Highway Patrol. Highway Patrol was not aware of the problems of Commission statues and rules. Thus a full circle was created without direction, leadership or solutions."

City T & S remarked that more recently, it and some other HHG movers met with Chairman Finley and Commissioner Ervin to discuss industry problems, particularly enforcement. City T & S noted that outcomes of the meeting included the agreement that the industry needs somebody in the General Assembly to represent them; that the industry needs to meet with, educate, and gain the support of the State Highway Patrol; and that a task force consisting of Industry, the Public Staff, and the Commission Staff personnel needs to be formed to address enforcement. City T & S stated that since the meeting with Chairman Finley and Commissioner Ervin, the industry has met with House Member Danny McComas of Wilmington, who has promised his support if needed in the General Assembly; the industry has met with Major Jamie Hatcher and Major Marc Nichols of the State Highway Patrol; and the task force has met several times. The State Highway Patrol assigned Lieutenant Shackelford and Trooper Waters to the task force. City T & S asserted that Industry knows how to comply with the

Commission's statutes and rules; the State Highway Patrol has done what it needs to do by including HHG moving training at their academy and weigh stations; and now the Commission needs to determine exactly how it wants to handle violations of carrier statutes and rules. City T & S stated that the main problem the task force identified was once it has been determined that a carrier is in violation, what is the complete process from start to finish to either get the carrier in compliance or pursue for prosecution. City T&S concluded its comments by elaborating as follows on this main problem:

> How and who is going to determine if there is show cause to further pursue or not pursue for prosecution. Can or will the Commission under its jurisdiction revoke certificates? The Commission can improve by getting involved with Industry and the Highway Patrol in the field. Highway Patrol has trained its officers at weigh stations and on the roads on how to look for carriers that could be in violation. Commission needs to visit suspected carriers in the field especially for new certificated carriers. Commission needs to determine what the specific consequences will be for certain statues or rules violations. Commission needs to clarify its position on how to and when to apply Utility Law versus Criminal Law and who is going to pursue. Who is going to collect evidence to prove show cause. If show cause can be proven who will take control to prosecute. Will it go before the Commission or to Superior Court. Commission needs to determine who will be held accountable for fines issued and fines collected. Commission needs to determine a clear and concise procedure and timeline for both Industry and Patrol to follow once a carrier is in violation. Commission needs to determine a realistic time frame to chart the time it takes for the Carriers to respond to Commission requests for information. And finally, the Commission needs to determine what is going to be the end result for specific violations and who will follow up to see if the end result has been implemented.

Dunnagan's Moving recommended that either the Commission or Public Staff audit a mover within 90 days of the mover being granted authority. In addition, Dunnagan's Moving recommended that a new mover be audited after the initial 90-day period if there is a complaint against the mover. Further, Dunnagan's Moving suggested that the State Highway Patrol should pay a visit to the location of the operation for a compliance check and a citation should be issued if the operation is in violation.

Movin' On Movers stated that an improvement would be to require applicants to attend an MRT training seminar prior to, rather that subsequent to, being certified. Movin' On Movers further asserted that newly-certified movers should be audited at their place of business within six months of being certified to ensure compliance with the Commission's statutes and rules.

The **NCMA** is of the opinion that the Commission is doing a good job of enforcing the Commission's rules in regard to certificated carriers. The NCMA believes that the monthly MRT seminars are very beneficial in this regard.

The **Public Staff** explained that certificated movers must submit certificates of insurance showing vehicle, cargo, and general liability insurance coverage with their annual reports each

year. The Public Staff explained further that this requirement was established because some movers were not maintaining the required levels of coverage and some insurance companies providing the insurance were not authorized to provide insurance in North Carolina. The Public Staff recommended that the Commission intensify its review of the submitted insurance documents to ensure that all insurance is of the required amounts and provided by properly authorized insurance companies.

The Public Staff explained that currently, approximately 150 moving company employees per year attend MRT trainings seminars, conducted jointly by the Public Staff, the Commission Staff, and the NCMA. The Public Staff explained further that in January 2006, the Commission began requiring all newly-certificated movers to attend an MRT training seminar within 90 days of the date of the order granting authority, and the Commission also recently began requiring the same thing for transferees. The Public Staff noted that at this time, approximately 60 movers holding certificates of exemption prior to January 2006 have never attended an MRT seminar. The Public Staff recommended that the Commission require movers issued certificates prior to January 2006 to attend an MRT training seminar if they have not already done so.

Todd's Easy Moves suggested that more mandatory training classes would help ensure that certified movers remain in compliance with the Commission's requirements.

Issue No. 3 – Are there ways in which the Commission can better identify, investigate, pursue, and obtain the prosecution of individuals or businesses that operate in violation of our statutes and rules?

All American commented that Issue Nos. 2 and 3 needed to be answered as one question. All American is of the opinion that there is currently very little prosecution and enforcement of the Commission's requirements, and that this is largely because neither the Public Staff nor the Commission Staff believes that they are responsible for enforcement.

City T & S combined Issue Nos. 2 and 3 and offered comments which have been previously summarized hereinbefore under Issue No. 2. Those comments therefore are not repeated here.

Dunnagan's Moving remarked that many applicants are already operating even though they have not yet received the authority to operate from the Commission. Dunnagan's Moving commended Ms. Carol Stahl on the illegal mover work she has done. Dunnagan's Moving recommended that there be at least four dedicated officers to work with the Commission and the Public Staff to ensure compliance of all operations within North Carolina concerning the movement of household goods.

Movin' On Movers stated that the enforcement of the existing Commission's requirements has always been a problem. Movin' On Movers asserted that a necessary improvement in the enforcement process is the timelier submittal of information to the State Highway Patrol.

The NCMA stated, "Enforcement has always and will continue to be necessary. An illegal operator puts the public at risk. There is no one in a consumer's life that will make them as vulnerable as a mover. They are trusting a complete stranger to drive off with everything they own. The public deserves to have movers that have the proper equipment, insurance to ensure that they have a successful move, and are financially solvent."

The NCMA discussed Craigslist, the classified advertising website. The NCMA expressed concern that it is frequently used by illegal movers to advertise their services. The NCMA recommended that the Commission arrange to have Craigslist put a link on its website that would direct users to the Commission's aforementioned one-stop HHG mover webpage. The NCMA asserted that this would help educate both consumers and illegal movers of the Commission's requirements. The NCMA opined that many consumers and illegal movers are not aware of the Commission's requirements. The NCMA maintained that several states, including California, Illinois, and Washington have already arranged with Craigslist to put links on its website, and several other states are actively pursuing this.

The NCMA stated that the problem of illegal movers exists everywhere. The NCMA reasoned that the Commission would benefit from knowing what other states are doing about the problem, and accordingly offered the following comments:

> The Illinois Commission sends a letter to an illegal operator when it is informed of one. This letter requires a response within 10 days, with a warning if they do not respond, a citation in the amount of $750 will be issued. Once this citation has been issued, an officer goes out to do an investigation of [the company's] paperwork. This often results in additional penalties. This has been a very good deterrent.
>
> The Oregon Department of Transportation, along with the Oregon State Police and the Lane County Sheriff's Department has recently conducted a sting operation. They pre-identified firms they knew were operating without proper authority and made appointments. Seven companies showed up at the house. 18 truck safety violations were issued, 1 vehicle [was] placed out of service for safety violations. All were issued citations for not having an ODOT permit. One citation for driving while suspended; two citations for driving uninsured and two vehicles were impounded. Two individuals were also arrested on outstanding warrants – one as a fugitive from justice on a child fondling charge and the other on a parole violation. ODOT highly publicized this sting operation and in their press release educated consumers on why to choose a licensed and insured movers. Sting operations get the word out to both the illegal operators and the public.
>
> Washington State's regulatory agency has gotten the Craig's List link and publicized the reason why they did this. They are also proposing legislation that would allow them to actively pursue any illegal operator who simply holds themselves out as a mover as being a violation, without having proof of a move

taking place. This [is] being done because consumers are afraid to come forward, fearing retaliation from an illegal operator.

New Jersey fines illegal operators after receiving a complaint against one. They also make them sign a Consent Order, stating that they will cease illegal activity and send them an application to apply for a mover's license. The fines have ranged from $500 to $2500, with provisions for up to $10,000 for repeat offenders.

New York is regulated by the Department of Transportation, which is broken up into 11 regions. Within each region, there are dedicated investigators for household goods compliance. All new household goods carriers are placed under probationary status for one year. This allows the state to rescind their authority if they see a pattern of issues and complaints' violations. They are also required to attend a class on NY household goods and compliance, before they receive their authority. NYDOT also has regulation on how a mover can advertise. This was done because NYDOT realized that they cannot place restrictions on the Yellow Pages and other similar companies. Movers have to have their physical address and their certificate number in their advertising. They cannot say things like "Fully Insured" or "Cheapest Mover." If they make these statements, they have to furnish proof to the DOT that the statements are true. They will ask the mover to remove any questionable phrase from their advertisements. Illegal operator's ads are easily identified because they are not following the laws. Fines are levied.

The NCMA stated that it would be good if the Commission had a standard method, such as for example, a dedicated email address, for reporting illegal movers. The NCMA pointed out that its member companies are very good at identifying illegal movers. The NCMA contended that the Public Staff's plan to have an employee dedicated to the handling of illegal movers is a step in the right direction, and said too that a similar employee on the Commission Staff would be good. The NCMA commented that in regard to the State Highway Patrol, it would be helpful to have a single contact person for each of the eight troops in the state. The NCMA recommended that there be more meetings about illegal movers involving the NCMA, the Commission, the Public Staff, and the State Highway Patrol. The NCMA closed by saying, "The goal of the NCMA is not to keep illegal operators from becoming movers or any restraint of trade with them. Our goal is for illegal operators to be legal and operate under the Commission's rules. We feel that the public needs to know that a company in a legitimate industry is operating legitimately. We are willing to assist the Commission in identifying illegal operators; however, it is the Commission's responsibility to enforce their rules and regulations."

The **Public Staff** explained that the identification and investigation of illegal movers is currently conducted by the Public Staff. Illegal movers are discovered in the yellow pages of published telephone directories and are brought to the Public Staff's attention by consumers and certificated movers. In addition, investigating one illegal mover often results in the discovery of other illegal movers. The Public Staff noted that thus far their work has resulted in the identification of approximately 300 companies that are operating in violation of the Commission's requirements. The Public Staff explained further that upon discovery of an illegal

mover, they first attempt to educate the mover about the Commission's requirements. If the mover does not file an application or cease its operations, the Public Staff refers the mover to the Commission Staff for referral to the State Highway Patrol. The State Highway Patrol's findings are reported to the Commission Staff within 30 days, and the subsequent action taken is determined by what is written in the State Highway Patrol's report. The Public Staff contended that the Commission has authority under G.S. 62-310(a) to fine an illegal mover pursuant to a show cause proceeding. The Public Staff also contended that the Commission has authority under G.S. 62-278 to order the revocation of license plates issued to an illegal mover. The Public Staff opined that a two-pronged effort (from both the State Highway Patrol and the Commission) to pursue illegal movers could result in increased compliance with the Commission's requirements.

The Public Staff commented that Commission Rule R2-26(a) requires that the mover's name, home address, and certificate number appear on both sides of its vehicles in letters and numbers not less than three (3) inches high. The Public Staff stated that State Highway Patrol troopers have suggested that certificated movers also put the certificate number on the rear of the vehicle when possible. Troopers stated that immediately visible identification would help them determine whether the vehicle is operated by a certificated mover. The Public Staff stated that they and the NCMA have recommended that movers add their information to the rear of their vehicles. The Public Staff suggested that the Commission consider modifying Rule R2-26(a) to include this requirement.

The Public Staff also believes that a more informed public could reduce the use of limited resources to pursue illegal movers. The Public Staff accordingly recommended a public awareness program. The Public Staff stated that it is prepared to work with the Commission Staff to develop and implement a public awareness program.

Todd's Easy Moves stated that the State Highway Patrol should be allowed to do their job without their hands tied behind their backs with red tape. Also, somehow make it so that illegal movers cannot advertise in the yellow pages of published telephone directories.

Issue Concerning Portable On Demand Storage (PODS)-Like Operations - In addition to its aforementioned comments on the three issues on which the Commission requested comments, **Dunnagan's Moving** also provided the following comments concerning PODS-like operations:

> In closing, I would like to add [that] the Commission should also make competition more fair and equal. The Commission has ruled that PODs like operations do not have to be certified to move household goods within North Carolina. It is my understanding the reasoning of the Commission is to promote competition in the movement of household goods. PODs and like operations compete daily with certified and illegal household goods. Certified movers must apply charges (for the same service) for moving household goods from MRT-1, PODs and like operations are not required to follow MRT-1. I ask you, the Commission, is this fair and level competition? This affects all certified movers concerning hourly, weighted moves as well as storage-in-transit moves. Certified movers have the burden to pay regulatory fees to the state and maintain insurance

at all times whereas the PODs and like operations have no such requirements. To me this is unfair regulation of a competitive market.

DISCUSSION AND CONCLUSIONS

With respect to Issue No. 1, Dunnagan's Moving commented that the Commission is too lenient in its review of applications in regard to both the applicants' financial information and industry experience. Dunnagan's Moving opined that the way the Commission reviews applications contributes to what it believes is a high failure rate of new moving companies. Similarly, the NCMA also complained that the Commission is too lenient in its review of applicants' financial information, and that this contributes to a high failure rate of new moving companies. The NCMA suggested that the Commission require an applicant to submit, along with their application, their financial information by means of a balance sheet prepared by a CPA. The NCMA remarked that the problem with certificated moving companies going out of business is that consumer damage complaints may not be able to be resolved after the mover they contracted with is no longer in business.

Based upon the Commission's review and recollection of consumer complaints which have come to its attention in the past, and despite the fact that the Public Staff receives a number of consumer complaints for damage allegedly caused by moving companies, the Commission is not aware of any consumer complaints against certificated moving companies that were no longer in business at the time a complaint was made against them. At this juncture, the Commission does not believe that there is a need to modify the current application requirements for an applicant to apply for a certificate of exemption. Therefore, the Commission finds and concludes that it should maintain its current application requirements and procedures under which applicants may seek and obtain a certificate of exemption to transport HHG.

Further, with respect to Issue No. 1, Todd's Easy Moves recommended that the Commission should require moving companies to do criminal background checks on their employees.

In this regard, the Commission points out that the August 29, 2008 Order Amending Rule R2-8.1, at Page 28, provides as follows:

> The Commission recognizes that applicants and operators may hire employees possessing criminal backgrounds. This is not necessarily a bad thing. Instead, it is a management decision that the Commission believes to lie within the purview of the operator of the business rather than a matter the Commission should necessarily become involved in addressing. There are obvious practical limitations to the Commission's ability to obtain and review such information concerning every employee of an applicant or operator. More importantly, imposing such a requirement would run the risk of having the Commission become too involved in the management of the businesses providing intrastate HHG moving services in the state. That said, the management and operation of these business, as they affect the public interest, are legitimate interests of the Commission, and should the hiring decisions of a certificate holder and the

actions of its employees negatively impact the public interest, the Commission retains the authority to investigate and respond to such circumstances.

The Commission does not find that Todd's Easy Moves has offered any underlying rationale for implementing a requirement that would force certificated HHG moving companies to do criminal background checks on their employees. Based upon the foregoing, the Commission finds and concludes that it should maintain its current requirement that only the applicant or all of its partners/principals submit to the Commission certified criminal history record checks.

Additionally, with respect to Issue No. 1, the NCMA suggested that the Commission develop, as the California Public Utilities Commission has done, a one-stop webpage on its website from which potential movers could easily learn everything they need to know about the HHG moving industry in North Carolina and the Commission's requirements. The NCMA recommended that such a webpage should have several links to other webpages that explain different aspects of the HHG moving industry. Related to this, the Public Staff suggested that a FAQ document be developed and posted on the Commission's website.

The Commission agrees that a one-stop webpage and a FAQ section are good ideas. The Commission website currently has a Transportation Industry webpage with several links to other pages that explain different aspects of the moving industry. However, the Commission believes that the Transportation Industry webpage could be enhanced by the addition of items such as FAQ, insurance requirements, contact information, and additional links to HHG moving industry information. Accordingly, the Commission is inclined to make such enhancements to its Transportation Industry webpage and directs the Commission Staff to consult with the Public Staff and the NCMA to develop and present proposed recommendations for changes to the Commission for consideration. The proposed recommendations should include specific content and suggestions to enhance clarity, usefulness, and user friendliness of the Commission's Transportation Industry webpage.

Regarding Issue No. 2, Dunnagan's Moving recommended that a new mover should be audited within 90 days of being granted authority; that a new mover should be audited, after the initial 90-day period, if there is a complaint against the mover; and that the State Highway Patrol should pay a visit to the location of a new operation for a compliance check and issue a citation if the operation is in violation. Movin' On Movers suggested that newly-certificated movers should be audited at their place of business within six months of becoming certified to ensure compliance with the Commission's requirements.

The Commission understands that the current practice of the Public Staff is to audit new movers within three to six months of their having received a certificate of exemption from the Commission and to audit more established movers when they are having significant difficulties. The Public Staff conducts non-on-site audits that consist of a review of specifically requested information submitted by the movers. The Commission is of the opinion that the Public Staff's current audit regimen is sufficient and that it serves its intended purpose of ensuring that moving companies operate within the guidelines of the Maximum Rate Tariff (MRT). The Commission finds and concludes that it should not require the Public Staff to conduct on-site audits of

newly-certificated movers within six months of their becoming certified, as suggested by Movin' On Movers. Further, as to the suggestion by Dunnagan's Moving that the Commission should suggest that the State Highway Patrol routinely investigate newly-certificated movers, the Commission declines from making such a suggestion.

Further, with respect to Issue No. 2, Movin' On Movers recommended that an improvement would be to require applicants to attend an MRT training seminar prior to, rather that subsequent to, being certified. Todd's Easy Moves suggested that more mandatory training classes would help ensure that certificated movers remain in compliance with the Commission's requirements. The Public Staff suggested that the Commission require movers that were issued certificates of exemption prior to January 2006 to attend an MRT training seminar if they have not already done so.

At this time, the Commission believes that its current practice requiring a newly-certificated carrier to attend an MRT training seminar within the first three months after the issuance of the order granting its certificate of exemption is reasonable. The Commission began this requirement in January 2006. MRT training seminars are usually held once a month, except for July, which is the peak month for moves, and the seminars are free and open to any carriers who want to come, if room permits. The Commission agrees with the Public Staff's suggestion that movers that were issued certificates of exemption prior to January 2006 should be required to attend an MRT training seminar if they have not already done so. Consequently, the Commission finds and concludes that it is appropriate to require all HHG movers who were certified prior to January 2006 to attend an MRT training seminar within the next six months, unless they have already done so. The Commission finds and concludes that it will request that the Public Staff prepare and provide a complete listing to the Commission of all the carriers that should be notified of this requirement.

Additionally, with respect to Issue No. 2, the Public Staff suggested that the Commission Staff review the insurance documents submitted by movers with their annual reports to ensure that all their required types of insurance (vehicle, cargo, and general liability) are in the required amounts and provided by insurance companies who are authorized to provide insurance in North Carolina.

The Commission agrees with this suggestion and the Commission Staff will review all certificates of insurance for general liability, cargo liability, and vehicle liability coverage submitted by movers with their annual reports to ensure that certificated HHG carriers are in compliance with the Commission's insurance requirements. In addition, the Commission Staff will continue with its ongoing weekly monitoring of the North Carolina Division of Motor Vehicle's database to discover any cancellations or pending cancellations of certificated movers' insurance.

Regarding Issue Nos. 2 and 3, comments were raised about how to enforce the Commission's requirements and how to investigate and prosecute individuals or businesses that operate in violation of the Commission's statutes and rules. Several of the comments about illegal movers, particularly those of City T&S and All American, suggests that the Commission

needs to establish a clear and well-defined operating procedure for the thorough handling of illegal movers.

The Commission does not entirely agree with many of the comments regarding enforcement. However, because it may be helpful to interested parties, the Commission's enforcement procedure is generally described below.

Complaints regarding illegal operators are initially reported and/or referred to the Public Staff. Complaints may be referred by movers, the State Highway Patrol, the Commission, or members of the general public. Upon receipt of any such complaint, the Public Staff, pursuant to N.C.G.S. 62-15(d)(7), will investigate the matter in a manner it determines appropriate and seek to resolve any issue of legal noncompliance. If the Public Staff is unable to resolve the matter such that it is able to determine either that the operator is operating in accordance with the law and the Commission's Rules and/or has ceased to operate illegally, the Public Staff may assist the complaining party having an interest in the subject of the matter to bring a complaint in the complaining party's name pursuant to N.C.G.S 62-73 (if the complaining party wishes to bring a formal Complaint), or may, in the Public Staff's discretion, petition the Commission to initiate proceedings to review the matter pursuant to N.C.G.S. 62-15(d)(4). After a formal Complaint is filed with the Commission or the Public Staff has petitioned to initiate proceedings, the matter will be assigned a docket number by the Clerk and the docket will be handled either as provided in Commission Rule R1-9 or as a Show Cause proceeding if so ordered by the Commission. If no final disposition of the matter is made prior to the cause coming on for a hearing, the Commission will ultimately enter an order supported by competent material and substantial evidence upon consideration of the whole record. If the Commission determines that the defendant in a Complaint proceeding or a respondent in a Show Cause proceeding is in violation of applicable law and/or the Rules of the Commission, the Commission may take such actions against the defendant or respondent as permitted by law, including but not limited to the issuance of injunctions, the revocation or withholding of certification, the imposition of penalties and fines, and the revocation of license plates.

The Commission finds and concludes that the above-described procedure is sufficient for the enforcement of current law and the Commission's rules relating to carriers of household goods.

Next, with respect to Issue No. 3, the NCMA discussed having Craigslist, the classified advertising website, to put a link on its website that would direct users to the Commission's one-stop, HHG movers' webpage. The NCMA asserted that many consumers and illegal movers are not aware of the Commission's requirements and that a link on the Craigslist site would help educate uninformed illegal movers and consumers. The NCMA reported that several states, including California, Illinois, and Washington, have already arranged to have Craigslist include links to their respective state webpages, and that several other states are actively pursuing this arrangement.

The Commission finds and concludes that having a link to its Transportation webpage should be further examined and directs the Commission Staff to investigate the possibility of having Craigslist add such a link to its site, Craigslist's requirements and terms for same, and

potential issues that should be considered prior to entering into an agreement with Craigslist regarding such a link.

Further, with respect to Issue No. 3, the Public Staff suggested that the Commission amend Rule R2-26(a) to include the requirement that movers put their certificate number on the rear of their vehicles so that the State Highway Patrol can more easily identify the vehicles of uncertificated moving companies. The Public Staff observed that the State Highway Patrol troopers had suggested that certificated movers should also place the certificate number on the rear of the vehicle as it would help to have such immediately visible identification to determine whether the vehicle is being operated by a certificated mover. The Public Staff stated that the NCMA has also recommended that movers add their information to the rear of their vehicles.

Currently, pursuant to Rule R2-26(a), the following is required:

> No carrier shall operate any motor vehicle upon the highways in the transportation of household goods or passengers for compensation unless the name, or trade name, home address and the North Carolina number assigned to such carrier, as provided in Rule R2-25 appear on both sides of such vehicle in letters and figures not less than three (3) inches high.

The Commission agrees with this recommendation and finds and concludes that it will initiate a docket to amend Rule R2-26(a) to include the underlined text as follows:

> No carrier shall operate any motor vehicle upon the highways in the transportation of household goods or passengers for compensation unless the name, or trade name, home address and the North Carolina number assigned to such carrier, as provided in Rule R2-25 appear on both sides of such vehicle in letters and figures not less than three (3) inches high. <u>The North Carolina number assigned to such carrier shall also be placed on the rear, right lower quadrant, of such vehicle in letters and figures not less than three (3) inches high.</u>

Lastly, with respect to Issue No. 3, the Public Staff suggested that a more informed public could help reduce the use of limited resources to pursue illegal movers. The Public Staff recommended a public awareness program and offered to work with the Commission Staff to develop and implement such a program.

The Commission agrees that a public awareness program could be helpful and might reduce the use of limited resources to pursue illegal movers. The Commission directs the Commission Staff to develop a public awareness program in consultation with the Public Staff and the NCMA and to present the proposed program to the Commission for its approval.

Finally, regarding the PODS-like operations issue raised by Dunnagan's Moving, the Commission has previously reconsidered the issue of whether PODS-like operations should be treated as HHG transportation subject to Commission regulation, at the request for reconsideration filed by Dunnagan's Moving on October 26, 2004, in Docket No. T-100, Sub 61. In said docket, on March 23, 2005, the Commission issued its Order Ruling On Request For

Reconsideration, and therein, the Commission ordered, "That the Commission Staff's opinion letter issued in August 2003 be, and the same is hereby, affirmed, and that the type service provided by PODS, i.e., rental and transporting of portable storage containers, does not constitute household goods transportation subject to regulation by the Commission." PODS-like operations are of interest to the Commission, and if a PODS-like operation provides any regulated services such as loading/packing and/or unloading/unpacking of a portable storage container for a customer, or is in control of a third party providing this service, such PODS-like operation will be required to obtain a certificate of exemption from the Commission. The Commission finds and concludes that the matter raised by Dunnagan's Moving regarding PODS-like operations is beyond the scope of this proceeding.

IT IS, THEREFORE, ORDERED as follows:

1. That the Commission Staff, in consultation with the Public Staff and the North Carolina Movers Association, shall develop a proposal, for review and approval by the Commission, to enhance the clarity, usefulness, and user friendliness of the Commission's Transportation Industry webpage.

2. That all HHG movers issued certificates of exemption by the Commission prior to January 2006 will attend an MRT training seminar, if they have not already done so, within six months of the date of this Order. The Commission Staff will request from the Public Staff a complete listing of all the HHG movers that need to be notified of this requirement.

3. That the Commission Staff shall review all certificates of insurance, which certificated movers submit each year with their annual reports, to ensure that movers are in compliance with the Commission's insurance requirements. Certificated movers shall submit copies of certificates of insurance included in their annual reports to the Commission Staff at the time they file their annual reports. The Commission Staff will continue with its weekly monitoring of the North Carolina Division of Motor Vehicle's database to discover any cancellations or pending cancellations of movers' insurance.

4. That complaints regarding suspected illegal movers shall be handled according to the procedure set forth hereinabove in the Discussion and Conclusions section of this Order.

5. That the Commission Staff shall further examine having a link placed on the Craigslist website that would direct Craigslist users to the Commission's Transportation Industry webpage.

6. That the Commission will initiate a docket to amend Rule R2-26(a) to include the underlined text as follows:

> No carrier shall operate any motor vehicle upon the highways in the transportation of household goods or passengers for compensation unless the name, or trade name, home address and the North Carolina number assigned to such carrier, as provided in Rule R2-25 appear on both sides of such vehicle in letters and figures not less than three (3) inches high. The North Carolina number

assigned to such carrier shall also be placed on the rear, right lower quadrant, of such vehicle in letters and figures not less than three (3) inches high.

7. That the Commission Staff will consult with the Public Staff and the North Carolina Movers Association to develop a proposal, for review and approval by the Commission, for a HHG mover public awareness program.

8. That the matter of PODS-like operations is beyond the scope of this proceeding.

ISSUED BY ORDER OF THE COMMISSION.
This the 30th day of October, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

br103009.01

DOCKET NO. E-2, SUB 931

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Application by Carolina Power & Light	)	ORDER APPROVING AGREEMENT
Company, d/b/a Progress Energy Carolinas,	)	AND STIPULATION OF PARTIAL
Inc., for Approval of Demand Side Management	)	SETTLEMENT, SUBJECT TO CERTAIN
and Energy Efficiency Cost Recovery Rider	)	COMMISSION-REQUIRED
Pursuant to G.S. 62-133.9 and Commission	)	MODIFICATIONS
Rule R8-69	)	

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on September 17, 2008, and January 7 and 8, 2009

BEFORE: Chairman Edward S. Finley, Jr., Presiding; Commissioner Robert V. Owens, Jr.; Commissioner Lorinzo L. Joyner; and Commissioner William T. Culpepper, III

APPEARANCES:

For Progress Energy Carolinas, Inc.:

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For the Using and Consuming Public:

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For the Carolina Industrial Group for Fair Utility Rates II:

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For the North Carolina Sustainable Energy Association:

Kurt Olson, 417 S. Boylan Street, Raleigh, North Carolina 27617

BY THE COMMISSION: G.S. 62-133.9(d) authorizes the Commission to approve an annual rider to the rates of electric utilities to recover all reasonable and prudent costs incurred for the adoption and implementation of new demand-side management and energy efficiency (DSM/EE) programs. In accordance with Commission Rule R8-69(b), such rider consists of the utility's reasonable and appropriate estimate of expenses expected to be incurred during the rate period and an experience modification factor (EMF) rider to collect the difference between the utility's actual reasonable and prudent costs incurred during the test period and actual revenues realized during the test period under the DSM/EE rider then in effect. The Commission is also authorized to award incentives to electric utilities for adopting and implementing new DSM/EE programs, including appropriate rewards based on the sharing of savings achieved by the programs. Further, Commission Rule R8-69(b) provides that the Commission will each year conduct a proceeding for each electric utility to establish an annual DSM/EE rider to recover DSM/EE related costs.

Pursuant to G.S. 62-133.9 and Commission Rule R8-69, on June 6, 2008, Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (PEC or Company), filed an application and the associated testimony of Robert P. Evans for the approval of Rider BA-1 to recover reasonable and prudent forecasted DSM/EE costs, and incentives in the form of Net Lost Revenues and a sharing of savings. PEC also sought approval for an EMF rider and, pursuant to Commission Rule R8-69(b)(2), PEC also requested recovery, through the EMF rider, of its costs, including Net Lost Revenues and Program Performance Incentives (PPI), incurred up to 30 days prior to the hearing in this proceeding. On June 9, 2008, PEC filed a corrected version of the work papers attached to its June 6, 2008 filing.

On June 12, 2008, pursuant to G.S. 62-134, the Commission issued an Order suspending proposed Rider BA-1 pending further investigation, review, and decision. On June 18, 2008, the Commission issued an Order Scheduling Hearing, Establishing Discovery Guidelines, and Requiring Public Notice.

On June 23, 2008, the Attorney General filed a notice of intervention, which is recognized pursuant to G.S. 62-20. The intervention of the Public Staff is recognized pursuant to G.S. 62-15(d) and Commission Rule R1-19(e). Other petitions to intervene were subsequently filed and allowed as follows: by the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II) on June 24, 2008 (allowed July 1, 2008); by Carolina Utility Customers Association, Inc. (CUCA) on July 3, 2008 (allowed July 8, 2008); by the North Carolina Sustainable Energy Association (NCSEA) on July 23, 2008 (allowed July 31, 2008); by Wal-Mart Stores East, LP and Sam's East, Inc. (Wal-Mart), on August 6, 2008 (allowed August 13, 2008); and jointly by the Environmental Defense Fund (EDF), the Natural Resources Defense Council (NRDC), the Southern Alliance for Clean Energy (SACE), and the Southern Environmental Law Center (SELC) on August 12, 2008 (allowed August 14, 2008) hereinafter collectively referred to as "the Environmental Intervenors."

On June 25, 2008, the Public Staff filed a motion to disapprove PEC's proposed Rider BA-1, and on July 9, 2008, PEC filed comments in response to the issues raised in the Public Staff's filing.

On July 10, 2008, the Public Staff filed a motion to allow email service of discovery, which was allowed by Order issued July 15, 2008.

On July 18, 2008, the Commission issued an Order consolidating this docket with Docket No. E-2, Sub 926 (Distribution System Demand Response (DSDR) program) for hearing only, since PEC in this docket is seeking recovery of the DSDR program implementation costs through the proposed rider. Said Order also established dates for filing testimony and required compliance with certain discovery guidelines.

On August 6, 2008, Holly Rachel Smith, attorney for Wal-Mart, filed a motion for *pro hac vice* admission which was allowed by Order issued on August 13, 2008.

On August 12, 2008, Sarah C. Rispin, attorney for the Environmental Intervenors filed a motion for *pro hac vice* admission which was allowed by Order issued August 14, 2008.

On August 15, 2008, the Environmental Intervenors served their first data request on PEC.

On August 20, 2008, PEC filed the supplemental direct testimony of Robert P. Evans. On August 27, 2008, the Public Staff filed a motion to extend the due dates for testimony and to reschedule the evidentiary hearing from September 17, 2008, to a date more suitable for all the parties. On August 28, 2008, the Commission issued an Order on Motion to Reschedule Hearing requiring that the parties confer and that the Public Staff file with the Commission an agreed-upon date for the rescheduled hearing or a report on such discussions. On September 4, 2008,

the Public Staff filed its report on rescheduling the hearing; and on September 8, 2008, the Public Staff filed a letter regarding the parties' availability for hearing. Also on September 8, 2008, a notice of substitution for local counsel for Wal-Mart was filed. By Order issued September 12, 2008, the Commission rescheduled the evidentiary hearing for December 17, 2008, and established new filing dates for testimony.

On September 11, 2008, PEC filed in this present proceeding, as required by Decretal Paragraph No. 1 of the Commission's Order issued on August 25, 2008, in Docket No. E-2, Sub 924, the amount of incremental administrative costs, general costs, and other costs deferred as of September 1, 2008, as well as the portions of such amounts which PEC is seeking to recover in its currently proposed DSM/EE cost recovery rider.

On September 16 and 29, 2008, PEC filed its newspaper affidavits of publication for the public notice required by the Commission.

On September 17, 2008, a hearing was held for the purpose of taking testimony from interested members of the public. No public witnesses appeared.

On October 15, 2008, in Docket Nos. E-2, Sub 926 (the DSDR program), Sub 929 (recovery of fuel and fuel-related costs), Sub 930 (recovery of Renewable Energy and Energy Efficiency Portfolio costs), and Sub 931, PEC requested that the Commission allow Rider BA-1 to become effective on December 1, 2008. PEC made the request in order to allow all rate adjustments to occur on the same date, subject to modification and possible refund, based on the Commission's decisions with respect to issues presented at the December 17, 2008 hearing. On that same date, PEC filed its notice to customer of change in rates.

On October 17, 2008, North Carolina Waste Awareness and Reduction Network (NC WARN) filed a petition to intervene. On October 20, 2008, PEC filed a motion in opposition to NC WARN's petition. On October 22, 2008, NC WARN filed its response to PEC's motion in opposition. On October 24, 2008, the Commission allowed NC WARN's intervention in the proceeding.

On October 22, 2008, the Commission issued an Order Allowing Comments in response to PEC's October 15, 2008 filing regarding PEC's proposed implementation of Rider BA-1.

On October 31, 2008, the Public Staff filed comments that supported PEC putting Rider BA-1 into effect as of December 1, 2008, subject to adjustment and refund with interest at the time that the Commission specifies in its order following the December 17, 2008 hearing. On November 14, 2008, the Commission allowed Rider BA-1 to become effective December 1, 2008, subject to refund with interest, and required PEC and the Public Staff to draft a proposed Notice of Change in Rates to be sent to PEC's customers. On November 14, 2008, PEC filed the revised supplemental testimony and exhibits of Robert P. Evans. On November 18, 2008, PEC and the Public Staff submitted their proposed notice to customers, which the Commission approved by Order issued on November 20, 2008. PEC subsequently mailed such notice to all customers as a bill insert. On November 24, 2008, PEC filed its rate schedules, riders, and other revised tariffs.

On November 20, 2008, the Environmental Intervenors filed a motion for extension of time to file expert testimony and requested to reopen discovery. On November 26, 2008, the Public Staff filed a response supporting such extension of time. Also on November 26, 2008, the Commission issued an Order Granting Extension of Time.

On December 1, 2008, NCSEA filed the direct testimony of Rosalie R. Day.

On December 4, 2008, the Environmental Intervenors filed a motion to reschedule the hearing from December 17, 2008, to a date in early January 2009. On December 5, 2008, the Public Staff filed a letter supporting that motion and proposing other adjustments to the procedural schedule. On December 8, 2008, the Commission rescheduled the hearing for January 7, 2009, and extended the dates for the filing of testimony, exhibits, and settlement agreements. On December 9, 2009, the Commission issued an Order Setting Time for Hearing which established that the hearing would begin at 9:00 a.m. on January 7, 2009.

On December 9, 2008, the Public Staff filed the direct testimony of Michael C. Maness. Also on December 9, 2008, PEC, the Public Staff, and Wal-Mart submitted an Agreement and Stipulation of Partial Settlement (Stipulation) of certain issues in the consolidated dockets. On December 12, 2008, PEC filed additional supplemental testimony and exhibits of Robert P. Evans to provide the Commission with information in support of the Stipulation. On December 23, 2008, the Public Staff filed the supplemental testimony of Michael C. Maness in response to PEC witness Evans's testimony; and NCSEA filed the additional testimony of Rosalie R. Day in response to the Stipulation.

Also on December 23, 2008, the Environmental Intervenors jointly filed the testimony of J. Richard Hornby, Brian M. Henderson, and Nathanael Greene. On December 29, 2008, PEC filed a motion to strike portions of the prefiled testimony of witnesses Henderson and Greene; on January 5, 2009, Environmental Intervenors responded in opposition to the motion; and on January 6, 2009, PEC replied. On January 6, 2009, the Commission granted PEC's motion to strike with respect to witness Greene's testimony but denied it with respect to witness Henderson's testimony.

On January 5, 2009, PEC filed the revised testimony of Robert P. Evans in support of the Stipulation and the rebuttal testimony of Laura A. Bateman. On January 6, 2009, PEC filed the rebuttal testimony of B. Mitchell Williams.

The case came on for hearing as scheduled on January 7, 2009. The prefiled and supplemental testimony of PEC witness Robert P. Evans was received into evidence, and witness Evans presented direct testimony on behalf of the Company. The prefiled and supplemental testimony of Rosalie R. Day was received into evidence, and witness Day presented direct testimony on behalf of NCSEA. The prefiled testimonies of Nathanael Greene (the nonstricken portions only), Brian M. Henderson, and J. Richard Hornby were received into evidence, and these witnesses presented direct testimony on behalf of the Environmental Intervenors. The prefiled and supplemental testimony of Michael C. Maness was received into evidence, and witness Maness presented direct testimony on behalf of the Public Staff. The rebuttal testimony of Laura Bateman and B. Mitchell Williams was received into evidence, and

the witnesses presented testimony on behalf of PEC. The Commission also admitted into evidence the exhibits of these witnesses. No other party presented witnesses, but one public witness appeared at the beginning of the hearing: Marvin Woll.

On January 30, 2009, the Public Staff filed the Public Staff's Maness Late-Filed Exhibit Nos. 1 and 2.

The Commission initially scheduled proposed orders to be filed on February 20, 2009. On January 30, 2009, the Commission issued a Post-Hearing Order requiring PEC to file certain additional information, requesting the Stipulating Parties to address an additional issue in their briefs and rescheduling the date for the filing of proposed orders to February 27, 2009. On February 3, 10, and 13, 2009, PEC filed the information required by the Commission's January 30, 2009 Order.

On February 5, 2009, PEC filed its confidential customer survey results as requested by Chairman Finley during the evidentiary hearing. On February 18, 2009, PEC filed supplemental information on administrative and general (A&G) costs.

On February 20, 2009, CIGFUR II filed its Post-Hearing Brief.

On February 24, 2009, the Environmental Intervenors filed a motion requesting the Commission to extend the time for the parties to file proposed orders and briefs until March 13, 2009. On February 25, 2009, PEC filed its opposition to such motion. The Commission, by Order dated February 26, 2009, allowed an extension of time for all parties to file briefs or proposed orders until March 6, 2009.

On March 2, 2009, Christopher Simmler filed additional comments regarding PEC's Petition for Approval of the DSDR program as a DSM program in Docket Nos. E-2, Sub 926 and Sub 931. On March 10, 2009, PEC filed a motion to strike Mr. Simmler's additional comments.

On March 3, 2009, the Commission issued a second Post-Hearing Order requiring PEC to file certain additional information and revising the date for the filing of proposed orders to March 20, 2009. On March 11, 2009, PEC filed the additional information required by the Commission's March 3, 2009 Order.

On March 5, 2009, the Environmental Intervenors filed Hornby Late-Filed Exhibit No. 1. On March 6, 2009, PEC filed its motion to strike Hornby Late-Filed Exhibit No. 1. On March 16, 2009, the Environmental Intervenors filed a response to PEC's motion to strike. By this Order, the Commission finds good cause to deny PEC's motion to strike Hornby Late-Filed Exhibit No. 1. That exhibit is hereby made a part of the evidentiary record in this case.

On March 16, 2009, Wal-Mart filed a letter of clarification for the record.

The parties filed briefs and proposed orders by March 20, 2009, as allowed by the Commission, with NC WARN filing its Brief on March 23, 2009.

On April 29, 2009, the Commission issued an Order Ruling on Motion to Strike Comments of Christopher Simmler.

Based upon PEC's application, the testimony and exhibits received into evidence at the hearing, and the record as a whole, the Commission now makes the following

FINDINGS OF FACT

1. PEC is a duly organized corporation existing under the laws of the State of North Carolina and is engaged in the business of developing, generating, transmitting, distributing, and selling electric power to the public in North and South Carolina, and is subject to the jurisdiction of the North Carolina Utilities Commission as a public utility. PEC is lawfully before this Commission based upon its application filed pursuant to G.S. 62-133.9 and Commission Rule R8-69.

2. The test period for the purposes of this proceeding is August 21, 2007 through March 31, 2008.

3. Pursuant to Commission Rule R8-69(b)(2), PEC is entitled to recover through its EMF rider its costs incurred up to 30 days prior to the hearing. In this proceeding, such period is referred to as the prospective period, which is April 1, 2008 through July 31, 2008.

4. The rate period for the purposes of this proceeding is the 12-month period December 1, 2008 through November 30, 2009. The rate period is the period during which the DSM/EE rider established in this proceeding will be in effect.

5. Pursuant to the Commission's November 14, 2008 Order allowing PEC's Rider BA-1 to be implemented, PEC is currently collecting the following DSM/EE rider charges, including EMF charges, subject to refund with interest, pending the Commission's decision:

Customer Class	Rider in effect as of 12/1/2008, subject to refund (includes gross receipts tax and regulatory fee)
Residential	$0.00074 per kWh
Small General Service	$0.00047 per kWh
Med. General Service	
Large General Service	
Lighting	None

6. The reasonableness and prudence of the costs incurred or projected to be incurred associated with PEC's approved DSM/EE programs and measures, other expenses incremental to PEC's DSM/EE efforts, the justification and amount of any utility incentives to be included in the DSM/EE rider, and the determination of a rider or riders to allow recovery of such costs and, as appropriate, incentives, are the only matters at issue in this Rule R8-69 proceeding. PEC's approved DSM/EE programs for purposes of this proceeding are:

(a) Compact Fluorescent Light (CFL) Pilot Program, approved by the Commission in Docket No. E-2, Sub 908 on September 19, 2007.
(b) Residential Home Advantage Program, approved by the Commission in Docket No. E-2, Sub 928 on October 14, 2008.
(c) Commercial, Industrial, and Government (CIG) New Construction Program, approved by the Commission in Docket No. E-2, Sub 928 on October 14, 2008.
(d) CIG Retrofit Program, approved by the Commission in Docket No. E-2, Sub 928 on October 14, 2008.
(e) DSDR Program, approved by the Commission in Docket No. E-2, Sub 926, on June 15, 2009.
(f) Residential EnergyWise Program, approved by the Commission in Docket No. E-2, Sub 927 on October 14, 2008.

7. It is appropriate for PEC to recover reasonable and prudent costs relative to the DSM and EE programs, listed above, in its DSM/EE rider subject to review and true-up during its next annual rider proceeding. PEC's reasonable and prudent North Carolina retail test period capitalized O&M expenses for its DSM/EE programs are $3,021,909; and subject to review in PEC's next annual DSM/EE rider proceeding, PEC's reasonable and appropriate estimate of North Carolina retail prospective period and rate period DSM/EE capitalized O&M expenses are $1,872,474 and $23,085,991, respectively.

8. The Stipulation and the Cost Recovery and Incentive Mechanism for Demand-Side Management and Energy Efficiency Programs (Mechanism) entered into and agreed to by PEC, the Public Staff, and Wal-Mart were filed with the Commission on December 9, 2008. The Stipulation and the Mechanism are reasonable and appropriate and should be approved subject to certain Commission-required modifications, as discussed elsewhere herein and as reflected in Appendix A (the Commission-approved Mechanism) attached hereto. The incentives proposed by the Stipulating Parties, including both Net Lost Revenues and the PPI, are reasonable and appropriate, except for the Net Lost Revenues and PPI related to PEC's CFL Pilot program.

9. With respect to PEC's CFL Pilot program, it is appropriate for the Company to recover over 10 years, with a carrying charge on the unamortized balance, its reasonable and prudent North Carolina retail test period capitalized O&M costs and, subject to review in PEC's next annual DSM/EE rider proceeding, its reasonable and appropriate estimate of North Carolina retail prospective and rate period capitalized O&M costs as stipulated, but it is not reasonable or appropriate to allow recovery of Net Lost Revenues and a PPI for the CFL Pilot program in the DSM/EE rider. Such Commission-modified cost recovery is fair and reasonable to both PEC and its ratepayers.

10. It is appropriate for PEC to amortize incremental A&G costs supporting its DSM and EE programs over three years, with a carrying charge on the unamortized balance, rather than over 10 years as agreed to in the Stipulation. As a general rule, A&G costs not directly related to an approved DSM or EE program should be deferred and amortized over a period not to exceed three years. It is also appropriate for the Public Staff to monitor and review PEC's subject A&G costs on an ongoing basis, with particular emphasis on the effectiveness of the

Company's general EE education programs, and report its findings to the Commission during PEC's next and future DSM/EE rider proceedings.

11. G.S. 62-133.9(e) provides that the costs of new DSM/EE programs are to be assigned to and recovered from only the class or classes of customers that directly benefit from such programs. Therefore, the costs of an approved DSM/EE program or measure should first be allocated to the North and South Carolina retail jurisdictions and such costs should then be recovered from only the class or classes of retail customers to which the program is targeted. No costs of any approved DSM or EE program should be allocated to the wholesale jurisdiction, as agreed to in the Stipulation at Paragraph No. 4.A.

12. The costs of PEC's DSDR program should be recovered from all retail customers that benefit; that is, all retail customers that receive power via PEC's distribution system, regardless of the "opt out" provision for industrial and large commercial customers contained in G.S. 62-133.9(f). Industrial and large commercial customers that receive power via PEC's distribution system may not opt out of this program or its costs. Consistent with the Stipulation, PEC is authorized to recover all reasonable and prudent costs associated with the DSDR program, including a Net Lost Revenues incentive. The DSDR program will not, however, be eligible for recovery of a PPI, as agreed to in the Stipulation at Paragraph No. 3.B.

13. The allocation methodology, for purposes of allocating DSM/EE costs between PEC's retail jurisdictions, agreed to by the Stipulating Parties in Paragraph Nos. 2.B. and 2.C. of the Stipulation is appropriate.

14. The Stipulation's definition of "large commercial customer" is consistent with Commission Rule R8-69.

15. PEC should include all actual program revenues, including Net Lost Revenues and the PPI incentives, and costs for purposes of calculating and presenting its regulated earnings to the Commission in the Company's quarterly NCUC ES-1 Reports. Such information, including certain supplementary schedules, is necessary to allow the Commission to efficiently and effectively assess the financial implications of the Company's EE and DSM programs, including the reasonableness and efficacy of the Commission-approved Mechanism.

16. PEC shall, in its next annual DSM/EE rider proceeding, develop its DSM/EE rider and DSM/EE EMF rider calculations consistent with the decisions in this Order and the Commission-approved Mechanism attached hereto as Appendix A.

17. Unless requested to do so earlier by PEC, the Public Staff, or another interested party, the Commission will initiate a formal review of the Commission-approved Mechanism not later than June 1, 2012. Such review will specifically address whether the incentives in the Commission-approved Mechanism are resulting in significant DSM and EE; whether the customer rate impacts from the DSM/EE rider are reasonable and appropriate; whether overall portfolio performance targets should be adopted; and any other relevant issues that may arise.

18. It is appropriate for PEC to submit a modified Evans Revised Settlement Exhibit No. 2 and an updated Rider BA-1 to reflect the Commission's findings and conclusions presented in this Order and in the Commission-approved Mechanism attached hereto as Appendix A.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 THROUGH 5

These findings of fact are essentially informational, procedural, and jurisdictional in nature and are uncontroverted. The test period, prospective period, and rate period proposed by PEC and agreed to by the Public Staff and Wal-Mart (hereinafter the Stipulating Parties) are consistent with Commission Rule R8-69.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

The evidence for this finding of fact can be found in the Commission's Orders in Docket Nos. E-2, Subs 908, 926, 927, and 928, wherein the Commission approved the six DSM/EE programs, whose costs and incentives are at issue; as well as in Commission Rules R8-68 and R8-69; witness Henderson's testimony; the Commission's January 6, 2009 Order on Motions to Strike; and the testimony of PEC witnesses Evans and Williams.

PEC witness Evans testified that in this proceeding PEC seeks cost recovery and incentives for six DSM/EE programs pursuant to Commission Rule R8-69 and G.S. 62-133.9. Witness Evans presented exhibits detailing the six programs and their costs, as well as other incremental A&G and O&M expenses that the Company has incurred or expects to incur due to its DSM/EE efforts.

The Environmental Intervenors witness Henderson presented testimony challenging PEC's programs and providing conceptual recommendations regarding how PEC should select and implement programs. Witness Henderson recommended that PEC's DSM/EE programs be realigned to put more focus on energy conservation rather than DSM. He advocated significantly increased funding for long-term EE programs and a "state-of-the-art" portfolio of programs. He also advocated a more open, stakeholder-driven process relative to program decisionmaking. Witness Henderson argued that PEC's programs should be benchmarked against "the best programs offered throughout the nation."

PEC witness Williams testified that the Commission's rules implementing G.S. 62-133.9 have only been in effect since February 2008. Pursuant to these rules, PEC has filed for approval of seven[1] DSM and EE programs. Witness Williams explained that these are not all of the programs PEC intends to offer. Rather, PEC intends to continue to develop additional programs that will be filed for approval and added to PEC's portfolio of programs over the coming months and years. Further, witness Williams testified that it is unreasonable and impractical to expect PEC to develop and offer all of the DSM/EE programs it will ever offer in such a short period of time.

[1] The seventh DSM/EE program filed by PEC was the Residential Home Energy Improvement Program which was approved by the Commission in Docket No. E-2, Sub 936 on April 30, 2009.

The Commission's January 6, 2009 Order on Motions to Strike, noted that "this proceeding is not the appropriate forum within which to consider the merits of previously-approved DSM/EE programs or DSM/EE programs, other than the proposed DSDR program [addressed via a separate Commission Order], that have been filed with the Commission for approval and have yet to be decided." The Commission's Orders in Docket Nos. E-2, Subs 908, 926, 927, and 928 approved the programs whose costs are now at issue, and established that this docket, Docket No. E-2, Sub 931, would focus on cost recovery and incentives, as appropriate, relative to those six programs. Commission Rule R8-69 provides that utilities may file annually to recover the costs and to request incentives relative to their DSM/EE programs. Therefore, the Commission finds and concludes that the reasonableness and prudence of the costs PEC has incurred, or is projected to incur, associated with those programs and measures, its other incremental expenses, its proposed utility incentives, and the allocation of its costs to various customer classes are the only matters at issue in this R8-69 proceeding. The Commission notes that the Stipulation includes commitments from PEC regarding its process for evaluating and selecting DSM/EE measures and programs in the future. That process includes a commitment by PEC to "contact each party to its most recent DSM/EE cost recovery proceeding by March 1 of each year and provide them with a list and description of programs and measures either currently being considered or planned for future consideration, and seek suggestions for additional programs and measures for consideration." The Commission encourages the Environmental Intervenors and other interested parties to provide PEC with robust and thoughtful input on possible future DSM/EE programs and measures worth consideration.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence for this finding of fact can be found in the testimony and exhibits of PEC witnesses Evans and Williams; the testimony of Public Staff witness Maness; and in the Commission's Orders in Docket Nos. E-2, Subs 908, 926, 927, and 928. Witness Evans presented the actual and projected costs of the six DSM and EE programs in his Revised Settlement Exhibit No. 2 filed on January 5, 2009. Witness Evans testified that PEC's North Carolina retail, test period, DSM/EE capitalized costs were $3,021,909. For PEC's prospective period, he stated that PEC's North Carolina retail, DSM/EE capitalized costs were $1,872,474. Further, witness Evans indicated that PEC's rate period, North Carolina retail, DSM/EE projected capitalized costs would be $23,085,991. Witness Evans represented that these costs are consistent with the Stipulation entered into by and among PEC, the Public Staff, and Wal-Mart. Public Staff witness Maness testified that the Public Staff investigated PEC's DSM/EE test period, prospective period, and rate period costs using a team of attorneys, engineers, financial analysts, and accountants who spent months analyzing PEC's initial application and subsequent revisions to such application. The Public Staff also employed the services of an outside consultant, Richard F. Spellman of GDS Associates, Inc., to assist with its investigation. Witness Maness testified that the Public Staff's investigation resulted in the Stipulation and that the Public Staff concluded that PEC's test period, prospective period, and proposed rate period DSM/EE costs are appropriate and reasonable in this proceeding.

The Environmental Intervenors witness Henderson testified that PEC's administrative costs are excessive, and represent 33% of PEC's overall EE program costs. The Environmental Intervenors argued further that "PEC has failed to show that the costs it seeks to recover are

reasonably and prudently incurred, insofar as it has refused to present to this Commission a comprehensive picture of its EE and DSM plans, or even an overall target." They asserted that PEC's programs will achieve "anemic" levels of energy savings and demand reduction and are too focused on demand reduction rather than energy conservation. They argued that, because of these flaws, PEC has not borne its burden of showing that its proposed cost-recovery mechanism is reasonable or prudent. They argued for changes in the incentive structure (discussed elsewhere in this Order) and recommended that the Commission direct PEC to resubmit a proposal within six months with an expanded and complete portfolio of EE programs that will yield greater energy savings.

As noted earlier, the Environmental Intervenors witness Henderson presented testimony challenging PEC's approved DSM/EE programs, recommending that PEC's process of proposing new programs one, two, or three at a time should be replaced with a process whereby PEC submits for Commission approval a complete portfolio of programs in a single comprehensive filing. Witness Henderson recommended that PEC's programs should be more heavily weighted toward EE, and that PEC's programs should be benchmarked against the best programs offered throughout the nation.

In its Post-Hearing Brief, NC WARN argued that PEC's EE programs would produce too little real energy savings and that there was no showing in the record that PEC's programs would meet the goals of Session Law 2007-397[1] (Senate Bill 3) or that the costs associated with the proposed programs are reasonable and prudent.

As mentioned previously, PEC witness Williams argued that the Commission's rules implementing Senate Bill 3 have only been in effect since February 2008. Pursuant to those rules, PEC has filed for approval of seven DSM and EE programs. He explained that these are not the only programs PEC intends to offer. Rather, PEC intends ultimately to offer a comprehensive and diverse portfolio of cost-effective DSM/EE programs. Witness Williams explained that the Commission's rules contemplate filing programs for approval individually. He referred to G.S. 62-133.9(b), which requires utilities to use the least-cost mix of demand reduction and generation measures to meet the electricity needs of their customers, and asserted that both EE and DSM programs will play a role in meeting customer needs. Additionally, witness Williams explained that comparing North Carolina DSM/EE efforts to those of utilities in other states has little value. He observed that many states have much higher electricity prices, and have had them for many years. As a result, it is to be expected that their DSM/EE expenditures and impacts would exceed those of PEC. Further, witness Williams maintained that because their electric rates are higher, many more DSM/EE programs are cost effective in those other states. Witness Williams also noted that the Environmental Intervenors witness Henderson ignored the opt-out provision available to all industrial and large commercial customers in North Carolina. Witness Williams remarked that this provision will limit the potential energy and demand savings likely to be achieved in North Carolina from utility-sponsored programs, compared to those in other states. Witness Williams also testified on rebuttal that all of the programs PEC has filed pass the relevant cost-benefit tests.

[1] Senate Bill 3 was signed into law on August 20, 2007. This comprehensive energy legislation, among other things, provides for the cost recovery of DSM and EE expenditures pursuant to G.S. 62-133.9.

The Commission finds PEC's and the Public Staff's positions to be persuasive and understands that, under the terms of the Stipulation, PEC is committed to annually contact each party to seek suggestions for additional DSM/EE programs. Furthermore, the Commission recognizes PEC's commitment to file additional DSM/EE programs. The issue before the Commission is whether PEC's costs for the six programs that have been approved by the Commission in Docket Nos. E-2, Subs 908, 926, 927, and 928 are reasonable and prudent, as well as its other incremental costs related to its DSM/EE efforts. While witness Henderson raised concerns about PEC's administrative costs, witness Williams reiterated that PEC's programs have passed all of the relevant cost-benefit tests. Commission Rule R8-69(f) states: "Except for those costs found by the Commission to be unreasonable or imprudently incurred, the costs of new demand-side management or energy efficiency measures approved by application of this rule shall be recovered through the annual rider ...." The Commission finds that PEC's test year DSM/EE program costs are reasonable and prudent; and that its prospective period and rate period DSM/EE costs appear to be reasonable and prudent, subject to review and true-up during PEC's next DSM/EE rider proceeding. Additionally, the Commission notes that PEC has committed in program application dockets (such as Docket No. E-2, Sub 938) to seek advance Commission approval for any program changes that would increase or decrease the estimated total cost of a program by 20% or more.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence for this finding of fact can be found in the testimony and exhibits of PEC witnesses Evans, Bateman, and Williams, the testimony and exhibits of Public Staff witness Maness, the testimony of NCSEA witness Day, and the testimony of Environmental Intervenors witnesses Henderson and Hornby.

Public Staff witness Maness testified that G.S. 62-133.9(d) allows a utility to petition the Commission for approval of an annual rider to recover: (1) its reasonable and prudent costs of new DSM and EE measures and (2) other incentives for adopting and implementing new DSM and EE measures. He further explained that Commission Rule R8-69 sets forth the general parameters and procedures governing the approval of the annual rider, including: (1) provisions for both a DSM/EE rider to recover the estimated costs and incentives applicable to the utility's rate period in which the DSM/EE rider would be in effect, and a DSM/EE EMF rider to recover the difference between the DSM/EE rider in effect for a given test period and the actual recoverable amounts incurred during that test period; (2) an allowance for inclusion in the DSM/EE EMF rider of the net under- or over-recovery experienced between the end of the test period and the date 30 days prior to the hearing in the annual proceeding, subject to review in the utility's next annual proceeding; (3) the allowance for possible recovery of Net Lost Revenues; (4) provision for deferral accounting for net under- or over-recoveries; and (5) provisions for interest or a return on the deferral account and on refunds to customers.

Public Staff witness Maness testified that in PEC's initial June 6, 2008 application, the Company requested approval of a DSM/EE rider and a DSM/EE EMF rider that would provide for recovery of its program costs, Net Lost Revenues, and an additional incentive equal to 50% of the net benefit of each applicable DSM/EE program as determined pursuant to the utility cost test (UCT).

Further, witness Maness explained that a task force of Public Staff attorneys, engineers, financial analysts, and accountants spent several months analyzing PEC's application. The Public Staff task force worked independently and with PEC to design a reasonable cost recovery and incentive mechanism. He also explained that the Public Staff was assisted in its investigation by an independent consultant, Richard F. Spellman of GDS Associates, Inc.

In addition, witness Maness testified that upon completion of the Public Staff's investigation, PEC, the Public Staff, and Wal-Mart negotiated a Stipulation, including a "Mechanism." Witness Maness explained the major aspects of the Stipulation and Mechanism. He asserted that PEC's annual DSM/EE rider requested in this docket (including the EMF Rider) should be established according to the terms and conditions of the Mechanism. He stated that the purpose of the Mechanism is to: (1) allow PEC to recover its reasonable and prudent costs of its new DSM/EE measures and programs as required by G.S. 62-133.9; (2) establish certain requirements in addition to those included in Commission Rule R8-68 for requesting approval of DSM/EE programs; and (3) establish the terms and conditions for the recovery of Net Lost Revenues and an additional PPI associated with new DSM/EE programs.

More specifically, witness Maness explained that the Mechanism is divided into sections that address cost recovery, Net Lost Revenues, and the PPI separately. The cost recovery section addresses the recovery of incurred DSM/EE program costs as part of the annual riders, and sets forth how such costs will be recovered on both an estimated basis and a trued-up basis in accordance with Commission Rule R8-69. He testified that it allows for the deferral of incurred DSM/EE program costs (costs that would not otherwise be capitalized) as allowed by G.S. 62-133.9, with an amortization over a period of time not to exceed 10 years, unless the Commission determines otherwise. These deferred costs would be allowed to earn a return at the overall net-of-tax average rate of return approved in PEC's most recent general rate case proceeding, consistent with Commission Rule R8-69 treatment of the deferral of DSM/EE costs prior to a utility seeking approval of such programs.

Next, witness Maness explained that the Net Lost Revenues section of the Mechanism sets forth the criteria that would govern the recovery of Net Lost Revenues. In particular, the Mechanism limits the recovery of Net Lost Revenues resulting from an approved measurement unit installed in a given vintage year to the Net Lost Revenues experienced during the first 36 months after the measurement unit is installed. He observed that a vintage year is an identified 12-month period in which a specific DSM or EE measure is installed for an individual participant or group of participants. Witness Maness further stated that a "measurement unit" is the basic unit to be used to measure and track the incurred DSM/EE costs, Net Lost Revenues, and net savings for DSM/EE measures installed in each vintage year. Measurement units can consist of either individual measures or bundles of measures. When PEC requests approval of a DSM or EE program, it will be required to identify and request approval of the measurement units that will be used for that program. The Mechanism provides that certain general programs and measures, as well as research and development activities, are ineligible for recovery of Net Lost Revenues; and pilot programs are ineligible for recovery of Net Lost Revenues, unless PEC requests and the Commission approves such recovery at the time of program approval. Additionally, recovery of Net Lost Revenues for a given measurement unit will cease upon the implementation of new rates approved by the Commission in a general rate case or equivalent

proceeding. Further, recoverable Net Lost Revenues are to be reduced by increases in PEC's revenues resulting from any activity by PEC's public utility operations which cause a customer to increase demand or energy consumption.

Witness Maness noted that the Mechanism creates criteria pursuant to which Net Lost Revenues will be trued-up in the DSM/EE EMF rider. The true-up will be calculated using actual Net Lost Revenues, measured by the actual: (1) number of installations of measurement units; (2) net kWh and kW savings per installation; (3) gross lost revenues per kWh and kW saved; and (4) deductions from gross lost revenues (such as fuel and variable O&M expenses) per kWh and kW saved.

Addressing the PPI section of the Mechanism, witness Maness explained that it provides for the recovery by PEC of a performance incentive for the implementation and operation of cost effective new DSM/EE programs that actually achieve verified energy and peak demand savings. The PPI is based on the sharing of those savings as contemplated by G.S. 62-133.9(d)(2). Witness Maness noted that the same limitations applicable to the recovery of Net Lost Revenues for certain general programs and measures costs, research and development activities costs, and pilot program costs also apply to the recovery of the PPI. Also, with the exception of low-income programs, there is a rebuttable presumption that the PPI for a measure or program should be zero for any vintage year in which a program or measure total resource cost (TRC) test result is less than 1.00.

Further, witness Maness testified that the PPI would be based on the net savings of each program or measure as calculated using the UCT, and would be tracked by measurement units installed in specific vintage years. The specific incentives are: (1) 8% of the net savings for DSM programs as measured by the UCT and (2) 13% of the net savings for EE programs as measured by the UCT. When a measurement unit installed, or expected to be installed, in a particular vintage year is first eligible to be included in the DSM/EE rider being considered for a rate year, the amount of the PPI for that measurement unit can be calculated by multiplying the estimated net present value UCT savings for the measurement unit by 8% for DSM programs and measures and by 13% for EE programs and measures. The estimated net present value UCT savings will be calculated by using current estimates of measurement units to be installed in a vintage year, kWh and kW savings over each measurement unit's life, per kWh and per kW avoided costs (as determined annually by PEC, subject to the Public Staff's and the Commission's review), and utility costs incurred to install/operate the measurement unit. After determining the stream of benefits and costs related to a given measurement unit installation over that installation's life, the results will be discounted to determine the estimated net present value UCT savings. Then, after multiplying this amount by the 8% or 13% PPI rate, the resulting PPI will be converted into a stream of 10 levelized annual payments, incorporating an annual return, for inclusion in the rate period DSM/EE Rider.

After a vintage year related to a given program or measure has been subject to impact evaluation, and such impact evaluation has been reviewed, witness Maness testified that the PPI related to the measurement units and vintage years reviewed will be trued-up in the DSM/EE EMF rider. The calculation of the trued-up PPI will follow the same process used to calculate the initial estimated PPI, except that it will use (1) actually installed measurement units per

vintage year; (2) verified per installation kWh and kW savings for the measurement unit's life; and (3) actual vintage year measurement unit utility cost.

With regard to PEC's proposed DSDR program, the Stipulation provides for the recovery of its reasonable and prudent costs and Net Lost Revenues, but not a PPI. In addition, the Stipulating Parties agreed that the rate of return on investment used to determine the DSDR program capital related costs included in each annual rider should be based on PEC's then-current capital structure, embedded cost of preferred stock, embedded cost of debt (net of appropriate income taxes), and the cost of equity approved in PEC's most recent general rate case proceeding.

Finally, witness Maness explained that the Mechanism establishes steps and criteria that PEC will use in determining which DSM/EE programs and measures should be offered. For example, PEC will first perform a qualitative screening to determine if a proposed measure is commercially viable, sufficiently mature, suitable for PEC's service area, and otherwise feasible. PEC will then screen such measures for cost effectiveness. With limited exceptions, particularly with regard to low-income measures, PEC will not consider measures with TRC test results less than 1.00. Once measures have been assigned to DSM or EE programs, the programs (again with the exception of low-income programs) will be required to show a TRC test result greater than 1.05 to be eligible to be submitted to the Commission for approval.

The NCSEA, the Environmental Intervenors, and the Attorney General raised a variety of concerns regarding the Net Lost Revenues and PPI incentives provided for in the Stipulation and Mechanism. They argued that the Mechanism does not provide for the establishment of performance targets that must be met before PEC may receive an incentive. Further, they argued that PEC should not be allowed a return on all of its DSM/EE expenses as well as a PPI and that the selection of the 8% and 13% PPIs was not supported by empirical analysis. The Environmental Intervenors argued in their Brief that the PPI should be adjusted downward "to account for the 10.45% return on equity" that PEC "is already receiving as an incentive to invest in DSM and EE." The Attorney General argued against recovery of the Net Lost Revenues incentive.

PEC witness Bateman testified that the establishment of performance targets at this time was not appropriate, and that performance targets were not needed to incent PEC to pursue DSM/EE programs aggressively if the Mechanism is adopted. She explained that if the goal is to incent PEC to pursue DSM/EE programs aggressively, the Mechanism as proposed, particularly the PPI portion, provides a very strong incentive to PEC to make every program as successful as possible because the award is based upon a percentage of the savings resulting from a specific program. As a result, the more successful the program, the greater the incentive award to PEC. Witness Bateman, therefore, concluded that establishing an overall portfolio target would not provide any greater incentive to PEC to offer and pursue DSM/EE programs or make such programs more successful than the incentive created by the PPI. In fact, Witness Bateman emphasized that the PPI is entirely consistent with witness Hornby's testimony in which he recommended that an incentive be tied to actual performance. According to witness Bateman, no better tying of the award to performance can be achieved than providing a greater award for greater achievement.

Additionally, witness Bateman testified that establishing overall portfolio performance targets is a complex and somewhat subjective undertaking. She testified that in order to establish realistic targets, a DSM/EE market potential study must be performed. PEC has commissioned such a study, but as of the date of the hearing, it was not complete. She asserted that without these results, any targets are only guesses at what can reasonably be accomplished through a portfolio of DSM or EE programs. Consistent with the testimony of witnesses Day and Hornby, witness Bateman testified that in addition to completing a market potential study, the utility must also gain experience with the DSM/EE program implementation process. Customer acceptance rates must be determined and evaluated in order to establish reasonable performance targets. She then concluded that the issue of performance targets can be revisited, as appropriate, in future DSM/EE cost recovery proceedings after these critical factors are known.

NCSEA witness Day testified that if she were tasked with establishing performance targets, she would "pay a lot of consultants" and do research on other utilities in like climates and with similar housing stock, as well as consult a myriad of energy efficiency experts to come up with a stretch target of energy reduction goals. She also explained that the utility would need a certain level of knowledge about customer behavior in the particular markets in question before such targets could be established.

The Environmental Intervenors witness Henderson argued that, "instead of achieving energy savings of only 0.23% of retail sales, as currently presented by the PEC Program in 2013," the Company should pursue all cost-effective EE and "should be required to achieve an incremental annual reduction of at least 0.75% in year 2013, and a cumulative reduction of at least 1.85% over the 5-year period." As discussed previously, witness Henderson advocated that PEC should develop a more robust portfolio of programs, with greater emphasis on EE programs. He also advocated an open, transparent, stakeholder-driven monitoring and verification (M&V) process.

Furthermore, the Environmental Intervenors witness Hornby testified that the incentives PEC would receive under the Stipulation are unreasonable because they are not commensurate with the Company's risk and financing costs and because PEC does not have to meet a reasonable performance target before starting to receive the PPI. Witness Hornby asserted that the Stipulation provision for three years of Net Lost Revenues is not the best approach; instead, he advised decoupling, but he agreed that the Net Lost Revenues approach in the Stipulation is preferable to denial of any incentive. Witness Hornby observed that the carrying cost PEC will receive is a financial incentive. Witness Hornby recommended that the level of incentives proposed by the Public Staff in Duke's Save-a-Watt proceeding should be approved for PEC, but he also stated that incentives should be utility specific. However, in their Brief, the Environmental Intervenors recommended that although the three-year cut-off for Net Lost Revenues was not established in an analytical manner, that such issue had been adequately explored and that the three-year compromise was a reasonable estimate of the actual impact of EE on the Company's finances under its current rate structures.

On cross-examination, witness Hornby acknowledged that those states that he recommended this Commission emulate in establishing performance targets (California[1] and New York) have had DSM/EE programs in place for well over a decade and therefore have extensive customer experience to draw upon in attempting to set performance targets for their utilities. He further agreed that one of the pitfalls in attempting to establish performance targets and tying them to incentives is that if the targets are established too low, the utility could recover an incentive for very limited or low performance. Correspondingly, he noted that if the targets are set too high, the utility may be discouraged from trying to achieve any goals and, thereby, the incentive becomes meaningless. Further, witness Hornby testified that California took more than a year to attempt to set appropriate targets tied to appropriate performance incentives, but in his opinion that was not surprising since the methodology for the establishment of a performance target is evolving.

Furthermore, witness Hornby recognized that the provision allowing for a review of the Mechanism's cost recovery methodology at least every three years will provide an opportunity for the Commission to determine in a meaningful way whether performance targets should be established for PEC once PEC has had adequate experience with customer behavior and the DSM/EE market. Finally, witness Hornby agreed that comparisons of incentives between states could be problematic because of the differences in the states' regulatory frameworks. He testified, "I think they're [other states] useful at a high level to give orders of magnitude and I also think to indicate the level of analysis that perhaps goes into the considerations that are made, but at the end of the day, I think that is as far as you can take it."

PEC witness Bateman argued that witness Hornby's comparison of the Mechanism to other states' DSM/EE cost recovery decisions is neither relevant nor instructive. She testified that there is no uniform or standard approach to DSM/EE program cost recovery or incentives. Each state's approach will depend on its own unique circumstances, including its structure and level of electric rates. Witness Bateman explained that the approach for states with very high rates, such as California and New York, will be different from the approach of a state like North Carolina, which has much lower electricity rates. This difference in rates impacts the structure of a utility's DSM/EE portfolio, the cost effectiveness of DSM/EE programs, and the appropriate incentives. Further, witness Bateman observed that the usage patterns of PEC's North Carolina customers and those of California and New York utilities are as different as their climates, which impact their heating and cooling needs. She also explained that there are a variety of differences existing among all states, especially between North Carolina and California, and that variety dictates that one state's achievement of EE cannot by rote be applied to North Carolina.

The Commission agrees with all of the parties that the DSM/EE programs, procedures, and performance targets established by other states cannot be perfunctorily applied to North Carolina or PEC. Rather, before the Commission can determine whether performance targets are

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[1] The Commission notes and takes judicial notice of an Order issued February 4, 2009, by the California Public Utilities Commission (CPUC) instituting a rulemaking to address the CPUC's policies related to an EE risk/reward incentive mechanism (RRIM). The CPUC stated that the rulemaking was instituted on its own motion to adopt, repeal, or amend rules, regulations, and guidelines for the electric and gas utilities. The CPUC further stated that it believes it is necessary to consider a more transparent, more streamlined, and less controversial RRIM program which may require making small but significant changes to the existing RRIM or a wholesale adoption of a new incentive mechanism. See Order Instituting Rulemaking, R.09-01-019.

appropriate and, if so, what the appropriate level of such targets for any particular utility should be, the state and the state's utilities must obtain experience in customer acceptance rates, customer behavior, DSM/EE program actual savings achievements, and cost effectiveness. Until such information is available, it is not appropriate or meaningful to delay implementation of these DSM and EE programs at this time to establish performance targets.

With regard to the assertions of the Environmental Intervenors and NCSEA witnesses that PEC should not be allowed a return on its DSM/EE program costs or that such return should be considered when establishing incentive levels, the Commission must be guided by the General Assembly's policy in this regard. The General Assembly's policy is set forth in G.S. 62-133.9(d), which provides, in part, that:

> In determining the amount of any rider, the Commission: (1) Shall allow electric public utilities to capitalize all or a portion of those costs to the extent that those costs are intended to produce future benefits ....

According to witness Bateman, when PEC defers and amortizes its DSM/EE costs over multiple years as contemplated by the Mechanism, it incurs a carrying cost on the unamortized balance. A utility's cost of money is a cost just like any other cost incurred by the utility to provide service. She explained that a utility's cost of money is a combination of its cost of all financing sources, including debt and equity. She explained that Commission Rule R8-69 allows a utility to earn its overall net-of-tax rate of return approved in its last general rate case on the balance of its DSM/EE deferred account. She also noted that both state and federal law require that a utility's authorized overall return be established at such a level as will allow the utility to maintain its credit and attract capital on reasonable terms. Witness Bateman then explained that the return the Mechanism allows PEC to earn on its unamortized DSM/EE expenses is simply equal to that established by Commission Rule R8-69 for its deferred account. As a result, witness Bateman concluded that the return PEC is allowed pursuant to the Mechanism simply represents cost recovery as required by G.S. 62-133.9.

Witness Maness also testified that, while the Public Staff did not have any particular concern regarding whether PEC chose to capitalize or expense its costs, it did recognize that rates would go up less in the short run, if PEC chose to defer its costs for later recovery from its ratepayers rather than try to recover them all from ratepayers in the year in which they were incurred. Whether PEC recovers its costs in the first year of implementation or defers those costs, it will be allowed to recover them. Therefore, witness Maness stated that, taking the time value of money into account, he was essentially indifferent over the long term as to the approach PEC chose.

During cross-examination, the Environmental Intervenors witness Hornby agreed that when a utility incurs a cost and it is not recovered in the year incurred, the utility experiences a carrying cost associated with the unamortized expenses. He further agreed that a utility such as PEC is a cost-based regulated utility, and that the cost of money is one of the costs a utility such as PEC is entitled to recover. The Environmental Intervenors witness Hornby acknowledged that the statute grants a utility the absolute right to capitalize and earn a return on its DSM/EE program costs. The resulting question is whether it is appropriate for PEC to be allowed to

recover both a return on its incurred but unamortized DSM/EE program expenses and a performance incentive.

The Commission agrees with PEC and witness Hornby that under G.S. 62-133.9, the Company is allowed to defer and amortize its DSM/EE costs rather than expense them in the year incurred. The Commission is of the opinion that the General Assembly adopted this provision to incent public utilities to pursue DSM and EE. PEC is entitled to recover as a cost its carrying cost on the unamortized balance. The Commission has previously recognized in Commission Rule R8-69 that the appropriate carrying cost for use in such deferred accounts is the utility's most recently approved overall after-tax rate of return. The recovery of such a return is simply a recovery of the utility's cost of money used in financing the expenses in question rather than recovering 100% of the costs from its customers in the year such costs are incurred.

Consequently, the question before the Commission is whether and at what level additional incentives are necessary and appropriate to incent the type of behavior desired of PEC with regard to the provision of DSM/EE programs.

NCSEA witness Day testified that her organization favors capitalization and deferred accounting of program expenses and awarding PEC up to 15% of the positive net present value resulting from its cost test, if its entire portfolio of programs meets specified targets. She stated that NCSEA does not support PEC receiving Net Lost Revenues. NCSEA argued in its Brief that allowing utility incentives is discretionary and the Commission may choose to award or not award them where "appropriate." Senate Bill 3 did not make utility incentives automatic or guarantee them. In its Brief, NCSEA stated that PEC's "cost-recovery and incentive mechanism for demand-side management programs and energy efficiency measures (the 'Mechanism') constitutes a reasonable, conceptual framework, but should not be immutable. Determining whether and what discretionary incentives, particularly utility incentives, are 'appropriate' has to be made on a case-by-case decision."

Further, NCSEA voiced concern that additional incentives are unnecessary for a program that produces a positive cost-benefit ratio via the Utility Cost Test (UCT). In particular, NCSEA stated that

> ... the positive UTC [sic] demonstrates that the utility will benefit from undertaking the ... program and arguably is a proxy for broader efficiencies. A positive UTC also suggests, however, that in a perfect world the measures producing that positive result would have been undertaken anyway because the program results in a more efficient use of resources. Additional incentives to the utility would be unnecessary because implementing the program would result in a net financial benefit to the utility, albeit via a new way of doing business. Thus, a demand-side management program or energy efficiency measure implemented by PEC pursuant to the criteria in its Mechanism will essentially result in a double recovery to PEC: first PEC benefits from implementing programs that result in real financial benefits; and second PEC is awarded a program performance incentive ... plus net lost revenue simply for implementing the program. Consequently, if the UTC is going to be used as the measure of success, NCSEA

> has serious doubts about whether PEC's ... incentives ... are needed or 'appropriate.'

Additionally, NCSEA argued that the proposed incentives are "based on the financial benefits to the utility and not on the program's actual performance." NCSEA argued that "tiered program performance incentives tied to actual performance in relation to performance targets would better align utility and ratepayer interests." However, NCSEA did not make a specific proposal in this regard.

The Environmental Intervenors put the question of incentives in the context of overall State policy, which is:

> 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 ... G.S. 62-2(a)(3a). [Emphasis added.]

Further, the Environmental Intervenors noted that with the passage of Senate Bill 3 in 2007, the North Carolina legislature declared it to be the policy of the State to:

> ... promote the development of renewable energy and energy efficiency through the implementation of a Renewable Energy and Energy Efficiency Portfolio Standard (REPS). G.S. 62-2(a) [Emphasis added.]

The Environmental Intervenors asserted that Senate Bill 3 requires utilities to implement both DSM and EE measures, linking them to the general mandate for utilities to "use supply-side resources to establish the least cost mix of demand reduction and generation measures that meet the electricity needs of its customers." G.S. 62-133.9(b). They argued that PEC is asking for an "incredibly generous" three-part package of (1) a return on deferred amounts; (2) a performance incentive; and (3) Net Lost Revenues for three years.

The Attorney General contended that, while Senate Bill 3 created a new annual rate rider for recovering the costs of DSM and EE programs, the new law did not modify the least cost and cost of service/rate of return principles that are to guide Commission decisions. "The Act's fundamental principle of cost-based rates is present through [G.S.] 62-133.9." The Attorney General argued that both the annual rider and the capitalization of costs are new incentives for electric utilities. "In addition to these two new incentives, in [G.S.] 62-133.9(d) the General Assembly also gave the Commission discretion to approve "other incentives" for adopting and implementing new energy efficiency measures."

Additionally, the Attorney General maintained in his Brief that while the PPI appears to be appropriate, the second "other incentive" under the Stipulation, Net Lost Revenues, does not. The Attorney General argued that PEC had failed to carry its burden of proving that it needs Net Lost Revenues as an incentive, saying, "[e]vidence shows that PEC's retail sales will continue to grow at a healthy pace." The Attorney General asserted that PEC's 2008 Integrated Resource Plan shows that PEC projects a 1.7% average annual growth in retail demand through 2022. "Further, even after deducting the projected DSM/EE kilowatt-hour (kWh) savings, PEC projects the annual retail demand growth rate to be a robust 1%." Further, if PEC's sales growth is not sufficient to provide the Company an opportunity to earn its authorized return, it has the option of applying to the Commission for an increase in its base rates. Finally, "automatically awarding PEC Net Lost Revenues could create a disincentive for ratepayers to engage in energy conservation. By awarding lost revenues, the Commission sends ratepayers the conflicting message that they should conserve electricity, but if they do so they will nonetheless be required to pay PEC for every kWh they save.... Therefore, the Commission should adopt the Agreement's provisions allowing PEC to recover its program operating costs, capitalize program capital costs and recover program performance incentives, but not to automatically recover Net Lost Revenues."

While NCSEA witness Day testified that PEC should not be allowed to recover a PPI and Net Lost Revenues, she agreed that NCSEA would like PEC and other utilities to be positively motivated to engage in DSM and EE. The Environmental Intervenors witness Greene testified that a lost revenue adjustment mechanism allows a utility to recover the retail revenues lost due to its EE and DSM programs, but such mechanisms are unsustainable and should be replaced with revenue decoupling. He also testified that a lost revenue adjustment mechanism may be acceptable as part of a settlement package that included a strong efficiency target and reasonable performance-based incentives.

While certain intervenors alleged that the Mechanism incorporated in the Stipulation among the Stipulating Parties conceptually should be revised, none of these parties presented any specific challenges or proposed changes to PEC witness Evans' or Public Staff witness Maness' calculation of the DSM/EE riders to be used by PEC to recover its reasonable and prudent DSM/EE costs. NCSEA advocated incentives linked to targets, but did not provide a specific proposal.

The Commission believes that the decision on the issue of incentives is by nature a balancing act. The incentives should not be excessive, but they must be sufficient to motivate PEC to deploy DSM/EE programs effectively and aggressively. The Commission notes that state law mandates that utilities pursue DSM and EE. The Commission is of the opinion that the overall package of incentives proposed by the Stipulating Parties, in addition to the creation of an annual rider with a true-up, and the authority for PEC to defer and amortize its DSM/EE costs with a return, is very generous and should be sufficient to properly motivate the Company. However, the Commission also agrees with the testimony of PEC witness Bateman that there is no empirical method to precisely determine the exact performance incentives that should be established for a particular utility. To a large extent, it requires the exercise of sound judgment based on the information available and experience over time. The Commission also agrees with

witness Hornby that there is no standard design for performance incentives and that performance incentives are likely to vary from state to state and perhaps even from utility to utility.

The Commission notes that the stipulated PPI incentive awards, in and of themselves, of 8% (for DSM) and 13% (for EE), while significantly larger, are not unreasonably different from those initially recommended by the Public Staff of 5% (for DSM) and 10% (for EE). The Commission further notes that these percentages are not materially different from the 12% incentive used in California and New York, the states that the Environmental Intervenors witness recommended that the Commission look to for guidance in this matter. Based upon the evidence in this proceeding, there was no empirical method presented to establish such incentives precisely. Further, the incentives in question were the result of arms-length negotiations among the Stipulating Parties and they were not materially or unreasonably different from those being advocated by the Environmental Intervenors. Based upon the foregoing, the Commission concludes that the agreed-upon incentives, as proposed by the Stipulating Parties, are reasonable and appropriate for use in this proceeding. In reaching this conclusion, the Commission is further guided by the fact that we have decided to initiate a formal review of the Commission-approved Mechanism not later than June 1, 2012.[1] To the extent the Commission-approved Mechanism needs to be revised, especially its provisions regarding incentives, it can be reviewed and adjusted, as needed, during the formal review process. Accordingly the Commission concludes that the Net Lost Revenues and PPI incentives of 8% for DSM programs and 13% for EE programs, as proposed by the Stipulating Parties, are reasonable and appropriate and should be adopted, subject to review in three years.

G.S. 133.9(d)(1) requires the Commission to allow electric public utilities to "capitalize all or a portion" of their DSM/EE costs. Since the programs in question are expected to provide energy and/or demand reductions for 10 or more years, the Stipulation's general provision providing for recovery over 10 years is reasonable for these programs. The Commission will, however, modify the Mechanism to incorporate the following exception: as a general rule, A&G costs not directly related to an approved DSM or EE program will be deferred and amortized over a period not to exceed three years.[2] The Commission will review other proposed programs on a case-by-case basis to determine the appropriate recovery period for them in future DSM/EE rider proceedings.

In regard to witness Henderson's proposal for a stakeholder-driven M&V process, the Commission notes that PEC is required to file its M&V reports with the Commission. Parties may review and comment on those reports. In addition, PEC files M&V plans as part of each program application; the Commission encourages interested parties to comment regarding the adequacy of those plans during the program review process.

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[1] This formal review is embodied and discussed in conjunction with Finding of Fact No. 17 and the Evidence and Conclusions in support thereof.

[2] See Finding of Fact No. 10 and the Evidence and Conclusions in support thereof.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for this finding of fact is found in the Stipulation and in the testimony of Public Staff witness Maness and PEC witness Evans, including exhibits attached to Evans' pre-filed testimony and exhibits provided by PEC in response to the Commission's Post-Hearing Orders.

PEC witness Evans testified regarding the CFL Pilot program's contribution to PEC's overall DSM/EE rider request under the Stipulation, and presented those costs in Evans Revised Settlement Exhibit No. 2. That exhibit showed that PEC sought to recover $268,897 for costs incurred during the test period and $28,458 for costs incurred during the prospective period relative to the CFL Pilot program.

The Commission takes judicial notice of the record in Docket No. E-2, Sub 908, including the "Impact Evaluation of 2007 CFL Buy-Down Pilot" dated May 20, 2008, and prepared for PEC by Summit Blue Consulting, LLC. That evaluation report showed that the CFL Pilot program achieved 6,706 MWh of annual energy savings, 630 kW of summer demand savings, and 711 kW of winter demand savings; and that those savings are expected to persist for 10 years. No party contested the prudency and reasonableness of the costs of the CFL Pilot program. Therefore, the Commission concludes that it is appropriate for PEC to recover its CFL Pilot program costs through its DSM/EE rider.

The proposed Mechanism addressed incentives for pilot programs by excluding them, "unless the Commission approves PEC's specific request...when PEC seeks approval of that program..." Public Staff witness Maness testified that, despite the Stipulation's general prohibition against incentives for pilot programs, the Public Staff does not oppose incentives for the CFL Pilot program because PEC had indicated early on that it intended to seek incentives for the CFL Pilot program and because the Pilot has been shown to have benefits.

In response to the Commission's March 3, 2009 Post-Hearing Order Requiring Further Information and Granting Extension of Time, PEC provided data regarding its proposed total revenue recovery for the CFL Pilot program over 10 years. Specifically, on Line 17 of Schedule C-6, Page 1 of 1, included in its response to Item No. 1, PEC proposed to recover revenue requirements of approximately $1.968 million over 10 years relative to its CFL Pilot program. According to information contained on Line Nos. 15 and 16 of said Schedule C-6, as well as information contained on Schedules B-1 and B-2 of the Company's response to Item No. 8 of the March 3, 2009 Order relative to the CFL Pilot program, approximately $1.5 million of the Company's proposed revenue requirements would result from the collection of the Net Lost Revenues and PPI incentives.

The Commission agrees with and fully supports the Stipulation's general prohibition against incentives for pilot programs; approval of incentives for any pilot program should be authorized only under very exceptional circumstances which are not present in this case. The incentives PEC now seeks for its CFL Pilot program are, in the view of the Commission, much too large and generous relative to the Company's limited initial cash outlay and the narrow focus of this pilot program. It would be unreasonable and unfair to require PEC's ratepayers to pay

such extremely large incentives under these circumstances. Therefore, the Commission concludes that PEC has not demonstrated by the preponderance of the evidence in this case that incentives should be allowed in conjunction with its CFL Pilot program. However, PEC will be allowed to recover the costs of the CFL Pilot program over 10 years, with a carrying charge on the unamortized balance. The Commission believes that such Commission-modified cost recovery is fair and reasonable to both PEC and its ratepayers.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence supporting this finding of fact is contained in the testimony of PEC witnesses Evans and Bateman and Public Staff witness Maness. PEC witness Evans Revised Settlement Exhibit No. 2 shows that PEC's proposed incremental A&G expense supporting its DSM and EE programs is $2.1 million during the test period, $1.1 million during the prospective period, and $3.8 million during the rate period, resulting in a total amount of proposed incremental A&G expenses of $7.0 million. Witness Evans testified that the costs proposed to be recovered through the DSM/EE rider only include incremental new DSM and EE programs and new activities, not existing programs. Public Staff witness Maness testified that the subject A&G expenses are used to support all of PEC's programs and will continue each year. No witness testified that PEC's proposed A&G costs are unreasonable or inappropriate for inclusion in the DSM/ EE rider.

PEC witness Bateman testified that the Stipulating Parties selected the 10-year amortization period because they felt it "was most in line with the typical benefit life of the DSM and EE programs."

PEC's Response to Item No. 16 of the Commission's January 30, 2009 Post-Hearing Order stated that PEC proposed to recover $3.4 million for its Save the Watts program, and that such amount would be recovered over 10 years with a carrying charge. PEC's Response to Item No. 10 of the Commission's March 3, 2009 Post-Hearing Order Requiring Further Information and Granting Extension of Time clarified that the Save the Watts ad campaign costs were included within PEC's A&G costs, and stated:

> Rule R8-69(b)(6) requires that utilities receive approval prior to deferring 'any administrative costs, general costs, or other costs not directly related to a new demand side management or energy efficiency measure.' PEC promptly filed a petition with the NCUC on April 24, 2008 under E-2, Sub 924 to place incremental administrative, general and other costs in a deferred account. In that petition, PEC identified such costs to include 'developing and implementing generic education programs' and further clarified that these costs could not be directly associated with any one particular program or measure .... The Company has launched this campaign [Save the Watts] in an aggressive manner for the purpose of raising awareness and educating customers about energy savings opportunities while it awaits the approval and launch of its DSM and EE programs. PEC expects that future generic, non program-specific Save the Watts advertising costs will be reduced as its marketing and advertising efforts focus more heavily on the recruitment of participants in specific programs ....

> However, PEC plans to continue developing and implementing generic energy efficiency education and awareness programs, including but not limited to K-12 education, residential custom energy reports, online customer audit tools, etc .... PEC cannot quantify any measurable direct energy reduction benefits from the Save the Watts campaign. However, by raising customer awareness of the importance of using electricity wisely, this program enhances the participation rates of PEC's DSM/EE programs. [Emphasis added.]

G.S. 62-133.9(d)(1) states that the Commission "[s]hall allow electric public utilities to capitalize all or a portion of those [incremental DSM and EE] costs to the extent that those costs are intended to produce future benefits." [Emphasis added.]

Public Staff witness Maness testified that rates would go up less in the short run if costs were deferred for later recovery rather than recovered entirely in the year in which they were incurred. Further, Public Staff witness Maness testified that it's "fair and reasonable," from a customer perspective, to trade-off a lower revenue requirement paid in early years against a higher revenue requirement paid in later years. Over the long term, witness Maness was indifferent between the two approaches, but testified that "it's certainly nice for customers to get a benefit up front in terms of a lower rate."

The Commission finds and concludes that PEC's incremental A&G costs supporting PEC's DSM and EE programs appear reasonable and appropriate for provisional recovery in the Company's DSM/EE rider. However, given the recurring nature of such A&G costs and the fact that no witness asserted direct "future benefits" from these A&G expenditures, the Commission concludes that a 10-year amortization period is not appropriate for these costs in this proceeding. Although it would be reasonable to expense these costs as they are incurred, the Commission will, in order to moderate the rate impact for customers of these A&G costs in PEC's DSM/EE rider, approve a three-year amortization period for these A&G costs. Therefore, as a general rule, A&G costs not directly related to an approved DSM or EE program should be deferred and amortized over a period not to exceed three years. PEC will be required to recalculate its Rider BA-1 charges based on a three-year, rather than a 10-year, amortization period for A&G costs. The Commission will also request that the Public Staff monitor and review PEC's incremental A&G costs supporting its DSM and EE programs on an ongoing basis, with particular emphasis on the effectiveness of the Company's general EE education programs, and report its findings to the Commission during PEC's next and future DSM/EE rider proceedings.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The evidence for this finding of fact is found in the testimony of Public Staff witness Maness, PEC witness Bateman, North Carolina statutes and case law. PEC and the Public Staff proposed to allocate costs differently between and among PEC's retail rate classes. The two parties provided different interpretations of G.S. 62-133.9(e), which states as follows:

> The Commission shall determine the appropriate assignment of costs of new demand-side management and energy efficiency measures for electric public

utilities and shall assign the costs of the programs only to the class or classes of customers that directly benefit from the programs.

PEC witness Bateman testified that the North Carolina General Assembly's use of the words "only" and "directly" indicated its clear intent that the costs of a program or measure are to be recovered from those customer classes eligible to participate in the program. In her view, it naturally follows that the cost of programs and measures that are only available to residential customers are to be recovered from the residential customer class. Similarly, those programs and measures that are only available to PEC's General Service customers (i.e., its nonresidential customers) are to be recovered from those customers in the General Service rate schedule classification.

In support of PEC's position, witness Bateman gave the following example. She explained that under PEC's Residential Home Advantage Program, residential customers are eligible for certain monetary incentives to assist them in financing the construction of a home that meets the Energy Star rating and to install various high efficiency appliances. She testified that residential customers participating in such a program benefit in four ways: (1) they receive the benefit of PEC paying for a portion of the cost of EE improvements to their new home; (2) over the life of the improvements, such customers enjoy lower energy costs than would otherwise have been the case; (3) given that the residential class of customers would experience lower kWh and kW consumption than would otherwise have been the case, that class of customers would be allocated less cost for ratemaking purposes; and (4) given that the program will have been determined to be cost effective from an overall resource planning perspective, these customers will enjoy lower electric rates than would otherwise have been the case. For those customers not eligible to participate in this program, the only benefit they receive is an indirect benefit of lower rates. Witness Bateman then concluded that this distinction between direct and indirect benefits of DSM/EE programs is the only logical basis for the General Assembly's choice of wording in G.S. 62-133.9(e) that the cost of a DSM/EE program is to be recovered *only* from the customer class *directly* benefited by the program. She explained that any other interpretation of the statute renders the use of the word "directly" meaningless.

In contrast, the Public Staff argued that the "direct benefits" of DSM/EE programs are the system benefits of fewer power plants and lower operating costs, and therefore all customer classes should be required to pay for all of PEC's DSM/EE costs based on system benefits. Witness Maness testified that such a benefit was the direct benefit of the program or measure and therefore the statute required all costs supporting DSM/EE programs and measures be spread to all retail customer classes.

The Attorney General agreed with the Public Staff's proposal to allocate costs based on the direct benefit of reductions in system-wide energy and demand, but further argued in his Brief that the direct benefits PEC's wholesale customers receive from its DSM/EE programs should be considered in the costs and incentives recovered from retail ratepayers. "If PEC saves money by not building 1,000 MW of generation, then PEC's average system costs will go down. Without some adjustment being made, such as in a general rate case, that reduction in PEC's average system costs will result in reduced rates for wholesale customers." That reduction would be a direct benefit received by PEC's wholesale customers. Therefore, the Attorney General

argued that PEC's wholesale customers would receive a windfall at the expense of retail customers, if retail customers are required to pay all of the DSM/EE costs and incentives. The Attorney General asserted that PEC's use of its existing voltage reduction control (VRC) program illustrated that wholesale customers receive benefits from the utility's DSM programs. Further, the Attorney General cited a late-filed exhibit in which PEC listed the dates and emergency conditions under which it had used the VRC program in 2008. The Attorney General said that according to PEC's response, the program was used five times to "deliver emergency reserve capacity to a neighboring utility. Thus, VRC was used to benefit wholesale customers more than one-third of the time .... "

It is a well-established principle of statutory interpretation in North Carolina that a statute should not be interpreted in a manner which would render any of its words superfluous. Each word of a statute is to be construed as having meaning, where reasonable and consistent with the entire statute, because it is always presumed that the Legislature acted with care and deliberation. *State v. Haddock*, ___, N.C.App. ___, 664 S.E.2d 339, 345 (2008); *State v. Ramos*, ___, N.C.App. ___, 668 S.E.2d 357, 363 (2008).

The Commission agrees with the Public Staff that, to some degree, all customers benefit from the implementation of new DSM and EE programs. To conclude, however, that this general benefit encompasses the direct benefit contemplated by the General Assembly fails to interpret the statute in a logical manner. Accordingly, the Commission agrees with PEC that to interpret the statute in the manner proposed by the Public Staff would render the words "directly" and "only" meaningless. Clearly, the General Assembly intended for those words to have meaning and the most logical meaning they can have is that the cost of a new DSM/EE program is to be recovered only from those customer classes eligible to participate in the program and to which the program is targeted. While the Public Staff is correct that all retail customer classes benefit from PEC's DSM/EE programs, the Commission is of the opinion that there would have been no need for such a statutory provision if not to direct the Commission to allocate these costs in a different manner. The Commission concludes that the law favors PEC's interpretation and disfavors the Public Staff's position.

Regarding the Attorney General's assertions that wholesale customers benefit from PEC's DSM/EE programs, the Commission finds that the costs and incentives at issue are for DSM/EE programs targeted toward retail customers. Any benefit that wholesale customers receive is clearly an indirect benefit. There is no evidence in the record to suggest that the "neighboring utilities" that benefitted from PEC's VRC program in 2008 were, in fact, wholesale customers. (It is more likely that they were other transmission owning utilities, such as Duke, TVA, or Southern, that are responsible for instantaneously balancing load and demand within a control area.) Finally, PEC's North Carolina wholesale customers are electric power suppliers covered by Senate Bill 3. Just like PEC, they are required to meet their own requirements for the use of renewable energy and EE. As they do so, it is reasonable to assume that their retail customers will pay for their programs, just like PEC's retail customers will pay for its programs.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

This finding of fact is drawn from the Commission's Order Approving Program in Docket No. E-2, Sub 926 on this same day and the Commission's interpretation of

G.S. 62-133.9(f). In the Order approving PEC's DSDR program, the Commission concluded that all retail customers served by PEC's distribution system directly benefit from the DSDR program and that it is impossible for any of the industrial and large commercial customers served by PEC's distribution system to opt out of the DSDR program. Therefore, the Commission concludes that none of PEC's customers served via its distribution system may opt out of the DSDR program or its costs.

G.S. 62-133.9(f) provides for industrial customers and certain large commercial customers to "opt-out" of new DSM or EE programs under certain circumstances, in which case none of the costs of the programs will be assigned to them. This provision reads as follows:

> None of the costs of new demand-side management or energy efficiency measures of an electric power supplier shall be assigned to any industrial customer that notifies the industrial customer's electric power supplier that, at the industrial customer's own expense, the industrial customer has implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures and that the industrial customer elects not to participate in demand-side management or energy efficiency measures under this section .... The provisions of this subsection shall also apply to commercial customers with significant annual usage at a threshold level to be established by the Commission.

The notice for such an opt-out requires two statements: (1) that the customer has, or will, implement alternative DSM and EE measures at the customer's own expense and (2) that the customer elects not to participate in the program as to which it opts out. Although the Commission has concluded that the DSDR program comes within the definition of an EE program as defined in G.S. 62-133.8(a)(4), the DSDR program is undoubtedly different from most of the activities traditionally regarded as DSM and EE programs. Traditionally, such programs involve activities and/or equipment on the customer's side of the meter that the customer elects to engage in, or not. The DSDR program involves activities and equipment on the electric supplier's side of the meter, and these activities and equipment benefit all customers, regardless of any particular customer's choice. The EE benefits of the DSDR program, in the form of voltage reduction, essentially come over the distribution lines to all customers who take service from the distribution system. In Docket No. E-2, Sub 926, PEC witness Simpson testified that all customers will participate in the DSDR program without regard to whether they affirmatively elect to do so or not and that "an election is not necessary." Thus, the notion that an individual customer can elect "not to participate" has no application to this program.[1] Physically,

[1] Similarly, Commission Rule R8-69(d)(1) does not apply in this instance where an individual customer cannot "elect not to participate" in the new program. Thus, no customer may "elect this option," i.e., not to participate in the DSDR program, a requirement for opting out of the rider, and may not avoid responsibility for such costs. To the extent Commission Rule R8-69(d)(1) appears to imply that the DSM/EE rider must either be paid or avoided in its entirety, inconsistent with the instant Order, the Rule fails to appropriately anticipate the current situation and will be clarified or revised, as necessary, by future Commission Order.

no customer served by PEC's distribution grid can "not participate."[1] Therefore, none of PEC's distribution-level customers could give the requisite opt-out notice under G.S. 62-133.9(f).[2]

It appears from the language of G.S. 62-133.9(f) that certain industrial and large commercial customers were given the ability to opt-out because they had implemented, or will implement, their own DSM or EE measures and should not essentially "pay twice" for such benefits. Again, however, the DSDR program is not a traditional EE program. The DSDR program involves changes to the electric supplier's equipment, and it has aspects of a general distribution system improvement. The DSDR program achieves a type of efficiency, voltage reduction, that no customer could achieve on its own initiative. Therefore, the rationale that an industrial or large commercial customer should be allowed to opt-out so as not to "pay twice" for efficiency does not logically apply to the DSDR program.

Finally, G.S. 62-133.9(e) provides that the Commission "shall assign the costs of [new DSM and EE programs] only to the class or classes of customers that directly benefit from the programs." The corollary of this proposition is that, except for the opt-out (which does not apply here), the Commission should assign the costs of a program to all classes of customers if all classes directly benefit from the program. Such is the case with the DSDR program. If the DSDR program were not regarded as a DSM or EE program -- an interpretation that was urged upon us by some industrial customers -- its costs would be recovered through base rates, and all customers would end up paying for the costs. This is the same result achieved by applying the DSDR program portion of the DSM/EE rider to all customers, without any opt-out. Consequently, the Commission concludes that all retail customers served by PEC via its distribution system should pay for the DSDR program via the Company's DSM/EE rider.

Consistent with the Stipulation, PEC is hereby authorized to recover all reasonable and prudent costs associated with the DSDR program, including a Net Lost Revenues incentive consistent with the terms and conditions of the Commission-approved Mechanism. The DSDR program should not, however, be eligible for recovery of a PPI, as stipulated.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

Public Staff witness Maness testified that the Stipulating Parties agreed that for the purposes of allocating DSM/EE costs between PEC's retail jurisdictions, PEC would use allocation factors based on each retail jurisdiction's coincident peak demand and annual energy usage as a ratio of total retail coincident peak demand and energy usage. Witness Evans also testified that PEC agreed, after several discussions with the Public Staff, to suspend the use of direct cost allocations for certain costs after December 31, 2008, in the manner specified in the Stipulation. Since no witness testified to the contrary regarding this aspect of cost allocations, the Commission finds Paragraph Nos. 2.B. and 2.C. of the Stipulation to be appropriate.

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[1] Approximately 66 PEC customers are served via PEC's transmission system, and this discussion does not apply to them.

[2] The Commission has authority under G.S. 62-133.9(f) to decide complaints that may be filed, or that it may file on its own, to challenge the validity of any particular notice of nonparticipation. The present discussion addresses the unique nature of this EE program as a whole; it is not an attempt to prejudge a G.S. 62-133.9(f) complaint.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

The evidence for this finding of fact can be found in the testimony and exhibits of PEC witness Evans and Public Staff witness Maness.

The Stipulation proposes to add the following language to the definition of "large commercial customer" contained in Commission Rule R8-69:

> For commercial accounts, once one account meets the opt-out eligibility requirement, all other accounts billed to the same entity with lesser annual usage located on the same or contiguous properties are also eligible to opt-out of the DSM/EE Rider and DSM/EE EMF.

Witnesses Maness and Evans explained that this language was intended to refine rather than change the Rule R8-69 definition of "large commercial customer." No other parties expressed any opinions regarding this proposal and no other party expressed any opposition to this proposal. The Commission concludes that the language in question serves to refine and clarify Rule R8-69 and should be accepted. Logic dictates that a single customer, on a single piece of property with an account with usage of 1,000,000 kWh or greater, should be eligible to opt-out not only that account but all other accounts on the same piece of property. Therefore, the Opt-Out Eligibility Requirement language contained in Paragraph No. 5 of the Stipulation will be incorporated into the Commission-approved Mechanism attached to this Order as Appendix A.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

The evidence for this finding of fact is found in North Carolina statutes as well as in PEC's response to the Commission's January 30, 2009 Post-Hearing Order. In the January 30, 2009 Post-Hearing Order, the Commission required PEC to explain how it would report the PPI and Net Lost Revenues incentives in its quarterly NCUC ES-1 Reports filed with the Commission. PEC's response to Item No. 9 of the January 30, 2009 Order was as follows:

> These two types of revenues are very different and should be treated differently for regulatory reporting purposes. Net Lost Revenues are for the recovery of fixed costs incurred by the utility in order to serve customers and go directly to support the Company's rate base and operating costs. For that reason, it is appropriate for Net Lost Revenues to be included as part of the Net Operating Income reported in Schedule 1 of the ES-1. In contrast, the PPI revenues are an incentive to encourage deployment of DSM and EE programs. Incentives, by their name, should not be considered when evaluating a company's earnings. To do otherwise would defeat the purpose of the incentive and be contrary to the intent of the General Assembly in adopting an incentive policy. PPI revenues are not intended to support recovery of utility costs or reflect a return on equity associated with rate base. Therefore, PPI revenues should not be considered as part of the Net Operating Income reported in Schedule 1 of the ES-1.

The Commission has a continuing statutory obligation to ensure, among other things, that the rates and charges of jurisdictional investor-owned electric utilities are just and reasonable, from the standpoint of both investor and ratepayer interests. The Commission is of the opinion that jurisdictional earnings presented in ES-1 Reports should be based on and reflect actual earnings. The Commission understands that a regulated utility, such as PEC, may be concerned if incentives earned from a cost recovery mechanism such as the one approved herein are included in earnings reports that are used by the Commission for purposes of assessing whether rates should be increased or decreased since the reported actual earnings would be assessed against allowed returns that did not include such incentives. Further, the Commission understands PEC's concern that PPI incentive revenues are not intended to support recovery of utility costs or reflect a return on equity associated with rate base and therefore should not be considered as part of the net operating income reported in Schedule 1 of the ES-1 Report. Although the Commission believes such concerns have some validity, the Commission is of the opinion that the reporting requirements set forth and adopted herein are reasonable and appropriate and will achieve full disclosure and transparency. Consequently, the Commission concludes that PEC should provide the necessary information needed to allow the Commission to monitor and assess the financial results of the Company's DSM and EE programs as well as the Company's actual level of jurisdictional earnings, including and excluding the effects of the Company's DSM and EE programs. Further, the Commission concludes that PEC should provide supplementary schedules setting forth its jurisdictional earnings including actual program revenues, costs, and Net Lost Revenues, but which exclude PPI revenues from the net operating income included in the ES-1 Report. Therefore, the Commission further concludes that the Company should be required to (1) include actual program revenues, including PPI and Net Lost Revenues incentives, and costs for purposes of calculating and presenting its regulated earnings to the Commission for ES-1 reporting purposes; (2) provide supplementary schedules setting forth the Company's jurisdictional earnings excluding the effects of its DSM and EE programs; (3) provide schedules separately stating the earnings impact of its DSM and EE programs on a combined basis as well as on a stand-alone, program-class basis, that is, with earnings from DSM programs, collectively, and earnings from EE programs, collectively shown separately; (4) provide schedules separately stating the earnings impact of each individual DSM and EE program; and (5) provide schedules setting forth its jurisdictional earnings including actual program revenues, costs, and Net Lost Revenues, but excluding the effects of its PPI revenues. Detailed calculations of the foregoing should also be provided. Such schedules and/or calculations should show, at a minimum, actual revenues; expenses; taxes; operating income; rate base, including components; and applicable capitalization ratios and cost rates, including overall rate of return and return on common equity.

The following language regarding Financial Reporting requirements will be incorporated in the Commission-approved Mechanism attached to this Order as Appendix A:

Financial Reporting Requirements

44. PEC shall, in conjunction with its quarterly NCUC ES-1 Reports, include all actual program revenues, including PPI and Net Lost Revenues incentives, and costs for purposes of calculating and presenting its regulated earnings to the Commission. PEC shall also provide supplementary schedules which set forth the Company's jurisdictional earnings

excluding the effects of its EE and DSM programs; the earnings impact of its DSM and EE programs on a combined basis as well as on a stand-alone, program-class basis; that is, with earnings from DSM programs, collectively, and earnings from EE programs, collectively, shown separately; the earnings impact of each individual DSM and EE program shown separately; and the Company's jurisdictional earnings including actual program revenues, costs, and Net Lost Revenues, but excluding the effects of its PPI revenues. Detailed calculations of the foregoing should also be provided. Such schedules and/or calculations should show, at a minimum, actual revenues; expenses; taxes; operating income; rate base, including components; and the applicable capitalization ratios and cost rates, including overall rate of return and return on common equity.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

This finding of fact is procedural in nature and is supported by the Commission's decisions in this Order as well as Commission Rule R8-69.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

This finding of fact is supported in part by Paragraph No. 2.D of the Stipulation, which states that the Mechanism will be revisited by the parties at least every three years, and the Commission's general statutory authority over PEC's rates. Therefore, unless requested to do so earlier by PEC, the Public Staff, or another interested party, the Commission will initiate a formal review of the Commission-approved Mechanism not later than June 1, 2012. Such review will specifically address whether the incentives in the Commission-approved Mechanism are resulting in significant DSM and EE; whether the customer rate impacts from the DSM/EE rider are reasonable and appropriate; whether overall portfolio performance targets should be adopted; and any other relevant issues that may arise.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

This finding of fact is procedural in nature and is supported by the Commission's decisions in this Order and in Docket No. E-2, Sub 926. PEC should submit a modified Evans Revised Settlement Exhibit No. 2 and an updated Rider BA-1 to reflect the Commission's findings and conclusions presented in this Order and in the Commission-approved Mechanism attached hereto as Appendix A.

IT IS, THEREFORE, ORDERED as follows:

1. That the Commission hereby approves the Stipulation and Mechanism jointly filed by PEC, the Public Staff, and Wal-Mart, subject to the modifications as discussed herein and reflected in the Commission-approved Mechanism attached hereto as Appendix A.

2. That PEC shall recover the reasonable and prudent costs of the CFL Pilot program over 10 years, with a carrying charge on the unamortized balance, but the Company shall not recover either Net Lost Revenues or a PPI for the CFL Pilot program in the DSM/EE rider.

3. That PEC shall amortize its incremental A&G costs supporting its DSM and EE programs over three years, with a carrying charge on the unamortized balance.

4. That the costs of an approved DSM/EE program or measure shall first be allocated to the North and South Carolina retail jurisdictions and such costs shall then be recovered from only the class or classes of retail customers to which the program is targeted. No costs of any approved DSM or EE program shall be allocated to the wholesale jurisdiction.

5. That the costs of PEC's DSDR program shall be recovered from all retail customers that benefit; that is, all retail customers that receive power via PEC's distribution system, regardless of the "opt out" provision for industrial and large commercial customers contained in G.S. 62-133.9(f). Industrial and large commercial customers that receive power via PEC's distribution system may not opt out of this program or its costs. PEC shall be authorized to recover all reasonable and prudent costs associated with the DSDR program, including a Net Lost Revenues incentive. The DSDR program shall not, however, be eligible for recovery of a PPI.

6. That PEC shall file with the Commission, as soon as reasonably possible, (1) a modified Evans Revised Settlement Exhibit No. 2 reflecting the findings and conclusions presented in this Order; (2) an updated Rider BA-1 consistent with the rulings in this Order; (3) work papers explaining the new Rider BA-1 rates, including allocations and rate derivations; and (4) a proposed plan for implementing changes to the DSM/EE rider and DSM/EE EMF rider. As provided for in the Commission's Order issued November 14, 2008, to the extent Rider BA-1 implemented December 1, 2008 has resulted in PEC collecting revenues that differ from those that would have been produced by the rates approved in this Order, PEC shall adjust the rates approved herein by the difference with interest on any over collection. As allowed by G.S. 62-130(e), the rate of interest shall be 10% per annum.. Any revenue difference applicable to months for which the actual DSM/EE revenue collection is not available at the time of PEC's filing shall be included in the EMF requested in the 2009 annual adjustment proceeding, with 10% interest on over collections.

7. That PEC shall file an exhibit pursuant to Paragraph No. 33, Page 7, of the Commission-approved Mechanism indicating for each program or measure for which it will collect a PPI, "the annual projected and actual utility costs, participant costs, number of measurement units installed, per kW and kWh impacts for each measurement unit, and per kW and kWh avoided costs for each measurement unit" related to the vintage year installations at issue in this proceeding. This exhibit shall be filed in this docket as well as in Docket No. E-2, Sub 951, as soon as reasonably possible.

8. That the Public Staff shall review the exhibits, proposed Rider BA-1, and implementation plan filed by PEC and shall provide comments to the Commission regarding said filing no later than 10 days after PEC's filing.

9. That the Public Staff shall monitor and review PEC's incremental A&G costs supporting its DSM and EE programs on an ongoing basis, with particular emphasis on the

effectiveness of the Company's general EE education programs, and report its findings to the Commission during PEC's next and future DSM/EE rider proceedings.

10. That PEC shall include all actual program revenues, including Net Lost Revenues and the PPI incentives, and costs for purposes of calculating and presenting its regulated earnings to the Commission in the Company's quarterly NCUC ES-1 Reports. PEC shall file such information, including certain supplementary schedules, in the manner and format required by this Order.

11. That PEC shall, as soon as reasonably possible, revise its DSM/EE rider application and pre-filed direct testimony in Docket No. E-2, Sub 951 consistent with the decisions in this Order and the Commission-approved Mechanism attached hereto as Appendix A.

12. That, unless requested to do so earlier by PEC, the Public Staff, or another interested party, the Commission shall initiate a formal review of the Commission-approved Mechanism not later than June 1, 2012.

13. That the motion filed by PEC on March 6, 2009, to strike Hornby Late-Filed Exhibit No. 1 be, and the same is, hereby denied.

14. That Hornby Late-Filed Exhibit No. 1 and the late-filed exhibits filed by PEC be, and the same are hereby, admitted into evidence in this proceeding.

ISSUED BY ORDER OF THE COMMISSION
This the 15th day of June, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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APPENDIX A
PAGE 1

COST RECOVERY AND INCENTIVE MECHANISM FOR DEMAND-SIDE MANAGEMENT AND ENERGY EFFICIENCY PROGRAMS

(Docket No. E-2, Sub 931)

The purpose of this Mechanism is (1) to allow Progress Energy Carolinas, Inc. (PEC or Company), to recover all reasonable and prudent costs incurred for adopting and implementing new demand-side management (DSM) and new energy efficiency (EE) measures in accordance with G.S. 62-133.9, Commission Rules R8-68 and R8-69, and the additional principles set forth below; (2) to establish certain requirements, in addition to those of Commission Rule R8-68, for requests by PEC for Commission approval of DSM and EE programs; and (3) to establish the terms and conditions for the recovery of Net Lost Revenues and an additional incentive to

reward PEC for adopting and implementing new DSM and EE measures and programs, based on the sharing of savings achieved by those measures and programs, in cases where the Commission deems such recovery and reward appropriate. The definitions set out in G.S. 62-133.8 and G.S. 62-133.9 and Commission Rules R8-68 and R8-69 apply to this Mechanism. For purposes of this Mechanism, the definitions listed below also apply.

Changes in the terms and conditions of this Mechanism shall be applied prospectively only. Approved programs and measures shall continue to be subject to the terms and conditions that were in effect when they were approved with respect to the recovery of reasonable and prudent costs and Net Lost Revenues. With respect to the recovery of Program Performance Incentives, approved programs and measures shall continue to be subject to the terms and conditions in effect in the vintage year that the measurement unit was installed.

Definitions

1. *Costs* include all capital costs, including cost of capital and depreciation expenses, administrative costs, implementation costs, incentive payments to program participants, and operating costs. Subject to Rule R8-69(b), *costs* also include the designated amounts dedicated for expenditure on efforts to promote general awareness of and education about EE and DSM activities, as well as research and development activities and the costs for pilot programs. *Costs* do not include expenditures allocable to the South Carolina retail jurisdiction.

2. *Low-Income Programs or Low-Income Measures* are DSM or EE programs or DSM or EE measures provided specifically to low-income customers.

3. *Measure* means, with respect to EE, an "energy efficiency measure," as defined in G.S. 62-133.8(a)(4), that is new within the meaning of G.S. 62-133.9(a); and, with respect to DSM, an activity, initiative, or program change, that is new under G.S. 62-133.9(a) and is undertaken by an electric power supplier or its customers to shift the timing of electricity use from peak to nonpeak demand periods. DSM includes, but is not limited to, load management, electric system equipment and operating controls, direct load control, and interruptible load.

4. *Measurement unit* means the basic unit that is used to measure and track the (a) incurred costs; (b) Net Lost Revenues; and (c) net savings for DSM or EE measures installed in each vintage year. A measurement unit may consist of an individual measure or bundles of measures. Measurement units shall be requested by PEC and established by the Commission for each program in the program approval process, and shall be subject to modification by the Commission when appropriate. If measurement units have not been established for a particular program, the measurement units for that program shall be the individual measures, unless the Commission determines otherwise.

5. *Measurement unit's life* means the number of years that equipment associated with a measurement unit will operate if properly maintained or activities associated with the measurement unit will continue to be cost-effective, unless the Commission determines otherwise.

6. *Net Lost Revenues* means a payment to PEC based on its revenue losses, net of marginal costs avoided at the time of the lost kilowatt-hour sale(s), or in the case of purchased power, in the applicable billing period, incurred by PEC's public utility operations as the result of a new DSM or EE measure. Net Lost Revenues shall also be net of any increases in revenues resulting from any activity by PEC's public utility operations which cause a customer to increase demand or energy consumption, whether or not that activity has been approved pursuant to Rule R8-68. Program Performance Incentives shall not be considered in the calculation of Net Lost Revenues.

7. *Program* means a collection of new DSM or EE measures with similar objectives that have been consolidated for purposes of delivery, administration, and cost recovery, and that has been or will be adopted on or after January 1, 2007, including subsequent changes and modifications.

8. *Program Performance Incentive* (PPI) means a payment to PEC for adopting and implementing new EE or DSM measures based on the sharing of savings achieved by those DSM and EE measures. PPI excludes Net Lost Revenues.

9. *Total Resource Cost (TRC) test* means a cost-effectiveness test that measures the net costs of a DSM or EE program as a resource option based on the total costs of the program, including both the participants' costs and the utility's costs (excluding incentives paid by the utility to participants). The benefits for the TRC test are avoided supply costs, i.e., the reduction in transmission, distribution, generation, and capacity costs valued at marginal cost for the periods when there is a load reduction. The avoided supply costs shall be calculated using net program savings, i.e., savings net of changes in energy use that would have happened in the absence of the program. The costs are the program costs paid by the utility and the participants, plus the increased supply costs for any periods in which load is increased. All equipment costs, installation, operation and maintenance, cost of removal (less salvage value), and the administration costs, no matter who pays for them, are included in this test. Any tax credits are considered a reduction to costs in this test.

10. *Utility Cost Test* (UCT) means a cost-effectiveness test that measures the net costs of a DSM or EE program as a resource option based on the costs incurred by the utility (including incentive costs paid by the utility to or on behalf of participants) and excluding any net costs incurred by the participant. The benefits for the UCT are the avoided supply costs, i.e., the reduction in transmission, distribution, generation, and capacity costs valued at marginal cost for the periods when there is a load reduction. The avoided supply costs shall be calculated using net program savings, i.e., savings net of changes in energy use that would have happened in the absence of the program. The costs for the UCT are the program costs incurred by the utility, the incentives paid to or on behalf of participants, and the increased supply costs for any periods in which load is increased. Utility costs include initial and annual costs, such as the cost of utility equipment, operation and maintenance, installation, program administration, and participant dropout and removal of equipment (less salvage value).

11. *Vintage year* means an identified 12-month period in which a specific DSM or EE measure is installed for an individual participant or group of participants.

Application for Approval of Programs

12. In evaluating potential DSM/EE measures and programs for selection and implementation, PEC will first perform a qualitative measure screening to ensure measures are:

(a) Commercially available and sufficiently mature.
(b) Applicable to the PEC service area demographics and climate.
(c) Feasible for a utility DSM/EE program.

13. PEC will then further screen EE and DSM measures for cost-effectiveness. With the exception of measures included in a Low-Income Program, an EE or DSM measure with a TRC test result less than 1.0 will not be considered further, unless the measure can be bundled into an EE or DSM Program to enhance the overall cost-effectiveness of that program. Consistent with PEC's agreement with Piedmont Natural Gas and Public Service Company of NC, all EE and DSM measures associated with an end-use that can be served by natural gas must pass the UCT.

14. With the exception of Low-Income Programs, all programs submitted for approval will have a TRC and UCT test result greater than 1.05. PEC will comply, however, with Rule R8-60(i)(6)(iii), which requires PEC to include certain information regarding the measures and programs that it evaluated but rejected in its biennial Integrated Resource Plan, revised as applicable in its annual report.

15. If a program fails the economic screening in Paragraph 14 above, PEC will determine if certain measures can be removed from the program to satisfy the criteria established in Paragraph 14.

16. PEC will contact each party to its most recent DSM/EE cost recovery proceeding by March 1 of each year and provide them with a list and description of programs and measures either currently being considered or planned for future consideration, and seek suggestions for additional programs and measures for consideration.

17. Nothing in this Mechanism relieves PEC from its obligation to comply with Commission Rule R8-68 when filing for approval of DSM or EE measures or programs. As specifically required by Rule R8-68(c)(3)(iii), PEC shall describe the industry-accepted methods to be used to measure, verify, and validate the energy and peak demand savings estimated in its filing for approval of measures and programs, and shall provide a schedule for reporting the savings to the Commission.

Cost Recovery

18. As provided in Rule R8-69 and G.S. 62-133.9(d), PEC shall be allowed to recover, through the DSM/EE rider, all reasonable and prudent costs reasonably and appropriately estimated to be incurred, during the current rate period, for DSM and EE programs that have been approved by the Commission under Rule R8-68. As permitted by G.S. 62 133.9(d), PEC shall be allowed to defer all or a portion of its reasonable and prudent costs to the extent those costs are intended to produce future benefits. Except for administrative

and general expenses (addressed in Paragraph No. 22(c) below), PEC shall be allowed to earn a rate of return at the overall weighted average net-of-tax rate of return approved in PEC's most recent general rate case on all such costs and shall be allowed to amortize the deferred costs over a period of time not to exceed 10 years, unless the Commission determines otherwise.

19. The DSM/EE EMF rider shall reflect the difference between the reasonable and prudent costs incurred during the applicable test period and the revenues actually realized during such test period under the DSM/EE rider then in effect.

20. The cost and expense information filed by PEC pursuant to Commission Rules R8-68(c) and R8-69(f) shall be categorized by measurement unit and vintage year.

21. Pursuant to Commission Rule R8-69(b)(6), the balance in the deferral account, net of deferred income taxes, may accrue a return at the net-of-tax rate of return approved in PEC's most recent general rate proceeding.

<u>Allocation Methodologies</u>

22. Unless the Commission determines otherwise in a G.S. 62-133.9 DSM/EE rider proceeding:

(a) The costs of an approved DSM or EE program will be allocated to the North and South Carolina retail jurisdictions and will only be recovered from those customer classes to which the program is targeted.

(b) No costs of any approved DSM or EE program will be allocated to the wholesale jurisdiction.

(c) Administrative and general costs supporting DSM and EE programs but not directly related to an approved DSM or EE program will be deferred and amortized over a period not to exceed three years.

(d) The allocation factors based upon peak demand and energy sales for each state included in PEC's testimony and exhibits filed in Docket No. E-2, Sub 931 will be the allocation factors used for all program costs in its jurisdictional cost allocations.

<u>Net Lost Revenues</u>

23. When authorized pursuant to Rule R8-69(c) and unless the Commission determines otherwise in a G.S. 62-133.9 DSM/EE rider proceeding, PEC shall be permitted to recover, through the DSM/EE and DSM/EE EMF riders, Net Lost Revenues associated with the implementation of approved DSM and EE measurement units, subject to the restrictions set out below.

24. Net Lost Revenues resulting from an approved measurement unit installed in a given vintage year shall be recovered through the DSM/EE and DSM/EE EMF riders only for

the first 36 months after the installation of the measurement unit. Thereafter, recovery of Net Lost Revenues shall end.

25. Programs or measures with the primary purpose of promoting general awareness and education of EE and DSM activities, as well as research and development activities are ineligible for the recovery of Net Lost Revenues. Pilot programs or measures are also ineligible for the recovery of Net Lost Revenues, unless the Commission approves PEC's specific request that a pilot program or measure be eligible for the recovery of Net Lost Revenues when PEC seeks approval of that pilot program or measure.

26. Recovery of Net Lost Revenues for measurement units installed in a prior vintage year shall cease upon the implementation of new rates approved by the Commission in a general rate case or comparable proceeding to the extent the rates set in the general rate case or comparable proceeding are set to explicitly or implicitly recover those Net Lost Revenues.

27. Overall Net Lost Revenues as measured by any vintage year or the two succeeding vintage years shall be reduced by any increases in revenues during the same periods resulting from any activity by PEC's public utility operations which cause a customer to increase demand or energy consumption, whether or not that activity has been approved pursuant to Rule R8-68.

28. Net Lost Revenues shall be trued-up as follows:

(a) Net Lost Revenues shall be trued-up in the first R8-69 proceeding following the completion and review of a program's or measure's impact evaluation. The true-up shall be based on approved measurement units and shall cover all vintage years, as provided in Paragraphs 23 through 27 above, from the previous measurement unit's impact evaluation or program or measure approval, whichever is more recent.

(b) The true-up factor shall be calculated based on the difference between projected and actual Net Lost Revenues for each measurement unit and vintage year under consideration, accounting for any differences derived from the completed and reviewed measurement unit evaluation including: (1) the projected and actual number of installations per measurement unit; (2) the projected and actual net kilowatt-hour (kWh) and kilowatt (kW) savings per installation; (3) the projected and actual gross lost revenues per kWh and kW saved; and (4) the projected and actual deductions from gross lost revenues per kWh and kW saved.

(c) The combined total of all true-up factors calculated in a given year's Rule R8-69 proceeding shall be incorporated into the DSM/EE EMF rider.

Program Performance Incentive (PPI)

29. When authorized pursuant to Rule R8-69(c), PEC shall be allowed to collect a PPI for each DSM or EE program approved and in effect during a given rate period, subject to the restrictions set out below.

30. Programs or measures with the primary purpose of promoting general awareness of and education about EE and DSM activities, as well as research and development activities, are ineligible for PPI. PEC's Distribution System Demand Response (DSDR) program is ineligible for PPI. Pilot programs or measures are also ineligible for PPI, unless the Commission approves PEC's specific request that a pilot program or measure be eligible for PPI when PEC seeks approval of that program or measure.

31. With the exception of Low-Income Programs or Low-Income Measures, for any vintage year in which a program's or measure's TRC test result is less than 1.00 at the time of the Rule R8-69 cost recovery proceeding, there shall be a rebuttable presumption that the PPI for that program or measure for the applicable vintage year is zero. PEC shall be allowed an opportunity to rebut the presumption that PPI should be zero, by showing the impact of weather, decline in avoided costs, uncontrolled market forces, etc.

32. The PPI shall be based on the net savings of each program or measure as calculated using the UCT. The total of the PPIs for all programs or measures shall be added to PEC's DSM/EE or DSM/EE EMF cost recovery riders, as appropriate.

33. In its annual filing pursuant to Rule R8-69(f), PEC shall indicate, for each program or measure for which it desires a PPI, the annual projected and actual utility costs, participant costs, number of measurement units installed, per kW and kWh impacts for each measurement unit, and per kW and kWh avoided costs for each measurement unit, related to the applicable vintage year installations that it requests the Commission to approve. Upon its review, the Commission will make findings based on PEC's annual filing for each program or measure for which an estimated or trued-up PPI is approved.

34. Unless the Commission determines otherwise in a G.S. 62-133.9 DSM/EE rider proceeding, the amount of the PPI initially to be recovered for a given measurement unit and vintage year shall be equal to 8% for DSM programs and measures and 13% for EE programs and measures, multiplied by the estimated net savings. Estimated net savings shall be calculated by multiplying the number of measurement units projected to be installed specific to a program or measure in a vintage year by the most current estimates of the annual per installation kW and kWh savings over the measurement unit's life and by the most current estimates of the annual kW and kWh avoided costs, subtracting the estimated utility costs over the measurement unit's life related to the projected installations in that vintage year, and discounting the result to determine a net present value. In approving the initial PPI, the Commission will assume that projections will be achieved.

35. Unless the Commission determines otherwise in a G.S. 62-133.9 DSM/EE rider proceeding, the initial PPI shall be converted into a stream of 10 levelized annual payments,

accounting for and incorporating PEC's overall weighted average net-of-tax rate of return approved in PEC's most recent general rate case as the appropriate discount rate.

36. The per kW avoided capacity costs and the per kWh avoided energy costs used to calculate net savings for a vintage year shall be determined annually by PEC using comparable methodologies to those in the most recently approved biennial avoided cost proceeding. PEC's assumptions used in these methodologies, as well as the methodologies, are subject to the Public Staff's review and acceptance at the time PEC files its petition for annual cost recovery pursuant to Rule R8-69 and this Mechanism. Unless PEC and the Public Staff agree otherwise, PEC shall not be allowed to update its avoided capacity costs and avoided energy costs after filing its petition for its annual cost recovery proceeding pursuant to R8-69 and this Mechanism and prior to the Commission's order establishing the rider for that rate period for purposes of calculating the PPI.

37. When PEC files for its annual cost recovery under Rule R8-69, it shall comply with the filing requirements of Rule R8-69(f)(1)(iii), reporting all interim measurement and verification data, even if that data is not final, to assist the Commission and the Public Staff in their review and monitoring of the impacts of the DSM and EE measures.

38. PEC bears the burden of proving all savings and costs included in calculating the PPI. As provided in Rule R8-68(c)(3)(iii), PEC shall be responsible for the measurement and verification of energy and peak demand savings consistently with its measurement and verification plan described in Paragraph 17.

39. The PPI shall be trued-up as follows:

(a) The PPI shall be trued-up in the first R8-69 proceeding following the completion and review of a program's or measure's impact evaluation. The true-up shall include all measurement units specific to the program or measure and shall cover all vintage years since the previous measurement unit's impact evaluation or program or measure approval, whichever is more recent.

(b) The amount of the PPI ultimately to be recovered for a given program or measure and vintage year shall be based on the actual net savings derived from all measurement units specific to the program or measure. Actual net savings shall be calculated by multiplying the number of actual installed measurement units in a vintage year by the verified annual per installation kW and kWh savings over the measurement unit's life and by the annual per kW and kWh avoided costs used in calculating the initial PPI, subtracting the actual vintage year measurement unit costs over the measurement unit's life related to installations in that vintage year and discounting the result to present value.

40. The combined total of all components of the estimated and trued up performance incentive shall be incorporated into the DSM/EE rider and the DSM/EE EMF rider, as appropriate.

DSDR Program

41. The DSDR program is a new EE program as defined by G.S. 62-133.8 and G.S. 62-133.9, and is eligible for recovery of reasonable and prudent costs, as well as Net Lost Revenues, subject to the terms and conditions of Net Lost Revenues set forth hereinabove. The DSDR program is not eligible for recovery of a PPI.

42. The rate of return on investment used to determine the DSDR program capital-related costs included in each annual rider will be based on the then-current capital structure, embedded cost of preferred stock, and embedded cost of debt of the Company (net of appropriate income taxes), and the cost of common equity approved in the Company's then most recent general rate case.

Opt-Out Eligibility Requirement for Industrial Customers and Certain Commercial Customers

43. With the exception of the DSDR Program and any other similarly-situated DSM or EE program (i.e., a program which involves activities and equipment on PEC's side of the meter which provides a direct benefit to the customer and where the customer has no choice but to participate and benefit), commercial customers with annual consumption of 1,000,000 kWh or greater in the billing months of the prior calendar year and all industrial customers who implement or will implement alternative DSM/EE measures may, consistent with Commission Rule R8-69(d), elect to not participate in any utility-offered DSM/EE measures and, after written notification to the utility, will not be subject to the DSM/EE rider and DSM/EE EMF rider. For purposes of application of this option, a customer is defined to be a metered account billed under a single application of a Company rate tariff. For commercial accounts, once one account meets the opt-out eligibility requirement, all other accounts billed to the same entity with lesser annual usage located on the same or contiguous properties are also eligible to opt-out of the DSM/EE rider and DSM/EE EMF rider. Since these rates are included in the rate tariff charges, customers electing this option shall receive a DSM/EE Credit on their monthly bill statement.

Financial Reporting Requirements

44. PEC shall, in conjunction with its quarterly NCUC ES-1 Reports, include all actual program revenues, including PPI and Net Lost Revenues incentives, and costs for purposes of calculating and presenting its regulated earnings to the Commission. PEC shall also provide supplementary schedules which set forth the Company's jurisdictional earnings excluding the effects of its EE and DSM programs; and the earnings impact of its DSM and EE programs on a combined basis as well as on a stand-alone, program-class basis; that is, with earnings from DSM programs, collectively, earnings from EE programs, collectively, shown separately; the earnings impact of each individual DSM and EE program shown separately; and the Company's jurisdictional earnings including actual program revenues, costs, and Net Lost Revenues, but excluding the effects of its PPI revenues. Detailed calculations of the foregoing should also be provided. Such schedules and/or calculations should show, at a minimum, actual

revenues; expenses; taxes; operating income; rate base, including components; and the applicable capitalization ratios and cost rates, including overall rate of return and return on common equity.

Review of Mechanism

45. Unless requested to do so earlier by PEC, the Public Staff, or another interested party, the Commission will initiate a formal review of this Mechanism not later than June 1, 2012.

DOCKET NO. E-2, SUB 951

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application by Carolina Power & Light Company,	)	
d/b/a Progress Energy Carolinas, Inc., for	)	ORDER CONCERNING DSM/EE
Approval of Demand Side Management and	)	RIDER AND DSM/EE EMF RIDER
Energy Efficiency Cost Recovery Rider Pursuant	)	
to G.S. 62-133.9 and Commission Rule R8-69	)	

HEARD: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Wednesday, September 16, 2009, at 10:30 a.m.

BEFORE: Commissioner Lorinzo L. Joyner, Presiding; Chairman Edward S. Finley, Jr.; Commissioner Robert V. Owens, Jr.; Commissioner William T. Culpepper, III; Commissioner Bryan E. Beatty; Commissioner Susan W. Rabon; and Commissioner ToNola D. Brown-Bland

APPEARANCES:

For Progress Energy Carolinas, Inc.:

Len S. Anthony, General Counsel, Progress Energy Carolinas, Inc., Post Office Box 1551, PEB 17A4, Raleigh, North Carolina 27602-1551

For the Using and Consuming Public:

Kendrick C. Fentress, Staff Attorney, Public Staff, North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

Leonard G. Green, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629

BY THE COMMISSION: G.S. 62-133.9(d) authorizes the Commission to approve an annual rider to the rates of electric public utilities to recover all reasonable and prudent costs incurred for adopting and implementing new demand-side management and energy efficiency (DSM/EE) programs. The Commission is also authorized to award incentives to electric utilities for adopting and implementing new DSM/EE programs, including rewards based on the sharing of savings achieved by the programs. Commission Rule R8-69(b) provides that the Commission will each year conduct a proceeding for each electric public utility to establish an annual DSM/EE rider to recover the reasonable and prudent costs incurred for adopting and implementing new DSM/EE measures previously approved by the Commission pursuant to Rule R8-68. Under Rule R8-69, this rider consists of the utility's forecasted costs during the rate period and an experience modification factor (EMF) rider to collect the difference between the utility's actual reasonable and prudent costs incurred during the test period and actual revenues realized during the test period under the DSM/EE rider then in effect.

BACKGROUND

Pursuant to G.S. 62-133.9 and Commission Rule R8-69, on June 4, 2009, Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (PEC or the Company), filed an application and the associated testimony of Robert P. Evans for the approval of a DSM/EE cost recovery rider to recover reasonable and prudent forecasted DSM/EE costs, carrying costs, incremental administrative and general (A&G) costs, Net Lost Revenues and an additional incentive. In addition, PEC asked for approval of an EMF rider and, pursuant to Commission Rule R8-69(b)(2), PEC also requested recovery through the EMF of its costs, including Net Lost Revenues and an additional incentive, incurred up to 30 days prior to the hearing in this proceeding. On June 16, 2009, the Commission issued an Order scheduling a hearing for September 16, 2009, establishing discovery guidelines, providing for intervention and testimony by other parties, and requiring public notice.

On June 17, 2009, the Carolina Utility Customers Association, Inc. (CUCA) filed a petition to intervene, which was allowed July 1, 2009. On June 19, 2009, the Attorney General filed a notice of intervention, which is recognized pursuant to G.S. 62-20. The intervention of the Public Staff is recognized pursuant to G.S. 62-15(d) and Commission Rule R1-19(e). On June 24, 2009, the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II) filed a petition to intervene, which was allowed July 1, 2009. CUCA and CIGFUR II did not participate in the evidentiary hearing in this matter.

On August 17, 2009, PEC filed the supplemental direct testimony and exhibits of witness Evans. On August 26, 2009, the Public Staff filed a Motion to Extend Time to File Direct Testimony, which the Commission allowed by Order issued August 27, 2009.

On August 31, 2009, Christopher Simmler made a filing in this docket captioned Notice of Intent to be a Public Witness/Petition to Intervene. On September 8, 2009, the Commission issued an Order indicating that Mr. Simmler could choose to testify as a public witness at the hearing scheduled for September 16, 2009, or he could petition to intervene within five days.

On September 2, 2009, the Commission issued a Pre-Hearing Order Requiring Verified Information that requested certain information be filed by PEC. On September 10, 2009, PEC filed verified pre-hearing exhibits in response to the Commission's Order, as well as the affidavits of publication of the required notices of the proceeding.

On September 9, 2009, the Public Staff filed the testimony and exhibits of Michael C. Maness and the affidavits of Jack L. Floyd and Jay B. Lucas. On September 11, 2009, PEC filed the rebuttal testimony of witness Evans, and on September 15, 2009, the Public Staff filed the supplemental testimony of witness Maness.

OTHER RELEVANT DOCKETS

On June 15, 2009, the Commission issued an Order Approving Agreement and Stipulation of Partial Settlement, Subject to Certain Commission-Required Modifications in PEC's first DSM/EE rider proceeding, Docket No. E-2, Sub 931. In that Order, the Commission approved, with certain modifications, an Agreement and Stipulation of Partial Settlement, between PEC, the Public Staff and Wal-Mart Stores East, LP and Sam's East, Inc. (Wal-Mart) setting forth the terms and conditions for approval of DSM/EE measures and the annual DSM/EE rider proceedings pursuant to G.S. 62-133.9, Commission Rule R8-68, and Commission Rule R8-69.

On July 13, 2009, PEC filed a Motion for Reconsideration and Stay regarding certain decisions made by the Commission in Docket Nos. E-2, Sub 926 and Sub 931. The request for reconsideration involved, among other things, the Commission's decision that industrial and large commercial customers may not opt-out of cost recovery with respect to PEC's distribution system demand response (DSDR) program. PEC also filed a Motion for Full Commission Review of its Motion for Reconsideration and Stay. The resolution of these issues directly affects the calculation of the DSM/EE and DSM/EE EMF riders that PEC has applied for in Docket No. E-2, Sub 951.

On July 20, 2009, the Commission issued an Order Requesting Comments on Motion for Reconsideration and Order on Motion for Stay granting PEC's request to stay its compliance requirements relative to DSDR program costs pending the Commission's final decision on the motions for reconsideration. After receiving comments and reply comments, on August 24, 2009, the Commission issued an Order on Motion for Full Commission Review setting the matter for oral argument before the full Commission on September 16, 2009, following the conclusion of the evidentiary hearing in the Company's Sub 951 docket. The Commission issued an Order on PEC's Motion for Reconsideration on November 25, 2009.

PUBLIC AND EVIDENTIARY HEARING

The case came on for hearing as scheduled on September 16, 2009. Mr. Simmler appeared as a public witness. He testified that he strongly disagreed that the DSDR program was either a DSM or an EE program because it has a greater supply-side resource focus. Simmler Exhibit 1 was received into evidence.

The pre-filed direct, supplemental direct, and rebuttal testimony of PEC witness Evans was received into evidence, as well as Evans Exhibits Nos. 1-10, Evans Supplemental Exhibits Nos. 1 -11, and witness Evans presented testimony on behalf of the Company. The affidavits of Public Staff witnesses Floyd and Lucas were received into evidence. The pre-filed direct and supplemental testimony of Public Staff witness Maness was received into evidence and witness Maness presented testimony of behalf of the Public Staff. The Commission's June 15, 2009 Order in Docket No. E-2, Sub 931 was judicially noticed.

The Commission initially scheduled proposed orders to be filed on October 26, 2009. On September 21, 2009, the Commission issued a Post-Hearing Order requiring PEC to file certain additional information. PEC timely complied with the Commission's Order, filing Verified Post-Hearing Exhibits on September 28, 2009 (PEC's Post-Hearing Exhibits).

On October 22, 2009, the Public Staff filed a Motion for Extension of Time for all parties to file briefs or proposed orders from October 26, 2009 until November 2, 2009. By Order issued October 23, 2009, the Commission allowed the Public Staff's request. On November 2, 2009, PEC and the Public Staff filed proposed orders. Also on November 2, 2009, PEC filed Verified Late-Filed Exhibits reflecting all of the adjustments discussed in PEC's Post-Hearing Exhibits, PEC's testimony, and the Public Staff's testimony.

On November 5, 2009, public witness Simmler filed a letter with the Commission expressing gratitude for the efforts advanced in these proceedings.

On November 19, 2009, PEC filed Revised Tariffs to Reflect Fuel Charge, DSM/EE, and REPS Adjustments in Docket Nos. E-2, Subs 847, 931, 949 and 951. In that submittal PEC noted that the Commission had not yet issued its orders in Docket Nos. E-2, Subs 931 and 951 to establish new DSM/EE riders and stated that, "Given that it is possible there may not be sufficient time for PEC to revise its DSM/EE riders and billing process between the time the Commission issues its orders in Subs 931 and 951 and the date the new rates are to take effect (December 1, 2009), PEC and the Public Staff recommend that PEC be allowed to implement PEC's proposed DSM/EE riders effective December 1, 2009. Following the issuance of the Commission's orders in Subs 931 and 951, PEC will, as quickly as practicable, adjust its DSM/EE riders accordingly..." PEC also filed a proposed customer notice for review and approval by the Commission. On November 24, 2009, the Commission issued an Order Approving Amended Public Notice and Revised Tariffs and Riders.

Based upon PEC's application, the testimony and exhibits received into evidence at the hearing, and the record as a whole, the Commission now makes the following

FINDINGS OF FACT

1. PEC is a duly organized corporation existing under the laws of the State of North Carolina and is engaged in the business of developing, generating, transmitting, distributing, and selling electric power to the public in North and South Carolina, and is subject to the jurisdiction of the North Carolina Utilities Commission (NCUC) as a public utility. PEC is lawfully before

this Commission based upon its application filed pursuant to G.S. 62-133.9 and Commission Rule R8-69.

2. The test period for the purposes of this proceeding is the 12-month period, April 1, 2008 through March 31, 2009.

3. The rate period for the purposes of this proceeding is the 12-month period, December 1, 2009 through November 30, 2010.

4. Pursuant to Commission Rule R8-69(b)(2), PEC is entitled to include in its DSM/EE EMF rider a true-up of the net recovery of its costs, plus its incentives, experienced up to 30 days prior to the hearing. In this proceeding, such period is referred to as the prospective period, which is April 1, 2009 through July 31, 2009.

5. For purposes of this proceeding, PEC has requested the recovery of costs and incentives related to the following DSM/EE programs: DSDR; EnergyWise™ Commercial, Industrial, and Governmental (CIG) Demand Response; Residential Home Advantage; Residential Home Energy Improvement; Residential Low Income-NES; CIG EE; Residential Solar Water Heater Pilot; and Compact Fluorescent Light (CFL) Pilot. The Commission has approved each of these programs pursuant to Commission Rule R8-68.

6. PEC also requested recovery of incremental A&G expenses not directly related to specific DSM or EE programs. The incremental costs are $3,118,125 for the test period, $1,046,120 for the prospective period and $3,317,900 for the rate period. It is appropriate for PEC to recover these costs, with the prospective and rate period costs subject to further review in PEC's next annual DSM/EE rider proceeding. PEC should file additional information about the productivity and costs of its general education and awareness initiatives in that proceeding.

7. PEC also requested recovery of carrying charges of $497,420 for the test period, $339,797 for the prospective period, and $2,662,853 for the rate period. PEC's proposed carrying charges are consistent with the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931, PEC's first DSM/EE rider proceeding, and are appropriate for recovery in this proceeding, with the prospective and rate period costs subject to further review in PEC's next annual DSM/EE rider proceeding.

8. PEC requested incentives of $30,019 for the prospective period and $1,673,558 for the rate period. PEC should be allowed to adjust its DSM/EE revenue requirement to estimate its Net Lost Revenue incentive for event-driven DSM and EE measures on the basis of actual events, as opposed to annualized estimates. PEC's proposed incentives are consistent with the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931, PEC's first DSM/EE rider proceeding and are appropriate for recovery in this proceeding, with the prospective and rate period costs subject to further review in PEC's next annual DSM/EE rider proceeding.

9. It is appropriate for PEC to recalculate its revenue requirements to conform with this Order and the Commission's November 25, 2009 Order Granting Motions for Reconsideration in Part in Docket Nos. E-2, Subs 926 and 931. The revenue requirements to be

recalculated are as follows: (1) For purposes of its DSM/EE EMF rider, PEC's reasonable and prudent North Carolina retail test year expenses for its DSM/EE costs, incremental A&G costs, carrying charges, and incentives, are $3,658,728. Subject to review in PEC's next annual DSM/EE rider proceeding, PEC's North Carolina retail DSM/EE program expenses, for the prospective period, plus incremental A&G costs, carrying charges, and incentives, are $1,650,671. The sum of these figures has been reduced by $579,729, representing revenues recovered from April 1, 2008 to July 31, 2008, to avoid double counting revenues previously recognized in Docket No. E-2, Sub 931. Therefore, $4,729,670 is appropriate to use to develop the DSM/EE EMF revenue requirement. (2) For purposes of the DSM/EE rider to be set in this proceeding and subject to review in PEC's next DSM/EE rider proceeding, PEC's reasonable and appropriate estimate of its North Carolina retail DSM/EE program expenses, plus its incremental A&G costs, carrying charges and incentives, for the rate period, is $20,740,441, and this is the appropriate amount to use to develop the DSM/EE revenue requirement.

10. It is appropriate for PEC to prospectively adjust its DSM/EE rider and subsequent DSM/EE EMF riders to recognize the impact of uncollectible billed DSM/EE revenues and the DSM/EE revenue reduction caused by PEC's 5% Residential Service Energy Conservation Discount Rider RECD-1C (5% energy conservation discount). In addition, PEC should address whether amending its 5% energy conservation discount rider, so that DSM/EE charges would not be subject to the 5% energy conservation discount, would be a better long-term solution.

11. The reasonable and prudent DSM/EE EMF riders for the Residential, General Service, and Lighting rate classes are: a decrement of 0.025 cents per kilowatt hour, a decrement of 0.008 cents per kilowatt hour, and an increment 0.012 cents per kilowatt hour, respectively,[1] and the reasonable and prudent DSM/EE riders to be charged by PEC during the rate period for the Residential, General Service, and Lighting rate classes are: 0.078 cents per kilowatt hour; 0.069 cents per kilowatt hour, and 0.049 cents per kilowatt hour, respectively, subject to recalculation to recognize the impact of the Commission's Order Granting Motions for Reconsideration in Part in Docket Nos. E-2, Sub 926 and Sub 931, as well as the Commission's decisions in this Order. PEC should file those recalculations as soon as reasonably possible.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-4

These findings of fact are essentially informational, procedural, and jurisdictional in nature and are uncontroverted. The rate period, test period, and prospective period proposed by PEC are supported by the Public Staff and are consistent with Commission Rule R8-69.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

The evidence for this finding of fact can be found in the testimony and exhibits of PEC witness Evans, the affidavit of Public Staff witness Floyd, PEC's Post-Hearing Exhibits and various Commission orders.

[1] These rates, as well as those discussed in the Evidence and Conclusions for these Findings of Fact, all exclude gross receipts taxes and the NCUC regulatory fee.

PEC witness Evans and Public Staff witness Floyd agreed that, for purposes of this proceeding, PEC had requested recovery of costs and incentives related to the following programs: DSDR, CIG Demand Response, EnergyWise™, Residential Home Advantage, Residential Home Energy Improvement, Residential Low Income, CIG EE, Residential Solar Water Heating Pilot, and CFL Pilot program. The Commission approved these programs in Docket Nos. E-2, Subs 908, 926, 927, 928, 935, 936, 937, 938, 952, and 953.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

The evidence for this finding of fact can be found in the affidavit of Public Staff witness Floyd and the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931, which directed the Public Staff to monitor and review PEC's A&G costs on an ongoing basis, with particular emphasis on the effectiveness of PEC's general EE education programs, and to report its findings to the Commission during PEC's next and future DSM/EE rider proceedings. Witness Floyd reviewed PEC's A&G costs directly related to specific programs, as well as those related to its general education and awareness program. He testified that his review of PEC's A&G costs directly related to specific programs showed that they have been incorporated into the costs shown in column 1 of Supplemental Evans Exhibit No. 2 for the rate, test, and prospective periods. In response to a data request from the Public Staff, PEC indicated that these program-related A&G costs total $581,318.

With respect to PEC's general education and awareness programs, witness Floyd stated that PEC's 2008 Integrated Resource Plan described its "Save the Watts" campaign, online assessment tools, and energy saving tips, saying PEC designed them to provide consumers information about DSM/EE programs available to them. In response to a data request from the Public Staff, PEC also listed the following general education and awareness initiatives:

1. Customized Home Energy Reports – an on-line survey that reveals energy saving tips based on customer responses;
2. Energy Efficiency World – Internet-based resources for classroom activities;
3. Social Networking – Energy tips made available through websites such as Twitter;
4. Community Events – Distribution of information at community sponsored events.
5. Educational Materials – brochures and signage describing PEC's DSM/EE programs, and directing consumers to the Save the Watts website; and,
6. Newspaper inserts for school-aged children about energy saving tips and renewable energy.

Witness Floyd testified that PEC indicated that its incremental general A&G costs for those programs are $1,570,000.

Witness Floyd testified that PEC's primary general education and awareness initiative is its "Save the Watts" campaign. He determined that $1,461,420 (48%) of the $3,031,420 included in column 3 of Supplemental Evans Exhibit No. 2 is associated with "Save the Watts"

costs during the test and prospective periods. Witness Floyd confirmed that PEC used a three-year amortization for general A&G costs not directly related to an approved DSM or EE program, as directed by the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931.

Witness Floyd explained that determining the efficacy of general education and awareness initiatives not specifically designed to result in quantified capacity or energy savings is difficult. He testified that these general education initiatives help to transform the market by making customers increasingly receptive to specific DSM/EE program offerings, as well as by providing information to customers about how they can save money on their utility bills through either specific utility programs or other energy saving activities.

Witness Floyd further testified that North Carolina does not have a long history of electric utilities offering extensive EE and DSM programs; consequently, he believed it was reasonable to expect PEC to invest in marketing and consumer education initiatives to increase its customers' interest in and reception of specific DSM/EE programs. Witness Floyd recommended no adjustment to PEC's A&G costs related to general education initiatives in this proceeding and stated that the Public Staff will continue to monitor these general education and awareness initiatives, as well as the A&G costs associated with them.

The Commission agrees with witness Floyd that it is difficult to measure the benefits of general education and awareness initiatives in terms of energy savings. However, it is possible to develop data regarding, for example, the number of specific communications (such as television and newspaper ads), the audience size of the media used, the number of website visitors, the number of participants in on-line surveys, and the number of customers and school children reached via specific communications efforts. Such data would better allow parties and the Commission to assess whether PEC's efforts in this regard are worthwhile and whether the expenditures are reasonable and prudent. Since no party opposed the general education and awareness expenditures described in witness Floyd's affidavit, and, based on the Public Staff and PEC's testimony that the expenditures are reasonable and prudent, the Commission finds and concludes that the expenditures are, in fact, reasonable and prudent. Nonetheless, the Commission concludes that PEC should be required to provide verified statistical data regarding the customer reach and effectiveness of PEC's general education programs in its next DSM/EE rider application. The Commission will also request that the Public Staff continue to review PEC's A&G expenses and report its findings to the Commission in PEC's future DSM/EE rider proceedings.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence for this finding of fact is contained in the testimony and exhibits of PEC witness Evans, including PEC's Verified Late-Filed Exhibits. No party disputed PEC's carrying costs in this proceeding, and the costs are consistent with the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931. Therefore, the Commission finds and concludes that such costs are reasonable and prudent, with the prospective and rate period carrying charges subject to further review during PEC's next annual DSM/EE rider proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence for this finding of fact is found in PEC witness Evans' testimony and exhibits, including PEC's responses to the Commission's September 21, 2009 Post-Hearing Order Requiring Verified Information, and PEC's Verified Late-Filed Exhibits. PEC's response to the Commission's September 21, 2009 Order regarding the estimation of lost sales resulting from its DSDR program indicated that in hindsight, PEC believed the determination of Net Lost Revenues for event-driven measures, such as DSDR program activations, are best determined on the basis of actual events, as opposed to annualized estimates. In its response, PEC proposed that it be allowed to base its Net Lost Revenue estimates for event-driven measures on the frequency and duration of actual events, as opposed to relying on annualized forecasts.

PEC incorporated this proposed methodology in its Verified Late-Filed Exhibit No. 1, thereby removing $88,817 of Net Lost Revenues associated with the DSDR, EnergyWise™ and CIG Demand Response programs from PEC's DSM/EE rider request. No party filed any response opposing PEC's adjustment in this regard. The Commission finds that PEC's proposed approach is reasonable and concludes that the Company should be allowed to adjust its DSM/EE revenue requirement to reflect its Net Lost Revenues for event-driven DSM and EE measures on the basis of actual events. PEC's proposal to estimate lost sales based on actual energy-saving and demand-reducing events, as opposed to estimates of such events, will result in more accurate rider calculations. For that reason, the Commission finds and concludes that PEC's proposal is reasonable and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for this finding of fact can be found in the testimony and exhibits of PEC witness Evans, the affidavits of Public Staff witnesses Lucas and Floyd, PEC's Verified Late-Filed Exhibits and the Commission's Orders in Docket No. E-2, Sub 931.

PEC's Verified Late-Filed Exhibits reflected all of the revenue requirement adjustments that had been agreed to by the parties. PEC witness Evans calculated PEC's North Carolina retail test period DSM/EE cost in the amount of $3,658,728. PEC made a downward adjustment of $579,729 to test period expenses for April 1, 2008 through July 31, 2008, to avoid double recovery of costs during this period. For the prospective period, he calculated PEC's North Carolina retail DSM/EE cost to be $1,650,671. He testified that the sum of these amounts, $4,729,670, is used to develop the DSM/EE EMF revenue requirement (net of test period and prospective period DSM/EE rate recoveries). Witness Evans calculated PEC's rate period North Carolina retail cost to be $20,740,441.

Witness Evans testified that he had adjusted his initial calculations, contained in PEC's June 4, 2009 filings, to reflect the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931. With regard to A&G expenses, witness Evans testified in his Supplemental Testimony that PEC had reduced the amortization period from ten years to three years. In other words, PEC's A&G costs are spread over three years instead of the ten years reflected in PEC's initial filing. This change increased the revenue requirement by $3,776,218. However, witness Evans noted that as a result of recovering deferred expenses over a shorter time period, carrying costs

are lessened. Applicable reductions in the carrying charges were recognized in witness Evan's August 17, 2009 updated testimony and exhibits.

Witness Evans also described changes in the revenue requirement that resulted from recognizing the Internal Revenue Code Section 199 Domestic Production Activities Deduction. This deduction provides businesses engaged in a qualified production activity with tax deductions from net income. Portions of PEC's operations qualify for this deduction and, by association, a portion of this credit applies to PEC's DSM/EE activities. Witness Evans estimated and applied this reduction to PEC's marginal income tax rate for 2009 in the amount of 1.1% for 2009 activities. He further testified that an estimated marginal income tax rate reduction of 1.6% had been applied to 2010 activities. Witness Evans explained that Section 199-related income tax credits influence the Program Performance Incentive (PPI), DSDR program tax liabilities, and carrying costs. In total, a revenue requirement reduction of approximately $190,000 results from this provision.

No party disputed witness Evans' adjustments as described above.

Public Staff witness Lucas testified that he and Public Staff Accountant Johnson performed on-site audits of PEC's DSM/EE transaction journals for the test period in this docket. Their review included the months of April 2008 through March 2009, and the prospective period from PEC's first DSM/EE rider proceeding (Docket No. E-2, Sub 931). The purpose of the audits was to review the reasonableness and prudence of the expenditures recorded in those journals. Witness Lucas also reviewed responses to data requests that detailed several expenditures. Witness Lucas testified that based on his review, PEC's expenditures during the test period appeared to be reasonable and prudent.

Public Staff witness Floyd testified that under G.S. 62-133.9, Commission Rule R8-69, and the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931, PEC is allowed to recover through the DSM/EE rider all reasonable and prudent costs reasonably and appropriately estimated to be incurred during the current rate period for DSM and EE programs that have been approved under Commission Rule R8-68. The DSM/EE EMF rider is also intended to reflect the difference between the reasonable and prudent costs incurred during the applicable test period and the revenues actually realized during such test period under the DSM/EE rider then in effect. According to witness Floyd, the Public Staff sampled invoices related to the test period to determine if the costs incurred were reasonable and eligible for recovery through the DSM/EE EMF rider. Witness Floyd reported that, based on its review, the Public Staff concluded that the program costs incurred during the test period appeared reasonable, prudent, and eligible for recovery though the DSM/EE EMF rider.

Although the Commission classified the DSDR program as an EE program in its June 15, 2009 Order in Docket No. E-2, Sub 931, PEC did not modify its jurisdictional allocations and the customer base for DSDR program recovery in this docket to conform with that Order, pending the Commission's decision on PEC's Motion for Reconsideration and Stay (filed July 13, 2009). DSDR program cost allocations between North Carolina and South Carolina, as well as the potential for industrial and large commercial customers to opt-out of DSDR program costs, were the major issues raised by PEC's Motion. On November 25, 2009, the Commission issued its Order Granting Motions for Reconsideration in Part. In that Order,

the Commission reversed its earlier decision and found that industrial and large commercial customers may, in fact, opt-out of all DSM/EE program costs, including those for the DSDR program. The Commission, however, confirmed its initial decision that the DSDR program is an EE program, rather than a DSM program, and that its costs should be allocated between North Carolina and South Carolina on the basis of energy consumption (rather than on the basis of peak demand). PEC's compliance filing in this docket must conform with the Commission's decisions on these two issues.

Witness Floyd indicated that he had reviewed costs related to the prospective and rate periods for each approved program. Based on his review of the initial program approval filings and the cost recovery proceeding in Docket No. E-2, Sub 931, witness Floyd found the program costs included in the prospective and rate periods to be reasonable and appropriate. These costs will be further reviewed in future DSM/EE rider proceedings for reasonableness and prudence.

The Commission's June 15, 2009 Order in PEC's first DSM/EE rider proceeding (Docket No. E-2, Sub 931) generally approved PEC's ability to earn and recover from customers a Net Lost Revenue incentive and a PPI. Both of these incentives are to be estimated by program, collected from customers in the DSM/EE rider and DSM/EE EMF rider, and then trued-up in subsequent rider proceedings based on verified energy and demand savings. The June 15, 2009 Order directed PEC to eliminate both incentives for the Company's CFL Pilot program. This resulted in PEC reducing the initial revenue requirement requested in its June 4, 2009 filing in this docket (its second DSM/EE rider proceeding) by $138,761 (PPI) and $662,641 (Net Lost Revenue incentive). In total, these adjustments reduced PEC's revenue requirement by $801,402. Witness Floyd noted the Commission's decision in Docket No. E-2, Sub 931 that pilot programs are ineligible for incentives, unless specifically requested and approved by the Commission. Witness Floyd confirmed that PEC had removed the incentives associated with the Solar Water Heating and CFL pilot programs in its August 17, 2009 updated Evans testimony.

Public Staff witness Maness testified that the Public Staff had recommended to PEC that for purposes of the PPI calculation, it reduce its per kilowatt and kilowatt hour avoided costs to correspond with the assumptions and methods approved by the Commission in the most recent Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities (Docket No. E-100, Sub 117). In that proceeding, PEC agreed to revise several of the assumptions contained in its pre-filed testimony concerning its discount rate, the projected inflation rate, its inclusion of the income tax deductions associated with Section 199 of the American Jobs Creation Act of 2004, and its short-term price forecasts for natural gas, oil, and coal. Witness Maness reported that PEC witness Evans' August 17, 2009 Supplemental Testimony included the Section 199 tax deductions. Public Staff witness Maness also testified that the Company had agreed to employ avoided costs, inflation, and discount rate assumptions used to develop the rates approved by the Commission in Docket No. E-100, Sub 117 for use in its PPI calculations. This modification reduced the revenue requirement for the rate period by $3,645, as reflected in PEC's Verified Late-Filed Exhibits.

Witness Maness further testified that on pages 11 and 12 of PEC witness Evans' June 4, 2009 testimony, witness Evans explained that to determine the Net Lost Revenue rate, PEC reduces the average retail rate for each customer class by, among other items, "the average

fuel component of the rate." PEC had also used this method in its first DSM/EE rider proceeding (Docket No. E-2, Sub 931). Witness Maness noted that this statement appears to be inconsistent with the provisions of the Commission-approved Cost Recovery and Incentive Mechanism[1], which defines Net Lost Revenues, in part, as being "net of marginal costs." Witness Maness explained that in most, if not all, hours, the marginal fuel cost rate differs from the average fuel component of any given retail rate. However, because of the dollar-for-dollar true-up of fuel costs, any difference between fuel revenues lost as a result of a DSM/EE program and marginal fuel costs thereby avoided will serve to increase or decrease the under- or over-recovery of fuel and fuel-related costs measured in the fuel clause proceedings. Because this difference will be reflected in the fuel and fuel-related cost EMF, witness Maness confirmed that the Public Staff considered it reasonable to utilize "the average fuel component of the rate" to determine Net Lost Revenues for purposes of PEC's DSM/EE cost recovery proceedings.

With respect to Net Lost Revenues and PPI, the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931 provides that they shall be trued-up in the first R8-69 proceeding following completion and review of a program or measure's impact evaluation. Public Staff witness Floyd reviewed the programs that were the subject of PEC's application. He stated that the only measurement units in place during the test period in this proceeding are associated with the Residential Home Advantage program. The measurement and verification of actual kW and kWh savings achieved by these measurement units were not completed for purposes of the true-up of the Net Lost Revenue or the PPI incentive as described in Paragraphs 28. (a) and (b) and 39. (a) and (b), respectively, of PEC's Commission-approved Cost Recovery and Incentive Mechanism[2]. Therefore, the Commission concludes that no additional adjustment to the incentives portion of PEC's DSM/EE riders is appropriate at this time. True-ups on the basis of actual energy and capacity savings will be considered in subsequent DSM/EE rider proceedings as PEC completes measurement and verification analyses of its programs.

After consideration of the above adjustments requested by or agreed to by PEC, the Company's proposed North Carolina retail test period DSM/EE cost is $3,658,728, with a downward adjustment of $579,729 to test period expenses for April 1, 2008 through July 31, 2009 to avoid double recovery of costs during this period. For PEC's prospective period, PEC's ultimately proposed North Carolina retail DSM/EE cost is $1,650,671. Thus, the proposed net North Carolina retail test and prospective period DSM/EE cost is $4,729,670. PEC's ultimately proposed rate period North Carolina retail DSM/EE cost is $20,740,441. The Public Staff concurred in these amounts.

With the exception of the Public Staff on certain issues discussed later in this Order, no party presented any evidence that PEC's test period, prospective period, and rate period costs were not reasonable and prudent.

G.S. 62-133.9 provides that PEC is allowed to recover its reasonable and prudent costs for adopting and implementing new DSM and EE programs, as well as, in certain circumstances, incentives for doing so, through an annual rider. Under Commission Rule R8-68(f), the

[1] Appendix A of Order Approving Agreement and Stipulation of Partial Settlement, Subject to Certain Commission-Required Modifications, Docket No. E-2, Sub 931, dated June 15, 2009.
[2] Id.

reasonable and prudent costs of adopting and implementing new DSM or EE measures approved under that rule are eligible for recovery through the annual rider described in G.S. 62-133.9 and Rule R8-69. Commission Rule R8-68(f) further provides that the Commission may consider in the annual rider proceeding whether to approve any utility incentive, which may include Net Lost Revenues, pursuant to G.S. 62-133.9(d).

Commission Rule R8-69 sets forth the cost recovery process for DSM and EE measures. It provides, *inter alia*, that each year the Commission shall conduct a proceeding for each electric public utility to establish an annual DSM/EE rider, which shall consist of a reasonable and appropriate estimate of the expenses expected to be incurred by the electric public utility during the rate period, for adopting and implementing new DSM and EE programs. These expenses will be further modified through a DSM/EE EMF rider, which will reflect the difference between reasonable expenses prudently incurred by the electric public utility during the test period and the revenues that were actually realized during the test period under the DSM/EE rider then in effect. Moreover, Rule R8-69 provides that, upon the request of the electric public utility, the Commission shall also incorporate the experienced over-recovery or under-recovery of costs up to thirty days prior to the date of the hearing in its determination of the DSM/EE rider, provided that the reasonableness and prudence of these costs shall be subject to review in the utility's next annual DSM/EE rider proceeding.

In addition to the terms of Commission Rule R8-69, the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931 provided that it is not reasonable or appropriate to allow recovery of incentives for PEC's CFL Pilot Program; however, PEC may recover over the next ten years, with a carrying charge on the unamortized balance, its reasonable and prudent North Carolina retail test period capitalized operations and maintenance costs for that program as stipulated. Also, the Commission's June 15, 2009 Order provided that PEC may amortize the incremental A&G costs supporting its DSM and EE programs over three years, rather than over ten years.

Both Commission Rule R8-69 and the June 15, 2009 Order require that PEC bear the burden of proving the reasonableness and prudence of its incurred costs, its calculations of utility incentives, and the justification for including those incentives in the annual rider.

The Commission concludes that PEC has, with its proposed adjustments and the Public Staff's recommended adjustments, complied with G.S. 62-133.9, Commission Rule R8-69, and the terms and conditions of the June 15, 2009 Order in Docket No. E-2, Sub 931 with regard to calculating its costs and incentives (including Net Lost Revenues) for the test, prospective, and rate periods at issue in this proceeding (with the exception of DSDR program costs, which are addressed in the Commission's November 25, 2009 Order Granting Motions for Reconsideration in Part in Docket Nos. E-2, Subs 926 and 931). In addition, PEC's use of "the average fuel component of the rate" to determine Net Lost Revenues as described by Public Staff witness Maness is reasonable and therefore, is approved. The Commission recognizes that PEC incorporated these modifications into its Verified Late-Filed Exhibits.

Therefore, the Commission concludes that for purposes of the DSM/EE EMF rider to be set in this proceeding, and subject to a re-allocation of DSDR program costs, PEC's reasonable

and prudent North Carolina retail test year expenses for its DSM/EE costs, plus its incentives and carrying charges, are $3,658,728. Similarly, subject to review in PEC's next annual DSM/EE rider hearing, PEC's North Carolina retail DSM/EE expenses, for the prospective period, plus its incentives and carrying charges, are $1,650,671, subject to a re-allocation of DSDR program costs. The sum of these figures should be reduced by $579,729, representing activities from April 1, 2008 to July 31, 2008, to avoid double counting activities previously recognized in Docket No. E-2, Sub 931. Therefore, $4,729,670 is appropriately used to develop the DSM/EE EMF revenue requirement (net of test period and prospective period DSM/EE rate recoveries), subject to a re-allocation of DSDR program costs. Finally, for purposes of the DSM/EE rider to be set in this proceeding and subject to review in subsequent DSM/EE rider hearings, the reasonable and appropriate estimate of PEC's North Carolina retail DSM/EE expenses, plus its incentives and carrying charges, for the rate period, is $20,740,441, subject to a re-allocation of DSDR program costs. PEC's compliance filing in this proceeding should recalculate these revenue requirements as discussed further on page 22 of this Order.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence for this finding of fact can be found in the testimony of PEC witness Evans and the testimony of Public Staff witness Maness.

Witness Evans discussed two other factors that it included in calculating PEC's proposed DSM/EE riders. According to witness Evans, ignoring these two factors would diminish PEC's ability to recover all of its costs relative to new DSM and EE programs. The first of these factors is the Company's 5% energy conservation discount. Residential customers whose dwellings meet certain efficient building criteria receive a conservation discount of 5% on the energy charge (and demand charge, if applicable) portion of their electric bill. Since the DSM/EE rider is part of the energy charge portion of the bill, and with more than 25% of PEC's North Carolina residential energy usage being discounted through the 5% energy conservation discount, an adjustment is necessary to ensure PEC recovers all of its "new"[1] DSM/EE costs. In addition, witness Evans explained, uncollectible accounts hamper PEC's ability to recover all of its new DSM/EE costs. While the 5% energy conservation discount impacts only residential billings, uncollectible billings impact residential and non-residential billings alike. Witness Evans further testified that because PEC never receives DSM/EE revenues from its uncollectible accounts and the discounted revenue associated with the 5% energy conservation discount, it is necessary to adjust the DSM/EE rider derivation to be certain that PEC recovers its DSM/EE revenue requirement in full. Witness Evans then explained that to account for both the uncollectible billings and the 5% energy conservation discounts, PEC developed adjustment factors. He provided that the Residential adjustment factor is 1.7797 percent and the General Service adjustment factor is 0.1020 percent. Finally, witness Evans offered to true-up these estimates if actual results vary from these amounts.

[1] "New" DSM costs are costs for programs approved pursuant to G.S. 62-133.9 that are eligible for recovery in an electric public utility's DSM/EE rider.

In his direct testimony, Public Staff witness Maness argued that the Commission should disallow PEC's proposal to adjust its DSM/EE riders due to uncollectibles and the 5% energy conservation discount. Witness Maness characterized PEC's proposal as a "gross-up" of the riders.

Witness Maness explained that "gross-up" refers to calculations made to a revenue requirement to recognize that certain amounts will be removed from any collected dollar of revenue to pay for an extraneous item before the remainder of that dollar can be used to recover the underlying utility cost. According to witness Maness, a common example of an item for which a gross-up factor must be applied is the North Carolina gross receipts tax (GRT), which is paid by electric utilities at a rate of 3.22% of revenues. The Commission has typically allowed for the gross-up of GRT. Witness Maness recounted that in PEC's most recent general rate case, Docket No. E-2, Sub 537 (1988), the only revenue-related cost item upon which a gross-up was provided was GRT. At that time, the NCUC Regulatory Fee did not exist; uncollectibles and the 5% energy conservation discount existed, but were not included in the gross-up factors. Therefore, witness Maness testified that it was inherently assumed that any additional uncollectibles expense or discount amounts resulting from the rate increase granted by the Commission would be recovered in the approved rates, along with other cost of service items, without the need to adjust rates to provide for gross-up.

Witness Maness disagreed with PEC's proposal to increase its DSM/EE and DSM/EE EMF riders by grossing-up for uncollectibles and the 5% energy conservation discount for several reasons. First, he noted that PEC used a South Carolina study to estimate the uncollectibles rate in North Carolina. He preferred that any uncollectibles gross-up factor be based on North Carolina's uncollectibles. Second, even though both uncollectibles and the 5% energy conservation discount existed at the time of PEC's last general rate case, no amount related to these items was included in the gross-up factor at that time. Witness Maness did not believe that the Commission should find those items needed a gross-up factor between general rate cases, when it did not find that those items required a gross-up factor in the last general rate case, even though the costs existed at that time. Witness Maness distinguished between these two items and the Regulatory Fee by noting that, even though the Commission had begun including that fee in PEC's gross-up factor for various rate proceedings, the Regulatory Fee did not exist at the time of PEC's last general rate case.

Witness Maness also testified that determining the appropriate uncollectibles and 5% energy conservation discount gross-up factors would be a matter of judgment from year to year. The rates are not likely to remain the same over time, and witness Maness believed that it may not be appropriate simply to use the actual experience during a year to determine the appropriate factors for a pending case. Witness Maness asserted instead that some sort of normalization would be appropriate. He contrasted that with the rates used for GRT and the Regulatory Fee, which are set by statute. Since the GRT and NCUC Regulatory Fee do not change unless the statute changes, witness Maness explained, the rates used for GRT and the Regulatory Fee are easier to determine with certainty. Witness Maness predicted that if PEC's proposal were to be approved, the necessity of applying continual judgment to determine these gross-up factors would introduce unintended issues into the DSM/EE cost recovery proceedings. In addition to determining the appropriate and reasonable DSM/EE costs to be recovered under

G.S. 62-133.9 and Rule R8-69, the Commission would also need to address uncollectibles expense and the 5% energy conservation discount.

Witness Maness also concluded that the 5% energy conservation discount could be regarded as an EE program that predates G.S. 62-133.9, with the 5% discount being a program incentive paid to residential ratepayers who meet the efficiency requirements of the tariff. Witness Maness reported that he was advised by counsel that including a portion of the costs related to the 5% energy conservation discount in the DSM/EE cost recovery process would be inappropriate because it is not a "new" DSM or EE program eligible for rider recovery.

Witness Maness further explained that it was specifically inappropriate for revenues calculated for the test and prospective period over- or under-recovery calculations in this proceeding, which are based on rates charged to customers in the past, to be reduced for these discounts. For the pre-discount revenues used by PEC in the residential test and prospective periods (together, April 1, 2008 through July 31, 2009) over- or under-recovery is derived from the DSM/EE riders approved for the Residential class by the Commission in Docket No. E-2, Sub 931 (net of GRT and the Regulatory Fee). These "Sub 931 Riders" were calculated by dividing the estimates of the DSM and EE program costs and incentives applicable to the Sub 931 rate period, and only these costs and incentives, by residential kilowatt hour sales estimated for the rate period, according to witness Maness. Thus, no portion of the Sub 931 rate period riders was related to discounts associated with the 5% energy conservation discount. Therefore, in witness Maness's opinion, now using a portion of the Sub 931 rate period DSM and EE riders to recover 5% energy conservation discounts would amount to an inappropriate diversion of revenues that were intended by the Commission to recover only DSM and EE costs and incentives. Revenues derived from rates approved by the Commission in Sub 931 to recover DSM and EE costs and incentives should not be retroactively redirected to recover other items.

On cross-examination by PEC, witness Maness explained further that he did not believe that the items related to uncollectibles expense and the 5% energy conservation discount could never be recovered; he simply believed that it was inappropriate to recover the 5% energy conservation discount and the uncollectibles through the DSM/EE rider. Instead, PEC should recover them as base rate items.

Witness Maness distinguished the uncollectibles expense and the 5% energy conservation discount from a DSM or EE cost during cross-examination. The uncollectibles expense, he explained, has always been a component of PEC's base rates; it is not a cost of a DSM or EE program. Instead, it is a cost to PEC related to customers not paying their bills. Similarly, the 5% energy conservation discount is the program cost of another, older DSM/EE program that has existed for many years. Therefore, it is not a cost that would fall under G.S. 62-133.9 as a new DSM or EE program. Witness Maness reaffirmed on cross-examination that these two costs were recoverable, but through base rates, not the DSM/EE riders. In the Public Staff's opinion, these are costs that arise not from adopting and implementing new EE and DSM programs, but from PEC's overall cost of service. The Public Staff reads G.S. 62-133.9 to refer to actual measure costs for the DSM and EE programs and not any other costs in the utility's cost of service.

In his rebuttal testimony, witness Evans cited G.S. 62-133.9(d), which provides that the Commission shall approve an annual rider for PEC to recover all reasonable and prudent costs incurred for adoption and implementation of new DSM and EE measures. Because some of PEC's customers do not pay their bills, PEC is unable to recover all of its reasonable and prudent DSM/EE costs. Also, PEC's residential customers receiving the 5% energy conservation discount receive the discount from the DSM/EE rider, as well as from base rates. Witness Evans stated that this resulted in PEC being unable to recover all of its reasonable and prudent DSM/EE costs. Therefore, witness Evans concluded that for PEC to recover all of its DSM/EE costs as provided for in G.S. 62-133.9, the revenue adjustments, or gross-ups, must be made.

Witness Evans believed that applying judgment is necessary in establishing any utility rate and it should not be the reason to disallow the gross-up factors. Witness Evans noted that PEC's DSM/EE program costs are trued-up every year through the DSM/EE EMF, so any forecasting errors could be corrected through that true-up. Finally, witness Evans described the adjustments as impacting calculations at the fifth and sixth decimal points; therefore, any forecasting errors would have little impact on rates.

Witness Evans agreed that the 5% energy conservation discount is not a new DSM or EE program eligible for cost recovery in PEC's DSM/EE riders, and he asserted that PEC is not attempting to recover the discounts enjoyed by participating customers through the DSM/EE rider. Instead, PEC seeks to recover the costs of new, Commission-approved DSM/EE programs through the DSM/EE rider. Witness Evans did not believe it was possible under the Public Staff's proposal for PEC to recover all of its DSM/EE program costs.

The Commission has carefully considered the positions of the parties as regards PEC's proposed gross-ups. While the Public Staff makes some persuasive arguments, on balance, the Commission agrees that PEC's adjustments for uncollectible revenue and the 5% energy conservation discount improve the accuracy of its DSM/EE cost recovery and should, therefore, be approved. PEC correctly identified the Legislature's intent that the Company should be allowed to recover 100% of its prudently incurred new DSM/EE costs. As provided by Rule R8-69 and G.S. 62-133.9(d), PEC should be allowed to recover, though the DSM/EE rider, all reasonable and prudent costs for new DSM and EE programs that have been approved by the Commission under Rule R8-68. The Commission finds that if PEC only bills 95% of its DSM/EE rider charges to customers served under its 5% energy conservation discount, it cannot fully collect 100% of its DSM/EE costs. Likewise, the Commission finds that, because not all customers pay their electric bills, PEC cannot recover 100% of its DSM/EE costs. In addition, the revenue losses under review in this proceeding, those associated with new DSM and EE programs, were not a part of PEC's last general rate case proceeding. The Commission concludes that, in the absence of these adjustments, PEC will not recover all of its reasonable and prudent new DSM/EE costs as provided by G.S. 62-133.9. The Commission recognizes that differences in uncollectible revenues may exist between PEC's North and South Carolina jurisdictions; therefore, in the future, PEC should present North Carolina data in seeking adjustments for uncollectible revenues. The Commission finds and concludes that PEC is not seeking to recover any direct costs of the 5% energy conservation discount program; it is instead attempting to recover fully its new DSM/EE program costs and related carrying charges and incentives.

The Commission agrees with Public Staff witness Maness that it would be inappropriate for PEC to retroactively apply the gross-up factors to the periods covered by the Company's first DSM/EE rider proceeding. Therefore, the Commission finds and concludes that PEC should apply the gross-ups prospectively only, with the rider period beginning December 1, 2009.

Finally, in regard to the gross-up for "lost" revenues, the Commission believes that there might be another solution that is more appropriate for the long-term. Specifically, it might be appropriate to amend the 5% energy conservation discount rider so that DSM/EE rider and EMF rider charges are not subject to the 5% discount. Therefore, the Commission concludes that PEC should be required to address the reasonableness of this alternative in its next DSM/EE rider application. The Commission encourages other parties to address this issue as well.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The evidence for this finding of fact can be found in the testimony of PEC witness Evans, the testimony of Public Staff witness Maness, the affidavits of Public Staff witnesses Floyd and Lucas, PEC's Post-Hearing Exhibits, the Commission's July 20, 2009 Order in Docket Nos. E-2, Subs 926, 931 and 951, and the Commission's November 25, 2009 Order Granting Motions for Reconsideration in Part in Docket Nos. E-2, Sub 926 and 931.

Based upon the test and prospective period DSM/EE costs proposed by PEC witness Evans and confirmed by the Public Staff, witness Evans proposed PEC's DSM/EE EMF riders. He testified that PEC's proposed DSM/EE EMF riders result from the sum of (1) test period costs, including amounts relating to the amortization of deferred costs from prior periods, (2) estimated prospective period costs (April 1, 2009 through July 31, 2009), less costs incurred in the prior prospective period (April 1, 2008 through July 31, 2008), which were included in establishing the 2008 DSM/EE EMF riders, and (3) credits for actual and estimated DSM/EE rider revenues for the period of December 1, 2008 through July 31, 2009. As discussed earlier, witness Evans explained that the costs incurred in the prior prospective period (April 1, 2008 through July 31, 2008) overlap with the current test period and were used in determining the DSM/EE EMF revenue requirement in PEC's last annual filing in Docket No. E-2, Sub 931. Therefore, witness Evans excluded those costs to avoid "double counting."

Witness Evans testified that in developing its proposed DSM/EE EMF and DSM/EE riders, PEC separated all costs to be recovered into three categories: (1) EE-related costs; (2) DSM-related costs; and (3) costs that provide a system benefit in support of both EE and DSM programs. PEC then employed different allocation methods for each of these categories to assign those costs to the appropriate jurisdiction. Common A&G costs, witness Evans explained, provide a system benefit in support of both EE and DSM programs; therefore they are divided into both categories. The division of these costs into either the EE or DSM category is based upon the percentage of each type of expenditure anticipated during the next forecast calendar year. This use of a forecast period recognizes the types of new programs PEC will offer in the immediate future that will be supported by these administrative costs. Witness Evans testified that the A&G costs provided for in this proceeding have been assigned to these categories based upon forecasted DSM and EE costs for 2010.

Witness Evans continued that any program costs that are identified as being EE-related, including A&G costs, are allocated to the North Carolina retail jurisdiction based upon the ratio, at the meter, of North Carolina retail sales to PEC system retail sales. The allocation percentage is updated each May, and is based on the prior calendar year's usage data. Costs that are identified as DSM-related, including A&G costs, are allocated to the North Carolina retail jurisdiction based upon the ratio of the North Carolina retail demand to the PEC system retail demand at the hour of the annual system peak. This allocation percentage is also updated each May, and is based on the prior calendar year demand data.

Witness Evans next explained that once PEC allocated its DSM/EE costs between North and South Carolina retail operations, these costs were assigned to PEC's Residential, General Service, and Lighting rate schedules. Costs were assigned to the customer classes based on program design and participation, that is, costs were assigned to customer groups that directly benefit from the programs. When programs benefit multiple groups, the costs are allocated to the benefitted groups using appropriate annual energy or coincident peak demand allocation factors.

Witness Evans further testified that under G.S. 62-133.9 and Commission Rule R8-69, commercial customers with an annual consumption of 1,000,000 kWh or greater in the billing months of the prior calendar year and all industrial customers may elect not to participate in PEC's DSM and EE programs. Rate class allocation factors were developed assuming that customers electing to opt-out of the DSM/EE rider will continue to do so. If such customers decide to change their opt-out status, the resulting revenue gains or losses will be recognized in subsequent DSM/EE EMF calculations.

According to witness Evans, after adjusting energy and demand for "opt-out" customers, the resulting allocation factors were employed in cases where programs or measures directly benefit multiple rate groups. EE costs were multiplied by rate class energy allocation factors and DSM costs were multiplied by rate class demand allocation factors. Witness Evans testified that the energy allocation rate factors were developed from the forecasted rate class usage, after subtracting actual sales for opt-out customers for the year ended March 31, 2009 (since usage for opt-out customers is not forecasted). The demand allocation rate class factors were based on the summer coincident peak demand for 2008. The forecast does not provide rate class coincident peak demands, therefore, the most recent historic data was deemed representative of future demand impacts.

Witness Evans further testified that the calculated rate class EE and DSM revenue requirements were divided by rate class sales, after adjustment for opt-out customers, to establish the rate class DSM/EE rider. Similarly, the calculated rate class EE and DSM EMF revenue requirements, adjusted for historic cost recoveries, were divided by rate class sales, after adjusting for opt-out customers, to establish the DSM/EE EMF rider rate.

Witness Floyd confirmed that PEC had allocated DSM- and EE-related costs to the North Carolina and South Carolina jurisdictions on the basis of peak demand and energy sales, respectively, as required by the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931. He also confirmed that PEC's calculation of its DSM/EE and DSM/EE EMF riders included

allocations of program costs, and related incentives, to the specific customer classes that the programs were designed to serve, with the exception of DSDR program costs. The energy sales related to customers who have opted-out pursuant to G.S. 62-133.9(f) were not included in the allocation factor calculations.

Based on these calculations, and after taking into consideration the post-hearing adjustments agreed to or requested by PEC, PEC's proposed DSM/EE EMF rider for the Residential class would be a decrement of 0.0241 cents per kilowatt hour; for the General Service rate class, a decrement of 0.0077 cents per kilowatt hour; and for the Lighting class, an increment of 0.0115 cents per kilowatt hour, all excluding GRT and the NCUC regulatory fee.

Based upon the rate period DSM/EE requirements of $20,740,441 calculated by witness Evans, PEC's proposed DSM/EE riders for the Residential, General Service, and Lighting rate classes are increments of: 0.0763 cents per kilowatt hour, 0.0688 cents per kilowatt hour, and 0.0490 cents per kilowatt hour, respectively, all excluding GRT and the NCUC Regulatory Fee.

As a result, the total proposed DSM/EE annual riders, including the DSM/EE EMFs for the Residential, General Service, and Lighting rate classes are increments of: 0.0522 cents per kilowatt hour; 0.0611 cents per kilowatt hour; and 0.0605 cents per kilowatt hour, respectively, excluding GRT and the NCUC regulatory fee

Based on the testimony of witnesses Evans and Floyd, and the entire record in this proceeding, the Commission finds and concludes that the DSM/EE riders proposed by PEC are appropriate, except that PEC should re-calculate them to conform with (1) the Commission's November 25, 2009 Order Granting Motions for Reconsideration in Part as discussed below, and (2) the Commission's decision in this Order that PEC should apply the uncollectibles and 5% energy conservation discount gross-ups prospectively only.

As discussed previously, on July 13, 2009, PEC filed a Motion for Reconsideration and Stay regarding certain decisions in the Commission's June 15, 2009 Orders in Docket No. E-2, Sub 926 (PEC's DSDR program application) and Docket No. E-2, Sub 931 (PEC's first request for DSM/EE and DSM/EE EMF riders). Several issues in that reconsideration request affect the final disposition of PEC's DSM/EE and DSM/EE EMF riders in this docket. Specifically: (1) the allocation of DSDR program costs between North Carolina and South Carolina; and (2) whether industrial and large commercial customers can "opt-out" of DSDR program costs. The Commission's July 20, 2009 Order Requesting Comments on Motions for Reconsideration and Order on Motion for Stay stated that PEC "may exclude [from its Sub 931 compliance filing and updates in the Sub 951 docket] the effects of any DSDR program adjustments pending a ruling on the motions for reconsideration." Public Staff witness Floyd testified that, for the DSDR program, the issue of the allocation of program costs and Net Lost Revenues with respect to the opt-out provision of G.S. 62-133.9(f) was then pending before the Commission, and that PEC intended to submit updated schedules on the jurisdictional allocations and customer base for DSDR program recovery upon the Commission's final decision on that issue. At that time, the Public Staff would review and comment upon PEC's updated schedules. The Commission has now acted on the reconsideration motions and it is appropriate that PEC's DSM/EE rider and DSM/EE EMF rider be brought into conformance with the Commission's Orders in that regard.

IT IS, THEREFORE, ORDERED as follows:

1. That PEC shall re-allocate DSDR program costs between North Carolina and South Carolina based on each state's relative energy consumption, consistent with the Commission's decisions in its November 25, 2009 Order in Docket Nos. E-2, Sub 926 and Sub 931, and file those re-allocations and revised revenue requirements in a compliance filing as soon as reasonably possible;

2. That PEC shall, effective with the rate period beginning December 1, 2009, prospectively apply a gross-up factor to adjust its DSM/EE rider and DSM/EE EMF rider for the impacts of uncollectibles and the Company's 5% energy conservation discount;

3. That PEC shall file with the Commission revised exhibits, rate schedules and riders demonstrating appropriate DSM/EE rider and DSM/EE EMF rider charges based on the re-allocation of DSDR program costs and the Commission's decision regarding gross-ups in this Order as soon as reasonably possible;

4. That the Public Staff shall review PEC's re-allocations, rate schedules, and DSM/EE riders and DSM/EE EMF riders and provide comments to the Commission as soon as reasonably possible, but no later than ten days after filing. If approved by the Commission, such riders are to be effective for service rendered on or after December 1, 2009, and shall be implemented by PEC as soon as practicable, with interest and refunds as appropriate as a result of PEC implementing its proposed riders as approved by Commission Order dated November 24, 2009;

5. That PEC shall reflect Net Lost Revenues on the basis of actual events for event-driven DSM and EE measures;

6. That, in its next DSM/EE rider application and testimony, PEC shall provide verified information regarding its DSM/EE education and general awareness initiatives, including costs and productivity data;

7. That in its next DSM/EE rider application, PEC shall address whether it would be appropriate to amend its 5% energy conservation discount rider such that the 5% discount would not apply to DSM/EE rider and DSM/EE EMF rider charges; and

8. That in its next DSM/EE rider application, PEC shall base its uncollectibles gross-up on a North Carolina uncollectibles study.

ISSUED BY ORDER OF THE COMMISSION.
This the 25th day of November, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Commissioner Robert V. Owens, Jr. concurs with this Order except that he dissents in regard to Finding of Fact No. 10, which addresses PEC's proposal to "gross-up" its DSM/EE rider and EMF for uncollectibles and the 5% energy conservation discount. Commissioner Owens opposes approval of those gross-ups for the reasons cited by the Public Staff.

DOCKET NO. E-7, SUB 790

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application of Duke Energy Carolinas, LLC, for	)
Approval of an Electric Generation Certificate of	) ORDER DENYING MOTION FOR
Public Convenience and Necessity to Construct	) REVOCATION OF CERTIFICATE
Two 800 MW State-of-the-Art Coal Units for	)
Cliffside Project	)

BEFORE: Commissioners Robert V. Owens, Jr; Lorinzo L. Joyner; and William T. Culpepper, III[1]

BY THE COMMISSION: On March 21, 2007, the Commission issued an Order Granting Certificate of Public Convenience and Necessity with Conditions in this docket granting Duke Energy Carolinas, LLC (Duke) a certificate of public convenience and necessity for the construction of one 800-megawatt (MW) supercritical pulverized coal-fired electric generating facility, together with related transmission facilities, to be located at the existing Cliffside Steam Station (Cliffside certificate), subject to certain conditions set forth in detail in the Order. Such conditions included that Duke shall retire the existing Cliffside Units 1 through 4 (approximately 200 MW) no later than the commercial operation of the new 800-MW unit and that Duke shall also retire other coal-fired generating units on a MW-for-MW basis to account for actual load reduction realized from new energy efficiency and demand-side (DSM) programs, subject to certain constraints.

On May 5, 2009, the North Carolina Waste Awareness and Reduction Network (NC WARN) filed a motion for revocation of the Cliffside certificate. In its motion, filed pursuant to G.S. 62-110.1(e1), NC WARN requests that the Commission review the Cliffside certificate and determine that completion of the new Cliffside unit is no longer in the public interest, that the Cliffside certificate should be revoked, and that future construction costs should be deemed unreasonable and imprudent. NC WARN alleges changed circumstances as the basis for the relief requested, as summarized below. A supporting affidavit is attached to the NC WARN motion.

PROCEDURAL HISTORY

After receiving the motion, the Commission issued an Order on May 5, 2009, allowing parties to file comments. In the Order, the Commission stated that such comments should address both the allegations of the motion and the legal basis for the motion, under either G.S. 62-110.1(e1) or G.S. 62-80.

[1] The March 21, 2007 order was entered by the Full Commission. The Commissioners who participated in the hearing and rendered the decision were Sam J. Ervin, IV, Presiding Commissioner; Robert V. Owens, Jr.; Lorinzo L. Joyner; James Y. Kerr, II; Howard N. Lee; and William T. Culpepper, III. Commissioners Ervin, Kerr, and Lee subsequently resigned from the Commission. Therefore, NC WARN's motion has been decided by the remaining three Commissioners who heard the evidence in this case.

On May 20, 2009, NC WARN filed a supplement to its motion stating that the Commission has the authority to revoke the Cliffside certificate under either G.S. 62-110.1(e1) or G.S. 62-80. NC WARN added that wholesale sales are Duke's sole justification for the new Cliffside facility and that, if it was not apparent in its motion, NC WARN urges the Commission to hold an evidentiary hearing on the allegations in support of its request for the revocation of the Cliffside certificate.

On June 26, 2009, Duke filed a response to NC WARN's motion submitting that there is no legal basis for revoking the Cliffside certificate under either statute and that the need for the new Cliffside unit remains. In addition, the Environmental Defense Fund, Southern Alliance for Clean Energy and the Southern Environmental Law Center (EDF/SACE/SELC) filed comments on June 26, 2009, proffering that both statutes authorize the Commission to revoke or modify the Cliffside certificate if it determines that the facility is no longer needed and requesting that the Commission convene such proceedings as it deems necessary in light of developments indicating that the new Cliffside unit is no longer in the public interest. The Public Staff also filed comments on June 26, 2009, stating that G.S. 62-110.1(e1) should not be applied retroactively to the Cliffside certificate, but that G.S. 62-80 continues to authorize the Commission to revoke or modify a certificate if it determines that the facility is no longer needed. However, the Public Staff argues that NC WARN failed to make a sufficient showing that the Cliffside certificate should be revoked under either statute.

On June 30, 2009, several health, environmental, and social justice organizations[1] filed a letter in this proceeding voicing support for NC WARN's motion to revoke the Cliffside certificate and requesting a public hearing in Charlotte as part of the hearing process.

On September 8, 2009, NC WARN filed a second supplement to its motion noting that Duke has proposed to enter into a wholesale contract with Central Electric Power Cooperative. NC WARN submits that this is increasing evidence that the new Cliffside unit is not needed absent new wholesale sales. NC WARN also argues that the initial hearings on the Cliffside certificate could not have considered the impacts of the current economic downturn on the need for the Cliffside certificate as now reflected in Duke's 2008 IRP in Docket No. E-100, Sub 118, and in Duke's 2009 IRP update in Docket No. E-100, Sub 124.

Finally, on September 16, 2009, Duke filed its response to NC WARN's second supplement and argues that NC WARN's second supplement is another filing in a series of maneuvers attempting to prevent Cliffside construction and that NC WARN continues to misstate or misrepresent Duke's IRPs. Duke states that the relief requested by NC WARN should be promptly denied.

[1] The organizations are: Appalachian Voices, Beloved Community Center – Greensboro, Blue Ridge Environmental Defense League, Canary Coalition, Carolinas Clean Air Coalition, Catawba Riverkeeper Foundation, Clean Water for NC, Conservation Council of NC, Environment NC, Greenpeace NC, Mountain Voices Alliance, NC Conservation Network, NC Fair Share, NC Interfaith Power & Light (a program of the NC Council of Churches), NC Justice Center, Neuse Riverkeeper Foundation, Nuclear Information and Resource Service, People Advocating for Real Conservancy, Southern Energy Network, Western NC Alliance, and Western NC Physicians for Social Responsibility.

NC WARN MOTION

NC WARN initially filed its motion to revoke the Cliffside certificate "pursuant to the provisions of G.S. 62-110.1(e1)." In the first supplement to its motion, NC WARN also argues that the certificate could be revoked under the authority of G.S. 62-80. According to NC WARN, "This more general authority fits perfectly with the provisions of G.S. 62-110.1(e1) in that both authorities are predicated on a change of circumstances that require the revision to the earlier decision..."

In support of its motion, NC WARN argues that there have been several significant changes in circumstances subsequent to the issuance of the Cliffside certificate such that the new Cliffside unit is not in the public interest. According to NC WARN, changes in the probable future growth shows that the new unit is not necessary; new regulatory requirements for energy efficiency and renewable energy have been established that present viable alternatives to the new unit; and recent costs of the construction and operation of the new unit make it not in the public convenience and necessity. NC WARN states that the changes to the forecasts in the future growth in the use of electricity include (1) the requirements of the Renewable Energy and Energy Efficiency Portfolio Standard (REPS) passed by the General Assembly in Session Law 2007-397; (2) the denial of Duke's system average cost wholesale contract with Orangeburg, South Carolina; (3) the availability of purchases from other utilities in the Southeast; and (4) the relationship of Duke's reserve margin to the need for the new Cliffside unit. NC WARN adds that other considerations are the expected cost of carbon regulation, the increasing cost of coal, and the increasing cancellations of new baseload generating capacity across the country.

According to NC WARN, Duke's 2008 IRP shows a significant slowing down in the forecast annual increase of peak demand when compared to the 2006 IRP, especially in the scenario of high costs of carbon emissions. NC WARN states that Duke's 2008 IRP shows almost a flat growth for Duke in the foreseeable future with the growth in summer peak demand between 2010 and 2015 of only 308 MW. NC WARN contends that this amount can easily be met without costly new baseload construction such as the Cliffside project. NC WARN also believes that Duke's forecast scenarios continue to discount the potential for renewable energy and energy efficiency.

NC WARN submits that the affidavit and supporting report of Dr. Robert Blackburn attached to its motion show that there is no need for the new Cliffside unit at all with a few reasonable and cost-effective adjustments to Duke's 2008 IRP. In the scenario of the high cost of carbon emissions, NC WARN proffers that Duke can in fact close 2400 MW of existing coal plants by the year 2025. According to NC WARN, Dr. Blackburn's adjustments include increasing energy efficiency measures, utilizing the REPS provisions in Session Law 2007-397, modestly increasing load control programs and adding some cogeneration. Dr. Blackburn believes that Duke should be able to obtain purchase contracts to meet any short-term needs and that the load forecasts should be further decreased by "the elimination of wholesale sales outside of the service area [that] mirrors the Commission's Order in the Orangeburg docket." Dr. Blackburn's adjusted forecasts also maintain Duke's insistence of a 17% to 23% reserve margin. Dr. Blackburn concludes that "based on my experience and analysis of the last several IRPs, it is

my opinion that there is no need for Cliffside Unit 6 and as such, the certificate of public convenience and necessity should be revoked." Blackburn Affidavit, paragraph 10.

NC WARN states that the elimination of the Orangeburg contract alone (between the time the Commission approved the Cliffside certificate and today) is dispositive that there is simply no need for the new Cliffside unit. According to NC WARN, "[T]he Commission's Order in Docket No. E-7, Sub 858 requires Duke Energy to reduce or eliminate wholesale sales outside Duke Energy's service area." By eliminating the Orangeburg sales along with other wholesale sales contracts that NC WARN believes Duke is seeking, namely 650 MW in wholesale sales being negotiated with Greenwood, South Carolina, and Fayetteville, North Carolina, NC WARN argues that the need for the new Cliffside unit is completely eliminated.

According to NC WARN, findings that no new coal plants are needed and that existing plants can be closed reflect national trends. NC WARN cites publications or reports by the US Energy Information Administration, the National Energy Technology Laboratory, the Sierra Club, and comments by FERC Chairman Jon Wellinghoff to support this claim. Additionally, NC WARN argues that the increasing costs and risks of coal plants have also caused several utilities to rethink their support for coal plants. Although NC WARN acknowledges that the 2009 cost estimate report of Duke maintains that costs for the new Cliffside unit would not increase from the current estimate of $2.4 billion, NC WARN states that the Cliffside plant has already been delayed at least a year and further delays will increase the cost of the plant.

NC WARN also opines that the air permit for Cliffside is still being strenuously challenged and remains at risk. NC WARN states that the view that carbon dioxide must be regulated as a pollutant is gaining ground nationally and that the costs of carbon regulation should be considered by the Commission in the costs of Cliffside and as to whether, given the health and environmental impacts, any new coal plant is in the public interest. In a cap and trade scheme, NC WARN estimates that carbon could add an additional $108 to $144 million per year to the cost of the new Cliffside unit and add $3 to $5 billion to the cost over the life of the new Cliffside unit.

NC WARN argues that the increasing cost and volatility of Appalachian coal supplies compound the cost risks of the new Cliffside unit. NC WARN quotes the testimony of a Duke witness in Docket No. E-7, Sub 875, Duke's most recent fuel charge adjustment proceeding, wherein the witness stated that "market prices for Central Appalachia coal continued to escalate from the low to mid $90s per ton in February 2008 to approximately $150 per ton for spot type transactions by the summer of 2008." Further, NC WARN notes that most of the proposed increase in that proceeding of about $4 per month for residential customers was directly related to the price of coal. NC WARN adds that in addition to market conditions, regulatory proposals to eliminate the mining practice known as "mountain top removal" would raise the price of coal even further.

In summary, NC WARN argues that the need for the new Cliffside unit is negated by any of the following: the denial by the Commission of the wholesale contract with Orangeburg, South Carolina, and other similar sales outside of Duke's service area, reducing demand by almost 900 MW; the denial by the Commission of the 1,000-MW long-term contract with the

Central Cooperative in South Carolina; Duke's meeting its Sav-A-Watt commitment for a 2 percent reduction through energy efficiency and DSM programs over the next four years followed by a 1 percent per year savings; the reduction of Duke's reserve margins to the levels of other utilities in North Carolina; continuing purchased power contracts with other utilities and merchant plants at the current levels of 600 MW; or taking the steps outlined in Dr. Blackburn's report to encourage a mix of energy efficiency and DSM programs with additional renewable energy and cogeneration.

DUKE RESPONSE

Duke argues that the Commission has no legal authority to revoke the Cliffside certificate. Duke says that G.S. 62-110.1(e1) should only apply prospectively since nothing suggests that the legislature intended for this statute to apply retroactively and since retroactive application of the statute would affect substantial rights arising before enactment. Further, Duke says that if the statute were applied retroactively, revoking the Cliffside certificate would interfere with Duke's vested rights. Duke asserts that it has a right to "construct Cliffside Unit 6 to meet its customers' needs." As to G.S. 62-80, Duke says that although this statute seems broad, it does not authorize revocation of a certificate. Duke reasons that if G.S. 62-80 authorized the Commission to revoke a certificate, "the legislature would have had no need to pass Section 62-110.1(e1), which specifically gives the Commission this authority (albeit, not retroactively)." Duke goes on to argue that even if G.S. 62-80 does authorize revocation of a certificate, the Commission cannot exercise such authority here because Duke has a property right in the Cliffside certificate and it would be unconstitutional to deprive Duke of its vested property right. "Therefore, the Commission may not interpret either statute as allowing it to revoke the Cliffside CPCN."

Duke disagrees with NC WARN's characterization of various IRPs. Duke states that the 2007 IRP and the 2008 IRP both contain a projected growth rate in summer peak demand of 1.6%. According to Duke, the key issue related to the need for Cliffside is not only the long-term but the near-term load forecast. In the 2007 IRP, the forecasted peak load was 19,623 MWs and about 100,000 GWH of energy for 2012. In the 2008 IRP, the forecasted peak load was 19,654 MWs and about 100,000 GWH of energy for 2012. Thus, Duke contends that the projected load for 2012 is essentially unchanged between the 2007 IRP and the 2008 IRP. Dukes notes that NC WARN highlights the impact of a higher-carbon scenario on the load forecast, but Duke believes that the impact (which occurs after 2012) is irrelevant to the need for Cliffside in 2012. Duke argues that, even though peak load is not projected to increase after 2012 in the higher-carbon scenario, in light of the retirements of older coal plants, there is a need for the new Cliffside unit in 2012 as well as for additional generation over the planning horizon. In addition, Duke states that NC WARN incorrectly concludes that Duke's need for new generation went down by 1280 MWs for 2014 between the 2005 and 2006 IRPs. According to Duke, this decrease was primarily due to the addition of new generation, i.e., the Rockingham plant, and only in part due to a reduction in load forecast. Duke notes that this issue was addressed by the Commission in the Order granting the Cliffside certificate.

Duke reiterates an excerpt from its reply comments in the 2008 IRP docket, wherein it states that "with regard to NC WARN's assertion that no new plants are needed and retirement of

existing plants can be accelerated, ...the analysis is so flawed as to be completely unreliable." Duke believes that Dr. Blackburn continues to improperly cite the Company's energy efficiency market potential study by ignoring that the study reported a market potential of 1.6% that could be achieved over the next five years, not 19%. According to Duke, the level of 19% is an estimate of market potential that assumes all customers install all the cost-effective measures and ignores the fact that only a portion of the customers will actually participate in the energy efficiency programs.

Duke also denies that elimination of wholesale load outside its service area is a major change in circumstances that eliminates the need for the Cliffside unit. Duke denies NC WARN's characterization of the Orangeburg Order and argues that the Commission did not "disapprove" the Company's contract with Orangeburg, but ordered that the load may not be served at native load priority. In response to the Orangeburg Order, Duke revised its 2008 IRP to reflect removal of the load associated with Orangeburg from the load forecast that the Company used as the basis for its planning for the 2008 IRP. However, Duke did not remove the undesignated wholesale load of approximately 300 MWs in 2011 and 600 MWs in 2012 because Duke anticipates the opportunity to serve the supplemental requirements of historically served customers in its balancing authority area that are sufficiently greater than those levels. Duke contends that, even with the exclusion of the Orangeburg load, its reserve margins, including the new Cliffside capacity, are not excessive in 2012 and beyond.

Duke denies NC WARN's conclusion that national trends suggest that no new coal plants are needed and existing plants can be closed. While NC WARN states that the US Energy Information Administration report "found no need for many of the coal plants currently on the drawing board and included only a few large coal plants in its reference case," Duke asserts that the 17,000 MWs of new coal plants included in the report's reference case is not an insignificant amount. Duke also denies there is any basis to assume that FERC Chairman Wellinghoff's comments reflect a reassessment of the need for coal plants at a national level or, more particularly, reassessment of the need for a unit under construction pursuant to a certificate and Commission-approved resource plan. In addition, Duke states that the National Energy Technology Laboratory study does not show that electric utilities are relying less and less on new coal plants. Further, Duke says that it lacks the knowledge to form an opinion as to whether or not there are 48 coal plants "likely to be canceled or postponed" according to such an assessment by the Sierra Club, and Duke found no evidence upon which NC WARN based its conclusion on this assessment. Duke argues that Dr. Blackburn's conclusion that Duke should be able to obtain purchase contracts is based on a SERC Reliability report which included generation in 2017 from the new Cliffside unit and the proposed Buck and Dan River proposed projects. Duke states that NC WARN's logic is circular – no units need to be built because the units exist or are planned to be built. Regarding NC WARN's assertion that further delays would increase the cost of the new Cliffside unit, the Company replies that there is no basis for such a warning given Duke's stated intent to complete the unit by the summer of 2012 as scheduled.

Duke states that the North Carolina Department of Environment and Natural Resources' Air Quality Division issued the air permit for the new Cliffside unit in January of 2008 and issued a modification to the permit in March of 2009 to clarify that the new unit will be a minor source of hazardous air pollutant emissions. Duke also states that, contrary to NC WARN's

inaccurate statements, the permit retains the stringent mercury emissions control requirements from the January 2008 permit. Duke asserts that this air permit is the only one for a coal-fired facility in North Carolina that includes a limit on mercury emissions. Furthermore, it is the only air permit known to have a requirement to be carbon neutral by 2018.

Duke notes that its 2006 IRP that was the basis for showing the need for the Cliffside project included a carbon sensitivity scenario and that evidence related to possible carbon legislation was also presented in the certificate proceeding. The Commission concluded in the Order granting the Cliffside certificate that without the new Cliffside unit, Duke would be required to run its older, less efficient coal plants more, resulting in increased emissions or increased costs of pollution control. Thus, Duke believes it is clear that the Commission considered the impact of possible carbon legislation in its decision to grant the Cliffside certificate. Duke states that the boiler and emission control systems of the new unit will be extremely flexible in their ability to handle a variety of coal from various regions. Therefore, Duke contends that the ability to burn a variety of coal while meeting all emission limits will enable the Company to select the most cost-effective fuel available and, in turn, minimize costs to its customers. Duke adds that although the current view of how to regulate carbon dioxide is receiving additional attention, the fact remains that there was no requirement to regulate carbon dioxide at the time the air permit for the new Cliffside unit was issued in January of 2008 and that remains the case today. However, due to public concern, Duke has voluntarily agreed to a permit condition that would sharply reduce carbon dioxide emissions across the Company's fleet in North Carolina and will ensure the unit is carbon neutral by 2018. Duke believes that coal will remain a critical energy resource for North Carolina and the United States for at least the next fifty years and that the new Cliffside unit – with its state-of-the-art design – will use coal more efficiently and effectively than other Duke units, including the 1,000 MW of older units that will be retired under the condition of the Order granting the certificate.

Finally, Duke denies the allegation that its target planning reserve margin is too high. Duke says that the planning reserve margin of 17% has been demonstrated historically as an appropriate margin for resource planning that the Commission has supported with approval of Duke's IRPs over the last 10-plus years. In addition, Duke states that the Public Staff supported the proposed reserve margin levels in its comments in the 2008 IRP docket.

In conclusion, Duke submits that the need for the new Cliffside unit remains and that it is unnecessary for the Commission to conduct a review or revoke the certificate. No evidentiary or public hearing is required or necessary in this proceeding. The Commission concluded that the new Cliffside unit was appropriate to meet Duke's generating needs when it issued the certificate on March 21, 2007, and Duke believes that no legal or factual basis supports a change in that conclusion.

PUBLIC STAFF COMMENTS

In its comments, the Public Staff says that G.S. 62-110.1(e1) cannot be applied to the Cliffside certificate since G.S. 62-110.1(e1) should be applied prospectively. However, the Public Staff says that the Commission has broad authority under G.S. 62-80 to revoke any prior

order if changed circumstances or additional evidence require such action in the public interest and that G.S. 62-80 was not limited by enactment of G.S. 62-110.1(e1).

The Public Staff notes that NC WARN's contention that the Cliffside certificate should be revoked because of changes to the load forecast relies heavily on the affidavit and report of Dr. Blackburn. According to the Public Staff, the resource plan in Dr. Blackburn's report is based on a simplistic methodology and a number of inaccurate and unrealistic assumptions as discussed in Duke's reply comments dated May 27, 2009. In contrast, the Public Staff asserts that the Order granting the Cliffside certificate discussed in detail the sophisticated modeling of long-range resource portfolio options that supported the need for 800 MW of additional baseload generating capacity beginning in 2011.

With respect to the probable future growth in the demand for electricity, the Public Staff agrees with NC WARN that the compound annual growth rates from Duke's 2008 forecasts of peak demand and energy sales are lower than Duke's forecasts in the 2005, 2006 and 2007 IRPs. However, the Public Staff points out that in the September 2006 hearings in this docket, its witness considered a low growth scenario in Duke's 2006 IRP with compound annual growth rates that mirror the compound annual growth rates in Duke's 2008 IRP and he concluded that even those lower levels of forecasted growth in peak demand and energy sales justified building the proposed Cliffside units.

The Public Staff also contends that NC WARN misunderstands the effect of the Orangeburg decision and its impact on Duke's energy needs. NC WARN apparently believes that the Orangeburg decision required Duke to adjust its 2008 IRP by eliminating the Orangeburg load plus an additional 650 MW of undesignated load that NC WARN assumes to be outside of Duke's balancing authority area. In response to the Orangeburg decision, Duke removed only the Orangeburg load from its 2008 IRP. Its stated reason for not removing the additional undesignated load was because Duke anticipates an opportunity to serve the supplemental requirements of its historically served customers in its balancing authority area. Therefore, according to the Public Staff, NC WARN errs when it removes the 650 MW of undesignated load from Duke's 2008 IRP on the assumption that such load was located outside of Duke's balancing authority area. In addition, the Public Staff states that it cannot be assumed that the addition of wholesale load requires the addition of only baseload plants. The Public Staff states that most wholesale customers have load profiles roughly similar to Duke's and, therefore, need peaking, intermediate, and baseload resources to meet their needs. Accordingly, excluded wholesale load cannot be subtracted MW for MW from the need for a baseload plant. Finally, even with the removal of all of the undesignated load, the Public Staff says that the resulting forecasted growth rates for both peak demand and energy sales are the same low growth rates analyzed in the 2006 IRP. As discussed above, these lower growth rates were explicitly considered in the Cliffside certificate proceeding and were considered to be sufficient to justify the construction of the new Cliffside unit.

The Public Staff also argues that NC WARN's assumption that Duke can meet all of its future energy needs through increasing energy efficiency measures and load control programs, adding combined heat and power resources, and utilizing renewable energy resources is unrealistic and completely ignores the fundamental physics and operating characteristics of

electricity production and delivery on a real-time basis. For example, the Public Staff points out that many renewable resources, such as wind and solar generation, are not dispatchable and have little to no capacity value without storage media, which does not currently exist. In the order granting the Cliffside certificate, the Public Staff also notes that the Commission found that Duke cannot rely upon demand side management (energy efficiency and demand response) to eliminate or delay its need for additional baseload generating capacity beginning in 2011 and NC WARN has cited no market potential studies conducted since that time showing that this finding should be modified.

The Public Staff also states that NC WARN overlooks the effect that revocation of the Cliffside certificate would have on Duke's ability to retire its older, conventional coal-fired units. The Public Staff points out that the Commission conditioned the Cliffside certificate upon Duke retiring the existing Cliffside Units 1 through 4 no later than the commercial operation date of the new Cliffside unit and that this would make for a more diverse and secure generation fleet and would allow Duke to increase its baseload generating capacity without increasing its carbon footprint. In addition, the Commission required Duke to retire additional older coal-fired units on a MW-for-MW basis to account for actual load reductions realized from new energy efficiency and DSM programs, subject to certain constraints. The Public Staff also notes that Duke's report filed in this docket on March 16, 2009, stated that the air permit issued for the new Cliffside unit was based upon Duke's agreement to retire 800 MW of additional coal-fired units located in North Carolina, without regard to whether it achieved a commensurate level of MW savings from new energy efficiency and DSM programs. The Public Staff also notes that Duke's 2008 IRP lists coal unit retirements at an even faster pace than required by the air permit for the new Cliffside unit. While the older coal-fired units currently run at a lower capacity factor than the capacity factor expected for the new Cliffside unit, these older units to be retired are capable of producing a substantial amount of energy. The Public Staff argues that the expected growth in energy needs after the effects of energy efficiency have been included is such that it cannot be assumed that the certificate could be revoked and Duke could still retire those older units. In its comments, the Public Staff demonstrates in detail the amount of energy deficiency that would exist by 2017, even if the new Cliffside unit is completed and the older coal-fired units are retired.

Finally, the Public Staff addresses NC WARN's concern with the 17% to 23% reserve margin forecasted by Duke. In its comments filed on April 24, 2009, in the 2008 IRP proceeding, the Public Staff generally agreed with Duke's proposed reserve margins, but also stated that Duke's reserve margins should be reconsidered based on the Orangeburg decision and in light of several risks identified by the Company. More importantly, according to the Public Staff, Duke's revised 2008 IRP indicates that its reserve margins did not increase substantially over those filed on November 3, 2008, for the high carbon case, even after the removal of the Orangeburg load.

In summary, the Public Staff believes that NC WARN has failed to make a sufficient showing of changed circumstances since the Cliffside certificate was granted to justify review by the Commission on its own motion under G.S. 62-110.1(e1), if applicable, or the exercise of the Commission's authority under G.S. 62-80, to determine whether the Cliffside certificate should be revoked. The Public Staff adds that NC WARN's motion is based on a report that is before

the Commission in Docket No. E-100, Sub 118, in which Duke's 2008 IRP is currently under investigation, but that there are serious flaws in the report and therefore in NC WARN's allegations. Accordingly, the Public Staff recommends that while the Commission could conclude that NC WARN's motion is premature and should be held in abeyance pending the Commission's decision in the 2008 IRP proceeding, there is good cause for the Commission to find no basis to revoke the Cliffside certificate under either statute and to deny NC WARN's motion.

EDF/SACE/SELC COMMENTS

In their comments, these environmental intervenors argue that G.S. 62-110.1(e1) and G.S. 62-80 both authorize the Commission to revoke a certificate to construct a generating facility if the Commission determines that the facility is no longer needed.

EDF/SACE/SELC notes that NC WARN cites several factors in support of its motion, including falling growth in demand for electricity, new regulatory requirements for energy efficiency and renewable energy, denial of Duke's request to charge Orangeburg system average rates in a wholesale contract, the availability of purchased power from other Southeast utilities, Duke's high reserve margin, and the cost of carbon regulation. EDF/SACE/SELC contends that such developments, in addition to other developments, including other potential wholesale sales by Duke and significantly lower prices forecasted for natural gas rendering natural gas-fired generation a reasonable alternative, strongly indicate that the new Cliffside unit is not needed and that revocation of the Cliffside certificate is appropriate. Therefore, these intervenors recommend that the Commission should allow parties to conduct discovery and should hold a hearing to consider whether to revoke or modify the Cliffside certificate pursuant to either statute.

DISCUSSION AND CONCLUSIONS

For the reasons discussed below, the Commission concludes that either G.S. 62-110.1(e1) or G.S. 62-80 might, in appropriate circumstances and with sufficient grounds, be invoked to seek reconsideration of a certificate, but that NC WARN has not made a convincing case for reconsideration in this instance.

G.S. 62-110.1(e1) is a new provision that was enacted as part of Session Law 2007-397 (Senate Bill 3). G.S. 62-110.1(e1) provides as follows:

> Upon the request of the public utility or upon its own motion, the Commission may review the certificate to determine whether changes in the probable future growth of the use of electricity indicate that the public convenience and necessity require modification or revocation of the certificate. If the Commission finds that completion of the generating facility is no longer in the public interest, the Commission may modify or revoke the certificate.

Duke argues that G.S. 62-110.1(e1) cannot be applied to the Cliffside certificate because the certificate was granted on March 21, 2007, and G.S. 62-110.1(e1) became effective on January 1, 2008. The Commission rejects this argument as follows.

First, whether a statute can be applied retroactively often depends upon whether it is regarded as being substantive or procedural.

> "It is well settled that legislation that is interpretive, procedural, or remedial must be applied retroactively, while substantive amendments are given only prospective application. 'Substantive acts are generally defined as those which create, confer, define, or destroy rights, liabilities, causes of action, or legal duties. Procedural acts describe methods for enforcing, processing, administering, or determining rights, liabilities, or status.'"

Georgia Dept. of Human Resources v. Deason, 520 S.E.2d 712, 719 (Ga. Ct. App. 1999) (internal citations omitted) (quoted in Twaddell v. Anderson, 136 N.C.App. 56, 65 (1999)). The Commission concludes that G.S. 62-110.1(e1) is a procedural statute, and Duke's objection to its retroactive application is therefore misplaced.

Alternatively, even if G.S. 62-110.1(e1) is seen as affecting substantive rights, it still does not follow that it cannot be applied to the Cliffside certificate. "A statute is not rendered unconstitutionally retroactive merely because it operates on facts which were in existence prior to its enactment." Booker v. Medical Center, 297 N.C. 458, 467 (1979). Here, G.S. 62-110.1(e1) became effective on January 1, 2008, and NCWARN filed its motion invoking the authority of G.S. 62-110.1(e1) on May 5, 2009. The fact that the motion relates to a certificate issued in March 2007 does not make for an impermissible retroactive application. G.S. 62-110.1(e1), by its very nature, relates to review of a previously issued certificate. There is nothing in the language of G.S. 62-110.1(e1) or in Section 16 of Session Law 2007-397 to suggest that G.S. 62-110.1(e1) only authorizes reviews of certificates that were issued after January 1, 2008, so long as the review itself is conducted after January 1, 2008. Section 16 of Session Law 2007-397 provides for Section 6, which includes G.S. 62-110.1(e1), to become effective January 1, 2008. Section 16 also provides for Section 2 to become effective January 1, 2008, but it goes on to specifically provide that the cost recovery provisions of Section 2 "apply only to costs that are incurred on and after 1 January 2008" and it also provides that the cost recovery provisions in Sections 4 and 5 apply only to costs incurred after the effective date of those Sections. If the General Assembly had intended for G.S. 62-110.1(e1) to apply only to certificates issued after G.S. 62-110.1(e1)'s effective date, it could have so provided, just as it provided for the cost recovery provisions of Sections 2, 4, and 5 to apply only to costs incurred after those provisions' effective dates. The fact that the General Assembly made no such provision as to G.S. 62-110.1(e1) supports the proposition that this statute could, in appropriate circumstances and with sufficient grounds, be invoked as to the Cliffside certificate.

Finally, Duke argues that it has a vested right in the Cliffside certificate and that the Commission cannot constitutionally interfere with it. "The proper question for consideration is whether the act as applied will interfere with rights which had vested...." Booker at 467. "Stated otherwise, the statute may be applied retroactively only insofar as it does not impinge upon a

right which is otherwise secured, established, and immune from further legal metamorphosis." Gardner v. Gardner, 300 N.C. 715, 719 (1980). Citing Transland Properties, Inc. v. Board of Adustment, 18 N.C.App. 712 (1973) (holding that a private developer who had expended money and incurred contractual obligations in reliance upon a building permit for a condominium project acquired a legal right to complete construction even after the zoning was changed and the permit was revoked), Duke argues that "[j]ust as an individual may obtain a vested right in a building permit arising out of substantial expenditures, Duke Energy Carolinas has obtained a vested right in the Cliffside CPCN" and it would be unconstitutional for the Commission to deprive Duke of its vested property right. Duke's argument overlooks the fact that Duke is not a private developer and Cliffside is no ordinary building project. Duke is a public utility engaged in a business affected with the public interest, and it is subject to ongoing regulation by the Commission. The very reason certificates are required for construction of electric generating plants is to "prevent costly overbuilding." State ex rel. Utilities Comm. v. High Rock Lake Ass'n, 37 N.C.App. 137, 141, appeal dismissed and rev. denied, 295 NC 646 (1978). After a certificate is issued, the Commission must "maintain an ongoing review of such construction as it proceeds," G.S. 62-110.1(f), and the Commission must also "keep current an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina, including its estimate of the probable future growth of the use of electricity...," G.S. 62-110.1(c). There can be no question as to the Commission's authority to modify or revoke a certificate should it find that changed circumstances, including changes in the demand for electricity affecting the need for the facility, require such action in the public interest, and there would be no constitutional bar to such a Commission decision. Indeed, the Commission has always had such authority under G.S. 62-80, and the Cliffside certificate has never been "immune from further legal metamorphosis."

The Commission concludes that, in appropriate circumstances and with sufficient grounds, reconsideration could be undertaken and a certificate could be revoked under the authority of G.S. 62-80. G.S. 62-80 provides that 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." The broad phrase "any order or decision" clearly encompasses the March 21, 2007 Order Granting Certificate of Public Convenience and Necessity with Conditions issued in this docket. G.S. 62-80 authorizes the Commission to modify or set aside any prior order due to a change of circumstances requiring it for the public interest. State ex rel. Utilities Comm. v. Carolina Coach Co., 260 N.C. 43, 51-2 (1963);[1] State ex rel. Utilities Comm. v. N. C. Gas Service, 128 N.C.App. 288, 293-4, rev. denied, 348 N.C. 78 (1998).

Duke argues that enactment of G.S. 62-110.1(e1) shows that the Commission had no prior authority to review certificates under G.S. 62-80, but the Commission disagrees. The General Assembly adopted G.S. 62-110.1(e1) as part of the comprehensive energy legislation in Senate Bill 3. Another provision of Senate Bill 3 added language to G.S. 62-110.1(e) to the

[1] "The effect of Greyhound's application is to allege that circumstances have changed and public convenience and necessity now requires the lease agreement to be modified and the franchise authority to be awarded to Greyhound. It was within the authority of the Commission to treat the application as a motion in the prior cause, and to modify the order approving the lease agreement. Toomes v. Toomes, 254 N.C. 624, 119 S.E. 2d 442. This the Commission apparently did." Id. at 51-2.

effect that "[o]nce the Commission grants a certificate, no public utility shall cancel construction of a generating unit or facility without approval from the Commission based upon a finding that the construction is no longer in the public interest." The enactment of G.S. 62-110.1(el) should be viewed in light of this new provision in G.S. 62-110.1(e). The enactment of G.S. 62-110.1(el) in no way casts doubt on the Commission's already-existing and often-recognized authority under G.S. 62-80 to reconsider any order or decision, including a certificate order, due to changed circumstances.

The Commission wishes to note another issue as to G.S. 62-110.1(el). G.S. 62-110.1(el) authorizes the Commission to conduct a review "[u]pon the request of the public utility or upon its own motion...." It does not speak to a party such as NC WARN requesting a review. Still, the Commission notes that long-standing practice allows any party to move for reconsideration under G.S. 62-80 even though G.S. 62-80 does not specifically refer to a party's moving for reconsideration. The Commission concludes that it could, in its discretion, act "upon its own motion" under G.S. 62-110.1(el) when presented with a convincing motion filed by any party.

In summary, the Commission concludes that, in appropriate circumstances and with sufficient grounds, it would have authority under either, or both, G.S. 62-110.1(el) and G.S. 62-80 to undertake a review and to modify or revoke a certificate should it find that changed circumstances, including changes in the probable future growth of the use of electricity, require such in the public interest. The question is not whether the Commission has statutory authority, but rather whether NC WARN has made a convincing case for a review in this instance.

The Commission concludes that it must deny NC WARN's motion for the following reasons. First, the Cliffside order and decision were premised upon a demonstrated need for 800 MW of baseload generating capacity beginning in 2011.[1] In so ruling, the Commission specifically found that Duke could not rely upon DSM and renewable energy resources, new nuclear generating facilities, or integrated gasification combined cycle technology to eliminate, delay, or supply its need for additional baseload generating capacity beginning in 2011; and that it would be unreasonable for Duke to rely upon natural gas-fired combined cycle generation to supply all of its additional baseload generating capacity needs beginning in 2011. Notwithstanding the allegations set forth in NC WARN's motion, the Commission remains convinced, on the basis of the comments offered by the Public Staff in particular, that there continues to be a need for baseload generation on Duke's system in the 2012 time frame to supply the Company's long-term resource needs and that the need for baseload generation justifies completion of the new Cliffside generating unit. In addition, the Commission agrees with the Public Staff that while NC WARN's motion focuses on meeting short-term MW or capacity needs, the Commission's real focus must be on least cost resource options to meet the Company's long-term energy and capacity needs. The new Cliffside unit will meet those needs.

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[1] Although Duke now estimates that the new Cliffside generating unit will become operational by the summer of 2012, rather than in 2011, the Commission does not find the delay to be of such significance to justify review under either G.S. 62-110.1(el) or G.S. 62-80. In fact, the delay most likely resulted from the Commission's decision to approve only one Cliffside unit and the need for Duke to modify the scope of the project as well as its air permit application.

Second, the Commission previously denied two motions for reconsideration by Orders dated June 6 and June 14, 2007, and no party, including NC WARN, appealed the Cliffside order and decision. Duke has proceeded with construction of the unit and as of December 31, 2008, the Cliffside project was 29 percent complete according to the Company's February 27, 2009 cost estimate report. Duke further reported that as of December 31, 2008, the Company had committed $1.1 billion for the Cliffside project out of the total cost estimate for the project of $1.8 billion (excluding allowance for funds used during construction or AFUDC).[1] In the absence of an appeal of the Commission's Cliffside order and decision, Duke has done what it is legally authorized to do: construct the new Cliffside plant in a timely fashion to meet its obligation to provide reliable service to its customers in what the Commission has heretofore determined to be the least cost manner. The Cliffside plant is scheduled to begin commercial operation in less than three years and the project is on budget. Duke and the Public Staff strongly oppose NC WARN's motion and maintain that construction of the new Cliffside baseload plant should continue on the current schedule. The Commission agrees. NC WARN's motion does not justify further review of the Cliffside project.

Third, the Commission required as a condition to its approval of the Cliffside project that Duke retire its existing Cliffside Units 1 through 4 (198 MW) and commit to invest 1% of the Company's annual retail electricity revenues in energy efficiency and DSM programs and to retire older coal-fired generating units (in addition to Cliffside Units 1 through 4) on a MW-for-MW basis up to the 800 MW level to be added by the new Cliffside unit, considering the impact on reliability.[2] The Commission does not find it reasonable to assume that the certificate to construct the new Cliffside plant could be revoked as requested by NC WARN, considering the impact such revocation would have on the reliability of the entire system, while still expecting Duke to retire more than 1000 MW of older coal-fired generation, particularly considering the expected growth in energy needs of Duke's customers even after consideration of the effects of energy efficiency and DSM programs. Retirement of this older coal-fired generation was central to the Commission's decision to approve one new Cliffside generating unit and that condition continues to be crucial as the Commission considers the merits of NC WARN's motion. The Commission hereby reaffirms its previous conclusion that use of modern supercritical pulverized coal technology, together with the retirement of Cliffside Units 1 through 4, will make for a more diverse and secure generation fleet and will allow Duke to increase its baseload generating capacity without significantly increasing the Company's environmental footprint.

Accordingly, for the reasons set forth above, the Commission concludes that NC WARN has failed to make sufficient allegations of a change in circumstances since the Cliffside order and decision were issued to justify a review by the Commission under either G.S. 62-110.1(e1)

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[1] Supplemental direct testimony prefiled on September 11, 2009, by Duke witness James L. Turner in the Company's pending general rate case (Docket No. E-7, Sub 909) states that as of July 31, 2009, the Cliffside project was approximately 44 percent complete, that the new Cliffside plant itself was approximately 40 percent complete, and that the Company had committed $1.2 billion for the Cliffside project.

[2] In the air permit for the new Cliffside plant issued by the North Carolina Department of Environment and Natural Resources (DENR), Duke agreed to retire 800 MW of additional coal capacity from coal-fired emission units located in North Carolina, without regard to achieving a commensurate level of MW savings from new energy efficiency and DSM programs, according to a specified schedule, subject to and considering the impact on system reliability.

or G.S. 62-80. Nevertheless, denial of NC WARN's motion in this docket does not, in any manner, constitute approval by the Commission of the costs associated with construction of the Cliffside plant for ratemaking purposes, and this order is without prejudice to the right of any party to take issue with the ratemaking treatment of the costs of construction in a pending or future proceeding. Further, this order does not, in any manner, constitute approval by the Commission in this docket of the reasonableness or prudence of Duke's actions to date regarding construction of the Cliffside plant and is without prejudice to the right of any party to raise such issues in a pending or future proceeding. Indeed, such issues have been raised in the pending Duke rate case in Docket No. E-7, Sub 909, and an evidentiary hearing has been held in that proceeding. This docket is concerned solely with whether Duke's certificate to construct the Cliffside plant should be revoked, and this order should not be cited by any party as a precedent in any pending or future proceeding where prudence and ratemaking may be at issue.

ISSUED BY ORDER OF THE COMMISSION.
This the _4th_ day of November, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Commissioner Robert V. Owens, Jr., while reaffirming the reasoning set forth in his dissent to the March 21, 2007 order, concurs in the result of this Order Denying Motion for Revocation of Certificate. Commissioner Owens generally concurs in the second and third lines of reasoning set forth by the Commission in support of this decision.

Kc110409.01

DOCKET NO. E-2, SUB 926

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of Progress Energy Carolinas,	)	
Inc. for Approval of Distribution System	)	ORDER APPROVING PROGRAM
Demand Response Program	)	

HEARD: September 17, 2008, and January 7 and 8, 2009, in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Chairman Edward S. Finley, Jr., Presiding; Commissioner Robert V. Owens, Jr.; Commissioner Lorinzo L. Joyner; and Commissioner William T. Culpepper, III

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For the North Carolina Sustainable Energy Association:

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BY THE COMMISSION: On April 29, 2008, Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (PEC or the Company), filed an application for approval of a new demand-side management (DSM) program, the Distribution System Demand Response (DSDR) program, pursuant to Commission Rule R8-68 and G.S. 62-133.9. The application also sought inclusion of program-related costs and incentives in the annual DSM/Energy Efficiency (EE) rider authorized by G.S. 62-133.9(d) and Rule R8-69.

On May 20, 2008, pursuant to Rule R8-68(d)(1), Roy Cooper, the North Carolina Attorney General, filed a notice of intervention. The intervention of the Attorney General is recognized pursuant to G.S. 62-20.

On May 23, 2008, the Public Staff petitioned for an extension of time until June 30, 2008, to file responses or protests, noting that PEC had filed three new DSM programs around the same time, with the same deadline for comments. The Commission granted the extension on May 28, 2008.

On May 29, 2008, the Carolina Utility Customers Association, Inc. (CUCA) filed a petition to intervene, which the Commission allowed on June 6, 2008. Petitions to intervene were filed on June 30, 2008, by the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II), the North Carolina Sustainable Energy Association (NCSEA), the Environmental Defense Fund (EDF), the Natural Resources Defense Council (NRDC), the Southern Alliance for Clean Energy (SACE), and the Southern Environmental Law Center (SELC). The Commission subsequently allowed the interventions of all these parties on July 11, 2008. The intervention of the Public Staff is deemed recognized pursuant to G.S. 62-15(d) and Commission Rule R1-19(e).

On June 30, 2008, the Attorney General and the Public Staff filed comments on the program. The Public Staff's comments included its endorsement of the DSDR program as a new DSM program as defined by G.S. 62-133.8 and 62-133.9. Also on June 30, 2008, CIGFUR II filed a Protest to PEC's application for approval and NCSEA filed comments opposing PEC's

application stating, generally, that DSDR is not a new DSM program eligible for cost recovery pursuant to G.S 62-133.9.

On July 10, 2008, PEC filed reply comments in response to the issues raised in the June 30, 2008 filings of the Public Staff, the Attorney General, and CIGFUR II. On July 14, 2008, PEC filed comments in response to NCSEA's filing.

On July 18, 2008, the Commission issued an Order consolidating this docket with Docket No. E-2, Sub 931 for hearing only, since PEC had filed an application in the latter docket seeking DSM and EE cost recovery, including costs associated with implementation of the DSDR program. The Order set the date of the hearing for September 17, 2008, and established deadlines for filing testimony and required compliance with certain discovery guidelines.

On July 25, 2008, NCSEA filed a letter clarifying the relief sought in its June 30 comments, in response to PEC's July 14, 2008 reply comments.

On August 1, 2008, PEC filed the direct testimony of Robert M. Simpson. On August 27, 2008, the Public Staff filed a motion to extend the due dates for testimony and to reschedule the evidentiary hearing from September 17, 2008, to a date more suitable for all the parties. By Order issued September 12, 2008, the Commission rescheduled the evidentiary hearing for December 17, 2008 and established new filing deadlines for testimony.

On September 17, 2008, a public hearing was held for the purpose of taking testimony from interested members of the public. No public witnesses appeared.

On October 15, 2008, PEC filed a letter in Docket Nos. E-2, Sub 926, Sub 929 (recovery of fuel and fuel-related costs), Sub 930 (recovery of Renewable Energy and Energy Efficiency Portfolio costs) and Sub 931 (recovery of DSM/EE costs) requesting that the Commission allow Rider BA-1 (which includes DSM/EE program cost recovery) to become effective on December 1, 2008 – subject to modification and possible refund based on the Commission's decisions with respect to the issues presented at the December 17, 2008 hearing – in order to allow all rate adjustments to occur on the same date.

On October 31, 2008, the Public Staff filed comments that supported PEC putting Rider BA-1 into effect as of December 1, 2008, subject to adjustment and refund with interest at the time that the Commission specifies in its Order following the December 17, 2008 hearing.

On November 14, 2008, the Commission allowed Rider BA-1 to become effective December 1, 2008, subject to refund with interest, and required PEC and the Public Staff to draft a proposed Notice of Change in Rates to be sent to PEC's customers. On November 18, 2008, PEC and the Public Staff submitted such notice, which the Commission approved on November 20, 2008. PEC subsequently mailed this notice to all customers as a bill insert.

On December 4, 2008, SELC, SACE, and EDF filed a motion to reschedule the hearing for early in January 2009, and on December 5, 2008, the Public Staff filed a letter supporting the motion and proposing other adjustments to the procedural schedule. On December 8, 2008, the Commission issued an Order rescheduling the hearing for January 7, 2009, and extending deadlines for the filing of testimony, exhibits and settlement agreements.

On December 9, 2008, PEC, the Public Staff, and Wal-Mart Stores East, LP submitted an Agreement and Stipulation of Partial Settlement (Stipulation) of certain issues in Docket Nos. E-2, Sub 926 and Sub 931. In its letter filed with the Stipulation, the Public Staff stated that it believed that its June 30, 2008 comments in Docket No. E-2, Sub 926 and the testimony of PEC witness Simpson were sufficient for the Commission to determine whether the DSDR program was a DSM program eligible for cost recovery under G.S. 62-133.9.

On December 23, 2008, the EDF, NRDC, SACE, and SELC filed the testimony of J. Richard Hornby, Brian M. Henderson, and Nathanael Greene. On December 29, 2008, PEC filed a motion to strike portions of the prefiled testimony of Mr. Henderson and Mr. Greene. Also, on December 29, 2008, Christopher Simmler filed comments on the DSDR Program. On January 2, 2009, PEC filed a motion to strike Mr. Simmler's filing, and on January 5, 2009, Mr. Simmler filed his opposition to PEC's motion. On January 6, 2009, PEC filed a letter in reply to Mr. Simmler's opposition. On January 6, 2009, the Commission granted PEC's motion to strike with respect to Mr. Greene's testimony, but denied PEC's motion with respect to Mr. Henderson. Mr. Simmler did not appear at the hearing.

The case came on for hearing as scheduled on January 7, 2009. The prefiled testimony of PEC witness Simpson was received into evidence and witness Simpson presented direct testimony on behalf of the Company. The prefiled testimony of Nathanael Greene (the nonstricken portions only), Brian M. Henderson, and J. Richard Hornby were received into evidence, and these witnesses presented direct testimony on behalf of EDF, NRDC, SACE, and SELC. The Commission admitted into evidence the exhibits of these witnesses.

The Commission initially scheduled proposed orders to be filed on February 20, 2009. On January 30, 2009, the Commission issued a Post-Hearing Order requiring PEC to file certain additional information, requesting the parties to address an additional issue, and rescheduling the date for proposed orders to February 27, 2009.

On February 24, 2009, the EDF, NRDC, SACE, and SELC filed a motion requesting the Commission to extend the time for the parties to file proposed orders and briefs until March 13, 2009. PEC opposed this motion. The Commission, by Order dated February 26, 2009, allowed an extension of time for all parties to file briefs or proposed orders until March 6, 2009.

On March 3, 2009, the Commission issued a second Post-Hearing Order requiring PEC to file certain additional information and revising the date for the filing of proposed orders to March 20, 2009. On March 11, 2009 PEC filed the additional information required by the Commission's March 3, 2009 Order.

The parties filed briefs and proposed orders by March 20, 2009, as allowed by the Commission.

Based upon PEC's application, the testimony and exhibits received into evidence at the hearing, and the record as a whole, the Commission now makes the following

FINDINGS OF FACT

1. PEC is a duly organized corporation existing under the laws of the State of North Carolina and is engaged in the business of developing, generating, transmitting, distributing, and selling electric power to the public in North and South Carolina, and is subject to the jurisdiction of the North Carolina Utilities Commission as a public utility. PEC is lawfully before this Commission based upon its application filed pursuant to G.S. 62-133.9 and Commission Rule R8-68.

2. G.S. 62-2 and 62-133.9 require North Carolina's electric power suppliers to implement DSM and EE measures and use supply-side resources to establish the least-cost mix of demand reduction and generation measures that meet the electricity needs of their customers.

3. G.S. 62-133.8(a)(2) defines DSM as "activities, programs, or initiatives undertaken by an electric power supplier or its customers to shift the timing of electricity use from peak to nonpeak demand periods. 'Demand-side management' includes, but is not limited to, load management, electric system equipment and operating controls, direct load control, and interruptible load."

4. G.S. 62-133.8(a)(4) defines the term "energy efficiency measure" as "an equipment, physical, or program change implemented after 1 January 2007 that results in less energy used to perform the same function. 'Energy efficiency measure' includes, but is not limited to, energy produced from a combined heat and power system that uses nonrenewable energy resources. 'Energy efficiency measure' does not include demand-side management."

5. G.S. 62-133.9(a) provides that a DSM or EE measure is "new" if it was adopted and implemented on or after January 1, 2007.

6. Commission Rule R8-68 requires a utility to seek and obtain Commission approval prior to offering any new DSM or EE program and establishes the filing requirements associated with an application for approval of a new DSM or EE program.

7. On April 29, 2008, PEC submitted an application requesting approval of a new peak load reduction program, the DSDR program, as a new DSM program.

8. PEC's April 29, 2008 application requesting approval of its DSDR program satisfies the filing requirements of Commission Rule R8-68.

9. PEC's proposed DSDR program involves developing and installing advanced technology on PEC's distribution system that enables the Company to manage the voltage level on its entire distribution feeder system. Through this program, PEC can reduce demand by

lowering system voltage at the substation while controlling the magnitude of the voltage drop along the distribution feeder and stay within the required range. This allows PEC to lower peak demand while maintaining adequate voltage quality for all distribution customers.

10. The DSDR program is focused on PEC's distribution system and not the Company's transmission system. The projected incremental peak load reduction capability of the DSDR program is 247 megawatts (MW) in the year 2012, growing to 299 MW in the year 2023. All customers served by PEC's distribution system will directly benefit from the DSDR program and the effect of the resulting voltage reduction will be unnoticeable. PEC estimates that it will utilize the DSDR program 15 to 20 times a year for four to six hours at a time, which is consistent with the Company's peak load and the times the Company uses peak load generators.

11. As of December 31, 2007, PEC had 4,049 industrial customers; 3,990 of those customers took delivery of electricity over PEC's distribution lines. At year-end 2007, PEC had 217,608 commercial customers; 217,601 of those customers took delivery of electricity over PEC's distribution lines.

12. PEC's measurement and verification (M&V) plan for the DSDR program, which will rely upon PEC's review of demand data from the records from the Company's Energy Control Center and the DSDR Distribution Management System, is adequate and reasonable.

13. PEC's proposed DSDR program is a new EE program as defined by G.S. 62-133.8 and G.S. 62-133.9.

14. The voltage control and demand resource capability provided by the DSDR program is completely new. This capability does not currently exist. The use of PEC's existing peak load voltage reduction capability of 75 MW is limited to emergency situations due to its operating limitations and potential adverse customer or system impacts. The existing voltage reduction program was used only 10 times in 2008, during emergency situations on PEC's system. The new DSDR equipment will replace the existing voltage reduction equipment.

15. All customers who take delivery of electricity over PEC's distribution lines will participate in and directly benefit from the DSDR program and it is impossible for any of these customers to elect not to participate or to "opt out" of the program. An affirmative election by customers to participate in the program is not necessary. The DSDR program does not involve or require any changes on the customer side of the meter.

16. PEC's proposed new DSDR program is cost-effective and should be approved.

17. PEC's proposed new DSDR program is in the public interest and benefits the Company's overall customer body; it does not unreasonably discriminate among persons receiving or applying for the same kind or degree of service; it does not promote unfair or destructive competition and is not inconsistent with the public policy of the State of North Carolina as set forth in G.S. 62-2 and 62-140; and it has a beneficial impact on PEC's peak loads, load factors, and system energy requirements.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 THROUGH 6

These findings of fact are essentially informational, jurisdictional, and procedural in nature and are not controversial.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 7 AND 8

The evidence for these findings of fact is contained in the procedural history and filings in this proceeding. PEC's filing was made in accordance with Commission Rule R8-68. None of the parties to this proceeding presented any evidence that PEC's April 29, 2008 application for approval of its DSDR program does not satisfy the filing requirements of Commission Rule R8-68 and the Commission concludes that PEC has complied with all such requirements.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 9 THROUGH 17

The evidence for these findings of fact is contained in the testimony of PEC witness Simpson and PEC's April 29, 2008 application for approval of the DSDR program. PEC witness Simpson explained that there are only two types of resources available to utilities to meet their customers' electricity needs: supply-side resources and demand-side resources. Supply-side resources generate electricity. Demand-side resources do not. Witness Simpson testified that the DSDR program is a demand-side resource that will not generate any electricity, rather it will reduce peak load in two ways. First, it will shift customer usage from peak to nonpeak times. Second, it will reduce customer usage.

Witness Simpson explained that the DSDR program reduces peak load through a system of electric equipment and operating controls that enable PEC to reduce the voltage on its distribution system uniformly during peak periods to reduce generation requirements effectively. In addition to reducing peak load, the DSDR program will also result in energy savings due to the reduction in line losses and the impact on certain customer end uses such as lighting. Witness Simpson testified that the DSDR program will provide PEC an additional demand-side resource to meet the future energy needs of PEC's customers and reduce emissions that can impact global climate change. He explained that the incremental peak-load reduction capability of this program is 247 MW.

According to witness Simpson, the DSDR program causes a shift of electricity usage from peak to nonpeak demand periods because the reduction in voltage from the DSDR equipment affects the operation of appliances, such as heat pumps, refrigerators, and other temperature or pressure-regulating motor-dependent devices that are attempting to satisfy a thermostat. As a result, the appliance's operation is shifted in time either by longer run times, additional run cycles, or both, thus shifting usage from peak to off-peak periods.

Witness Simpson described the impact of the DSDR program on an electric water heater as an example of the shift in usage from peak to off-peak periods. He explained that a water heater operates until the water in the tank reaches the temperature setting of the thermostat. When the DSDR program is activated during peak times, the lower voltage reduces the heat output (watts) of the water heater, which causes the water to heat more slowly, so that the water heater has to run longer to heat the water to the temperature required by the thermostat. As a

result of running longer, the water heater will continue to operate in the off-peak period when it otherwise (if DSDR had not been activated) would have satisfied the thermostat during the peak period and shut off. Once the peak period passes and the DSDR program is deactivated, voltage returns to normal, and the water heaters that have not satisfied the thermostat do so during the off-peak period. At that point, the water heater will continue to operate until it heats the water in the tank to the prescribed thermostat setting during the off-peak period. The same is true for many other appliances, such as heat pumps and refrigerators.

Witness Simpson noted that this is a representation of the shifting of electricity use that occurs when the DSDR equipment is activated. Witness Simpson explained further that the degree to which electricity use shifts from a peak to nonpeak demand period depends upon the peak-load duration, load composition, efficiency impact of the voltage reduction on the device, and the environmental conditions associated with what the device is regulating.

For other types of customer appliances that do not involve a thermostat, such as lighting, the reduction in voltage reduces the amount of kilowatts required by the load (less kilowatts of power are used to perform the same function).

Witness Simpson analogized the impact of the DSDR program to PEC's EnergyWise DSM program, which the Commission has approved. Through the EnergyWise program, PEC controls the operation of and the supply of electricity to a customer's heat pump and/or water heater by simply turning it off during peak times, so that it consumes no electricity during the peak period. The DSDR program essentially does the same thing, i.e., it controls the operation of and the supply of electricity to customer's appliances. With the DSDR program, PEC simply reduces the electricity available to the appliance rather than completely turning it off, thus allowing PEC to reduce and shift demand.

Witness Simpson explained that the equipment, technology, control systems, and activities that PEC will undertake to implement the DSDR program go far beyond that required to simply maintain system reliability and service quality. He testified that while PEC's current maintenance activities meet or exceed the performance associated with both adequate and reliable service to PEC's customers and compliance with regulatory requirements, the current equipment, technology, control systems, and level of activities are not sufficient to implement the DSDR program. Witness Simpson explained that this is because the DSDR program's purpose is to provide a new capability that does not exist today: to enable the distribution system to be used as a demand-side resource to reduce peak-load demand for a duration and sustainability equivalent to a peak-load generator. Witness Simpson testified that this new capability requires a financial investment beyond that required to provide adequate and reliable service and comply with regulatory requirements.

In order to implement the DSDR program, witness Simpson indicated that PEC will undertake a comprehensive feeder-conditioning initiative over the next five years on the Company's 1,100+ distribution feeders in the Carolinas. That initiative consists of changing tap-line configurations to improve load balance, installing additional phase wires to balance load, relocating and adding approximately 400 new line capacitors, and adding approximately 4,400 new line voltage regulators.

Witness Simpson explained that this feeder-conditioning initiative will improve the voltage profile on PEC's distribution feeders so that voltage will remain relatively flat from the distribution substation to the transformers serving customers. As a result, PEC will be able to reduce demand by lowering system voltage at the substation while controlling the magnitude of the voltage drop along the distribution feeder and while remaining within the Commission-required voltage range. This will enable peak-demand reduction while maintaining voltage quality for all distribution customers. This improved voltage profile will benefit all retail customers served from distribution feeders.

Witness Simpson then explained that once the feeder-conditioning equipment is installed, PEC will utilize an advanced system of electric equipment and operating controls that allows for optimizing electrical equipment located on the distribution feeders. Through the use of a Distribution Management System (DMS), power flows will be managed in real time to implement the desired demand reduction needed during peak conditions. A sophisticated network of sensors as well as new control systems to provide real-time communications between the DMS and electrical equipment located on the distribution feeders will be installed in order to provide feedback to the DMS so that it can operate and control the distribution system such that demand reduction can be achieved during times of system peak. Witness Simpson emphasized that these enhancements to the distribution grid greatly exceed the capability of the existing distribution infrastructure that provides and maintains the proper voltage quality and reliable electric service that exists today.

Witness Simpson then explained how the DSDR program is different from PEC's existing voltage-reduction program. He testified that the existing voltage-reduction program is limited to 75 MW of load reduction and is only used in emergency situations. He explained that it has significant operating limitations and potential adverse impacts to system voltage quality, and, as a result, it has limited effectiveness as a DSM resource. In contrast, he explained that the DSDR program is a new DSM program that requires state-of-the-art technology to manage power flow in real time to deliver peak-load reduction capability from the distribution system. Witness Simpson testified that PEC will operate its DSDR program when PEC is experiencing heavy loads during peak times of the day. PEC will activate its DSDR program on a systemwide basis to reduce peak load and mitigate the need for generation resources. As a DSM program, the DSDR program will be utilized for four to six hours at a time, which is a duration typical of peak-load periods. This will allow PEC to avoid building a new combustion turbine. Since this state-of-the-art DSM program will be implemented subsequent to January 1, 2007, witness Simpson testified that it will constitute a "new" DSM program as defined by G.S. 62-133.9.

Witness Simpson further testified on cross-examination that the DSDR equipment will replace the equipment associated with PEC's existing voltage-reduction program. He stated that all customers will benefit from the DSDR program; that the effect of the voltage reductions under the DSDR program will be unnoticeable to customers; and that all customers will participate in the program since an election to do so is not necessary.

PEC described its M&V plan for the DSDR program in its April 29, 2008 application. According to the application, each year, following summer system peak, the demand reduction achieved through the DSDR program will be determined and compared to the estimated demand reductions that PEC provided in its April 29, 2008 application for approval. PEC will rely upon

its review of demand data from the records from PEC's Energy Control Center and the DSDR DMS.[1]

Witness Simpson explained that the DSDR program passed the three applicable standard cost-effectiveness tests, to wit: the utility cost test, the total resource cost test, and the rate impact measure test. The results of these tests are contained in PEC's April 29, 2008 application for approval. Witness Simpson testified that PEC used the best available data in performing the cost-effectiveness evaluations for the DSDR program, as well as all other DSM/EE programs. He stated that the trend in avoided costs, which is the primary cost benefit of the DSDR program, is increasing, and that this trend is expected to continue. As a result, PEC concludes that the cost-effectiveness test results will improve, all other factors being equal, as updated avoided costs are considered. Witness Simpson further explained that PEC has high confidence that it can control program costs and deliver the projected peak-load reduction benefits to ensure the program remains cost-effective.

Witness Simpson testified that this level of control will help optimize the operation of the distribution system such that system losses can be reduced; the power factor can be improved and maintained; and during peak conditions, demand can be reduced.

In addition to peak-load shifting and reduction, which are the primary benefits of the DSDR program, witness Simpson explained that it will also provide ancillary system benefits in the form of reduced system losses and an improved system power factor that in turn generates real fuel savings. Witness Simpson testified that because of the advanced technology and the DMS system it requires, the DSDR program will ready the system as a necessary step toward future Smart Grid strategy phases that have been identified by PEC. According to witness Simpson, this will result in ancillary benefits associated with automated metering infrastructure (AMI), communications and controls for DSM, improved asset management, reliability improvements, and communications to distributed resources including renewable power sources. Using the DSDR infrastructure and the DMS system, PEC will be able to communicate with distributed generation and renewable resources installed on the distribution system and provide pricing and control signals to customers participating in future DSM programs. The DMS engine will holistically manage all of the load shaping elements of future Smart Grid investments. Investment in the communications infrastructure required for the DSDR program can be scaled up for incremental costs to support these future Smart Grid capabilities.

PEC witness Simpson testified that the Company has already begun installing DSDR features in some of its feeders.

Public Staff's Comments

On March 20, 2008, PEC and the Public Staff filed a Joint Proposed Order. The Public Staff agreed with PEC's position that the DSDR program is a DSM program as defined by

[1] In its Comments in Reference to the Public Staff's Response to Petition for Approval of Program, filed with the Commission in this docket on July 10, 2008, PEC agreed to work with the Public Staff to develop an annual report for the DSDR program that will provide key operating data and to submit the first report to the Public Staff beginning in the fall of 2009.

G.S. 62-133.8; that it is a new program as defined by G.S. 62-133.9; and that it should be approved pursuant to Commission Rule R8-68.

Attorney General's Comments

In its Post-Hearing Brief, the Attorney General asserted that the DSDR program is an enhancement to PEC's distribution system and that, in comparison to other supply-side enhancements, the DSDR program is a least-cost improvement. Therefore, the Attorney General supported PEC's implementation of the DSDR program, as well as recovery of PEC's costs and a return on asset capital through base rates. However, the Attorney General took the further position that PEC has not shown that the DSDR program is a new DSM or EE program under G.S. 62-133.9. Shifting electricity usage from peak to nonpeak periods is not a principal attribute of the DSDR program. Rather, the DSDR program is mainly a supply-side enhancement that enables the distribution system to operate more efficiently by reducing line losses and improving substation voltage regulation. This is demonstrated by the fact that the MWh reductions will occur primarily because PEC's generating plants run less, rather than by reducing or shifting usage by consumers.

According to the Attorney General, the DSDR program is not typical of DSM programs, such as PEC's proposed Residential EnergyWise program, in which customers agree, in return for a reduced rate, to have the utility curtail their usage during peak hours. The DSDR program will operate systemwide to reduce the voltage of all customers, as well as reducing line losses, when PEC activates the equipment during peak periods. Customers do not choose to participate in the program. Indeed, as a practical matter no customer can opt out of participation in the program.[1]

Further, the Attorney General asserted that all customers will directly benefit from the MW capacity savings achieved by the program. Thus, all customers should pay for the program, as required under G.S. 62-133.9(e). This includes wholesale customers. Even though industrial, large commercial, and wholesale customers cannot in fact opt out of participation in the DSDR program and will receive the direct benefit of lower rates from the DSDR program's MW savings, those customers would be able to opt out of paying for the DSDR program if its costs and incentives are recovered through a DSM annual rider. That result would violate the requirement of G.S. 62-133.9(e) that all customers who directly benefit from DSM measures shall pay for the cost of those measures. It would further violate the requirement that the Commission set just and reasonable rates. It would not be fair to PEC's residential and small commercial customers to require them to pay the full costs of the DSDR program through an annual rider, while industrial, large commercial, and wholesale customers receive the same benefits but pay nothing. Rather, it would be just and reasonable that the DSDR program's cost be placed in rate base, with PEC allowed to earn a 12.75% return on equity and a 10.45% overall rate of return, as authorized in PEC's last general rate case. Accordingly, the Attorney General

[1] Most of PEC's industrial and commercial customers receive service from a distribution line. As of December 31, 2007, PEC had 4,049 industrial customers, with 3,990 receiving service from a distribution line. As of that same date, PEC had 217,608 commercial customers, with 217,601 receiving service from a distribution line. *Testimony of Robert M. Simpson*, T. Vol. 1, p. 53.

asserted that the Commission should not approve annual cost recovery and incentives for the DSDR program under G.S. 62-133.9(d).

CUCA's Comments

In its Post-Hearing Brief, CUCA asserted that the DSDR program does not represent either a "new" technology or a "new" method of system operations. For years, PEC has had a "voltage reduction" program in place. This program has been used, as described by the PEC witnesses, as a form of mini brownout, during periods of system "emergency," to force the square peg of demand to fit into the round hole of available capacity. The only features of the DSDR program which are different from the long-existing PEC voltage reduction program are: (1) through the expense of millions of investment dollars, PEC will be able to expand the "voltage reduction" program to operate on a systemwide basis; and (2) as proposed, the DSDR program would be used to force the square peg into the round hole during all periods where the system is approaching a "peak," rather than simply for system "emergencies."

CUCA stated that Senate Bill 3 (SB 3) envisions that a true DSM program will have the salutary effect of actually reducing peak demands by inducing customers to move their actual usage away from the peak, either through rate incentives and/or disincentives or by allowing the customer to voluntarily install load restriction devices on the customer's premises and equipment. In contrast, the DSDR program is solely a function of what PEC does, on PEC's system, using PEC's equipment. The customer has no choice or say-so in the matter at all.

Nevertheless, CUCA stated that it is not opposed to PEC's proposal to implement, deploy, and operate the DSDR system. However, CUCA is opposed to the approval of the DSDR program as a "new" DSM program of the type envisioned by SB 3 and further opposed the inclusion of costs related to the DSDR program in the PEC DSM cost recovery rider mechanism. In the absence of SB 3, the type of capital investment and increased annual operating expenses proposed by PEC in order to deploy the DSDR program would be matters subject to cost recovery, if at all, only in a general rate case proceeding. In the general rate case context, the DSDR program would very likely be given a favorable review, as a "sound management practice." However, if the Commission allows recovery of these costs through the DSM rate rider, it would impose the equivalent of a "double whammy" on consumers. In the first place, PEC will have absolute control over reducing its system voltage to a level less than the "normal" or "average" system voltage. This means that the customer receives "Whammy No. 1" in being required to pay the existing PEC general base rates, including fuel cost riders, for what can only be described as a "lesser" value of service. Stated another way, the customer is paying the same, unreduced rate that the customer otherwise would pay for a lower quality voltage of the electricity purchased from PEC. Then, as "Whammy No. 2," under PEC's proposal, the customer gets to pay, yet again, under the DSM rate rider. So, as a bottom-line result, if the DSDR program is approved as a "new" DSM Program, and its costs are included in the DSM rate rider, the customer will in fact have to pay a "higher" rate than at present for a "lower" quality of service. CUCA asserted that it simply does not believe that this was a consequence or result envisioned or intended by the General Assembly in adopting SB 3.

NCSEA's Comments

In its comments which were part of its petition to intervene, the NCSEA urged the Commission to clarify the definition of DSM and disputed PEC's contention that all aspects of the DSDR program meet the requirements of a "new" DSM program. NCSEA argued that the Commission should not approve the inclusion of tap changers, phase additions, installation of voltage regulators, or capacitor banks in the DSM rate rider, because "these actions are undertaken in order to maintain the distribution system and should be considered part of doing business."

CIGFUR II's Comments

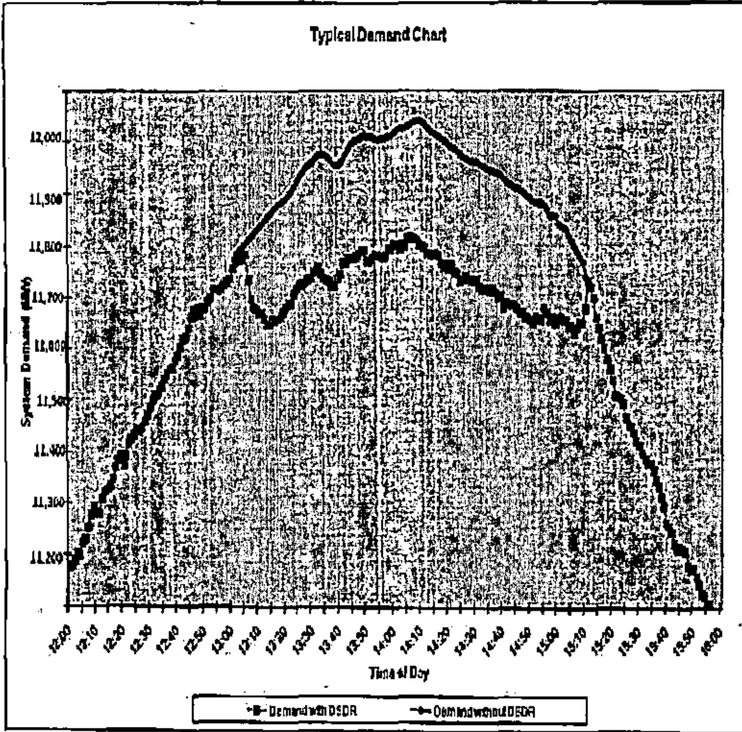
In its Protest and Petition to Intervene, CIGFUR II argued that the DSDR program is not DSM because it does not shift the timing of electricity use from peak to nonpeak periods and that the DSDR program costs should be recovered through base rates. CIGFUR II also argued that a portion of the DSDR costs should be allocated to the wholesale jurisdiction.

COMMISSION CONCLUSIONS

The Commission finds that PEC's DSDR program does not fit the statutory definition of a DSM program, but does meet the statutory definition of an EE program. The DSDR program does not substantially "shift the timing of electricity use from peak to nonpeak demand periods," as required by statute. In fact, contrary to the general testimony offered by PEC witness Simpson, the following "Figure 3," which appeared in PEC's application, clearly shows that the DSDR program will not shift usage into the nonpeak time period.[1] Rather, the DSDR program reduces customers' energy consumption during peak periods; i.e., it "results in less energy [being] used to perform the same function." Thus, the DSDR program more closely falls within the statutory definition of an "energy efficiency measure" as set forth in G.S. 62-133.8(a)(4).

[1] Any shift in customer usage from peak to nonpeak times as a result of the DSDR program will, at best, be *de minimus*. PEC witness Simpson's non-specific testimony on this point was not convincing to the Commission, particularly in contrast to the other more credible evidence cited hereinabove. The Attorney General is correct in his assertion that shifting electricity usage from peak to nonpeak periods is not a principal attribute of the DSDR program.

Figure 3 - Illustrative Impact of DSDR Program



The Commission also takes judicial notice of PEC Exhibit No 1, Page 10 which was filed with PEC's June 6, 2008 application for approval of its DSM/EE rider in Docket No. E-2, Sub 931. That Exhibit included the following chart:

Expected Energy Reductions (MWh)

	CFL Program	DSDR Implementation	EnergyWise	CIG New Construction	CIG Retrofit	Res New Construction	Total
2008	6,934	9,195	59	345	505	774	17,812
2009	6,934	22,211	236	1,724	5,558	3,626	40,289
2010	6,934	38,956	413	3,966	12,885	8,189	71,343
2011	6,934	57,389	590	7,415	23,244	17,316	112,888
2012	6,934	76,443	766	11,726	35,877	31,006	162,752

PEC projects that the DSDR program will provide more EE than any other EE or DSM program offered thus far by the Company. For calendar years 2008 through 2011, the DSDR program is projected to provide more than 50% of the Company's expected energy reduction savings each year. By 2012, the DSDR program is projected to provide approximately 47% of PEC's total EE.

Therefore, based upon a careful review of the entire record in this proceeding, the Commission concludes that the DSDR program is an EE program as defined by G.S. 62-133.8; that it is a "new" program as defined by G.S. 62-133.9; and that the program should be approved pursuant to Commission Rule R8-68. The Commission is of the opinion that the DSDR program is a new program for the reasons generally given by PEC and the Public Staff in support of their position on that issue; i.e., the voltage control and demand resource capability provided by the DSDR program is completely new; this capability does not currently exist; and the new DSDR equipment will replace the existing voltage reduction equipment.

Having concluded that the DSDR program is a new EE program, the Commission further concludes that its costs should be recovered from all retail customers that benefit; that is, all retail customers that receive power via PEC's distribution system, regardless of the "opt out" provision for industrial and large commercial customers contained in G.S. 62-133.9(f).[1] The Commission reaches this conclusion primarily based on the following considerations. G.S. 62-133.9(e) provides that the Commission "shall assign the costs of [new DSM and EE programs] only to the class or classes of customers that directly benefit from the programs." All retail customers served by PEC's distribution system will participate in and directly benefit from the DSDR program. It is impossible for any of these customers to elect not to participate or to "opt out" of the program. An affirmative election by retail customers to participate in the program is not necessary. The DSDR program does not involve or require any changes on the customer's side of the meter. The specific ratemaking implications of this decision are more fully discussed in the Order entered this same day in Docket No. E-2, Sub 931.

The Commission further notes that PEC, prior to receiving approval to implement its proposed DSDR program, has already begun installing DSDR features in some of its distribution feeders. Commission Rule R8-68(c) provides that a public utility shall not implement any DSM or EE measure or program prior to obtaining approval from the Commission to do so. The Commission will waive this provision of Rule R8-68 in this instance, but expects PEC to comply in full with this requirement in the future or risk disallowance of program costs and/or incentives.

Finally, the Commission acknowledges that much of the investment in the DSDR program is taking the form of traditional utility distribution system infrastructure. However, that infrastructure is necessary in order for the DSDR program to successfully save more than 76,000 MWh of energy per year and 247 MW of peak demand by 2012. Therefore, the Commission finds and concludes that those costs are an appropriate cost component of this new EE program, subject to review and true-up in PEC's annual DSM/EE rider proceedings.

IT IS, THEREFORE, ORDERED as follows:

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[1] Under the Settlement, industrial and large commercial customers that opt out of Progress's DSM/EE programs would have avoided all cost responsibility for the DSDR program.

1. That PEC's Distribution System Demand Response program shall be, and hereby is, approved as a "new" EE program pursuant to Commission Rule R8-68.

2. That the costs of PEC's DSDR program shall be recovered from all retail customers that benefit; that is, all retail customers that receive power via PEC's distribution system, regardless of the "opt out" provision for industrial and large commercial customers contained in G.S. 62-133.9(f).

3. That PEC shall work with the Public Staff to develop an annual report for the DSDR program that will provide key operating data from its M&V plan. PEC shall submit its first report to the Public Staff and the Commission no later than November 30, 2009.

4. That utility incentives, program costs, and cost allocation procedures for the DSDR program shall be determined and established in Docket No. E-2, Sub 931 consistent with the provisions of this Order. Accordingly, the specific ratemaking implications of the DSDR program shall be fully addressed in the Order entered this same day in Docket No. E-2, Sub 931.

ISSUED BY ORDER OF THE COMMISSION.
This 15th day of June, 2009.

NORTH CAROLINA UTILTIES COMMISSION
Gail L. Mount, Deputy Clerk

Bb061509.01

Chairman Edward S. Finley, Jr., Concurring in Part and Dissenting in Part.

DOCKET NO. E-2, SUB 926

Chairman Finley, concurring in part and dissenting in part.

The Commission should approve the stipulation between PEC, the Public Staff and Wal-Mart in its entirety. The majority has modified the stipulation because it determines that commercial and industrial (C&I) customers that exercise their opt-out right benefit from the DSDR program without fairly sharing the cost responsibility. While this concern may be legitimate, the General Assembly created the opt-out option with language that exempts qualifying consumers that exercise that right from DSDR-type program cost responsibility, and the Commission is not free to change the statute to accomplish what is deems to be a more equitable result. An elaborate stakeholders process preceded passage of Senate Bill 3 that included C&I customers' representatives. The opt-out right was included in the legislation in exchange for the support of these customers. The General Assembly created the opt-out right and the Commission is not free to remove it.

In the Commission's February 29, 2008 rulemaking in Docket No. E-100, Sub 113, the Commission rejected the very logic upon which it now relies to circumvent the plain language of the statute. PEC, the Public Staff and Wal-Mart justifiably relied upon what the statute says and what the Commission determined it says to reach their stipulation. The Commission has

unjustifiably upset the compromises reached by the parties in the stipulation by modifying, rather than accepting or rejecting, the stipulation for reasons impermissible under the statute. This piecemeal approach discourages compromises and hinders the implementation of the objective of Senate Bill 3.

The clear intent of G.S. 62-133.9(f) and its plain language exempt industrial and commercial customers from the cost responsibility for DSDR upon their exercise of the opt-out right:

> None of the costs of new demand-side management or energy efficiency measures of an electric power supplier shall be assigned to any industrial customer that notifies the industrial customer's electric power supplier that, at the industrial customer's own expense, the industrial customer has implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures and that the industrial customer elects not to participate in demand-side management or energy efficient measures under the section. . . . The provisions of this subsection shall also apply to commercial customers with significant annual usage at a threshold level to be established by the Commission.

Significantly, the statute addresses costs of DSM and EE "measures," not "programs." The statute grants the right to opt out of the utility programs upon the customer's adoption of "alternative" programs. The statute clearly does not contemplate that the C&I customers adopt the same or comparable programs on their own as the utility adopts among its DSM and EE measures before the customer is entitled to opt out. Opt-out can be an all or nothing election. Many of PEC's programs are only available to residential customers. Obviously, C&I customers cannot opt into or out of programs only available to a customer class to which they do not belong. The C&I customers nevertheless are free to opt out in toto from PEC's EE or DSM measures. The appropriate reading of the statute is that if the DSM or EE program is one that qualifies for cost recovery under the DSM and EE rider or qualifies for REP standard compliance, the commercial or industrial customer can opt out.

Consequently, the majority's lone justification for determining that the C&I customers cannot avoid DSDR cost responsibility—DSDR is a PEC controlled and administered program operative on PEC's side of the meter so the C&I customer cannot opt out of it—simply makes no sense.[1]

The majority is contradicting the Commission's prior interpretation of the opt-out election and now adopts the very logic it rejected in February 2008 in doing so.

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[1] The majority also seeks to support its conclusion by asserting that DSDR is not a "traditional" program. This conclusion appears in the Commission's companion order in Docket No. E-2, Sub 931. A threshold requirement for a program's qualifications under Senate Bill 3 for meeting the REP standard or for recovery through the EE and DSM rider is that the program be a "new" one after the implementation date. The fact that DSDR is not "traditional" supports the conclusion that DSDR is the very type program anticipated in Senate Bill 3 and for which the opt-out for C&I customers was intended.

In Docket No. E-100, Sub 113, Duke Energy Carolinas argued that C&I customers should not be allowed to opt out of DSM programs instituted by the utility "through direct control by the utility" that the "customers simply cannot implement on their own." As the Commission stated in summarizing Duke's position: "Given that customers cannot implement such a program on their own, Duke argues that all customers must be assigned costs for demand response programs and that no customer should be eligible to opt out of payment for demand responses programs."

The Commission, in its February 29, 2008 order, unequivocally rejected Duke's position:

> The Commission believes that Duke's proposal directly contravenes the explicit language of Senate Bill 3, which provides that none of the costs of new demand-side management measures shall be assigned to any industrial or large commercial customer that notifies the electric supplier that it has in the past or will in the future implement alternative DSM or EE programs or measures and that the customer elects not to participate in the utility-sponsored DSM or EE measures. The Commission, therefore, finds good cause to reject Duke's proposal.

pp. 133-34.

Consistently, the Commission, in its Docket No. E-100, Sub 113 rulemaking, rejected arguments that C&I customers should be prohibited from opting out of utility programs unless the programs the C&I customers implemented or intended to implement on their own were "substantially equivalent to those implemented by the electric supplier." The Commission concluded "that Rule R8-69 should not be revised to include [the] proposal to require a 'substantially equivalent' test in order for customers to opt out of DSM or EE programs. . . ." Order Adopting Final Ruling, Docket No. E-100, Sub 113, p. 129, February 29, 2008. This determination is impossible to reconcile with the majority's requirement that a commercial or industrial customer be in a position to implement DSDR independently of PEC before the customer can opt out of the program.

The purpose of the extensive Docket No. E-100, Sub 113 rulemaking was to provide guidance to parties like those participating in this docket as they embark on the task of Senate Bill 3 compliance. The parties have followed this guidance to their detriment. Significantly, no party has asserted that C&I customers are not permitted to opt out of DSDR.

When the Commission was attempting to adopt rules to implement G.S. 62-133.9(f) unconstrained by any concrete set of facts or costs to be assigned, the Commission, relying on the unambiguous language of the statue, ruled that C&I customers can opt out of programs like DSDR that are under PEC's control and avoid cost responsibility for them. Now, when the majority disagrees with the result the statute and its ruling require, the majority does an about face. I dissent from this portion of the Commission's ruling. To the extent this ruling is repeated and expanded in the Commission's companion order in Docket No. E-2, Sub 931, I dissent from that portion of the companion order as well.

/s/ Edward S. Finley, Jr.
Edward S. Finley, Jr. Chairman

DOCKET NO. E-2, SUB 926
DOCKET NO. E-2, SUB 931

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 926 In the Matter of Petition of Progress Energy Carolinas, Inc., for Approval of Distribution System Demand Response Program DOCKET NO. E-2, SUB 931 In the Matter of Application by Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc., for Approval of 2008 Demand Side Management and Energy Efficiency Cost Recovery Rider Pursuant to G.S. 62-133.9 and Commission Rule R8-69	)	ORDER GRANTING MOTIONS FOR RECONSIDERATION IN PART

BEFORE: Chairman Edward S. Finley, Jr., Presiding; and Commissioners Robert V. Owens, Jr.; Lorinzo L. Joyner; William T. Culpepper, III; Bryan E. Beatty; Susan W. Rabon; and ToNola D. Brown-Bland

BY THE COMMISSION: On June 15, 2009, the Commission entered an Order Approving Program in Docket No. E-2, Sub 926 and an Order Approving Agreement and Stipulation of Partial Settlement, Subject to Certain Commission-Required Modifications in Docket No. E-2, Sub 931.

On July 13, 2009, Progress Energy Carolinas, Inc. (PEC or Company) filed a motion for reconsideration regarding the June 15, 2009 Orders in the Company's Sub 926 and Sub 931 dockets and a motion for stay in the Company's Sub 931 and Sub 951 dockets. By its motions, PEC requested that the Commission

> reconsider its decisions issued June 15, 2009, in Docket Nos. E-2, Sub 926 and Sub 931 prohibiting industrial and large commercial customers from opting-out of all DSM [demand side management] and EE [energy efficiency] measures and programs and instead give effect to the plain meaning of the statutes which allow such customers to completely opt-out of any cost recovery responsibility for all DSM and EE programs and measures, allow PEC to allocate the costs of its DSDR [Distribution System Demand Response] program between North and South Carolina based on demand, revise the reporting requirements as described [in its motion], and stay the requirement that PEC revise its filings in Docket Nos. E-2,

Subs 931 and 951, until the Commission has ruled on PEC's motion for reconsideration.

On July 13, 2009, the Carolina Utility Customers Association, Inc. (CUCA) also filed a motion for reconsideration in the Sub 926 and Sub 931 dockets. On that same day, Wal-Mart Stores East, LP and Sam's East, Inc. (collectively, Wal-Mart) filed a motion for reconsideration and notice in Docket No. E-2, Sub 931. On July 14, 2009, the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II) filed a motion for reconsideration in the Sub 926 and Sub 931 dockets. CIGFUR II contends that the Commission acted in excess of its authority and in violation of the parties' due process rights by overruling its previous Order in Docket No. E-100, Sub 113 without providing proper notice and an opportunity to be heard.

On July 15, 2009, PEC filed a motion whereby the Full Commission was requested to review and vote upon the various motions for reconsideration filed in these dockets.

On July 20, 2009, the Commission entered an Order in these dockets whereby the parties to the Sub 926 and Sub 931 dockets were requested to file comments in response to the various motions for reconsideration.

The North Carolina Sustainable Energy Association (NCSEA) filed initial comments on July 30, 2009, in support of the motions for reconsideration. Specifically, NCSEA requested the Commission to approve the various motions for reconsideration and, in so doing, (1) treat PEC's DSDR program as a DSM measure (rather than as an EE measure) for the purpose of cost recovery and (2) to adhere to the plain language of G.S. 62-133.9 and Commission Rule R8-69 which allow commercial and industrial customers meeting certain requirements to opt-out of the cost-recovery responsibilities associated with utility-sponsored DSM or EE measures. In the event the motions for reconsideration are denied, NCSEA requested the Commission to issue an Order in Docket No. E-100, Sub 113, requesting interested parties to file comments on the applicability and scope of Rule R8-69(d).

On July 31, 2009, the Public Staff filed comments in support of the motions for reconsideration regarding the DSDR program, stating that it generally agrees with arguments advanced by the parties requesting reconsideration of the Commission's determination that industrial and large commercial customers may not opt out of the DSDR program. According to the Public Staff, the language of G.S. 62-133.9(f) is plain and the language of that statute compels no other interpretation than the one advanced by the parties seeking reconsideration. The Public Staff also urged the Commission to reconsider its conclusion that the DSDR program is a new EE program, stating that the record in this matter supports the DSDR program being classified as a DSM program. In the alternative, should the Commission decline to reconsider whether the DSDR program is a DSM program, the Public Staff requested the Commission to allow PEC's motion to allocate the costs of the DSDR program between North and South Carolina based upon peak demand and then to allocate those costs to its customer classes for ratemaking purposes based on North Carolina energy sales. The Public Staff did not comment on the merits of PEC's ES-1 reporting requirement request.

The Attorney General filed comments on July 31, 2009, in opposition to the motions for reconsideration regarding the DSDR program and recommended that those motions be denied. The Attorney General asserted that the Order of the Commission is fully supported by the Commission's findings of fact and application of the law regarding the DSDR program.

The North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN) filed comments on August 3, 2009, stating that the Commission should take the opportunity to reexamine its determination that the DSDR program is wholly a DSM program that is eligible for funding under the proposed rate rider. NC WARN stated that it seems reasonable in light of the provisions of G.S. 62-133.9(f) to allow industrial and large commercial customers to opt out of the portion of the DSDR program that will potentially be used for DSM, but that it is also reasonable to treat the portion of the DSDR program that serves as a routine and requisite upgrade of the distribution grid to be treated like other infrastructure upgrades, with recovery established during rate cases and costs allocated between customer classes.

On August 3, 2009, Christopher Simmler filed comments in opposition to the motions for reconsideration. The Commission noted that Mr. Simmler was not an Intervenor and that his comments would be included in the Commission's Official Files as a consumer statement of position.

On August 7, 2009, CUCA filed reply comments in opposition to the comments filed by the Attorney General, NC WARN, and Christopher Simmler. CUCA asked that the motions for reconsideration regarding the DSDR program be granted.

PEC filed reply comments on August 7, 2009, in opposition to the comments filed by the Attorney General and NC WARN and in support of the various motions for reconsideration.

By Order dated August 24, 2009, the various motions for reconsideration were scheduled for oral argument before the Full Commission. The oral argument was conducted on September 16, 2009. The following parties were present and participated through counsel: PEC; the Public Staff; the Attorney General; CUCA; CIGFUR; NCSEA; and NC WARN.

On November 6, 2009, Daren Bakst filed comments regarding the pending motions for reconsideration. The comments filed by Mr. Bakst have been included in the Commission's Official Files as a consumer statement of position.

WHEREUPON, the Commission notes that the primary focus of the various motions for reconsideration filed by PEC, CUCA, Wal-Mart, and CIGFUR II is a request for the Commission to reconsider its decision issued June 15, 2009, in Docket Nos. E-2, Sub 926 and Sub 931 prohibiting industrial and large commercial customers from opting-out of all DSM and EE measures and programs and instead give effect to the plain meaning of the statutes which allow such customers to completely opt-out of any cost recovery responsibility for all DSM and EE programs and measures. In addition, PEC requested that the Commission reconsider two additional issues so as to (a) allow PEC to allocate the costs of its DSDR program between North and South Carolina based on demand and (b) revise the Commission's ES-1 quarterly reporting requirements as described in the Company's motion.

The Commission will separately address each of the three major issues raised by the various motions for reconsideration.

ISSUE 1
The DSDR Program and the Opt-Out Provision of G.S. 62-133.9(f)

In PEC's motion for reconsideration, the Company first requests that the Commission reconsider its decision prohibiting industrial and large commercial customers from opting out of paying for the DSDR program. In support, PEC argues that the Commission's decision is contrary to the plain meaning of G.S. 62-133.9(f), which states in pertinent part that:

> None of the costs of new demand-side management or energy efficiency measures of an electric power supplier shall be assigned to any industrial customer that notifies the industrial customer's electric power supplier that, at the industrial customer's own expense, the industrial customer has implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures and that the industrial customer elects not to participate in demand-side management or energy efficiency measures under this section. . . .The provisions of the subsection shall also apply to commercial customers with significant annual usage at a threshold level to be established by the Commission.

According to PEC, the Commission decided to prohibit industrial and large commercial customers from opting out of the DSDR program under this statute for several reasons. First, the Commission found that PEC's DSDR program involves activities and equipment on PEC's side of the meter and that these activities and equipment benefit all of PEC's retail customers, regardless of any particular customer's election not to participate. The Commission further found that the DSDR program is not a traditional EE program; that no customer could achieve a comparable voltage reduction impact; and that the DSDR program has aspects of a general distribution system improvement. Based upon these findings, the Commission concluded that, because none of PEC's customers can "opt out" from receiving the benefits of the DSDR program, none of PEC's customers may "opt out" of paying for the DSDR program, as allowed in G.S. 62-133.9(f).

PEC does not challenge the Commission's findings, but does challenge the Commission's resulting conclusion that none of PEC's customers can opt out of paying for the DSDR program. PEC asserts that, because G.S. 62-133.9(f) does not authorize the Commission to abrogate the industrial and large commercial customers' right to opt out of DSM and EE programs and cost recovery under any circumstances, the Commission has relied upon irrelevant factors when determining whether it can require PEC's industrial and large commercial customers to pay for the DSDR program. According to PEC, the only factor that the Commission should consider is whether the industrial or large commercial customer, at its own expense, has implemented or will implement alternative DSM or EE measures, consistent with G.S. 62-133.9(f). If so, that customer may opt out of the cost recovery rider completely. In support of this argument, PEC relies upon the rules of statutory interpretation, citing two cases from the North Carolina Court of

Appeals: State ex rel. Banking Comm'n. v. Weiss, 174 N.C. App. 78, 620 S.E.2d 540 (2005), and Navistar Fin. Corp. v. Tulson, 176 N.C. App. 217, 625 S.E.2d 852 (2006), which both generally hold that statutory interpretation starts with the examination of the plain words of the statute. PEC also cites State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977), in which the North Carolina Supreme Court held that the Commission is a creature of the Legislature and has no authority except that given to it by statute. PEC argues that this case demonstrates that the Commission may not review the "wisdom and fairness" of the Legislature's determination expressed in a statute by effectively nullifying that statute.

PEC then argues that the language of G.S. 62-133.9(f) plainly grants to industrial and large commercial customers the absolute right to opt out of any cost recovery responsibility for all of an electric power supplier's DSM and EE measures upon notifying the electric supplier that the customer has implemented or will implement DSM and EE measures of its own. The Commission may not limit or condition that right. The Commission's Sub 926 and Sub 931 Orders, however, place new conditions and variables on that right that the statute simply does not allow.

The motions for reconsideration and comments filed by CUCA, Wal-Mart, and CIGFUR II largely make the same arguments as those offered by PEC and request the same relief; i.e., that industrial and large commercial customers served by PEC be allowed to opt-out of participation in the Company's DSDR program. The various motions for reconsideration as they pertain to the DSDR program opt-out issue are also supported by the Public Staff and NCSEA.

CONCLUSIONS REGARDING ISSUE 1

On reconsideration, the Commission concludes that PEC's interpretation of the opt-out provision contained in G.S. 62-133.9(f) is correct for the reasons generally set forth above in the description of the Company's legal analysis. G.S. 62-133.9(f) is unambiguous on this point. The statute says that **none** of the costs of new DSM or EE measures shall be assigned to **any** industrial customer that notifies its electric power supplier that it has in the past or will, at its own expense, implement **alternative** DSM or EE measures and that it elects not to participate in any of the electric power supplier's DSM and EE measures. The words "none" and "any" are unambiguous and permit no exceptions.[1] It is impossible to imply exceptions for programs to which the industrial and large commercial customers cannot opt into or out of, for which the customers receive a benefit, or that arise from electric power supplier operations on the supplier's side of the meter.[2] As was correctly stated and asserted by the Public Staff and other

[1] As a rule, where the language of a statute is clear and unambiguous, the statute's clear meaning may not be evaded by an administrative body or a court under a guise of construction. 73 Am. Jur 2d, Statutes § 113, pp 322-23.

[2] As variously expressed, the statute may not be restricted, constricted, qualified or narrowed. Thus, general words are to have general operation where the manifest intention of the legislature affords no ground for qualifying or restraining them. *Id.* § 119, p. 329.

A court is not authorized to insert qualifying provisions not included in the statute, and may not rewrite a statute to conform to an assumed intention that does not appear from the language. *Id.* § 123, p. 332.

petitioning parties, G.S. 62-133.9(f) compels and supports no other interpretation than the one advanced by the various motions for reconsideration.

Thus, contrary to the interpretation being urged by those who wish the Commission to assign DSDR program costs to industrial and large commercial customers that have exercised their option under G.S. 62-133.9(f), an accurate reading of this subsection, when viewed in isolation or in a larger context, has no requirement that the "customer" be able to or in fact exercise an election not to participate in the DSDR program specifically as a prerequisite to opting out of EE and DSM costs. The election can be made to opt out in advance of future or from existing electric power supplier "measures." It is irrelevant that the DSDR program is one under PEC's control and that the provision of EE and DSM benefits arises from procedures on PEC's side of the meter. The DSDR program is a "program" that is a subset of the more comprehensive EE or DSM "measures." The election is available to individual "customers" within the broader General Service "customer class." "Classes" are the categories of consumers addressed in the cost assignment provisions of G.S. 62-133.9(e). The industrial or large commercial customer only needs to promise to implement now or in the future "alternative" "measures." Again, "measures" is broader and more comprehensive than "programs."[1]

For example, G.S. 62-133.8(a)(2) defines "demand-side management" to mean "activities, programs, or initiatives undertaken by an electric power supplier or its customers . . ." When the Legislature used the term "measures" in G.S. 62-133.9(e) and (f), "measures" is a shortened reference to the "activities, programs or initiatives undertaken either by the electric power supplier or its customers" more comprehensively enumerated in G.S. 62-133.(8)(a)(2). To the extent "program" connotes a service offering the customer can subscribe to or not at its election, "measures," including activities, programs, or initiatives undertaken by the electric power supplier or the customer, is a more comprehensive concept. Measures include offerings the customer can opt into such as the Residential Home Advantage Program and the CIG Retrofit Program, and those the customer may not opt into or out of such as the DSDR program.

An election to implement a DSM and/or EE measure that is an "alternative" to the measures the electric power supplier implements expressly eliminates the requirement that the industrial or large commercial customer must be able to and in fact exercise an affirmative choice of refusing to participate in EE and DSM programs such as the DSDR program before the opt out of DSDR program costs responsibility is permissible. When an industrial or large commercial customer exercises its nonparticipation rights under G.S. 62-133.9(f) from all of the electric power supplier's DSM and EE measures by promising to implement alternative measures on its own, the alternative measures need not match those implemented by the electric power supplier. If the industrial or large commercial customer can avoid being assigned costs of the DSDR program by implementing alternative measures, it is irrelevant that the customer cannot elect to opt in or out of the DSDR program.

Thus, a condition or restriction should not be implied as to a right granted by a statute which places no such condition or restriction thereon. *Id.* § 128, pp. 338-39.

[1] Where different language is used in different parts of a statute, it is presumed that the language is used with a different intent. *Id.* § 131, pp. 340-41.

Another justification that has been given for removing DSDR program costs as those eligible for opt out under subsection (f) is that the DSDR program is "nontraditional." Also, it is argued, the DSDR program is a program under PEC's control and not under the control of the industrial or large commercial customer because the benefits result from measures imposed on the distribution system on PEC's side of the meter. These justifications do not square with the unequivocal definitions within Senate Bill 3.

G.S. 62-133.8(a)(2) defines "demand-side management" for purposes of Senate Bill 3 compliance as follows:

> "Demand-side management" means activities, programs, or initiatives undertaken by an electric power supplier or its customers to shift the timing of electricity use from peak to nonpeak demand periods. "Demand-side management" includes, but is not limited to, load management, electric system equipment and operating controls, direct load control and interruptible load.

G.S. 62-133.8(a)(4) defines the term "energy efficiency measure" as follows:

> "Energy efficiency measure" means an equipment, physical, or program change implemented after 1 January 2007 that results in less energy used to perform the same function. "Energy efficiency measure" includes, but is not limited to, energy produced from a combined heat and power system that uses nonrenewable energy resources. "Energy efficiency measure" does not include demand-side management.

Nowhere do these definitions limit DSM or EE to what traditionally was deemed a DSM or EE program.[1] Instead, Senate Bill 3 requires that costs for DSM and EE measures for purposes of rider recovery must be costs for "new" measures. As became apparent in the Duke Energy Carolinas LLC Save-a-Watt hearing in Docket No. E-7, Sub 831, most DSM/EE programs may be criticized as not being "new" because they fail to include sufficient distinctive characteristics from "traditional" DSM/EE programs to qualify. The fact that the DSDR program is "nontraditional" or "new" is a factor in favor of classifying the program among those for which cost recovery is permissible under the Senate Bill 3 DSM/EE rider, and, therefore, such costs are those for which the industrial and large commercial customers can opt out. When the statues which comprise Senate Bill 3, define DSM and EE, what was traditional or nontraditional prior to enactment of the new statutes encompassed within Senate Bill 3 is irrelevant.

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[1] If the legislature has provided an express definition of a term, that definition is generally binding on the courts. In the exercise of its power to define terms, the legislature may include within the concept and definition of a term ideas which may not be strictly within its ordinary definition. *Id.* § 145, p. 350.

A statutory definition supersedes the common-law, colloquial, commonly acquired, dictionary, or judicial definition. *Id.* § 146, p. 350.

Nothing in the definitions of DSM and EE suggests that the measure must be one chosen by the customer. Significantly, included among the category of energy efficiency "measures" are a "program change." Under the statute "measure" is a broader term than "program."

Accordingly, for all of the reasons set forth above, the Commission hereby reconsiders the prior decision on this matter and concludes that industrial and large commercial customers served by PEC may opt out of participation in all Commission-approved DSM and EE programs offered by the utility, including the DSDR program. Accordingly, Section 43 of PEC's Commission-approved Cost Recovery and Incentive Mechanism for Demand-Side Management and Energy Efficiency Programs (Mechanism) is hereby amended to read as follows:

> **Opt-Out Eligibility Requirement for Industrial Customers and Certain Commercial Customers**
>
> 43. Commercial customers with annual consumption of 1,000,000 kWh or greater in the billing months of the prior calendar year and all industrial customers who implement or will implement alternative DSM/EE measures may, consistent with Commission Rule R8-69(d), elect to not participate in any utility-offered DSM/EE measures and, after written notification to the utility, will not be subject to the DSM/EE rider and DSM/EE EMF rider. For purposes of application of this option, a customer is defined to be a metered account billed under a single application of a Company rate tariff. For commercial accounts, once one account meets the opt-out eligibility requirement, all other accounts billed to the same entity with lesser annual usage located on the same or contiguous properties are also eligible to opt-out of the DSM/EE rider and DSM/EE EMF rider. Since these rates are included in the rate tariff charges, customers electing this option shall receive a DSM/EE Credit on their monthly bill statement.

ISSUE 2
JURISDICTIONAL COST ALLOCATIONS BETWEEN NORTH CAROLINA AND SOUTH CAROLINA

PEC requests that the Commission address the method used to allocate DSDR program costs between North and South Carolina. PEC cites Section 22(d) of Appendix A of the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931:

> The allocation factors based upon peak demand and energy sales for each state included in PEC's testimony and exhibits filed in Docket No. E-2, Sub 931 will be the allocation factors used for all program costs in its jurisdictional cost allocations.

PEC further asserts that because the Commission found that the DSDR program is an EE program rather than a DSM program, it would follow that the Company is expected to allocate the costs between North Carolina and South Carolina based on energy sales. In South

Carolina, however, the DSDR program is classified as a DSM program, and hence is subject to interstate allocations on a peak demand basis. In support of its position, PEC states:

> As a result, PEC would be required to allocate its DSDR costs in North Carolina based upon energy sales while in South Carolina the cost will be allocated based upon peak demand. This creates the opportunity for the costs to either be over-recovered or under-recovered in total. Thus, PEC requests that the Commission allow PEC to allocate its DSDR program costs between North and South Carolina based upon peak demand. PEC will then allocate these costs to its customer classes for rate making purposes in North Carolina based on energy sales.

NCSEA agrees with PEC that the DSDR program should be treated as a DSM program for cost-recovery purposes and that peak demand should, therefore, be the allocation method used.

The Public Staff also supports PEC's motion for reconsideration on this issue and urges the Commission to allow PEC's motion to allocate the costs of the DSDR program between North and South Carolina based upon peak demand and then to allocate these costs to its customer classes for ratemaking purposes based on North Carolina energy sales.[1]

CONCLUSIONS REGARDING ISSUE 2

The Commission has previously determined that PEC's DSDR program is an EE program. Therefore, it is reasonable and appropriate for the costs of the DSDR program to be allocated based on each jurisdiction's energy use. All parties agree that EE programs, which are characterized by their energy savings, should be allocated based on energy consumption. Since North Carolina is PEC's largest retail jurisdiction, it is reasonable for the Commission to allocate costs between North and South Carolina and between North Carolina retail customer classes based upon classification of the DSDR program as an EE program. The fact that South Carolina has treated the DSDR program as a DSM program is not controlling. What controls the decision on this issue is the Commission's classification of the DSDR program as an EE program in North Carolina and Section 22(d) of Appendix A of the Commission's June 15, 2009 Order in Docket No. E-2, Sub 931.

For the reasons set forth above, PEC's motion for reconsideration on this issue is hereby denied.

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[1] The Public Staff's primary position on this issue was a request that the Commission reconsider its prior Orders and reclassify the DSDR program as a DSM program rather than as an EE program. The Public Staff's request is outside of the scope of reconsideration noticed by the Commission in the August 24, 2009 Order on Motion for Full Commission Review.

ISSUE 3
ES-1 REPORTING REQUIREMENTS

In regard to ES-1 reporting requirements, the Company requested in its motion for reconsideration and stay that the Commission revise the financial reporting requirements contained in Finding of Fact No. 15 and Decretal Paragraph No. 10 of the Commission's June 15, 2009 Order. Specifically, PEC requested that the Commission withdraw the following reporting requirements: (1) that the Company provide the earnings impact on its DSM and EE programs on a stand-alone basis, that is, with earnings from DSM programs, collectively, and earnings from EE programs, collectively, shown separately, and (2) that PEC provide the earnings impact of each individual DSM and EE program shown separately. In its motion, PEC expressed agreement with the Commission's requirement to include in its quarterly ES-1 Reports all actual program revenues and costs for purposes of calculating and presenting regulated earnings to the Commission, including supplementary schedules which set forth PEC's jurisdictional earnings excluding the effects of all EE and DSM programs but contended that the requirement to report the revenues and expenses of DSM and EE programs separately or on a program basis would be administratively burdensome as it would require manual tracking and allocation of revenues for each program as if each program were a separate rider. PEC maintained that the NCUC ES-1 reporting requirement to provide certain jurisdictional information with and without the impact of the DSM and EE programs would provide transparency to fulfill the Commission's obligation to monitor and assess the financial results of PEC's DSM and EE programs as well as PEC's actual level of jurisdictional earnings.

Further, PEC asserted that additional transparency to the financial implications of the DSM and EE programs is available to the Commission by the provision of certain program specific information required pursuant to Commission Rules R8-69(f)(1)(iii) and R8-69(f)(1)(iv). Specifically, PEC stated that Rule R8-69(f)(1)(iii) requires PEC to submit total expenses for the test period for each measure for which cost recovery is requested through the DSM/EE EMF rider and that Rule R8-69(f)(1)(iv) requires PEC to provide the actual calculation of the proposed utility incentive for each measure for which the recovery of utility incentives is requested.

No other party took a position on this issue.

CONCLUSIONS REGARDING ISSUE 3

The Commission has a continuing statutory obligation to ensure, among other things, that the rates and charges of jurisdictional investor-owned electric utilities are just and reasonable, from the standpoint of both investor and ratepayer interests. Further, the Commission believes that such statutory obligation includes, among other things, monitoring and evaluating the reasonableness and efficacy of any Commission-approved cost recovery mechanism, such as PEC's Mechanism approved in the present proceeding. Consequently, the Commission is of the opinion that the provision of certain financial information, including supplementary schedules, by PEC is necessary in order to allow the Commission to efficiently and effectively assess the financial implications of the Company's EE and DSM programs.

While the Commission finds that the Commission-approved reporting requirement to provide jurisdictional earnings information in its quarterly ES-1 Reports with and without the impact of the DSM and EE programs to be very useful information, such information does not provide the Commission all the information it needs to appropriately assess the financial implications of PEC's DSM and EE programs. In particular, PEC would not be required to provide an income statement, statement of rate base, the overall rate of return or the return on common equity related to or realized from its DSM and EE programs, either on a program-class basis or on a program- specific basis within each program class if the Commission were to allow only the "with and without" reporting requirement as PEC proposes.

In the June 15, 2009 Order, the Commission approved an 8% program performance incentive for DSM programs and a 13% program performance incentive for EE programs. Consequently, it is appropriate for the Commission to review and monitor the Company's earnings from DSM and EE programs separately on a collective (i.e., program-class) basis. Such level of oversight cannot be accomplished under the Company's proposal.

With respect to the Commission's requirement that the earnings impact of each individual DSM and EE program be shown separately, such requirement was deemed necessary by the Commission largely due to the size and magnitude of PEC's DSDR program in comparison to all other programs.[1] Additionally, in establishing the individual-program reporting requirement, the Commission was also mindful of the fact that the lack of profitability of PEC's DSDR program in the first seven years of the program would distort the total overall profitability reported for PEC's DSM and EE programs in those years, as well as the profitably reported on a program-class basis.[2] Therefore, the Commission believes that, at a minimum, provision of program specific information related to PEC's DSDR program should be provided. However, based upon the Company's contention that reporting the earnings impact of each individual DSM and EE program would be administratively burdensome, as it would require manual tracking and allocation of revenues for each program as if each program were a separate rider, the Commission concludes that it should modify its original reporting requirement to require that only the earnings impact of the DSDR program be reported on an individual program basis rather than requiring such individual reporting for all programs.

With respect to PEC's contention that information provided in compliance with Commission Rules R8-69(f)(1)(iii) and R8-69(f)(1)(iv) will provide additional transparency to the financial implications of the DSM and EE programs, the Commission is of the opinion that, while such information is useful and informative, it does not provide the earnings information needed (e.g., an income statement, statement of rate base, overall rate of return, and return on common equity) as required by the Commission's June 15, 2009 Order. As previously stated, such earnings information is needed for the Commission to adequately monitor and evaluate PEC's DSM and EE programs. Further, the Commission believes that, when information is

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[1] Public Staff witness Michael C. Maness testified at the January 8, 2009 evidentiary hearing that approximately 47% of the $10.4 million total stipulated revenue requirement is related to PEC's DSDR program.

[2] On Page 3, at Paragraph No. 12 of its June 30, 2008 filing in Docket No. E-2, Sub 926, the Public Staff discussed the cost-effectiveness of PEC's DSDR program and stated that "...only in the eighth year of the program do its benefits begin to exceed the costs."

needed by the Commission in order for it to perform its statutory obligations, such information should be compiled and supplied by the Company, in terms and in a format as needed by the Commission; that is, in effect, without requiring the Commission to make calculations, allocations, or request further information or data or to import data from other dockets or filings.

For the reasons set forth hereinabove, the Commission, on reconsideration, hereby amends Section 44 of the Mechanism to read as follows:

Financial Reporting Requirements

44. In its quarterly ES-1 Reports to the Commission, PEC shall calculate and present its primary North Carolina retail jurisdictional earnings by including all actual EE and DSM program revenues, including PPI and Net Lost Revenue incentives, and costs. Additionally, PEC shall prepare and present (1) supplementary schedules setting forth PEC's North Carolina retail jurisdictional earnings excluding the effects of the PPI; (2) supplementary schedules setting forth PEC's North Carolina retail jurisdictional earnings excluding the effects of the Company's EE and DSM programs; (3) supplementary schedules setting forth earnings, including overall rates of return and returns on common equity, actually realized from PEC's EE and DSM programs in total and stated separately by program class (program classes are hereby defined to be (a) EE programs and (b) DSM programs); and (4) supplementary schedules setting forth earnings, including overall rates of return and returns on common equity actually realized from PEC's (a) DSDR program and (b) all other programs, collectively, in the EE program class. (Show DSDR program returns and all other collective EE program returns separately.) Detailed workpapers shall be provided for each scenario described above. Such workpapers, at a minimum, shall clearly show actual revenues; expenses; taxes; operating income; rate base/investment, including components; and the applicable capitalization ratios and cost rates, including overall rate of return and return on common equity.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 25th day of November, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

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Commissioners Robert V. Owens, Jr., William T. Culpepper, III, and ToNola D. Brown-Bland dissent in part as to Issue 1 above. Commissioners Owens, Culpepper, and Brown-Bland voted to affirm the Commission's original decision and reasoning holding that industrial and large commercial customers that receive power via PEC's distribution system may not opt-out of participation in the DSDR program or its costs.

DOCKET NO. E-2, SUB 926
DOCKET NO. E-2, SUB 931

Commissioner William T. Culpepper III, Dissenting, as to Issue 1:

Boiled to its essence the majority states in the first sentence of the first full paragraph on page 6 that:

> ...G.S. 62-133.9(f)' ... has no requirement that the "customer" ... not ... participate in the DSDR program ... as a prerequisite to opting out of EE ... costs.

In so stating the majority completely writes the words **"elects not to participate"** out of the subject statute.

I do not believe that the General Assembly intended, nor do I believe that it legislatively provided (by incorporating the requirement **"elects not to participate"** into the provisions of G.S. 62-133.9(f)), for a customer to actually participate in and gain the benefits of (e.g. a **direct** reduction in the customer's electricity usage and concomitant utility bill) an EE program and escape responsibility for any share of that program's costs.

As an aside I specifically reject the majority's conclusion that the terms "measures" and "programs" are defined differently or have any different meaning whatsoever within the confines of Senate Bill 3. I believe these terms are synonymous and find the majority's efforts to differentiate the two, in order to justify its decision pertaining to the "unambiguous"[1] opt-out provision of G.S. 62-133.9(f), unpersuasive.

\s\ William T. Culpepper, III
Commissioner William T. Culpepper III

DOCKET NO. E-2, SUB 926
DOCKET NO. E-2, SUB 931

Commissioner ToNola D. Brown-Bland, Dissenting in Part:

I must respectfully dissent. The majority has correctly recognized that statutory construction starts with the meaning of the express words present in the statute. Where the express language of the statute is clear, the Commission is required to enforce and apply the statute as written and may not construe the language to conform to an assumed legislative intention not present in the clear unambiguous language of the statute. However, while accurately citing the law of statutory construction, the majority nevertheless has reached its result by looking past the plain language of N.C.G.S. 62-133.9(f) to an interpretation it assumes the legislature intended.

[1] The majority reasons that PEC's interpretation of the opt-out provision is correct because "G.S. 62-133.9(f) is unambiguous on this point." (page 6). A 3-1 Majority Commission decision which has been reversed by a "new" majority, 4 to 3, would seem to suggest circumstances far from "unambiguous".

The question on reconsideration is not whether G.S. 62-133.9(f) permits industrial and large commercial customers (collectively sometimes referred to as "industrial customers") to elect not to participate in demand-side management or not to participate in energy efficiency measures (it clearly does), but whether an industrial customer who has notified its power supplier, PEC, of its election not to participate in PEC's demand-side management (DSM) and energy efficiency measures (EEMs) is excused from sharing in any and all costs associated with PEC's DSDR, previously determined by the Commission to be an energy efficiency measure. Note that the proper question assumes as fact that the industrial customer has already made the 133.9(f) election not to participate in DSM or EEMs, that the election was a general election not specific to PEC's DSDR[1], and that DSDR is an energy efficiency measure.

The answer to the question posited is found in the language of the statute. Quoting in pertinent part, N.C.G.S. 62-133.9(f) plainly states:

> None of the costs . . . shall be assigned to any industrial customer that notifies the . . . power supplier that . . . [it] has implemented . . . or will implement alternative demand-side management and energy efficiency measures and that [it] elects not to participate in demand-side management or energy efficiency measures under this section.

This language provides on its face that in order to escape assignment of all DSM/EEM costs an industrial customer must notify its power supplier of two factual conditions: (1) that it has or will implement its own alternative demand-side management and energy efficiency measures <u>and</u> (2) that it **elects not to participate in** the supplier's DSM or EEM. Contrary to the arguments of PEC and others, the customer cannot avoid assignment of costs solely by implementing its own alternative DSM and EEM. To avoid the costs it must also elect not to participate in the supplier's DSM or EEM. In order to give effect to the second condition and not render it superfluous or meaningless, the notice of election not to participate in the supplier's new DSM or EEMs necessarily means that the industrial customer will not in any fashion participate in the new measures. The plain common sense interpretation of "elects not to participate in ...energy efficiency measures" implicates only those measures that are subject to both participation and non-participation.

Thus, while an industrial customer is permitted by G.S. 133.9(f) to avoid the costs of a supplier's new energy efficiency measures by giving notice of a one-time election[2] not to participate in any such measures, the election can only apply to those measures as to which the

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[1] With respect to the issue raised by the Motions for Reconsideration, whether "measures" was intended to connote a broader category than the word "programs" is irrelevant. Assuming that measures is a broad and general term, the statute provides that the election is one not to participate in measures, which, as discussed herein, necessarily means that the election itself can only apply to measures as to which a customer can have a choice of participation or non-participation. The election cannot apply to a measure in which participation is mandatory and not optional.

[2] While the majority is incorrect in its conclusion that the election to implement an alternative DSM and/or EEM eliminates the requirement that the industrial customer must be able to refuse to participate in a new DSM or EEM, it is correct in its understanding that the customer's election not to participate need only be made one time and not on a case by case basis. However, as explained above, once the election is made it can only be applied to measures in which the customer is in fact able not to participate.

customer is not a participant. Stated another way, an industrial customer's election not to participate in the supplier's EEMs applies to any EEM with respect to which the customer is not a participant, but does not apply to an EEM as to which the customer actually participates and cannot *not* participate. Where the supplier introduces a new EEM to its system which requires the mandatory participation of all of its customers without exception or choice, an industrial customer's notice of election not to participate in the supplier's EEMs cannot apply to such new measure. On the other hand, if the new measure is subject to non-participation, then the customer's election not to participate will apply to the new measure and none of the costs of any such measure shall be assigned to the customer. In this regard, the plain meaning of the express words of the statute is clear and unambiguous.

If the legislature had intended the result reached by the majority—that industrial customers could give notice of election not to participate in the supplier's efficiency measures and avoid the costs of a measure while actually participating in the measure—it could easily have said so. The legislature could have codified the majority's result simply by not including the "elects not to participate" language and ending the first sentence in G.S. 62-133.9(f) by placing a period after "will implement alternative demand-side management and energy efficiency measures." Alternatively, the legislature could have modified the second condition of avoiding costs by stating that "the industrial customer elects not to participate *in the costs of* the measures," or that "the industrial customer elects not to participate *in the annual rider provided for in subsection (d).*" However, the legislature did not choose language that would yield the result determined by the majority. To the contrary, the legislature expressly stated that the second condition of avoiding costs was to "elect not to participate in . . . [the] *measures* under this section;"—not to elect not to participate in costs or in the annual rider. The express statutory language of G.S. 133.9(f) makes it clear that an industrial customer's election not to participate in the supplier's EEMs applies only to such measures as to which the customer can choose not to participate and in fact does not participate.[1]

In the case at hand, it is undisputed and PEC has admitted in the record that DSDR is not subject to customer non-participation. DSDR is a system improvement and no customer, whether it implements its own measures or not, is able not to participate in DSDR, the energy

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[1] Even if it could be shown that the legislature intended to permit industrial customers to elect not to participate in the supplier's efficiency measures while actually participating in the measures despite the election, thereby escaping assignment of the costs of such measures, under the rules of statutory construction the Commission is bound by the express statutory language. Effect must be given to the plain meaning of the words comprising the statute and when that meaning is clear, the Commission may not go beyond the bounds of the statute to consider hidden or unexpressed intentions of the legislature. Here, the statutory language clearly and plainly provides that to be free of the costs of EEMs, an industrial company must elect not to participate in such measures. As discussed above, plain and customary usage dictates that "elect not to participate" can only apply to measures that are subject to two choices: either to participate or not to participate. If a measure does not lend itself to such a choice, then the election not to participate cannot be applied to that measure as to which there is no choice. If the legislature intended anything different, then it is strictly in the province of the legislature to amend the statute to express such other intent; the Commission may not substitute its judgment for the legislature's nor ignore the express language of the statute where the statute is clear in order to give effect to a hidden, unstated intent of the legislature. *See State of North Carolina ex rel. Utilities Commission v. Edmisten,* 297 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). If the present statute were ambiguous on its face, then the Commission might look beyond the statute for legislative intent but that is not the case in this matter.

efficiency measure at issue in this docket. Accordingly, no industrial customer's election under G.S. 133.9(f) can be applied to avoid assignment of costs of PEC's DSDR.

Because, for the foregoing reasons, the language of G.S. 133.9(f) is clear on its face when the express words are given their plain and clear meaning, it is not necessary to look outside of the statute to determine legislative intent. However, if the statute were ambiguous and required us to look beyond the words of the statute to determine legislative intent, it would be worth noting that more than likely the legislature understood energy efficiency measures or programs to be something with respect to which customers had to sign up to participate. While Senate Bill 3 does indeed contemplate and provide for new "nontraditional" energy efficiency measures, at the time the bill was drafted and debated, the legislature's only frame of reference for participating in new or traditional measures would have been by election, i.e., signing up to be a participant. At the time of passage of Senate Bill 3, the common and customary use of the phrase "participate in," when used in regard to a utility's energy savings or efficiency plan, was understood to reference a voluntary choice to join, be involved with, i.e., "participate in" the plan. In other words, the legislature certainly did not intend to limit DSM or energy efficiency measures to traditional programs but whether new innovative programs or measures were anticipated or not, the legislature would have understood that customers had always had a choice of participation or non-participation; hence, the language "elects not to participate" was intended to reference, acknowledge and codify a real choice—not a paper fiction.

Finally, the impact of the Commission's decision is to shift the cost of a utility's system-wide improvement to residential and small business customers such that they will in effect subsidize system use by industrial and certain commercial customers. This subsidization comes on top of the automatic savings that industrial and commercial customers will receive from their usage of or "participation in" PEC's DSDR, a Distribution System Demand Response improvement to PEC's entire distribution system which will reduce all customers' voltage use as a function of electric use on the demand side of the system. That is to say that all customers, including industrial and certain commercial businesses, will have their power bills lowered as a result of voltage reduction imposed across the system by DSDR, but only the residential and small business customers will share in the costs of DSDR. Industrial and large commercial customers will reap the benefits of the system-wide improvement without sharing in any of the costs. This result represents a monumental shift in the way North Carolinians pay for public utility facilities. I do not believe this result is called for by the plain language of N.C.G.S. 62-133.9(f) nor do I believe it is a result intended by the legislature. To the contrary, the statute is written so that all classes will pay their fair share for equipment and system changes which they use and from which they benefit. See G.S. 62-133.9(e).

For the foregoing reasons, with respect to Issue 1 in the majority opinion of the Commission, I vote to affirm the Commission's original decision and not allow industrial and large commercial customers to avoid sharing in the costs of PEC's DSDR, an improvement to PEC's distribution system which serves all PEC customers without exception.

\s\ ToNola D. Brown-Bland
Commissioner ToNola D. Brown-Bland

DOCKET NO. E-7, SUB 877
DOCKET NO. E-7, SUB 880
DOCKET NO. E-7, SUB 884
DOCKET NO. E-7, SUB 889
DOCKET NO. E-7, SUB 892
DOCKET NO. E-7, SUB 895
DOCKET NO. E-7, SUB 896
DOCKET NO. E-7, SUB 901
DOCKET NO. E-7, SUB 905

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-7, SUB 877

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Gaston Shoals Hydro Station, Units 4, 5, and 6, as New Renewable Energy Facilities

DOCKET NO. E-7, SUB 880

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Great Falls Hydro Station, Units 1, 2, 5, and 6, as New Renewable Energy Facilities

DOCKET NO. E-7, SUB 884

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Rocky Creek Hydro Station, Units 5 and 6 as New Renewable Energy Facilities

DOCKET NO. E-7, SUB 889

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Fishing Creek Hydro Station, Units 2, 3, and 5, as New Renewable Energy Facilities

ORDER DENYING REGISTRATION OF RENEWABLE ENERGY FACILITIES

DOCKET NO. E-7, SUB 892

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Lookout Shoals Hydro Station, Units 1, 2, and 3, as New Renewable Energy Facilities

DOCKET NO. E-7, SUB 895

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Mission Hydro Station, Unit 3, as a New Renewable Energy Facility

DOCKET NO. E-7, SUB 896

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Ninety-Nine Islands Hydro Station, Units 1, 2, 3, and 4, as New Renewable Energy Facilities

DOCKET NO. E-7, SUB 901

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Rhodhiss Hydro Station, Units 1 and 3, as New Renewable Energy Facilities

DOCKET NO. E-7, SUB 905

In the Matter of
Application of Duke Energy Carolinas, LLC, for Registration of Tuxedo Hydro Station, Units 1 and 2, as New Renewable Energy Facilities

BY THE CHAIRMAN: On January 29, 2009, Duke Energy Carolinas, LLC (Duke), applied pursuant to Commission Rule R8-66 to register as new renewable energy facilities thirty (30) hydroelectric generating units at fifteen (15) of its hydroelectric generating facilities in North and South Carolina, including the following units in the above-captioned dockets: Fishing Creek Hydro Station, Units 2, 3, and 5; Gaston Shoals Hydro Station, Units 4, 5, and 6; Great Falls Hydro Station, Units 1, 2, 5, and 6; Lookout Shoals Hydro Station, Units 1, 2, and 3; Mission Hydro Station, Unit 3; Ninety-Nine Islands Hydro Station, Units 1, 2, 3, and 4; Rhodhiss Hydro

Station, Units 1 and 3; Rocky Creek Hydro Station, Units 5 and 6; and Tuxedo Hydro Station, Units 1 and 2.

The filing included certified attestations that: 1) the units are in substantial compliance with all federal and state laws, regulations, and rules for the protection of the environment and conservation of natural resources; 2) the units will be operated as new renewable energy facilities; 3) Duke will not remarket or otherwise resell any renewable energy certificates (RECs) used or sold to an electric power supplier to comply with G.S. 62-133.8; and 4) Duke consents to the auditing of its books and records by the Public Staff.

On February 9, 2009, the Public Staff made an oral motion for an extension of time to file the recommendation required pursuant to Rule R8-66(e). On February 11, 2009, the Commission granted the requested extension of time, and allowed the Public Staff and any other interested persons until February 23, 2009, to file recommendations in this docket.

On February 23, 2009, the Public Staff filed the recommendation required by Commission Rule R8-66(e) stating that the information contained in Duke's filing appeared to meet the requirements for registration. However, the Public Staff stated that it could not answer the question of whether or not the units should be considered renewable energy facilities under G.S. 62-133.8 until the Commission responded to the Public Staff's February 9, 2009 Motion for Clarification in Docket No. E-100, Sub 113.

No other party filed comments in this proceeding.

On June 17, 2009, the Commission issued its Order in Docket No. E-100, Sub 113, concluding that individual generating units that are components of a larger hydroelectric generating plant are not individual renewable energy facilities. Rather, the Commission determined that the term "facility" refers to the entire generating plant.

Duke has sought registration for specific generating units in the above-captioned dockets. Duke's filings predated the Commission's June 17, 2009 Order in Docket No. E-100, Sub 113. Therefore, based upon the foregoing and the entire record in this proceeding, consistent with the Commission's determination in its June 17, 2009 Order regarding the registration of individual hydroelectric generating units, the Chairman finds good cause to deny registration of these hydroelectric generating units as renewable energy facilities or as new renewable energy facilities. Such ruling is without prejudice to efforts by Duke to re-submit registration applications in compliance with the June 17, 2009 Order in Docket No. E-100, Sub 113.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 31st day of July, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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DOCKET NO. E-2, SUB 960

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application of Progress Energy Carolinas, Inc. for a Certificate of Public Convenience and Necessity to Construct a 950 Megawatt Combined Cycle Natural Gas Fueled Electric Generation Facility in Wayne County Near the City of Goldsboro and Motion for Waiver of Commission Rule R8-61	) ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY SUBJECT TO CONDITIONS

BY THE COMMISSION: On August 18, 2009, Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (PEC), filed an application for a certificate of public convenience and necessity to construct a 950-megawatt (MW) combined cycle natural gas-fired electric generating facility at a site (the Lee site) in Wayne County near the City of Goldsboro. PEC presently operates three coal-fired generating units, with a combined generating capacity of 397 MW (hereinafter cited as approximately 400 MW), at the Lee site, and PEC stated that it will cease operation of these units upon completion of the proposed facility. PEC requested waiver of the filing requirements of Commission Rule R8-61.

The application was filed pursuant to G.S. 62-110.1(h), which was recently enacted by the General Assembly effective July 31, 2009. G.S. 62-110.1(h) provides that for applications that come within the scope of that subsection, "the Commission shall render its decision on an application for a certificate within 45 days of the date the application is filed...." On August 24, 2009, the Commission entered an order requesting the Public Staff to investigate the application and to present its findings, conclusions, and recommendations at the Regular Commission Staff Conference of September 21, 2009. This order granted PEC's request for a waiver of the filing requirements in Commission Rule R8-61.

The Attorney General filed notice of intervention on August 25, 2009. On September 3, 2009, EPCOR USA North Carolina, LLC (EPCOR), filed a petition to intervene. PEC filed a motion to deny EPCOR's intervention on September 8, 2009, and EPCOR filed a reply on September 11, 2009. On September 15, 2009, the Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene. Both CUCA and EPCOR were allowed to intervene by orders issued on September 18, 2009. EPCOR's motion for limited admission to practice for its out-of-state counsel was allowed by order of the same date.

On September 18, 2009, EPCOR filed Proposed Additional Language to Order Issuing Certificate, asking that any order allowing a certificate in this docket include the additional language set forth in its filing. On September 21, 2009, the Commission issued an order requesting comments on the language proposed by EPCOR, and on September 25, 2009, such comments were filed by EPCOR, PEC, and the Public Staff.

Meanwhile, the Public Staff presented the application at the Regular Commission Staff Conference (Commission Conference) of September 21, 2009. The Public Staff stated its

conclusion that the application meets the requirements of G.S. 62-110.1(h) and recommended that the Commission issue the certificate as requested subject to four conditions set forth hereinafter.

On October 1, 2009, the Commission issued a Notice of Decision stating that a full order with discussions and conclusions regarding all issues would follow.

Based upon the entire record in this proceeding, the Commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Section 1 of Session Law 2009-390 was enacted effective July 31, 2009. In Section 1.(a) of Session Law 2009-390, the General Assembly makes several legislative findings, including the following:

> (5) The retirement of coal-fired generating units and installation of generating units that use natural gas as the primary fuel will reduce emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) more than would the installation of sulfur dioxide (SO2) emissions controls on the coal-fired generating units.
> (6) The retirement of coal-fired generating units and installation of generating units that use natural gas as the primary fuel will reduce emissions of carbon dioxide (CO2) and mercury (Hg) significantly more than would the installation of sulfur dioxide (SO2) emissions controls on the coal-fired generating units.
> (7) The retirement of coal-fired generating units that are owned and operated by Progress Energy and located in eastern North Carolina and the installation of generating units that use natural gas as their primary fuel to replace them will reduce emissions of oxides of nitrogen (NOx), sulfur dioxide (SO2), carbon dioxide (CO2), and mercury (Hg) more than would the installation of sulfur dioxide (SO2) emissions controls on the older coal-fired generating units.

2. Section 1.(b) of Session Law 2009-390 adds subsection (h) to G.S. 62-110.1. G.S. 62-110.1(h) provides as follows:

> (h) Notwithstanding any other subsections of this section to the contrary, the Commission shall render its decision on an application for a certificate within 45 days of the date the application is filed if (i) the public utility that has applied for the certificate is subject to the provisions of subsection (e) of G.S. 143-215.107D; (ii) the application involves a request by the public utility to construct a generating unit that uses natural gas as the primary fuel at a specific coal-fired generating site that the public utility owns or operates on July 1, 2009; (iii) the coal-fired generating units at the site are not operated with flue gas desulfurization devices; (iv) the public utility will permanently cease operations of all of the coal-fired generating units at the site on or before the completion of the generating unit that is the subject of the certificate

application; and (v) the installation of the generating unit that uses natural gas as the primary fuel allows the public utility to meet the requirements of subsection (e) of G.S. 143-215.107D. When the public utility applies for a certificate as provided in this subsection, it shall submit to the Commission and the Department of Environment and Natural Resources a revised verified statement required pursuant to subsection (i) of G.S. 62-133.6 and to the Commission an estimate of the costs of construction of the generating unit that uses natural gas as the primary fuel in such detail as the Commission may require. The provisions of G.S. 62-82 and subsection (e) of this section shall not apply to a certificate applied for pursuant to this subsection. The authority granted pursuant to this subsection expires January 1, 2011.

3. PEC is a corporation existing under the laws of the State of North Carolina and is engaged in the business of generating, transmitting, distributing, and selling electric power to the public in its franchised service territory in North Carolina.

4. PEC presently operates three coal-fired electric generating units with a combined generating capacity of approximately 400 MW at its Lee site in Wayne County. None of the Wayne County coal-fired units have any form of flue gas desulfurization device. According to Appendix A of Attachment 1 of its application, PEC operates a total of eighteen coal-fired units at seven electric generating plants in its North Carolina service area.

5. PEC is subject to the Clean Smokestacks Act (CSA). Pursuant to G.S. 143-215.107D(e) of the CSA, beginning in calendar year 2013, PEC must reduce its annual emissions of sulfur dioxide from its North Carolina coal-fired generating units from 100,000 tons to 50,000 tons.

6. On August 18, 2009, PEC filed an application for a certificate of public convenience and necessity to construct a 950-MW combined cycle natural gas-fired electric generating facility at the Lee site. PEC stated in its application that upon completion of the proposed facility, it will permanently cease operation of the three existing coal-fired generating units at the site. The application was filed pursuant to the provisions of G.S. 62-110.1(h).

7. PEC stated in its application that it had initially planned to meet the 2013 CSA requirements by scrubbing approximately 400 MW of its existing uncontrolled coal-fired generation, but that further evaluation led it to consider ceasing operation of the three coal-fired generating units (approximately 400 MW) at its Lee site in Wayne County and replacing them with a natural gas-fired combined cycle unit as a means to meet its 2013 CSA requirements and any potential new environmental regulations.

8. PEC stated in its application that it could replace the coal-fired generating units at the Lee site with two simple cycle combustion turbines (CTs), but that the existing units are used as an intermediate resource and combined cycle (CC) facilities are more efficient and cost-effective than CTs for intermediate load operation. PEC stated that the Lee site can support either a 2x1 CC facility, with a total generating capacity of approximately 650 MW, or a 3x1 CC

facility, with a total generating capacity of approximately 950 MW,[1] and that a 3x1 CC facility would produce electricity at a lower levelized busbar cost and would optimize the existing plant's main condenser cooling water supply and transmission infrastructure.

9. The Public Staff recommended that the Commission issue the certificate as requested by PEC subject to the following four conditions:

> 1. Require that the facility be constructed and operated in strict accordance with all applicable laws and regulations, including the provisions of all permits issued by the North Carolina Department of Environment and Natural Resources.
> 2. Require that PEC file with the Commission in this docket a progress report and any revisions in the cost estimates for this facility on an annual basis, with the first such report due no later than one year from the date of issuance of the certificate.
> 3. Require that immediately upon completion and placement into service of the facility, PEC shall permanently cease operation of the three coal-fueled generating units at its Wayne County facility and file with the Commission in this docket a notice that operation of the three coal-fueled generating units has been terminated.
> 4. Clarify that issuance of this certificate does not constitute approval of the final costs associated with the construction of the Lee Facility for ratemaking purposes and this order is without prejudice to the right of any party to take issue with the ratemaking treatment of the final costs in a future proceeding.

10. The Commission concludes that a certificate of public convenience and necessity to construct the proposed 950-MW combined cycle natural gas-fired electric generating facility at the Lee site in Wayne County should be issued subject to the conditions recommended by the Public Staff and subject to a further condition that within 60 days PEC shall submit, for Commission approval following opportunity for comments by parties, a plan to retire additional unscrubbed coal-fired generating capacity reasonably proportionate to the amount of incremental generating capacity authorized by the certificate above 400 MW.

11. EPCOR owns two coal-fired electric generating plants in North Carolina, one in Roxboro and one in Southport. These plants were constructed as qualifying cogeneration facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA). PEC has had power purchase agreements as to the plants now owned by EPCOR since they first came online in the late 1980s, but the current agreements expire December 31, 2009. One plant remains a QF, and EPCOR is trying to reestablish the other as a QF. EPCOR is upgrading and refurbishing both plants to burn a blend of biomass, tire-derived fuel, and coal (instead of coal alone) in order to earn renewable energy certificates (RECs). PEC is required to purchase electricity from QFs under PURPA at prices that equal its own avoided costs, and EPCOR has been trying to negotiate new power purchase agreements with PEC. The certificate issued herein is without

[1] A 2x1 CC facility consists of two CTs connected to two heat recovery steam generators and a steam turbine. A 3x1 CC facility consists of three CTs connected to three heat recovery steam generators and a steam turbine.

prejudice to the right of any party to assert its relative rights and obligations under PURPA in any future arbitration or other proceeding relating to the EPCOR plants.

DISCUSSION OF FINDINGS AND CONCLUSIONS

The above findings of fact are based upon matters of record and matters as to which there appears to be no dispute. The conclusions of law are based upon the findings and upon the Commission's assessment of the comments, the arguments, and the applicable law.

The Commission is acting in this docket upon an unverified application with no supporting testimony and the presentations of the Public Staff and PEC at Commission Conference. The Commission asked the Public Staff to investigate the application and to present its findings, conclusions, and recommendations to the Commission. The Public Staff presented this matter at Commission Conference and stated that it believes the application meets the requirements of G.S. 62-110.1(h). The Public Staff stated that it had reviewed the application and had held discussions with PEC to review the cost assumptions and considerations that led to PEC's decision to apply for a certificate to construct the proposed facility, and that it appears that PEC's analysis used methodologies consistent with previous evaluations of generation additions. The Public Staff also stated that it appears, based upon PEC's assumptions, that the estimated cost of the proposed facility is comparable on a per-KW basis to other recent additions of combined cycle units by PEC and Duke Energy Carolinas, LLC (Duke). Finally, the Public Staff stated that, based on its review and discussions with a representative of the Department of Environment and Natural Resources (DENR), if PEC constructs the proposed facility and permanently ceases operation of the coal-fired units at the Lee site, PEC will be able to meet its 2013 CSA requirements.

The Commission finds and concludes that, except for the incremental capacity issue discussed hereinafter, the application filed by PEC comes within the scope of G.S. 62-110.1(h). It appears to be without dispute that PEC is subject to the provisions of the CSA; that PEC has filed an application requesting a certificate to construct generating units that use natural gas as the primary fuel at a site in Wayne County where it owned coal-fired generating units on July 1, 2009; that the existing coal-fired generating units are not operated with flue gas desulfurization devices and will be retired when the proposed facility is completed; and that installation of the proposed facility will allow PEC to meet the requirements of subsection (e) of G.S. 143-215.107D. Acting pursuant to G.S. 62-110.1(h), the Commission made a decision on the application within 45 days after it was filed and issued its Notice of Decision on October 1, 2009. Certain issues have been presented by the application and parties, and these issues are fully discussed in this order.

An initial issue arises from the fact that PEC is planning to retire approximately 400 MW of existing coal-fired generating capacity at the Lee site and to construct 950 MW of new natural gas-fired generation at the site. The Commission is being asked to certificate an amount of new generating capacity over twice the amount being retired. The issue presented is whether the expedited procedures of G.S. 62-110.1(h) may be used to certificate such a significant amount of incremental capacity.

PEC argues that G.S. 62-110.1(h) does not require that the natural gas-fired generation constructed pursuant to that subsection be exactly equal to the amount of coal-fired generation retired. PEC stated both in its application and at Commission Conference that it could replace the 400 MW of existing coal-fired generating units with two simple cycle CTs, each with a generating capacity of 190 MW, but that this would not be the optimum replacement because the existing units are used as an intermediate resource and CC facilities are more efficient and cost-effective than CTs for intermediate load operation. PEC stated that the Lee site can support either a 2x1 CC facility, with a total generating capacity of approximately 650 MW, or a 3x1 CC facility, with a total generating capacity of approximately 950 MW. PEC has estimated that a 3x1 CC facility would produce electricity at a levelized busbar cost of approximately $147/MWh at a 40% capacity factor, compared to $161/MWh for a 2x1 CC facility at a 40% capacity factor. Further, PEC stated that construction of a 3x1 CC facility will optimize the existing plant's main condenser cooling water supply and transmission infrastructure. The Public Staff supports granting the full amount of generating capacity requested. Although PEC's capacity margin will be higher than its target for approximately two years,[1] the Public Staff believes that this "lumpiness" is not unusual and is not excessive under the circumstances. EPCOR, on the other hand, argues that G.S. 62-110.1(h)

> was not intended to create an expedited process for those utilities to substantially increase the capacity at the site without complying with the other requirements of N.C.Gen.Stat. §62-110.1 and Commission Rule R8-61. .... Allowing a public utility to more than double its capacity at the site without the type of scrutiny and public input applied to traditional [certificates of public convenience and necessity] overreaches the limits of the new statute and will lead to unintended consequences.

Preventing the overbuilding of generating capacity is the purpose of the certificate statute. State ex rel. Utilities Comm'n v. High Rock Lake Ass'n, 37 N.C.App. 138, appeal dismissed and rev. denied, 295 N.C. 646 (1978).[2] G.S. 62-110.1(h) prescribes expedited

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[1] According to PEC, if it does not use the incremental capacity to close additional coal units, its capacity margin in 2013 is estimated to be 16% and to decline thereafter. PEC's target capacity margin is 11-13%.

[2] As stated in that case,

> [G.S. 62-110.1] was enacted in 1965 to help curb overexpansion of generating facilities beyond the needs of the service area. To this end, the General Assembly used the term "public convenience and necessity" to define the standard to be applied by the Utilities Commission to proposed facilities. In reviewing the Commission's application of the standard in other regulatory actions, the Court has held that public convenience and necessity is based on an "element of public need for the proposed service." State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 270, 148 S.E.2d 100, 110(1966); see also State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E. 2d 731 (1973), cert. den., 284 N.C. 623, 201 S.E. 2d 693 (1974); State ex rel. Utilities Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969). Moreover in 1975, an "act to establish an expansion policy for electric utility plants in North Carolina, to promote greater efficiency in the use of all existing plants, and to reduce electricity costs by requiring greater conservation of electricity" was enacted by the General Assembly, 1975 Sess. Laws Ch. 780. This act, codified as G.S. 62-110.1(c)-(f), directs the Utilities Commission to consider the present and future needs for power in the area, the extent, size, mix and location of the utility's plants, arrangements for pooling or purchasing power, and

procedures that limit the way in which the Commission must consider and decide an application for a certificate of public convenience and necessity to construct an electric generating facility coming within the scope of the subsection. This short-lived legislation (it was enacted by the General Assembly effective July 31, 2009, and it will expire on January 1, 2011) provides that the "provisions of G.S. 62-82 and [G.S. 62-110.1(e)] shall not apply to a certificate applied for pursuant to this subsection." One requirement of G.S. 62-110.1(e) is that "no certificate shall be granted unless the Commission has ... made a finding that such construction will be consistent with the Commission's plan for expansion of electric generating capacity." This requirement is eliminated for an application coming within the scope of G.S. 62-110.1(h).[1] G.S. 62-110.1(e) provides that the Commission "shall hold a public hearing on each such application" for a certificate for a new generating facility; G.S. 62-82 provides a different procedure: that the applicant publish notice for four weeks in a daily newspaper local to the site of the proposed facility and that the Commission "upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing...."[2] The hearing requirements of G.S. 62-110.1(e) and G.S. 62-82 do not apply if an application comes within the scope of G.S. 62-110.1(h). If an application comes within the scope of G.S. 62-110.1(h), it must be decided within 45 days after it is filed, and the 45-day time limit allows for little in the way of a hearing.

These expedited procedures in G.S. 62-110.1(h) are understandable where the new generating facility is replacing the same (or approximately the same) amount of existing generating capacity that is being retired, since the retirement essentially establishes the need for the new capacity. One key legislative finding indicates that the General Assembly considered this in enacting G.S. 62-110.1(h).[3] Other legislative findings speak to meeting the requirements

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> the construction costs of the project before granting a certificate of public convenience and necessity for a new facility. From these statues and the case law, it is clear that the purpose of requiring a certificate of public convenience and necessity before a generating facility can be built is to prevent costly overbuilding.

37 N.C.App. at 140-1.

[1] Eliminating this requirement is particularly significant here. PEC proposes approximately 550 MW of new, incremental generating capacity to come online in 2013, but no such block of new generating capacity has appeared in any PEC Integrated Resource Plan (IRP) until PEC recently filed its 2009 IRP update on September 1, 2009, in Docket No. E-100, Sub 124, which reflects the current proposal. PEC seeks to justify the proposed 550 MW of incremental generating capacity on the basis of economies of scale: the cost of building a 3x1 CC facility of 950 MW compares favorably to the cost of building a 2x1 CC facility of 650 MW and a 3x1 CC facility would optimize the existing support facilities. However, the Commission has stated in two recent orders that economies of scale, standing alone, cannot be used to establish need for new generation. Order Granting Certificate of Public Convenience and Necessity with Conditions, issued March 21, 2007, in Docket No. E-7, Sub 790 (the Cliffside order) ("a similar argument could be made for almost any construction project. Economies of scale, in and of themselves, do not establish a need for the capacity, and the need for the capacity is the Commission's initial consideration under G.S. 62-110.1.") and Order on Advance Notice and Joint Petition for Declaratory Ruling issued March 30, 2009, in Docket No. E-7, Sub 858 (the Orangeburg order).

[2] In practice, the Commission usually follows G.S. 62-110.1(e) and holds a hearing for each generation certificate application filed by a public utility. In this case, even if G.S. 62-82 had been followed, EPCOR's filing would have prompted the Commission to schedule a hearing.

[3] Section 1.(a)(7) of Session Law 2009-390 speaks to retiring coal-fired units and installing gas-fired units "to replace them."

of the CSA and reducing emissions of nitrogen oxides, sulfur dioxide, carbon dioxide, and mercury. PEC argued at Commission Conference that G.S. 62-110.1(h) "was designed to facilitate compliance with the Clean Smokestacks Act and to reduce emissions of carbon dioxide." The retirement of the 400 MW of coal-fired generating capacity at the Lee site facilitates these purposes; the construction of 550 MW of incremental generating capacity does not facilitate compliance with the CSA and it does not reduce emissions except as it would allow PEC to retire additional coal-fired generation.

The Commission concludes that the appropriate interpretation of Section 1 of Session Law 2009-390 is that the expedited procedures in G.S. 62-110.1(h) should be used to certificate new capacity reasonably proportionate to the capacity retired. This does not mean a strict one-for-one match, since electric generating capacity is never as exact as that, but it does mean that any new generating capacity certificated pursuant G.S. 62-110.1(h) should be in reasonable proportion to the generating capacity retired. This interpretation might lead to a conclusion that, to the extent PEC's application seeks a certificate for significantly more incremental generating capacity than the 400 MW being retired, standard certificate procedures should be followed as to the incremental capacity. However, the Commission believes that a more appropriate course of action is to allow a certificate for the full amount of generating capacity requested, but to condition the certificate upon PEC's retiring additional unscrubbed coal-fired capacity reasonably proportionate to the amount of incremental gas-fired capacity authorized by this certificate above 400 MW. This course of action serves the spirit of Section 1 of Session Law 2009-390 to replace coal-fired generation with cleaner gas-fired generation; it enables PEC to meet the 2013 CSA requirements; it accommodates the economies of scale claimed by PEC while also addressing the issue of overbuilding generating capacity; and it achieves even greater retirement of unscrubbed coal-fired plants with attendant benefits.[1]

Such a condition is suggested by PEC's own statements in its application and at Commission Conference. In its application, PEC states, "This incremental capacity [i.e., the 550 MW of capacity above that being retired at the Lee site] may be used for a number of purposes including the replacement and closure of some of the remaining older coal units owned by PEC in North Carolina that do not have any SO2 controls."[2] In the economic analysis attached to the application, PEC states that the 550 MW of proposed incremental capacity "may be used to replace other existing uncontrolled coal units...." At Commission Conference, PEC's counsel stated that "we are in all probability going to be faced with shutting down the remaining under-controlled units." With respect to one of these unscrubbed coal-fired plants, PEC's counsel stated that if the plant is not retired "within the next several number of years, we will be faced with having to either go to dry ash storage for the ash produced by that plant or build another ash

[1] Note that the Commission recently required Duke to retire old coal-fired generation in connection with issuance of certificates for new generating capacity. Duke is being required to retire 198 MW of coal-fired generation (plus up to another 825 MW to match load reductions from DSM and EE "on a MW-for-MW basis") in connection with its March 2007 Cliffside certificate in Docket No. E-7, Sub 790 (and DENR required additional retirements in connection with its air permit), and Duke is being required to retire 247 MW of coal-fired generation in connection with its June 2008 certificates for the Buck and Dan River combined cycle projects in Docket No. E-7, Subs 791 and 832.

[2] PEC also stated in its application that the incremental capacity could be used to meet load growth and defer other generation additions and/or to displace coal-fired generation from time to time, depending upon the relative fuel costs. As discussed below, EPCOR fears that the incremental capacity will be used to displace QF capacity.

pond." The Commission believes that it is appropriate to follow up on these statements and to require that PEC focus on such additional retirements.

PEC's existing unscrubbed coal-fired generating units vary greatly as to their generating capacities and locations with respect to load and transmission facilities. As previously stated, the Commission recognizes that PEC cannot achieve a strict one-for-one match of additional retirements with the incremental capacity being certificated, and the Commission does not require an exact match. Many factors must necessarily be considered and, as always, reliability must be maintained. Only PEC has the knowledge of its system and the expertise as to these considerations. The Commission will allow PEC time and flexibility in submitting a plan for additional retirements and will approve the plan by further order following opportunity for comments by the parties.

A second issue was raised by intervenor EPCOR. EPCOR owns two electric generating plants in North Carolina, one in Roxboro and one in Southport.[1] These coal-fired plants were constructed as QFs under PURPA. Certificates of public convenience and necessity for construction of the plants were issued by the Commission in 1985. EPCOR states that it is now in the process of spending about $79 million to upgrade and refurbish the plants to burn a blend of biomass, tire-derived fuel, and coal (instead of coal alone). This upgrade is intended to allow the plants to earn RECs, and EPCOR plans to register the plants as new renewable energy facilities. PEC is required to purchase electricity from QFs under PURPA at prices that equal its own avoided costs, and PEC has had power purchase agreements with the plants now owned by EPCOR since they first came online in the 1980s. The current agreements expire December 31, 2009. EPCOR has been trying to negotiate new power purchase agreements with PEC, but EPCOR claims that PEC recently told it that capacity from the Roxboro and Southport plants is no longer "desirable" due to PEC's internal resource planning and reductions in demand projections.[2]

EPCOR is concerned that if the Commission grants the certificate as requested herein, PEC will assert that the avoided cost prices it must pay QFs such as EPCOR should be greatly reduced because it has more capacity than it needs. In order to address its concern, EPCOR proposes that any order allowing a certificate as requested by PEC include language as follows:

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[1] EPCOR asserts that the Roxboro facility was originally a 56-MW coal-fired cogeneration plant that began operating in August 1987. It produced both electricity and steam, which gave it QF status under PURPA. The steam was originally sold to Collins & Aikman, but that facility closed, and the Roxboro plant lost its QF status. EPCOR is working to re-establish the Roxboro plant as a QF in 2010 based on its being refurbished to burn biomass and tire-derived fuel in addition to coal. EPCOR asserts that the Southport facility was originally a 112-MW coal-fired cogeneration plant that also began operating in August 1987. This facility continues to supply steam to Archer Daniels Midland, and its QF status remains intact.

[2] The Commission takes notice of PEC's recent IRP filings. PEC's 2008 IRP in Docket No. E-100, Sub 118, shows the Roxboro plant as an intermediate resource with 56 MW of summer capacity and the Southport plant as an intermediate resource with 103 MW of summer capacity. It states that the power purchase agreements for both plants expire at the end of 2009, but are "assumed to extend beyond expiration date in Resource Plan." See page C-1. PEC's 2008 IRP shows 179 MW of NUG QF – Cogen for years 2009 through 2023. Table 1 on page 18. In its 2009 IRP update in Docket No. E-100, Sub 124, PEC shows the Roxboro and Southport power purchase agreements as simply expiring at the end of 2009, and there is no NUG QF – Cogen power listed for years 2010 through 2024. See the Firm Wholesale Purchased Power Contracts listed on page C-1 and Table 1 on page 22.

> That the issuance of this Certificate and the construction of the facility allowed hereby shall not interfere with or be used or cited to minimize, negate, diminish, or otherwise affect PEC's obligations or opportunities to purchase power and capacity from Renewable energy facilities or Qualifying Facilities in accordance with provisions of North Carolina Senate Bill 3 and the rules promulgated pursuant thereto, Section 210 of the Public Utility Regulatory Policies Act of 1978 and the rules promulgated pursuant thereto, the Commission's avoided cost orders, or any future federal renewable energy portfolio standards, nor shall it be used or cited to alter PEC's obligations under Section 210 of the Public Utility Regulatory Policies Act of 1978 or the Commission's avoided cost orders to freely and openly negotiate with qualifying facilities not eligible for standard avoided cost rates.

The Public Staff commented that it does not object to the inclusion of language in the Commission's order to the effect that the granting of the certificate and construction of the proposed facility is without prejudice to the right of any party to assert its relative rights and obligations under PURPA in any future arbitration or other proceeding. PEC interprets EPCOR's proposed language as "asking the Commission to pretend 550 MWs of generating capacity associated with PEC's proposed 950 MW natural gas fired generating facility does not exist when determining the avoided cost capacity rates PEC should pay EPCOR." PEC believes that EPCOR is asking the Commission "to assume that PEC has a capacity need when it does not."

The Commission does not read EPCOR's proposed language as PEC reads it. The Commission reads EPCOR's language as requiring only that the parties adhere to the obligations of PURPA and the Commission's avoided cost orders. As thus interpreted, the Commission approves such language. Avoided cost decisions specific to EPCOR's situation cannot be made in this docket. Such decisions must be made either through negotiations of the parties or in a future Commission proceeding, and the present decision is without prejudice to such decisions. The Commission urges the parties to renew their efforts to reach a negotiated agreement.

In summary, the Commission concludes that the public convenience and necessity require the construction of the facility as proposed in the application subject to (1) the four conditions proposed by the Public Staff and (2) a condition that Progress submit, for Commission approval following an opportunity for comments by parties, a plan to retire additional unscrubbed coal-fired capacity reasonably proportionate to the amount of incremental gas-fired capacity authorized by this certificate above 400 MW.

IT IS, THEREFORE, ORDERED as follows:

1. That PEC's application for a certificate of public convenience and necessity to construct a 950-MW combined cycle natural gas-fired electric generating facility in Wayne County near the City of Goldsboro is hereby approved and that this order shall constitute the certificate;

2. That the facility certificated in this order shall be constructed and operated in strict accordance with all applicable laws and regulations, including the provisions of all permits issued by the DENR;

3. That PEC shall file with the Commission in this docket a progress report and any revisions in the cost estimates for this facility on an annual basis, with the first such report due no later than one year from the date of this order;

4. That immediately upon completion of the facility, PEC shall permanently cease operation of the three coal-fired generating units at its Wayne County facility and shall file with the Commission in this docket a notice that operation of the three coal-fired generating units has been terminated;

5. That issuance of this order does not constitute approval of the final costs associated with the construction of the facility for ratemaking purposes and this order is without prejudice to the right of any party to take issue with the ratemaking treatment of the final costs in a future proceeding; and

6. That within 60 days PEC shall submit, for Commission approval after opportunity for comments by parties, a plan to retire additional unscrubbed coal-fired generating capacity reasonably proportionate to the amount of incremental generating capacity authorized by the certificate above 400 MW.

ISSUED BY ORDER OF THE COMMISSION.
This the 22nd day of October, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Commissioners Bryan E. Beatty and ToNola D. Brown-Bland did not participate.

Sk102209.01

DOCKET NO. E-7, SUB 866

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement with the City of Greenwood, South Carolina and Request for Declaratory Ruling	))))	ORDER ON ADVANCE NOTICE AND REQUEST FOR DECLARATORY RULING

BEFORE: Chairman Edward S. Finley, Jr., Presiding; Commissioners Lorinzo L. Joyner; William T. Culpepper, III; and Bryan E. Beatty

APPEARANCES:

For Duke Energy Carolinas, LLC:

Lara S. Nichols, Associate General Counsel, Duke Energy Corporation, 526 S. Church Street, Charlotte, NC 28202

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For Greenwood Commissioners of Public Works:

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For the Using and Consuming Public:

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Leonard G. Green, Assistant Attorney General, Department of Justice, P.O. Box 629, Raleigh, NC 27602

BY THE COMMISSION: On October 15, 2008, Duke Energy Carolinas, LLC (Duke or Company), filed an Advance Notice in the present docket, acting pursuant to Regulatory Condition No. 7(b), as approved in the March 24, 2006 Order Approving Merger Subject to Regulatory Conditions and Code of Conduct (Merger Order) in Docket No. E-7, Sub 795. The

filing gives advance notice of Duke's intent to grant native load priority[1] to the City of Greenwood, South Carolina, acting by and through its Commissioners of Public Works (Greenwood), pursuant to a Purchase Power Agreement (PPA) between Duke and Greenwood dated October 1, 2008, and to treat the retail native load of Greenwood as if it were Duke's retail native load under Regulatory Condition Nos. 5 and 6 of the Merger Order.

In its advance notice, Duke stated that Greenwood is located within Duke's balancing authority area and was a wholesale requirements customer of Duke prior to 1997. From 1997 to 2002, Greenwood was a wholesale requirements customer of Cinergy Corporation, and from 2003 to 2009, it has been a customer of South Carolina Electric & Gas Company (SCE&G). Duke stated that the PPA is for all of Greenwood's native load requirements (after application of Greenwood's Southeastern Power Administration (SEPA) entitlement) for a term of January 1, 2010, through December 31, 2019, and that the additional peak load estimated to be served by Duke pursuant to the PPA is approximately 61 megawatts (MW) in 2010 and is expected to grow to 70 MW by 2019. The PPA provides that Greenwood will pay for capacity and energy based upon Duke's system average capacity and energy costs as determined by a cost formula to be approved by the Federal Energy Regulatory Commission (FERC).

On October 30, 2008, the Public Staff filed a Response, noting the relationship between the present Sub 866 docket and Docket No. E-7, Sub 858 (Sub 858 docket or Orangeburg docket). The Sub 858 docket involves an advance notice by Duke to provide native load priority wholesale electric service to the City of Orangeburg, South Carolina, and a related petition for a declaratory ruling. The Public Staff moved that the Commission extend the advance notice period in the present docket pending proceedings then scheduled in the Sub 858 docket.

The Commission issued an Order on November 12, 2008, extending the advance notice period in the present docket until further order of the Commission.

On March 30, 2009, the Commission issued its Order on Advance Notice and Joint Petition for Declaratory Ruling (Orangeburg Order) in the Sub 858 Orangeburg docket. As to the advance notice, the Commission considered reliability concerns raised by some parties, but concluded that Duke should be allowed to proceed with its wholesale contract with Orangeburg at its own risk subject to the declaratory ruling on retail ratemaking. Duke's advance notice also asked to treat the retail native load of Orangeburg as Duke's native load under its Regulatory Condition Nos. 5 and 6. The Commission stated that these conditions are designed to give certain benefits -- in terms of planning, dispatch, and retail rates -- to those Duke customers who have been on-system for years and have contributed to paying for the present system, that Orangeburg is not such a customer, and that "in order to preserve the intent of, and the policies embodied in Condition Nos. 5 and 6," Duke's request to treat the retail native load of Orangeburg as Duke's retail native load was denied. As to the request for a declaratory ruling, the Commission concluded that Duke's retail and historically served wholesale customers should not subsidize service to new wholesale customers such as Orangeburg and that, although future retail ratemaking decisions must be based upon the evidence presented in those future proceedings, on the basis of the evidence presented in the Sub 858 proceeding, the costs of the Orangeburg

[1] Native load priority is defined by Condition No. 7(c) of the Merger Order as power supply provided "with a priority of service equivalent to that planned for and provided by Duke Power to its Retail Native Load Customers."

contract should be allocated based upon incremental costs in any future retail ratemaking proceeding.

On May 1, 2009, Duke filed a Motion to Close Advance Notice Period and For Declaratory Ruling in the present docket. Duke requested that the advance notice period be closed and that the Commission issue a declaratory ruling as to Greenwood, pursuant to the request made in the Sub 858 docket, to the effect that Duke may serve Greenwood at native load priority and at formula rates based upon Duke's system average cost.

In support of its Motion, Duke asserted that, as set forth in the evidence submitted in the Sub 858 docket, Greenwood is for all practical purposes identical to Duke's Schedule 10A wholesale customers[1] and, as such, should be treated in the same manner as those customers for purposes of Regulatory Condition Nos. 5 and 6, even though it is not one of the customers specifically listed in Regulatory Condition No. 7(a). Like the Company's historically served customers listed in Regulatory Condition 7(a), Greenwood was a long-time wholesale customer of Duke. In the Sub 858 docket, Greenwood presented witness Sheree L. Brown, who testified that Greenwood was a wholesale requirements customer of the Company from the early 1900s through 1941, and then again from 1966 through 1997. As such, Greenwood was a customer during the extended time period in which the majority of Duke's generating assets were acquired, planned and built, and contributed to the capital cost of the Company's generating resources for many years. In addition, Greenwood paid Duke an exit fee of over $5.4 million in stranded costs upon departing the Company's system in 1997, thereby preventing the Company's retail customers from bearing potential stranded costs. Duke further stated that, like the Company's Schedule 10A customers, Greenwood is located within Duke's balancing authority area and its traditional service territory and is directly connected to Duke's transmission system. As Greenwood witness Brown testified in the Sub 858 docket, the Greenwood PPA is substantially the same as the power supply arrangements recently negotiated between Duke and the Schedule 10A customers. The Greenwood PPA is a requirements wholesale service agreement with a ten-year contract term with successive ten-year term renewal options. Witness Brown explained that this timing is purposely synced-up to the operation of the terms for contract expiration and extension renewal of the majority of the newly negotiated contracts with Duke's Schedule 10A customers. In addition, Duke stated that the small size of the Greenwood load relative to the Company's generation capacity indicates that this load will not materially impact retail customers' rates or quality of service. The load is 52 MW in 2010 and is expected to grow to 54 MW by 2019. According to Duke, the Greenwood load represents approximately 0.26% of the Company's generation capacity. Duke cites the Order Allowing Request to Provide Native Load Firm Service to Towns that was issued on November 20, 2007, in Docket No. E-2, Sub 910 (a proceeding involving Progress Energy Carolinas, Inc. (Progress), and the Towns of Sharpsburg, Lucama, Black Creek, and Stantonsburg (Towns)); and Duke asserted that -- given the small size of this load, Greenwood's location in Duke's control area, the Company's decades of past direct service to Greenwood, and its contribution to past and future costs -- Greenwood is in the same position vis-à-vis the Company as the Towns were vis-à-vis Progress. Thus, as with the Towns, the "tiny amount of incremental load" represented by Greenwood will "have no impact on . . . [the Company's] ability to meet the needs of its customers, be they retail or

[1] Schedule 10A refers to certain historically served customers of Duke. Schedule 10A has now been terminated, but Duke has signed new wholesale contracts with most of the customers formerly on Schedule 10A.

wholesale," particularly because the Company will include "this load in its integrated resource plan and will plan, construct and operate its system in order to ensure that there is no degradation to the reliability of service provided to its retail customers." Likewise, service by the Company to Greenwood will have "no discernable impact on. . . [its] retail customers' rates or quality of service." Finally, Duke stated that Greenwood will be allocated its share of the Company's costs on a system average basis, which will, for example, equate to approximately 0.26% of the $2.4 billion Cliffside generating facility that Duke will bring into service in 2012.

On May 7, 2009, Greenwood filed a Petition to Intervene and Comments in Support of Motion to Close Advance Notice Period and for Declaratory Ruling, urging the Commission to grant Duke's motion. Greenwood made many of the arguments set forth in Duke's Motion and these arguments will not be repeated here. Greenwood's Comments included a representation by counsel that Greenwood is willing and committed to extend the initial term of the PPA for an additional ten years provided the service is at native load priority and under formula rates based upon system average cost in accordance with the PPA and any later negotiated terms for service to the previous Schedule 10A customers.

On May 12, 2009, the Commission issued an Order establishing dates for the filing of petitions to intervene and responses to Duke's Motion. The Commission also allowed Greenwood to intervene by a separate Order issued on May 12, 2009.

On May 22, 2009, the Public Staff filed Comments in response to Duke's Motion. After noting certain discrepancies in Duke's Advance Notice and its Motion, the Public Staff stated that it does not agree with Duke's and Greenwood's argument that the undisputed evidence establishes that for all practical purposes Greenwood is identical to Duke's Schedule 10A wholesale customers and therefore should be treated in the same manner. None of the historically served wholesale customers listed in Regulatory Condition No. 7(a), including the Schedule 10A customers, are guaranteed any particular ratemaking treatment. Therefore, the Public Staff reasoned that treating Greenwood in the same manner as the Schedule 10A customers would mean that the request for a declaratory ruling should be denied and the decision as to how the costs associated with a Duke grant of native load priority to Greenwood should be preserved until the appropriate time. The Public Staff stated that while Regulatory Condition No. 7(a) provides that the retail native loads of the customers listed therein shall be considered to be Duke's retail native load for purposes of Regulatory Condition Nos. 5 and 6, Regulatory Condition No. 7(d) provides that, for all wholesale contracts entered into after the date of the Merger Order, the Commission retains the right to assign, allocate and make pro forma adjustments with respect to the revenues and costs associated with those wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes. All of the Public Staff's filings and Commission Orders in advance notice proceedings indicate the reservation of this right in the Commission. Similarly, the Commission Order cited by Duke with respect to Progress's proposal to provide native load priority service to the Towns of Sharpsburg, Lucama, Black Creek, and Stantonsburg in Docket No. E-2, Sub 910, explicitly states that Progress's Regulatory Condition No. 57 (which is comparable to Duke's Regulatory Condition No. 7) provides the ratemaking protections intended by the Commission.

With respect to Duke's and Greenwood's other assertions that language in the Commission's Orangeburg Order supports their arguments, the Public Staff asserted that the language tends to appear in the section of the Orangeburg Order in which the Commission is distinguishing Orangeburg from the historically served customers listed in Regulatory Condition No. 7(a) for purposes of responding to Duke's and Orangeburg's constitutional arguments. It cannot be interpreted as contradicting principles that have been well established in other cases. A good example of a lawful reason to allocate other than on average system costs is the scenario covered by Regulatory Condition No. 7(d)(ii). Under this section, Duke has assumed the risk that investments in generating facilities or commitments to purchase power may become uneconomic sunk costs that are not recoverable from Duke's retail ratepayers. If Duke were to build a nuclear plant as it currently envisions and then lose all of its wholesale load to other suppliers, the Commission could allocate away from retail customers all costs of such a plant (except to the extent the capacity was needed in the near term to reliably serve Duke's retail customers). This is the case regardless of whether the capacity costs had been incurred for the historically served customers listed in Regulatory Condition No. 7(a) or for wholesale customers for which an advance notice had been filed pursuant to Regulatory Condition No. 7(b). There is no guaranteed ratemaking treatment with respect to either set of wholesale customers.

The Public Staff stated that the Commission should keep in mind that Duke has no obligation to serve any wholesale customers. If it voluntarily makes an offer to serve a buyer inside its control area, it must make such an offer under its cost-based tariff and it must file each such contract with the FERC for review prior to the commencement of service. Thus, the regulatory conditions should always be interpreted in the way that affords adequate protection of Duke's captive retail customers.

For purposes of preserving the issue in case there is an appeal in this docket, the Public Staff noted that Duke violated Regulatory Condition Nos. 7(b) and 59 by signing the Greenwood PPA prior to the expiration of the advance notice period. Duke not only signed the PPA, it filed it with the FERC, also in violation of the regulatory conditions. While Duke and Greenwood have not so far argued in this docket, as they did in the Orangeburg docket, that the Commission is preempted from allocating the costs associated with the Greenwood PPA on any basis other than average system costs, the Public Staff addressed this issue for purposes of preserving any potential positions on appeal. In this regard, the Public Staff also noted that the FERC requires that sales of power for more than one year will be priced on an embedded cost of service basis,[1] not on an average system cost basis.

Finally, while the Public Staff opposes the declaratory ruling requested by Duke and Greenwood, the Public Staff was willing to state in its Comments that, given Greenwood's small size and the fact that it contributed for a number of years to the costs of Duke's existing generating facility, it is not very likely that the Public Staff will recommend in a future retail ratemaking proceeding that the costs associated with the Greenwood PPA be allocated on an incremental cost basis.

On May 22, 2009, Duke filed recommendations as to how the Commission should proceed to consider its Motion. Duke asserted that the pleadings filed in the Sub 866 docket, as

[1] See, e.g., Order on Market-Based Rates, 111 FERC ¶ 61,506, issued on June 30, 2005, ¶ 62.

well as the record in the Sub 858 docket, contain evidence sufficient for the Commission to rule on the present Greenwood docket and that there is no need for an evidentiary hearing or additional legal or policy argument.

On June 26, 2009, the Commission issued an Order Requiring Filing Regarding Certain Factual Discrepancies in Record, requiring Duke and Greenwood to correct and explain the factual discrepancies in their filings noted in the Public Staff's Comments.

On July 2, 2009, Duke and Greenwood made a Further Filing in response to the Commission's June 26, 2009 Order. They confirmed that the initial term of the PPA is from January 1, 2010, through December 31, 2018 (not 2019 as erroneously stated in the advance notice). They stated that the load projections in Duke's May 1, 2009 Motion are based upon more recent information than the projections in the advance notice and that the recent projections are lower, reflecting deteriorating economic conditions and assumptions on energy efficiency savings. Finally, Greenwood confirmed that FERC has "accepted" the PPA, not "specifically approved" it as stated in Greenwood's May 7, 2009 Comments.

No party has requested oral argument or an evidentiary hearing. In its May 1, 2009 Motion, Duke states that it "incorporates by reference into this Docket the testimony of witness Brown presented in Docket No. E-7, Sub 858." The Commission will treat this as a request that the Commission take judicial notice of portions of the evidentiary record in the Orangeburg docket. The Public Staff opposed the incorporation by reference of evidence presented in the Orangeburg docket into this docket, but stated that if any evidence from the Orangeburg docket is considered, the entire record should be incorporated into this proceeding. Greenwood presented a witness in the Sub 858 proceeding to testify regarding its PPA with Duke, the three parties to the present docket were also parties to the Sub 858 docket, and the Commission will take judicial notice of the entire record in the Sub 858 docket for purposes of the present docket. G.S. 62-65(b); Mason v. Town of Fletcher, 149 N.C.App. 636, disc. rev. denied. 355 N.C. 492 (2002).

Based upon the filings herein and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Duke is a North Carolina public utility with an obligation to provide electric service to retail customers in its franchised service area in North Carolina, subject to the jurisdiction of this Commission. Historically, Duke has also provided electric service to certain wholesale customers within its control area.

2. Greenwood is a municipality located in the State of South Carolina which provides retail electric service within city limits through its Commissioners of Public Works. Greenwood served approximately 11,500 residential, industrial, and commercial electric customers as of 2007.

3. Greenwood is located within the balancing authority area, or control area, of Duke; it is within Duke's traditional service territory and is directly connected to Duke's transmission system. Greenwood was a wholesale requirements customer of Duke from the early 1900s through 1941 and again from 1966 to 1997. Greenwood was a Duke customer during the time when the majority of Duke's present-day generating assets were acquired, planned, and built. Greenwood made a stranded cost payment of $5,441,715 to Duke when it left the Duke system in 1997 to prevent a shift of costs to other Duke customers as a consequence of its departure. Greenwood has remained a transmission customer of Duke without interruption.

4. Greenwood is presently a wholesale customer of SCE&G, but its present contract will terminate December 31, 2009. Duke and Greenwood negotiated a PPA which they signed on October 1, 2008. The PPA will reestablish Greenwood as a full requirements customer of Duke with wholesale electric service to begin on January 1, 2010. Duke will provide Greenwood's native load requirements, after the application of Greenwood's 11 MW allotment of hydroelectric power from SEPA. Greenwood's peak load in 2010 is now expected to be 52 MW, and it is expected to grow to 54 MW by 2019. The Greenwood load will represent approximately 0.26% of Duke's generating capacity.

5. The PPA has an initial term of 9 years, and it includes a provision that the PPA shall automatically renew for additional extension terms of 10 years each, unless either party gives notice of termination two years before expiration of the term then in effect. The contract term was established to align with the contracts that Duke recently signed with former Schedule 10A wholesale customers. In Comments filed herein, Greenwood's counsel represented that Greenwood is willing and committed to extend the initial term of the PPA for an additional ten years provided the service is at native load priority and under formula rates based upon system average cost in accordance with the PPA and any later negotiated terms for service to the previous Schedule 10A customers.

6. The PPA provides that Greenwood will pay for capacity and energy based upon Duke's system average capacity and energy costs as determined by a cost formula to be approved by the FERC. The PPA was filed with the Federal Energy Regulatory Commission (FERC) in Docket No. ER09-120, and FERC accepted the PPA for filing effective January 1, 2009.

7. The PPA includes conditions precedent that the Commission shall not reject the PPA, or subject its approval of the PPA to a condition unacceptable to Duke, or disapprove or reject the use of system average cost accounting for the PPA for retail ratemaking.

8. Duke was ordered to comply with certain Regulatory Conditions by the Merger Order issued by the Commission on March 24, 2006, in Docket No. E-7, Sub 795, a proceeding for approval of the merger of Duke and Cinergy Corporation. The Merger Order indicates that these Regulatory Conditions were important to approval of the merger, and Duke specifically agreed to the conditions by letter filed in that docket on March 27, 2006.

9. Regulatory Condition Nos. 5 and 6 of the Merger Order provide certain benefits to Duke's retail native load customers and to the retail native loads of certain historically served wholesale customers of Duke.

10. Regulatory Condition No. 5 provides, "Duke Power shall retain the obligation to pursue least cost integrated resource planning for its Retail Native Load Customers and remain responsible for its own resource adequacy subject to Commission oversight in accordance with North Carolina law. Duke Power shall determine the appropriate self-built or purchased power resources to be used to provide future generating capacity and energy to its Retail Native Load Customers, including the siting considered appropriate for such resources, on the basis of the benefits and costs of such siting and resources specifically to Duke Power's Retail Native Load Customers."

11. Regulatory Condition No. 6 provides, "The planning and dispatch of Duke Power system generation and purchased power resources subsequent to the Merger shall ensure that Duke Power's Retail Native Load Customers receive the benefits of those resources, including priority of service, to meet their electricity needs. Duke Power 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 sales to customers that are not Retail Native Load Customers."

12. Regulatory Condition No. 7(a) of the Merger Order provides, "To the extent that Duke Power proposes to enter into wholesale power contracts that grant native load priority to the following historically served customers: Schedule 10A Customers, Town of Highlands, WCU, the electric membership cooperatives (EMCs) within Duke's control area, North Carolina Municipal Power Agency No. 1, Piedmont Municipal Power Agency, and Saluda River Electric Cooperative, Inc., Duke Power is not required to file an advance notice with the Commission or receive its approval. Subject to the conditions set out in subsection (d) below, the retail native loads of these historically served wholesale customers shall be considered Duke Power's Retail Native Load Customers for purposes of Regulatory Condition Nos. 5 and 6...."

13. Schedule 10A has since been terminated, but Duke has signed new wholesale contracts with most of the historically served customers that were formerly Schedule 10A Customers.

14. Regulatory Condition No. 7(b) of the Merger Order provides, "Before granting native load priority to a wholesale customer other than as provided for in subsection (a) above or to other companies' retail customers, Duke Power must provide 30 days' advance notice of its intent to grant native load priority and to treat the retail native load of a proposed wholesale customer as if it were Duke Power's retail native load pursuant to Regulatory Condition Nos. 5 and 6."

15. Regulatory Condition No. 7(d)(i) of the Merger Order provides that the Commission "retains the right to assign, allocate, and make pro-forma adjustments with respect to the revenues and costs associated with Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes."

16. On October 15, 2008, Duke filed an Advance Notice as to the Greenwood PPA pursuant to Regulatory Condition No. 7(b) of the Merger Order. Duke gave notice of its intent to grant native load priority to Greenwood and to treat the retail native load of Greenwood as if it is the Company's native load under Regulatory Condition Nos. 5 and 6.

17. Duke may proceed with the Greenwood PPA and may treat the retail native load of Greenwood as the Company's native load for purposes of Duke's Regulatory Condition Nos. 5 and 6.

18. Duke has also requested that the Commission "issue a Declaratory Ruling, pursuant to the request made in Docket No. E-7, Sub 858, holding that the Company is entitled to serve the City of Greenwood... at native load priority and at formula rates based upon system average costs." Greenwood supports issuance of such a declaratory ruling given the similarity of Greenwood's circumstances to those of Duke's Schedule 10A customers.

19. In any future retail ratemaking proceeding, the Commission will allocate the wholesale revenues and costs of the Greenwood PPA on the basis of the evidence presented in that future proceeding. On the basis of the evidence presented herein and consistent with Duke's Regulatory Conditions and with the Commission's statutory responsibilities, the Commission gives a declaratory ruling or policy statement that it would be appropriate to allocate revenues from the Greenwood PPA to wholesale jurisdiction and to allocate the wholesale costs of the PPA to wholesale jurisdiction based upon system average costs in any future retail ratemaking proceeding.

DISCUSSION AND CONCLUSIONS AS TO INTERPRETATION OF CONDITION 7(b)

The Public Staff again objects, as it did in the Orangeburg docket, that Duke's advance notice was not timely filed. Duke signed the Greenwood PPA before filing its advance notice. The Greenwood PPA was signed October 1, 2008; advance notice was filed October 15, 2008; delivery of electricity to Greenwood is to commence January 1, 2010. Duke's Condition No. 7(b) provides that "[b]efore granting native load priority to a wholesale customer...Duke Power must provide 30 days' advance notice of its intent to grant native load priority and to treat the retail native load of a proposed wholesale customer as if it were Duke Power's retail native load pursuant to Regulatory Condition Nos. 5 and 6."

The Commission addressed this issue in the Orangeburg Order and concluded the Duke was not complying with Condition No. 7(b). The Commission reasoned that Condition No. 7(b) requires Duke to provide advance notice 30 days "[b]efore granting native load priority to a wholesale customer...," that Duke "grants" native load priority when it signs a wholesale contract and legally obligates itself to perform, and that Condition No. 7(b) therefore requires the advance notice to be filed with the Commission no less than 30 days before a wholesale contract is signed. The Commission further reasoned that in 2005 the North Carolina Supreme Court and Court of Appeals upheld[1] the Commission's assertion of jurisdiction "to review, before they are

[1] State ex rel. Utilities Commission v. Carolina Power & Light Company, 359 N.C. 516 (2005), and State ex rel. Utilities Commission v. Carolina Power & Light Company, 174 N.C.App. 681 (2005).

signed, proposed wholesale contracts by a regulated North Carolina public utility granting native load priority to be supplied from the same plant as retail ratepayers…"; that Condition No. 7(b) was adopted in March 2006 to implement these decisions; and that the Commission clearly intended for advance notices to be filed before the associated wholesale contracts are signed. In the Orangeburg Order, the Commission directed Duke to comply with its Condition No. 7(b) in future advance notice proceedings.

The Commission notes that the Greenwood PPA was signed and the present advance notice was filed before issuance of the Orangeburg Order; however, the Commission again directs that Duke shall comply with Condition No. 7(b) as interpreted in the Orangeburg Order in all of its future wholesale contract activities.

DISCUSSION AND CONCLUSIONS AS TO THE ADVANCE NOTICE FILING

The Commission now turns to the advance notice of the Greenwood PPA. The North Carolina Supreme Court has stated that advance notice review "is necessary to enable [the Commission] to fulfill its obligations under the North Carolina Public Utilities Act by ensuring that a regulated public utility has sufficient generating resources to provide reliable and adequate service to its captive retail ratepayers." 359 N.C. at 529.

In this case, no reliability concerns have been raised as to the Greenwood PPA, and the Commission notes the relatively small size of the Greenwood load in terms of Duke's generating capacity. The load is now projected to be 52 MW in 2010 and to grow to 54 MW by 2019; this represents approximately 0.26% of Duke's capacity. The Commission concludes that the advance notice period should be closed and that Duke may proceed with the Greenwood PPA.

Duke's advance notice also indicates the intent to treat the retail native load of Greenwood as if it is the Company's native load under Regulatory Condition Nos. 5 and 6 of the Merger Order. As noted in the Orangeburg Order, Condition No. 5 and 6 are designed to give certain benefits to those Duke customers who have been on-system for years and have contributed to paying for the present system facilities. The conditions provide for Duke to pursue least cost integrated resource planning for its retail native load customers; for Duke to plan and dispatch both system and purchased resources so as to ensure that retail native load customers receive the benefits of those resources, including priority of service; and for Duke to serve its retail native load customers with the lowest-cost power it can reasonably generate or purchase before making power available to customers who are not retail native load customers. The phrase "Retail Native Load Customers" refers to the captive retail customers that Duke is obligated to serve under North Carolina law. Additionally, Condition No. 7(a) provides that the retail native loads of certain named historically served wholesale customers of Duke are considered as retail native load customers for purposes of Conditions Nos. 5 and 6. The benefits provided by Conditions Nos. 5 and 6 reflect the system contributions that retail native load customers and historically served wholesale customers have made over time. These customers have essentially paid for the existing Duke system facilities.

Greenwood is not one of the historically served wholesale customers named in Condition No. 7(a); Greenwood was not a Duke customer at all at the time the Merger Order was issued.

However, on the basis of the evidence herein, and given the reasoning underlying the Merger Order and the Orangeburg Order, the Commission concludes that Greenwood should be treated consistent with Duke's historically served wholesale customers for purposes of Regulatory Condition Nos. 5 and 6. The basis for this conclusion is discussed further below in connection with the declaratory ruling request.

In conclusion, as to the advance notice, Duke may proceed with the Greenwood PPA and may treat the retail native load of Greenwood as the Company's native load for purposes of Duke's Regulatory Condition Nos. 5 and 6. The Commission will extend to the retail native load of Greenwood the additional benefits that Duke's Condition Nos. 5 and 6 provide to its retail and historically served wholesale customers, i.e., Duke's obligation to pursue least cost integrated resource planning and responsibility for resource adequacy; the benefits, including priority of service, of the planning and dispatch of Duke system generation and purchased power resources; and the right to "the lowest-cost power" that Duke can reasonably generate or purchase.

DISCUSSION AND CONCLUSIONS AS TO THE DECLARATORY RULING REQUEST

The next consideration is the motion for a declaratory ruling filed by Duke and supported by Greenwood. In the recent Sub 858 docket, the Commission questioned whether circumstances similar to those in this docket support issuance of a declaratory ruling; however, the Commission decided to give a declaratory ruling or policy statement in the Sub 858 docket based upon the evidentiary record before it and with certain qualifications. The Commission will issue another declaratory ruling in the present docket. The Commission does not intend to issue declaratory rulings in all cases where they might be requested. Each request must be decided on its own merits. The present declaratory ruling is being issued because it will expand upon, and help to clarify, the reasoning in the declaratory ruling issued in the Sub 858 docket.

The Commission will give a declaratory ruling or policy statement in this docket applicable to the Greenwood PPA based upon the present evidentiary record. The ruling or policy statement is as follows: On the basis of the evidence presented herein, it would be appropriate to allocate revenues from the Greenwood PPA to wholesale jurisdiction and to allocate wholesale costs to wholesale jurisdiction based upon system average costs in any future retail ratemaking proceeding. This declaratory ruling is subject to the following two qualifications. First, the Commission cannot bind future Commissioners making ratemaking decisions in particular cases. Any such decision will be made on the basis of the evidence presented in that future proceeding. Second, Duke's Condition No. 7(d)(i) specifically provides, "The Commission retains the right to assign, allocate, and make pro-forma adjustments with respect to the revenues and costs associated with Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes." The Commission reaffirms this right, and the present order does not revise any of Duke's regulatory conditions or waive any of the Commission's rights under the regulatory conditions.

The Commission reaches a different conclusion in this case from the conclusion reached in the declaratory ruling in the Sub 858 Orangeburg docket. The Sub 858 declaratory ruling was based in large part upon the key proposition that Duke's retail and historically served wholesale customers -- who have been customers for decades and who have essentially paid for Duke's

present system facilities -- should not subsidize service to new wholesale customers who have never previously been customers of Duke and who have not shared in the costs of the existing generating facilities. Orangeburg was such a new wholesale customer; Greenwood is not such a customer. The evidence demonstrates significant factual differences on points that were crucial to the Commission's reasoning in the Orangeburg declaratory ruling. The evidence is that Greenwood is inside Duke's balancing authority or control area; that Greenwood was a wholesale customer of Duke for many decades in the past, during the time when most of Duke's present-day generating plants were acquired, planned, and built; and that Greenwood paid a substantial exit fee when it left the Duke system in 1997, to protect remaining Duke customers from stranded costs. Given Greenwood's decades of receiving service from Duke and Greenwood's contributions to past and future utility costs, Greenwood is sufficiently similar to Duke's historically served wholesale customers to distinguish it from Orangeburg and to justify a different declaratory ruling herein.

The Commission notes an additional distinction that sets the present situation apart. The Greenwood PPA provides for extensions of the initial term in successive 10-year extensions. The Orangeburg contract included no such provision. Greenwood's counsel represented in his May 7, 2009 filing herein that

> Greenwood is willing and committed to extend the term for wholesale requirements service from Duke for an additional ten years after the initial term of its PPA with Duke ends on December 31, 2019 provided that the service is supplied by Duke to it at native load priority and under formula rates based upon system average cost in full accordance with the PPA. [footnote omitted; the footnote added "and any later negotiated terms for service to the previous Schedule 10A customers of Duke, at the time."] Thus, the duration of the PPA between Greenwood and Duke could extend to at least twenty years in term, insuring Greenwood's status as a long-term requirements customer of Duke over the period when new generation investment is planned to be added to serve its native load requirements.

This commitment by Greenwood has significant implications for system planning and cost recovery, and it is another important distinction between the present circumstances and those underlying the Sub 858 declaratory ruling.

In summary, given the evidence presented herein, the Commission concludes that the Commission should allocate revenues from the Greenwood PPA to wholesale jurisdiction and should allocate wholesale costs to wholesale jurisdiction based upon average system costs in any future retail ratemaking proceeding. The Commission again notes that it has acted on the basis of the present evidentiary record in making this ruling and that any future ratemaking decision will be based upon the evidence presented in that future proceeding.

The Commission notes that Greenwood made a stranded cost payment to Duke when Greenwood left for another wholesale supplier in 1997, but no such provision is included in the present PPA. In order to keep advised as to Duke's operations, the Commission wishes for Duke to file a statement which describes Company policies that generally pertain to inclusion or exclusion of stranded costs provisions in wholesale PPA contracts.

IT IS, THEREFORE, ORDERED as follows:

1. That Duke's Condition No. 7(b) requires that an advance notice be filed no less than 30 days before a wholesale contract is signed and Duke shall comply with this holding in future advance notice proceedings;

2. That the advance notice period herein is hereby closed and Duke may proceed with the Greenwood PPA and Duke may treat the retail native load of Greenwood as the Company's native load for purposes of Duke's Regulatory Condition Nos. 5 and 6;

3. That, given the evidence presented herein, the Commission should allocate revenues from the Greenwood PPA to wholesale jurisdiction and should allocate wholesale costs to wholesale jurisdiction based upon average system costs in any future retail ratemaking proceeding; and

4. That within 30 days Duke shall file a statement describing its policies pertaining to the inclusion or exclusion of stranded cost provisions in its wholesale contracts.

This the 20th day of July, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Chairman Edward S. Finley, Jr., concurs in result.
Commissioner Lorinzo L. Joyner concurs in part and dissents in part.

Commissioners Robert V. Owens, Jr.; Susan W. Rabon; and ToNola D. Brown-Bland did not participate in this decision.

Kc072009.02

DOCKET NO. E-7, SUB 866

Chairman Finley, concurring in result.

I concur with the result of the Majority opinion. My views on the issues in this docket are set forth in my opinion concurring in part and dissenting in part in the Commission's Order dated March 30, 2009, in Docket No. E-7, Sub 858.

/s/ Edward S. Finley, Jr.
Edward S. Finley, Jr., Chair

DOCKET NO. E-7, SUB 866

Commissioner Lorinzo L. Joyner, Concurring in Part and Dissenting in Part: I agree with the majority opinion in all substantive respects, save one. I would not have granted the request for a declaratory ruling or a policy statement regarding the appropriate allocation of revenues from the Greenwood PPA. I find this case to be distinguishable from the Orangeburg proceeding in Docket No. E-7, Sub 858, where I joined the Commission in finding that it was appropriate to enter a declaratory ruling. In the Orangeburg docket, the Commission, although expressing a finding of merit in some of the arguments which questioned the propriety of a declaratory ruling,[1] decided to enter a ruling with two important qualifications. Those qualifications were that:

> First, the present Commission cannot bind future Commissioners making ratemaking decisions in particular cases. Both Duke and Orangeburg have conceded as much. To the extent Duke seeks to alleviate uncertainty, the present order gives as much certainty as the Commission can provide in the present circumstances. Second, Duke's Condition No. 7(d)(i) specifically provides, "The Commission retains the right to assign, allocate, and make pro-forma adjustments with respect to the revenues and costs associated with Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes." Reconsideration under G.S. 62-80 would be the appropriate remedy to revise this regulatory condition, but Duke has not asked for reconsideration and the procedures for reconsideration have not been followed herein. The present order therefore does not purport to reconsider any prior Commission decision or to revise any of Duke's regulatory conditions.

I believe that the Commission should have declined to enter a declaratory ruling in this case for several reasons. First, unlike Orangeburg, no party, including the Public Staff, filed objections to the Greenwood PPA. Therefore, the Commission has determined that Duke may proceed with the Greenwood PPA and provide service to Greenwood at native load priority and may treat the retail native load of Greenwood as the Company's native load for purposes of Regulatory Condition Nos. 5 and 6. Second, the Public Staff concluded its May 22, 2009 Comments by stating that "given Greenwood's small size and the fact that it contributed for a number of years to the costs of Duke's existing generating facility, it is not very likely that the Public Staff will recommend in a future retail ratemaking proceeding that the costs associated with the Greenwood PPA be allocated on an incremental cost basis." Thus, there is nothing in the present record pertaining to the Greenwood PPA which should cause Duke to feel any significant degree of uncertainty as to the future retail ratemaking implications of the Greenwood contract. In fact, as the Public Staff recognized, there are specific facts and circumstances present in this case which appear to differentiate Greenwood from Orangeburg. Third, while the Orangeburg Order is not directly applicable to Greenwood, Duke and Greenwood should find

[1] The Commission noted that, as the Commission had ruled before, a declaratory ruling should not be used as a substitute for another proceeding that must be filed in the future and that it had also previously noted the difficulty of trying to make ratemaking decisions as to wholesale contracts in an advance notice proceeding. The Commission stated that it could not know what the evidence might be at the time a rate case or fuel case is ready for decision, and such a decision would have to be based upon the evidence presented at that time.

much in the reasoning of that Order to give them comfort that the wholesale costs of the Greenwood PPA will likely be allocated based upon system average costs in any future retail ratemaking proceeding. The factual distinctions between Orangeburg and Greenwood (particularly the fact that Orangeburg is an entirely new customer while Greenwood is a past customer located in Duke's balancing authority area which has contributed to existing plant through past rates and stranded cost payment) go to the very points that the Commission found crucial in the Orangeburg Order.

Therefore, I believe that a declaratory ruling is not justified in this case and that the Commission should have declined to give Duke a declaratory ruling. I fear that the Commission is rapidly charting a path leading toward unnecessary and routine issuance of declaratory rulings. I question the propriety and wisdom of that course of action, particularly in view of the two important qualifications set forth by the Commission in the Orangeburg order as quoted above. The Commission should take greater care to entertain and grant requests for declaratory rulings in only the most deserving cases so as to not further erode the underlying legal basis upon which declaratory rulings are premised.

/s/ Lorinzo L. Joyner
Commissioner Lorinzo L. Joyner

DOCKET NO. E-7, SUB 874

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Petition of Duke Energy Carolinas, LLC for an	)	
Accounting Order to Defer Certain Environmental	)	ORDER APPROVING DEFERRAL
Compliance Costs and the Incremental Costs Incurred	)	ACCOUNTING WITH CONDITIONS
From the Purchase of a Portion of Saluda River's	)	
Ownership in the Catawba Nuclear Station	)	

BY THE COMMISSION: On February 4, 2009, Duke Energy Carolinas, LLC (Duke or Company) filed a Petition with the Commission requesting that it be authorized, for regulatory accounting purposes, to defer in a regulatory asset account certain post-in-service costs that are being or will be incurred in connection with (1) the addition of the Allen Steam Station (Allen) flue gas desulfurization equipment (FGD or scrubbers)[1] related to environmental compliance and (2) the purchase of a portion of Saluda River Electric Cooperative, Inc.'s (Saluda River's) ownership interest in the Catawba Nuclear Station. Duke further requested that the Commission rule on its request as soon as possible, but no later than by March 31, 2009, as the Company wishes to reflect the requested deferral in its quarterly financial reports for the first quarter of 2009.

[1] These scrubbers are scheduled to be placed into service before mid-year 2009.

On February 10, 2009, the Commission issued an Order Requesting Comments regarding Duke's Petition. The Order also provided for Duke to file reply comments not later than March 9, 2009.

On February 11, 2009, the Carolina Industrial Group for Fair Utility Rates (CIGFUR III) filed a petition to intervene. Such intervention was allowed by Order issued February 16, 2009.

On February 17, 2009, Attorney General Roy Cooper (Attorney General) filed notice of intervention.

On February 27, 2009, Carolina Utility Customers Association, Inc. (CUCA) filed a petition to intervene and initial comments and the Attorney General and the Public Staff filed comments. CUCA's intervention was allowed by Order issued March 20, 2009.

On March 9, 2009, Duke filed reply comments.

DUKE'S PETITION

As explained in its Petition, Duke is seeking to defer the incremental costs that are being or will be incurred from the date the present assets are placed in service, and are used and useful in providing electric service to its North Carolina retail customers, to the date the Company is authorized to begin reflecting in rates the recovery of such costs on an ongoing basis. The incremental costs for which this deferral treatment is requested include depreciation, cost of capital, property taxes, and related nonfuel operation and maintenance (O&M) expenses.

According to its Petition, Duke contemplates filing an application to increase its base rates in June 2009. The Company stated that such filing, among other things, would include the annual costs associated with the present plant additions, including a levelized amount to amortize and recover over a period of years the costs deferred and accumulated in the regulatory asset account for which Duke seeks approval to establish in the context of this proceeding.

Duke commented that the total plant cost of the assets in question was $680 million and that $480 million of that amount was attributable to its North Carolina retail operations. The Company argued that the potential adverse impact to its earnings, before consideration of income tax effects, associated with these asset additions, absence approval of the requested deferral accounting treatment, was approximately $125 million on a total-company basis and nearly $90 million on a North Carolina retail basis.

The Company noted that its earnings in 2008 were below the authorized return on common equity[1] (ROE) most recently allowed by the Commission, even after taking into account the additional $80 million the Commission authorized the Company to collect in 2008 through a 12-month rate increment rider for merger savings. Duke observed that it will suffer an additional

[1] The terminology "authorized return on common equity" refers to the cost of common equity capital that the Commission determined the Company should be given a reasonable opportunity to earn based upon the evidence presented in the Company's most recently completed general rate case. By Order issued December 20, 2007, the Commission, among other things, determined that Duke's cost of common equity capital, at that time, was 11%.

sizeable decline from its authorized ROE in 2009 unless the Company is permitted to defer, for future recovery, the costs in question. Duke asserted that avoiding such an adverse earnings impact is important in that it is necessary to ensure that the Company can maintain access to needed capital on reasonable terms, particularly during this time of global financial and credit crisis.

Further, according to Duke, customers are currently benefiting from the increased capacity and reduced fuel costs resulting from an increase in nuclear generation, and will soon benefit from the Allen scrubber addition.

Allen Scrubbers

In response to G.S. 62-133.6, the Clean Smokestacks Act (the Act), the Company's compliance plans, among other things, reflect installation of scrubbers at Allen, the construction of which is scheduled to be completed by the spring of 2009. According to Duke, the $500 million cost of these scrubbers is in addition to the $1.043 billion the Company has invested in environmental controls equipment placed in service through year-end 2008, in order to comply with the Act. In its Petition, Duke observed that the present scrubbers are needed in order to comply with certain federal emissions requirements.

Duke stated that, during the period 2002 through 2007, the Company recovered $1.050 billion of Clean Smokestacks compliance costs through accelerated amortization as required by the Act. In Duke's last general rate case, Docket No. E-7, Sub 828, and the Commission proceeding undertaken pursuant to G.S. 62-133.6(d),[1] the Commission authorized Duke to discontinue amortization under the Act and reduced the Company's base rates effective January 1, 2008. Therefore, according to Duke, the cost of the Allen scrubbers has been financed wholly by Duke's investors.

Duke maintained that the annual incremental cost of depreciation, nonfuel-related O&M expenses, property taxes, and cost of capital related to placing the Allen scrubbers in service was approximately $85 million on a total-company basis and approximately $60 million with respect to the Company's North Carolina retail operations. The Company noted that the total cost associated with the Allen scrubbers to be deferred will be based on the dates the scrubbers are placed in service through the date the annual cost of owning and operating the Allen scrubbers is reflected in base rates.

In concluding its comments in this regard, Duke averred that, as a result of the Commission's having reduced its North Carolina retail rates in the Company's last general rate case to eliminate Clean Smokestacks amortization, the cost of the Allen scrubbers has not been reduced through accelerated amortization.

[1] The purpose of this proceeding, Docket No. E-7, Sub 829, was to allow the Commission to review the Company's Clean Smokestacks environmental compliance costs and determine the annual cost recovery amounts (i.e., the annual amounts of accelerated amortization) to be recorded and recovered for calendar years 2008 and 2009.

Duke's Purchase of a Portion of Saluda River's Ownership Interest in Catawba Nuclear Station

Under an Asset Purchase Agreement, Duke purchased 71.96% of Saluda River's ownership interest in the Catawba Nuclear Station, at a cost of $158 million. Such purchase had been incorporated into Duke's 2006 Integrated Resource Planning Process, and it was reflected in the Company's 2006 and 2007 Integrated Resource Plans filed with and approved by the Commission.[1]

The Company completed the acquisition of this additional ownership interest in the Catawba Nuclear Station on September 30, 2008. According to Duke, the annual cost for depreciation; cost of capital; nonfuel O&M expenses; property taxes; and insurance is $42 million on a total-company basis and $30 million on a North Carolina retail basis. The costs to be placed into the regulatory asset account will include costs incurred from the September 30, 2008 closing date through the date rates are effective that recover the ongoing annual costs of this additional ownership interest in the Catawba Nuclear Station.

Duke noted that its most recent fuel charge adjustment proceeding incorporated the savings associated with the Company's increased ownership interest in the Catawba Nuclear Station. According to Duke, the lower fuel costs resulting from the increase in nuclear generation saves North Carolina retail customers $21 million on an annual basis. The current fuel and fuel-related rates incorporating the savings attributable to this purchase became effective September 1, 2008. Therefore, Duke argued that customers are currently enjoying the benefits of the Company's additional investment in the Catawba Nuclear Station.

Financial Consequences of Duke's Request

Duke stated that, in its most recent earnings surveillance report (ES-1 report) filed with the Commission, its reported jurisdictional ROE was significantly less than the return approved by the Commission in its most recent general rate case.[2] The Company commented that the proposed deferral will not result in it earning more than its authorized return in 2009. According to Duke, the costs in question, which total $90 million on a North Carolina retail basis, absent deferral, would produce more than a 120 basis point reduction in the Company's North Carolina retail ROE for calendar year 2009. The Company observed that the ultimate rate impact of this proposed deferral on customers, if allowed, would not be significant, as Duke would propose in its next general rate case to recover the deferred costs over a multi-year period.

Duke noted that it must make significant capital expenditures in the foreseeable future to comply with environmental requirements, meet customer demand, and modernize its generation

[1] In its 2006 planning process, Duke determined that the present purchase was a least-cost addition to the Company's generation portfolio under all circumstances.

[2] For the 12-month period ending December 31, 2008, Duke reported that it had realized a 9.79% ROE with respect to its North Carolina retail operations. As previously noted, in Duke's most recent general rate case, the Commission determined that the Company should be given a reasonable opportunity to earn an 11% return on common equity, which was based upon the evidence presented in that case. The Commission's ruling in that regard was entered by Order issued December 20, 2007, in Docket No. E-7, Sub 828.

fleet and power delivery system, and that it was therefore crucial that it maintain credit quality. Duke maintained that the creditworthiness of its debt would be adversely impacted by a denial of the requested deferred accounting treatment. Duke opined that the Commission's approval of the requested deferral accounting treatment would enhance the Company's ability to attract necessary capital on a reasonable and timely basis because it reinforces the market's positive perception of a constructive regulatory environment in North Carolina. Additionally, Duke stated that such approval would help mitigate the potential for significant earnings deterioration in 2009. Such mitigation, according to Duke, would benefit both the Company and its customers, as it would have a positive effect on investor confidence in the Company and, as a result, would thereby help in assuring access to needed capital on reasonable terms.

Finally, the Company noted that Commission approval of its accounting request would not preclude the Commission from addressing the reasonableness of the costs deferred, and recorded as a regulatory asset, in the general rate case which Duke contemplates filing in June 2009.

Duke's Concluding Comments

In conclusion, Duke asserted as follows:

(1) That deferral of the incremental annual costs relating to (a) placement of the Allen scrubbers in service and (b) the Company's additional ownership interest in the Catawba Nuclear Station are important to the maintenance of Duke's credit quality and financial integrity and would avoid a significant deterioration in the Company's 2009 level of earnings.

(2) That completion of the Allen scrubbers was required to comply with the Clean Smokestacks Act.

(3) That it is appropriate and reasonable to defer the costs of the Saluda River purchase to avoid loss of recovery of the capital costs incurred by shareholders, particularly given that retail customers are receiving the benefits of the lower fuel and fuel-related costs made possible by the Company's additional investment in the Catawba Nuclear Station.

(4) That the total investment of $658 million[1] in the Allen scrubbers and the additional investment in the Catawba Nuclear Station is financially significant and constitutes an extraordinary item of cost.

(5) That, due to the potential for adverse earnings impacts associated with placing large projects in service and mindful of the negative financing consequences that can flow from such adverse impacts, the Commission has historically authorized deferral accounting for post-in-service costs of major generating plant additions from the date the units were placed in service to the date rates reflected the cost of the plants. For example,

[1] On Page 2 of the Company's Petition, "[t]he plant cost of these assets is [stated to be] $680 million . . . ." However, that appears to be the result of an inadvertent oversight.

in Duke's 1991 rate case, the Commission authorized the deferral of $42 million of the costs associated with the Bad Creek Pumped Hydroelectric Station during the period between commercial operation of each unit and the date of the Commission's Order. The Commission amortized those costs on a levelized basis over a three-year period. The Commission has authorized similar deferral accounting treatment for Duke and other utilities for the costs of other generating plants. Thus, Commission precedent supports similar treatment for the costs at issue here.

CUCA'S COMMENTS

In its comments, CUCA stated that, under traditional ratemaking, when a utility builds or acquires a "used and useful" asset, the new asset is incorporated into the utility's North Carolina retail rate base and rate structure through the filing of a general rate case. Accordingly, CUCA is of the opinion that the issues raised by Duke's Petition would be best resolved in the context of a general rate case proceeding, where all items of cost can be looked at and reviewed simultaneously. CUCA opined that this is especially true with regard to Duke's repurchase of a portion of Saluda River's share of the Catawba Nuclear Station.

CUCA observed that there is no way of knowing, at this point, how much of the Saluda River purchase will, in fact, be allocable to the Company's North Carolina retail operations (and, thus, "used and useful" to North Carolina retail ratepayers). CUCA commented that, as Duke has publicly announced its intention to file a general rate case in North Carolina later this year, it is of the opinion that it would be more appropriate to simply require Duke to include the Allen scrubbers and the repurchase of plant facilities from Saluda River in the general rate case filing. In concluding its comments, CUCA stated that Duke's comments do not appear to indicate that there will be any major impact on Duke's ability to raise new investment capital if the Commission simply follows its usual ratemaking procedures.

ATTORNEY GENERAL'S COMMENTS

Duke's Petition Presents Issues of Fact that Require An Evidentiary Hearing

The Attorney General argued that Duke's petition presents numerous questions of fact. For example, according to the Attorney General, Duke's assertions regarding its 2008 and future ROEs; the effects of the present costs on the Company's ROE; and the Company's financial market potential if cost deferral is not allowed all raise factual issues.

Further, the Attorney General contended that there are other factual issues not mentioned by Duke that are nonetheless pertinent to a Commission decision in this case. First, the Commission would need to examine Duke's 2008 overall rate of return and the impact that the Allen scrubbers and the Catawba Nuclear Station purchase will have on Duke's future overall rate of return. Second, although Duke might have acted prudently in making the Catawba Nuclear Station purchase and the environmental equipment additions at the Allen plant, the Commission should make at least a preliminary determination of whether those actions were prudent and the costs are reasonable before authorizing Duke to defer those costs. Even though a

final prudence and reasonableness determination could be made in Duke's next general rate case, a preliminary determination would be necessary for such an important decision as allowing the deferral of these costs. There is no emergency or urgent circumstance justifying establishment of a regulatory asset. Indeed, prematurely establishing a regulatory asset might lead the credit community to conclude that these costs will receive special treatment, a conclusion that could harm Duke and other similarly situated North Carolina utilities if the Commission, after gathering the facts and making a final prudence and reasonableness decision, eliminated the regulatory asset.

According to the Attorney General, the question of whether an act is prudent or a cost is reasonable is a question of fact. *See State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 484, 493, 385 S.E.2d 463, 472 (1989). The Commission cannot make those or any of the other factual determinations sought by Duke without the production of competent evidence in a due process hearing. *See* G.S. 62-60 (2008) ("[t]he Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record.")

The Attorney General commented that, in 2007, the Commission reaffirmed the necessity for an evidentiary hearing on factual questions in the Duke proceeding in which Duke requested assurance of cost recovery for activities involved in developing a nuclear plant. Rejecting specific statements proposed by Duke to define approved "development work", but issuing a general declaration, the Commission stated:

> [t]hese general statements are clearly sufficient to provide Duke with the assurance it needs to continue pursuing the assessment of the proposed Lee Nuclear Station as a potential resource for serving its customers. In addition, they are also consistent with the Commission's existing legal authority to provide such assurances. The absence of an evidentiary record mitigates against and precludes the Commission from making a more detailed pronouncement or ruling to define the term "Development Work" at this time.

Order Issuing Declaratory Ruling, Docket No. E-7, Sub 819, at Page 23 (March 20, 2007).

In addition, the Attorney General argued that the precedential value of such a declaratory ruling is questionable. The Attorney General noted that, as the Commission held in Duke's application for a declaratory ruling on its proposed affiliate contracts creating a revolving credit facility, a proceeding for a declaratory ruling is not appropriate where a different process is required by statute. In particular, the Commission ruled as follows:

> [T]he Commission does not believe that this is an appropriate proceeding for a declaratory ruling. These affiliate contracts must be filed with the Commission pursuant to G.S. 62-153(a), and a declaratory ruling should not be used as a substitute for another proceeding required by statute. Anticipatory rulings are not favored, and the Commission does not believe that it is appropriate to issue a declaratory ruling as to how the Commission will rule in a future proceeding. If the declaratory ruling requested herein actually commits the Commission, it would render the future statutory proceeding pointless; if the ruling does not

> commit the Commission, it fails to give Duke Energy the assurance that it says it needs.

Order on Affiliate Contracts, NCUC Docket No. E-7, Sub 728, at Pages 4-5 (Aug. 2003).

The Attorney General further noted that, more recently, in Duke's request for deferral of the costs of a drought purchase power agreement (PPA), the Commission ruled that an evidentiary hearing was required to resolve several factual questions. In pertinent part, the Commission ruled as follows:

> [A]s a general rule, when a request is made for cost deferral accounting treatment, the Commission evaluates the costs at issue to determine if they were reasonably and prudently incurred, unusual or extraordinary in nature, and of a magnitude that would result in a material impact on the Company's financial position (level of earnings) . . . .
>
> [I]n addition, there are very substantial unresolved questions of fact that the Commission believes need to be addressed, such as (1) the prudence and reasonableness of Duke's entry into (the PPA); (2) its selection of Columbia *vis-a-vis* other alternatives; (3) the number of megawatts Duke decided to purchase; (4) the structure of the payment . . . .
>
> [A]t this juncture, the Commission concludes that an evidentiary hearing is equitable, appropriate, and necessary to resolve the relevant factual issues that must be addressed in order to determine whether it would be appropriate to allow deferral of such costs and their amortization over an extended period of time.

Order Denying Request to Implement Rate Rider and Scheduling Hearing to Consider Request for Creation of Regulatory Asset Account, NCUC Docket No. E-7, Sub 849, at Pages 19 and 20 (June 2, 2008).

Deferral Would Be a Significant Departure from Traditional Ratemaking Principles and Would Appear to Be Inappropriate

The Attorney General commented that, as a general rule, the Commission has not favored cost deferrals, allowing deferral only when expenses are unusual and would have a material effect on a company's financial position. *Id.*; *See also, In re Request by Public Service Company of North Carolina, Inc., for Deferred Accounting Treatment Related to Year 2000 Conversion Costs, Order Approving Deferred Accounting Treatment*, Docket No. G-5, Sub 369 (1997).

The Attorney General observed that,

> [i]n numerous instances, the Commission has allowed utilities to defer major expenditures to repair facilities damaged by hurricanes. On a case-by-case basis, the Commission has determined whether a particular expenditure is "major," or, in contrast, an acceptable utility operating expense, recognizing that not every major weather event should trigger cost deferral.

In addition, application of the just and reasonable rates standard requires a determination of whether deferral is justified based upon a fair division of costs between ratepayers and shareholders. Thus, another factor that the Commission has considered is the company's level of earnings. For instance, if the company can absorb the costs of a weather event and still have an opportunity to achieve a reasonable earnings level, then the public interest is not served by allowing the company to defer the costs, absent some extraordinary circumstances. The same should be true of these capital costs that Duke seeks to defer.

Duke's request that these capital costs be deferred for recovery in the future, once Duke is authorized to change its base rates, is also a significant departure from the Commission's traditional approach to amortization of deferred costs. Contrary to Duke's request, the Commission has required the amortization of deferred costs to begin right away, rather than placing them in suspension until the company's next rate case. For example, in Docket No. E-2, Sub 843, Progress Energy Carolinas (PEC) requested deferral of $23.5 million in 2003 storm damage costs until January 2008, after the Clean Smokestacks rate freeze, and an amortization of those costs over the ten year period 2008 through 2017. The Commission rejected PEC's request, instead allowing deferral for a five year amortization beginning in February 2003, when the first of the storm costs were incurred. In weighing the public interest, the Commission based its decision, in part, on the effects on PEC's earnings, stating, '[i]t is appropriate, among other things, to consider PEC's level of earnings and the effect that deferring, or not deferring, certain storm costs would have on those earnings.' *Order Granting in Part and Denying in Part Request for Deferral Accounting*, Docket No. E-2, Sub 843 (Dec. 23, 2003), at 23. *See also Order Approving Deferral and Amortization*, Docket No. E-7, Sub 776 (Dec. 28, 2004) (deferral allowed for $2.9 million of storm damage in Nantahala service territory by Hurricane Ivan in September 2004, with amortization over five years beginning in September 2004); *Carolina Industrial Group for Fair Utility Rates v. Carolina Power & Light Company*, Order Approving Accounting Adjustments, Docket No. E-2, Sub 699 (1996) (deferral allowed for $39.7 million of costs related to Hurricane Fran in September, 1996, with amortization of such costs over 40 months, beginning in September 1996); *In re Request for Approval of Accounting for Storm Damage Costs*, Order Establishing Accounting Procedure, Docket No. E-7, Sub 460 (1990) (deferral allowed for $ 3.5 million costs of repair resulting from a tornado in May, 1989, and $20 million for Hurricane Hugo in September, 1989, with amortization of such costs over a five year period, beginning in May and September, 1989, respectively).[1]

Similarly, in Duke's most recent general rate case Duke requested deferral of its GridSouth start-up costs, which Duke began incurring in June 2002, until Duke's most recent base rates went into effect in January 2008. The Commission rejected this request, holding instead that the amortization period should begin as

[1]The amounts deferred were later modified in Duke's 1991 general rate case, NCUC Docket No. E-7, Sub 487. [This Footnote No. 1, including the number, is presented verbatim.]

of June 2002, although it allowed an unusually long ten-year amortization of the GridSouth costs. *Order Approving Stipulation and Deciding Non-Settled Issues*, NCUC Docket No. E-7, Sub 828, at 56-58 (Dec. 20, 2007).

Attorney General's Recommendation

In consideration of the foregoing, the Attorney General recommended that the Commission deny Duke's request for an expedited decision on its Petition, as the Attorney General is of the opinion that there is no urgency or emergency situation that compels the Commission to make a hasty decision on such important issues. Moreover, according to the Attorney General, there are questions of fact that must be decided by an evidentiary hearing before the Commission can determine the appropriate action to take on Duke's Petition.

PUBLIC STAFF'S COMMENTS

The Public Staff advised that it had reviewed Duke's petition as well as additional information provided by the Company in response to informal data requests. Based on that information, the Public Staff has determined that the Catawba Nuclear Station annual costs for which deferral is requested would be approximately $47 million on a total-company basis and $34 million on a North Carolina retail basis.

The Public Staff stated that determining the cost deferral associated with the Allen scrubbers is complicated by the fact that the FGD equipment at Allen actually consists of two scrubbers sharing a common concrete stack, limestone, dewatering system, and wastewater system. The Public Staff commented that, according to the Company, approximately 80% of the investment costs of the two scrubbers relate to Scrubber 1, and the remaining costs relate to Scrubber 2. Scrubber 1 is attached to Units 1, 2, and 5, and Scrubber 2 is attached to Units 3 and 4.

The Public Staff noted that Units 2 and 1 returned to service on February 21st and February 25th, respectively; that Unit 5 is expected to return to service on March 17th, and that Units 4 and 3 are expected to return to service on May 2nd and May 19th, respectively. According to the Public Staff, based on information provided by Duke, the annual costs associated with the Allen scrubbers for which deferral is requested would be approximately $67 million on a total-company basis and $48 million on a North Carolina retail basis. The Public Staff submitted calculations of the estimated deferral amounts for both the Catawba Nuclear Station acquisition and the Allen scrubbers. Those calculations had been provided to the Public Staff by the Company.

The Public Staff commented that it had also reviewed the circumstances of the deferrals allowed in connection with Duke's general rate cases during the period 1983 through 1991. In those cases, the Commission allowed the deferral of costs for major generating plant additions that became operational between the dates of Duke's various general rate increase applications and the effective dates of new base rates reflecting the recovery of those costs. The Public Staff's comments included a summary of the history of each of those deferral requests. Such summaries are presented below:

Docket No. E-7, Sub 373 (1984 Rate Case): As part of a general rate increase application filed November 30, 1983, Duke requested approval of interim rates effective for service rendered on and after the date of commercial operation of McGuire 2. Duke stated that total plant in service would increase by $1.1 billion ($672 million on a North Carolina retail basis, of which $277 million had been previously included as construction work in progress) with the addition of McGuire 2. Duke asserted that interim rates would prevent a monthly revenue loss of $13 million on a total-company basis ($7.6 million North Carolina retail) and were necessary to avoid "a significant and unfair penalty that will adversely affect the Company's financial condition" and "the otherwise inevitable decline in Company earnings." Duke also noted that the financial impact of commercial operation had been partially offset by $42 million of reductions related to nuclear fuel savings.

The Public Staff moved that the request for interim rates be dismissed and that Duke be allowed to capitalize and defer capital costs and O&M expenses associated with McGuire 2 beginning with the date the unit was declared commercial until the plant was allowed into rate base by final order in the rate case. The Public Staff asserted that if Duke was allowed to defer and collect capital costs and expenses associated with McGuire 2, it would suffer no emergency and therefore the request for interim rate relief should be denied.

By Order issued December 27, 1983, the Commission denied Duke's request for interim rates and instead allowed deferral accounting for the McGuire 2 costs. As part of the deferral accounting process, precommercial and commercial fuel savings related to McGuire 2 were also deferred. McGuire 2 went into commercial operation and deferral accounting of nonfuel costs began on March 1, 1984. The Rate Case Order was issued June 13, 1984.

Docket No. E-7, Sub 391 (1985 Rate Case): As part of a general rate increase application filed February 15, 1985, Duke requested authority to defer costs and fuel savings related to Catawba 1 between the date of commercial operation of the unit and the date of the rate case order, and also to defer precommercial fuel savings. In support of its request, Duke cited the Order Authorizing Deferral Accounting in connection with the 1984 Rate Case. Duke noted that Catawba 1 was expected to go into commercial operation in late spring of that year. Duke asserted that unless it was allowed to defer costs and fuel savings related to commercial operation of Catawba 1, it would suffer a monthly operating income deficiency, net of tax, of $15 million on a total-company basis and $8.8 million on a North Carolina retail basis. Duke again asserted that deferral was necessary "in order to avoid a significant and unfair penalty to the Company."

The Public Staff recommended that Duke's motion be allowed, and the Commission issued an Order on March 19, 1985, finding the deferral proper and allowing it. The commercial operation date of Catawba Unit 1 was June 29, 1985. The Rate Case Order was issued September 17, 1985.

Docket No. E-7, Sub 408 (1986 Rate Case): As part of a general rate increase application filed March 27, 1986, Duke requested authority to defer costs and fuel savings related to Catawba 2 during the period between the commercial operation date and the date of the rate case order, and also to defer precommercial fuel savings. In support of its request, Duke cited the Order

Authorizing Deferral Accounting in connection with the 1985 Rate Case. Duke noted that Catawba 2 was expected to go into commercial operation in the fall of that year. Duke asserted that without the deferral it would suffer a monthly operating income deficiency, net of tax, of $13.5 million on a total-company basis and $8 million on a North Carolina retail basis. Duke also asserted that deferral was necessary "in order to avoid a significant and unfair penalty to the Company."

The Public Staff recommended that Duke's motion be allowed, and the Commission issued an Order on April 22, 1986, finding the deferral proper and allowing it. The commercial operation date of Catawba 2 was August 19, 1986. The Rate Case Order was issued October 31, 1986.

Docket No. E-7, Sub 487 (1991 Rate Case): On February 7, 1991, prior to a general rate increase application Duke contemplated filing in April 1991, the Company filed a request, in Docket No. E-7, Sub 484, to defer the costs of the Bad Creek pumped storage units incurred between the dates of commercial operation and the date of the order in the rate case. Duke noted that the commercial operation date of Bad Creek Unit 1 was expected to occur as early as April 1991. Duke asserted that, without the deferral, or interim rates, it would suffer an operating revenue deficiency in 1991 of $100 million on a total-company basis and $62 million on a North Carolina retail basis. Duke also asserted that "the better practice would be to use deferral accounting rather than interim rates" and that the deferral was "necessary in order to avoid a significant and unfair penalty to the Company."

The Public Staff recommended that Duke's motion be allowed, and the Commission issued an Order on March 6, 1991, finding the deferral proper and allowing it. Duke filed its rate case application on April 12, 1991, and cost deferral began with the Bad Creek 1 and 2 commercial operation date of May 15, 1991. Bad Creek Units 3 and 4 followed on September 3, 1991 and September 13, 1991, respectively. The Rate Case Order was issued November 12, 1991.

Public Staff's Analysis of the Foregoing
Deferral Requests and the Current Deferral Request

The Public Staff maintained that all of the abovementioned deferral requests have at least three things in common. First, commercial operation of the generating units (and the beginning of deferral accounting for nonfuel costs) occurred after the date Duke filed its general rate case application. Second, the deferral was considered, either explicitly or implicitly, to be an alternative to interim rates. Third, the deferral was alleged to be necessary "in order to avoid a significant and unfair penalty" to the Company.

The Public Staff stated that, in the instant case, however, Duke has requested authority to defer costs associated with (a) a plant addition (the Catawba Nuclear Station acquisition) that occurred long before the upcoming rate case is expected to be filed and (2) a plant addition (Allen Scrubber 1) that will occur several months before the rate case filing. The Public Staff noted that neither interim rates, which are typically requested along with an application for a general rate increase and not before, nor a penalty are mentioned in Duke's Petition. The Public

Staff is of the opinion that the foregoing differences raise a question as to when cost deferrals are appropriate outside of a general rate case, when interim rates are not an option.

The Public Staff noted that, in addition to pending-rate-case deferrals as discussed above, the Commission from time to time has allowed deferrals of unusual costs for recovery in a future period instead of the period in which the costs would normally be recognized in expenses and presumed to be recovered in rates. Generally Accepted Accounting Principles (GAAP) and the Federal Energy Regulatory Commission (FERC) Uniform System of Accounts (USOA), which has been adopted for use by this Commission, both provide for the deferral of such cost, as long as the deferral reflects the real economic consequences of the regulatory action (that is, the intent to allow rate recovery of a specific cost in a time period other than the time period the cost would otherwise be recognized in expenses). The Commission has historically treated deferral accounting as a tool to be allowed only as an exception to the general rule, and only for good reason. This reluctance is appropriate, because deferral accounting typically allows the utility to set rates to recover in the future the costs of resources utilized to provide service to ratepayers in the past. It also, typically, allows single-issue ratemaking for the period of deferral, contrary to the general ratemaking principle that all items of revenue and costs germane to the ratemaking and cost-recovery process should be examined in their totality in determining the appropriateness of the utility's existing rates and charges. It should not be used simply to protect the utility against lower than authorized earnings between rate cases.

The Public Staff stated that the costs, for which deferral is being requested in this case, are clearly identifiable with time periods prior to the date of the upcoming general rate case application as currently contemplated by Duke, and, as such, are recognizable for regulatory accounting purposes in those periods. The Catawba Nuclear Station acquisition is an addition to Duke's production plant resources, and the Allen scrubbers are part of an environmental compliance plan that Duke has been implementing for many years. Thus, according to the Public Staff, the essential question is whether the costs associated with the Catawba Nuclear Station acquisition and the Allen scrubbers are of a nature and magnitude that would justify deferral beginning on their closing or in-service dates prior to the filing of the rate case. The Public Staff set forth certain Commission decisions which it believed provided some guidance in this regard, while noting that such decisions involved costs that would normally be expensed, as opposed to the significant capital costs which constitute the greater part of the costs here at issue. In particular, the Public Staff stated as follows:

> In Docket No. E-13, Sub 136, for example, Nantahala Power and Light Company (Nantahala) requested authority to defer and amortize expenditures associated with dam repair, insulation replacement, pipeline painting, and the rewind of a large generator outside a general rate case. By order issued December 12, 1989, the Commission authorized deferral of the dam repair and generator rewind costs, but concluded that the other expenditures, 'although significant in amount and infrequently occurring,' did not 'significantly increase the service benefits of the related assets,' nor were they 'of such a magnitude as to warrant deferral accounting treatment.' Subsequently, in Docket No. E-13, Sub 158, Nantahala requested authority to defer and amortize additional expenditures for dam repairs and expenditures for penstock painting and the cleanup of contaminated soil. By order issued January 12, 1992, the Commission

authorized the requested deferral. Citing its order in Docket No. E-13, Sub 136, the Commission concluded that these expenditures were of such a magnitude as to warrant deferral accounting, did not occur regularly, and were of a nature similar to those for which deferral had been authorized in the past.

More recently, by order issued October 19, 2006, in Docket No. E-2, Sub 894, the Commission authorized Progress Energy Carolinas, Inc. (PEC), to defer and amortize $15.4 million of estimated accruals associated with certain environmental remediation obligations during the rate freeze imposed by the Clean Smokestacks Act. In that Order, the Commission concluded that, in consideration of the impact of the environmental costs on PEC's current earnings, those costs satisfied the 'major expenditures' requirement of G.S. 62-133.6(e) regarding governmental action. By order issued December 23, 2003, in Docket No. E-2, Sub 843, the Commission authorized PEC to defer and amortize $23.5 million of storm damage costs, concluding that those costs satisfied the 'major expenditures' requirement of G.S. 62-133.6(e) regarding force majeure, particularly in view of their impact on PEC's reported and expected jurisdictional earnings. Both cases involved the kind of costs for which deferral is typically allowed outside a general rate case.

Public Staff's Recommendation

In conclusion, the Public Staff, based upon the cases and regulatory principles discussed in its filing, recommended that Duke's petition be granted in part and denied in part. In particular the Public Staff stated as follows:

> With respect to the . . . [Catawba Nuclear Station], that acquisition closed at the end of the third quarter 2008. If Duke is allowed to increase its base rates effective January 1, 2010, fifteen months will have elapsed since that closing. Moreover, the annual costs associated with the . . . [Catawba Nuclear Station] acquisition are significantly less than the annual costs associated with the Allen scrubbers and, standing alone, would hardly warrant a deferral outside a general rate case. With respect to the Allen scrubbers, the associated costs and the timing of the in-service dates relative to the upcoming rate case application are more analogous to deferrals that have historically been allowed in connection with general rate cases. The Public Staff has not reviewed Duke's reported earnings, but assuming they are accurate, the Company is unlikely to exceed its authorized return during 2009, even if the requested deferral is allowed in its entirety. Given Duke's capital needs and the challenge of meeting those needs on reasonable terms under current market conditions, the Public Staff is not opposed to deferral accounting for costs associated with the Allen scrubbers pending completion of the upcoming general rate case.
>
> . . . Accordingly, based on the circumstances surrounding this case and on the assumption that Duke will file its general rate increase application no later than June 2009, the Public Staff recommends as follows:

> (a) That the Commission authorize the deferral of the depreciation, cost of capital, and . . . [operations and maintenance] costs associated with the Allen scrubbers from (1) the later of March 1, 2009, or the in-service date for Scrubber 1 and the later of May 1, 2009, or the in-service date for Scrubber 2 to (2) the earlier of January 1, 2010, or the effective date of rates reflecting the recovery of those costs; and
>
> (b) That the Commission deny the deferral of the costs related to the acquisition of 71.96% of Saluda River's interest in the . . . Catawba Nuclear Station.
>
> The Public Staff further recommends that the deferral be without prejudice to the right of all parties in Duke's upcoming general rate case to present testimony concerning the appropriate level of deferred depreciation, cost of capital, and O&M costs and the appropriate amortization and ratemaking treatment to be given to these items.

DUKE'S REPLY COMMENTS

Duke's Response
to the Public Staff's Comments

Duke observed that the Public Staff had argued that its Petition should be granted in part and denied in part. The Company noted that the Public Staff had agreed with the proposed cost deferral associated with the Allen scrubbers, having determined, according to Duke, that the deferral of these costs is necessary to meet the Company's capital needs on reasonable terms under current market conditions. Duke is also of the opinion that the Public Staff recognized the financial penalty to the Company that would result from drastically reduced earnings in 2009, including the consequence of greater future capital costs and diminished ability to access the capital markets, which would be to the detriment of both the utility and its customers.

Regarding the Public Staff's having recommended that the Commission deny the Company's request for deferring the costs associated with its acquisition of a portion of Saluda River's ownership interest in the Catawba Nuclear Station, Duke stated that the Public Staff had done so for the following two reasons:

> (1) 'With respect to the Saluda River [Catawba Nuclear Station], that acquisition closed at the end of the third quarter of 2008. If Duke is allowed to increase its base rates effective January 1, 2010, fifteen months will have elapsed since that closing.' (Comments of the Public Staff at Paragraph 19, Page 7)
>
> (2) 'Moreover, the annual costs associated with the Saluda River [Catawba Nuclear Station] acquisition are significantly less than the annual costs associated with the Allen scrubbers and, standing alone, would hardly warrant a deferral outside a general rate case.' (Comments of the Public Staff at Paragraph 19, Page 7)

Duke is of the opinion that these reasons are without basis and do not provide reasonable grounds for distinguishing the acquisition of the additional ownership interest in the Catawba Nuclear Station from the addition of the Allen scrubbers.

The Company stated that it believes the Commission should consider the following points and approve the Company's request for deferral of the costs associated with both the Allen scrubbers and the Catawba Nuclear Station acquisition:

(1) the unique rate case circumstances that contributed to this earnings dilemma for the Company;

(2) the current benefits to customers these assets are producing; and

(3) the significant adverse earnings impact that will result if the requested deferral authority for both the Allen scrubbers and the Catawba Nuclear Station purchase is not granted.

According to the Company, generally, utilities choose the test year and timing for filing a change in base rates. Duke stated that the timing is highly dependent on the completion of major assets, as well as unavoidable cost increases and the conditions in the financial markets. The Company maintained that the foregoing was all changed in 2007. Duke opined that for the first time, in the Company's last general rate case proceeding, Docket No. E-7, Sub 828, the Commission chose the test year and the timing of that rate case. The test year was the calendar year 2006 and new, lower rates became effective January 1, 2008. This timing presented a dilemma to the Company in terms of incorporating the costs of a major new asset – the Catawba Nuclear Station acquisition – into its rates.

The Company commented that, although the contract with Saluda River to acquire a portion of their ownership in the Catawba Nuclear Station at a favorable price was signed well before the hearing in that case, and therefore was arguably a known change, that known change would not actually take place until almost two years after the close of the test year (and almost a year after the new rates would be put into effect). The Company thus concluded that there was no precedent for such a 2008 adjustment to its 2006 test-year costs, and that such an adjustment if proposed would in all likelihood not be accepted. Accordingly, the Company chose not to propose such an out-of-test-period adjustment for this asset in the 2007 rate case. Duke observed that in making this decision, however, the Company did not intend or agree to be penalized by not being allowed to defer fifteen months of these costs for recovery in a subsequent rate case as the Public Staff recommends. Duke noted that the cost deferral requested in its Petition allows the Company to defer and subsequently recover these costs associated with providing service to customers.

The Company further asserted that, in summarizing past Commission decisions on deferral requests for major generating plants, the Public Staff had made it clear that the Commission did not flow the savings associated with nuclear fuel through the annual fuel charge adjustment proceedings during the deferral period. In following that approach, according to Duke, the Commission recognized the link between the higher capital and O&M costs of these types of assets, and, as a result, offset those higher costs with the lower fuel cost benefit.

Duke noted, in this case, however, as emphasized in its Petition, the fuel rates of North Carolina retail customers have already been reduced by $21 million effective September 1, 2008, as a result of the fuel cost savings resulting from the Catawba Nuclear Station acquisition. According to Duke, if the Commission adopts the Public Staff's recommendation, the Company will be penalized with significantly lower earnings in 2009 from unrecovered capital and O&M costs, while customers benefit both from the availability of the new capacity and from significantly lower fuel cost rates beginning September 2008.

Duke stated that the second reason argued by the Public Staff against the cost deferral for the Catawba Nuclear Station acquisition is that these costs are significantly less than the costs related to the Allen scrubbers and, as such, "would hardly warrant a deferral outside a general rate case." (Comments of the Public Staff at Paragraph 19, Page 7) First, according to Duke, this statement is confusing because the Company is asking for a deferral in the context of an impending general rate case. Second, the Public Staff lists the cost deferral amounts, as allocated to North Carolina retail, of $34 million related to the Catawba Nuclear Station acquisition and $48 million with respect to the Allen scrubbers. Duke maintained that the effect of these cost deferrals, in terms of the Company's North Carolina retail ROE, is 47 basis points for the Catawba Nuclear Station acquisition and 67 basis points for the Allen scrubbers – both significant impacts, whether taken together or standing alone. Yet, the Public Staff's comments cite the Commission Order issued October 19, 2006, in Docket No. E-2, Sub 894, in support of its position, notwithstanding the fact that said Order actually supports deferral for costs of this or lesser magnitude.

In the October 19, 2006 Order, the Commission authorized PEC to defer $15.4 million. According to Duke, the Commission's discussion of the criteria for justifying a cost deferral also supports the Company's position. Duke stated that, importantly, the Commission recognized in that case:

> It is entirely reasonable and appropriate to consider PEC's earnings and the effect that deferring, or not deferring, the subject costs would have on those earnings. ROE is a key financial indicator. Should the Company's Petition not be allowed, its ROE would be reduced by approximately 0.40% (i.e., 40 basis points) . . . .

Order Granting Petition with Modification, Docket No. E-2, Sub 894 (October 19, 2006), at Page 7.

Duke argued that, like the situation in the foregoing PEC case, the costs associated with the Allen scrubbers and the Catawba Nuclear Station acquisition represent significant investments that produce material operating cost impacts – cost impacts which will, absent deferral, significantly reduce the Company's 2009 earnings and, potentially, its credit quality, and that result is without regard to whether these asset additions are evaluated either separately or together. In concluding its response to the Public Staff's comments, the Company asserted that the facts demonstrate that, even by itself, the impact of the costs associated with the Catawba Nuclear Station acquisition, of nearly one-half percent (i.e., 0.50% or 50 basis points) in terms of North Carolina retail ROE, is material and should be eligible for cost deferral. Finally, according to the Company, not only is there ample North Carolina precedent for granting this type of

deferral accounting relief, this type of relief is routinely granted by utility commissions in many other states, in situations where major projects are put in service and the lack of deferral authority would result in a significant adverse earnings impact.[1]

Duke's Response
to the Attorney General's Comments

Duke noted that the Attorney General had asked the Commission to deny Duke's request for an expedited decision on its Petition because, in the Attorney General's opinion, there is no urgency or emergency situation that compels the Commission to expedite the decisionmaking process. Further, the Company observed that the Attorney General had suggested that the Commission should hold an evidentiary hearing to determine the appropriate action. Duke commented that, to support his recommendation, the Attorney General had presented several arguments. Those arguments, as stated by the Company, and Duke's response are as follows:

> The Attorney General asserts that there are 'issues of fact that require an evidentiary hearing.' (Attorney General's Comments at Section I, page 2) The Company does not agree. The Company's actual rate of return is a matter of record. The Commission has the expertise to determine if adding $82 million of costs without an increase in revenues will reduce the Company's earnings in 2009. The Attorney General's position ignores the fact that the Commission approved the Company's 2006 and 2007 Annual Plans, which included the acquisition from Saluda River, and has reviewed the costs incurred for the Allen scrubbers in connection with the reporting requirements of the Clean Smokestack legislation. The Commission is aware of the financial crisis and the precipitous drop in the Company's stock price to a level well below book value. The costs the Company seeks to defer are the type of costs that are considered normal costs of providing electric service (and in fact are being incurred to provide service to customers today) and generally are not controversial in a general rate case proceeding . . . .

[1] See, for example, *In Re Arizona-American Water Co.*, Docket No. W-1303A-05-0718; Decision No. 69914 (Ariz. Corp. Comm'n; 9/27/07) (Arizona Commission approved water company's request for authority to defer post-in-service AFUDC and depreciation expense of a major new tank project); *In Re PSI Energy, Inc.*, Cause Nos. 41744-S1 and 42061 (IURC; 7/3/02) (Indiana Commission approved PSI Energy's request for authority to defer post-in-service AFUDC and depreciation expenses associated with pollution control facilities necessary to comply with NOx SIP Call); *In Re Indiana-American Water Co., Inc.*, Cause No. 40442 (IURC; 10/2/96); *In Re Missouri-American Water Co.*, Case No. WR-2000-281 (Mo.PSC; 3/23/00) (Authorization for water company to capitalize post-in-service AFUDC and defer depreciation expense associated with new plant after its in-service date); *In Re CL&P Application*, Docket No. 85-10-22 (Conn. DPU; 4/1/86) (Deferral authority granted for operating and carrying costs associated with significant new generating plant investment); *In Re PSI Energy, Inc.*, Cause No. 39482 (IURC; 1/13/93) (Indiana Comm'n approved deferral accounting treatment, finding that the treatment would benefit the utility and its customers by improving its ability to consummate its planned financings on the best terms possible); *In Re Application of Monongahela Power Co.*, Case No. 94-35-EL-AAM (PUCO; 6/2/94) (Ohio Comm'n approved authority to accrue post-in-service carrying charges and to defer depreciation and O&M expense associated with new scrubbers). See also the recent South Carolina Commission's approval of Duke Energy Carolinas' request for the same accounting treatment requested in this case – for the Catawba Nuclear Station Purchase and the new Allen Scrubbers. *In Re Petition of Duke Energy Carolinas*, Docket No. 2009-55-E (Directive issued February 25, 2009).

The Attorney General asserts that 'cost deferral would be a significant departure from traditional ratemaking principles.' (Attorney General's Comments at Section II, Page 5) The Company disagrees. As discussed in the Public Staff's comments, the Commission has recognized the importance of authorizing deferred accounting for major new investments in order to avoid a significant earnings impact on the utility, and has allowed cost deferrals many times in the past. The Attorney General clarifies his position by stating the Commission allows 'deferral only when expenses are unusual and would have a material effect on a company's financial position.' (Attorney General's Comments at Section II, Page 5) As [the] . . . [discussion] above in response to the Public Staff's comments make[s] plain, the deferral of costs the Company is requesting amounts to a 114 basis point difference in the Company's equity rate of return for its North Carolina retail operations. Undoubtedly this is a material effect and a . . . [steep] increase in its cost of operations.

The Attorney General states that the 'application of the just and reasonable rates standard requires a determination of whether deferral is justified based upon a fair division of costs between ratepayers and shareholders.' (Attorney General's Comments at Section II, Page 5) This statement misconstrues the regulatory compact. The Company is obligated to provide adequate, reliable and reasonably priced service to all customers; in return, the Company is entitled to recover its prudent and reasonable costs of providing that electric service. Sharing of costs as suggested by the Attorney General effectively constitutes a reduction in the utility's opportunity to earn a reasonable return for its investors, and has occurred in the past only when the benefits of a cost are not clear. The benefits of the Allen scrubbers and the Saluda River acquisition are not in doubt. In fact, customers are already receiving benefits from the nuclear acquisition from Saluda River through lower fuel rates effective September 1, 2008.

The Attorney General also states that the Commission's traditional approach is to begin amortizing the deferred costs right away. The Company does not agree with this interpretation as the deferred costs sought in the Petition are deferred in anticipation of filing a general rate case in the very near future. In such situations, where deferral authority is granted in anticipation of a general rate case, previous Commission decisions authorize the commencement of cost amortization when rates were put in place that reflected those costs.

Duke's Response
to CUCA's Comments

CUCA argued that "the issues raised by the current Petition would be best resolved in the context of a general rate case proceeding, where all items of cost can be looked at and reviewed simultaneously." CUCA also "believes that it would be more appropriate to simply require Duke to include the Allen Steam Plant scrubbers and the repurchase from Saluda River in the general rate case filing." In conclusion, CUCA stated that "Duke's comments do not appear to indicate that there will be any major impact on Duke's ability to raise new investment capital if the Commission simply follows its usual ratemaking procedures."

Contrary to CUCA's position, the Company submitted that its Petition does, indeed, request the Commission to follow its usual ratemaking procedures. The Company maintained that it will include the annual ongoing costs associated with the Allen scrubbers and the Catawba Nuclear Station in its upcoming general rate case. In fact, according to the Company, these costs will be a major component of the need for the Company to increase its base rates.

Duke observed that, in the context of the upcoming general rate case, the present costs, as well as all other costs necessary to the providing of efficient, reliable, and reasonably priced electric utility service will be reviewed. Duke stated that customers will not begin paying for these costs until new rates become effective, which is anticipated to be January 1, 2010. Duke noted that the Company's Petition seeks to defer the subject costs from the time these assets are placed in service until such time as its base rates reflect the costs of these assets. The Company also noted that the deferred costs, assuming deferral is approved by the Commission, would be one of the issues to be addressed in the upcoming general rate case.

In responding to CUCA's suggestion that Duke's Petition constituted single-issue ratemaking, Duke opined that, as a result of the Commission's having allowed deferrals of costs associated with major asset additions when a general rate case proceeding is contemplated, the matter of single-issue ratemaking is avoided.

According to Duke, CUCA's position also ignores the fact that the assets in question are used and useful and are providing service to customers today. Duke further contended that such service is not only adequate and reliable but that it is also lower cost, due to the fuel savings, than would otherwise be the case.

Finally, Duke averred that CUCA's conclusory statement, which the Company regards as unsupported, concerning the ability of Duke to obtain financing, appears to ignore the materiality of these costs; the impact of the costs on the Company's ability to earn a reasonable return for its investors; and the potential impact such an adverse earnings situation may have on the Company's ability to attract capital to fund future needed investments on reasonable terms, as detailed in the Petition and the Company's reply comments.

Duke's Concluding Comments

In conclusion, the Company stated that it is in agreement with the Public Staff's recommendation that the Commission's approval of its Petition should be without prejudice to the right of all parties, in Duke's upcoming general rate case, to present testimony concerning the appropriate level of deferred depreciation, cost of capital, and O&M costs and the appropriate amortization and ratemaking treatment to be given to these items.[1] Under that recommendation, the Commission would determine the reasonableness of the costs deferred in the context of the general rate case.

[1] This appears to be somewhat of an overstatement in that the Public Staff's recommendation applied only to deferred costs associated with the Allen Scrubbers and not to the Company's proposed deferral of costs associated with its purchase of a portion of Saluda River's ownership interest in the Catawba Nuclear Station. As discussed elsewhere herein, the Public Staff opposed deferral of the Catawba Nuclear Station costs.

Duke further maintained that, contrary to the Attorney General's and CUCA's comments, a continued decline in the Company's earnings in 2009 will affect many of the fundamental financial ratios reviewed by external parties such as the credit rating agencies which rate the creditworthiness of the Company's debt. Duke noted that, as stated in its Petition, the Commission's approval of the requested deferred accounting treatment will enhance the Company's ability to attract necessary capital on a reasonable and timely basis because it reinforces the market's positive perception of a constructive regulatory environment in North Carolina. According to Duke, the market's perception is increasingly important in the current financial environment in which significant volatility is created by uncertainty.

The Company is of the opinion that the Commission's deferral of the costs associated with both the Catawba Nuclear Station and the Allen scrubbers is crucial to its earnings stability and that such deferral is fair and reasonable to both customers and shareholders. The Company is further of the opinion that the Commission has the necessary information to allow for the deferral of the requested costs without an evidentiary hearing.

DISCUSSION

In its Petition, Duke has requested that the Commission enter an accounting order allowing the Company to defer, in a regulatory asset account, certain post-in-service costs that are being or will be incurred in connection with (1) the completion of construction of the Allen scrubbers and their addition to utility plant in service and (2) the purchase of a portion of Saluda River's ownership interest in the Catawba Nuclear Station. The related costs for which the Company seeks deferral include depreciation expense, nonfuel O&M expenses, property taxes, and cost of capital. According to Duke's Petition, the annual amounts of such costs with respect to the Allen scrubbers and the Catawba Nuclear Station are expected to be approximately $60 million and $30 million, respectively, on a North Carolina retail basis. The Company stated that this $90 million in costs is material and would, absent deferral, equate to more than a 120 basis point reduction in the Company's North Carolina retail ROE for calendar year 2009.

The Company stated, in its reply comments, that the Public Staff had listed ". . . the cost deferral amounts, as allocated to North Carolina retail, of $34 million related to the Saluda River acquisition and $48 million for the Allen scrubbers. . . ." The Company further stated that "[t]he effect of these cost deferrals to the Company's . . . North Carolina retail . . . [ROE] is 47 basis points for the acquisition from Saluda River and 67 basis points for the Allen scrubber addition . . . ." In its comments, the Public Staff stated that it had determined the cost deferral amounts based on information provided by the Company. The Public Staff, however, did not comment in regard to the specific basis point impacts of such amounts.

Based on the foregoing, it would appear that the Company does not take exception to the cost deferral amounts as set forth by the Public Staff. Further, presumably, the Company has calculated the basis point impacts of the cost deferrals, as set forth immediately above, based

upon the cost deferral amounts as determined by the Public Staff.[1] Those impacts total 114 basis points.

As noted above, under the Company's proposal, the costs in question would not be charged against revenues realized during the accounting period in which the costs were actually incurred, as would be the case for nonregulated companies under GAAP, but, rather, such costs would be deferred and accumulated in a regulatory asset account, that is, according to the Company. As a result, the deferred costs, in effect, would be specifically reserved for recovery prospectively. The period over which the costs would be accumulated in the regulatory asset account would begin when the asset is placed in service and end on the date the Company is authorized to begin charging rates reflecting the specific inclusion of the Allen scrubbers and the Catawba Nuclear Station acquisition in Duke's North Carolina retail cost of service.

Under Duke's proposal, the deferred costs as well as the ongoing costs associated with the Allen scrubbers and the Catawba Nuclear Station acquisition would be specifically added to and included in the Commission-approved test-period cost of service as established in the context of Duke's upcoming general rate case, which Duke contemplates filing in June 2009. Consequently, approval of Duke's deferral and cost recovery proposal would ultimately result in a level of rates, to be charged prospectively, that would specifically include an allowance providing for the recovery of the present deferred costs, per se. On the other hand, if the request for deferral is denied, the Company would then be required to recognize the costs, for which it seeks deferral, as items of expense in the period incurred; and such costs, effectively, would then be presumed to have been recovered through the Company's existing level of rates.

As noted by the Public Staff and the Attorney General, the Commission has historically treated deferral accounting as a tool to be allowed only as an exception to the general rule, and its use has been allowed sparingly. That is due, in part, to the fact that deferral accounting, typically, provides for the future recovery of costs for utility services provided to ratepayers in the past; and, as indicated by the Public Staff, the longer the deferral period, the greater the likelihood that the ratepayers who are ultimately required to pay rates including the deferred charges, which are related to resources consumed by the utility in providing services in earlier periods, may not be the same ratepayers who received the services.

The Commission has also been reluctant to allow deferral accounting because it, typically, equates to single-issue ratemaking for the period of deferral, contrary to the well-established, general ratemaking principle that all items of revenue and costs germane to the ratemaking and cost-recovery process should be examined in their totality in determining the appropriateness of the utility's existing rates and charges.

[1] The Commission has independently determined the basis point impacts of the cost deferral amounts, as set forth by the Public Staff, and has determined such impacts, on an annual basis, to be virtually the same as those stated by the Company, that is, 47 basis points with respect to the proposed Catawba Nuclear Station cost deferral of $34 million and 67 basis points with respect to the Allen scrubbers cost deferral of $48 million.

The foregoing notwithstanding, as indicated by the parties, the Commission has, over the years, on occasion, approved requests proposing the use of deferral accounting. Such requests, by necessity, have been considered on a case-by-case basis; and have been approved only in those instances where there was a clear and convincing showing that the costs in question were of an unusual and/or extraordinary nature and that, absent deferral, would have a material impact on the company's financial condition.

Duke contended that the present costs are of an unusual or extraordinary nature; that, absent deferral, they would have a materially detrimental impact on the Company's 2009 earnings and, quite possibly, its ability to raise additional investment capital on reasonable terms; and that, consequently, approval of its deferral request was warranted.

CUCA maintained that Duke's Petition should be considered in the context of the general rate case proceeding which Duke has announced its intention to file later this year; and that there would not appear to be any major impact on Duke's ability to raise new investment capital if the Commission simply follows its usual ratemaking procedures.

The Attorney General argued that there is no urgency or emergency situation that compels the Commission to make a hasty decision on such important issues; and that there are questions of fact that must be decided by an evidentiary hearing before the Commission can determine the appropriate action to take on Duke's Petition.

The Public Staff, based upon the assumption that the Company will file a general rate case application not later than June 2009, recommended that the Commission (1) approve the deferral of costs related to the Allen scrubbers and (2) deny the deferral of costs related to the Catawba Nuclear Station acquisition. The Public Staff further recommended that the Commission's decision approving deferral of costs associated with the Allen scrubbers be entered without prejudice to the right of all parties in Duke's upcoming general rate case to present testimony concerning the appropriateness of the levels of costs deferred and the appropriate ratemaking treatment to be accorded such costs.

The Public Staff opposed the deferral of costs related to the Catawba Nuclear Station acquisition because, in its opinion, (1) such costs are significantly less than the costs associated with the Allen scrubbers and, standing alone, would not warrant deferral and (2) the length of the deferral period over which the costs are to be accrued is excessive.

As indicated by the Company, in assessing the appropriateness of cost-deferral requests, the Commission has, historically, based its decision, in large measure, on the impact that the costs would have on the level of earnings currently being achieved by the company. The impact on earnings, typically, has been measured and assessed in terms of ROE, considered in conjunction with (1) the ROEs realized and reported to the Commission in the company's more recent quarterly ES-1 reports, particularly the ROE reflected in the company's most recent report, and (2) the company's currently authorized ROE. Also, as indicated by the Company, current economic conditions; the Company's need for new investment capital; and the impact that the Commission's decision will have on the future availability and cost of such capital are also relevant to the appropriate resolution of matters of this nature. Additionally, whether the

company has requested, or is contemplating requesting, a general rate increase and the timing, or the proposed timing, of the filing of such a request is also pertinent. The Commission is of the opinion that the foregoing test and criteria continue to be appropriate for use in the present regard and that, as such, should be utilized for purposes of this proceeding.

Duke's most recent quarterly ES-1 report shows that the Company actually realized a 9.79% ROE for the 12-month period ending December 31, 2008. That return reflects a decrease of 96 basis points from the 10.75% ROE reported as realized by the Company for the 12-month period ending December 31, 2007, and it is 121 basis points less than the Company's authorized return of 11%, which was established by Order issued December 20, 2007.

As noted by the Public Staff, assuming Duke's 2008 earnings to be accurately stated (and no party has suggested otherwise), it is unlikely that the Company will exceed its authorized return during 2009, even if the requested deferral were to be allowed in its entirety. However, if the requested deferral is not allowed, it would appear to be very likely that the Company's 2008 ROE, of 9.79%, would be further eroded in 2009, due to the fact that the ROE impact of the costs for which deferral is requested is estimated to be 114 basis points (67 basis points for the Allen scrubbers and 47 basis points for the Catawba Nuclear Station acquisition).[1]

WHEREUPON, the Commission reaches the following

CONCLUSIONS

In consideration of (1) the Company's 2008 level of earnings; (2) the impact that the costs in question can reasonably be expected to have on Duke's 2009 earnings, if deferral is not allowed; (3) current economic conditions; (4) the Company's currently authorized ROE; (5) the fact that Duke is currently contemplating filing an application for a general rate increase in the near term; and (6) the record as a whole, the Commission is of the opinion that Duke's request for deferral of costs associated with both the Allen scrubbers and the Catawba Nuclear Station acquisition is warranted and should be approved; and it, therefore, so concludes. Further, the Commission is of the opinion, and so concludes, that, in so ruling, it should specifically reserve judgment as to the appropriate amount, if any, of such costs to be included in future rates pending a future evidentiary proceeding.[2] (No party would appear to object to such a provision.) The Commission, therefore, finds and concludes that its decision to allow the present deferral of

[1] The Commission considers these impacts, both on a stand-alone basis and in total, to be materially significant, particularly in consideration of the Company's current level of earnings; the potential impact of the present costs on the Company's future level of earnings, absent approval of the deferral request; current economic conditions; and the Company's currently authorized ROE.

[2] The Commission considers this provision to be particularly important with respect to the Catawba Nuclear Station cost deferral because such costs will have been incurred, to a certain extent, in connection with the production and sale of electric energy generated by Duke's additional ownership interest in the Catawba Nuclear Station. Therefore, among other things, it may be appropriate to take the revenue from such sales into account in determining the level of deferred costs, or net deferred costs, if any, to be included in future rates. As noted by the Company in its Form 10-K (Annual Report), for the fiscal year ended December 31, 2008, filed with the Securities and Exchange Commission, on March 13, 2009 (See Note 4, Page 38.), ". . . the [Catawba Nuclear Station] acquisition occurred on September 30, 2008, [and] Duke Energy Carolinas began recording earnings associated with the additional acquired interest beginning October 1, 2008."

deferral of costs should be, and hereby is, entered without prejudice to the right of any party to take issue with the amount, if any, of the present costs to be allowed for ratemaking purposes, if such costs are included in future rate filings.

Additionally, inasmuch as the Commission is of the opinion that Duke should not be allowed the latitude to (1) defer the subject costs indefinitely or (2) carry the balance of the deferred costs on its books without amortization for an undefined period, in the event that the Company has not filed an application for a general rate increase on or before December 31, 2009, the Commission is further of the opinion, and so concludes, that the Company should be required (a) to cease deferring costs effective December 31, 2009, and (b) begin amortizing the costs deferred pursuant to the provisions of this decision over a 36-month period, beginning January 1, 2010.[1]

In reaching the foregoing conclusions, the Commission has been mindful of the positions taken and the arguments offered by the Intervenors in opposition to Duke's Petition. The Commission, however, has not found those arguments persuasive, particularly in light of the fact that issues involving the amount of deferred costs, if any, to be recovered in future rates have been reserved for future evidentiary proceedings.

IT IS, THEREFORE, ORDERED as follows:

1. That Duke's Petition to defer costs associated with the Allen scrubbers and the Catawba Nuclear Station acquisition shall be, and hereby is, approved; provided, however, that the Company shall be, and hereby is, required to cease deferring said costs concurrent with the date the Company is authorized to begin reflecting the costs associated with the Allen scrubbers and the Catawba Nuclear Station acquisition in rates or December 31, 2009, whichever shall occur first.

2. That, in the event that the Company has not filed an application for a general rate increase on or before December 31, 2009, the Company shall be, and hereby is, required to begin amortizing the costs deferred pursuant to the provisions of this decision over a 36-month period, beginning January 1, 2010. Additionally, it is further provided that said 36-month amortization provision shall be, and hereby is, established for the sole purpose of this Order and is not intended, and is not to be construed, to be determinative or indicative as to the appropriate period over which the present costs are to be amortized, if at all, in the context of future proceedings, including proceedings associated with the general rate case that the Company currently contemplates filing.

3. That this decision shall be, and hereby is, entered without prejudice to the right of any party to take issue with the amount, if any, of the deferred costs to be allowed for ratemaking purposes, if such costs are included in future rate filings.

[1] The adoption of this 36-month amortization provision, in the event the Company has not filed an application for a general rate increase on or before December 31, 2009, is for the sole purpose of this Order and is not intended, and is not to be construed, to be determinative or indicative as to the appropriate period over which the present costs are to be amortized, if at all, in the context of future proceedings, including proceedings associated with the general rate case that the Company currently contemplates filing.

4. That this decision is not intended to provide, and should not be construed to be, assurance that future revenue will be provided to permit recovery of any portion of the present costs rather than to provide for expected levels of similar future costs.

5. That this decision, being made in an expedited fashion at Duke's request, is not intended, and is not to be construed, to be precedential in any future proceeding.

ISSUED BY ORDER OF THE COMMISSION.
This the 31st of March, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Commissioner Bryan E. Beatty did not participate in this decision.

Dh033109.01

DOCKET NO. E-22, SUB 456

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application of Dominion North Carolina Power for Authority to Adjust its Electric Rates Pursuant to G.S. 62-133.2 and NCUC Rule R8-55	) ORDER APPROVING) FUEL CHARGE) ADJUSTMENT)

HEARD: Tuesday, November 10, 2009, beginning at 9:00 a.m., in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina 27603

BEFORE: Commissioner William T. Culpepper, III, Presiding; and Commissioners Robert V. Owens, Jr.; and ToNola D. Brown-Bland

APPEARANCES:

For Dominion North Carolina Power:

Robert W. Kaylor, 3700 Glenwood Avenue, Suite 330, Raleigh, North Carolina 27612

Bernard L. McNamee, McGuire Woods, LLP, One James Center, 901 East Cary Street, Richmond, Virginia 23219

For Carolina Industrial Group for Fair Utility Rates I:

Ralph McDonald, Bailey and Dixon, LLP, Post Office Box 1351, Raleigh, North Carolina 27602

For Nucor Steel-Hertford:

Joseph W. Eason, Nelson, Mullins, Riley & Scarborough, LLP, 4140 ParkLake Avenue, Glen Lake One, Suite 200, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Gisele L. Rankin, Staff Attorney, Public Staff-North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

Leonard G. Green, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629

BY THE COMMISSION: On August 27, 2009, Virginia Electric and Power Company, d/b/a Dominion North Carolina Power (NC Power or the Company), filed its Application for Approval of its Annual Fuel Charge Adjustment, along with accompanying testimony and exhibits, pursuant to G.S. 62-133.2 and Commission Rule R8-55 relating to fuel and fuel-related charge adjustments for electric utilities. On September 3, 2009, the Commission issued its Order Scheduling Hearing, Establishing Discovery Guidelines, and Requiring Public Notice.

On September 2, 2009, the Carolina Utility Customers Association (CUCA) filed a petition to intervene, which was granted by Commission Order dated September 8, 2009. Nucor Steel-Hertford, a division of Nucor Corporation (Nucor), and the Carolina Industrial Group for Fair Utility Rates I (CIGFUR) filed petitions to intervene on September 4, 2009, which were granted by Orders dated September 14, 2009. The Attorney General filed Notice of Intervention on September 22, 2009. The Public Staff's intervention is recognized pursuant to G.S. 62-15.

On October 26, 2009, Nucor filed the testimony and exhibits of Dr. Dennis W. Goins. Also on October 26, 2009, the Public Staff filed the affidavit and exhibit of Darlene P. Peedin, Supervisor of the Electric Section of the Public Staff's Accounting Division, and the affidavit of Kennie D. Ellis, Electric Engineer with the Public Staff's Electric Division. On October 29, 2009, the Public Staff filed a letter making one correction in the affidavit of Kennie D. Ellis. Also on October 29, 2009, the Company filed its Affidavits of Publication. On November 3, 2009, NC Power filed the rebuttal testimony of David F. Koogler and Steven M. Foust. A Settlement Agreement among NC Power, the Public Staff, and Nucor was filed on November 10, 2009.

The case came on for hearing as scheduled on November 10, 2009. No public witnesses appeared at the hearing. The Public Staff notified the Commission that NC Power, the Public Staff, and Nucor had entered into a Settlement Agreement, pursuant to which they had agreed not to call their witnesses to the stand and to move all of the pre-filed testimony into the record, along with the pre-filed exhibits. All parties agreed that the witnesses need not be made available for cross-examination.

For the Company, the following were received into evidence: the pre-filed direct testimony of NC Power witnesses David F. Koogler, Director – Rates and Load Research; Glenn A. Kelly, Director of Generation System Planning; Steven M. Foust, Manager of Generation Accounting; Gregory A. Workman, Director – Fuels; Harrison H. Barker, Manager of Nuclear Fuel Procurement; and Alan L. Meekins, Director – Electric Market Operations; the pre-filed exhibits of witnesses Koogler, Kelly, Foust, and Meekins; and the pre-filed rebuttal testimony of witnesses Koogler and Foust. The Commission also received into evidence the affidavit and exhibit of Public Staff witness Peedin and the affidavit of Public Staff witness Ellis, along with the letter filed October 29, 2009, making one correction to witness Ellis' affidavit. The pre-filed testimony and exhibits of Nucor witness Goins also were received into evidence. Finally, the Settlement Agreement was marked Public Staff Hearing Exhibit No. 1 and received into evidence.

Based upon the verified Application, the evidence adduced at the hearing, and the entire record in this matter, the Commission makes the following:

FINDINGS OF FACT

1. NC Power is duly organized as a public utility operating under the laws of the State of North Carolina and is subject to the jurisdiction of the North Carolina Utilities Commission. The Company is engaged in the business of developing, generating, transmitting, distributing, and selling electric power to the public in northeastern North Carolina. NC Power is lawfully before this Commission based on its Application filed pursuant to G.S. 62-133.2.

2. The test period for purposes of this proceeding is the twelve months ended June 30, 2009.

3. The Company's fuel procurement and purchasing practices during the test period were reasonable and prudent.

4. The test period per book system sales are 82,276,976 MWh.

5. The test period per book system generation is 84,509,449 MWh, which includes various types of generation as follows:

Generation Type	MWh
Coal	28,142,590
Combined Cycle and Combustion Turbine	6,637,599
Heavy Oil	766,240
Nuclear	25,980,439
Hydro	2,510,476
Pumped Storage (Pumping)	(2,341,547)
Power Transactions	
NUG	8,782,185
Other	15,367,140
Sales for Resale	(1,335,673)

6. The nuclear capacity factor appropriate for use in this proceeding is 91.88%, which is the estimated nuclear capacity factor for the 12 months beginning January 1, 2010.

7. The adjusted test period system sales for use in this proceeding are 80,737,662 MWh.

8. The adjusted test period system generation for use in this proceeding is 82,870,274 MWh, which is categorized as follows:

Generation Type	MWh
Coal	27,225,027
Combined Cycle and Combustion Turbine	6,421,155
Heavy Oil	741,271
Nuclear	26,287,625
Hydro	2,510,476
Pumped Storage (Pumping)	(2,341,547)
Power Transactions	
NUG	8,495,860
Other	14,866,079
Sales for Resale	(1,335,673)

9. Setting the fuel costs associated with purchases from power marketers and certain other sellers at a level equal to 70% of the energy portion of the purchase price is reasonable for use in this proceeding.

10. The fuel portion of the Financial Transmission Rights (FTR) revenue allocation to be applied as a credit to purchased power costs, and therefore a reduction in test year retail fuel costs, in this proceeding is $967,108.

11. The appropriate fuel prices for use in this proceeding are as follows:

A. $27.93/MWh for coal;
B. $4.51/MWh for Surry and $4.89/MWh for North Anna – nuclear;
C. $101.70/MWh for heavy oil;
D. $75.96/MWh for combined cycle and combustion turbine fuel;
E. $9.14/MWh for NUG Power Transactions Fuel; $45.27/MWh for Purchases (@ 70%) and $48.46/MWh for Sales for Resale; and,
F. A zero fuel price for hydro and pumped storage.

12. The adjusted test period system fuel expense for use in this proceeding is $2,116,146,664.

13. A fuel cost rider (Rider A) of 0.974¢/kWh, excluding gross receipts tax, or 1.006¢/kWh, including gross receipts tax, combined with the base fuel factor of 1.647¢/kWh excluding gross receipts tax, or 1.701¢/kWh, including gross receipts tax, is reasonable and appropriate for use in this proceeding. The proper prospective fuel factor for this proceeding, to be collected against fuel costs incurred beginning January 1, 2010, is 2.621¢/kWh, excluding gross receipts tax, or 2.707¢/kWh, including gross receipts tax.

14. The study submitted by the Company to demonstrate that it has complied with Ordering Paragraph 1(e) of the Commission's Order Approving Transfer with Conditions issued April 19, 2005, in Docket No. E-22 Sub 418 (PJM Order), is reasonable for use in this proceeding.

15. The appropriate North Carolina test period jurisdictional fuel expense under-collection is $13,980,150. The adjusted North Carolina jurisdictional test year sales are 3,954,766,621 kWh.

16. The appropriate Experience Modification Factor (EMF) for this proceeding is an increment of 0.354¢/kWh, excluding gross receipts tax, or 0.366¢/kWh, including gross receipts tax.

17. The final net fuel factor to be billed to NC Power's North Carolina retail customers during the 2009 fuel clause billing period is 2.975¢/kWh, excluding gross receipts tax, or 3.073¢/kWh, including gross receipts tax.

18. It is reasonable to delay the consideration of voltage- and class-differentiated fuel rates and charges until either the Company's next general rate case or the 2010 fuel clause proceeding, whichever has an earlier effective date for the resulting rate changes, as generally provided for in the Settlement Agreement of NC Power, the Public Staff, and Nucor.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, jurisdictional, and procedural in nature and is not controverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

G.S. 62-133.2(c) sets out the verified, annualized information that each electric utility is required to furnish the Commission in an annual fuel charge adjustment proceeding for an historical 12-month test period. Commission Rule R8-55(b) prescribes the 12 months ending June 30 as the test period for NC Power. The Company's filing was based on the 12 months ended June 30, 2009.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

Commission Rule R8-52(b) requires each electric utility to file a Fuel Procurement Practices Report at least once every ten years and each time the utility's fuel procurement practices change. The Company's current fuel procurement practices were filed with the Commission in Docket No. E-100, Sub 47A, on July 10, 2008. In addition, the Company files monthly reports of its fuel costs pursuant to Rule R8-52(a).

No party offered testimony contesting the Company's fuel procurement and power purchasing practices. Based on the fuel procurement practices report and in the absence of evidence to the contrary, the Commission concludes that these practices were reasonable and prudent during the test period.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4 AND 5

The evidence for these findings of fact is contained in the testimony of NC Power witnesses Koogler and Kelly.

NC Power witness Koogler testified that the Company's test period per book system sales were 82,276,976 MWh, and witness Kelly testified that the Company's test period per book system generation was 84,509,449 MWh. The test period per book system generation is categorized as follows:

Generation Type	MWh
Coal	28,142,590
Combined Cycle and Combustion Turbine	6,637,599
Heavy Oil	766,240
Nuclear	25,980,439
Hydro	2,510,476
Pumped Storage (Pumping)	(2,341,547)
Power Transactions	
NUG	8,782,185
Other	15,367,140
Sales for Resale	(1,335,673)

No other party offered or elicited testimony on the level of test year per books system MWh sales or generation. The Commission thus concludes that the foregoing test period per books levels of sales and generation are reasonable and appropriate for use in this proceeding

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 6 AND 7

The evidence for these findings of fact is contained in the testimony of NC Power witnesses Kelly and Koogler and the affidavit of Public Staff witness Ellis.

Commission Rule R8-55(c)(1) provides that capacity factors for nuclear production facilities will be normalized based generally on the national average for nuclear production facilities as reflected in the most recent North American Reliability Council's (NERC) Equipment Availability Report, adjusted to reflect the unique, inherent characteristics of the utility facilities and any unusual events.

NC Power witness Kelly testified that, for the test period of July 1, 2008, to June 30, 2009, North Anna Unit 1 performed at a net capacity factor of 93.1%, North Anna Unit 2 performed at a net capacity factor of 83.6%, Surry Unit 1 performed at a net capacity factor of 92.4%, and Surry Unit 2 performed at a net capacity factor of 100.4%. He testified that all four of the Company's nuclear units exceeded the NERC 2003-2007 five-year industry average net capacity factor of 85.24% for units 400-799 MW and 89.21% for units 800-999 MW. He further testified that, for the 12 months ending December 31, 2010, North Anna Unit 1 is projected to operate at a net capacity factor of 89.5%, North Anna Unit 2 is projected to operate at a net capacity factor of 88.5%, Surry Unit 1 is projected to operate at a net capacity factor of 90.6%, and Surry Unit 2 is projected to operate at a net capacity factor of 98.9%.

Public Staff witness Ellis testified that the Company's proposed fuel factor is based on a 91.88% system nuclear capacity factor, which is what the Company anticipates for the 12 months

beginning January 1, 2010, the period the new rates will be in effect. The actual system nuclear capacity factor for the test year was 92.39%. In comparison, the latest NERC five-year (2003-2007) weighted average nuclear capacity factor for Pressurized Water reactors is 89.21%. He testified that he believes the proposed 91.88% nuclear capacity factor to be more representative of the factor the Company can reasonably be expected to achieve during the period that the fuel factor is in effect than the NERC five-year average. No other party offered or elicited testimony on the normalized nuclear capacity factor.

Company witness Koogler testified that the Company's system sales for the twelve months ended June 30, 2009, were adjusted for changes in usage, weather normalization, and customer growth in accordance with Commission Rule R8-55(d)(2). Witness Koogler took test year sales of 82,276,976 MWh and adjusted them by 1,539,314 MWh. This adjustment is the rounded sum of adjustments for changes in usage, weather normalization, and customer growth of (660,384) MWh, (821,861) MWh, and 25,451 MWh, respectively, and an adjustment of (82,521) MWh from the restatement of non-jurisdictional sales to Old Dominion Electric Cooperative (ODEC) from production level to sales level. The Public Staff reviewed and accepted these adjustments. No other party offered or elicited testimony on these adjustments.

Based on the foregoing evidence, the Commission concludes that a 91.88% normalized system nuclear capacity factor is reasonable and appropriate for use in this proceeding. In addition, the Commission concludes that the adjustments for changes in usage, weather normalization, and customer growth, and the restatement of non-jurisdictional ODEC sales are reasonable and appropriate adjustments for use in this proceeding. Therefore, the Company's adjusted system sales for the twelve months ended June 30, 2009, were 80,737,662 MWh.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence for this finding of fact is contained in the testimony of NC Power witness Kelly and the affidavit of Public Staff witness Ellis.

NC Power witness Kelly presented an adjustment to per book MWh generation for the 12-month period ended June 30, 2009, due to weather normalization, customer growth, and increased usage, to arrive at his adjusted generation level of 82,870,274 MWh. Public Staff witness Ellis accepted witness Kelly's adjusted generation level, which includes various types of generation as follows:

Generation Type	MWh
Coal	27,225,027
Combined Cycle and Combustion Turbine	6,421,155
Heavy Oil	741,271
Nuclear	26,287,625
Hydro	2,510,476
Pumped Storage (Pumping)	(2,341,547)
Power Transactions	
NUG	8,495,860

Other	14,866,079
Sales for Resale	(1,335,673)

The Commission concludes that adjusted test period system generation level of 82,870,274 MWh is reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for this finding of fact is contained in the testimony of NC Power witness Foust and the affidavit of Public Staff witness Peedin.

Witness Peedin testified that, during the test year for this proceeding, NC Power purchased power from suppliers, primarily through the markets administered by PJM Interconnection, LLC (PJM), that did not provide NC Power with the actual fuel costs associated with those purchases. In the Company's last fuel proceeding, Docket No. E-22, Sub 451, the Public Staff and NC Power entered into a Settlement Agreement in which the parties agreed to implement, for the 2008 and 2009 fuel proceedings, a fuel percentage of 70% to be applied to purchases from suppliers that do not provide NC Power with actual fuel costs. In the fuel clause proceeding in 2008, the Commission found the 70% fuel-to-energy percentage for NC Power to be reasonable for use in that proceeding. No party disputed the use of 70% in this proceeding. Based upon the foregoing, the Commission concludes that it is reasonable to use a 70% fuel-to-energy percentage to be applied to NC Power's purchases from suppliers that do not provide NC Power with actual fuel costs as the proxy for actual fuel costs associated with such purchases in this proceeding

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence supporting this finding of fact is contained in the testimony and exhibits of NC Power witness Foust and the affidavit of Public Staff witness Peedin.

In the Commission's Order Approving Fuel Clause Adjustment issued on December 22, 2006, in Docket No. E-22, Sub 436, the Commission concluded that it was appropriate to reduce the Company's test year North Carolina retail fuel costs by allocating FTRs to offset any congestion charges in the fuel component of the Company's net purchased power expense in order to bring the Company's test year fuel costs into compliance with the conditions approved by the Commission in the PJM Order. The Company made an adjustment consistent with the PJM Order, which was then corrected by Public Staff witness Peedin. The Company, in the rebuttal testimony of its witness Foust, concurred with and accepted this adjustment. The Commission accordingly concludes that the fuel portion of the FTR revenue allocation to be applied as a credit to purchased power costs, and, therefore, a reduction in test year retail fuel costs, in this proceeding is $967,108.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 11-13

The evidence for these findings of fact is contained in the testimony of NC Power witness Kelly and Public Staff witness Ellis.

NC Power witness Kelly proposed using fuel costs for the 12 months ended June 30, 2009, for all fuels, as shown on NC Power Exhibit GAK-1, Schedule 4, Column 4, for all Company-burned fuels (coal, nuclear, heavy oil, and natural gas). In his affidavit, Public Staff witness Ellis accepted these fuel prices. These prices, including the use of a 70% fuel to energy percentage as discussed above, are as follows:

A. $27.93/MWh for coal;
B. $4.51/MWh for Surry and $4.89/MWh for North Anna – nuclear;
C. $101.70/MWh for heavy oil;
D. $75.96/MWh for combined cycle and combustion turbine fuel;
E. $9.14/MWh for NUG Power Transactions Fuel; $45.27/MWh for Purchases (@ 70%) and $48.46/MWh for Sales for Resale; and
G. A zero fuel price for hydro and pumped storage.

Based upon the foregoing, the Commission concludes that these fuel prices are reasonable and appropriate for use in this proceeding.

Using the 70% fuel to energy percentage and the fuel costs previously found to be appropriate for use in this proceeding, adjusted test period system fuel expenses are $2,116,146,664, which the Commission concludes is the appropriate level of fuel expenses to be used to set the prospective, or forward-looking, fuel factor.

The Commission further concludes that the resulting fuel cost rider (Rider A) of 0.974¢/kWh, excluding gross receipts tax, or 1.006¢/kWh, including gross receipts tax, combined with the base fuel factor of 1.647¢/kWh, excluding gross receipts tax, or 1.701¢/kWh, including gross receipts tax, is reasonable and appropriate for use in this proceeding. Therefore, the proper prospective fuel factor for this proceeding, to be collected against fuel costs incurred beginning January 1, 2010, is 2.621¢/kWh, excluding gross receipts tax, or 2.707¢/kWh, including gross receipts tax.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

The evidence for this finding of fact is contained in the testimony of NC Power witness Meekins and Public Staff witness Ellis.

As a condition of approval for NC Power to join PJM Interconnection, LLC (PJM), Ordering Paragraph 1(e) of the PJM Order required the Company to allocate sufficient FTRs or other revenues toward its fuel costs to offset any congestion charges or other fuel-related costs resulting from NC Power's joining PJM and sought to be recovered from NC Power's North Carolina ratepayers through its fuel clause proceedings. In the 2005 fuel clause proceeding, NC Power testified that it had not yet performed a detailed analysis evaluating what may have happened if NC Power had not joined PJM, as necessitated by Ordering Paragraph 1(e). The Commission concluded that NC Power should file such a study (referred to hereinafter as the PJM Study) in the 2006 fuel clause proceeding, and the Commission imposed various deadlines and requirements with respect to updating the Public Staff on the nature and progress of the Company's PJM Study on a regular basis and including other intervenors in meetings.

In the 2006 fuel cost adjustment proceeding (Docket No. E-22, Sub 436), the Commission concluded that no adjustments to NC Power's fuel costs should be made as a result of its integration into PJM, but that the results of the PJM Study submitted by NC Power in that proceeding should not be relied upon, and that its methodology was not implicitly approved or accepted. The Commission ordered NC Power to continue to work with the Public Staff and other parties and to file a new PJM Study in the next fuel cost adjustment proceeding.

In the 2007 fuel cost adjustment proceeding (Docket No. E-22, Sub 444), the Commission concluded that NC Power should be required to use a co-optimization approach, as generally advocated in testimony filed by Nucor, in the PJM Study run to be performed for, and filed in, the next fuel cost adjustment proceeding. A co-optimization approach would seek to find the least cost combination of purchases and dispatch of NC Power's generating units. The purpose of the requirement was to narrow the issues in controversy in order to facilitate the determination of a single methodology for the running of the PJM Study in future fuel proceedings for use in ascertaining whether NC Power's retail customers have been held harmless from the Company's integration into PJM.

In the 2008 fuel cost adjustment proceeding (Docket No. E-22, Sub 451), Company witness Meekins testified that, based upon the direction provided by the Commission's Order in the 2007 fuel case, the Company developed a model that co-optimizes the dispatch of company generation with the purchase of off-system energy and submitted the resulting study to the Public Staff and other interested parties. Nucor witness Morey, in his pre-filed testimony in the Sub 451 proceeding, identified several problems with the Company's implementation of the co-optimization method and with other assumptions the Company made. He conducted an independent comparative fuel cost study to address these shortcomings, which produced lower estimates of the differences between a stand-alone case and a PJM case.

Although the Company did not necessarily agree with Dr. Morey's proposed changes to the study protocol, Nucor and the Company executed a Settlement Agreement on December 1, 2008, in which they agreed to meet, along with members of the Public Staff, to further discuss and undertake reasonable efforts to agree on the protocol for the PJM Study to be conducted for the 2009 fuel clause proceeding. NC Power and Nucor agreed that such discussions would be limited to the four assumptions with which Dr. Morey took issue in his pre-filed testimony (relating to transmission transfer limits, hourly purchases versus block purchase assumptions, transmission rates as hurdle rates, and restrictions on hour-to-hour purchase volatility). The Commission concluded that the approach contained in the Settlement Agreement was reasonable and required the Company to work with the parties to resolve the listed assumptions for the PJM Study prepared for the 2009 fuel clause proceeding.

In this proceeding, NC Power witness Meekins testified that, in the last proceeding, NC Power was ordered to address the four issues identified during that proceeding in the study it prepared to show the impact of its integration into PJM. He further testified that the PJM Study attached to his testimony, which was filed under seal, was for the July 2008 through June 2009 time period and that it compares the Company's total energy costs and fuel clause costs associated with operating in PJM versus the hypothetical case of the Company operating as a stand-alone entity. Based on this study, he concluded that the Company's joining PJM had

provided system fuel benefits and that no adjustments were necessary to comply with Ordering Paragraph 1(e) of the PJM Order.

In his affidavit, Public Staff witness Ellis provided some of the history related to the PJM Study. He also indicated that NC Power, Nucor, and the Public Staff had met, exchanged information through conference calls and emails, and generally reached agreement on appropriate ways within the limitations of the software in use to deal with the four assumptions identified in the 2008 proceeding. Witness Ellis noted that for some months the stand-alone case delivered the lowest cost, but that the net result of all of the months in the test year was a small amount of net savings. Although the savings were small, particularly as compared to the total cost of the purchased power, witness Ellis opined that no adjustment to reduce NC Power's fuel costs as a result of the PJM Study appears to be warranted at this time.

Based on the foregoing, the Commission concludes that the PJM Study submitted by the Company is reasonable for use in this proceeding and that no adjustment to reduce the Company's fuel costs as a result of the study is necessary for purposes of this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 15 AND 16

The evidence supporting these findings of fact is contained in the testimony and exhibits of NC Power witnesses Koogler and Foust, the affidavit of Public Staff witness Peedin, and the rebuttal testimony of NC Power witness Foust.

NC Power witness Koogler testified that NC Power under-collected its fuel expenses by $14,859,013 during the test year ending June 30, 2009, and that the adjusted North Carolina jurisdictional fuel clause test year sales were 3,954,766,621 kWh and that the appropriate EMF was 0.389¢/kWh, including gross receipts tax.

Public Staff witness Peedin investigated the EMF to determine whether NC Power properly determined its fuel costs during the test period. Witness Peedin's investigation resulted in two adjustments. The first adjustment corrected an error made by the Company related to the calculation of the appropriate amount of North Carolina retail fuel revenue to be applied to fuel expense. This resulted in a decrease of $891,535 in the under-collection calculation. The second adjustment corrected an adjustment made by the Company related to the allocation of FTR revenue to be applied to purchased power costs. This adjustment resulted in an increase in the under-collection of $12,672. The combination of the adjustments reduced NC Power's under-collected fuel expenses by $878,863. As a result, the Public Staff proposed a test year under-collection amount of $13,980,150 and an EMF increment of 0.354¢/kWh, excluding gross receipts tax, or 0.366¢/kWh, including gross receipts tax. NC Power witness Foust in his rebuttal testimony accepted these adjustments, the resulting proposed under-collected fuel balance, and the resulting EMF.

G.S. 62-133.2(d) provides in part that the Commission "shall incorporate in its fuel cost determination under this subsection the experienced over-recovery or under-recovery of reasonable fuel expenses prudently incurred during the test period...in fixing an increment or decrement rider. The Commission shall use deferral accounting, and consecutive test periods, in

complying with this subsection, and the over-recovery or under-recovery portion of the increment or decrement shall be reflected in rates for 12 months, notwithstanding any changes in the base fuel cost in a general rate case."

The Commission concludes that NC Power under-collected its fuel expenses by $13,980,150 during the test year ending June 30, 2009, and that the adjusted North Carolina jurisdictional fuel clause test year sales were 3,954,767 MWh. Therefore, an EMF increment of 0.354¢/kWh, excluding gross receipts tax, or 0.366¢/kWh, including gross receipts tax, is reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

The evidence supporting this finding of fact is cumulative and is contained in the testimony and exhibits of NC Power witnesses Koogler, Kelly, and Foust and the affidavits and exhibits of Public Staff witnesses Peedin and Ellis.

Based upon the above findings and conclusions, the Commission finds and concludes that the final net fuel factor approved for usage in this proceeding is 2.975¢/kWh, excluding gross receipts tax, or 3.073¢/kWh, including gross receipts tax.

This final net fuel factor is determined as follows:

Normalized System Fuel Expense	$2,116,146,664
System kWh Sales at Sales Level	80,737,662 MWh
Test Year North Carolina Retail Fuel Underrecovery	$13,980,150
North Carolina Retail kWh Sales at Sales Level	3,954,766,621
Base Fuel Component Approved in Docket No. E-22, Sub 412 (cents per kWh)	1.647
Gross Receipts Tax Factor	1.03327

Base Fuel Component including gross receipts tax = 1.701¢/kWh

Fuel Cost Rider A (excluding gross receipts tax)
= [($2,116,146,664)/80,737,661,847] - 1.647¢/kWh = 0.974¢/kWh

Fuel Cost Rider A (including gross receipts tax)
= 0.974¢/kWh x 1.03327 = 1.006¢/kWh

Fuel Cost Rider B (excluding gross receipts tax)
= [($13,980,150)/ 3,954,766,621 = 0.354¢/kWh

Fuel Cost Rider B (including gross receipts tax)
= 0.354¢/kWh x 1.03327 = 0.366¢/kWh

	Effective 1/1/2010 (Including Gross Receipts Tax)
Base Fuel Factor	1.701
EMF/Rider B	0.366
Fuel Cost Rider A	1.006
FINAL FUEL FACTOR	3.073

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

The evidence supporting this finding of fact is cumulative and is contained in the testimony and exhibits of Nucor witness Goins, the rebuttal testimony of NC Power witness Koogler, and the Settlement Agreement of NC Power, the Public Staff, and Nucor, which was filed on November 10, 2009, and admitted into evidence at the hearing as Public Staff Hearing Exhibit No. 1.

In his pre-filed testimony, Nucor witness Goins testified that voltage losses have a measurable and significant effect on every utility's cost of delivered energy and that NC Power uses less fuel and incurs a lower cost to produce and deliver a unit of energy to a high voltage or transmission customer, as compared to a low voltage customer. He further testified that uniform charges in NC Power's fuel riders is inconsistent with its cost-of-service allocation of fuel expense to different rate classes based upon energy loss factors. Based upon his evaluation, witness Goins recommended that the Commission require NC Power to implement a non-uniform, voltage-differentiated fuel rate and, as a first step, differentiate Rider A in this proceeding, with a differentiation of Rider B on the basis of voltage being considered in NC Power's future fuel cost adjustment cases.

In his rebuttal testimony, NC Power witness Koogler testified that while Dr. Goins' analysis was correct in theory, it was incomplete. Witness Koogler opined that the analysis was not thorough enough for the Commission to determine whether it has merit. Witness Koogler stated that a more comprehensive study would need to be conducted to evaluate alternative methods and to determine the most reasonable basis for establishing class-differentiated fuel charges. The Company recommended that the Commission delay making a decision to differentiate the Company's fuel factor until the Company has a base case review.

In the Settlement Agreement filed November 10, 2009, NC Power, the Public Staff, and Nucor all agreed to support the consideration of appropriate methods to determine voltage-differentiated fuel rates and reasonable bases on which to establish class-differentiated fuel charges (for application in NC Power's base rate and annual fuel clause proceedings). The Settlement Agreement indicates that it is the parties' intention that, if voltage-differentiated or other class-differentiated fuel rates are approved as a result of such consideration, such rates would be effective no later than the effective date of the rates resulting from the 2010 fuel clause proceeding. The agreement further states that the parties' support for the consideration of such fuel rates will occur in NC Power's next general rate case, if any resulting rate changes would go into effect before or at the same time as would the rates approved in the 2010 fuel clause proceeding; otherwise, the support for the consideration of such fuel rates will occur in NC Power's 2010 fuel clause proceeding. To this end, (a) by February 11, 2010, NC Power agrees

to provide the Public Staff and Nucor with the voltage-differentiated base fuel component applicable to each rate class; and (b) if NC Power has not filed a general rate case application by February 26, 2010, then NC Power, the Public Staff, and Nucor, along with other interested intervenors, agree to meet no later than March 5, 2010, to discuss specific proposals.

The Settlement Agreement further provides that any party proposing a methodology to determine voltage differentiated fuel rates or a basis on which to establish class differentiated fuel charges, whether in a general rate case proceeding or in advance of the 2010 fuel clause proceeding, would provide to the other participating parties, electronically and in a timely fashion, the assumptions, inputs, and workpapers to support its proposal(s). Furthermore, NC Power, the Public Staff, and Nucor agree to continue to discuss such proposals as needed and in a timely fashion and to include other intervenors to the extent such intervenors indicate an interest in participating in such further discussions.

The Commission concludes that this aspect of the Settlement Agreement is a reasonable way to resolve the issues raised by Nucor witness Goins in this proceeding. Accordingly, NC Power should be required to provide to the Public Staff and Nucor, no later than February 11, 2010, the voltage-differentiated base fuel component applicable to each rate class. If NC Power has not filed a general rate case application by February 26, 2010, then NC Power is required to meet with the Public Staff and Nucor, along with other interested intervenors, no later than March 5, 2010, to discuss specific proposals.

IT IS, THEREFORE, ORDERED as follows:

1. That effective beginning with usage on and after January 1, 2010, NC Power shall adjust the base fuel component in its North Carolina retail rates approved in Docket No. E-22, Sub 412, by an increment Rider A of 0.974¢/kWh, excluding gross receipts tax, or 1.006¢/kWh, including gross receipts tax;

2. That an EMF Rider increment (Rider B) of 0.354¢/kWh, excluding gross receipts tax, or 0.366¢/kWh, including gross receipts tax, shall be instituted and remain in effect for usage from January 1, 2010, until December 31, 2010;

3. That NC Power shall file appropriate rate schedules and riders with the Commission in order to implement the fuel charge adjustments approved herein not later than five (5) working days from the date of receipt of this Order;

4. That NC Power shall notify its North Carolina retail customers of the rate adjustments approved in this proceeding by including the Notice to Customers of Rate Decrease attached to this Order as Appendix A as a bill insert with customer bills rendered during the next regularly scheduled billing cycle;

5. That, with respect to the study required to determine compliance with Ordering Paragraph 1(e) of the PJM Order, NC Power shall perform and file a PJM Study for the next fuel cost adjustment proceeding consistent with the PJM Study submitted in this proceeding, as discussed more fully herein; and

6. That, by February 11, 2010, NC Power shall provide the Public Staff and Nucor with the voltage-differentiated base fuel component applicable to each rate class. If NC Power has not filed a general rate case application by February 26, 2010, then NC Power shall meet with the Public Staff and Nucor, along with other interested intervenors, no later than March 5, 2010, to discuss specific proposals.

ISSUED BY ORDER OF THE COMMISSION.
This the _17th_ day of December 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr121409.01

APPENDIX A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-22, SUB 456

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Dominion North Carolina Power for Authority to Adjust its Electric Rates Pursuant to G.S. 62-133.2 and NCUC Rule R8-55	))))	NOTICE TO CUSTOMERS OF RATE DECREASE

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission entered an Order in this docket on December 17, 2009, after public hearing, approving a decrease of $5,259,840 in the annual rates and charges paid by customers of Virginia Electric and Power Company, d/b/a in North Carolina as Dominion North Carolina Power. The rate decrease will be effective for usage on and after January 1, 2010. The rate decrease was approved by the Commission after review of Dominion North Carolina Power's fuel expenses during the 12-month test period ended June 30, 2009, and represents changes experienced by Dominion North Carolina Power with respect to its reasonable costs of fuel and the fuel component of purchased power.

The change in the approved fuel charge will result in a monthly net decrease of approximately $1.33 for each 1,000 kWh of usage per month.

ISSUED BY ORDER OF THE COMMISSION.
This the _17th_ day of December, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

mr121409.01

DOCKET NO. E-7, SUB 856

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Duke Energy Carolinas, LLC,	)	
for Approval of a Solar Photovoltaic	)	ORDER ON
Distributed Generation Program and for	)	RECONSIDERATION
Approval of the Proposed Method of	)	
Recovery of Associated Costs	)	

BY THE COMMISSION: On June 6, 2008, Duke Energy Carolinas, LLC (Duke), filed an application for a blanket Certificate of Public Convenience and Necessity (CPCN) authorizing construction over a two-year period of up to 20 megawatts (MW) direct current (DC) of solar photovoltaic (PV) generation and for approval of its proposed method of cost recovery. Duke stated that its proposed program would meet its need to acquire solar energy in order to satisfy the solar set-aside requirements of the North Carolina Renewable Energy and Energy Efficiency Portfolio Standard (REPS), G.S. 62-133.8(d). The proposed facilities will be dispersed throughout Duke's North Carolina service territory and will be installed as roof-mounted and ground-mounted facilities on the property of Duke's customers and on property owned by Duke. In its application, Duke estimated that the cost of the proposed facilities would be approximately $100 million. In its rebuttal testimony, Duke reduced the size of its proposed program to 10 MW (DC), with an estimated cost of $50 million.

The scale of the program provides for multiple types of installations in multiple locations. Eighty to ninety percent (80-90%) of the proposed installed capacity will consist of large-scale installations such as ground-mounted facilities and rooftop installations on large commercial or industrial buildings, with individual facilities in this category ranging from 500 kilowatts (kW) to 3 MW. Up to 10% of the proposed installed capacity will consist of medium-scale rooftop facilities, with individual facilities in this category ranging in size from 15 to 500 kW. Small-scale facilities on residential rooftops, ranging from 1.5 to 5 kW in capacity, will comprise the remainder of the program and up to 10% of the total capacity.

Duke further stated in its application that, in addition to simply providing solar energy to meet the REPS requirements, the program will provide certain additional benefits which it believes cannot be obtained through a purchase from a third party. These additional benefits include enabling Duke to develop competency as an owner of solar renewable assets; to leverage volume purchases; to build relationships with solar PV developers, manufacturers and installers; to gain experience with the installation and operation of various types of solar distributed generation facilities; and to evaluate the impact of such facilities on its electric system. In addition, Duke expects that the program will help it to understand the types of distributed generation facilities desired by customers, promote the commercialization of solar facilities in North Carolina, and fill knowledge gaps so as to enable successful, widespread deployment of solar PV technologies. Moreover, Duke noted that, if it owns solar generating facilities, it will not be entirely dependent on purchases from outside entities to meet the solar requirements contained in the REPS.

On December 31, 2008, the Commission issued an Order granting Duke's application for a CPCN to implement its proposed 10 MW solar PV distributed generation program and to construct the associated generating facilities. The Order, however, provided that no more than the effective price per megawatt-hour (MWh) submitted by the third-place solar bidder in response to Duke's 2007 request for proposals (RFP), as stated in Public Staff Smith Confidential Cross-Examination Exhibit 1, less Duke's avoided costs, may be recovered through the REPS and REPS EMF riders pursuant to G.S. 62-133.8(h)(1)(a). This restriction was without prejudice to Duke's right to apply for recovery of any remaining costs of the program pursuant to G.S. 62-133.8(h)(1)(b). The Commission further stated that the issuance of that Order did not constitute approval of Duke's final costs for ratemaking purposes and was without prejudice to the right of any party to take issue with the ratemaking treatment of the final costs in a future proceeding.

In its Order, the Commission cited evidence in the case that one reason Duke's costs were projected to be higher than the costs in the third-place RFP bid was that Duke was required to comply with normalization requirements with respect to investment tax credits while the nonregulated third-place RFP bidder faced no comparable constraints. The Commission's Order contained language suggesting that if Duke's costs were higher than the third-place bidder, this fact might indicate that the prudent course for Duke to take would be to forego the self-build option in favor of reliance on the less expensive third party generator.

On January 29, 2009, Duke filed a Motion for Reconsideration of the Commission's December 31, 2008 Order. In its Motion, Duke contended that limiting the amount of program costs recoverable through the REPS riders places the Company in jeopardy of violating the federal tax normalization requirements. Duke also contended that the Commission inappropriately has sent the Company mixed signals by approving the CPCN while, at the same time, suggesting that the Company faces potential future prudency disallowances for choosing the self-build over the third-party option.

On February 2, 2009, the Commission issued an Order Allowing Briefs on Motion for Reconsideration and Scheduling Oral Argument.

On March 4, 2009, initial briefs were filed by the following parties: Duke, Southern Alliance for Clean Energy, North Carolina Sustainable Energy Association (NCSEA), The Solar Alliance, the Attorney General, and the Public Staff. On March 18, 2009, Duke, NCSEA, and the Public Staff filed reply briefs. Carolina Utility Customers Association, Inc. (CUCA), filed a letter in lieu of a reply brief.

Oral argument was heard on March 23, 2009, as scheduled. Appearances were entered by counsel for Duke, The Solar Alliance, the Attorney General, and the Public Staff. In its brief and oral argument, the Public Staff suggested modifications that, in its view, eliminate concerns over violations of the federal tax normalization requirements; the Attorney General and Solar Alliance opposed Duke's Motion for Reconsideration.

DISCUSSION AND CONCLUSIONS

After careful review of the arguments of the parties, the Commission concludes that its December 31, 2008 Order should be modified to negate language determining or suggesting that

Duke risks an imprudence disallowance in a future case resulting from its decision to proceed with its self-build program rather than contracting with a third-party solar generator. However, the requirements in the December 31, 2008 Order limiting costs to be recovered through the REPS riders shall remain in place. To the extent that decisions Duke makes in implementing the program, other than its decision to proceed, are questioned on grounds of prudence or reasonableness, nothing in this Order prevents any party from raising such issues in a future case.

The Commission agrees with Duke that the prudency of Duke's decision to proceed with its program, the self-build option, is an issue the Commission appropriately should address in this CPCN proceeding undertaken pursuant to G.S. 62-110.1. The investigation the Commission must make in compliance with this statute requires it to balance factors such as those at issue in this case in making its threshold determination of whether the issuance of the CPCN furthers the public convenience and necessity. State ex rel. Utilities Comm'n v. Piedmont Natural Gas Co., Inc., 346 N.C. 558, 488 S.E.2d 591 (1997). It is inappropriate to authorize Duke to proceed with its program, but to leave this threshold issue, raised by contested facts in the docket, unresolved while even suggesting that Duke's decision to proceed with the self-build option may be an imprudent choice for which it may face a disallowance penalty in the future.

The Commission faced a similar issue in dockets addressing Duke's requests for CPCNs for combined cycle gas-fired generating stations at Dan River and Buck, Docket No. E-7, Subs 791 and 832. There, a third-party generator questioned Duke's decision to choose the self-build option over the proposals of third-party generators which had submitted bids in response to an RFP. The Commission resolved that issue in its order granting Duke the requested CPCN. The Commission similarly should resolve the issue here.

Proper resolution of the issue based on the facts before the Commission presents substantial difficulty. The third-place bid that played a prominent role in the Commission's December 31, 2008 decision contains a substantially lower price per MWh than Duke's self-build option. The Commission bears the responsibility of protecting ratepayers by prohibiting utilities like Duke from incurring unreasonable and excessive costs, whether those costs are excessive in comparison to acceptable alternatives because of more expensive materials, labor, financing costs or unfortunate requirements of tax normalization regulations. Were the decision to be based on price alone, Duke's request for a CPCN should be denied.

Countervailing factors of record in this case that are set forth in the December 31, 2008 Order include the fact that bids submitted in response to RFPs are not firm and final, but often are subject to substantial modification and adjustment as the proposed project proceeds. Of particular significance to the Commission's decision are the facts Duke has presented with respect to another bid, which Duke accepted, set forth in the post-order affidavit of Melisa B. Johns accompanying Duke's Motion for Reconsideration.

At the hearing, Duke witness McManeus testified that "it is not rare to receive a bid and then end up negotiating the details of the contract and end up with a different," and potential higher, price. In addition, Ms. Johns' affidavit demonstrates that a solar bid price cannot be considered a firm price and is not a reliable indicator of the actual price Duke will have to pay when solar energy is actually delivered years after the bid is submitted. Ms. Johns explained that many factors related to a supplier's product and pricing can change as a renewable project

proceeds from an initial bid to a finalized, executed contract, and finally to actual construction of a generating facility and the delivery of energy.

Virtually all renewable energy bidders are project-financed. Therefore, the seller must have a long-term power sales agreement executed before the seller is able to proceed to obtain financing and construct the facility. The seller's bid price to Duke is based on its assumptions regarding all its project costs. Accordingly, the seller's bid price generally is contingent upon critical matters, such as: the seller finding an acceptable site; performing due diligence on that site to confirm the suitability of that site; obtaining an interconnection to the buyer's system at an acceptable cost; obtaining the projected tax credits for the project; avoiding unexpected state or local taxes on the project; obtaining financing at projected rates; and meeting the energy buyer's credit or performance requirements within project costs. In addition, some bids contain cost pass-through provisions under which specific types of cost (such as tax increases) are passed through to the buyer directly instead of being included in the energy price.

According to Ms. Johns' affidavit, the solar bids received in response to the 2007 RFP, including the third-place solar bid, incorporate these types of contingencies. Even after the energy contract is signed, the price is still not truly firm because the seller and the seller's lender will often require that the contract contain condition precedents, which may allow the seller to terminate the project if certain of the contingencies are not satisfied. Thus, although bid prices are informative in comparing relative cost estimates, they are not definitive enough for establishing an inflexible maximum recovery amount.

Duke faces compliance with the REPS solar set-aside requirement under Senate Bill 3 as early as 2010. After balancing all of the factors in favor of granting Duke the CPCN against those weighing in favor of denial, the Commission determines that Duke's request should be granted and that Duke's decision to proceed with the distributed generation program is not imprudent.

The Commission determines that the limitations set forth in the December 31, 2008 Order constraining the costs recoverable through the REPS riders should remain in place. While the Commission grants Duke's CPCN to implement the self-build distributed generation program even though the cost is in excess of bids received in response to Duke's RFP, the Commission remains unwilling to permit Duke to recover all of these costs through the REPS riders. The Commission remains concerned that undue reliance on relatively expensive solar generation from Duke's program will result in Duke's reaching the price caps under Senate Bill 3 before meeting the solar set-aside requirement, or will so nearly approach the cap that acquisition of solar generation from other sources is substantially limited. Likewise, the Commission interprets Senate Bill 3 as endorsing efforts to spur a market in renewable generation in which a diversity of generators participates so that prices will decline. These considerations support leaving the limitations in place. While use of the third-place bid price is only one of a number of ways to establish the limitation and has been criticized by Duke as being arbitrary, the Commission reaffirms its determination that reliance on this metric is reasonable. Furthermore, Duke, in its Motion for Reconsideration, briefs and oral argument, agreed that this limitation is acceptable.

Substantial difficulty and sharp dispute giving rise to the Motion for Reconsideration arise from provisions in the December 31, 2008 Order purporting to assign incremental costs above avoided costs into categories recoverable through the various cost recovery mechanisms

on the basis of the purpose for which the costs were incurred. The Commission determines that efforts to assign incremental costs to categories, as though they were divisible, based on the reason the costs were incurred were ill-advised and were not supported by record evidence. To the extent such assignments were made in the December 31, 2008 Order, they are hereby withdrawn. Instead, the Commission determines that the incremental costs are indivisible and cannot be assigned to categories, such as costs incurred to meet the REPS solar set-aside, to realize the broader objectives of the program, or as a result of tax normalization requirements. The only categorization of the incremental costs is the division of those recoverable through the REPS and REPS EMF riders and those recoverable through base rates, and this categorization is made, as explained above, for reasons other than the purpose for which they were incurred. The categorization is made to retain headroom for compliance with the REPS requirements. As such, the Commission determines that no portion of the costs of Duke's program may be recovered through the REPS riders as research and development costs under G.S. 62-133.8(h)(1)(b).

Resolution of the issues as discussed above renders moot Duke's arguments that the December 31, 2008 Order jeopardizes the continued availability of investment tax credits through indirectly providing ratepayers benefits in excess of those allowed by regulations. Nonetheless, the Commission stresses that its determination to grant Duke relief in response to its Motion for Reconsideration is based on arguments other than the tax arguments upon which much of its Motion are based. Nothing in the December 31, 2008 Order is part of a Commission effort "to negate the impact of the normalization compliance costs" or to disallow plant costs with a "intent [to] merely finesse the normalization rules." The Commission's language expressing skepticism over Duke's choice of the more expensive self-build alternative addressed the determination to choose a more costly alternative over another one. Any hypothetical reference to imprudence was to Duke's paying a price per MWh for solar-generated power in excess of lower-priced bid proposals submitted in response to Duke's RFP, not to Duke's use of investment tax credits.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 6th day of May, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Commissioner William T. Culpepper, III, concurs in this decision.
Commissioner Robert V. Owens, Jr., joins in Commissioner Culpepper's concurrence.
Commissioners Bryan E. Beatty and Susan W. Rabon did not participate in this decision.

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DOCKET NO. E-7, SUB 856

Commissioner William T. Culpepper, III, concurring:

In its Motion For Reconsideration Duke has requested that the "Commission eliminate the condition limiting recovery of Program costs through the REPS rider to the third-placed solar bid; or, in the alternative provide the Company with assurance that (a) proceeding with implementation of the Program is reasonable and prudent, and (b) the Company may recover all costs incurred in executing the Program through a combination of the REPS rider and base rates, subject only to the Commission's review of the reasonableness or prudence associated with [Duke's] execution of the Program." This Order On Reconsideration fully allows Duke the alternative relief it has requested in its motion. However, it is my belief that Duke is legally entitled to the relief that it has requested in the first instance, i.e. that the Commission eliminate the condition limiting recovery of Program costs through the REPS rider to the third-placed solar bid.

Simply put, the Commission has granted Duke's application for a Certificate of Public Convenience and Necessity to implement its proposed solar photovoltaic distributed generation program and to construct the associated generating facilities. The purpose of Duke's program is compliance with the solar energy resources requirements set forth in G.S. 62-133.8(d). G.S. 62-133.8(h)(4) states: "An electric power supplier shall be allowed to recover the incremental costs incurred to comply with the requirements of subsections ... (d) ... of this section ... through an annual rider ..." (emphasis supplied). Duke has requested full recovery of its Program costs via the REPS rider and I am of the belief that it is statutorily entitled to what it requests.

Nonetheless, in its motion Duke has phrased its requested relief in alternative terms, indicating that it will be satisfied if it is allowed to recover only a portion of its Program costs via the REPS rider, so long as it may recover the balance thereof in base rates. Indeed, this Order states that Duke has "agreed that this limitation is acceptable."[1] Notwithstanding Duke's having "agreed" to alternative relief, if this docket was mine alone to decide, circumstances are such that I would grant Duke the relief it has requested in the first instance and to which it is statutorily entitled.

However, this docket is before four members of the Commission, two of whom have reached the opinion that Duke should be granted the alternative relief to which it has "agreed", rather than full recovery of Program costs under the REPS rider. Despite my difference of opinion in this regard, I have elected to concur with the decision of my fellow Commissioners for reasons hereinafter stated.

First, this order causes retention of more headroom under the REPS cost cap provisions of G.S. 62-133.8(h)(4) for additional renewable energy projects than would otherwise occur if all incremental costs of Duke's program were allowed to be recovered under the REPS rider.

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[1] See page 5. Of course, the circumstances leading one to "agree" to something can vary from pure volition to extreme duress. This Commission has placed Duke under some duress in this docket by virtue of improvident provisions contained in its December 31, 2008 Order Granting Certificate which are withdrawn by this Order On Reconsideration.

Second, and more important, if neither Commissioner Owens nor I were to concur with the decision of our fellow Commissioners, the resulting 2-2 split would effectively deny Duke's Motion For Reconsideration and leave in place the Commission's December 31, 2008 Order Granting Certificate of Public Convenience and Necessity With Conditions. This would be untenable.

The Commission is unanimous in its opinion that the certificate it has granted Duke hereby has been justified by the public convenience and necessity. Duke has a solar energy resources requirement with which it must comply beginning with calendar year 2010 pursuant to legislative mandate. The company must be allowed to proceed with construction of its solar project unimpeded by the improvident tax normalization and cost recovery limitation provisions contained in our December 31, 2008 order, and it is entitled to an opportunity to fully recover its Program costs. Because this Order comports with all of the foregoing, I concur therewith.

\s\ William T. Culpepper III
Commissioner William T. Culpepper III

DOCKET NO. G-5, SUB 508

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Piedmont Natural Gas Company, Inc., Complainant v. Public Service Company of North Carolina, Inc., Respondent	)	ORDER SERVING COMPLAINT AND SCHEDULING ORAL ARGUMENT

BY THE COMMISSION: Notice is hereby given of the filing with this Commission on May 6, 2009, of a complaint of Piedmont Natural Gas Company, Inc. (Piedmont or Complainant), against Public Service Company of North Carolina, Inc. (PSNC or Respondent). Piedmont alleges that PSNC has entered into a joint venture with the City of Monroe (Monroe), which is located within Piedmont's exclusive franchise territory; that PSNC has provided active assistance to Monroe in the installation of natural gas transmission and distribution lines within Piedmont's exclusive franchise territory; and that these acts violate Piedmont's exclusive service territory rights, Commission Rule R6-60, Commission Rule R6-61, and Commission Rule R6-62.

In accordance with the Commission's Rules of Practice and Procedure, service of the complaint is hereby made on the Respondent by copy thereof attached to this Order Serving Complaint, by United States Certified Mail, Return Receipt Requested. The Respondent is hereby directed to satisfy the demands of the Complainant or to file an answer on or before May 26, 2009. The answer should comply with Rule R1-9 of the Commission's Rules of Practice and Procedure, including the filing of an original and 15 copies of the answer with the Chief Clerk. The mailing address for the Chief Clerk's Office is Chief Clerk-North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4325.

The Commission notes that, in addition to permanent relief, Piedmont requests "an immediate order by the Commission directing PSNC to cease and desist from conducting unauthorized and unlawful activities within Piedmont's exclusive service territory." The Commission interprets this as a request for preliminary injunctive relief[1] and concludes that expedited proceedings should be ordered as to this request. The Commission hereby schedules an oral argument for June 3, 2009, at 10:00 a.m., in the Commission Hearing Room in Raleigh for the purpose of hearing from the parties as to Piedmont's request for a preliminary injunction

[1] A preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits. A preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties pending litigation. It will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. A.E.P. Industries v. McClure, 308 N.C. 393, 400-01 (1983); see also G.S. 1A-1, Rule 65.

against PSNC. The parties should file any affidavits in addition to their verified pleadings that they intend to rely upon at this hearing on or before May 29, 2009.

IT IS, THEREFORE, ORDERED as follows:

1. That Respondent shall satisfy the demands of the Complainant or file an answer on or before May 26, 2009; and

2. That an oral argument is hereby scheduled for June 3, 2009, at 10:00 a.m., in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, for the purpose of hearing from the parties as to Piedmont's request for preliminary injunctive relief against PSNC.

ISSUED BY ORDER OF THE COMMISSION.
This the 11th day of May, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Kc050709.01

DOCKET NO. G-5, SUB 508

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Piedmont Natural Gas Company, Inc., Complainant
v.
Public Service Company of North Carolina, Inc., Respondent

ORDER DENYING MOTION FOR ORAL ARGUMENT ON MOTION TO DISMISS AND ALLOWING THE PARTIES TO FILE BRIEFS

BY THE PRESIDING COMMISSIONER: On May 6, 2009, Piedmont Natural Gas Company, Inc. (Piedmont or Complainant) filed a complaint against Public Service Company of North Carolina, Inc. (PSNC or Respondent). In its complaint, Piedmont alleged that PSNC has entered into a joint venture with the City of Monroe (Monroe), which is located within Piedmont's exclusive franchise territory; that PSNC has provided active assistance to Monroe in the installation of natural gas transmission and distribution lines within Piedmont's exclusive franchise territory; and that these acts violate Piedmont's exclusive service territory rights, Commission Rule R6-60, Commission Rule R6-61, and Commission Rule R6-62.

By Order entered in this docket on May 11, 2009, the Commission served Piedmont's complaint on PSNC for answer and scheduled an oral argument for Wednesday, June 3, 2009 at 10:00 a.m. for the purpose of hearing from the parties as to Piedmont's request for a preliminary

injunction against PSNC. The parties were also required to file any affidavits in addition to their verified pleadings that they intend to rely upon at this hearing on or before May 29, 2009.

On May 26, 2009, PSNC filed a Motion to Dismiss and Answer to Complaint whereby the Commission was requested to (1) dismiss Piedmont's complaint with prejudice or, in the alternative, as not ripe; (2) deny Piedmont's request for a Commission Order for PSNC to cease and desist; and (3) hear PSNC's motion to dismiss at the oral argument scheduled in this docket for June 3rd.

On May 28, 2009, Piedmont filed a response in opposition to PSNC's request to argue its motion to dismiss at the June 3rd oral argument. Instead, Piedmont requested that the Commission either defer consideration of PSNC's motion to dismiss until after the oral argument on June 3, 2009, or decide that motion on the written submissions of the parties filed on or before that date.

On May 29, 2009, PSNC filed a reply in support of its request that the Commission hear argument on its motion to dismiss at the June 3rd oral argument.

WHEREUPON, the Presiding Commissioner finds good cause to deny PSNC's request to argue its motion to dismiss at the oral argument presently scheduled for June 3rd. The Commission will, by further Order, serve PSNC's Motion to Dismiss and Answer to Complaint on Piedmont and specify the procedures that will apply. Furthermore, the Commission Staff and PSNC have been advised by Piedmont that it intends to file a legal brief prior to the June 3rd oral argument and that it will file such brief by Monday, June 1, 2009. In response, PSNC has advised the Commission Staff and Piedmont that it objects to Piedmont's notice of intent to file a legal brief prior to the oral argument. The Presiding Commissioner will allow both parties, in their discretion, to file briefs no later than Monday, June 1.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 29th day of May, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Kc052909.02

DOCKET NO. G-5, SUB 508

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Piedmont Natural Gas Company, Inc., Complainant	)))	
v.	)	PRELIMINARY INJUNCTION
Public Service Company of North Carolina, Inc., Respondent	)))	

HEARD: Wednesday, June 3, 2009, at 10:00 a.m., in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Lorinzo L. Joyner, Presiding, and Chairman Edward S. Finley, Jr., and Commissioner Bryan E. Beatty

APPEARANCES:

For Piedmont Natural Gas Company, Inc.:

James H. Jeffries IV and Brian S. Heslin, Moore and Van Allen PLLC, 100 North Tryon Street, Suite 4700, Charlotte, North Carolina 28202

For Public Service of North Carolina, Inc.:

Mary Lynne Grigg, McGuireWoods LLP, Post Office Box 27507, Raleigh, North Carolina 27601

Craig Collins, Assistant General Counsel, SCANA Services, Inc., 1476 Main Street, Columbia, South Carolina 29201

BY THE COMMISSION: On May 6, 2009, Piedmont Natural Gas Company, Inc. (Piedmont), filed a Complaint in this docket against Public Service Company of North Carolina, Inc. (PSNC or Public Service). Piedmont alleges that PSNC has entered into a joint venture with the City of Monroe (Monroe), which is now a natural gas customer of Piedmont; that PSNC is assisting Monroe in the installation of natural gas transmission and distribution lines in Union County, which is within Piedmont's service territory, as part of a proposed bypass pipeline that will traverse Union, Cabarrus, and Iredell Counties and will connect Monroe to the interstate pipeline of Transcontinental Gas Pipe Line (Transco); and that these acts of PSNC violate Piedmont's exclusive service territory rights, Commission Rule R6-60, Commission Rule R6-61, and Commission Rule R6-62.[1] The Complaint seeks as relief: (1) an order directing PSNC to

[1] In addition to the complaint filed against PSNC, Piedmont has filed a civil action against Monroe in the Superior Court of Union County, designated as 09 CVS 1120.

cease and desist from engaging in any further activities designed to assist or facilitate Monroe's (or any other party's) efforts to design, construct, install, or operate natural gas transmission or distribution facilities within Union County and (2) an order finding PSNC's joint venture with Monroe, its participation in the proposed pipeline project, and its prospective provision of natural gas service to end-users, including Monroe, within Union County to be unlawful and in violation of Piedmont's exclusive service territory rights and Commission Rules.

The Commission issued an order on May 11, 2009, serving the complaint on PSNC and scheduling an oral argument for June 3, 2009, for the purpose of hearing from the parties as to whether a preliminary injunction should be issued against PSNC. That order required the parties to file any affidavits in addition to their verified pleadings that they intend to rely upon at the oral argument on or before May 29, 2009.

On May 26, 2009, PSNC filed a Motion to Dismiss and Answer to Complaint. PSNC responded to the allegations of the Complaint and asked the Commission (1) to dismiss the complaint with prejudice or, in the alternative, as not ripe; (2) to deny the request for injunctive relief; and (3) to hear the motion to dismiss at the June 3 oral argument. On May 28, 2009, Piedmont filed a response in opposition to the request that the motion to dismiss be argued at the June 3 oral argument. On May 29, 2009, the Presiding Commissioner issued an order denying the request to argue PSNC's motion at the oral argument and allowing the parties to file briefs on the request for a preliminary injunction by June 1, 2009.

On May 29, 2009, Piedmont filed eight affidavits, many with attached exhibits, in support of its motion for a preliminary injunction. Among other things, these affidavits tend to show several instances of PSNC trucks being sighted at locations where gas transmission and distribution lines were being installed in Union County in April and May 2009; at least one instance of a PSNC employee contacting a landowner in Union County to inform him that gas lines would be installed on his property the next day and directing him to Monroe's attorney when he objected; and an answer filed by Monroe in Union County Superior Court admitting, among other things, that Monroe had entered into a joint venture agreement with PSNC by which PSNC would acquire an ownership interest and joint control as to the proposed pipeline in Cabarrus and Iredell Counties, which are within PSNC's service territory.

Also on May 29, 2009, PSNC filed an affidavit tending to show, among other things, that Monroe has entered into agreements with Midland in Cabarrus County and Mooresville in Iredell County to build a pipeline to connect to the Transco pipeline, that PSNC has entered a joint venture with the three municipalities by which PSNC will serve customers in its service territory from this pipeline, that PSNC has entered into a separate agreement with Monroe for PSNC to provide construction inspection services as to the pipeline, and that the construction and operation of the pipeline "is in no way contingent upon PSNC's participation in the project."

On June 1, 2009, Piedmont filed a brief in support of preliminary injunctive relief.

The oral argument was held as scheduled on June 3, 2009. Piedmont and PSNC participated, making arguments as to injunctive relief and responding to questions from the Commissioners.

In summary, Piedmont argued that "Public Service is involved with the construction of a natural gas facility in Union County, which is outside of its service territory" without having given notice or received approval from the Commission. Piedmont argued that PSNC's activities in Union County go "well beyond simply inspecting the pipe" and that it is unrealistic to view these activities in Union County in isolation "because they are clearly part of a larger arrangement between Public Service and Monroe and they are meant to facilitate the goals of that larger joint venture arrangement." Piedmont sees "a Public Service partnership in and active assistance to the design, construction, and operation of the bypass pipeline that's intended to provide natural gas service to both existing and potential Piedmont customers throughout Piedmont's northern Union County exclusive territory." Piedmont argued that PSNC "will have de facto operational control over the pipeline in Union County" and that its involvement is "tantamount to Public Service proposing to deliver gas to Monroe, a current customer of Piedmont located in Union County, through a unified integrated and unsegregated pipeline that Public Service will both have an ownership interest in and will operate." "[T]hey are going to be operating the pipeline through which all gas flows -- all gas that is ultimately consumed in Union County flows.....if Public Service isn't serving customers in Union County, then who is?" Piedmont argued that PSNC is relying upon a "contrived transactional structure" and warned,

> We believe that if you find that Public Service can parse this project and draw artificial lines at borders that aren't reflective of the reality of the pipeline facilities or how it's being operated, then what you do is you invite competition at every point where it is feasible for a natural gas company to cross its border and serve a customer in another territory. And that in our view is directly contrary to the longstanding fundamental policy of the State of North Carolina that service areas for public utilities should be exclusive.

PSNC, on the other hand, argued that its participation in the pipeline project is limited and that its activities in Union County are only those of "an independent contractor providing safety inspections of pipeline." "We have two men in two pickup trucks providing safety inspections to contractors in Monroe on a pipeline that is going to be built regardless." PSNC argued that Monroe "has ultimate control and responsibility over the construction of that pipeline" and that PSNC's activities in Union County "are non-jurisdictional activities," accounted for "below the line." "It is not a public utility construction activity." Upon completion of construction, PSNC will acquire an ownership interest as to that part of the pipeline in Cabarrus and Iredell Counties and capacity rights to serve its customers, but PSNC argued that "an ownership interest located in our territory doesn't violate [Piedmont's] territory." Upon completion, PSNC will perform maintenance and operation functions as to the pipeline in Cabarrus and Iredell Counties pursuant to contract, but PSNC argued that, since the pipeline will cross its service territory, "we thought it was in our interest, our customers' interest and also be beneficial for Monroe for us to perform certain maintenance and operation in our service territory." PSNC maintained that Monroe will be the "point operator of the Transco takeoff" and will have "sole responsibility for the maintenance and operation for what happens in Union County." PSNC stressed that it "is not serving any customer in Union County. Our interest, although it is an ownership interest, is for providing service in our territory from taps that we have on this pipeline in our territory." As to the distribution lines being installed in Union

County, PSNC denied that it is inspecting those lines and stated that "what Monroe intends or doesn't intend to do with that distribution doesn't involve PSNC."

Following the oral argument, on June 3, 2009, as requested by the Presiding Commissioner, PSNC filed copies of the Contract for Pipeline Construction Inspection entered into by PSNC and Monroe on February 17, 2009. The contract provides that PSNC

> shall provide manpower and equipment on an hourly basis as needed and directed by [Monroe] to oversee, monitor, and direct, construction activities on the Project....shall insure compliance with the City's construction contract, shall serve as public liaison and shall provide written reports and other data as necessary to document construction activities....shall install or cause to be installed pipeline, communications, and right-of-way markers along the right of way during the course of construction.

Finally, it should be noted that the day before the oral argument (June 2, 2009), in a separate docket (Docket No. G-5, Sub 510), PSNC filed an application pursuant to Commission Rule R6-61 seeking approval to operate the proposed pipeline facilities in Cabarrus and Iredell Counties. That application includes the Joint Venture Agreement of PSNC and the three municipalities and the Operating and Maintenance Agreement between PSNC and Monroe.

PRELIMINARY INJUNCTION

A preliminary injunction is an interlocutory order, issued after notice and hearing, which restrains a party pending final determination of the merits of a complaint. A preliminary injunction is issued to preserve the status quo pending litigation. A preliminary injunction will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. A.E.P. Industries v. McClure, 308 N.C. 393, 400-01 (1983).

On the basis of the verified pleadings, the affidavits, and the oral argument presented herein, the Commission finds good cause to issue a preliminary injunction in this proceeding. PSNC is hereby enjoined from engaging in any further acts during the pendency of this proceeding designed to assist or facilitate Monroe's (or any other party's) efforts to design, construct, install, or operate natural gas transmission and distribution facilities within Union County, North Carolina. This preliminary injunction is being issued for the following reasons.

The Commission concludes that Piedmont has shown a likelihood of success on the merits as to at least two of its claims: that PSNC is engaging in activities within Union County

that violate Piedmont's exclusive service territory rights[1] and violate Commission Rule R6-60.[2] The Contract for Pipeline Construction Inspection defines the scope of services being provided by PSNC, and affidavits tend to show that PSNC is providing such services in Union County. The Commission concludes that such services conducted in furtherance of the construction of the proposed pipeline in Union County constitute construction of natural gas facilities in Piedmont's territory without the requisite notice, opportunity to be heard, and approval of the Commission. These activities are being conducted by personnel and trucks clearly identified as those of PSNC. It does not avail PSNC that it proposes to account for the associated revenues and costs "below the line" if the activities in fact violate another public utility's service territory. It does not avail PSNC that in other instances it may have provided contract services in another public utility's territory at that utility's request. PSNC cited its 1998 contract to construct regulator station facilities for Frontier Natural Gas Company, but activities conducted in another utility's territory by contract with that other utility are clearly distinguishable from the present situation and provide no precedent here. It does not avail PSNC that the proposed pipeline will be built regardless of its involvement. The fact that Piedmont's exclusive service territory rights may not protect it from the activities of Monroe does not excuse PSNC's activities in Piedmont's territory or diminish the Commission's jurisdiction as to PSNC, and only PSNC is being enjoined hereby. Finally, it does not avail PSNC that the subject activities are being provided by contract with Monroe. PSNC's present activities in Union County cannot be viewed in isolation from its involvement with the proposed integrated pipeline project as a whole. When viewed in that context, the Commission concludes that PSNC's activities within Union County are public utility construction activities and that these activities in Union County violate Piedmont's exclusive service territory.

The Commission also concludes that Piedmont has shown that it is likely to sustain irreparable loss unless preliminary injunctive relief is ordered and/or that issuance of a preliminary injunction is necessary to protect Piedmont's rights during the course of this complaint litigation. Piedmont argues that more than mere monetary damages are at stake here, that another public utility is intruding into its service territory, that PSNC's activities create confusion as to who is providing natural gas service in Union County, and that this activity "threatens the entire rationale underlying the requirement to obtain a certificate of public convenience and necessity prior to conducting utility operations within an area of the State." The Commission agrees. As stated in a preliminary injunction issued by the Commission in 1989,

> [t]he threatened loss herein involves the integrity of the exclusive service territories under franchises issued by this Commission, which is a basic aspect of

[1] "[T]he basis for a requirement of a certificate of public convenience and necessity, as a prerequisite to the right to serve, is the adoption, by the General Assembly, of the policy that, nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. The requirement of such a certificate is not an absolute prohibition of competition between public utilities rendering the same service. There is, however, inherent in this requirement the concept that, once a certificate is granted which authorizes the holder to render the proposed service within the geographic area in question, a certificate will not be granted to a competitor in the absence of a showing that the utility already in the field is not rendering and cannot or will not render the specific service in question." Utilities Comm'n v. Carolina Telephone and Telegraph Co., 267 N.C. 257, 271 (1966).

[2] "No natural gas utility shall construct or operate natural gas facilities in territory occupied by and receiving similar service from another natural gas utility except upon written notice to the Commission and to the Company occupying and serving the territory, opportunity for public hearing, and written approval by the Commission."

> public utility regulation, and it involves the harmony among our State's natural gas public utilities, which this Commission is obligated to promote.

Order Denying Motions to Dismiss and Issuing Preliminary Injunction, issued on December 14, 1989, in Docket No. G-21, Sub 279.

The Commission concludes that no bond should be required in connection with this preliminary injunction. See G.S. 1A-1, Rule 65(c).[1] The discretion allowed by Rule 65(c) to set bond upon issuing injunctive relief includes the discretion

> "to dispense with any security requirement whatsoever where restraint will do the defendant 'no material damage,' [citations omitted] where there 'has been no proof of likelihood of harm,' [citations omitted] and where the applicant for equitable relief has 'considerable assets and [is]...able to respond in damages if [defendant] does suffer damages by reason of [a wrongful] injunction' [citations omitted]."

Keith v. Day, 60 N.C.App. 559, 562 (1983), quoting Federal Prescription Service, Inc. et al. v. American Pharmaceutical Assoc., 636 F.2d 755, 759 (D.C.Cir. 1980). The Commission concludes that no security shall be required of Piedmont.

The Commission notes that this preliminary injunction is limited to activities within Union County. The Commission will address PSNC's proposed activities in Cabarrus and Iredell Counties either in Docket No. G-5, Sub 510, or by further proceedings in the present docket. The Commission will proceed as it deems appropriate by further orders to hear and render a final decision in this docket.

IT IS, THEREFORE, ORDERED that PSNC should be, and hereby is, enjoined from engaging in any further acts during the pendency of this proceeding designed to assist or facilitate Monroe's (or any other party's) efforts to design, construct, install, or operate natural gas transmission and distribution facilities within Union County, North Carolina, until such time as a final determination of this complaint may be had.

ISSUED BY ORDER OF THE COMMISSION.
This the 15th day of June, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Kc061509.05

[1] "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

DOCKET NO. P-10, SUB 479

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of Central Telephone Company	)	ORDER APPROVING ALTERNATIVE
for Approval of a Price Regulation Plan	)	PROPOSAL FOR DISPOSITION OF
Pursuant to G.S. 62-133.5	)	SERVICE QUALITY PENALTIES

BY THE COMMISSION: On September 25, 2000, the Commission issued an order approving a modified Price Regulation Plan (Plan) for Central Telephone Company (Central). This revised Plan included a new self-enforcing penalty arrangement. Under this arrangement, Central became subject to penalties beginning on November 1, 2000, for failure to meet specific Plan benchmarks for measures 5 through 14 of Commission Rule R9-8.

The Plan requires Central to issue a credit on the bill of each residence and business customer of record within sixty (60) days after the end of the period should any service penalties be applicable. On December 19, 2008, Central filed a letter indicating that discussions were underway with the Public Staff concerning potential remedies for the penalty period ending October 31, 2008 and requesting that the December 31, 2008, date for finalizing any such remedy be extended until an appropriate resolution could be developed for the Commission's consideration. The Commission granted an extension until March 1, 2009. Subsequent requests for extensions of time made by Central have been granted by the Commission giving Central until July 1, 2009, to finalize a remedy for the service penalties applicable for the period November 1, 2007, through October 31, 2008.

On June 9, 2009, Central filed a proposal for disposition of the service quality penalties in question. In its filing, Central stated that the amount of credit issued to customers would be nominal[1] and that it initiated discussions with the Public Staff to consider alternative remedies that would provide a more substantial and tangible benefit to Central's customers. Central proposed that, in lieu of a one-time customer credit, an unplanned and unbudgeted capital expenditure be made to extend Digital Subscriber Line (DSL) service to locations identified in Attachment B of Central's June 9, 2009, filing.

The Public Staff presented this item for the Commission's consideration at the Regular Commission Conference on June 15, 2009. The Public Staff noted that it has reviewed Central's penalty period reports and believes that the dollar amount that each Central customer would receive if the penalties were issued as credits would be so small that most customers would be unlikely to notice the impact on their monthly bills. The Public Staff asserted that, rather than issue a *de minimis* credit to each Central customer, the better course of action would be for the Commission to allow Central to apply the penalty amounts to an expansion of Central's DSL deployment.

The Public Staff noted that, in making its recommendation, it relied heavily on Central's assurances that it has not allocated any 2009 or 2010 capital dollars for DSL expansion into the areas identified in Attachment B of Central's June 9, 2009 filing. The Public Staff also noted

[1] The exact amount of the credit has been filed confidentially.

that Central has stated that, absent approval of its proposal, the customers that would benefit from the investment would not have DSL service available to them for the foreseeable future. The Public Staff commented that, should the alternative proposal be approved by the Commission, Central expects to have DSL service available to customers in the affected locations by the end of 2009.

The Public Staff suggested that the Commission require Central to file a report with the Commission detailing the areas and numbers of customers to which the projects have made DSL arrangements available once these DSL projects are completed. The Public Staff recommended that the Commission also require Central to confirm in its report that the DSL expansions were completed in accordance with the June 9, 2009, proposal and that the costs incurred in extending DSL service to these new areas and customers equal or exceed the cost estimates furnished in the filing.

The Public Staff noted that it has met with Central and discussed the reasons for the service quality problems that resulted in the imposition of penalties for the period November 1, 2007 through October 31, 2008. The Public Staff maintained that, based upon Central's assertions in these meetings, it believes the service quality issues were not systemic and have been corrected.

The Public Staff recommended that the Commission issue an order: (1) authorizing Central to utilize the service quality penalty amounts for the 12 months ended October 31, 2008, cited on Attachment A of its June 9, 2009, filing to offset the capital costs its incurs in extending DSL service into the areas identified in Attachment B of that filing and (2) requiring Central to submit a report by January 31, 2010, providing details on the new areas and customers served by DSL and the costs Central incurred in completing the DSL expansion projects identified in its June 9, 2009 filing.

WHEREUPON, the Commission finds that good cause exists to approve Central's alternative proposal for the disposition of service quality penalty amounts due for the November 1, 2007 through October 31, 2008 penalty year as outlined in Attachment A of its June 9, 2009 filing.

Accordingly, Central is authorized to extend its DSL service into the areas identified in Attachment B of its June 9, 2009 filing in lieu of providing a one-time customer credit for the service quality penalties incurred during the November 1, 2007 through October 31, 2008, penalty period under its approved Price Regulation Plan. In addition, Central shall file a report by January 31, 2010, providing details on the new areas and customers served by DSL from this expansion and the costs Central incurred in completing the DSL expansion projects approved in this Order.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 16th day of June, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bp061509.01

DOCKET NO. P-31, SUB 145

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of LEXCOM Telephone Company	)	ORDER APPROVING PRICE
for Approval of a Price Regulation Plan	)	REGULATION PLAN
Pursuant to N.C. Gen. Stat. §62-133.5(a)	)	

HEARD: Wednesday, March 4, 2009, in the Lexington City Hall, City Hall Chambers, 28 West Center Street, Lexington, North Carolina 27292-3316

BEFORE: Commissioner Lorinzo L. Joyner, Presiding; and Commissioner Bryan E. Beatty and Commissioner Susan W. Rabon

APPEARANCES:

FOR LEXCOM TELEPHONE COMPANY:

Daniel C. Higgins
Burns, Day & Presnell, P.A.
2626 Glenwood Avenue, Suite 560
Raleigh, North Carolina 27608-1370

FOR THE USING AND CONSUMING PUBLIC:

Dianna W. Jessup
Public Staff – North Carolina Utilities Commission
4326 Mail Service Center
Raleigh, North Carolina 27699-4326

BY THE COMMISSION: LEXCOM Telephone Company (LEXCOM) is currently operating under traditional rate of return regulation as provided for in North Carolina G.S. 62-133.

G.S. 62-133.5(a) provides that "[a]ny local exchange company [LEC], subject to the provisions of G.S. 62-110(f1), that is subject to rate of return regulation pursuant to G.S. 62-133 . . . may elect to have rates, terms and conditions of its services determined pursuant to a form of price regulation, rather than rate of return or other forms of earnings regulation."

Under the form of price regulation authorized by G.S. 62-133.5(a), "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."

G.S. 62-133.5(a) requires notice and a hearing, allows different forms of price regulation as between different LECs, and requires the Commission to decide price regulation cases within 90 days subject to an extension by the Commission for an additional 90 days, or a total of 180 days from the filing of the Application. The statute requires the Commission to approve price plan regulation for a LEC upon finding that a proposed price regulation plan:

(i) protects the affordability of basic local exchange service, as such service is defined by the Commission;

(ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards that the Commission may adopt;

(iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and

(iv) is otherwise consistent with the public interest.

On December 11, 2008, LEXCOM filed a Petition for Approval of Price Regulation Plan and also, separately, a Stipulation (Stipulated Price Plan or Plan) and Agreement between LEXCOM and the Public Staff. LEXCOM and the Public Staff asserted that the North Carolina Price Regulation Plan for LEXCOM attached to and incorporated within the Stipulation and Agreement meets and satisfies the four statutory criteria for Commission approval of a price regulation plan under G.S. 62-133.5(a).

On January 21, 2009, the Commission issued its *Order Scheduling Hearing, Requiring Public Notice, and Requiring Prefiled Testimony*. The Commission scheduled a public hearing for Wednesday, March 4, 2009 to be immediately followed by an evidentiary hearing in Lexington. The Order also established a schedule for the filing of direct testimony and rebuttal testimony.

On January 30, 2009, BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina (AT&T) filed a Notice of Intervention and Request to be Placed on Service List.

On February 6, 2009, LEXCOM filed the direct testimony of Donna K. Arnold.

On February 10, 2009, LEXCOM filed a Response to Notice of Intervention. LEXCOM stated that AT&T had failed to show an adequate basis for intervention in this docket and that the Commission should not allow AT&T to intervene.

On February 11, 2009, AT&T filed a Reply to LEXCOM's Response to Notice of Intervention.

On February 16, 2009, the Commission issued its *Order Denying Intervention* wherein the Commission concluded that AT&T failed to provide a statement upon which the Commission could allow its intervention in this docket. However, the Commission directed the Chief Clerk

of the Utilities Commission to place AT&T on the service list of this docket which would allow AT&T to receive orders issued in the docket.

On February 18, 2009, the Public Staff filed the direct testimony of Charles B. Moye.

On March 2, 2009, LEXCOM and the Public Staff jointly filed their proposed order of witnesses and estimations of cross-examination times.

The public hearing was held as scheduled on March 4, 2009 in Lexington before the Commission Panel assigned to this proceeding. Representatives for both LEXCOM and the Public Staff were in attendance and two public witnesses testified: Mr. Radford Thomas, President of the Lexington Chamber of Commerce, and Mr. George Clifton. Mr. Thomas, representing the Lexington Chamber of Commerce, testified without objection. Mr. Clifton posed a question regarding the cable television service offered by LEXCOM Cable and was directed to speak with representatives of LEXCOM. Immediately following the public hearing on March 4, 2009, an evidentiary hearing was held in this matter wherein LEXCOM witness Arnold and Public Staff witness Moye testified. The Stipulation and the prefiled testimony were offered into evidence without objection.

As described in the direct testimony of witness Moye and the Stipulated Price Plan itself, the Stipulated Price Plan provides for the following:

- Classification of existing services into four categories of service designated as Moderate Pricing Flexibility Services, Discretionary Pricing Flexibility Services, High Pricing Flexibility Services, and Total Pricing Flexibility Services.

    - **Moderate Pricing Flexibility Services**. Services that are classified in this category include business and residential basic local exchange services and switched access charges applicable to interexchange carriers. Prices for these services could be increased by a maximum of 10% in each Plan year, provided that revenues for the category do not increase by more than one and one-half times the rate of inflation.

    - **Discretionary Pricing Flexibility Services**. Initially, there would be no services that would be classified in this category. Prices for services placed into this category would be no higher than tariff rates but may be reduced for individual customers, for competitive reasons, below tariff rates at LEXCOM's discretion.

    - **High Pricing Flexibility Services**. Services that are classified in this category include operator assisted local calls and optional business and residential calling features. Prices for these services could be increased by a maximum of 20% in each Plan year, provided that revenues for the category do not increase by more than two and one-half times the rate of inflation.

    - **Total Pricing Flexibility Services**. Services in this category include Centrex service. Prices for these services would not be regulated by the Plan.

- The Offset will be zero percent.

- Allows LEXCOM to make revisions to its extended local calling services. LEXCOM's Stipulated Price Plan would allow expansion of LEXCOM's local calling scope and a rebalancing of its rates on a revenue neutral basis. LEXCOM's Plan is designed to help simplify its service offerings, make it easier for customers to understand prices, and to present a bill with fewer line items and charges. The Stipulated Price Plan allows LEXCOM to rebalance its rates, and that will enable LEXCOM to allow its customers in the exchanges of Lexington, Southmont, and Welcome to enjoy the same local, unlimited calling to the Piedmont Calling Plan (PCP) area of 58 exchanges in 15 different counties with a population of almost 1.4 million people. This will eliminate billings to LEXCOM customers for calls to the PCP area. Under the Stipulated Price Plan, LEXCOM will completely eliminate monthly charges for Touch Calling, Extended Area Service, and both monthly and usage charges for Expanded Local Calling. After rebalancing, all customers will have Touch Calling on their line at no additional monthly charge. Monthly service charges for residential and business Community Caller customers would be frozen for two years following the rebalancing provided for in the Stipulated Price Plan.

- Allows LEXCOM to increase rates by a set amount regardless of the applicable rate element constraint. Specifically, for services in the Moderate Pricing Flexibility Services category, a rate element priced on a flat-rated monthly basis would be allowed a rate increase of 10% or $0.35, whichever is greater. A rate element priced on a per use basis would be allowed a rate increase of 10% or $0.15, whichever is greater. A similar constraint is available for rate elements in the High Pricing Flexibility Services category, with the following allowed minimum rate increases: 20% or $0.50, whichever is greater, for rate elements priced on a flat-rated monthly basis, and 20% or $0.30, whichever is greater, for rate elements priced on a per use basis. There are two exceptions to the per use minimum rates: (1) minute of use rates, such as usage rates associated with expanded local calling plans, can be increased by a maximum of $0.01 or the rate element constraint, whichever is greater, and (2) this provision will not apply to Intrastate Switched Access Service rates.

- Allows LEXCOM to propose multiple rate increases per year for individual rate elements, provided the cumulative price increase remains within the appropriate rate element constraint.

- Contains language prohibiting LEXCOM from operating in an anticompetitive manner, and prohibits unlawful price discrimination, predatory pricing, price squeezing, or anticompetitive bundling or tying arrangements. In addition, under the language of the Stipulated Price Plan, the Commission retains oversight for service quality, complaint resolution, and compliance by LEXCOM with all elements of the Plan.

- Provides for financial penalties to be paid to customers if LEXCOM fails to meet service objectives established by the Commission.

On April 3, 2009, LEXCOM and the Public Staff filed a Joint Proposed Order in this proceeding.

WHEREUPON, based on the foregoing and the entire record in this matter, the Commission now makes the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. LEXCOM is a "local exchange company" as the term is defined in G.S. 62-3(16a). LEXCOM currently operates under traditional rate of return regulation pursuant to G.S. 62-133. LEXCOM is seeking approval of a price regulation plan pursuant to G.S. 62-133.5(a). Thus, this matter is properly before the Commission for consideration, and LEXCOM meets all of the requirements for price regulation under G.S. 62-133.5.

2. The Stipulated Price Plan will protect the affordability of basic local exchange service.

3. The Stipulated Price Plan will reasonably assure the continuation of basic local exchange service that meets reasonable service standards.

4. The Stipulated Price Plan will not unreasonably prejudice any class of telephone customers, including telecommunications companies.

5. The Stipulated Price Plan is otherwise consistent with the public interest.

DISCUSSION OF FINDING OF FACT AND CONCLUSION OF LAW NO. 1

Finding of Fact and Conclusion of Law No. 1 is supported by the record as a whole and is not contested.

DISCUSSION OF FINDING OF FACT AND CONCLUSION OF LAW NO. 2
AFFORDABILITY

Finding of Fact and Conclusion of Law No. 2 (and Nos. 3-5 as well) are supported by the direct testimony of LEXCOM witness Arnold and Public Staff witness Moye. The Commission has also taken into account the testimony of public witness Thomas.

LEXCOM witness Arnold testified as to the economic rationale for LEXCOM's proposal of the Plan; the economic context in which the Plan should be evaluated; the changes in the competitive landscape for telecommunications services in the United States and North Carolina; and the effects of new technology and increased competitive options. In addition, witness Arnold explained why LEXCOM sought to move to a price regulation plan. Specifically, witness Arnold testified that the Stipulated Price Plan would enable LEXCOM to more quickly react to competitive pressures and changing customer expectations and demands. The flexibility provided for in the Stipulated Price Plan would provide immediate, as well as long-term, benefits to many of LEXCOM's customers and would allow LEXCOM to better meet competitive challenges within its service territory.

In her direct testimony, witness Arnold discussed the detailed provisions of the Stipulated Price Plan, explained why the Stipulated Price Plan is consistent with the requirements of G.S. 62-133.5(a), and stated that the Stipulated Price Plan represents a compromise supported by representatives of the using and consuming public and LEXCOM. Witness Arnold's testimony provided clear evidence that LEXCOM has experienced a net loss of access lines to competition, which losses continue to mount, and that the prospect of future losses through competition is high. Witness Arnold testified to significant risk for traditional wireline local telephone companies from competition from wireless to Voice over Internet Protocol (VoIP) providers such as Time Warner Cable Information Services and Sprint Communications Company, both of which have secured interconnection agreements with LEXCOM within the last year.

Public Staff witness Moye also testified that developments have changed the landscape of the telecommunications industry in North Carolina since local competition was authorized by state and federal laws. Specifically, witness Moye described these changes as the growth in access line competition from wireline competing local providers (CLPs); the growth in wireless service; the apparent reversal of access line growth for incumbent LECs; and the potential for further competition from new technologies. In addition, witness Moye testified that the Stipulated Price Plan satisfies the criteria of G.S. 62-133.5(a). Like witness Arnold, he indicated that the Stipulated Price Plan is a reasonable compromise between LEXCOM and the Public Staff. The testimony of witnesses Arnold and Moye establishes that, for many services in LEXCOM's service area, price constraints imposed by the existence of competitors are current, real, and generally effective, supporting the Commission's determination that the Stipulated Price Plan will result in affordable basic local exchange service rates.

In Commission Rule R17-1(a), the Commission has defined basic local exchange service as "[t]he telephone service comprised of an access line, dial tone, the availability of touchtone, and usage provided to the premises of residential customers or business customers within a local exchange area." In the Stipulated Price Plan, basic local exchange service is included in the Moderate Pricing Flexibility Services category, which allows LEXCOM some flexibility to adjust the price of basic local exchange service. Under the Stipulated Price Plan, aggregate annual price changes for services included in the Moderate Pricing Flexibility Services category are limited to one and one half times the rate of inflation as measured by the annual change in the Gross Domestic Product Price Index (GDPPI), minus an offset of zero percent.

Further, under the Stipulated Price Plan and as noted by witness Moye, the rate element constraint is 10% in the Moderate Pricing Flexibility Service category. In the High Pricing Flexibility Services category the rate element constraint is 20%. The Stipulated Price Plan also includes a provision under which any rate element in the Moderate Pricing Flexibility Services category may be increased on an annual basis by up to ten percent (10%) or thirty-five cents ($0.35), whichever is greater, if it is priced on a flat-rated monthly basis, and up to ten percent (10%) or fifteen cents ($0.15), whichever is greater, if it is priced on a per-use basis. A similar constraint is available for rate elements in the High Pricing Flexibility Services category, with the following allowed rate increases: up to twenty percent (20%) or fifty cents ($0.50), whichever is greater, for rate elements priced on a flat-rated monthly basis, and up to twenty percent (20%) or thirty cents ($0.30), whichever is greater, for rate elements priced on a per use

basis. Exceptions to this provision are: (1) minute-of-use rates, such as usage rates associated with ELCA service, can be increased by a maximum of $0.01 or the rate element constraint, whichever is greater; and (2) this provision does not apply to Intrastate Switched Access Service rates.

The Commission concludes that the increase in pricing flexibility allowed by the Stipulated Price Plan is appropriate and still protects the affordability of basic local exchange service. Prices for Moderate Pricing Flexibility Services in the aggregate can increase by no more than one and one half times the change in GDPPI. Further, the Commission notes that aggregate price increases for rate elements in the Moderate Pricing Flexibility Services category above the constraint must be accompanied by commensurate (offsetting) aggregate price reductions in other rate elements. The Stipulated Price Plan further protects the affordability of local exchange services by generally limiting the potential annual price increase for any single rate element to 10% for services in the Moderate Pricing Flexibility Services category.

In reaching this conclusion, the Commission notes that LEXCOM's last general rate case was over 25 years ago, and its current rates were set under circumstances very different from those existing today. The record shows that, in the last eight years, LEXCOM has lost more than 31% of its customer base as a result of changing technology and competition. In contrast, when LEXCOM's current rates were adopted, there was no competition for local service. The limited increase in pricing flexibility allowed under the Stipulated Price Plan for basic local exchange services and discretionary services is fully justified by the increased competition that exists in LEXCOM's North Carolina telecommunications market. It is also consistent with increased pricing flexibility approved for other North Carolina incumbent LECs.

DISCUSSION OF FINDING OF FACT AND CONCLUSION OF LAW NO. 3
SERVICE QUALITY

Finding of Fact and Conclusion of Law No. 3 was not disputed by any party. The Stipulated Price Plan contains provisions expressly relating to service quality measurements and the provision for appropriate service quality penalties. The Commission retains powers and authority with regard to the provision of quality service. LEXCOM will continue to operate under Commission Rule R9-8 and will be subject to the service quality penalties set forth in the Stipulated Price Plan. Furthermore, the Commission will retain oversight for service quality, complaint resolution, and compliance with all elements of the Stipulated Price Plan and applicable state law.

Thus, the Commission concludes that the Stipulated Price Plan reasonably assures the continuation of basic local exchange service that meets the reasonable service standards established by the Commission in Rule R9-8.

DISCUSSION OF FINDING OF FACT AND CONCLUSION OF LAW NO. 4
NO PREJUDICE AMONG CUSTOMER CLASSES

LEXCOM witness Arnold's testimony addressed the issue of whether the Stipulated Price Plan will unreasonable prejudice any class of telephone customers. She stated that, for several reasons, the Stipulated Price Plan will not result in such prejudice.

First, witness Arnold asserted that LEXCOM will continue to charge tariffed rates for services on non-discriminatory terms and conditions and that those prices will be restrained by the Stipulated Price Plan's pricing limits and by competition.

Second, witness Arnold stated that customers in a position to negotiate customer-specific agreements will obtain prices that are constrained by the existence of competitive alternatives.

Third, witness Arnold testified that the Stipulated Price Plan does not change any terms and conditions applicable to LEXCOM's relationship with other carriers, such as the terms and conditions of access tariffs and interconnection agreements, and applicable nondiscrimination requirements remain in effect.

Finally, witness Arnold stated that the Stipulated Price Plan uses existing rates as a starting point and, therefore, preserves the pricing for basic residential services. She asserted that, at the same time, the Stipulated Price Plan permits LEXCOM to modify its basic residential prices, over time, without necessarily making corresponding changes in basic business prices that begin at higher levels. Witness Arnold maintained that, in this way, the Stipulated Price Plan preserves a balance between the treatment that residential customers have traditionally enjoyed and the possibility that basic business rates may require a somewhat different treatment in the future because they are more competitive.

Public Staff witness Moye did not take issue with witness Arnold's analysis, and he agreed that the Stipulated Price Plan will not be unreasonably prejudicial to customers.

The Commission finds the record to be persuasive and concludes that the Stipulated Price Plan will not unreasonably prejudice any class of telephone customers, including telecommunications companies.

DISCUSSION OF FINDING OF FACT AND CONCLUSION OF LAW NO. 5
PUBLIC INTEREST STANDARD

Witness Moye asserted in his testimony that the Stipulated Price Plan is in the public interest for a number of reasons. Witness Moye noted that the Stipulated Price Plan will allow LEXCOM to gradually rebalance its rates in order to meet the increasingly competitive telecommunications market. He stated that the service category revenue constraints and rate element constraints incorporated in the Stipulated Price Plan will prevent "rate shock", and the transition to a competitive marketplace should offer customers an increasing array of telecommunications services at competitive prices. Witness Moye maintained that the service quality objectives, self-enforcing penalties, and Commission authority over complaint resolution

will help to ensure that LEXCOM continues to provide a high level of service to its customers. Witness Moye opined that, in addition to these benefits and protections, the Stipulated Price Plan offers LEXCOM increased flexibility to tailor its service offerings to satisfy current customer expectations and to provide new enhanced features and services in the future.

The public interest standard is one the Commission has employed in its deliberations for many years. The Commission finds the Stipulated Price Plan to be in the public interest for several reasons. First, it permits the rate rebalancing necessary for the ongoing transition to competition, without allowing the rebalancing process to proceed at such a rapid pace as to impose an undue burden upon those customers whose rates may increase. Second, the Stipulated Price Plan provides affordable rates and assures that LEXCOM will continue to provide adequate service to its customers. Third, the Stipulated Price Plan contains specific service performance measures and penalties. Fourth, the Commission believes that a competitive marketplace is consistent with the goals established by the legislature, and will engender significant benefits for the citizens of the State through improved services, generally lower prices, and greater technological innovation, and that it will therefore offer significant potential for enhanced economic development.

At the same time, the Commission recognizes that the public interest could be adversely affected if telecommunications services were fully deregulated, or regulated so lightly that the only limitations on prices were those imposed by competition at a time when competition has not yet progressed to the point where it could discipline prices effectively in LEXCOM's North Carolina service territory.

In addressing this concern, the Commission notes that there is a close correlation between the assignment of telecommunications services to pricing categories under the Stipulated Price Plan and the degree of competition for particular services in LEXCOM's service area. The assignment of services to categories in the Stipulated Price Plan was determined by negotiation between LEXCOM and the Public Staff; however, the services assigned to the Total Pricing Flexibility Services category are those for which the greatest degree of competition exists. In contrast, the services categorized as Moderate Pricing Flexibility Services are those for which competition is less vigorous. The Commission finds it significant that the Public Staff, which is responsible under G.S. 62-15 for protecting the interests of the using and consuming public, has agreed to the Stipulated Price Plan. Under the Stipulated Price Plan, the Commission will retain sufficient authority to monitor and maintain service quality, to review rate structures and the terms and conditions of tariffs against a public interest standard, to decide complaints concerning anticompetitive behavior, and to oversee the reclassification and regrouping of services and the financial impacts of governmental actions.

In addition, the Commission notes that no public witnesses testified in opposition to the Stipulated Price Plan. In fact, there was public witness testimony in favor of the Stipulated Price Plan. Public witness Thomas represented the Lexington Chamber of Commerce, and he described LEXCOM's role in the community and voiced support for LEXCOM's request for adjustment of its rates.

Accordingly, the Commission concludes that the provisions of the Stipulated Price Plan are sufficiently limited, and that the Stipulated Price Plan is consistent with the public interest given the current level of competition in LEXCOM's service territory. Furthermore, the Commission recognizes that, under the Stipulated Price Plan, it retains regulatory oversight authority over any request by LEXCOM to classify new services or reclassify existing services to a Category providing greater pricing flexibility. This continuing authority regarding the appropriate classification of services is important, as it enables the Commission going forward to ensure that each request to classify or reclassify services is supported by a showing of increased competition for these services.

FINAL OBSERVATIONS AND CONCLUSIONS

Consistent with the law and policy of this State, LEXCOM and the Public Staff have negotiated a Stipulated Price Plan that meets each of the criteria prescribed by G.S. 62-133.5(a), and the Commission finds that approval of the Stipulated Price Plan is appropriate. The Commission has approved similar price plans for similarly situated companies. The Stipulated Price Plan in this case has many elements in common with these previously approved price regulation plans. The record shows that the telecommunications market has changed considerably since 1996, when competition in the local exchange telecommunications market began. The Commission believes that the flexibility afforded by the Stipulated Price Plan will enable LEXCOM to compete effectively and continue to provide reasonably affordable basic local exchange service. The Commission's decision to approve the Stipulated Price Plan is based upon its analysis of the record in this proceeding and should not be understood as indicating that a different plan would not be appropriate given the existence of a different record.

IT IS, THEREFORE, ORDERED that the Stipulated Price Plan be, and the same is hereby, approved for implementation by LEXCOM effective no later than July 1, 2009, provided that LEXCOM shall, not later than May 1, 2009, refile the Stipulated Price Plan bearing an effective date not later than July 1, 2009.

ISSUED BY ORDER OF THE COMMISSION.
This the 22nd day of April, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

bp042209.01

DOCKET NO. P-55, SUB 1013
DOCKET NO. P-7, SUB 825
DOCKET NO. P-10, SUB 479
DOCKET NO. P-19, SUB 277

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of AT&T North Carolina, Carolina	)	
Telephone and Telegraph Company LLC d/b/a	)	ORDER REDUCING FREE
Embarq and Central Telephone Company d/b/a	)	DA CALL ALLOWANCE
Embarq and Verizon South, Inc. To Reduce	)	
Directory Assistance Call Allowances	)	

BY THE COMMISSION: On May 5, 2009, AT&T North Carolina (AT&T), Carolina Telephone and Telegraph Company d/b/a Embarq and Central Telephone Company d/b/a Embarq (collectively, Embarq), and Verizon South, Inc. (Verizon) (collectively, the Joint Petitioners) filed a Petition to Reduce Directory Assistance Call Allowances. Under the Joint Petitioners' proposal, the number of free monthly local directory assistance (DA) calls would be reduced from three to one such call for both residential and business customers.

The Joint Petitioners argued that this reduction is appropriate because demand for the Joint Petitioners' traditional DA services has decreased significantly while, at the same time, the market for free and low-cost DA alternatives accessible from consumers' landlines, computers, and wireless devices has correspondingly increased significantly. The Joint Petitioners maintained that the requested relief would level the competitive playing field among the Joint Petitioners and their competitors, while ensuring that consumers would still retain access to traditional DA services. The Joint Petitioners also noted that the Commission has already begun the process of reducing free DA calls for the Joint Petitioners when it reduced the call allowance in 2006. The Joint Petitioners noted that numerous competitive alternatives exist to traditional local DA services in the form of free and pay-per-use DA offered by competitive DA service providers, pay-per-use DA offered by competing local providers (CLPs), and wireless providers, Short Messaging Service (SMS) text messaging offered by Internet and wireless companies, white and yellow pages print and online directories, and various Internet websites. As a result, local DA service of the Petitioners has declined significantly in the period from 2004-2008.

For the above reasons, the Joint Petitioners requested that the Commission approve their Petition. Upon approval, the Petitioners stated that they are prepared to notify customers fourteen days in advance of this rate change, and appropriate filings and documentation will be made with the Public Staff with respect to the Joint Petitioners' Price Plans. The Joint Petitioners requested that the Commission approve their request by June 15, 2009, to allow sufficient time for the necessary public notice prior to the Joint Petitioners' tariff effective dates in mid-August.

The Commission sought comments from parties to the above dockets according to the following schedule: (1) from the Public Staff, Attorney General, and any party other than the

Joint Petitioners, by not later than Wednesday, May 20, 2009; and (2) from the Joint Petitioners in Reply, by no later than Wednesday, May 27, 2009.

COMMENTS

The **Public Staff** questioned the assumptions underpinnings of the Joint Petitioners' arguments. For instance, the Public Staff questioned whether the local DA market has become significantly more competitive since 2007, as alleged by the Joint Petitioners. While the local DA market may have a number of providers, the Joint Petitioners have not demonstrated, qualitatively or quantitatively, any such increase in DA competition since the Commission last addressed DA call allowances. If there were really competition for local DA services, the Joint Petitioners, with their three free call allowances and generally lower rates, would have a competitive advantage.

As for volume of local DA calls, that figure has not been declining in greater proportion than the access line losses. According to the Joint Petitioners, during December 2008, DA calls were placed by 12% of AT&T's access lines, 13% from Embarq's, and 14% from Verizon's. This contrasts with 14% of AT&T's access lines making DA calls during June 2006. This indicates little to no change.

Moreover, the Joint Petitioners' contention that reducing the free DA call allowance from three to one would "level the playing field" between LECs and their competitors misrepresents the nature of the local DA call market. While competition has increased overall, there is little, if any, competition *specifically* for local DA service between landline companies, wireless companies, and the cable companies in a specific area.

The Public Staff also argued that there is an important policy reason for retaining the present three free DA call allowance: there are some customers who do not have access to or know about the alternatives to the Joint Petitioners' services, and some telephone numbers sought by customers are not in the current local directories. The Public Staff noted that AT&T will distribute residential directories to Charlotte subscribers only upon demand pursuant to a Commission-approved pilot program. This will tend to reduce the amount of readily available telephone directories, a trend that would only increase if other ILECs were authorized to do likewise. This highlights the importance of a free local DA call allowance.

The Public Staff further noted that the rates for DA calls have risen significantly in the past several years. AT&T's average DA call rate has more than doubled from $0.25 in June 2006 to $0.61 in December 2008. Since 1999, Carolina Telephone's DA call rate has gone from $0.20 to $1.20, while Verizon's has increased in its former GTE-South service area from $0.25 to $1.25. These rate increases have likely contributed to the decreased volume of local DA calls handled by the Joint Petitioners as much as competition from alternative sources.

Finally, the Public Staff criticized the Joint Petitioners for not having met their obligations under their respective Price Plans when submitting increases, by either not filing any supporting data (AT&T) or only a limited amount (Embarq and Verizon). If the Commission

does not grant the Joint Petitioners' request outright, the Commission should require the Joint Petitioners to fully comply with the obligations of their Price Regulation Plans.

The **Attorney General** also recommended that the Commission reject the Joint Petitioners' request. It has long been the Commission's policy that telephone subscribers should receive a certain number of local DA calls for free. Phone books are not always up-to-date and fully accurate in a particular area. The movement toward not distributing white pages directories except upon request is likely to increase the demand for local DA. The Joint Petitioners' argument that reducing the DA call allowance would help them compete on a "level playing field" is unpersuasive. Reducing the free call allowance for local DA would have the opposite effect from the one the Joint Petitioners suppose. It would, if anything, tend to drive consumers to migrate to competitors who do offer free DA services themselves. Competing by *raising* costs on one's customers is a curious proposition.

Finally, the Attorney General suggested that the Commission consider the effect of reducing free DA allowances upon the Joint Petitioners' more vulnerable customers: for instance, low-income consumers and those in rural areas, many of whom either do not have computers or broadband access and are thus without effective Internet access. The Commission should also consider that, in these bad economic times, there are many consumers who have trouble making ends meet and do not need the additional burden of yet another increased charge for something that used to be free.

REPLY COMMENTS

The **Joint Petitioners** maintained that there was no dispute that DA service is a competitive offering, noting that the Public Staff had conceded that there are a variety of DA alternatives available to consumers. However, whether a telecommunications provider offers free DA allowances is not a "make-or-break" proposition when a customer chooses a provider; otherwise, the Joint Petitioners would not continue to lose customers to new market entrants such as Time Warner when Time Warner offers no free call allowances and charges its subscribers $1.50 per DA call. Moreover, the Joint Petitioners have experienced steep declines of over 50% between 2004 and 2008 in the demand for traditional DA services. Thus, the claims of harm by the Public Staff and Attorney General if the free DA call allowances are reduced are overstated.

The Joint Petitioners reiterated that customers have a wide range of DA alternatives. For those without ready computer access, such customers can access a number of free 800-type DA services such as 1-800-FREE411 and 1-800-GOOG411, and 1-800-THEINFO. With respect to the Charlotte trial concerning white pages delivery upon request, the Joint Petitioners doubted that this would add to the difficulty in finding local phone numbers and noted that AT&T estimates that less than 20% of its DA traffic is for residential listings. The Joint Petitioners challenged the Attorney General's assertion that the relief they seek would harm their ability to compete in the DA market. DA is only a very small subset of the services and features that the Joint Petitioners offer. What the Joint Petitioners desire is a level playing field and freedom from unnecessary regulatory constraints.

Finally, the Joint Petitioners reiterated their belief that the relief they seek would not harm the public interest. The market for DA service is highly competitive, and the claims of harm, or potential harm, made by the Public Staff and Attorney General are exaggerated and unsubstantiated.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to allow the Joint Petitioners to reduce their free DA call allowance from the current three to one. The Joint Petitioners have convincingly argued that DA calling is a competitive service and that the harm that might result from reducing the free DA call allowance from three to one is relatively small. The Commission believes that, overall, such a reduction is in the public interest.

While the harm of reducing the free DA call allowance from three to one is relatively small, the Commission is not convinced that the same can be said of a possible future reduction to zero. The Commission urges the Joint Petitioners to consider the situation of their customers of modest means. Such customers are having an especially hard time making ends meet in the current downturn. In addition, they lack reasonable access to computers and other means of communication that others take for granted. The Joint Petitioners have traditionally and rightfully prided themselves on being good corporate citizens. To continue to offer at least one free DA call is a way to show it-even if a future regulatory regime permits the Joint Petitioners to eliminate it.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of June, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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Commissioner Susan W. Rabon did not participate.

DOCKET NO. P-55, SUB 1022

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of BellSouth Telecommunications	)	ORDER RULING
Inc. to Provide In-Region InterLATA Service	)	ON WIN BACK
Pursuant to Section 271 of the	)	RESTRICTIONS
Telecommunications Act of 1996	)	

BY THE COMMISSION: On December 15, 2008, BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina (AT&T or Company) filed a Petition for Competitive Relief, asking that the Commission modify certain restrictions arising from the Commission's July 9, 2002, Order and Advisory Opinion Regarding Section 271 Requirements (Section 271 Order).

First, AT&T asked the Commission to remove the restrictions that prohibit AT&T from (a) engaging in "win back" activities for a period of seven calendar days after the customer switches to another local telephone company **[Restriction 1]** and (b) including marketing information in the final bill sent to the customer that has switched providers **[Restriction 3]**. If the Commission is not disposed to grant such relief, then, alternatively, AT&T requested that the Commission create parity among providers and apply the win back restrictions to all providers equally.

Second, AT&T requested that the Commission declare that it will interpret the provision in its Section 271 Order prohibiting the sharing of information from AT&T's wholesale unit with its retail unit **[Restriction 2]** consistent with Section 222 of the Telecommunications Act of 1996. Section 222 deals generally with duties related to the privacy of customer information, and Section 222(b) deals specifically with the confidentiality of carrier information.[1]

The relevant text of the Section 271 Order, Ordering Paragraph No. 2, at page 269 reads as follows:

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[1] Section 222(b) reads as follows: "A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." The import of this provision has been the subject of extensive comment in this proceeding due to AT&T's request for declaratory ruling by the Commission with respect to Restriction 2 above. The relevant line of cases started with the decision by the Chief of the Enforcement Bureau of the Federal Communications Commission (FCC) in *Bright House Network LLC et al. v. Verizon California, Inc. et al.*, File No. EB-08-MD-002 (Released April 11, 2008), where the Bureau concluded that Verizon's retention marketing practices involving the use by the retail organization of information gathered by the wholesale organization as part of the number porting process did not violate Section 222(b). However, the FCC itself overturned the Bureau's conclusion in *Bright House Networks, LLC v. Verizon California, Inc.*, 23 FCC Rcd 10704 (2008), concluding that Verizon's retention efforts did violate Section 222(b). (*Bright House Order*). On appeal by Verizon, the United States Court of Appeals for the District of Columbia Circuit found the FCC's interpretation of Section 222(b) reasonable in *Verizon California et al. v. FCC*, No. 08-1234 (Decided February 10, 2009)(*Verizon California*). Since the D.C. Circuit's decision came down after comments were received in this docket, the comments on the subject sometimes refer to it as pending.

> That with regard to potential anticompetitive marketing practices, AT&T shall abstain from any marketing activities directed to a customer for seven days after the customer switches to another local telephone company; that BellSouth's wholesale divisions are prohibited from sharing information concerning customer switches with its retail division; and that BellSouth shall not include marketing information in the final bill sent to a customer that has switched providers.

AT&T stated that, while these provisions showed a "degree of caution befitting the early days of competition" and were meant to curtail "potential dominant behavior and encourage competition," much has changed in six years and the win back moratorium is now a deterrent to full and robust competition. For example, in the most recent price regulation proceeding involving AT&T, the Commission found as follows: "AT&T has presented detailed information on the significant competitive alternatives to its basic local exchange service in Rate Group 10 provided by wireline CLPs, wireless carriers, and VoIP providers. After careful examination of the data presented in this docket, the Commission concludes that the degree of Rate Group 10 competition, both intermodal and intramodal, which AT&T faces today and which the Company will likely face in the future is meaningful and pervasive...." (Docket P-55, Sub 1022, April 14, 2008, Order, pp. 11-12) AT&T argued that continuation of win back moratorium restrictions on one carrier is unnecessary in today's market. Common sense suggests that a customer is less likely to switch back to AT&T seven days after he or she has switched than might be the case on the first or second day.

AT&T further argued that lifting the win back moratorium will not cause competitive harm, nor are any such moratoria in place in the 13 AT&T states outside the Southeast. Almost no other ILEC in North Carolina is subject to a win back moratorium, nor are CLPs. Indeed, the win back moratorium is at this point unreasonably discriminatory against AT&T. This can best be cured by either lifting the moratorium as it applies to AT&T (the preferable solution) or applying it to all providers.

AT&T also argued that the Commission should declare that the prohibition against sharing information will be interpreted in a manner consistent with Section 222 of the Telecommunications Act. AT&T maintained that the prohibition on sharing wholesale information with AT&T's retail division, if interpreted too broadly, could cause harm to consumers by depriving them of the benefits of vigorous competition among providers. As such, the Commission should declare that the prohibition against sharing information will be no more stringent than the current prohibition contained in Section 222, as interpreted at the federal level.

COMMENTS

The Public Staff noted that AT&T has requested that Restrictions 1 and 3 should be removed or else applied to all carriers equally. AT&T also asked the Commission to issue a declaratory ruling that it will interpret Restriction 2 consistent with Section 222 of the Telecommunications Act and federal law. The Public Staff also noted that, while Verizon and Embarq were not impacted by the Section 271 Order, they had agreed not to contact a former customer for at least seven days after the customer switched to another carrier (Restriction 1).

The Public Staff identified the first factor leading to the imposition of Restrictions 1 and 3 as concern that AT&T would use its significant market power in an anti-competitive manner to induce former customers to switch back from the new carrier in the days immediately after switching from AT&T's service. At the time, the Public Staff believed that these win back restrictions were merited to protect the nascent CLP industry. However, at this point, the Public Staff believes that the competitive market for local customers has matured since the issuance of the Section 271 Order and that the win back restrictions are no longer necessary to combat potential anti-competitive actions by AT&T.

With the exception of multi-line business customers, switching local providers is now typically an uneventful process that proceeds rapidly and without incident.[1] The Public Staff believes that customers who have completed the switching process to a new carrier are no more likely to switch back to AT&T during the initial seven-day period than after its expiration. Thus the Public Staff no longer believes Restriction 1 is necessary or effective in safeguarding customers and CLPs from potential anti-competitive conduct by AT&T, with the possible exception of multi-line business customers. While acknowledging that potential harm to CLPs of the removal of Restriction 1 is "somewhat greater" in regard to multi-line business customers, the Public Staff also candidly stated that it "does not believe this potential harm rises to such a level that multi-line business customers should be treated differently."

With respect to Restriction 3, concerning the inclusion of marketing materials in the customer's final bill, the Public Staff also believes that this restriction should be removed. It confers no public benefit and does not in itself prevent anti-competitive conduct by AT&T. It may, in fact, hamper end users from acquiring information that would assist them in obtaining service at the lowest rates. While not directly advocating it, the Public Staff stated, in the alternative, that the Commission could conclude that, in general, AT&T's market power has been diminished such that removal of the win back restrictions is appropriate at this time, while maintaining Restriction 1 for multi-line business customers only. Restriction 3, however, could be removed with respect to multi-line business customers.

With respect to AT&T's alternative—that, if the win back restrictions are not removed, the restrictions should be imposed on all providers, the Public Staff doubted this would be a workable solution because of the uncertainty regarding the regulatory status of some of AT&T's competitors. In any event, there would be considerable difficulty in enforcing such restrictions on carriers that do not fall under the Commission's jurisdiction.

The final portion of AT&T's Petition requested that the Commission issue a declaratory ruling stating that it will interpret Restriction 2 as set out above consistent with Section 222 of the Act and federal law. However, AT&T has not cited any case or controversy in which Restriction 2 is an issue, nor did it indicate any course of action that it might pursue if the Commission did make the requested ruling. The Commission does not have the jurisdiction to

[1] The Public Staff observed that the process of switching a multi-line business customer is both lengthier and more complex than with an average customer. A successful conversion may require several days to resolve all the issues arising out of the conversion. The AT&T proposal could have the effect of allowing AT&T to initiate efforts to win back such former customer prior to the resolution of all the conversion issues with the new carriers.

review a matter which does not involve an actual controversy.[1] AT&T has essentially requested that the Commission apply the governing law if such a question arises. This is unnecessary. The Commission should deny AT&T's request to amend the Section 271 Order to clarify the prohibition on sharing information between AT&T's wholesale and retail units.

The Attorney General stated that he did not oppose the elimination of Restrictions 1 and 3. With respect to Restriction 2, the Attorney General characterized AT&T's request as premature. The Commission should not commit itself, in advance, to follow the interpretation or rationale of a federal court when the Commission lacks knowledge as to what the federal court will do.

Competitive Carriers of the Southeast (CompSouth)[2] said AT&T's Petition should be more properly characterized as a "Request for Abandonment of Competitive Protections." It opposed AT&T's Petition in all respects. CompSouth maintained that the protections that AT&T now seeks to remove were integral to the Commission's original endorsement of Section 271 relief. Restrictions 1 and 3 create a "quiet period" in which AT&T cannot market directly to the customer that has left. Such a policy is important and useful in the small and medium business market, where AT&T is not only a retail competitor but is also providing the loop facilities a CLP is using to provide service. CompSouth members focus on that market. The service-initiation period is, CompSouth argued, critical to gaining customer confidence and reinforces the necessary separation between AT&T's retail marketing and its provision of wholesale facilities. The small and medium business market is a sophisticated market and is well aware of AT&T's products when they make a decision to use a competitor. AT&T has plenty of opportunity to market to such businesses *before* they choose to go to a competitor. Restrictions 1 and 3 simply close the window while the service is in the process of being *provisioned*. This "quiet period" does not disadvantage AT&T to any material degree.

CompSouth also asserted that AT&T's network serving the business community is the largest and most extensive in the state, and it continues to expand. Despite the best efforts of CompSouth's members, AT&T's share of the business market in North Carolina has been stable for as long as the FCC has been collecting market share information that separately tracks conditions in the residential and business markets. Moreover, AT&T remains the monopoly provider of the wholesale high-capacity loops upon which most competition for the small and medium business customers depends. In contrast to the residential market, where cable-based providers have made inroads, competition in the business market remains heavily dependent on wholesale facilities obtained from AT&T. The "quiet period" provides a responsible measure of competitive protection commensurate with AT&T's market position.

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[1] See *State ex. rel. Util. Comm'n v. Public Staff*, 123 N.C. App. 43, 472 S.E.2d. 193 (1996); *Funk v. Masten*, 121 N.C. App. 364, 465 S.E.2d 322 (1996).

[2] CompSouth is the regional trade association representing competitors to ILECs in the nine-state region served by the former BellSouth prior to its absorption into AT&T. CompSouth's members are Access Point, Inc., Birch Communication (fka Access Integrated Networks, Inc.), Cavalier Telephone, Cbeyond Communications, Covad Communications Company, DeltaCom, Level 3 Communications, Momentum Telecom, Inc., NuVox Communications, Inc., Sprint Nextel, tw telecom, inc. and XO Communications Services, Inc.

Lastly, CompSouth argued that the Commission should deny AT&T's request with reference to Restriction 2. It would weaken the provision that AT&T may not share information between its wholesale and retail operations by asking the Commission to "interpret" its clear and unambiguous prohibition according to a decision that has not yet been reached as of the time of its comments in the *Verizon California* case. Aside from the fact that several of the issues raised in *Verizon California* are not relevant to the prohibitions, there is nothing in the Commission's Section 271 recommendation or in the FCC's approval of the subsequent application, that suggests that the prohibition on AT&T's sharing information it gained as the monopoly provider of wholesale services with its retail operations stems from Section 222(b) of the Act, which is the subject of the Verizon appeal. Rather, the Commission included the requirement to address "CLP's concerns about BellSouth's allegedly aggressive win back tactics," without reference to Section 222(b). There is no link between the Commission's policy and the federal statutory provision that the Court *may* interpret later.

Time Warner Cable Information Services (North Carolina), LLC (TWC) argued that the Commission should reject AT&T's Petition or, at a minimum, reaffirm the ban on retention marketing and refrain from making a speculative ruling in anticipation of a possible decision by a court of appeals in the pending appeal. TWC characterized AT&T's Petition as AT&T's purporting "to seek relief from restrictions on its ability to engage in 'winback' marketing,' which is directed at former customers after they leave AT&T," while also reflecting "AT&T's stated desire to engage in 'retention' marketing—including, in particular, its interest in using wholesale information, such as local number portability requests, in efforts to persuade customers to cancel orders to switch to a competing provider." TWC said that such retention marketing is "flatly prohibited by the Communications Act of 1934, as amended, and FCC precedent."

By way of background, TWC stated that the FCC in 1998 interpreted Section 222(b) of the Communications Act to prohibit carriers from engaging in retention marketing using a competitor's proprietary information, such as a carrier change request submitted for the purpose of facilitating a number port. ILECs sought forbearance of this provision, but the FCC rejected those claims the following year. The ILECs accepted and complied with this restriction, until Verizon commenced an unlawful retention marketing campaign in 2007, spurring a complaint by cable telephony providers, including TWC's affiliates, leading to the FCC's *Bright House Order*. Despite this ruling, AT&T continues to maintain in pleadings before the FCC and through its trade association to the D.C. Circuit that such retention marketing benefits consumers.

In view of the above, TWC finds AT&T's interest in using wholesale carrier-to-carrier information for purposes of retention marketing to be troubling. In addition, according to press reports, antitrust regulators recently filed a complaint against AT&T for violating a condition of its merger with Dobson Communications Corp. relating to restrictions on win back marketing. AT&T had agreed to divest certain wireless divisions and to operate those businesses independently through a trustee until they were sold. However, employees had access to sensitive information stored in shared databases, which were allegedly used to solicit customers of supposedly independent businesses by offering them preferential treatment including waiver of early termination fees. In order to settle the alleged violations of the merger agreement, AT&T entered into a consent decree and committed to paying a $2 million penalty. TWC said

that this occurrence means that any relief from the restrictions relating to win back or retention marketing is unjustified. The Commission should strongly reaffirm that retention marketing based on the sharing of wholesale information is strictly prohibited. The Commission should not issue an advisory opinion about a hypothetical court decision but should rather evaluate whatever opinion is handed down.

Carolina Telephone Company LLC and Central Telephone Company and the **Joint Commenters**[1] (for the sake of convenience, all will be referred to as the Joint Commenters) stated that they supported AT&T's requests for relief from the Section 271 restrictions related to customer retention, while opposing the alternative proposed by AT&T, if its request is turned down, that all carriers be subject to the same customer retention restrictions. The Joint Commenters supported AT&T's request to interpret the Section 271 Order in a manner consistent with federal law with respect to AT&T's sharing of information between its wholesale and retail units.

AT&T REPLY COMMENTS

AT&T noted that, of the seven filings submitted in response to its Petition, five of the filings, including those filed by the Public Staff and Attorney General generally supported AT&T's request to modify restrictions relating to its win back activities. Two letters were received, one from the Better Business Bureau of the Southern Piedmont and the other from consumer and NAACP Area 3 District Director Yvonne Pettis. Both of these were also supportive of easing the win-back restrictions. Unsurprisingly, the two other filings which opposed easing the restrictions came from AT&T's competitors.

In reply to **TWC's** comments, AT&T contended that it had erected the straw man that AT&T was "really" seeking through its Petition to engage in "retention" marketing activities by using wholesale information to persuade customers to cancel orders to switch to a competing provider. TWC then devoted the rest of its Comments to explaining why such retention marketing is illegal, a point that AT&T never argued otherwise. In any event, AT&T made clear in its petition that it was not asking the Commission to rule on the legality of retention marketing activities at issue in the *Bright House Order*; rather, it was asking merely that the Commission interpret its restriction concerning the sharing of customer information between AT&T's wholesale and retail groups in a manner consistent with whatever federal precedent was set. That federal precedent now exists in the *Bright House Order*. AT&T also emphasized that it does not engage in retention marketing activities at issue in the *Bright House Order*; and, in any event, it is clear that no telecommunications carriers can do so anyway. To grant the relief that AT&T seeks, the Commission would merely need to note that such relief permits win-back activities not already invalidated by the FCC and sustained by the *Bright House Order*.

In reply to **CompSouth's** comments, AT&T noted that the Commission had conducted detailed analyses of AT&T's North Carolina markets twice in the last four years and had found

[1] The Joint Commenters include the following companies: The Alliance of North Carolina Independent Telephone Companies (which include Comporium, Ellerbe Telephone Company, LexCom Telephone Company, MebTel Communications, and North State Telephone Company), Randolph Telephone Company, Verizon South, Inc., Windstream North Carolina LLC and Windstream Concord Telephone, Inc.

them so pervasively competitive that it had granted AT&T significant regulatory relief as a result. Moreover, AT&T's role as a wholesale provider of telecommunications services has no impact on any existing obligation under federal law or interconnection agreements to provide wholesale services to CompSouth's members.

COMMENTS ON *VERIZON CALIFORNIA*

On February 13, 2009, **CompSouth** filed further comments purporting to specifically address the *Verizon California* case, decided by the D.C. Circuit on February 10, 2009, which sustained the FCC's *Bright House Order.* Although this round of comments had not been authorized, the Commission accepted CompSouth's comments and allowed parties other than CompSouth and AT&T to also file replies, with AT&T being authorized to file a later response.

A review of CompSouth's Reply Comments shows that it did not, in fact, directly address the *Verizon California case* except to say that the *Verizon California case* had rendered moot any necessity for the Commission to interpret its rule that AT&T's wholesale division may not share information with its retail division. Rather, CompSouth argued that, although the Public Staff had correctly identified the problem with respect to multi-line business customers, the Public Staff was mistaken as to extent of the negative impact on them if the restrictions were removed and unnecessarily cautious about treating them differently. CompSouth observed that there is nothing unusual about treating multi-line business customers differently and that the FCC collects data on this particular segment of the market.

TWC concurred with CompSouth that AT&T's request for a declaratory ruling "authorizing it to engage in retention marketing" had been rendered moot by the *Bright House Order* and hence should be rejected. TWC further noted that advisory opinions are generally to be avoided under the law. Such opinions are not appropriately invoked to determine matters purely speculative, render anticipatory judgments, deal with theoretical problems, or answer moot questions. See, e.g., *Little v. Wachovia Bank,* 252 N.C. 229, 243 (1960).

AT&T noted that, contrary to TWC's comments, it had never stated a desire to use wholesale information to persuade customers to cancel orders to switch to a competitor, noting that in its initial Petition it stated that it was "not asking the Commission to rule on the legality of the retention marketing activities at issue in the federal court case" but was rather seeking a declaration that the Commission would interpret its prohibition on the sharing of wholesale information consistent with Section 222 of the Act. It also explicitly denied that it engaged in the retention marketing activity at issue in the Verizon appeal. As for CompSouth, AT&T believes that CompSouth has underrated how much competition AT&T itself faces, including specifically the business market. *See,* e.g., the Commission's April 29, 2005, *Order Approving Modified Price Regulation Plan* where the Commission noted the "increasingly intense nature of competition for business customers" throughout AT&T's service area, the extensive choices available, and the fact that business customers in North Carolina were the "clearest beneficiaries" of such competition. In 2008, the Commission concluded that the competition facing AT&T had "continued to increase."

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration of the filings in this docket, the Commission concludes that good cause exists to remove Restriction 1 (forbidding AT&T to engage in win back activities for a period of seven calendar days after the customer switches to another local telephone company) and Restriction 3 (forbidding the inclusion of marketing information in the final bill sent to the customer that has switched providers. The Commission further concludes that AT&T's request that the Commission issue a declaratory ruling that it will interpret its Section 271 Order prohibiting the sharing of information from AT&T's wholesale unit with its resale unit consistent with Section 22 of the Telecommunications Act (Restriction 2) should be denied as moot in light of the D.C. Circuit's decision in the *Verizon California* case in which it sustained the FCC's *Bright House Order*. It is therefore not necessary to further address Restriction 2 inasmuch as the *Verizon California* case speaks for itself.

Essentially, this proceeding addresses the timing of efforts by AT&T to win back customers who have already left it.[1] It most often revolves around the porting process. Obviously, the wholesale division of AT&T (or any other similarly situated carrier, for that matter) must have actual knowledge in advance that a customer intends to leave it, so that it may assist the other carrier in making this transfer happen. The removal of Restrictions 1 and 3 simply means that, at such time as the transfer of the customer to the other carrier has been accomplished, then AT&T's retail division can legally do what almost any other competitor can do—that is, to communicate with the former customer in an effort to win him or her back, instead of having to wait seven days after the switch or being forbidden to include win back information in the final bill after the switch.

The restrictions at issue in this case were accepted by AT&T (then BellSouth) in 2002 as a part of the Section 271 process in which the Company sought legal authorization from the FCC to provide interLATA services. The purpose of including these restrictions was to curb potential anticompetitive marketing practices, reflecting concerns arising out of the state of competition in the telecommunications marketplace at that time. Times change, and it cannot be doubted that the marketplace for telecommunications services generally is now more significantly and robustly competitive than it was in 2002. AT&T has cited to this Commission's statements to that effect in recent price plan cases. AT&T also noted that such restrictions are not in place in the 13 AT&T states outside of the Southeast, and that almost no other ILEC or CLP is similarly restricted. The Commission finds it significant that both the Public Staff and the Attorney General, who represent the interests of the using and consuming public, have been supportive of AT&T's request for relief as to Restrictions 1 and 3. Unsurprisingly, AT&T's competitors opposed lifting Restrictions 1 and 3.

The Commission believes that the degree of competition existing in today's telecommunications marketplace in North Carolina is such that it is reasonable to remove Restrictions 1 and 3 for the reasons set forth by AT&T, the Public Staff and the Attorney General. The sole sub-issue that requires further specific examination is whether Restriction 1

[1] The term "win back" pertains to efforts of a company to lure back customers *who have already left the company*, whereas "retention marketing" pertains to efforts of a company to persuade customers who are in the process of leaving the company *not to do so.*

should be maintained for multi-line businesses. The Public Staff observed that, while switching local providers is now "typically an uneventful process that proceeds rapidly and without incident," the process is lengthier and more complex with respect to multi-line businesses, since a successful conversion may require several days to resolve all the issues arising out the conversion. The concern is that total relief from Restriction 1 might allow AT&T to initiate win back efforts before all conversion issues had been resolved. Significantly, after raising the question, the Public Staff answered it by stating that it did not believe that "this potential harm rises to such a level that multi-line business customers should be treated differently." As part of its general opposition to the removal of any of the restrictions, CompSouth extolled the "quiet period" created by Restriction 1 as critical to gaining customer confidence, and thus those restrictions should be maintained. But CompSouth also characterized the small and medium business market as a sophisticated market that is well aware of AT&T's products when such companies make the decision to switch.

The Commission concurs with the Public Staff's ultimate conclusion that the potential harm of AT&T's initiating win back efforts before all conversion issues are resolved does not rise to the level that multi-line business customers should be treated differently from other customers for the purposes of relief from Restriction 1. CompSouth itself has characterized the small and medium business market as a sophisticated one. As such, the members of this class have presumably made a considered decision to switch carriers from AT&T and are thus unlikely, even if the conversion process is not entirely complete, to succumb without good cause to the blandishments of AT&T to return to its fold. AT&T should be able to compete in this respect on a level playing field with *its* competitors who are not, and never have been, subject to the same restrictions it has been.

Finally, we note that certain comments have characterized this case, or primary portions of it, as one of "retention marketing" as opposed to "win back." This case is not about "retention marketing." The relief that AT&T was seeking with respect to Restrictions 1 and 3 was substantive and pertained to win back, while the relief that AT&T sought with respect to Restriction 2 did not seek to require that the Commission make any independent, substantive decision regarding "retention marketing," whatever AT&T's hopes and expectations were from the FCC and the courts. Rather, it was a request, in essence, that the Commission declare that it would follow the law with respect to the prohibition of the sharing of information from AT&T's wholesale unit to its retail unit, whatever the reach of the law was determined to be by higher authority. As noted above, the Commission believes that this issue is now moot; and the Commission, therefore, has declined to issue such declaratory ruling.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 23rd day of March, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

DI032309.01

Commissioner Bryan Beatty and Commissioner Susan Rabon did not participate.

DOCKET NO. P-118, SUB 86
DOCKET NO. P-16, SUB 181

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Violations of Statutes and Commission	)	ORDER FINDING WINDSTREAM IN
Rules by Windstream North Carolina,	)	VIOLATION OF STATUTE AND
LLC, and Windstream Concord Telephone,	)	COMMISSION RULES AND REQUIRING
Inc.	)	WINDSTREAM TO CEASE AND DESIST

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on Monday, March 9, 2009 at 2:30 p.m.

BEFORE: Chairman Edward S. Finley, Jr., Presiding; Commissioners Robert V. Owens, Jr.; Lorinzo L. Joyner; Howard N. Lee[1]; William T. Culpepper, III; Bryan E. Beatty; and Susan W. Rabon

APPEARANCES:

For Windstream North Carolina, LLC. and Windstream Concord Telephone, Inc.:

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BY THE COMMISSION: On February 18, 2009, the Public Staff filed a Petition for Commission Investigation and Order to Cease and Desist in the above referenced dockets. In its Petition the Public Staff alleged that it had received an email inquiry from a customer of Windstream North Carolina, LLC[2] seeking to ascertain if Windstream had sought and received Commission approval to change Windstream's prior billing practice which required Windstream to prorate charges or provide credit for any partial periods if the customer terminated services on a date prior to the last day of Windstream's billing cycle. According to the notice received by the

[1] Although Commissioner Howard N. Lee participated in the oral argument on March 9, 2009, he resigned from the Commission on March 31, 2009 and did not participate in this decision.

[2] Windstream consists of Windstream North Carolina, LLC., and Windstream Concord Telephone, Inc.. Depending upon the circumstances, Windstream may be referred to as "Windstream", "Windstream North Carolina" or "Windstream Concord Telephone."

customer, Windstream would discontinue its prior billing practice which required the proration of charges if the customer terminated his service prior to the last day of the company's billing cycle as of January 7, 2009 and replace it with the new billing policy which "will not prorate charges or provide credit for any partial periods if you change, add or terminate your service on a date prior to the last day of your billing cycle." The Public Staff's discussions with officials at Windstream subsequently confirmed that Windstream had, indeed, notified its customers of the change in billing practices and had begun to implement the change.

According to the Public Staff, Windstream did not inform the Commission or the Public Staff of this change in billing practice by means of a tariff revision or otherwise seek approval to make a change in its rates. The Public Staff asserted that it could find no provision in the tariff or price regulation plans of Windstream allowing Windstream to stop prorating charges without formal notice. Because the Public Staff believed that Windstream might have violated certain statutes and regulations, specifically, G.S. 62-140 and Commission Rule R9-4(b)(5) and the Public Staff's concern that Windstream's customers would be unjustly harmed by the new billing practices, the Public Staff requested the Commission to order Windstream to cease and desist implementing the new billing practice until the Public Staff had an opportunity to initiate an investigation and make a determination of whether Windstream had in fact violated Commission rules and regulations, and, if so, whether affected customers are due refunds from Windstream.

In response to the representations made in the Petition, the Commission issued an order dated February 19, 2009:

1. Scheduling an oral argument on an expedited basis with respect to the allegations contained in the Public Staff's Petition for Monday, March 2, 2009 at 1:30 p.m. in the Commission Hearing Room 2115, Dobbs Building, Raleigh, North Carolina;

2. Requiring Windstream to maintain adequate accounting records to ensure that refunds can be provided to any customers adversely affected by Windstream's change in billing practices; and

3. Requiring Windstream to answer the Public Staff's data request that was attached to the Petition and to file a response to the Public Staff's Petition by February 26, 2009.

On February 26, 2009, Windstream responded to the Petition. Briefly summarized, Windstream asserted that it implemented its minimum billing policy, or non-proration policy, in January, 2009. Windstream argued that its minimum billing policy is not precluded by and is in fact authorized under local general tariffs and price regulation plans. Further, Windstream asserted that its minimum billing policy did not change rates assessed to customers and instead merely reinforced the existing local/general tariff provisions which provide for monthly service terms. According to Windstream, the non-proration policy is intended to minimize customer confusion over prorated charges and results in certain practical benefits to customers who may add services in the middle of a bill cycle. For those reasons, Windstream asked that the Petition be denied.

After once being rescheduled, an oral argument was held on March 9, 2009, in which the Public Staff and Windstream participated. Both parties reiterated and expanded upon points made in their written filings and responded to the Commissioners' questions.

In its argument before the Commission, the Public Staff stated that, although Windstream has a price regulation plan which includes untariffed services such as bundled services, the subject of the Public Staff's Petition was the tariffed local exchange services of Windstream, and the issue was whether Windstream could eliminate the proration of those tariffed local exchange services without filing with the Commission a new tariff for approval.

The Public Staff noted that G.S. 62-133.5 governs price plan companies and acknowledged that Windstream is a price plan company. Windstream argued that, as a price regulation plan Company, it has bundled services that are not tariffed. While this may be true, as explained by the Public Staff, this is irrelevant to the present proceeding, because the Public Staff is only addressing Windstream's tariffed rates—not bundled services or any other service excepted from regulation by statute or its price regulation plan.

Windstream asserted during oral argument that discontinuing the proration of monthly charges is already contemplated in its North Carolina tariffs and, therefore, does not need to be specifically included in its tariffs. Windstream further argued that the practice is also allowed by its price regulation plan. The Public Staff, however, provided substantial evidence refuting Windstream's argument.

The Public Staff provided support for its position that Windstream's non-proration policy is in fact precluded by Windstream's tariffs that are on file with the Commission and also are in violation of its price regulation plan. The Public Staff presented copies of relevant sections of Windstream's tariffs. Alltel Carolina, Inc.'s (now known as Windstream North Carolina) General Subscriber Services Tariff Section 2.3.14.b—Termination of Service at Subscriber's Request provides:

> Service may be terminated at any time upon reasonable notice from the subscriber to the Company. Upon such termination the subscriber shall be responsible for the payment of all charges due. This includes all charges due <u>for the period service has been rendered</u> plus any unexpired portion of an <u>initial</u> service period or applicable termination charges, or both.

(Emphasis added.)

Windstream Concord's General Exchange Tariff Section 22.B.1., which specifically deals with termination of contracts, has similar language:

> Contracts may be terminated at any time after the expiration of the initial first month contract period upon reasonable notice in writing from the subscriber, upon payment of all charges due <u>for the period service has been rendered</u>.

(Emphasis added.)

The Public Staff further argued that the above tariff sections specifically speak to what the customer is obligated to pay if he terminates service. The Public Staff further argued that if Windstream does not allow proration of a customer's charges when the customer terminates service before the end of the billing period, the customer is being charged for service that he is not receiving.

The Public Staff noted that Windstream's reference to Tariff Section 2.3.5a - Initial Service Periods, only defines the minimum period of service for which a customer will be charged. This tariff section provides for an "initial" minimum period of service of one month for all customers, unless otherwise specified, during which customers will be charged for the initial first month of service regardless of whether the customer discontinues service within that first month of service. The Public Staff acknowledged the right of Windstream to impose this minimum charge, as this practice has already been approved by the Commission, but argued that after this initial month, customers should only be charged for services rendered as stated in Windstream's own tariff. Additionally, the Public Staff argued that Windstream would have to change this language and get Commission approval before it implemented its non-proration policy, because it intends to charge beyond the period that "service is rendered."

The Public Staff also presented what it contended was the most express indication of a proration requirement, Windstream North Carolina's Tariff Section 2.4.4b—Payment for Service, which provides, in part:

> The subscriber is responsible for payment of all charges for services furnished the subscriber, including charges for services originated or charges accepted at the subscriber's station.

(Emphasis added.)

	ASOC
Local Service Proration	PRO

The Public Staff pointed out that the specific reference to Local Service Proration in the tariff, along with coding, in the payment section of Windstream's tariff, clearly shows that Windstream's tariffs require proration, and, therefore, Windstream's non-proration policy is in violation of its own tariffs.

Windstream argued that the only tariff provisions providing for proration are Section 28.31 of Windstream Concord's tariffs and Section 2.4.5 of Windstream NC's tariffs, which specifically deal with Interruption of Service, not termination of service. The Public Staff, however, argued that these tariff sections only pertain to situations where the customer has not voluntarily terminated service but has an interruption due to circumstances beyond the customer's control. Therefore, these sections have relevance only with regard to service interruptions, because there is a tariff section specifically dealing with customer requests for termination. The Public Staff also argued that the fact that the word "prorate" is specifically

mentioned in one separate section of a company's tariff should not be interpreted to mean that Windstream does not have to prorate in any other instance.

After showing that Windstream's tariffs require proration, the Public Staff argued that Windstream is required by Section 6 of its price regulation plan to file revised tariffs with the Commission.

Section 6.A(4) of Windstream's price regulation plan provides:

> The Company will file tariffs with documentation demonstrating that all price changes comply with the pricing constraints set forth in this Plan.

Section 6.B(4) provides, in part:

> Price increases or decreases can be made at any time, subject to Commission review and approval.

In addition to the Public Staff's argument that Windstream's tariffs require proration and the Companies are required to file revised tariffs with the Commission, the Public Staff also argued that Windstream should have filed revised tariffs because the change in proration policy, effectively, caused a change in Windstream's rates. The Public Staff stated that Windstream did change its rates for service, because it increased the charge imposed for customers only receiving a partial month of service.

The Public Staff noted that G.S. 62-3(24) defines rate to mean "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 compensation, charge, fare, tariff, schedule, toll, rental or classification." (Emphasis added.)

The Public Staff also noted that the statute defines "rate" as not only the dollar amount, but also as the practices affecting any compensation. Additionally, the Public Staff argued that Windstream clearly changed the rules and practices affecting the compensation it receives for its services, and, as such, Windstream changed the rates that it imposes on customers. According to the Public Staff, the changes made by Windstream represent a modification of the rate structure in that the service covered by its rate elements now differs from that furnished prior to the modification; and that Windstream has restructured its monthly rates so that they apply, not just for 30 days of service, but for as little as one day as well.

Windstream contended that its non-proration policy did not necessitate a tariff revision because it did not involve any change in rates. Windstream further stated that it made no change in its service rates set forth in its tariffs. Windstream also stated that the definition of "rate" under G.S. 62-3(24), did not apply to price regulation plan companies. The Public Staff replied, however, that G.S. 62-133.5(g) lists sections of Chapter 62 that do not apply to price plan companies, and G.S. 62-3(24) is not one of the sections deemed inapplicable.

The Public Staff also stated that Section 5 of Windstream's price regulation plan requires Windstream to file revised tariffs changing rates, and also requires Windstream to quantify the Price Regulation Plan revenue impact due to eliminating the proration of charges. Section 5.A provides, in part:

> The Company will file tariffs for services included in any of the four service categories. These tariffs will specify the applicable rates, terms and conditions of the services.

Further, Section 5.A(1) states:

> The Commission may on its own motion, or in response to a petition from any interested party, investigate whether a tariff is consistent with this Plan and the Commission's rules, and whether the rates, terms and conditions of the services are in the public interest.

The Public Staff maintained that if the Commission accepts that the change in Windstream's proration practice amounts to a change in Windstream's rate that affects the compensation of the Company—and the Public Staff believes that it does— then Windstream must follow the statutory procedures, Commission rules, and its own price regulation plan rules prescribed for changing its rates.

The Public Staff also argued that Windstream violated Commission Rule R9-4 because it did not file a tariff revising its rates. Rule R9-4(b)(5) applies to every company regardless of whether it is a Price Plan company unless the rules of the price regulation plan relieves them of this provision. The rule requires that, when a company desires to make changes in its rates, an official tariff filing shall be made to the Commission. Windstream's price regulation plan does not exempt it from the requirement to file tariffs affecting the basic local exchange services at issue here.

Windstream's price regulation plans instead requires the Companies to file any change to rates. Section 5 of the price regulation plan requires the Companies to file any change in rates, and Section 6 requires the filing of tariffs when the Companies desire to adjust prices in any of the four service categories. Windstream's price regulation plan also requires that the proposed rate changes be evaluated for their effect on the service categories' Service Price Index (SPI). If the proposed rate changes result in increase in the service categories' total annual revenues, the SPI goes up; if the proposed rate changes result in a decrease in the service categories' total annual revenues, the SPI goes down.

The Public Staff noted that, in response to the Public Staff's Data Request Question #9, Windstream stated that it was unable to project the revenue effect that will result from the change in proration policy. Windstream stated that the revenue impact will be based on a number of variables that are difficult to predict. It is telling that Windstream made no attempt to determine the revenue impact. The Public Staff, with access to far less information than is available to Windstream, was able to conclude that the impact would favor Windstream. Clearly, an increase

in annual revenues would have an impact on the SPI, and must be evaluated prior to this policy change taking effect.

Windstream argued that proration is not specifically required under the statutes or the Commission's rules. The Public Staff replied that North Carolina statutes and the Commission's rules presume that consumers will be charged rates only for services rendered by a utility, and the Commission is charged by law under G.S. 62-2(4) to ensure that consumers only pay just and reasonable rates for those services. The Public Staff noted that the policy of prorating monthly charges has been in place in North Carolina literally for decades, and is known and understood by all regulated incumbent local exchange companies operating within the State.

In support of its argument that proration is presumed, the Public Staff referred to G.S 62-3(23)a.6, which defines a telephone public utility as an entity that operates equipment or facilities for: "conveying or transmitting [of] messages or communications by telephone, where such 'service' is offered to the public for compensation...." The Public Staff concluded that inherent in the definition is the presumption that a public utility will only charge for service rendered, and it follows that proration is required when a customer terminates service before the end of the billing cycle. Additionally, the Public Staff referred to G.S. 62-3(27), which defines the term "service" as "any service furnished by a public utility," thereby also giving rise to the assumption that the utility has to furnish a service in order to receive compensation.

Windstream argued that the Commission's rules pertaining to billing, Rules R12-9 and R12-17, do not require proration. The Public Staff countered by pointing out that, although Rule R12-9 does not specifically mention proration, it does state a declaration of Commission policy that no penalties or rate differentials shall be imposed on customers for services. The Public Staff argued that, under Windstream's non-proration policy, there was a rate differential between customers who were charged for a month of service that they received and those customers who were charged for a month of service even though they did not receive a full month of service. The Public Staff also noted that Rule R12-17 only pertains to billing for services received.

Windstream stated that it decided to cease prorating customer bills because proration caused customer confusion and a substantial increase in customer complaints. The Public Staff refuted Windstream's contention by referring to Windstream's responses to Public Staff Data Request No. 11. In response to the question of how many inquiries were received by Windstream's customer service personnel regarding prorated charges, and what percentage this was of total inquiries received, Windstream stated:

> Windstream does not maintain the data requested in a readily available format, and the requested data for the period indicated would be very time-consuming and burdensome to obtain as Windstream's corporate electronic data systems do not contain a specific indicator to track only proration inquiries.

In response to Public Staff Data Request No. 12, regarding how many complaints were received by Windstream regarding prorated charges during the 12-month period prior to implementing the new "non-proration" policy, Windstream stated:

> Windstream does not maintain the data requested in a readily available format, and Windstream's corporate electronic data systems do not contain a specific indicator to track only proration complaints....Windstream notes that one category of complaints that can relate to proration and is tracked by Windstream is 1st Bill/Bundling. Of the 279 total complaints that Windstream received during the year 2008, one (or .4%) was attributable to 1st Bill Bundling.

The Public Staff noted that the information provided by Windstream in no way supports Windstream's alleged impetus for changing its policy regarding proration. Additionally, the Public Staff concluded that, regardless of the actual number of complaints, Windstream did not follow the proper statutory or price plan procedures, and should cease implementing the non-proration practice and refund amounts collected.

During oral argument, the Public Staff asked the Commission to order Windstream to cease its current billing practice regarding proration until it has filed with the Commission a tariff and supporting documentation and received approval to implement the revised tariff. The Public Staff also requested that Windstream quantify the price regulation plan revenue impact due to eliminating the proration of charges. It was the opinion of the Public Staff that the affected customers are being harmed by Windstream's non-proration policy. If Windstream has applied this practice to any customer's bill since the change was instituted, the Commission should require Windstream to refund the amount billed for the portion of service that the customer did not receive. The Public Staff noted that time is of the essence in ordering Windstream to cease this practice and issue refunds, because there is a strong possibility that the longer the wait, the greater the likelihood that customers will not be able to be contacted to receive a refund.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The issues in this case arise because of the legislature's enactment of G.S. 62-133.5. With the adoption of that legislation, the legislature largely freed incumbent local exchange telephone companies that chose to adopt alternative forms of regulation, with Commission approval, from many of the rules and regulations that governed their conduct under traditional rate of return regulation. Slowly, but surely, most incumbent telephone companies opted for this new alternative regulatory regime. Windstream opted to abandon rate of return regulation in favor of price plan regulation in 1998 pursuant to this option.

The transition from the rate of return regulatory environment to the price plan regulatory regimen has, for the most part, been uneventful. However, as counsel for Windstream duly noted, at times there appear to be conflicts between the regulatory policies generally embodied in

Chapter 62 and the specific policies established in G.S. 62-133.5. The Commission is confronted with just such a conundrum in this case.

In these dockets, Windstream argues that the specific policies inherent in the adoption of G.S. 62-133.5, which limit Commission supervision and regulation of a price plan company's activities, negate the Chapter 62 general policy requiring regulated companies to file with and receive the Commission's prior approval for changes in practice such as the one here proposed. Windstream argues that, in adopting the price plan legislation, the legislature explicitly exempted price plan regulated telephone companies from the general mandates of G.S. 62-134(a), which explicitly precludes any public utility from making any changes to its rates except after 30 days notice unless otherwise ordered by the Commission. See G.S. 62-133.5(g). Further, Windstream argues that the change here proposed is not a change in rates at all, but rather a refinement and restatement of the tariff that is consistent with the original tariff. As such, Windstream argues that neither the statutes nor the Commission rules require that this refinement be filed with the Commission or the Public Staff.

On the opposite end of the spectrum, the Public Staff asserts in its initial petition that Windstream's actions *might* have violated G.S. 62-140 and Commission Rule R9-4(b)(5). G.S. 62-140 prohibits a public utility from making or granting any unreasonable preference or advantage to any person or subjecting any person to any unreasonable prejudice or disadvantage. Commission Rule R9-4(b)(5) provides that a telephone company shall make an official filing with the North Carolina Utilities Commission addressed to the Public Staff Communications Division when it desires to make a change in the rates, rules, maps, or other provisions of its tariff. The Public Staff argues that these two provisions require Windstream to file changes in its proration policy with the Public Staff for review and the Commission for approval.

G.S. 62-30 provides that the "Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such powers and duties as may be necessary or incident to the proper discharge of its duties." By its very nature, the statute grants unto this Commission broad and wide-ranging power and authority to supervise and control *public utilities generally.* (Emphasis added.) Although the Commission is generally granted this broad authority to regulate public utilities, our authority is and always will be constrained, in certain instances, by the legislative dictates of the General Assembly.

By adopting G.S. 62-133.5, the General Assembly acted to restrain the Commission's authority to regulate telephone companies in 1995 and restricted the Commission's ability to use certain regulatory tools that had heretofore been used to compel utilities to operate in accordance with the policy of this State. It is quite clear that the General Assembly intended that, telephone companies that opted for, and were found eligible by the Commission to be supervised through, an alternative regulatory process to better adjust to a changing, more competitive marketplace, would be freed from some of requirements that were deemed necessary and essential to regulate utilities generally. For instance, the General Assembly exempted price plan regulated companies from the general requirement applicable to all public utilities precluding those companies from making any change in rates except after 30 days notice to the Commission. G.S. 62-134.

The General Assembly did not, however, statutorily exempt price plan regulated companies from the general requirement applicable to all public utilities that those companies "[s]hall file with the Commission all schedules of *rates*, service regulations and forms of service contracts, used or to be used within the jurisdiction of the Commission." G.S. 62-138(a)(1). (Emphasis added.) Nor did the General Assembly exempt price plan regulated companies from the definition of rates included in G.S. 62-3(24) or the prohibition against granting any unreasonable preference as to rates or services contained in G.S. 62-140. These sections of the statute are applicable to Windstream even though we acknowledge as counsel for Windstream suggests, that the regulatory policies generally embodied in Chapter 62 and the specific policies established in G.S. 62-133.5, on their face, appear to be in conflict.

Three rules of statutory construction lead us to that conclusion. First, as a general rule, a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. Second, in the resolution of ambiguities, courts favor a general provision over an exception, and one seeking to be excluded from the operation of the statute must establish that the exception embraces him. Third and finally, it is a general rule of statutory construction that courts have no authority to create and will not create, exceptions to the provisions of a statute not made by the act itself.[1] 73 Am Jur2d Statutes, Sections, 165, 212-213.

Applying those rules in this case, we conclude that in order to give effect to both the general policies embodied in Chapter 62 and the exceptions enacted in G.S. 62-133.5, the general policies must be deemed to apply to Windstream if warranted by the particular facts of this case unless the Act, or the Commission acting pursuant to the Act, specifically exempts price plan regulated companies from the policy. Since G.S. 62-133.5 did not specifically exempt price plan companies from the general requirements applicable to all public utilities that are set forth in G.S. 62-3(24), 62-138 and 62-140 respectively, Windstream must continue to comply with these requirements unless relieved of this obligation by the Commission even though it may appear that these statutes conflict with the specific policy inherent in G.S. 62-133.5.

G.S. 62-133.5 authorizes alternative regulation for carrier such as Windstream. This statute provides the authority under which the Commission permitted Windstream to provide service as a price regulated instead of a rate base/rate of return telecommunications utility. G.S. 62-133.5(g) exempts price regulated local exchange companies from many of the statutory requirements of Chapter 62 with which non price regulated utilities must comply. Pursuant to 62-133.5(g), however, price regulated companies are not exempted from the requirements of G.S. 62-138.

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[1] See 73 Am Jur2d, Statutes, Section 213, "It is a general rule of statutory construction that courts have no authority to create and will not create, exceptions to the provisions of a statute not made by the act itself. Where the legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none. No rule of public policy is available to create exceptions to a statutory rule. It is especially true that the power to create exceptions may not be exercised where the words of the statute are free from ambiguity."

Pursuant to G.S. 62-138(a):

> Under such rules as the Commission may prescribe, every public utility except as permitted under G.S. 62-134(h) and (j):
> (1) Shall file with the Commission all schedules of rates, service regulations and forms of service contracts used or to be used within the jurisdiction of the Commission.

While G.S. 62-138(a) authorizes the Commission to permit price regulated companies to avoid the requirements of filing schedules of rates and service regulations, the Commission has not authorized Windstream to do so. The Windstream tariffs and service regulations addressed at length by the parties are on file and regulated by the Commission. The Commission determines that Windstream's rate pro ration practice or policy is a service regulation or a practice addressed directly or indirectly in its filed rates and tariffs. Consequently, when Windstream altered its proration policy, Windstream should have filed this policy or practice change with the Commission.

Commission Rule R9-4 was first promulgated in 1973 in Docket No. P-100, Sub 30, long before price regulation was authorized in 1995. The requirements of Rule R9-4 supplement statutes such as G.S. 62-134, from which price regulated companies are exempted, but also supplement G.S. 62-138. For example, R9-4(c) addresses "new service offerings" in addition to tariff revisions. Consequently, the Commission determines that Windstream should have complied with the pertinent provisions of Rule R9-4 when it changed its rates proration policy.[1]

Windstream argues, however, that implementation of the non-proration policy does not implicate G.S. 62-138 because the policy did not change rates assessed to customers – instead, it merely reinforces the existing local/general tariff provisions, which provide for monthly service terms. We disagree. To reinforce means to strengthen by adding additional force or support to the existing tariff. Windstream's existing tariff, or stated differently, its practice implementing the tariff, *required* Windstream to prorate its bills. A change in practice intended to strengthen or reinforce the existing tariff would have added language to enhance the existing practice requiring proration. Instead of adopting a change that would have strengthened its existing practice, Windstream proposed to adopt a change, non-proration, that is one hundred and eighty degrees different than its previous practice.

In the Commission's view, this change weakens rather than strengthens the tariff. No matter how one characterizes this change, the clear terms of G.S. 62-138 and G.S. 62-3(24), nevertheless, require that any change in a practice that affects rates must be filed with the

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[1] While rates are generally thought of only to include charges, fares, and other monetary delineations, the Public Utilities Act defines rates more expansively to include "any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule" *et cetera*. G.S. 62-3(24). Clearly, changing from Windstream's admitted, longstanding practice, which requires that the rate be prorated when a customer terminates service prior to the end of the billing period, to the proposed policy, where the customer's rate is not prorated when the customer terminates prior to the end of the billing period, is a practice that affects that customer's charge. At the simplest level, the change from the current practice to the proposed practice affects whether the customer pays Windstream or receives a refund for overpayment for services rendered. As such, G.S. 62-138 requires Windstream to file the new non-prorated rates practice with the Commission.

Commission. Since the change from proration to non-proration affects whether the customer pays for a full month of service or receives a refund when he discontinues service prior to the end of the monthly billing cycle, we believe that such a change as heretofore proposed by Windstream is fundamental and is required to be filed with the Commission pursuant to G.S. 62-138. Further, we believe that pursuant to G.S. 62-138 and the authority that we have been granted therein, Windstream was also required by Commission Rule R9-4 to file this change in tariff and supporting cost data with the Public Staff of the North Carolina Utilities Commission unless the price regulation plan approved by this Commission specifically exempted Windstream from complying with this requirement.

With regard to the latter proviso, we have carefully reviewed Windstream's previously approved price plans and we agree with the Public Staff that Windstream's price regulation plan does not exempt Windstream from complying with the requirement to file a change in rates that deviates from the plan parameters with the Commission and the Public Staff. In fact, the plan's language clearly indicates that the opposite is intended. For instance, Section 5 of the price regulation plan requires the Companies to file any change in rates, and Section 6 requires the filing of tariffs when the Companies desire to adjust prices in any of the four service categories. Windstream's price regulation plan also requires that the proposed rate changes be evaluated for their effect on the service categories' Service Price Index (SPI). If the proposed rate changes result in an increase in the service categories' total annual revenues, the SPI goes up; if the proposed rate changes result in a decrease in the service categories' total annual revenues, the SPI goes down. Thus, we conclude that Windstream was also required to file this change in tariff and supporting cost data with the Public Staff of the North Carolina Utilities Commission by the price regulation plan.

In reaching the aforementioned conclusion, we reject Windstream's contention that it was allowed to implement this change in policy without following the procedures outlined in the statute and rules because "[t]here are no provisions in the filed Windstream tariffs that affirmatively require proration of monthly service charges for a customer electing to terminate a feature, or his service, prior to the end of his billing month." Taken to the extreme, it appears that the crux of Windstream's argument is that the tariff must set forth with particularity every single item of policy that will be adopted to *implement a tariff* or that policy can be changed by the company without notice or recourse. (Emphasis added.)

If adopted, the position advocated by Windstream would represent a pronounced departure from our prior practice which permitted tariffs to be filed without the degree of particularity that the Windstream contention contemplates. With our prior practice, we relied upon various tools such as our understanding about common industry practices and North Carolina case law that holds that a court may consider a party's prior course of conduct to determine what the parties intended when they executed a contract[1] to add substance to a tariff if a dispute arose as to the precise requirements of the tariff. These tools would, of course, be abandoned in favor of a more detailed and particular tariff under the position advocated by Windstream. One can but imagine the exponential increase in the length and breadth of tariff

[1] While we acknowledge that a tariff is not technically a contract, our appellate courts have held that utility tariffs are sufficiently similar to contracts to avail themselves to the rules of contractual interpretation. *State ex rel Utilities Commission v. Thrifty Call, Inc.*, 154 N.C. App. 58, 571 S.E.2d 622 (2002).

filings as the Commission and the Public Staff attempt to ensure that every imaginable company practice that implements a tariff is precisely spelled out in the filed tariff. For this reason, we will not adopt the rationale proposed by Windstream.

Having determined that Windstream was required to file its proration/non-proration policy with the Commission and the Public Staff by the Public Utilities Act, the rules that we have adopted and the price plan itself, we now turn to the more difficult issue of whether the change that Windstream has proposed, i.e., that customers bills would no longer be prorated when they discontinue service prior to the end of the billing period, is prohibited as a matter of law, a position that *seems* to be advocated by the Public Staff. (Emphasis added.) After carefully reviewing the arguments of the parties and the law, we conclude that it is not.

In the Public Staff's Proposed Order and in the oral argument before the Commission, the Public Staff argued that North Carolina statutes and the Commission's rules presume that consumers will be charged rates only for services rendered by a utility, and the Commission is charged by law under G.S. 62-2(4) to ensure that consumers only pay just and reasonable rates for those services. Further, the Public Staff noted that the policy of prorating monthly charges has been in place in North Carolina literally for decades, and is known and understood by all regulated incumbent local exchange companies operating within the State. While these assertions may indeed be true, nothing in the statutes or Commission practice expressly requires a utility to prorate its charges when a customer discontinues service prior to the end of an arbitrarily defined period. Were this to be so, this policy or statute would have required Windstream to prorate its initial charge for the first full month of service when service is terminated prior to the end of the month since there is nothing conceptually different in that scenario from the scenario at bar.

Rather than adopting a prorated fee required by the position advanced by the Public Staff, the Commission, instead, approved a tariff which permits Windstream to charge a customer for the entire month of initial service even if the customer discontinues service prior to the end of his first month. We believe that this departure from the "presumption" that the Public Staff asserts exists is convincing evidence that the Commission's policy on proration is not predetermined or set in stone. As with every case that comes before this Commission, the Commission's decision as to whether a rate should be this or that, or prorated or not, varies based upon the particular facts presented by the proponent or the opponent of the position. In each instance, the Commission will determine if proration or non-proration is just and reasonable only after the Commission has heard and weighed the evidence in support of and in opposition to the rate. Our role in this regard is clearly circumscribed by the Public Utilities Act and the due process considerations embodied in both the constitution of this State and of the United States. Thus, there is no statute, practice or rule that prohibits or precludes Windstream, *as a matter of law*, from adopting this practice after it has complied with the notice and review requirements and received Commission approval.

Finally, both the Public Staff and Windstream have spent considerable time in their briefs, proposed orders and arguments before the Commission asserting that proration or non-proration either does or does not violate G.S. 62-140, the provision in the act that prohibits a utility from granting an unreasonable preference or advantage to any person. The Public Staff argues that the proposed non-proration policy is violative of this section and Windstream argues

that it is not. Both have advanced various policy and factual arguments to support their positions and each has asked that we decide this issue in accordance with their argument. However, because we have concluded that Windstream was required by the Public Utilities Act, the Commission's rules and the companies' price regulation plans to file the change in proration procedures with the Commission and the Public Staff prior to implementing that change, there is no necessity for the Commission to resolve this dispute in these dockets and we decline to do so.

IT IS, THEREFORE, ORDERED as follows:

1. Windstream shall immediately cease and desist implementing the new billing practice, and immediately resume prorating customer bills until they are expressly authorized not to do so.

2. Windstream shall provide to all affected customers a refund of the amount billed for the service that the customer did not receive plus interest.

3. Windstream shall file an accounting within 30 days indicating the name and account numbers of all customers affected and the refund amounts due.

4. Windstream shall issue a new billing message to all customers rescinding its non-proration policy.

ISSUED BY ORDER OF THE COMMISSION.
This the 15th day of May, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Lh051509.01

DOCKET NO. P-1187, SUB 2

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of Intrado Communications Inc. for	)	
Arbitration Pursuant to Section 252(b) of the	)	RECOMMENDED
Communications Act of 1934, as Amended, with	)	ARBITRATION
BellSouth Telecommunications, Inc. d/b/a	)	ORDER
AT&T North Carolina	)	

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on August 13, 2008

BEFORE: Commissioner Lorinzo L. Joyner, Presiding, Chairman Edward S. Finley, Jr., and Commissioner William T. Culpepper, III

APPEARANCES:

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FOR THE USING AND CONSUMING PUBLIC:

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BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission (the Commission) pursuant to Section 251 and Section 252 of the Telecommunications Act of 1996 (the Act) and North Carolina General Statute 62-110(f1).

On December 21, 2007, Intrado Communications Inc. (Intrado) filed a Petition for Arbitration of an Interconnection Agreement (or ICA) with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina (AT&T). Intrado also moved that the deadline for the filing of prefiled testimony be extended by 40 days. On December 27, 2007, Intrado filed a Motion for Admission *Pro Hac Vice* for Chérie R. Kiser, Angela F. Collins, and Rebecca Ballesteros.

By Order dated December 28, 2007, the Commission extended the deadline for the filing of prefiled direct testimony by Intrado to January 30, 2008, prefiled rebuttal testimony by AT&T to March 11, 2008, and prefiled rebuttal testimony of Intrado to March 21, 2008.

On January 3, 2008, the Commission granted the Motion for Admission *Pro Hac Vice* for Chérie R. Kiser, Angela F. Collins, and Rebecca Ballesteros.

On January 15, 2008, AT&T filed a Response to the Petition for Arbitration and a Motion for Abeyance. On January 23, 2008, Intrado filed an Opposition to AT&T's Motion for Abeyance. On January 28, 2008, AT&T filed a Response to Intrado's Opposition to Motion for Abeyance. On January 29, 2008, the Commission issued an *Order of Abeyance* to allow the parties to negotiate in good faith in order to resolve or clarify issues before the Commission. The Commission also modified the dates for the filing of testimony previously established in the December 28, 2007 Order.

On February 7, 2008, Intrado filed a copy of a *Finding and Order* issued by the Public Utilities Commission of Ohio for judicial notice by the Commission.

On March 20, 2008, Intrado filed a Motion to extend the deadline for the filing of direct and rebuttal testimony, which was granted by Order of the Commission on March 25, 2008. On April 24, 2008, Intrado prefiled the testimony of Thomas W. Hicks, Cynthia Clugy, and Carey F. Spence-Lenss.

On April 24, 2008, Intrado filed a Motion to extend the deadline for the filing of the joint issues matrix and joint proposed procedural schedule; the Commission granted the Motion by order issued on April 25, 2008. On May 1, 2008, Intrado moved for an extension of time to file the joint issues matrix; the Commission granted the Motion by order dated May 2, 2008.

Also on May 2, 2008, Intrado and AT&T, having been unable to reach an agreement on the proposed procedural schedule, separately filed proposed procedural schedules. On May 8, 2008, the Commission issued an *Order Setting Procedural Schedule.* On May 9, 2008, Intrado and AT&T filed their Joint Issues Matrix.

On May 23, 2008, AT&T filed the prefiled rebuttal testimony and exhibits of Patricia Pellerin and Jason Constable.

On June 3, 2008, Intrado filed the rebuttal testimony and exhibits of Thomas W. Hicks, Cynthia Clugy, John R. Melcher, and Carey F. Spence-Lenss.

On June 24, 2008, the Public Staff filed a Notice of Participation and Request for Service of Filings.

On July 1, 2008, Intrado and AT&T filed a Revised Joint Issues Matrix.

On July 15, 2008, AT&T filed a Motion to Admit J. Phillip Carver to Practice before the Commission; the Commission granted the Motion by order dated July 18, 2008.

On July 25, 2008, the Public Staff moved that the Commission issue an order requiring Intrado and AT&T to file a second revised joint issues matrix in order to reflect the parties' positions if the Commission adopted either the 9-state template interconnection agreement (9-state template) or the 13-state template interconnection agreement (13-state template) as the starting point in this proceeding. The Commission granted the Public Staff's Motion by Order dated July 28, 2008. On August 6, 2008, Intrado and AT&T filed a Second Revised Joint Issues Matrix.

Also on August 6, 2008, Intrado and AT&T filed orders of witnesses and estimates of cross-examination time. The Public Staff filed an estimate of cross-examination time on August 6, 2008.

The evidentiary hearing was held as scheduled on August 13, 2008.

On September 26, 2008, Mr. Craig Whittington, 911 and Special Projects Coordinator for the Guilford Metro 911, filed a letter with the Commission in this docket. Mr. Whittington stated that "the citizens of not just Greensboro and Guilford County, but all across North Carolina need a more robust emergency 911 system that serves all callers and competition among and of network service providers will ensure that the people of North Carolina are receiving the very best 911 and most cost efficient 911 network service support possible." Mr. Whittington stated that he personally supports open 911 competition in North Carolina.

After receiving an extension of time, on October 10, 2008, Intrado, AT&T, and the Public Staff filed their Post-Hearing Briefs and/or Proposed Orders in this matter.

On December 8, 2008, Intrado filed as Supplemental Authority a copy of a decision by the Indiana Regulatory Utilities Commission.

On December 10, 2008, AT&T filed as Supplemental Authority a copy of a decision by the Florida Public Service Commission.

On January 9, 2009, Intrado filed as Supplemental Authority a copy of its Motion for Reconsideration filed with the Florida Public Service Commission and a copy of AT&T's response to the Motion for Reconsideration filed in Florida.

On March 5, 2009, Intrado filed as Supplemental Authority a decision issued by the Ohio Public Utilities Commission on March 4, 2009 in its Intrado/AT&T Ohio arbitration proceeding.

On March 6, 2009, AT&T filed as Supplemental Authority: (1) the Florida Public Service Commission Staff's February 19, 2009 recommendation on Intrado's Motion for Reconsideration; (2) the Florida Public Service Commission's March 3, 2009 vote sheet approving Staff's recommendation that Intrado's Motion for Reconsideration be denied; and (3) the Proposed Arbitration Decision in the Illinois Commerce Commission's docket established to consider the identical relief sought by Intrado in the instant docket.

On March 9, 2009, Intrado filed additional Supplemental Authority. Specifically, Intrado noted that the Proposed Arbitration Decision from the Illinois Commerce Commission filed by AT&T in this docket on March 6, 2009 is a recommended administrative law judge decision that remains subject to review and revision by the full Illinois Commerce Commission. Intrado filed a copy of its written exceptions and reply exceptions filed with the Illinois Commerce Commission. Intrado noted that a final decision from the full Illinois Commerce Commission is expected either March 17 or March 25, 2009.

On March 17, 2009, AT&T filed a Notice of Supplemental Authority which included two recent orders by state commissions, including: (1) an order by the Florida Public Service Commission denying Intrado's Motion for Reconsideration; and (2) the Illinois Commerce Commission's Arbitration Decision finding that Intrado is not entitled to interconnect with AT&T Illinois under Section 251.

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

Based on the foregoing and the entire record in this matter, the Commission makes the following

FINDINGS OF FACT

1. Intrado seeks to provide competitive 911/E911 service to public safety answering points (PSAPs) and other public safety agencies in North Carolina.

2. The services that Intrado seeks to provide are telephone exchange services for which AT&T is required, pursuant to Section 251(c) of the Act, to offer interconnection. AT&T is also required to offer interconnection as to any other telephone exchange service or exchange access service Intrado may offer.

3. The ICA should contain rates in instances when AT&T is the 911 service provider to the Public Safety Answering Point (PSAP) and when Intrado is the 911 service provider. The rates should be those as proposed by AT&T with respect to Scenario 1 and that part of scenario 3 pertaining to Intrado-to-AT&T interconnection. As for the appropriate rates in Scenario 2 and

that part of Scenario 3 pertaining to AT&T-to-Intrado interconnection, AT&T should resume negotiations and include any agreement in the composite agreement. If the parties cannot agree, each party should submit filings to the Commission setting forth why its proposals are more reasonable than the other's.

4. AT&T's 9-state template is not the appropriate starting point for negotiations. The 13-state template is the appropriate starting point for negotiations for the parties in this proceeding. Based on the recent release of the 22-state template, if the parties agree, they may choose to use the 22-state template instead of the 13-state template since the 22-state template appears now to be the standard template for the combined BellSouth/SBC legacy regions.

5. The additional language proposed by AT&T in Appendix 911 Section 1.3 and by Intrado in Appendix 911 Section 9.1 should not be adopted. The clarifying language proposed by Intrado in Appendix OET Section 1.4 should be adopted. The language in Appendix ITR Section 4.2 should be adapted to conform to competing local provider (CLP) trunking obligations in the 9-state region.

6. AT&T's proposed primary/secondary routing system should be used to handle 911 traffic in a split wire center. The primary selective router should be determined by which selective router is assigned to the PSAP that serves the majority of access lines in the wire center.

7. The ICA should require Intrado to establish trunking to the appropriate Point of Interconnection (POI) on AT&T's network while acknowledging Intrado's right to provision these facilities through a third party.

8. AT&T is required to provide interconnection for the transmission and routing of telephone exchange traffic, exchange access traffic, or both, at any technically feasible point within AT&T's network when Intrado seeks to interconnect with AT&T.

9. The parties may negotiate and establish multiple POIs, or different POIs for different types of services.

10. AT&T must allow Intrado to interconnect at a technically feasible point on AT&T's network when Intrado seeks to interconnect with AT&T's network as prescribed by Part 51.305 in the Federal Communication Commission (FCC) rules.

11. The Commission will not mandate any language in the ICA regarding meet point, but the parties are free to negotiate meet point locations, if agreed upon.

12. The interconnection of selective routers operated by AT&T and Intrado should follow the primary/secondary routing architecture currently in use by AT&T and other incumbent local exchange companies (ILECs) in North Carolina. In addition, automatic number identification (ANI) and automatic location identification (ALI) information that was initially transmitted to the serving AT&T end office during the 911 call shall be retained whenever the call is transferred between the parties' selective routers. Lastly, each party shall advise the other party of any system changes which it believes may impact the efficiency or reliability of the

interconnected network, or might adversely impact the other party's provision of 911 service to the public.

13. Section 6.1 of Appendix ITR of the original 13-state template should be modified to reflect a reciprocal initial trunk forecasting requirement for AT&T and Intrado and to require each party to review the forecast it receives and advise the other party of any problems that may impact its trunk forecast. The ordering language Intrado proposed for Section 8.6.1 of Appendix ITR is reasonable and reciprocal and AT&T should be required to use Intrado's designated ordering process to obtain services from Intrado.

14. The ICA should include the terms and conditions proposed by AT&T to address separate implementation activities for interconnection arrangements after the execution of the ICA.

15. It is not appropriate to include Intrado's proposed language in Section 3.4.3 of Appendix 911 concerning the interoperability of ALI. Intrado and AT&T can review the other proposals outlined by the Public Staff in its Proposed Order and negotiate changes to Section 3.4 and/or Section 5.4 as they deem appropriate.

16. The ICA should not define a 911/E911-Trunk as a trunk from AT&T's End Office.

17. The parties should modify the definitions of Section 251(b)(5) Traffic, ISP-Bound Traffic, Switched Access Traffic in the General Terms and Conditions (GTC) section and the appendices to comport with current FCC decisions and orders and to be consistent with the Commission's understanding of those decisions and orders. Also, the Appendix Intercarrier Compensation (IC) and Appendix ITR should retain the references to "wireline" and "dialtone" service.

18. Language specifying the actions to be taken to remove misrouted Switched Access traffic is appropriate for inclusion in Section 16.2 of Appendix C of the parties' ICA. Also, the blocking of switched access traffic should not be included in the ICA as an option.

19. The ICA should permit the retroactive application of charges that are not prohibited by an order or other change in law.

20. Matrix Issue No. 18 concerning the term of the ICA and notification for a successor ICA has been resolved and the parties have agreed to use the language negotiated in Ohio concerning this issue.

21. Matrix Issue No. 20 concerning the appropriate terms and conditions regarding billing and invoicing audits has been resolved; the parties agree to use the language negotiated in Ohio concerning Matrix Issue No. 20.

22. Matrix Issue No. 22 concerning Intrado's ability to assign the ICA to an affiliated entity has been resolved; the parties agree to use the language negotiated in Ohio concerning Matrix Issue No. 22.

23. Matrix Issue No. 23 concerning individual case basis pricing for specific administrative activities has been resolved; the parties agree to use the language negotiated in Ohio concerning Matrix Issue No. 23.

24. AT&T may limit its liability for damages caused by unintentional or negligent acts or omissions, but not for liability for willful, wanton, or intentional acts or omissions.

25. The word "customer" should not be substituted for the phrase "End User" when the limitation of liability also covers an expansive definition of "Person".

26. Matrix Issue No. 25 concerning late payments has been resolved; the parties agree to use the language negotiated in Ohio concerning Matrix Issue No. 25.

27. Reciprocal compensation should be rounded up to the next whole minute, and airline mileage should be rounded up to the next whole mile.

28. AT&T's proposed language for Appendix Pricing Section 1.9.1 and Section 1.9.2 concerning non-recurring charges is appropriate and should be adopted for inclusion in the interconnection agreement.

29. Matrix Issue No. 33 concerning providing unbundled network elements (UNEs) at parity has been resolved; the parties agree to use the language negotiated in Ohio concerning Matrix Issue No. 33.

30. It is appropriate to use the language in Section 2.22 of the Physical Collocation Appendix concerning non-standard collocation requests from the 13-state template without the additional language proposed by Intrado.

31. Matrix Issue No. 35 concerning references to applicable law has been resolved and the parties have agreed to use the language negotiated in Ohio concerning this issue.

32. If a term is specifically defined in the ICA, it may be capitalized only when it is used in a manner consistent with the definition.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 AND 2

ISSUE NO. 1 - MATRIX ISSUE NO. 1(a): What service(s) does Intrado currently provide or intend to provide in North Carolina?

ISSUE NO. 2 – MATRIX ISSUE NO. 1(b): Of the services identified in Issue No. 1(a), which, if any, is AT&T required to offer interconnection under Section 251(c) of the Act?

POSITIONS OF PARTIES

INTRADO: Intrado's 911/E911 service to North Carolina PSAPs falls within the definition of "telephone exchange service" pursuant to the Act. Intrado is therefore entitled to interconnect

with AT&T pursuant to Section 251(c) for the purpose of providing 911/E911 services to North Carolina PSAPs.

AT&T: The emergency service that Intrado intends to provide does not comply with the definition of "telephone exchange service" contained in the Act. Intrado therefore is not entitled to an interconnection agreement pursuant to Section 251. Hence, Intrado's petition should be denied in its entirety.

PUBLIC STAFF: Intrado intends to provide telephone exchange service to PSAPs and other public safety agencies in North Carolina. AT&T is required to offer interconnection under Section 251(c) of the Act to Intrado for telephone exchange service to the PSAPs and other public safety agencies in North Carolina and any other telephone exchange service or exchange access Intrado may offer.

DISCUSSION

Since Matrix Issue Nos. 1(a) and 1(b) are closely intertwined, the Commission will consider them together. Taken as one, they represent the threshold question in this docket of whether Intrado is entitled to interconnection from AT&T under the Act. If the answer to Matrix Issue No. 1(b) is negative, then the arbitration cannot proceed; but if the answer is positive, then the arbitration should proceed.

Strictly speaking, Matrix Issue No. 1(a) simply poses the question of what services Intrado provides or intends to provide. There was no substantial difference among the parties as to what those services were. Where the parties differ is the legal significance of these services for the purposes of allowing the interconnection of those services.

According to Intrado, it intends to provide a competitive 911/E911 service similar to the "telephone exchange communications service" or "Business Exchange Service" currently offered by AT&T to PSAPs in North Carolina in its retail tariff. Intrado noted that AT&T's own 911 tariff described its E911 service offering as a telephone exchange communications service. Intrado also said it intends to provide in the future a so-called Intelligent Emergency Network to allow it to provide automatic retrieval and delivery of information directly to PSAPs and other government agencies. Intrado represented that its network was designed to interoperate with existing legacy PSAP equipment but allows for much more capability once the PSAP migrates to newer technologies. Intrado emphatically asserted that the competitive 911/E911 services it intended to offer are telephone exchange services.

On cross-examination, Intrado witness Spence-Lenss agreed that the service Intrado intends to provide is limited to aggregating emergency 911 calls at Intrado's selective router and then routing those calls to PSAPs, and it is not Intrado's intention to serve the end-users who place the 911 calls. AT&T argued that Intrado's arrangement contemplates that the calls will always flow in only one direction, a view reinforced by Intrado witness Spence-Lenss' statement that Intrado's 911 trunks were to be one-way trunks. AT&T noted that Intrado witness Spence-Lenss had testified that Intrado does not contend that the service it will provide constitutes an

exchange access service. Thus, AT&T identified the only question as being whether the service constitutes a telephone exchange service.

47 U.S.C. 153(47) defines telephone exchange service as follows:

> TELEPHONE EXCHANGE SERVICE—The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate telecommunications service.

AT&T contended that Intrado did not address part (A) in the presentation of its evidence; and that, in any event, Intrado could not meet the "within a telephone exchange" language of part (A) because wire centers and PSAP municipal boundaries do not mesh up. Furthermore, Intrado's proposed service does not allow for two-way traffic as required by part (B). This latter part is the nub of AT&T's argument.

This is a case of first impression in North Carolina. There is no clear precedent from the FCC or the courts on the precise question of whether interconnection for the purpose of exchanging 911/E911 traffic constitutes telephone exchange service or exchange access service pursuant to Section 251(c)(2)(A) of the Act.[1] Two relatively recent decisions by state utility commissions reached differing conclusions on the matter.[2] Earlier decisions found generally in

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[1] Section 251(c)(2)(A) of the Act provides that the ILEC must interconnect "for the transmission and routing of telephone exchange service and exchange access."

[2] For example, the Florida Public Service Commission (FPSC), *In Re: Petition by Intrado Communications, Inc. for Arbitration of Certain Rates, Terms and Conditions for Interconnection and Related Arrangements with BellSouth Telecommunications, Inc. d/b/a AT&T Florida*, Docket No. 070736-TP, Order No. PSC-08-0798-FOF-TP, Final Order (Issued December 3, 2008) ruled that Intrado's proposed service did not meet the definition of "telephone exchange service" under 47 U.S.C. 153(47) (at page 5). Intrado filed a Motion for Reconsideration on December 18, 2008. The FPSC affirmed that decision on February 19, 2009. The Indiana Regulatory Commission, *In the Matter of the Complaint of Communications Venture Corporation d/b/a Indigital Telecom Against Verizon North, Inc. and Contel of the South, Inc. d/b/a Verizon North Systems Concerning the Refusal of Verizon to Allow Connection of Indigital's Wireless Enhanced 911 Telephone System Serving Public Safety Answering Points and Indigital's Request for the Indiana Utilities Regulatory Commission to Order the Connection Under Reasonable Terms, Conditions and Compensation*, Final Order, Cause No. 43277 (Approved November 20, 2008) found that a private, commercial agreement between Verizon and Indigital Telecom was an interconnection agreement subject to Section 252 requirements and that the agreement "contains precisely the types of information typically contained in 47 U.S.C. 252 agreements: selective routing of traffic, purchase of trunks, port charges and terms of compensation among others." (at p. 9). Also, see *Petition for Arbitration to Establish an Interconnection Agreement with Illinois Bell Telephone Company*, Case No. 08-545, issued February 13, 2009, Proposed Arbitration Order (Intrado's proposed services fall under neither 47 U.S.C. 153(47)(A) or (B)).

Intrado's favor.[1] As is common with the introduction of new types of services — in this instance, *competitive* emergency services — decision-making bodies have struggled in their efforts to properly classify them. While the Act was passed only a little over a decade ago, this is a lifetime in the further development and evolution of telecommunications services. The Commission must therefore reach a conclusion based on its own best judgment of the law.

In the arbitration AT&T argued that, since Intrado was proposing to use one-way trunking, Intrado could not provide the two-way traffic required by 47 U.S.C. 153(47)(B). However, the first thing that should be noted about 47 U.S.C. 153(47) is that it is written in the disjunctive—that is, if either part (A) or part (B) of the definition is satisfied, then such service is a "telephone exchange service." While the provisions of 47 U.S.C. 153(47) are less than perfectly lucid, at least on first reading, the parts can be understood by breaking them down in the following manner. Under Part (A) a "telephone exchange service" must (1) furnish subscribers intercommunicating service, (2) be within a telephone exchange or within a connected system of telephone exchanges within the same exchange areas, and (3) be covered by an exchange service charge. Alternatively, a "telephone exchange service" under Part (B) must be (1) a comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof), (2) originate and terminate a telecommunications service, and (3) provide subscribers the ability to intercommunicate. The common feature of these two Parts is "intercommunication," either explicitly as in (A) or implicitly by reference to "comparable service" and "originate and terminate" as in (B). "Intercommunication" is not separately defined in the Act, nor is it exactly a term of art. The FCC in the *Advanced Services Order* stated, somewhat unhelpfully for our immediate purposes, that the requirement is satisfied "as long as it provides customers with the capability of intercommunicating with other subscribers."[2] More to the point, however, the *Webster's New World Dictionary,* Second College Edition (1972), defines "intercommunicate" simply as "to communicate with *or to* each other or one another." (Emphasis added). This definition implies that an intercommunication can include a situation in which one person delivers a message to another even if the other person does not or cannot reply.

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[1] See, for example, California Decision No. 01-09-048, *Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications,* Opinion Affirming Final Arbitrator's Report and Approving Interconnection Agreement (C.P.U.C., September 20, 2001) (agreeing with Arbitrator that SCC Communications Corporation, now Intrado, was providing "telecommunications services" and its services meet the definition of "telephone exchange service" by enabling subscribers to intercommunicate with a telephone exchange.). See, also, Ohio Case No. 07-119-TP-ACE, *In the Matter of the Application of Intrado Communications, Inc. to Provide Competitive Local Exchange Services in the State of Ohio,* Finding and Order (Ohio P.U.C., February 5, 2008), Para. 7. (The Ohio P.U.C. created a separate category of "competitive emergency services telecommunications carriers," to which it said Intrado belonged. Although not discussing 47 U.S.C. 153(47) directly, the Ohio PUC found that "Intrado is a telecommunications carrier engaged in the provision of telephone exchange service pursuant to Section 251 of the 1996 Act," although "its telephone exchange activities are restricted in scope and, thus, do not extend to the level of a CLEC." Ohio reinforced its conclusion that Intrado's proposed service qualified as telephone exchange service under both 47 U.S.C. 153(47)(A) and (B) in its Arbitration Award in Case No. 07-1280-TP-ARB (issued March 4, 2009) (*Ohio Arbitration Award*).

[2] *Deployment of Wireline Services Offering Advanced Telecommunications Capability, 15 FCC Rcd 385,* Para. 17 (1999) (*Advanced Telecommunications Capability Order*).

In construing 47 U.S.C. 153(47), it is important to note that the FCC has been expansive in its definition of telephone exchange services. In the *Advanced Telecommunications Capability Order,* it has found that telephone exchange service is not only traditional voice telephony, but also includes "non-traditional means of communicating information within a local area." Also, in the *Advanced Telecommunications Capability Order,* Para. 21, the FCC found that even if "the transmission is a data transmission rather than a voice transmission . . . such transmissions nevertheless constitute telephone exchange service." Notably, the FCC has also found in the *DA Call Completion Order* that telephone exchange service included call-completion services offered by competing directory assistance providers.[1] In that case, the FCC engaged in an analysis of 47 U.S.C. 153(47)(A) and (B). With respect to 47 U.S.C. 153(47)(A), the FCC stated that "the call-completion service offered by many competing DA [directory assistance] providers constitutes intercommunication because it permits a community of interconnected customers to make calls to one another in the manner prescribed by the statute." (*Id.,* Para. 17) Thus, while noting that a DA provider's offer of call completion was not "traditional provision of telephone exchange service through the provision of dial tone," the FCC reasoned that it permitted "intercommunication" within the meaning of 47 U.S.C. 153(47)(A). (*Id.,* Para. 18) The FCC also agreed that call completion met the requirements of 47 U.S.C. 153(47)(B) because it allowed the "calling party the ability 'through the system of switches, transmission equipment, or other facilities (or combination thereof)' to originate and terminate a telecommunications service." (*Id.,* Para. 20) The FCC observed that 47 U.S.C. 153(47)(B) was added to "ensure that the definition of telephone exchange service was not limited to traditional voice telephony, but including non-traditional means of communications within a local calling area."

Moreover, the FCC has even gone so far as to require local exchange companies "to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section 271(c)(2)(B)(vii) of the Act." The FCC continued: "We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions...."[2] These pronouncements suggest strongly that the language 47 U.S.C 153(47) should be given a liberal interpretation that furthers the purpose of telecommunications competition.

The Commission also notes with approval the reasoning set forth in the *Ohio Arbitration Award.* In that Order, the Ohio PUC found that Intrado's 911 service involved intercommunication, albeit limited, but noted that 47 U.S.C. 153(47)(A) "does not quantify intercommunication. It only requires the existence of intercommunication." (at 15) Furthermore, it rejected AT&T's argument that exchange boundaries must be coterminous with ILEC exchange boundaries. "PSAPs must have a service that takes into account the location of fire, police, and other emergency service providers within the county that it serves. Although the reach of a particular 911 service may not coincide with the boundaries of ILEC exchanges, the service does have geographical limitations that are generally consistent with a community of

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[1] *Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended,* 16 FCC Rcd 2736 (2001).

[2] *E911 Requirements for Internet Protocol (IP)-Enabled Service Providers,* 20 FCC Rcd 10245, Para. 38 (2005). See also *id.,* n. 128; and 47 U.S.C. 271(c)(2)(B)(vii)(I) (requiring Bell Operating Companies to provide nondiscriminatory access to 911 and E911 service to other telecommunications carriers)

interest."[1] Turning to the question of whether Intrado's service also falls under 47 U.S.C. 153(47) (B), which requires that a carrier both originate and terminate calls, the Ohio PUC noted that "as with 'intercommunicating', the statute does not quantify 'originate'." (at 16) The Ohio PUC thus concluded that the capability of a PSAP to call another PSAP and engage in two-way communications with 911 callers satisfies the call origination and termination requirement. We find the Ohio PUC's reasoning and analysis to be persuasive. Thus, for the reasons stated by the Ohio PUC, we, too, reject the arguments made by AT&T that Intrado's proposed service does not constitute telephone exchange service.

Lastly, it should be noted that AT&T witness Pellerin admitted on cross-examination that AT&T's own E911 tariff described its offering as a "telephone communications service", a classification that Intrado argued is comparable if not identical to telephone exchange service. As for one-way traffic, witness Pellerin also admitted that AT&T had entered into an interconnection agreement with a *one-way* paging company that regarded one-way paging as local traffic. AT&T has attempted to argue that these "examples" have simply been misclassifications or mistakes on AT&T's part and should not affect the construction of the definition of "telephone exchange service" in 47 U.S.C. 153(47) in this proceeding. We disagree. In our opinion, it is highly relevant and instructive that, at a point when AT&T was not anticipating this docket, AT&T itself has treated 911/E911 service or other services with similar characteristics as telephone exchange services. AT&T's previous behavior, combined with the expansive way the FCC has interpreted related matters, suggests that the better interpretation of 47 U.S.C. 153(47)(A) and (B) is that competitive 911/E911 services, such as those to be offered by Intrado, are included in those definitions[2]. In any event, the provision is written in the disjunctive, so satisfaction of (A) <u>or</u> (B) is sufficient to satisfy the statute.

Accordingly, the Commission concludes that Intrado intends to provide telephone exchange service as defined in both 47 U.S.C. 153(47)(A) and (B) to PSAPs and other public safety agencies in North Carolina. As such, it is not required to offer additional services for it to be deemed to offer telephone exchange service. Intrado is therefore a telecommunications carrier engaged in the provision of telephone exchange service pursuant to Section 251 of the Act.

CONCLUSIONS

With respect to Matrix Issue No. 1(a), the Commission concludes that Intrado seeks to provide competitive 911/E911 services to PSAPs and other public safety agencies in North Carolina.

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[1] The Ohio PUC also noted that Commercial Mobile Radio Service (CMRS) providers enter into Section 251 agreements even though they provide service in areas not coterminous with ILEC exchange boundaries. (at 16)

[2] AT&T's objection that Intrado could not comply with the "within a telephone exchange, or within a connected system of telephone exchanges within the same exchange" language because wire centers do not necessarily mesh up with municipal boundaries is not particularly persuasive. It fails to take into account the existence of extended area service (EAS), not to mention extended local calling areas (ELCA) or the fact that competing local providers are not formally bound to adopt the ILECs' local exchange boundaries for themselves.

With respect to Matrix Issue No. 1(b), the Commission concludes that the services that Intrado seeks to provide are telephone exchange services for which AT&T is required, pursuant to Section 251(c) of the Act, to offer interconnection. AT&T is also required to offer interconnection as to any other telephone exchange service or exchange access service Intrado may offer.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

ISSUE NO. 3 – MATRIX ISSUE NO. 1(c): Of the services identified in Matrix Issue No. 1(a), for which, if any should rates appear in the ICA?

ISSUE NO. 4 - MATRIX ISSUE NO. 1(d): For those services identified in Matrix Issue No. 1(c), what are the appropriate rates?

POSITIONS OF PARTIES

INTRADO: The rates proposed by Intrado to facilitate AT&T's connection to Intrado's network are reasonable and should be included in the parties' ICA. Intrado should not be subject to rates developed outside of the Section 251/252 process.

AT&T: If Intrado is entitled to a Section 251 agreement, the appropriate rates are those proposed by AT&T, which should be applied on a reciprocal basis.

PUBLIC STAFF: The ICA should contain rates in instances in which AT&T is the 911 service provider to the PSAP and those in which Intrado is the 911 service provider to the PSAP. When Intrado and AT&T each serve a different PSAP and transfer calls between themselves, the ICA need not contain rates for this direct trunking interconnection.

DISCUSSION

These issues were addressed by Intrado witnesses Spence-Lenss and Hicks and by AT&T witness Pellerin.

Intrado contended that the ICA with AT&T should include a pricing appendix that sets forth the prices to be charged by AT&T for services, functions, and facilities to be purchased in connection with the parties' interconnection arrangements in North Carolina. It also proposed rates for AT&T to pay to interconnect with Intrado.

In AT&T witness Pellerin's discussion of the sub-parts of Matrix Issue No. 1, she set forth three different rate scenarios that would arise together with AT&T's position as to how the services would be priced under each scenario. The three scenarios are:

1. When AT&T is the 911 service provider to the PSAP.

2. When Intrado is the 911 service provider to the PSAP.

3. When Intrado and AT&T each serve a different PSAP and transfer calls between each other.

With respect to the first scenario, AT&T has agreed to include terms and conditions for such interconnection and any related Section 251 rates in the ICA unless Intrado chooses to obtain facilities through AT&T's access tariff.

With respect to the second and third scenarios, AT&T contended that it is not required by Section 251(c) of the Act to offer those arrangements, although it is willing to negotiate a commercial agreement with Intrado to do so. If the Commission nevertheless requires AT&T to offer terms and conditions for these two scenarios, AT&T has proposed sections in Appendix 911. AT&T does not believe that rates to be paid to Intrado by AT&T should be included in the ICA.

The Commission believes that there is no dispute as to Scenario 1 in which AT&T has agreed to include terms and conditions for such interconnection and any related Section 251 rates in the ICA unless Intrado chooses to obtain facilities through AT&T's access tariff.

As for Scenario 2, Intrado is the 911 service provider to the PSAP, and thus AT&T would be required to seek interconnection with Intrado for the completion of AT&T's customers' emergency service calls to the PSAP. This is simply the reverse of Scenario 1. Here AT&T's interconnection with Intrado would be pursuant to Section 251(a).

Scenario 3, where an AT&T PSAP and an Intrado PSAP wish to be able to transfer calls between one another, involves trunks between a PSAP served by an AT&T selective router and a PSAP served by an Intrado selective router, in which case the public switched network would not be involved in the transfer of these calls. This creates a mixed situation, in which AT&T's interconnection would arise from Section 251(a) in the case of AT&T-to-Intrado and from Section 251(c) in the case of Intrado-to-AT&T.

There is a division of authority as to the outer limits of matters on which incumbents are obliged to negotiate and state commissions are to rule. The Commission notes that the more restrictive view is that incumbent carriers must negotiate only as to issues arising under Sections 251(b) and (c) *See*, e.g., *MCI Telecommunications Corporation v. BellSouth Telecommunications*, 298 F.3d 1269 (Eleventh Circuit, July 26, 2002) (unlimited issues contrary to scheme and text of statute, which lists only a limited number of issues incumbents must negotiate).[1] The broader view is that, where parties have voluntarily included in negotiations issues other than those pertaining to duties required of an incumbent, such issues can be decided through compulsory arbitration under Section 252(b)(1). *See*, e.g., *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 (Fifth Circuit, November 21, 2003) (jurisdiction of PUC not limited by terms of Sections 251(b) and (c) but by the actions of the parties in voluntary negotiations). In the instant case, the parties have

[1] Interestingly, the Eleventh Circuit also held in this case that the specific provision requested by MCI also fell within Section 252(b)(4)(C), which provides that the state commission must resolve an issue if resolution is necessary to implement the terms of the agreement under Section 252(c).

voluntarily negotiated as to all three scenarios, and the Commission will arbitrate them accordingly.

While the Commission has concluded that it has the authority to arbitrate as to all three scenarios, and it is clear that rates arising under Section 251(c) must be included in the ICA, it is less clear whether the rates arising under Section 251(a) must also be included in the ICA. However, since the parties have presented these issues for our decision and we have the authority to arbitrate the issues, it would be administratively efficient for the parties to include Section 251(a) rates in the ICA.

As to the question of the appropriate rates, the Commission notes that, while the overall record in this docket regarding this issue is relatively sparse, Intrado did concisely set forth its general position on the matter in the August 6, 2008 Revised Joint Issues Matrix. Intrado's Matrix Issue No. 1(d) position statement referred back to language in its position statement concerning Matrix Issue No. 1(c) in pertinent part as follows:

> Intrado Comm's interconnection agreement with AT&T should include the pricing appendix typically approved by the Commission for AT&T North Carolina interconnection agreements that sets forth the prices to be charged by AT&T for services, functions and facilities to be purchased in connection with the Parties' interconnection arrangements in North Carolina.

Intrado qualified this statement with reference to proposed rates for AT&T's interconnection to Intrado's network, such as port termination charges, when Intrado has been designated as the 911/E911 service provider. Intrado stated that its charges would apply to any carrier seeking to connect to Intrado's network (therefore not being "commercial agreements") and represented that the "charges proposed by Intrado Comm are similar to the [rates] imposed by AT&T for interconnection to AT&T's network."

AT&T responded that Intrado's rates were actually those of a "commercial agreement" and that AT&T should not have to pay Intrado commercial rates for interconnection while Intrado enjoys TELRIC rates from AT&T. AT&T urged, as a general matter, that Intrado's ICA rates to AT&T should not exceed AT&T's ICA rates to Intrado for reciprocal services. Furthermore, parties should only charge for services provided.

The Public Staff did not discuss the question of rates to be charged but confined its discussion to what services ought to be includable in the ICA under the various scenarios.

Given these representations by Intrado and AT&T in the Revised Joint Issues Matrix and the paucity of other evidence in the record, the Commission can only conclude that there is no disagreement as to the application of AT&T's rates involving Intrado's interconnection with AT&T but that there is a disagreement where AT&T interconnects with Intrado. The pertinent question at this point is what standard should apply to such rates.

It is perhaps inevitable that, as the Act enters its thirteenth year and competitive entry reaches further than the "garden variety" CLP-to-ILEC arrangement, the Commission would be faced with a novel situation. After all, the common situation is that the requesting carrier seeks to interconnect with the ILEC but not *vice versa*. Section 252 of the Act does not directly address ILEC-to-CLP interconnection arising out of Section 251(a). In the absence of such guidance, the Commission believes that the more general guide in such situations is one of "reasonableness" within the context of due recognition of the rights and obligations of each party.

In practical terms, Intrado's main concern appears to be centered on rates for access ports. Intrado noted in its Proposed Order that the Ohio PUC had recently determined that Intrado's rates for access ports (or "termination") on its network were "reasonable" and "not beyond the range of other companies." Intrado also observed that it was under no obligation to limit its rates to those charged by AT&T or comply with the other standards of the Act relating to rates. AT&T, as noted before, objected to being subject to what is viewed as commercial rates, noted that its rates were subject to TELRIC constraints, and urged that its rates be accepted as reciprocally applicable to both parties.

It is axiomatic that AT&T is subject to TELRIC rates. These rates have been validated and are acceptable to Intrado for Intrado-to-AT&T interconnection. By contrast, Intrado is not subject to TELRIC rates under the Act. Thus, the Commission has no basis in the record, other than Intrado's assertions and its citation to the Ohio PUC, to find that its proposed rates are in fact more reasonable than those of AT&T.

It may well be that the parties are not far apart in arriving at rates for AT&T-to-Intrado interconnection. The Commission therefore concludes that good cause exists to ask AT&T and Intrado to resume negotiations on this matter and to include any agreement in the Composite Agreement. If the parties cannot agree, each party should submit filings to the Commission setting forth why its proposals are more reasonable than the other's.

As for the rates pertaining to Scenario 1 and that part of Scenario 3 pertaining to Intrado-to-AT&T interconnection, these arise under Section 251(c) and shall be the proposed AT&T rates.

CONCLUSIONS

The Commission concludes that the ICA should contain rates in instances when AT&T is the 911 service provider to the PSAP and when Intrado is the 911 service provider. The rates should be those as proposed by AT&T with respect to Scenario 1 and that part of Scenario 3 pertaining to Intrado-to-AT&T interconnection. As for the appropriate rates in Scenario 2 and that part of Scenario 3 pertaining to AT&T-to-Intrado interconnection, AT&T should resume negotiations and include any agreement in the composite agreement. If the parties cannot agree, each party should submit filings to the Commission setting forth why its proposals are more reasonable than the other's.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

ISSUE NO. 5 – MATRIX ISSUE NO. 2: Is AT&T's 9-state template interconnection agreement the appropriate starting point for negotiations? If not, what is?

POSITIONS OF PARTIES

INTRADO: Intrado argued that the parties should use the 13-state template they have already negotiated and revised. Intrado asserted that AT&T has offered no valid reason for not using that agreement in North Carolina. Intrado maintained that AT&T's refusal is even more egregious given its development of the 22-state template[1], which contains many of the 13-state provisions at issue between the parties. Intrado opined that there is no need for the parties to renegotiate language they have already resolved in their Ohio negotiations.

AT&T: AT&T asserted that its 9-state template was specifically designed for use in the 9-state (former BellSouth) territory, including North Carolina. AT&T maintained that, in contrast, the 13-state template, which was designed for use in AT&T's 13-state (former SBC) territory, does not address the network configuration or systems in use in North Carolina. AT&T argued that the Commission should determine that the 9-state template is better suited for an interconnection agreement in North Carolina. AT&T finally noted that, in the alternative, the parties may mutually agree to utilize AT&T's 22-state template, which was released in July 2008 and was also designed for use in North Carolina.

PUBLIC STAFF: The Public Staff stated that, as many of the outstanding issues appear in the 13-state template and not in the 9-state template, the 13-state template should be used as a basis for an interconnection agreement between the parties. The Public Staff recommended that, if the parties agree, the Commission should conclude that the parties may instead choose to use the 22-state template since it appears now to be the standard template for the combined BellSouth/SBC legacy regions.

DISCUSSION

Intrado witness Spence-Lenss stated in her rebuttal testimony that Intrado will accept state-specific requirements, which are typically delineated in state-specific appendices. Witness Spence-Lenss noted that, however, the general terms and conditions and the majority of technical issues should be the same regardless of jurisdiction.

Witness Spence-Lenss further noted that Intrado has asked AT&T on numerous occasions to identify those portions of the 13-state template that would need to be modified for use in North Carolina. Witness Spence-Lenss stated that, other than general assertions about operational support systems (OSS), pricing, performance standards, and UNEs, AT&T has not provided specific information to Intrado. Witness Spence-Lenss testified that any necessary modifications could easily be addressed through the inclusion of additional appendices to the already agreed-upon terms.

[1] The 22-state template was released by AT&T on July 1, 2008.

Witness Spence-Lenss stated that Intrado has reviewed the 9-state template, but that the review was not thorough and its initial revisions did not reflect the arrangements that Intrado needs to provide competitive 911 service offerings in North Carolina. She maintained that, ultimately, if the Commission orders the use of the 9-state template, Intrado would be left with an interconnection agreement that it did not have the opportunity to review, comment on, or negotiate, and that does not reflect the arrangements Intrado needs to offer competitive service to PSAPs in North Carolina. She argued that this is very much a substantive issue.

Intrado maintained in its Proposed Order that the Commission should find that the parties must utilize the interconnection agreement template that the parties have spent a significant time reviewing, negotiating, and revising in connection with their Ohio negotiations. Intrado noted that the parties have already negotiated and reached agreement on many of the outstanding issues before the Commission and asserted that AT&T has provided no valid reason for not continuing to use that set of documents in North Carolina. Intrado argued that it has no obligation to negotiate an interconnection agreement based on the templates produced by AT&T.

Intrado asserted that AT&T has recognized the benefit of system-wide uniformity in other proceedings. Intrado maintained that, despite Intrado's repeated requests, AT&T has provided no reason, technical infeasibility or otherwise, for not using the documents the parties have negotiated and agreed to use in Ohio. Intrado stated that it sees no reason for the parties to negotiate new generic provisions for use in North Carolina when the parties have already reached agreement on such provisions that are unaffected by jurisdictional boundaries. Intrado opined that this approach is practical and will ensure that consistent terms and conditions are used throughout Intrado's service territory to the greatest extent possible.

Intrado maintained that similar (and in some cases exact) language to that agreed-upon by the parties is contained in AT&T's new 22-state template. Intrado asserted that, given the similarities between the 13-state template and the 22-state template, AT&T should not have any issue using the interconnection agreement language already reviewed and revised by the parties in North Carolina, especially when neither the 9-state template nor the 13-state template is available on AT&T's website since its release of the 22-state template.

Intrado recommended that the Commission find that the parties should utilize the set of interconnection documents previously negotiated in connection with the parties' Ohio arbitration proceeding and that Intrado is not required to utilize AT&T's 9-state template as the starting point for negotiations.

Intrado stated in its Post-Hearing Brief that it requested a 22-state template from AT&T on at least three different occasions prior to filing its arbitration petition. Intrado further noted that, based on its very cursory review, it appears that some of the provisions at issue between the parties from the 13-state template are contained in the 22-state template. Intrado noted that, for example, it appears that the language in dispute under Matrix Issue Nos. 14(b), 21, 22, 31, 32, and 33 is contained nearly verbatim in the 22-state agreement. Intrado asserted that the 22-state template appears to be based on the 13-state template with the necessary modifications, revisions, and additions made to accommodate the former BellSouth region. Intrado noted that, although the 22-state template appears to have incorporated much of the 13-state template,

Intrado's proposed language for inclusion in its North Carolina interconnection agreement with AT&T is the result of negotiated revisions to the 13-state template. Intrado stated that the parties have engaged in negotiations based on the 13-state template and exchanged proposed revisions to that template, which are the subject of this arbitration.

AT&T witness Pellerin stated in her rebuttal testimony that a Commission decision to utilize the 13-state template would require significant and time-consuming analysis of that template to identify language that must be changed for North Carolina – which would result in additional, but not yet identified, issues requiring arbitration. Witness Pellerin asserted that, additionally, the 13-state template is not the agreement that the parties started negotiating from in North Carolina, so it is not appropriate as a basis for this arbitration.

During cross-examination, witness Pellerin stated that AT&T invited Intrado to discuss or negotiate using the 9-state template. She also noted that Intrado later stated it was not going to look at the 9-state template. Witness Pellerin testified that she never participated in negotiations on the 9-state template, however, that such negotiations took place and that Intrado provided redlines to the 9-state template in October 2007. Witness Pellerin noted that Intrado then filed its arbitration petition using the 13-state template.

Witness Pellerin stated that AT&T invited Intrado to examine and engage in discussions with AT&T on the recent 22-state template, which Intrado did not do.

AT&T asserted in its Proposed Order that it advocates for use as a template agreement the 9-state template that it routinely makes available in North Carolina and that is adapted specifically for use in the 9-state region, including North Carolina. AT&T maintained that the 9-state template reflects the appropriate terms and conditions and network architecture for services AT&T offers in the 9-state region and accommodates the unique, state-specific legal and regulatory requirements, network, technical systems, operational systems, OSS, and policies for the former BellSouth region, including North Carolina.

AT&T argued that Intrado proposes to use the 13-state template, which was designed for use in the 13 AT&T states outside of the former BellSouth region, in this proceeding. AT&T maintained that the 13-state template has always been used in those 13 states and that no Commission has ever ordered the use of the 13-state template in any of the nine Southeast states. AT&T stated that the 13-state template has not been the basis for a voluntarily negotiated agreement between AT&T and any CLP in the 9-state Southeast region. AT&T noted that AT&T witness Pellerin testified that the 13-state template was designed for CLP interconnection agreements in AT&T's 13-state territory and does not accommodate the particular characteristics present in North Carolina.

AT&T maintained that it seems logical that a template specifically designed for use in North Carolina would be the better template. AT&T recommended that the Commission not order the use of a template agreement designed for use elsewhere in the absence of some compelling reason to do so, especially since Intrado has not offered any such reason. AT&T noted that Intrado witness Spence-Lenss, in her prefiled direct testimony, stated that Intrado desires a single agreement for the entire area served by AT&T; however, AT&T argued, Intrado

offered no indication as to why it believes its desire for a single agreement should necessarily mandate the use of the 13-state template, rather than the 9-state template.

AT&T further noted that it has provided standard offerings and capabilities for the portions of the agreement that are most likely to apply to Intrado. AT&T stated that, specifically, it has negotiated with Intrado appendices identified as Appendix 911 and Appendix 911 NIM, which contain virtually all of the terms and conditions that relate specifically to the functionality Intrado seeks for the services it will provide to PSAPs.

AT&T asserted that, thus, it is offering a single set of uniform contractual provisions that relate to what Intrado will actually utilize from the interconnection agreement. AT&T noted that this means that the entire subject dispute is over what to use as the boiler plate in the agreement, i.e., the general terms and conditions and appendices unrelated to 911 services, most of which are unlikely to ever be used by Intrado. AT&T argued that, given this, it is difficult to understand why Intrado objects so strongly to using the 9-state template.

AT&T maintained that, even though the 9-state template was provided to Intrado almost a year ago, and the parties commenced and engaged in negotiations from this template, witness Spence-Lenss testified that Intrado has never conducted a thorough review of the agreement. AT&T asserted that, although Intrado obviously deems the 9-state template less suitable than the 13-state template, Intrado cites to no particular provision of the 9-state template it finds unsuitable.

AT&T argued that, in contrast, AT&T witness Pellerin testified specifically as to a number of ways in which the 13-state template would fail to properly function in the 9-state region. AT&T stated that some examples include:

- in the 13 state region, the parties have actual usage recordings from which to bill for non-911 traffic that the parties exchange. But in North Carolina, due to switch recording and billing limitations, non-911 traffic is billed based on percentage factors – an example would be 72% local and 28% toll. Parties apply these factors to a big bucket or buckets of minutes to create their intercarrier compensation bills;

- the way the trunk groups are defined and how traffic is routed is different between the states; and

- collocation is handled differently between the states.

AT&T noted that the fact that the 13-state template does not work in the 9-state region from an operational standpoint is not the only problem. AT&T asserted that also problematic is the fact that the use of the 13-state template would needlessly complicate both the agreement itself and the process of setting the terms of the agreement. AT&T stated that, in this regard, AT&T witness Pellerin testified that a decision that the parties must utilize the 13-state template in North Carolina would require several months or more to assess and would give rise to numerous additional issues that are, as yet, unidentified.

AT&T maintained that, to date, Intrado's request for the 13-state template has resulted in a number of disputed issues that are largely unrelated to the central legal and technical disputes between the parties. AT&T stated that many of the issues in this proceeding that remain unresolved relate specifically to disputes over language in the 13-state template that do not exist if the 9-state template is used. AT&T noted that, specifically, Matrix Issue Nos. 13(b), 15, 34(a), and 34(b) would become moot if the Commission ordered the use of the 9-state template. AT&T maintained that use of the 9-state template would also avoid disputes over at least some of the language included in, and partially resolve, Matrix Issue Nos. 3, 4(c), 7(a), 10, 13(a), and 29(a).

AT&T noted that, finally, there are 11 issues in the proceeding that not only arise solely in the context of the 13-state template, but that have also been resolved in the context of that agreement during negotiations in Ohio; these issues are Matrix Issue Nos. 18(a), 18(b), 20, 22, 23, 25(a), 25(b), 25(c), 25(d), 33, and 35. AT&T stated that Intrado has requested that the Commission interject the negotiated language for these 11 issues into the 9-state template, even if the Commission selects the 9-state template rather than the 13-state template. AT&T recommended that the Commission decline to do so. AT&T argued that the 13-state template includes thousands of provisions, most of which are not in dispute. AT&T stated that these 11 issues pertain to language that was once in dispute, but has now been resolved; thus, these 11 issues currently have the exact same status as all of the other provisions in the 13-state template that were never in dispute. AT&T asserted that there is no reason for the Commission to treat these particular issues any differently from all of the other currently undisputed portions of the 13-state template. AT&T advocated that, instead, the Commission must make a decision to utilize either the 13-state template or the 9-state template. AT&T maintained that there is no basis to provide for special handling of the issues in the 13-state template that were once disputed, but are no longer in dispute.

AT&T further noted that it made its 22-state template available to CLPs on July 1, 2008 and that AT&T has agreed to utilize the 22-state template for Intrado's North Carolina interconnection agreement properly modified to reflect the outcome of issues presented for arbitration, as well as items previously resolved by the parties to the extent they are consistent with any technical, regulatory, and/or operational issues specific to the former BellSouth region. AT&T stated that it finds the 22-state template to be an acceptable alternative to the 9-state template provided both parties agree to its use.

AT&T recommended that the Commission order the use of the 9-state template and that, in the alternative, the parties may mutually agree to utilize AT&T's 22-state template. AT&T noted that acceptance of this recommendation would render moot Matrix Issue Nos. 13(b), 15, 34(a), and 34(b); portions of Matrix Issue Nos. 3, 4(c), 7(a), 10, 13(a), and 29(a) are effectively resolved as well. AT&T also recommended that the Commission decline to interject into the 9-state template the 11 issues resolved in Ohio for inclusion in the 13-state template. AT&T noted that this effectively resolves in favor of AT&T Matrix Issue Nos. 18(a), 18(b), 20, 22, 23, 25(a), 25(b), 25(c), 25(d), 33, and 35.

The Public Staff maintained in its Proposed Order that Intrado wants to use the 13-state template in North Carolina, on which it reached agreement with AT&T in Ohio, while AT&T wants to use its 9-state template, which it has used in negotiations in the former BellSouth

region. The Public Staff noted that both parties contend that, if the Commission rules against them on this issue, it will take a substantial amount of time to negotiate the subsequent interconnection agreement in order to adapt the template. The Public Staff stated that, on July 1, 2008, AT&T stopped offering the 9-state and 13-state templates and began offering a 22-state template. The Public Staff further stated that a template is merely a starting point for negotiations, the use of which can facilitate negotiations by establishing a framework for an interconnection agreement. The Public Staff asserted that the law does not require the use of a template at all or give either party the right to choose the template. The Public Staff stated that provisions can be added to, deleted from, or modified within the template and that Intrado and AT&T have negotiated many of these issues already in Ohio.

The Public Staff noted that AT&T has contended that a number of the issues raised by Intrado would need no resolution if the 9-state template is used because the issues do not arise in the context of the 9-state template. The Public Staff stated that, in the August 6, 2008 Joint Issues Matrix, Intrado contended that substitution of the 9-state template will not resolve the issues as contended by AT&T. The Public Staff asserted that, under Section 252(c) of the Act, the Commission is required to resolve each open issue set forth in the arbitration petition. The Public Staff stated that the issues raised by Intrado that AT&T contends would be settled by use of the 9-state template are valid and reasonable issues, and the Commission has the duty to resolve them. The Public Staff opined that many of the outstanding issues appear in the 13-state template and not in the 9-state template, and the Public Staff noted that many of these issues have been resolved in connection with the Ohio arbitration.

The Public Staff argued that, with the amount of time that has already been spent resolving issues pursuant to the 13-state template, the Commission should find that the 13-state template should be used as a basis for an interconnection agreement. The Public Staff further proposed that, if the parties agree, they should also be allowed to choose to use the 22-state template instead of the 13-state template since the 22-state template appears now to be the standard template for the combined BellSouth/SBC legacy regions.

After reviewing the record on this issue, the Commission finds that the main area of contention is whether the 9-state template is a better starting place for negotiations since it addresses the network configuration or systems in use in North Carolina or the 13-state template which the parties have already negotiated and revised. The Commission notes that it appears that the new 22-state template would satisfy the concerns of both AT&T and Intrado. AT&T has stated that the 22-state template was designed for use in North Carolina which resolves its concerns that the 13-state template was not designed for use in North Carolina. And, apparently, the 22-state template maintains the revisions from the 13-state template that Intrado is interested in preserving.

However, the Commission notes that the 22-state template was released in July 2008 and that the record in this proceeding is based on the use of the 9-state template or the 13-state template. In addition, the Commission agrees with the Public Staff that, under Section 252(c) of the Act, the Commission is required to resolve each open issue set forth in the arbitration petition. The issues set forth in Intrado's arbitration petition are structured based on the 13-state template only, and not on the 22-state template.

The Commission agrees with Intrado and the Public Staff that Intrado does not have any obligation to negotiate an interconnection agreement based on the templates produced by AT&T. Further, the Commission agrees with the Public Staff that a template is merely a starting point for negotiations, the use of which can facilitate negotiations by establishing a framework for an interconnection agreement, and that the law does not require the use of a template or give either party the right to choose the template.

Based on the record in this proceeding, the Commission concludes that AT&T's 9-state template is not the appropriate starting point for negotiations. The Commission finds that use of the 13-state template is the appropriate starting point for negotiations for the parties in this proceeding due to the amount of time that has already been spent resolving issues pursuant to the 13-state template. Further, based on the recent release of the 22-state template, the Commission concludes that, if the parties agree, they may choose to use the 22-state template instead of the 13-state template since the 22-state template appears now to be the standard template for the combined BellSouth/SBC legacy regions.

CONCLUSIONS

The Commission, in its discretion, concludes: (1) that AT&T's 9-state template is not the appropriate starting point for negotiations; (2) that use of the 13-state template is the appropriate starting point for negotiations for the parties in this proceeding; and (3) that, based on the recent release of the 22-state template, if the parties agree, they may choose to use the 22-state template instead of the 13-state template since the 22-state template appears now to be the standard template for the combined BellSouth/SBC legacy regions.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

ISSUE NO. 6 – MATRIX ISSUE NO. 3: What trunking and traffic routing arrangements should be used for the exchange of traffic generally?

POSITIONS OF PARTIES

INTRADO: Intrado has proposed minor, clarifying revisions to AT&T's proposed language for Appendix 911 Section 9.1. AT&T objects to Intrado's revisions, but has not explained why. Intrado is not required to establish trunking to every tandem in a Local Access and Transport Area (LATA) or every originating office connected to a tandem as AT&T's proposed language requires. AT&T's Out-of-Exchange Appendix should not apply to 911/E911 traffic or inter-selective router traffic. Intrado has proposed language to clarify that the terms and conditions of that appendix do not apply to those types of traffic.

AT&T: In Appendix 911 Section 1.3, the Parties agree that approval is required from the E911 Customer for a Party to carry the customer's 911 traffic. AT&T's additional language properly captures the E911 Customer's ability to revoke its authorization. In Appendix 911 Section 9.1, AT&T proposes language which provides that the 911 Appendix applies to the provision of 911 service pursuant to Section 251. Intrado objects to this general language, but its reasons are unclear. Regarding non-911 traffic, in the 13-state ITR Section 4.2, Intrado has substituted the word "may" for "shall" where AT&T would ask a carrier to establish trunking to the correct

tandem. (Similar language appears in 9-state Attachment 3 Interconnection.) Without a trunk group at these tandems, there is a possibility that there could be misrouted traffic or blocked calls. Intrado may never send public switched telephone network (PSTN) traffic anywhere, as it only wants to route 911 traffic, but the language AT&T proposes is important if it ever does (or if another CLP adopts Intrado's ICA). Intrado proposes language to exclude the exchange of 911 calls and inter-selective router (SR) calls from the Appendix Out-of-Exchange Traffic (OET). This language is unnecessary because the definition of out-of-exchange traffic in OET Section 1.4 already excludes 911 traffic.

PUBLIC STAFF: The additional language proposed by AT&T in Appendix 911 Section 1.3 and by Intrado in Appendix 911 Section 9.1 should not be adopted. The clarifying language proposed by Intrado in Appendix OET Section 1.4 should be adopted. The language in Appendix ITR Section 4.2 should be adapted to conform to CLP trunking obligations in the 9-state region.

DISCUSSION

Intrado stated that there is no justification for the inclusion of the addition made by AT&T in Appendix 911 Section 1.3 that a PSAP could revoke, condition, or modify its approval. Intrado asserted that carriers do not negotiate their ICAs based on customer approvals, but rather the services they want to market to the target customer base. Intrado stated that it needs to know that, if it markets call transfer capability to potential PSAP customers, its interconnection agreements will support selective router-to-selective router interconnection necessary to enable call transfers. Intrado contended that the language agreed to by both parties already ensures that PSAPs and E911 customers are part of the process, and there is no need for the additional language proposed by AT&T.

Intrado also argued that AT&T's language in Appendix ITR Section 4.2 requiring Intrado to establish trunking to each local tandem in a LATA, and in some cases trunking to each end office in a local exchange area, is unlawful. Intrado maintained that it is entitled to establish a single POI per LATA and is under no obligation to establish additional facilities beyond the POI.

AT&T disagreed with four contract provisions regarding general trunking that are unrelated to which carrier is providing service to the PSAP. In Appendix 911 1.3 AT&T proposed language that would permit an E911 customer to revoke the authorization of either Party providing 911 service to the PSAP, if desired. AT&T stated that Intrado did not offer any support for its objection to AT&T's additional language.

AT&T stated that Intrado's proposed language revisions in Appendix 911 Section 9.1 reflect reciprocity in the provision of 911 services pursuant to Section 251 of the Act. AT&T stated that it acknowledges that it has certain obligations regarding access to 911 databases pursuant to Section 251, but it does not agree that Intrado's provision of 911 services is subject to Section 251. AT&T stated that its proposed language is general and not specifically tied to the provision of 911 services as an obligation under Section 251 of the Act. AT&T suggested that Intrado's position reflects reciprocity in the provision of 911 services pursuant Section 251 of the Act.

AT&T disagreed with Intrado's statement regarding non-911 traffic that it "is not required to establish trunking to every tandem in the LATA." AT&T contended that ITR Section 4.2 requires Intrado to establish a trunk group to each tandem where Intrado offers basic local exchange service. AT&T stated that, without a trunk group at tandems where Intrado offers local exchange service, there is a possibility for misrouted traffic or blocked calls.

Finally, AT&T noted that Intrado wanted to add language in OET Section 1.1 that was redundant to the definition of Out-of-Exchange Traffic in Appendix OET Section 1.4 which already excludes 911 traffic. AT&T commented that Intrado's proposed language to Appendix OET Section 1.1 to exclude the Parties exchange of 911/E911 service calls or the inter-selective router transfer of 911/E911 service calls was unnecessary.

The Public Staff's view was that the proposed language by AT&T in Appendix 911 Section 1.3 and by Intrado in Appendix 911 Section 9.1, addressing the point at which the Parties agree that approval is required from the E911 customer for a party to carry the customer's 911 traffic is not needed in the agreement.

The Public Staff noted that Intrado had proposed to substitute the word "may" for "shall" where AT&T would be asking a carrier to establish end office and tandem trunking. The Public Staff stated that Intrado should not be required to establish trunking to every AT&T end office and tandem in a LATA. The Public Staff suggested that the parties should adapt the language in the agreement to clarify that Intrado is only required to establish trunking to the tandems and end offices that would be appropriate for a CLP operating in North Carolina.

The Public Staff also noted that Intrado wanted to add language to the definition of Out-of-Exchange Traffic in Appendix OET Section 1.1 to clarify that the OET Appendix does not apply to 911 traffic. The Public Staff observed that AT&T had argued that the language in the definition of Out-of-Exchange Traffic in Appendix OET Section 1.4 of the appendix already excludes 911 traffic. The Public Staff's view was that the additional language proposed by Intrado is necessary since the definition of OET does not clearly exclude 911 traffic.

After careful consideration, the Commission believes that the additional language proposed by AT&T in Appendix 911 Section 1.3 and by Intrado in Appendix 911 Section 9.1 should not be adopted. From the Briefs, arguments and testimony of the witnesses, both Parties agree that approval is required from the E911 Customer for a Party to carry the customer's E911 traffic. Therefore, the additional language is not necessary in the agreement.

The Commission also believes that the clarifying language proposed by Intrado in Appendix OET Section 1.4 should be adopted to clarify that Out-of-Exchange Traffic does not include 911/E911 traffic. The Commission is persuaded by Intrado's argument that the definition for Out-of-Exchange Traffic should explicitly state that 911 traffic is to be excluded.

The Commission further concludes that the language in Appendix ITR Section 4.2 should be adapted to conform to CLP trunking obligations in the 9-state region. Finally, the Commission concurs with the Public Staff that Intrado should not be required to establish trunking to every AT&T end office and tandem in a LATA. The Commission believes that the parties should adapt the language in the agreement to clarify that Intrado is only required to

establish trunking to the tandems and end offices that would be appropriate for a CLP operating in North Carolina.

CONCLUSIONS

Accordingly, the Commission concludes that the additional language proposed by AT&T in Appendix 911 Section 1.3 and by Intrado in Appendix 911 Section 9.1 shall not be adopted. The clarifying language proposed by Intrado in Appendix OET Section 1.4 shall be adopted. The language in Appendix ITR Section 4.2 shall be adapted to conform to CLP trunking obligations in the 9-state region.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

ISSUE NO. 7 – MATRIX ISSUE NO. 3(a): What trunking and traffic routing arrangements should be used for the exchange of traffic when Intrado is the designated E911/911 service provider?

POSITIONS OF PARTIES

INTRADO: When an area is served by more than one public safety agency (only one of which would be Intrado's customer), Intrado's language would require AT&T to implement "line attribute routing" to ensure that only traffic destined for Intrado's PSAP customer is delivered to Intrado. Where it is technically infeasible for AT&T to sort its end users 911 call traffic at the associated originating office and where an originating office serves customers both inside and outside of Intrado's network serving area, it is best for AT&T and Intrado to work cooperatively with the affected governmental 911 authority to determine which 911 provider is best suited to sort the 911 traffic and hand-off calls to the other 911 provider as appropriate.

AT&T: When Intrado is the designated 911/E911 service provider, there are two general scenarios that will be addressed: (1) AT&T will establish direct end office 911 trunk groups to the Intrado SR for wire centers that are not split between PSAP jurisdictions; and, (2) AT&T will establish SR to SR trunk groups for wire centers that are split between PSAP jurisdictions. Intrado's insistence that AT&T should re-engineer its network in a way that would severely compromise network reliability in order to reduce Intrado's cost of doing business should be rejected.

PUBLIC STAFF: AT&T's proposed primary/secondary routing system should be used to handle 911 traffic in a split wire center[1]. The primary selective router should be determined by the selective router assigned to the PSAP that serves the majority of access lines in the wire center.

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[1] A split wire center is a wire center where there are PSAPs served by both AT&T and Intrado. A wire center boundary follows the local loop cable footprint serving a specific geographic area and may or may not overlap municipal jurisdictions.

DISCUSSION

Intrado stated that when a CLP's customers receive emergency services from PSAPs that are served by the ILEC 911/E911 network, it is necessary for the CLP's switch to be configured to select the appropriate direct and redundant trunk group to the 911 selective router connected to the PSAP that is to respond to the CLP's 911 caller, as determined by the location of the caller. Further, in conjunction with direct trunking, such routing may be accomplished by setting the appropriate line attributes in the central office line database for each line during the service provisioning and automated recent line change processes. Intrado contended that this is similar to the way in which line attributes are established when an end user pre-subscribes to a long distance provider. Intrado stated that it refers to this technique as "line attribute routing."

Intrado argued that AT&T's proposal to use a common trunk group for all 911/E911 service traffic destined for Intrado's network is inconsistent with National Emergency Number Association (NENA)[1] recommendations. Intrado stated that the use of common transport trunk groups for all end office traffic makes it impossible for a PSAP served by Intrado to determine the originating carrier's end office and to take advantage of more robust traffic management capabilities. Intrado also argued that industry recommendations call for identifiable end office trunk groups for default routing.

Intrado stated that direct trunking to the selective router serving the PSAP provides the most reliable and redundant 911/E911 network, as evidenced by AT&T's use of direct trunking arrangements within its own network when it is the 911/E911 service provider. Intrado also stated that switching via AT&T's selective router is no longer necessary when Intrado is the designated provider, and inserting another stage of switching in the call processing path introduces the possibility of additional points of failure.

According to Intrado, North Carolina public safety entities must have assurances that 911/E911 service traffic destined to their first responders will be treated equally. Intrado pointed out that Congress and the FCC recognized that there are numerous operational barriers faced by competitors which require that all aspects of local services be available to all competitors on an equal basis. Thus, Intrado stated that Congress and the FCC determined that equal access was absolutely necessary for competition in the local market to survive. Intrado suggested that the routing technique that if proposed, direct routing to the selective router in conjunction with the use of line attribute routing, is similar to the equal access concept.

Intrado contended that 911 calls of all citizens should be routed using the most reliable process available – direct trunking to the selective router serving the PSAP. Intrado argued that AT&T's refusal to utilize direct trunking when Intrado is the designated 911/E911 service provider means that some AT&T customers' 911 calls (i.e., those calling a PSAP served by Intrado) will be treated differently than other AT&T customers' 911 calls (i.e., those calling a PSAP served by AT&T). Intrado believed that AT&T customers 911 calls should be treated in

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[1] NENA is a US non-profit organization promoting 911 as a standard emergency number, including technical support, public awareness, certifications programs, and legislative representation. Newton's Telecom Dictionary, 17th Edition, February 2001.

the same manner – directly trunked from the end office to the selective router serving the PSAP – regardless of who is the service provider for the PSAP or county.

Intrado stated that it has demonstrated that the use of direct trunking in conjunction with line attribute routing is technically feasible and that similar processes are in use today for the routing of long distance calls. Intrado argued that since it has demonstrated that its proposal is technically feasible, the burden shifts to AT&T to demonstrate, by clear and convincing evidence, that the proposal is not technically feasible or that specific and significant adverse impacts would result from Intrado's requested interconnection arrangement. Intrado maintained that AT&T has provided no demonstration that it is technically infeasible to utilize direct trunking and line attribute routing. Intrado stated that AT&T claimed that implementation of Intrado's proposal would impose some costs on AT&T, but when questioned, AT&T could not demonstrate the source of such information.

Intrado contended that AT&T's comparison of line attribute routing to "class marking" is inappropriate. Intrado stated that class marking involved data which is not validated by the Master Street Address Guide (MSAG)[1], while line attribute routing is based upon integration of MSAG data into AT&T's service provisioning. Intrado acknowledged that class marking earned a bad reputation for requiring manual procedures, which could lead to misapplication of tax codes and misrouted calls. Intrado stated that it is not requesting AT&T to use this type of class marking in providing 911/E911 call processing.

Intrado acknowledged that its direct trunking and line attribute routing proposal would require AT&T to validate its end users' address information against the MSAG or AT&T's regional street address guide to ensure that an end user's 911/E911 calls are directed to the appropriate PSAP. Intrado stated that this would involve putting an attribute on the end user's line so that when the end user calls 911, the switch knows where to send the call. Intrado opined that this is no different than presubscription when the end user designates the long distance carrier to which its 1+ calls are to be directed.

Intrado also added that in actuality, the use of direct trunking in conjunction with line attribute routing would not require AT&T to create any new information because the process is based on obtaining the caller's street address information from the MSAG. Further, AT&T would use the MSAG information to establish the "attribute" to direct the 911 call to the appropriate PSAP which covers the caller's address.

AT&T noted Intrado's recommendation that the system that is currently used for routing should be replaced by the use of call sorting at the originating caller's switch. According to AT&T, this sorting is sometimes referred to as class marking and, at other times, as line attribute routing. AT&T contended that, by any name, Intrado has proposed a costly and completely unproven process.

AT&T stated that it has agreed to establish a direct trunk group to the Intrado selective router without providing any additional switching in a wire center in which all customers are

[1] MSAG is a database containing the mapping of street addresses to Emergency Service Numbers within a given community. Newton's Telecom Dictionary, 17th Edition, February 2001.

served by a PSAP to which Intrado provides emergency services. In this instance, AT&T stated there is no need to use class marking or the current system of selective routing.

According to AT&T, the dispute in this issue is actually quite limited and relates to how AT&T end user 911 traffic will be routed when an AT&T end office serves PSAPs that are provided service by both AT&T and Intrado. AT&T's witness Constable explained that since PSAPs typically follow municipal or other governmental jurisdictions, a wire center may encompass the territory of two or more PSAPs that are served by different carriers (e.g., one by AT&T and one by Intrado), and thus are "split." AT&T maintained that it proposes to utilize selective routing to handle these situations for Intrado precisely as it currently does for other carriers.

Specifically, AT&T explained that a determination is made as to which carrier provides service to the PSAP that serves the majority of the customers in the wire center. The selective router of this carrier is designated as the Primary Selective Router. The selective router of the other carrier is designated as the Secondary Selective Router. Then, as witness Constable testified, "all calls from split wire centers would route to the Primary Selective Router, where a determination would be made via the Selective Router Database to route the call directly to a PSAP or deliver the call to the Secondary Selective Router for delivery to a PSAP." AT&T reiterated that the designation of a router as primary or secondary would be based entirely on which carrier serves the PSAP that provides 911 service to the majority of the end users in the wire center.

AT&T pointed out that Intrado witness Hicks testified that AT&T does not currently use line attribute routing in providing 911 service and that line attribute routing is superior to the method AT&T currently uses to route 911 calls. AT&T stated that, although witness Hicks cited nothing to support his view, the fact that Intrado advocates that the current system be discarded in favor of a new superior system creates an insurmountable legal impediment to Intrado's position. Specifically, AT&T noted that Section 251(c)(2)(C) requires the ILEC to offer interconnection that is at least equal in quality to that provided . . . to itself, or to any subsidiary, affiliate or any other party to which the carrier provides interconnection. AT&T stated that this is precisely what it has done when it offered to Intrado the same routing that it offers to other carriers.

Beyond the legal impediment to Intrado's argument, AT&T further contended that there is no record support for Intrado's assertion that line attribute routing is superior to the current system, or for that matter, even reliable. AT&T stated that there is no evidence to support any conclusion as to how line attribute routing would function in the real world setting.

AT&T also stated that the evidence established that the cost and time to put this untested system into place is prohibitive. AT&T pointed out that Intrado's witness Hicks agreed that the Commission should consider, at a minimum, "technical feasibility, cost and time to implement," in determining the reasonableness of a proposal. Further, AT&T noted that witness Hicks testified that he had no idea of the time and cost to AT&T to implement line attribute routing, but stated that the cost to implement line attribute routing is to be borne by AT&T.

AT&T witness Constable testified that AT&T has never used line attribute routing for 911 service. However, based on comparable projects, he believed that line attribute routing would cost between two to three million dollars and require 12 to 18 months to implement. Witness Constable also stated that class marking is time consuming, manual, and inefficient in addition to requiring costly changes at the wire center level and on each individual line.

AT&T witness Constable explained that class marking would require special, complicated switch software translations to be built into every split wire center switch for individual end users and PSAPs served within a split wire center office. Witness Constable also stated that each line would require a service order to be issued to change the properties associated with the individual customer's service to class mark that line to the correct PSAP. AT&T believed that the Intrado proposal should be rejected because there was no evidence to support a conclusion that it should be required to bear the substantial implementation costs of putting a new system in place.

AT&T also stated that Issue No. 7 - Matrix Issue No. 3(a) involves two side issues. First, Intrado takes the position that if the Commission does not adopt class marking, then it should simply make Intrado's selective router the Primary Router in all cases. In response, AT&T argued that Intrado criticizes selective routing on the one hand because it introduces additional switching and the theoretical possibility of technical problems. Yet, Intrado's alternative request is that it should always be the primary SR, even if it serves a PSAP that will handle only a small percent of the calls in any given area. AT&T noted that witness Constable testified on this point that Intrado's proposed language would give Intrado an unnecessary competitive advantage by creating additional charges that must be borne by PSAPs. AT&T also stated that there was no logical reason why Intrado should always be the primary SR. Second, AT&T believed that Intrado seeks to interject into Issue No. 7 - Matrix Issue No. 3(a) a pricing sub-issue that really has nothing to do with the routing question that is the proper subject of Issue No. 7 - Matrix Issue No. 3(a), and which is inappropriate for inclusion in the arbitration of a Section 251 Agreement. AT&T explained that under the current system the carrier designated as the primary SR bills the PSAP that ultimately receives the call for selective router functionality. AT&T stated that Intrado claims that this routing function does not constitute a service to the PSAP, and therefore, AT&T should not be allowed to charge the PSAP. AT&T argued that Intrado's position must be rejected because the purpose of this arbitration is to arrive at a set of rates, terms, and conditions for interconnection between the parties, not to determine what a third party should or should not be charged for services that are provided by either party. According to AT&T a Section 251/252 arbitration between an ILEC and a CLP is not the proper proceeding to determine what either carrier may charge third party customers that are not a party to the proceeding.

The Public Staff stated that this issue involves 911 calls delivered from an AT&T end office to a PSAP served by Intrado in a wire center split among multiple PSAP providers. The Public Staff stated that it agreed with AT&T that the primary/secondary routing process currently in place today should remain as the default routing method in split wire centers. Additionally, the Public Staff agreed with AT&T's method of determining the primary selective router, i.e., the router assigned to the PSAP that serves the majority of access lines in the wire center. The Public Staff stated that it does not support Intrado's recommendation to require AT&T to convert its systems to provide line attribute routing. The Public Staff commented that,

based on the cost and reliability issues associated with line attribute routing, it does not believe that Intrado's request is reasonable or necessary. The Public Staff maintained that primary/secondary routing can provide Intrado with the access to 911 traffic needed to provide service to prospective PSAP customers. Further the Public Staff believed that AT&T's proposal also allows it to meet its federal obligations under Section 251(c)(2)(d) of the Act to provide interconnection at least equal in quality to that provided to itself or another ILEC.

The Public Staff also recommended that the Commission should decline to find that AT&T should not charge a PSAP served by Intrado in the event that AT&T serves the primary routing function. Likewise, if Intrado provides the primary routing function in a split wire center, and transfers calls to an AT&T secondary router, the Public Staff recommended that the Commission should decline to find that Intrado should not charge the PSAP for its primary routing service. The Public Staff believed that costs incurred by a third-party PSAP should not be addressed in the ICA.

The Commission agrees with AT&T that the primary/secondary routing process currently in place today should remain as the default routing method in split wire centers. In reaching this conclusion, the Commission notes that Intrado has requested that the Commission order AT&T to provide it with a routing arrangement with direct trunking and line attribute routing. Intrado argued that the arrangement that it desires is technically feasible and superior to the methods now employed by AT&T. Intrado thus advocated that the current system be discarded in favor of this new superior system and that, to the extent that any costs are involved in implementing this proposal, those costs are to be borne by AT&T. Intrado relied upon Section 251(c)(2)(C) which requires that AT&T provide Intrado with an interconnection agreement which is equal in quality to the arrangement that it provides to itself to support its request. AT&T countered that AT&T does not currently use line attribute routing in providing 911 service and that line attribute routing is, at least in the opinion of Intrado, superior to the method AT&T currently uses to route 911 calls. AT&T argued further that Intrado's advocacy that the current system be discarded in favor of a new "superior" system creates an insurmountable legal impediment to Intrado's position because Section 251(c)(2) only requires AT&T "to offer interconnection that is at least equal in quality to that provided . . . to itself, or to any subsidiary, affiliate or any other party to which the carrier provides interconnection."

The FCC has stated unequivocally that Section 251(c)(2) requires an ILEC to offer a competitor interconnection that is "at least" equal in quality to that enjoyed by the ILEC itself. The FCC states further that: "This is a minimum requirement. Moreover, to the extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technically feasible. Requiring incumbent LECs to provide upon request higher quality interconnection than they provide themselves, subsidiaries, or affiliates will permit new entrants to compete with incumbent LECs by offering novel services that require superior interconnection quality. We conclude that, *as long as the new entrants compensate incumbent LECs for the economic costs of higher quality interconnection,* competition will be promoted." *First Report and Order*, Para. 225. Emphasis added.

Assuming arguendo that Intrado has made the case that the superior interconnection agreement that it has proposed is technically feasible for AT&T to implement, Intrado is entitled to and AT&T must provide the arrangement to Intrado, provided Intrado is willing to compensate AT&T for the economic costs of the higher quality interconnection. The evidence presented in this proceeding, to the extent that there was any evidence provided, indicates that the costs to AT&T to implement Intrado's novel intelligent Emergency Network ® arrangement would be substantial and that Intrado is not willing to bear any of the financial burden. Under these circumstances, we cannot and shall not require AT&T to accommodate Intrado's interconnection request to reprogram its central offices to permit line attribute routing.

In addition, the Commission agrees with AT&T that the primary/secondary routing process currently in place today should remain as the default routing method in split wire centers. The Commission declines to require AT&T to convert its systems to provide line attribute routing. The Commission believes that line attribute routing is a more error prone way of sorting 911 traffic, while requiring an unknown, but certainly sizable, cost and time commitment for AT&T to implement. These costs could also recur if a PSAP decides to switch to another provider from Intrado.

Based on the cost and reliability issues associated with line attribute routing, the Commission does not believe that Intrado's request is reasonable or necessary. Primary/secondary routing can provide Intrado with the access to 911 traffic it needs to provide service to prospective PSAP customers. AT&T's proposal also allows it to meet its federal obligations under Section 251(c) of the Act to provide interconnection at least equal in quality to that provided to itself or another ILEC.

Finally, the Commission agrees with the Public Staff and AT&T that the proper method of determining the primary selective router, i.e., the router assigned to the PSAP that serves the majority of access lines in the wire center, is appropriate. Further, the Commission is of the opinion that either AT&T or Intrado can charge the PSAP(s) for primary or secondary selective routing functions. The Commission believes that a Section 251/252 arbitration between an ILEC and a CLP is not the proper proceeding to determine what either carrier may charge third party customers that are not a party to the proceeding and that costs incurred by a third-party PSAP should not be addressed in the ICA.

CONCLUSIONS

The Commission concludes that AT&T's proposed primary/secondary routing system shall be used to handle 911 traffic in a split wire center. The primary selective router shall be determined by which selective router is assigned to the PSAP that serves the majority of access lines in the wire center.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

ISSUE NO. 8 – MATRIX ISSUE NO. 3(b): What trunking and traffic routing arrangements should be used for the exchange of traffic when AT&T is the designated E911/911 service provider?

POSITIONS OF PARTIES

INTRADO: AT&T's proposed language would require Intrado to provide interconnection trunking at each AT&T selective router in areas in which Intrado provides local exchange service to end users. Intrado has revised this language to clarify that Intrado's only obligation when providing local exchange service to end users is to have its end users' 911 traffic delivered to each AT&T selective router. AT&T's language would require Intrado to provide its own trunking to those routers rather than use transport facilities provided by a third party. There is no requirement that Intrado self-provision trunking to each AT&T 911 selective router.

AT&T: When AT&T is the designated 911/E911 service provider, AT&T expects to offer reciprocal trunk arrangements necessary to provide reliable 911/E911 service to Intrado's end user local exchange customers.

PUBLIC STAFF: The language in the agreement should require Intrado to establish trunking to the appropriate POI on AT&T's network while acknowledging Intrado's right to provision these facilities through a third party.

DISCUSSION

Intrado stated that it does not dispute that it is required to deliver 911/E911 service calls to AT&T's selective routers when AT&T is the designated 911/E911 service provider. Intrado disagreed with AT&T's language that would require Intrado to provide interconnection trunking at each AT&T selective router. Intrado maintained that it has the right to either self-provision trunking or obtain trunking from a third party.

AT&T characterized Intrado's proposed language on this issue as Intrado merely needing to arrange to deliver 911 traffic. AT&T stated that this general language ignores the fact that facilities and trunks are different. AT&T's proposal does not require Intrado to provide the "facilities" to each AT&T selective router, only that it provides interconnection trunks to the appropriate selective routers. AT&T maintained that the trunk arrangements should be reciprocal to what AT&T will provide its end user in accessing Intrado's PSAP customers.

The parties did not provide testimony addressing this issue. However, the Public Staff agrees with Intrado's position that it should be allowed to set up its network and to reach the POI on AT&T's network through a third party, if it desires to do so. The agreement language should clearly allow Intrado to arrange for third party facilities to reach the AT&T POI while making clear that Intrado is responsible for the establishment of the necessary trunking whether using its own facilities or those of a third party.

For the reasons stated by the Public Staff, the Commission believes that the agreement language should clearly allow Intrado to arrange for third party facilities to reach the AT&T POI while making clear that Intrado is responsible for the establishment of the necessary trunking whether using its own facilities or those of a third party. The Commission acknowledges AT&T's comment that facilities and trunk arrangements are different. However, the Commission directs Intrado and AT&T to provide reciprocal trunk group arrangements, to

include facilities, to insure the reliable exchange of traffic between their networks. The Commission also agrees with the Public Staff that Intrado has the right to either self-provision trunking or obtain trunking from a third party. The Commission believes that Intrado has the right to construct or lease facilities to reach the agreed upon POI on AT&T's network, and that Intrado is also responsible for any required trunking equipment necessary to connect to the AT&T selective router.

CONCLUSIONS

The Commission concludes that the ICA shall clearly allow Intrado to arrange for third party facilities to reach the AT&T POI while making clear that Intrado is responsible for the establishment of the necessary trunking whether using its own facilities or those of a third party.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 8, 9, 10, AND 11

ISSUE NOS. 9-12 – MATRIX ISSUE NOS. 4, 4(a), 4(b), AND 4(c): What terms and conditions should govern points of interconnection (POIs) generally, and when: (a) Intrado Communications is the designated 911/E911 service provider; (b) when AT&T is the designated 911/E911 service provider; and (c) when a fiber mid-span meet is used?

POSITIONS OF PARTIES

INTRADO: For non-911 traffic, Intrado has the right to designate a single POI at any technically feasible location on AT&T's network. For 911/E911 traffic, when Intrado has been selected as the designated provider of 911/E911 services, AT&T must interconnect to a minimum of two geographically diverse POIs on Intrado's network, which would be Intrado's selective router/access ports. When AT&T has been designated as the 911/E911 service provider, Intrado will establish a POI on AT&T's network for the exchange of local exchange traffic and emergency calls. This point may be at AT&T's selective router/911 tandem or any mid-span meet point established by the parties. If the parties were to interconnect for the exchange of non-911 traffic using a mid-span meet point, Intrado's proposed language would require the parties to negotiate a point at which one carrier's responsibility for service ends and the other carrier's begins and each party would pay its portion of the costs to reach the mid-span meet point.

AT&T: Federal law requires the POI to be established on the incumbent LEC's network. The POI shall be established within AT&T's network at the most economical and efficient location to provide service to a PSAP, which is at AT&T's Selective Router.

PUBLIC STAFF: AT&T is required to provide interconnection for the transmission and routing of telephone exchange traffic, exchange access traffic, or both, at any technically feasible point within AT&T's network. The parties may negotiate and establish multiple POIs, or different POIs for different types of traffic, but indicating to the parties a specific POI for a particular type of service, i.e., 911 service, is outside the authority of the Commission. AT&T is not required to agree to an interconnection point on the network of Intrado, but may agree to interconnect at a point on Intrado's network as part of a negotiated settlement.

DISCUSSION

In this arbitration, the parties have propounded the following issues for response by the Commission. First, what terms and conditions should govern points of interconnection (POIs) generally? And, second, what terms and conditions should govern points of interconnection when: (a) Intrado is the designated 911/E911 service provider; (b) AT&T is the designated 911/E911 service provider; (c) when a fiber mid-span meet is used? To answer those questions, the Commission must determine our authority to determine the location of the POI.

In our decisions in *In re the Petition of Ellerbe Telephone Co. et al for Arbitration with Alltel Communications et al*, Docket Nos. P-21, Sub 71 et al, *Recommended Arbitration Order (RAO)*, issued on December 20, 2007, and *Order Ruling on Objections and Requiring the Filing of Composite Agreements (Objections to RAO)*, issued on December 31, 2008, respectively, this Commission, on two occasions, struggled to discern the statutory authorization for locating the POI when the parties sought to interconnect with each other indirectly. Although the Parties to this proceeding had the benefit of the *RAO* prior to the filing of Post-Hearing Briefs and Proposed Orders and the Parties included and discussed the *RAO* in their analysis as they saw fit, none of the Parties had the benefit of the Commission's *Objections to RAO* prior to these filings. As a result, none of the Parties considered the issuance of the *Objections to RAO* in their Post-Hearing Briefs and Proposed Orders. Because we believe that both of these decisions are germane to the questions raised in this proceeding about the number and location of the POI, we will discuss each decision in detail.

In the *RAO*, a Commission Panel, with one Commissioner dissenting, decided that the POI must be located on the ILEC's network when the ILEC sought to interconnect with the CMRS Providers to deliver traffic to the CMRS Providers' customers. In the opinion of the Majority, the POI was required to be located on the ILEC's network even though the parties had agreed to interconnect indirectly through a third party tandem. The Panel Majority reasoned that, this Commission's prior decision in *In re Alltel, Docket No. P-118, Sub 130 (Alltel Order)*, held that when two carriers interconnect, either directly or indirectly, they must have a POI (i.e., a single point of interconnection at which traffic is exchanged between the two carriers' networks), and that that point of interconnection must be at a technically feasible point on the ILEC's network unless the two parties mutually agreed to do otherwise. In the Majority's opinion, this decision was mandated by Section 251(c)(2) and the FCC's regulations governing interconnection. The Dissenting Commissioner disagreed. He argued that clear federal authority held that, when an ILEC chooses to interconnect indirectly with a CLP through the use of a third party tandem, the interconnection was initiated pursuant to Section 251(a) rather than Section 251(c)(2). Because the parties had chosen to interconnect indirectly and the ILEC had chosen to exchange traffic in that manner, the Dissenting Commissioner asserted that there were two POIs for the exchange of traffic and that the POI was located on the CMRS Provider's network rather than the ILEC's network when the ILEC delivered the ILEC customer traffic to the CMRS Providers' networks for completion. The Dissent also reasoned that when the scenario was reversed, i.e., when the CMRS Provider indirectly delivered its customers' traffic to the ILEC's network for termination through the same third party tandem, the POI was to be located on the ILEC's network.

On reconsideration, the Full Commission, by a four to two vote, affirmed the original panel decision that there was but one POI and that the POI was to be located on the ILEC's network even though the ILEC had chosen to deliver its customers' traffic to the CMRS Provider through the use of a third party tandem. See the *Objections to RAO.* Although the Majority affirmed the decision of the earlier panel, it declined to adopt the panel's reasoning that the decision regarding the location of the POI was mandated by 47 U.S.C. 251(c)(2). Instead, the Majority held that, since the request to interconnect was not initiated by the CMRS Providers, but, rather by the ILEC, 47 U.S.C. 251(c)(2) did not govern the location of the POI. In the Majority's opinion, the location and, indeed, the number of POI(s) was grounded in the Section 251(a) requirement which provides that each telecommunications carrier has a duty to interconnect either directly or indirectly with the facilities and equipment of other carriers when the interconnection was made at the behest of the ILEC. The Majority stated:

> The Commission continues to believe that, in these dockets, there should be only one POI and it should be located on the RLECs' network. Obviously, in the absence of reliance on Section 251(c)(2), the grounding for that conclusion must be found elsewhere. The Commission believes that such grounding can be found in Section 251(a)(1), which provides that "[e]ach telecommunications carrier has the duty (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." This, of course, was the provision that the *Atlas* court relied upon. Unlike the language of Section 251(c)(2), Section 251(a)(1) does not specify the number of POIs or where the POI or POIs should be located. *As a result, the literal language of Section 251(a)(1), in an arbitration in which an RLEC seeks interconnection with a CMRS Provider, would seem to provide the Commission with the discretion to determine how many POIs there should be and where they should be located.* As a result, the Commission will proceed to determine, on the basis of its sound discretion, the number and location of the POIs for purposes of the parties' interconnection agreements. *(emphasis added).*

Objections to RAO, pp.11-12.

The Majority thereafter concluded that, in the exercise of its sound discretion, and based upon the equities in the case, the POI should be located at a single location of the CMRS Providers choice on the ILEC's network. The Majority grounded its decision in the Commission's discretionary authority under Section 251(a) to determine both the location and number of POIs, rather than mandatory provisions contained in Section 251(c)(2) which, when interpreted by the FCC, directed that a single POI must be established on the ILEC network. Two Commissioners dissented from the decision. It is noteworthy that neither the Dissenters in the *Objections to RAO,* nor the Dissenter in the *RAO,* based their objections to the decision on the invalidity of the single POI rule *per se.* Rather, their objections were primarily based upon the inapplicability of the single POI rule when the carriers agreed to indirectly interconnect. Indeed, there appears to be universal agreement that when a requesting CLP seeks to directly interconnect with an ILEC, the CLP has the option to choose a single, technically feasible,

location within the ILEC's network upon which to interconnect and that the parties are bound by that choice, unless the parties agree to do otherwise.[1]

The Commission thus concludes that the following general principles can be gleaned from our prior decisions in the *RAO*, the *Objections to RAO*, the federal statutes and the pronouncements of the FCC. First, when a requesting CLP seeks to interconnect directly with an ILEC, the requesting CLP has the option to select a single POI within the ILEC network. Second, when a requesting CLP seeks to interconnect directly with an ILEC, the parties may agree to establish a single POI or multiple POIs, at any location or number of locations, without regard to the requirements of Section 251(b) or (c). The location of the POI is thus chosen pursuant to the mandates in Section 251(c)(2) in the first instance or, under the auspices of Section 252(a)[2] in the second. Third, when an ILEC requests interconnection with a CLP or any other carrier, either directly or indirectly, the interconnection is pursuant to Section 251(a). Again, under those circumstances, the parties may agree to establish a single POI or multiple POIs, at any location or number of locations, without regard to the requirements of Section 251(b) or (c). If, however, the parties cannot agree voluntarily upon either the location or number of POI, the Commission *may*, in its discretion, determine both the number and location(s) of the POI. With these general principles in mind, we now determine the issues presented by the parties regarding the number and locations of the POIs based upon the facts and, where necessary, the equities of this case.

<u>**Matrix Issue No. 4 - What terms and conditions should govern POIs generally?**</u>

Intrado asserted that, when AT&T is the designated 911/E911 service provider or for non-911 traffic, Intrado is entitled to interconnect at any location on AT&T's network. Intrado stated that it cannot agree to language that would undermine its right as the competitor to designate the location of the POI.

Intrado added that, for the exchange of basic telecommunications traffic, it is entitled to designate any technically feasible location within AT&T's network for the POI. As such, Intrado argued that it is not limited to AT&T's end office or tandem as AT&T's language requires.

Witness Constable testified that the POI issue arises when two telecommunications carriers interconnect their networks. He explained that in this situation, the facilities are

[1] See Section 251(c)(2) of the Act. Further, in its Further Notice of Proposed Rulemaking about "Developing a Unified Intercarrier Compensation Regime," CC Docket 01-92 (Released March 3, 2005) (*Intercarrier Compensation NPRM*), the FCC wrote at Paragraph 87 that "[u]nder section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carriers to connect at any technically feasible point. The Commission has interpreted this provision to mean that competitive LECs have the option to interconnect at a single point of interconnection (POI) per LATA."

[2] Section 252(a)(1) provides that "[u]pon receiving a request for interconnection, services, or network elements pursuant to Section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."

physically connected, linking the two networks to one another. Therefore, the point at which this connecting or linking takes place is identified as the POI.

AT&T observed that the clear language of the Act establishes that the POI must be on AT&T's network. AT&T pointed out that Section 251(c)(2)(B) specifically provides that interconnection takes place "at any technically feasible place within the carrier's network." AT&T argued that Intrado does not address this clear language of the Act in any portion of its testimony, nor has it provided the Commission with a basis to find that this language does not apply.

The Public Staff stated that the authority governing this issue can be found in the FCC rules for interconnection in Part 51.305. That section provides, in part:

Part 51.305 Interconnection

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) The line-side of a local switch;
(ii) The trunk-side of a local switch;
(iii) The trunk interconnection points for a tandem switch;
(iv) Central office cross-connect points;
(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and
(vi) The points of access to unbundled network elements as described in Section 51.319.

The Public Staff noted that Intrado has argued that there should be multiple POIs, depending on which party is providing service to the PSAP. When the PSAP is a customer of Intrado, AT&T should establish two geographically diverse POIs on Intrado's network; and, when AT&T provides service to the PSAP, Intrado will establish the POI on AT&T's network. The Public Staff further noted that, Intrado also offered as an alternative the possibility that the parties will agree on a meet point between the networks, with both parties responsible for getting their respective traffic to the meet point. According to Intrado, the proposed meet point method is similar to the way AT&T interconnects with other ILECs for the exchange of 911 traffic. Intrado would like to "mirror the type of interconnection arrangements that AT&T has used historically with other ILECs."

The Public Staff observed that AT&T proposes that the POI be established at AT&Ts selective router location(s), which follows the precedent established when the FCC determined that interconnection at the selective router was the proper interconnection point for wireless carriers. Also the Public Staff observed that AT&T believes that Intrado's proposal to interconnect in the manner AT&T does with other ILECs is not appropriate because Intrado is not an ILEC, and those type arrangements are not governed by the requirements for interconnection requested under Section 251.

The Public Staff concluded that neither Intrado nor AT&T can compel the other to use its favored interconnection arrangements. The Public Staff concluded that Intrado has the right to interconnect at a point on AT&T's network as described in FCC rules, specifically Part 51.305. While both parties may freely agree to choose any of these approaches, the Commission's authority is limited by the language in the FCC rules. The Public Staff stated that both parties should ensure the safety of the public in operating an efficient 911 system.

The Commission believes that, generally speaking, AT&T is obligated "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network – at any technically feasible point within the carrier's network when Intrado requests to interconnect with AT&T."[1] The Commission further believes that AT&T is not obligated to choose a point of interconnection on Intrado's network. However, AT&T may, in the course of doing business, interconnect with Intrado or any other carrier in a contractual arrangement satisfactory to both parties. Intrado stated that it was not aware of the contractual arrangements which AT&T may have had in the past with other carriers, although special negotiated facility arrangements were not at all uncommon between carriers for the exchange of traffic. However, as pointed out by the Public Staff, Intrado is entitled to interconnect with AT&T's network as described in FCC rules, specifically Part 51.305.

Additionally, the Commission believes that the parties should mutually agree on a POI which is technically feasible for the exchange of local exchange traffic and access traffic, as necessary.

CONCLUSIONS FOR MATRIX ISSUE NO. 4

In accord with the discussion set forth in the preamble to this issue, the Commission concludes that: (1) AT&T is required by Section 251(c)(2) and Part 51.305 of the FCC rules to provide interconnection for the transmission and routing of telephone exchange traffic, exchange access traffic, or both, at any technically feasible point within AT&T's network when Intrado seeks to interconnect with AT&T; and, (2) the parties may agree to establish a single POI or multiple POIs at any location or number of locations without regard to the requirements of Section 251 (b) or (c).

[1] See Section 251(c)(2) of the Act.

Matrix Issue No. 4(a) - What terms and conditions should govern points of interconnection when Intrado is the designated 911/E911 service provider?

According to Intrado, in its rules to implement the Act, the FCC gave competing carriers the option to select the most efficient points at which to exchange traffic with the ILEC. Intrado commented that the FCC found that Section 251(c)(2) gave competitors the right to interconnect on the ILEC's network rather than obligating competitors to transport traffic to less convenient or efficient points. Intrado reasoned that Section 251(c)(2)(B)'s requirement that the POI be on the ILEC's network was established for the benefit of the competitor, not the ILEC.

Intrado stated that, to provide competitors with further benefits and ease of entry, the FCC determined that competitors have the right to establish only one interconnection point with the ILEC, which protected competitors from ILEC demands to interconnect at multiple points on the ILEC network. The FCC found that the single point of interconnection rule benefits the competitor by permitting it to interconnect for delivery of its traffic at a single point on the ILEC's network. Further, while the single point of interconnection rule was available to competitors, the FCC expressly recognized competitors were not precluded from establishing an alternative arrangement, such as one that permitted the ILEC to deliver its traffic to a different point or additional points that were more convenient for the incumbent than the single point designated by the competitor.

According to Intrado, the FCC concluded that these were intended to be minimum national standards for just, reasonable, and nondiscriminatory terms and conditions of interconnection to offset the imbalance in bargaining power. Intrado added that the FCC determined that, for Section 251 purposes, if an ILEC provides interconnection to a competitor in a manner that is less efficient than the ILEC provides itself, the ILEC violates its duty to be just and reasonable under Section 251(c)(2)(D).

Intrado stated that AT&T apparently recognizes that the industry practice is that the POI for connecting to the 911/E911 network is at the selective router. Intrado stated that this is consistent with the FCC's finding that the cost allocation point for the exchange of 911/E911 traffic should be at the selective router. Intrado added that, the Ohio Public Utilities Commission also confirmed that the point of interconnection should be at the selective router of the 911/E911 network provider and that an ILEC sending 911/E911 traffic to Intrado is responsible for delivering its 911/E911 traffic to an Intrado selective router location.

AT&T routinely requires all competitive carriers serving end users in the AT&T geographic service area to bring their end users' 911 calls to the appropriate AT&T selective router serving the PSAP to which the 911 call is destined, even when those carriers have established a POI at a different location for all other local exchange telephone traffic. Intrado stated that it seeks interconnection arrangements with AT&T for the provision of 911/E911 services to PSAPs that are at parity with what AT&T provides itself and others when it is the designated 911/E911 service provider. Intrado suggested that AT&T has not demonstrated why the interconnection arrangements it proposes on CLPs when AT&T is the designated 911/E911service provider are not equally applicable when Intrado is the designated 911/E911 service provider.

Intrado further stated that when AT&T is not the 911/E911 service provider for a PSAP, AT&T takes its originating end users' 911 calls to a meet point established with an adjacent carrier or all the way to the adjacent carrier's selective router. Intrado added that while not privy to the un-filed agreements between AT&T and adjacent ILECs, Intrado seeks interconnection between its network and AT&T's network similar to what AT&T has implemented for itself and with other 911/E911 service providers in the State. Intrado stated that the existence of these arrangements demonstrates that such arrangements are the preferred method of interconnection for completing calls to the 911/E911 service provider and are technically feasible. Intrado argued that AT&T is required under Section 251(c)(2)(C) to make the same arrangement available to Intrado that it makes available to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.

Intrado also noted that the FCC has determined that, if a particular method of interconnection is currently employed between two networks or has been used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures. Intrado pointed out that AT&T has not made a showing that there are any reasons, based on interface or protocol standards, why the two networks would not successfully interconnect at a technically feasible point employing substantially similar facilities.

Intrado stated that it has requested AT&T to establish interconnection to a minimum of two geographically diverse POIs on Intrado's network for reliability and redundancy purposes, and to benefit public safety. Intrado stated that implementation of its proposal would ensure that 911 calls are diversely routed consistent with FCC recommendations. The public benefit of diversity and redundancy requested has been supported by the FCC's Network Reliability and Interoperability Council (NRIC), which found when all 911 circuits are carried over a common interoffice facility route, the PSAP has increased exposure to possible service interruptions related to a single point of failure, such as a cable cut. Intrado believes that its proposed language implements industry best practices for diversity and redundancy.

Intrado also pointed out that AT&T is not encumbered in providing multi-LATA 911 services. Thus, Intrado reasoned that there should likewise be no restrictions on AT&T's ability to carry 911 service destined for Intrado's network outside of a LATA. Intrado stated that, the FCC and federal district court overseeing the Modified Final Judgment recognized that many 911/E911 transmissions cross LATA boundaries.

Intrado explained that it plans to deploy at least two geographically diverse routers in the state at which AT&T, CLPs, and other carriers can interconnect with it to deliver 911 calls destined for Intrado's PSAP customers. Intrado suggested that AT&T's concern about the "impact" of Intrado's POI proposal on other carriers was misplaced. Intrado stated that, by connecting to any Intrado selective router, a carrier can reach any PSAP connected to Intrado's network.

Intrado commented that Section 253(b) of the Act gave the Commission authority to adopt requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the

rights of consumers. Intrado added that Section 253(b) gives the Commission broad regulatory authority to achieve these public interest objectives and Intrado's proposed physical architecture meet the objectives set forth in the Act.

AT&T stated that witness Constable testified that if Intrado does not interconnect at AT&T's selective router, then, under the language Intrado proposes, all carriers would be required to reroute their facilities from the selective router at which it currently interconnects to the location that Intrado chooses. This would, in turn, impose additional costs on these carriers and risk service interruptions for 911 traffic. AT&T stated that interconnections for the provision of 911 services are currently at AT&T's selective routers.

According to Intrado, when Intrado is the designated 911 provider, AT&T should interconnect on Intrado's network at Intrado's selective routers. However, witness Hicks also testified that it currently does not have any selective routers in North Carolina other than one that is being used for test purposes. As pointed out by AT&T, witness Hicks also testified that he does not know the location of the test selective router or whether it is in the location at which Intrado plans to permanently place a selective router. AT&T commented that, nevertheless, Intrado would expect AT&T to interconnect at both selective router locations, wherever these locations may ultimately be.

To illustrate its point, AT&T commented that, if an AT&T customer is in Asheville, and Intrado's customer (i.e., the PSAP) is in Asheville, Intrado should have no objection to having a local presence in the area in which it is providing service, such as AT&T does. AT&T suggested that the practical effect of Intrado having remotely located selective routers is that AT&T must bear the transport costs for Intrado to reach its various PSAP customers around the State. AT&T also pointed out that, under Intrado's proposal, all of the CLPs and ILECs would have to pay the costs to transport their customers' 911 calls to Intrado's selective routers. AT&T suggested that Intrado has the option of reducing its costs by placing its equipment in the areas that it plans to serve in a location that is relatively close to AT&T's selective routers.

In the scenario presented in Issue 4(a), AT&T seeks to interconnect with Intrado to allow AT&T's customers to complete calls to the Intrado PSAP. This scenario is quite different from the traditional arrangement that exists in this state because Intrado will be performing the service that has traditionally been performed by ILECs such as AT&T. Additionally, this arrangement differs from the traditional approach because, in this instance, the request for interconnection originates with AT&T, the ILEC, instead of Intrado, the CLP. When the ILEC initiates a request to interconnect with the CLP's network, the Commission's authority to consider and implement

the proposals made by the parties is governed by the authority that we derive from Section 251(a) rather than Section 251(c)(2). See *Objections to RAO.*[1]

In the case at bar, Intrado advanced various arguments in support of its contention that AT&T should be required to interconnect with Intrado on Intrado's network when Intrado served as the designated 911/E911 service provider. For instance, Intrado asserted that, in the AT&T-to-Intrado scenario here presented, AT&T should establish interconnection at a minimum of two geographically diverse POIs on Intrado's network for reliability and redundancy purposes, and to benefit public safety. Further, Intrado stated that implementation of its proposal would ensure that 911 calls are diversely routed consistent with FCC recommendations. Intrado argued that the public benefit of diversity and redundancy that it requested has been supported by the FCC's NRIC, when it found that, when all 911 circuits are carried over a common interoffice facility route, the PSAP has increased exposure to possible service interruptions related to a single point of failure, such as a cable cut. Intrado asserted that its proposed language implements industry best practices for diversity and redundancy and that Section 253(b) gives the Commission broad regulatory authority to achieve the public interest objectives and the physical architecture needs that it has identified.

After carefully considering the arguments, evidence, and briefs presented by Intrado and AT&T, the Commission is not persuaded that AT&T should be required to establish interconnection at Intrado's selective routers at two geographically diverse locations on Intrado's network when Intrado serves as the designated 911/E911 service provider for the reasons generally advanced by AT&T. In particular, the Commission finds that it is unreasonable to expect AT&T to interconnect with Intrado at Intrado's selective router(s), which may be miles apart or, more specifically, removed from a particular AT&T exchange service area by LATA boundaries. Although the competitive marketplace is changing the geographic landscape of the traditional service exchange areas in which the ILECs were obligated to provide telecommunication services, to include 911 services, Intrado must not be allowed to make the ILECs and other telecommunication competitors incur operating expenses which are unreasonable or unwarranted because of Intrado's operating paradigm. Intrado's comments concerning how AT&T would have Intrado and other competitors connect with AT&T at AT&T's tandem switches, or at various other end offices, must be viewed in the context of

[1] See also, *Intrado Petition for Arbitration Order before the Ohio Public Utilities Commission*, Case No. 72-1216-TP-ARB, September 24, 2008 (*Ohio PUC Order*) where the Ohio Public Utilities Commission found that Section 251(c) was not applicable in a scenario where Intrado served as the designated 911/E911 service provider. The Ohio Public Utilities Commission stated: "In the second scenario whereby Intrado is the 9-1-1 service provider to the PSAP, the Commission notes that it is the ILEC (e.g., Embarq) that will be required to seek interconnection with Intrado for the purpose of allowing for the completion of Embraq's customer's emergency service calls to the PSAP. Therefore, Section 251(c) of the Act is not the applicable statutory provision for the purpose of interconnection under this scenario inasmuch as Section 251(c) establishes the obligations of ILECs with respect to satisfying the requests of other telecommunications carriers. The delineated obligations include those related to the interconnection of the requesting carrier with the ILECs' networks. Consistent with this discussion, the Commission determines that the disputed issues related to the scenario in which Intrado is the 9-1-1 service provider to the PSAP, should be addressed pursuant to Section 251(a) of the Act, which establishes the duty of a telecommunications carrier (e.g., Intrado) to interconnect directly or indirectly with the facilities of other telecommunications carriers." *Ohio PUC Order*, p. 8. As we noted in the *Objections to RAO*, "the literal language of Section 251(a)(1), in an arbitration in which an RLEC seeks interconnection with a CMRS Provider, ... provide[s] the Commission with the discretion to determine how many POIs there should be and where they should be located."

practicality as to network design practices commonly used by service providers within the telecommunications industry.

Given the particular facts and equities presented in this proceeding, the Commission will not require AT&T to interconnect with Intrado's network at two *yet-to-be determined* locations anywhere within the state of North Carolina at the behest of Intrado. In reaching this conclusion, the Commission notes that the parties are free to choose to interconnect at a single point of interconnection, or at several different points of interconnection, as may be decided by the parties based upon the practice of basic network design characteristics. Further, we note that the parties are, for the most part, the best judges of the nature and needs, be it architecture or financial, of their individual businesses and networks. For these reasons, the Commission declines to order AT&T to interconnect with Intrado in the manner requested by Intrado when Intrado serves as the designated 911/E911 service provider. However, when Intrado is the designated 911/E911 service provider for a particular county and/or PSAP, AT&T should continue to practice accepted industry standards in providing emergency service coverage in the most responsible manner.

CONCLUSIONS FOR MATRIX ISSUE NO. 4(A)

The Commission concludes that, the parties may negotiate and establish multiple POIs, or different POIs for different types of services, but, the Commission will not exercise its discretion, in this case, to dictate to the parties a specific POI for a particular type of service.

Matrix Issue No. 4(b) - What terms and conditions should govern points of interconnection when AT&T is the designated 911/E911 service provider ?

Intrado stated that when AT&T is the designated 911/E911 service provider or for non-911 traffic, Intrado is entitled to interconnect at any location on AT&T's network. Intrado argued that it cannot agree to language that would undermine its rights as the competitor to designate the location of the POI.

For 911 traffic, Intrado agrees that AT&T's selective router is the appropriate POI for Intrado's delivery of 911 traffic to AT&T when AT&T is the designated 911/E911 service provider. However, Intrado declared that AT&T refused to identify the selective router as the POI and requires all 911 calls destined for its PSAP customers to be delivered to the relevant selective router. Intrado stated that it agrees with AT&T that 911 calls should be delivered to the relevant selective router when that selective router is the POI for all 911 traffic. For non-911 traffic, Intrado opined that it can choose any technically feasible location within AT&T's network for the POI.

According to AT&T Intrado's position appears to be that, when AT&T provides 911 services, Intrado is willing to interconnect on AT&T's network. AT&T suggested that to the extent that this is the case, the parties appear to be in agreement. However, AT&T pointed out that Intrado witness Hicks testified that Intrado had the option of either interconnecting at AT&T's selective router/911 tandem or utilizing a mid-span meet point.

The Commission believes that it can only require that AT&T allow Intrado to interconnect at any technically feasible point on AT&T's network. This position is certainly well established and based on FCC directives. Intrado has the right to interconnect on AT&T's network, at a technically feasible point, and may further request additional points on interconnection, if desired. The Commission believes that, in most instances, the AT&T local tandem for local exchange traffic could serves a dual function as the 911 selective router location when AT&T is the designated 911 provider.

CONCLUSIONS FOR MATRIX ISSUE NO. 4(B)

The Commission concludes that AT&T must allow Intrado to interconnect at any technically feasible point on AT&T's network. The parties may, however, mutually agree to establish multiple POIs, or different POIs for different types of services.

Matrix Issue No. 4(c) - What terms and conditions should govern points of interconnection (POIs) when a fiber mid-span meet is used?

Intrado stated that, if the parties decide to interconnect using a meet point, the meet point should be at a point between the parties' networks with both parties sharing the cost of the meet point arrangement. Intrado argued that AT&T's proposed language regarding meet point interconnection is not consistent with the FCC's requirements because it dictates the specific location of the meet point and does not address the facilities AT&T is required to build to reach the meet point. Intrado claimed that AT&T utilizes meet point arrangements with other providers in North Carolina. Further, Intrado argued that meet point arrangements are technically feasible, and that Intrado has the right to obtain the same types of interconnection arrangements AT&T utilizes within its own network and with other carriers.

AT&T noted that Intrado claimed that it has the option of either interconnecting on AT&T's network at the selective router, an approach that AT&T obviously would agree with, or to require the use of a mid-span meet point. AT&T pointed out that Intrado does not identify a location for the meet point, but only contended that it has the right to negotiate for the use of such an arrangement. AT&T argued that the interconnection requirement provided for under Section 251(c)(2)(B) occurs on the ILEC's network. AT&T asserted that the meet point argument presented by Intrado should be disregarded under the law.

The Public Staff stated that Intrado offered as an alternative interconnection arrangement the use of a meet point between the networks, in which both parties are responsible for getting their respective traffic to the meet point. The Public Staff commented that Intrado stated that the proposed meet point method is similar to the way AT&T interconnects with other ILECs for the exchange of 911 traffic, and that Intrado would like to "mirror the type of interconnection arrangements that AT&T has used historically with other ILECs."

The Commission finds that, AT&T may, in the course of doing business, interconnect with Intrado or any other carrier in a contractual arrangement satisfactory to both parties. Intrado stated that it was not aware of the contractual arrangements which AT&T may have had in the past with other carriers, although special negotiated facility arrangements were not at all

uncommon between carriers for the exchange of traffic. However, as pointed out by the Public Staff, Intrado is entitled to interconnect with AT&T's network as described in the FCC rules, specifically Part 51.305.

CONCLUSIONS FOR MATRIX ISSUE NO. 4(C)

The Commission finds that, AT&T may, in the course of doing business, interconnect with Intrado or any other carrier in a contractual arrangement satisfactory to both parties. Further, the Commission finds that AT&T is required by Section 251(c)(2) and Part 51.305 of the FCC rules to provide interconnection for the transmission and routing of telephone exchange traffic, exchange access traffic, or both, at any technically feasible point within AT&T's network when Intrado seeks to interconnect with AT&T. However, the Commission also finds that Part 51.305 of the FCC rules does not provide guidance to the Commission as to the location of the POI when the parties decide to interconnect using the meet point. When the parties decide to interconnect through the use of a meet point and cannot agree upon the location, the Commission may, in its discretion, weigh the facts and the equities of a particular case to determine the terms and conditions governing the location of the POI when a fiber meet point interconnection is desired. In this particular case, however, the Commission, in its discretion, will not mandate any language in the ICA regarding meet point, and will remind the parties that they are free to negotiate mutually agreeable meet point locations.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

ISSUE NO. 13 – MATRIX ISSUE NO. 5: (a) Should specific terms and conditions be included in the ICA for inter-selective router trunking? If so, what are the appropriate terms and conditions? (b) Should specific terms and conditions be included in the ICA to support PSAP-to-PSAP call transfer with automatic location information (ALI)? If so, what are the appropriate terms and conditions?

POSITIONS OF PARTIES

INTRADO: The ICA serves as the framework for the interconnection and interoperability of competing local exchange networks. 911 is a local exchange network and end users (i.e. PSAPs) of the 911 network should be able to transfer 911 calls amongst themselves with full functionality regardless of who is the designated 911 service provider. In a competitive environment, a subscriber should be able to place calls to other subscribers without regard to who is the service provider. The best way to effectuate such seamless interoperability is to include provisions requiring inter-selective router trunk groups and PSAP-to-PSAP call transfer in the ICA.

AT&T: The best industry practice is for the parties to negotiate private agreements for such arrangements with the participation of PSAPs and other relevant government disaster agencies. Such agreements are necessary because it is the PSAP customer that determines whether a selective router is installed.

PUBLIC STAFF: The interconnection of selective routers operated by AT&T and Intrado should follow the primary/secondary routing architecture currently in use by AT&T and other

ILECs in North Carolina. ANI and ALI information that was initially transmitted to the serving AT&T end office during the 911 call should be retained whenever the call is transferred between the parties' selective routers.

DISCUSSION

Intrado stated that the parties disagree as to whether a separate agreement with the PSAP is necessary prior to implementing inter-selective routing capabilities. Intrado commented that it strongly supported the involvement of the county or PSAP in defining 911 call routing requirements, such as alternate routing, back-up routing, night transfer routing, call transfer routing, etc., with its designated 911 service provider. However, Intrado stated there is no need to include a provision in the interconnection agreement that requires the parties to obtain a separate, formal agreement with a county or PSAP as a prerequisite to deploying inter-selective router trunking. Intrado contended that the interconnection agreement should contain the framework for establishing the interconnection and interoperability of the parties' networks to ensure inter-selective router capabilities can be provisioned once requested by a county or PSAP.

Intrado stated that inter-selective router trunking allows emergency calls to be transferred between selective routers and the PSAPs connected to those selective routers while retaining critical access to the caller's number and location information associated with the emergency call. Intrado suggested that establishment of inter-selective router trunking ensures that PSAPs are able to communicate with each other and more importantly, that misdirected calls can be quickly and efficiently routed to the appropriate PSAP.

Intrado commented that a second related issue on inter-selective trunking dealt with whether the parties were required to notify each other of changes in dial plans that support inter-selective router trunking. Intrado stated that dial plans are used to determine to which PSAP emergency calls should be routed based on the route number passed during the call transfer. Intrado stated that it proposed language that would require the parties to notify each other of any changes, additions, or modifications to 911-related call transfer dial plans. Intrado pointed out that Section 251(c)(5) of the Act requires ILECs to provide public notice of changes in their network that would affect the interoperability of facilities and networks.

AT&T commented that this issue involves the use of inter-selective routing to provide the ability for a PSAP to transfer a call directly to another PSAP. AT&T stated that, while not all PSAP customers order this service, PSAPs who do want these arrangements typically order them on a customized basis that varies from one PSAP to the next, and they order the arrangements directly from the service provider. Furthermore, PSAPs order precisely what they want and pay AT&T for what they order. AT&T witness Constable stated that Intrado's proposal would require AT&T to incur all of the costs to implement this capability, regardless of whether any PSAP requested it; yet neither the PSAP nor Intrado would compensate AT&T for any of its costs incurred to provide this feature.

AT&T argued that providing inter-selective routing does not involve interconnection at all and is, therefore, not proper for inclusion in an interconnection agreement. AT&T reiterated that the call transfer functionality is a feature that a PSAP orders to allow it to transfer a call to

another PSAP. Intrado witness Constable testified that the engineering and implementation of call transfer must be designed and implemented in conjunction with a PSAP as well as any other relevant government agency. Unlike facility and trunking arrangements in a Section 251 interconnection agreement, these facilities and trunks would be deployed not to effectuate interconnection between AT&T and Intrado. Instead witness Constable stated that, "these facilities would be deployed to meet a specific request of the 911 customers, who are not parties to this agreement." AT&T commented that the purpose of a Section 251 interconnection agreement is to set the terms for interconnection between a CLP and an ILEC.

AT&T stated that, to provision inter-selective routing, it requests for call transfer capability to be initiated by the PSAP, and a separate agreement would be entered into to ensure that the PSAP gets precisely what it orders. In contrast, AT&T argued that Intrado wants AT&T to be directed to provide Intrado, without costs, call transfer functionality that it would provide PSAPs as a sort of "one-size-fits-all call transfer product."

AT&T commented that implementing the inter-selective routing that Intrado proposes would require AT&T to incur costs for facilities, trunks, database storage, extensive translations, and testing. However, AT&T commented that Intrado has not proposed a mechanism whereby AT&T could recover its costs, and Intrado has not offered to pay any of these costs in order to provide the PSAPs this feature. AT&T added that PSAP-to-PSAP inter-selective routing can be very useful, and this feature should be available to any PSAP requiring this feature. AT&T stated that this functionality should be made available to the PSAP requesting this feature on a customized basis. AT&T suggested that the PSAPs should pay "AT&T, or any other provider that undertakes the labor, and sustains the costs, necessary to create this capability."

AT&T witness Constable testified that AT&T does not know what Intrado means by "ALI interoperability" as the term is not defined in the ICA or in NENA standards. Witness Constable also testified that in the context of call transfer functions between AT&T and Intrado, the parties have detailed language regarding how ALI will be provided.

AT&T also addressed the dispute with Intrado related to the notification of dialing plan changes. AT&T stated that it objects to a requirement that it notify Intrado of each and every dialing plan change, as Intrado's contract language proposes AT&T to do. AT&T argued that such notification is unfairly burdensome and unnecessary, as AT&T experiences numerous dialing plan changes on a regular basis that have no impact whatsoever on inter-selective trunk routing for 911.

The Public Staff noted that Intrado witness Hicks contended that Intrado's "interoperability" plan utilizing inter-selective router trunking would ensure that call transfers from one selective router to another could be performed in a manner that allowed misdirected emergency calls to be terminated to the correct PSAP, irrespective of the 911 service provider. Calls transferred under its selective routing plan would retain critical caller ANI and ALI information associated with the call. Witness Hicks also contended while "interoperability," is technically feasible, it is currently only available on a limited basis in North Carolina. According to his testimony, interoperability is necessary to ensure that PSAPs can fully utilize the benefits of the enhanced, next-generation 911 services Intrado provides over Internet

Protocol (IP)-based technology, while maintaining the minimum service that is available today. Further whenever technically feasible, he believed that the trunks interconnecting selective routers should be geographically diverse and redundant.

The Public Staff stated that Intrado's proposed ICA language would require interselective router trunking to allow calls to be transferred between PSAPs subtending AT&T's selective routers and PSAPs subtending Intrado's selective routers. The resulting networks would have to satisfy industry service quality standards and support diversity, redundancy, and reliability consistent with state or local 911 rules.

The Public Staff observed that AT&T witness Constable contended that expensive trunking facilities should not be constructed unless a PSAP formally requests inter-selective router call transfer capabilities. As stated by AT&T, if a PSAP does request these capabilities, the requesting PSAP should work with AT&T and Intrado to ensure that the proposed facilities satisfy its needs. Further, witness Constable argued that placing inter-selective router call transfer functionality in an interconnection agreement between AT&T and Intrado with no oversight from the PSAPs would inappropriately remove the PSAPs from the decision-making process. Witness Constable stated that Intrado's proposed provisions for inter-selective router trunking would cause AT&T to incur costs for facilities, trunks, database storage, translations, and testing without receiving any compensation. Witness Constable testified AT&T should have to bear such costs only if a PSAP intends to use the call transfer functionalities, and in such a case, the requesting PSAP should be involved in planning and implementing the call transfer architecture. Under present established practices, PSAPs that request inter-selective call transfer compensate AT&T for the costs of providing this service. Witness Constable argued that Intrado's proposal would remove the PSAPs from the picture and place the burden of those costs on AT&T.

The Public Staff also observed that in Section 4 of the 911 Appendix, AT&T proposed language that would require AT&T and Intrado to provide inter-selective routing upon request from a PSAP. The requesting PSAP would be expected to participate in the planning process to ensure that the inter-selective router functionality meets its expectations.

The Public Staff suggested that, based upon the evidence presented by witness Constable, which Intrado did not refute, the Commission should conclude that the primary/secondary routing architecture currently employed by ILECs is the appropriate architecture for AT&T and Intrado to use when they jointly provide 911 service under a split wire center arrangement. The Public Staff stated that this routing process appears to work well whenever ILECs share 911 responsibilities within a given geographical area. In addition the testimony indicates that this arrangement should be more cost effective and less error-prone to implement than the inter-selective router architecture proposed by Intrado.

The Public Staff also believed that the use of AT&T's current primary/secondary routing architecture will not impair Intrado's ability to deploy any of its new or enhanced 911 features. The Public Staff commented that if Intrado begins providing service and encounters problems with such deployments, the Commission should expect AT&T to work cooperatively and expeditiously with Intrado to solve them.

The Public Staff also recommended that AT&T and Intrado should provision their interconnected network so that each 911 call transferred from a primary to a secondary router retains the same ANI and ALI information that was initially delivered to the primary router. Additionally, the Public Staff stated that each party should be responsible for advising the other party of any changes to its systems which may adversely impact the operation of the interconnected network, or the other party's provision of 911 service to the public.

The Public Staff stated that AT&T's charges for the facilities, equipment, and services needed to interconnect with Intrado to offer 911 services to PSAP and the public must comply with the requirements of Section 251(c). The Public Staff also stated that AT&T's charges and the charges Intrado intends to impose on AT&T for interconnection must be specified in the parties' ICA other than those involving trunking between a PSAP served by an AT&T selective router and a PSAP served by an Intrado selective router. The Public Staff stated that language contained in the ICA should be mutually agreed to between AT&T and Intrado, and should not require any consent endorsements from PSAPs.

The Public Staff also observed that Intrado's proposed ICA language would require AT&T to notify Intrado if it upgrades its selective routers or makes changes that might affect inter-selective routing capabilities, even if these changes do not directly affect Intrado. Intrado proposed that AT&T should also be required to advise Intrado of network changes that affect call transfer capabilities. The Public Staff stated that Intrado believes that AT&T currently exchanges dial plan information with other 911 providers and contends that it deserves the same treatment.

The Commission believes that the interconnection of selective routers operated by AT&T and Intrado should follow the primary/secondary routing architecture currently in use by AT&T and other ILECs. In reaching this conclusion, the Commission finds AT&T's testimony that this arrangement shall be more cost effective and less error-prone to implement than the inter-selective router architecture proposed by Intrado persuasive. The Commission also notes that the Public Staff stated that this routing process appears to work well whenever ILECs share 911 responsibilities within a given geographical area. Further, Intrado did not dispute the fact that the primary/secondary approach as practiced in the industry today would achieve the continuing support of the delivery of 911 service between itself and AT&T, as well as other telecommunications providers.

The Commission agrees with the Public Staff that each party is responsible for advising the other party of any changes to its systems which may adversely impact the operation of the interconnected network, or the other party's provision of 911 service to the public. The Commission observes that Section 251(c)(5) of the Act requires ILECs to provide public notice of changes in their network that would affect the interoperability of facilities and networks. Therefore, the Commission believes that AT&T and Intrado will continue to comply with the rules and regulations, as generally practiced within the industry, governing the exchange of public notices of changes in dial plans between service providers, as appropriate. The Commission further believes that in light of "technology neutrality," AT&T and Intrado are

obligated to provide for the seamless and transparent exchange of information "between and across telecommunications networks."[1]

CONCLUSIONS

The Commission concludes that the interconnection of selective routers operated by AT&T and Intrado shall follow the primary/secondary routing architecture currently in use by AT&T and other ILECs in North Carolina. In addition, ANI and ALI information that was initially transmitted to the serving AT&T end office during the 911 call shall be retained whenever the call is transferred between the parties' selective routers. Lastly, each party shall advise the other party of any system changes which it believes may impact the efficiency or reliability of the interconnected network, or might adversely impact the other party's provision of 911 service to the public.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

ISSUE NO. 14 - MATRIX ISSUE NO. 6: (a) Should requirements be included in the ICA on a reciprocal basis for: (1) trunk forecasting; (2) ordering; and, (3) service grading? (b) If not, what are the appropriate requirements?

POSITIONS OF PARTIES

INTRADO: Intrado has modified AT&T's proposed ICA language to make forecasting provisions reciprocal. As co-carriers, both parties will be purchasing services from each other and thus each party should be aware of the process to order services and facilities from each other. Intrado has therefore included language addressing its ordering process that is consistent with industry terms and parameters in the ICA.

AT&T: In the 13-state Appendix ITR Section 6.1, AT&T requires Intrado to provide an initial trunk forecast to ensure adequate trunking to accommodate Intrado's demand when it enters the local exchange service market. While AT&T's general trunk forecast is made available to CLPs on an ongoing basis, AT&T's forecast will have no meaning for Intrado from an initial implementation perspective. Both parties should follow industry standard ordering guidelines and systems, using Access Service Requests (ASRs) and the EXACT system. AT&T should not be obligated to use an undefined and non-standard ordering system.

PUBLIC STAFF: The first two sentences of Section 6.1 of Appendix ITR of the original 13-state template should be modified to reflect a reciprocal initial trunk forecasting requirement for AT&T and Intrado and to require each party to review the forecast it receives and advise the other party of any problems that may impact its trunk forecast. Further, the ordering language Intrado proposed for Section 8.6.1 of Appendix ITR is reasonable and reciprocal, and AT&T should be required to use Intrado's designated ordering process to obtain services from Intrado.

[1] See Section 256(a)(2) Coordination For Interconnectivity, of the Act.

DISCUSSION

Intrado stated that it modified AT&T's proposed language to make the forecasting provisions for non-911 trunks applicable to both parties rather than solely imposed on Intrado. Intrado argued that it must have some indication from AT&T how many trunks will be required to support calls between the parties' networks to adequately groom its network. Intrado further stated that AT&T claims it will provide trunk forecast information to Intrado, but disputes the requirement to provide an "initial" trunk forecast. Intrado also stated that forecasts are integral to ensuring the parties' networks meet industry standards and are properly sized to accommodate both immediate and anticipated growth, without experiencing implementation delays. Similarly, Intrado believed that language addressing how AT&T will order services from Intrado should be included in the interconnection agreement. Intrado has provided detailed information regarding its ordering process and explained that its procedures incorporate the standard Alliance for Telecommunications Industry Solutions (ATIS)-OBF Access Service Request process much like AT&T uses today and provides to other carriers when they order services from AT&T.

Intrado suggested that as co-carriers exchanging 911 traffic with each other, both parties will be purchasing services from the other. Intrado stated that each party should be aware of the process to order services and facilities from each other.

AT&T stated that the parties generally agree that trunk forecasting requirements should be fair and reciprocal and that each party should provide the other with necessary information. AT&T contended that the dispute relates specifically to initial trunk forecasts. In Section 6.1, Appendix ITR, AT&T has requested that Intrado provide it with an initial forecast that is necessary to ensure that AT&T has available enough trunks to meet the demands of Intrado's network. AT&T argued that there is, in this limited situation, no need for a reciprocal requirement because an initial forecast from AT&T would be of no use to Intrado. AT&T stated that it requires Intrado's initial forecast to determine how much additional traffic Intrado will be adding to AT&T's network, and to plan accordingly. AT&T added, on the other hand, that Intrado is developing a new network that will be initially sized. AT&T suggested that Intrado does not need an initial AT&T trunk forecast to determine whether its pre-existing network is adequate.

As to the dispute regarding trunk orders placed by AT&T, Intrado has proposed a process that has been proposed whereby AT&T would order trunks from Intrado according to procedures posted on Intrado's website. AT&T contended that, under such a proposal, it would be bound to accept whatever future rates and procedures Intrado chooses to post. AT&T stated that a more equitable approach is to make the ordering processes reciprocal.

The Public Staff noted that, Intrado witness Hicks contended that both parties needed information on trunk quantities to ensure that they were adequate to handle both immediate and anticipated emergency call traffic and Intrado had modified the ICA to require the exchange of forecast information. Intrado posited that both parties needed to maintain a proper quantity of trunks and a grade of service consistent with industry standards.

The Public Staff believes that, as suggested by Intrado, the requirement for the parties to exchange initial information on their respective trunk forecasts is worthwhile and should be retained. After reviewing both parties proposed language on this issue, the Public Staff suggested that the exchange of trunk information should be reciprocal and suggested the adoption of the following language for this issue in Section 6.1 Appendix ITR:

> Each party agrees to provide an initial forecast for all trunks groups described in this Appendix ITR. Each Party shall review the initial trunk forecast provided by the other Party and provide any additional information to the other Party that it believes may impact the other Party's trunk forecast.

With respect to the issue of trunk ordering, the Public Staff noted that both parties proposed language with procedures that contemplate the use of an ASR. The Public Staff suggested that, because of the limited testimony on this issue, the ordering language Intrado proposed for Section 8.6.1 of Appendix ITR is reasonable and reciprocal and that AT&T should be required to use Intrado's designated ordering system to obtain services from Intrado.

The Commission is of the opinion that each party should exchange initial and on-going trunk information, as required, to ensure that the emergency call traffic is handled in the most efficient manner following industry standards. In the case of non-911 initial trunk information, it would appear reasonable that the initial trunk requirements for such traffic would be driven by Intrado's network and business plans to which AT&T would be expected to provide adequate facilities to meet. However, the Commission believes that the reciprocal exchange of trunk information would be beneficial to both parties and should occur.

The Commission notes that AT&T stated in its Proposed Order that the issue on service grading was resolved and therefore is not to be addressed by the Commission.

In addition, the Commission instructs AT&T to use Intrado's ordering system to coordinate and order trunk facilities in order to meet network demand. The Commission's basis for this position is based on the information, as presented, that both AT&T's and Intrado's ordering procedures follow standard industry practices for this function. As such, both parties are to reciprocate in its practice of ordering trunk facilities from each other as reasonable.

CONCLUSIONS

The Commission concludes that Section 6.1 of Appendix ITR of the original 13-state template shall be modified to reflect a reciprocal initial trunk forecasting requirement for AT&T and Intrado, and that each party should review the forecast it receives and advise the other party of any problems that may impact its trunk forecast. The ordering language Intrado proposed for Section 8.6.1 of Appendix ITR is reasonable and reciprocal and AT&T shall be required to utilize Intrado's designated ordering process to obtain services from Intrado.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

ISSUE NO. 15 – MATRIX ISSUE NO. 7(a): Should the ICA include terms and conditions to address separate implementation activities for interconnection arrangements after the execution of the interconnection agreement? If so, what terms and conditions should be included?

POSITIONS OF PARTIES

INTRADO: Intrado argued that the parties should not be required to undertake additional activities (other than routine operational discussions) or enter into other agreements to effectuate their interconnection arrangements after the ICA has been executed. Further, Intrado stated that additional, unnecessary steps should not be required to implement interconnection arrangements or make network changes.

AT&T: AT&T asserted that Intrado shall notify AT&T when Intrado intends to interconnect to an AT&T Selective Router. Also, AT&T stated that either party should be required to give 120 days notice to add or remove a network switch.

PUBLIC STAFF: The Public Staff asserted that the ICA should include the terms and conditions proposed by AT&T to address separate implementation activities for interconnection arrangements after the execution of the ICA.

DISCUSSION

This issue was addressed by Intrado witness Hicks and AT&T witness Constable.

In its Proposed Order, Intrado argued that AT&T's proposed language contemplates that the parties will amend the ICA to set forth the specific interconnection arrangements to be utilized by the parties. Further, Intrado noted that AT&T's proposed language requires Intrado to provide notice beyond the ICA or amend the agreement to seek interconnection. Intrado does not agree with AT&T's requirement that it needs to provide notice beyond the ICA or amend the agreement to seek interconnection. According to Intrado, no further notice or action should be needed from Intrado to implement the interconnection arrangements set forth in the agreement other than routine discussions between the parties' operational personnel. Intrado asserted that AT&T's language would impose additional, unnecessary steps on Intrado to effectuate its interconnection arrangements with AT&T. Moreover, Intrado contended that, in a world where timely response to customer requests is important, having any period longer than 30 days to make a network change is poor business. Thus, Intrado strongly opposes AT&T's language that would require Intrado to wait 120 days after an agreement is signed before the parties can interconnect their networks. Also, Intrado argued that it has proposed language that clarifies that Intrado will provide the additional notifications required by AT&T only to the extent it seeks additional points of interconnection with AT&T. Intrado asserted that its proposed language is reasonable, reflects the need to respond quickly to public safety requests, and should be adopted.

AT&T witness Constable explained that the dispute involves several sections of language in the 911 NIM Appendix. Under AT&T's proposed language, Section 2.1 would require that the parties consent to the network architecture that will be developed; Section 5.1 would require that Intrado provide notice of any new interconnection arrangements it wishes to establish; and,

Section 5.4 would require each party to give 120 days' notice when adding or removing a switch from its network. According to witness Constable, the proposed language would reduce misunderstandings, facilitate Intrado's establishment of facility and trunking arrangements at a new AT&T Selective Router, and give the parties 120 days' notice when either party wishes to add or remove switches from its networks. Witness Constable explained that replacing a switching system requires more than the 30-day period suggested by Intrado in order to effect a smooth transition. In fact, witness Constable explained further that adding or removing a switch may take as much as a year due to long range planning, capital expenditures and the coordination required with other carriers.

The Public Staff stated in its Proposed Order that AT&T's proposed language contemplates that the parties will amend the ICA to set forth the specific interconnection arrangements to be utilized by the parties and that Intrado does not agree with AT&T's requirement that it needs to provide notice beyond the ICA or amend the agreement to seek interconnection. According to the Public Staff, Intrado believes that no further notice or action should be needed to implement the interconnection arrangements set forth in the agreement other than routine discussions between the parties' operational personnel. Intrado's proposed language also has clarified that, only to the extent it seeks additional points of interconnection with AT&T, Intrado will provide the additional notifications requested by AT&T. AT&T's language would impose additional, unnecessary steps on Intrado to effectuate its interconnection arrangements with AT&T.

The Public Staff noted that AT&T asserted that Appendix 911 NIM Section 2.1 provides that the parties will agree to the physical architecture plan in a particular interconnection area. AT&T simply proposes that the Parties document that plan prior to implementation. Such documentation will ensure that both Parties' understanding of the plan is the same - before either Party invests in its implementation - and will thus avoid potential disputes. In Appendix 911 NIM Section 2.4, AT&T requires Intrado to provide notification of its actual "intent" to change the parties' architecture plan, not to simply notify AT&T of its request for such a change. A request does not necessarily indicate intention to proceed with a change. Intrado needs to notify AT&T using the proper form when it intends to interconnect to an AT&T Selective Router. Further, 120-days notice (rather than only 30) is appropriate when Intrado will add a switch to its network because adding a switch is a significant network change that affects every carrier providing service in that geographic area. Finally, the Public Staff recommended that the ICA should include the terms and conditions proposed by AT&T to address separate implementation activities for interconnection arrangements after the execution of the ICA.

After reviewing the parties' positions and the record proper, the Commission agrees with the Public Staff and AT&T that: (1) Intrado should notify AT&T when Intrado intends to interconnect to an AT&T Selective Router; and, (2) that either party should be required to give 120 days notice to add or remove a network switch. The ICA shall be revised accordingly.

In requiring this revision, we acknowledge that Intrado's opposition to AT&T's proposal is rooted partially in its reluctance to share its business plans with AT&T. In today's competitive environment, this reluctance is completely understandable. Ordinarily, when a competitor seeks to compete with an ILEC to provide telecommunications service, the Commission would take

affirmative steps to minimize or avoid altogether any actions by the Commission which would result in Intrado's business plans being shared with or changed to accommodate AT&T. This, however, is not the ordinary situation. 911 and E911 providers routinely provide critical information on a real time basis to law enforcement officers, fire fighters, health care providers and other first responders which may, on occasion, mean the difference between life and death to a member of the public. As such, these 911/E911 services are extraordinarily important to the overall safety and welfare of the community.

As a result, the Commission believes that 911 and E911 networks must, to the extent possible, be designed and operated to ensure that the public can seamlessly and reliably access the network and that the operators of such network can accurately identify and transmit the location and other necessary information to the appropriate emergency services provider. To achieve this goal, it is necessary, in the Commission's opinion, for AT&T and Intrado to cooperate and coordinate their activities to preclude outages and minimize misdirected calls or other errors which could result in unnecessary loss of property and/or increased suffering or death. Undoubtedly, the degree of cooperation and coordination that we envision will impact Intrado's ability to respond as quickly as it would like to public safety requests. However, given the choices that we have been provided and our desire that the network be designed and operated to ensure seamless access and reliable information, the Commission finds the language proposed by AT&T with regard to notice required to add or replace a switching system to be more reasonable and more likely to produce the coordination necessary for a satisfactory interconnection between the parties.

CONCLUSIONS

Because 911 and E911 emergency services networks are responsible for ensuring that critical information is received from the public and transmitted to the correct emergency service providers in situations in which the well-being and safety of the individual providing the information and the public at large might be at risk, Intrado shall notify AT&T when Intrado intends to interconnect to an AT&T Selective Router in order to preclude outages and minimize misdirected calls or other errors which could result in unnecessary loss of property and/or increased suffering or death. In addition, either party to this ICA shall be required to give 120 days notice to add or remove a network switch.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

ISSUE NO. 16 – MATRIX ISSUE NO. 8(a): What terms and conditions should be included in the ICA to address access to 911/E911 database information when AT&T is the designated E911 service provider?

POSITIONS OF PARTIES

INTRADO: Intrado argued that the ICA should include a requirement that the parties maintain interoperability between their networks to support the exchange of ALI information between the parties.

AT&T: AT&T asserted that it is not appropriate to impose upon AT&T a duty to maintain "ALI interoperability". AT&T further maintained that Intrado has proposed no definition for the term "interoperability", and the proposed language is impermissibly vague for this reason.

PUBLIC STAFF: The Public Staff stated that the parties should be required to revise the ICA 13-state Appendix 911 template that AT&T witness Constable provided in Revised Exhibit JEC-1 to: (1) remove the phrase "to support ALI interoperability" from Section 3.4.3; (2) remove Section 3.4.5 concerning the mutual sharing of steering tables; and (3) reflect consistent treatment of the parties' mutual responsibilities in the parallel Sections 3.4.3 and 5.4.3 and the parallel Sections 3.4.4 and 5.4.4. The Public Staff maintained that all of these changes should be incorporated into the final version of the ICA filed with the Commission in this proceeding.

DISCUSSION

This matrix issue concerns the following disputed language for Section 3.4.3 of Appendix 911 (See Revised Exhibit JEC-1):

> 3.4.3 Where AT&T manages the E911 Database, AT&T's E911 Database shall accept electronically transmitted files **to support ALI interoperability** that are based upon NENA recommended standards. Manual (i.e. facsimile) entry shall be utilized only in the event that the DBMS is not functioning properly.

Intrado proposed the inclusion of the bold and underlined language shown above, and AT&T and the Public Staff opposed the inclusion of this language.

Intrado asserted in its Proposed Order that it has proposed language to ensure that the parties can maintain interoperability between their databases when exchanging 911 traffic or transferring 911 calls between each party's selective router. Intrado stated that, for this reason, it requests that the parties adopt arrangements to enable access to ALI when performing call transfers via inter-selective router trunking.

Intrado recommended that the Commission conclude that the transfer of ALI information is critical for emergency services personnel to locate the 911 caller, especially for wireless or Voice over Internet Protocol (VoIP) calls, or even wireline calls where the caller cannot speak. Intrado noted that language regarding inter-selective router trunking and call transfer with ALI is also necessary to ensure interoperability between the parties' networks as contemplated by Section 251(c) of the Act.

Intrado also recommended that the Commission reject AT&T's contention that the term "interoperability" is vague or unknown. Intrado maintained that the term is well understood by those in the 911 industry to mean the ability of networks to seamlessly and transparently exchange information and function together. Intrado stated that, in addition, the FCC has defined "interoperability" in 47 C.F.R. § 51.325(b) as, "the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged." Intrado argued that the proposed language should, therefore, be adopted for use in

the parties' interconnection agreement. Further, Intrado recommended that the Commission conclude that interoperability of the parties' networks is critical to ensuring reliable 911/E911 services for North Carolina consumers and public safety agencies, including the exchange of ALI information between the parties. Intrado urged the Commission, therefore, to adopt Intrado's proposed language for 911 in Section 3.4.3.

AT&T witness Constable stated in his rebuttal testimony that the Commission should reject Intrado's proposed language in Section 3.4.3 because it serves no real purpose and will only create confusion. He noted that the term "ALI interoperability" is not defined in the interconnection agreement or in NENA standards and that the language is unnecessary because the parties already have detailed language regarding how ALI will be provided.

AT&T stated in its Proposed Order that the single dispute remaining about this issue involves Intrado's request that the Commission impose an "ALI interoperability" requirement upon AT&T. AT&T noted that, in Appendix 911, Section 3.4.3, Intrado proposes to obligate AT&T to provide "ALI interoperability". AT&T asserted that this term is not defined anywhere in the ICA or in NENA standards. AT&T maintained that witness Constable testified that the parties have already agreed as to how ALI will be provided, so this language is unnecessary. AT&T recommended that the Commission find that no purpose would be served to require "ALI interoperability" when that term is undefined. AT&T recommended that the Commission adopt the language proposed by AT&T and reject the changes suggested by Intrado.

The Public Staff noted in its Proposed Order that provisions addressing database access appear in Appendix 911 of the 13-state template. The Public Staff maintained that Revised Exhibit JEC-1 is a draft of Appendix 911 showing the changes proposed by AT&T and Intrado. The Public Staff stated that Section 3.4 of the draft addresses database access in the event that AT&T is the designated provider of 911/E911 services. The Public Staff commented that Section 5.4 addresses database access if Intrado is the designated provider of 911/E911 services.

The Public Staff asserted that each of these sections contains four separate paragraphs. The Public Staff noted that paragraph 3.4.3 contains the language referring to ALI interoperability that AT&T witness Constable objected to in his testimony. The Public Staff provided the entire text of this paragraph, as follows:

> 3.4.3 Where AT&T manages the E911 Database, AT&T's E911 Database shall accept electronically transmitted files *to support ALI interoperability* that are based upon NENA recommended standards. Manual (i.e. facsimile) entry shall be utilized only in the event that the DBMS is not functioning properly. (Italics added by the Public Staff and represents disputed language.)

The Public Staff stated that witness Constable specifically noted that the term "ALI interoperability" is not defined in the "Definitions" section of Appendix 911. The Public Staff further maintained that the phrase "to support ALI interoperability" used in paragraph 3.4.3 appears to add nothing of substance to the paragraph. Thus, the Public Staff recommended that the Commission direct the parties to delete this phrase from Appendix 911.

The Public Staff asserted that paragraph 3.4.5 of Appendix 911, which addressed the issue of steering tables, is absent from Revised Exhibit JEC-1. The Public Staff noted that witness Constable testified that this issue had been resolved, and his position concerning the steering tables issue and the resolution of that issue were not contested by Intrado. The Public Staff recommended that the Commission conclude that there is no issue left to resolve concerning paragraph 3.4.5 and that the paragraph should not be included in the interconnection agreement.

Finally, the Public Staff noted that there are certain subtle differences between Sections 3.4 and 5.4 of Appendix 911 that the parties did not directly address. The Public Staff stated that paragraph 3.4.3 provides that files electronically transmitted to AT&T's E911 database must be "based upon NENA recommended standards." The Public Staff maintained that paragraph 5.4.3, which sets a parallel requirement for files that will be transmitted electronically to Intrado's E911 database, requires that these files be "based upon NENA standards." The Public Staff asserted that it is not certain that this slight difference in wording is significant relative to the parties' mutual responsibilities, but recommended that the Commission conclude that the requirements specified in these paragraphs should be identical. The Public Staff recommended that the Commission direct the parties to either remove the word "recommended" from paragraph 3.4.3 of Appendix 911 or add it to paragraph 5.4.3, whichever they prefer. The Public Staff noted that there are also significant differences between what should be parallel and identical language in paragraphs 3.4.4 and 5.4.4 concerning the parties' responsibilities. The Public Staff recommended that the Commission direct the parties to revise these paragraphs so that the mutual responsibilities and wording are consistent, and to include these revised paragraphs in the interconnection agreement.

The Commission notes that both Intrado and AT&T state in their Proposed Orders and Briefs that the only issue in contention in Matrix Issue No. 8(a) concerns the following highlighted language in Section 3.4.3 of Appendix 911 as outlined in Revised Exhibit JEC-1:

> 3.4.3 Where AT&T manages the E911 Database, AT&T's E911 Database shall accept electronically transmitted files <u>**to support ALI interoperability**</u> that are based upon NENA recommended standards. Manual (i.e. facsimile) entry shall be utilized only in the event that the DBMS is not functioning properly.

Intrado proposes the inclusion of the language highlighted above while AT&T and the Public Staff propose that the identified language be excluded from Section 3.4.3. Since this is the only issue that Intrado and AT&T identify as in dispute, it is the only issue the Commission will address. Intrado and AT&T can review the other proposals outlined by the Public Staff in its Proposed Order and negotiate changes to Section 3.4 and/or Section 5.4 as they deem appropriate.

After reviewing the record on the proposed inclusion of the phrase "to support ALI interoperability" in Section 3.4.3 of Appendix 911, the Commission is not persuaded that the inclusion of this language is necessary. Both AT&T and the Public Staff question the necessity for including this language, and Intrado has not provided any convincing arguments that this

phrase is of any importance or significance. Therefore, the Commission agrees with AT&T and the Public Staff that it is not appropriate to include Intrado's proposed language as identified above in Section 3.4.3.

CONCLUSIONS

The Commission concludes that Section 3.4.3 of Appendix 911 as outlined in Revised Exhibit JEC-1 should read as follows:

> 3.4.3 Where AT&T manages the E911 Database, AT&T's E911 Database shall accept electronically transmitted files that are based upon NENA recommended standards. Manual (i.e. facsimile) entry shall be utilized only in the event that the DBMS is not functioning properly.

Intrado and AT&T can review the other proposals outlined by the Public Staff in its Proposed Order and negotiate changes to Section 3.4 and/or Section 5.4 as they deem appropriate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

ISSUE NO. 17 – MATRIX ISSUE NO. 10: What 911/E911-related terms should be included in the ICA and how should those terms be defined?

POSITIONS OF PARTIES

INTRADO: The only 911/E911-related definition at issue between the parties is the definition of "911 Trunk." Intrado proposed to define "911 Trunk" as a trunk from either AT&T's End Office or Intrado's switch to the E911 System. AT&T, however, objects to the use of "End Office" and would prefer the language to state that it is a trunk from either party's switch to the E911 System. The inclusion of "End Office" when referring to AT&T's switch is appropriate because any trunks to the E911 System should come directly from the AT&T End Office where the end user making the 911 call is located. Industry standards recommend identifiable trunk groups from each end office when calls from multiple end offices are directed to the same PSAP. Inclusion of the term "End Office" ensures that AT&T will abide by default routing treatment when transmitting calls to the E911 System.

AT&T: The parties disagree regarding the definition of the term "911 Trunk" or "E911 Trunk." Intrado's additional language could inappropriately require AT&T to provide direct trunking from its end offices to Intrado's selective router – even if that required AT&T to implement extensive network modifications to support Class Marking.

PUBLIC STAFF: The ICA should not define a 911/E911-Trunk as a trunk from AT&T's End Office.

DISCUSSION

The testimony regarding this issue is limited. This issue was addressed by Intrado witness Clugy and AT&T witness Constable. Intrado witness Clugy testified that the term "End Office" was inserted because it implied the originating office and was a defined term in the agreement. In its Proposed Order, Intrado argued further that using "End Office" is appropriate because the definition is intended to describe the portion of the network carrying the 911 call from the originating end office to the selective router. According to Intrado, its proposed definition more accurately describes the 911 transport piece from the caller's originating end office to a selective router, and should therefore be adopted.

AT&T witness Constable did not directly address the definition of "911 Trunk" in his testimony, and the only language detailing AT&T's position is found in the Revised Joint Issues Matrix filed with the Commission on August 6, 2008. AT&T stated that the parties disagree regarding the definition of the term "911 Trunk" or "E911 Trunk" and that Intrado's additional language could inappropriately require AT&T to provide direct trunking from its end offices to Intrado's selective router – even if that required AT&T to implement extensive network modifications to support Class Marking.

AT&T referenced Matrix Issue No. 3(a) to further clarify its position in this regard. In his testimony concerning Matrix Issue No. 3(a) discussing how AT&T's end user 911 traffic would be routed to a PSAP served by Intrado, AT&T witness Constable stated that, if an AT&T End Office must connect to the E911 System as proposed by Intrado, then AT&T would conceivably have to establish dedicated trunk groups to each selective router using Intrado's proposed "class marking" translations.

In its Proposed Order, the Public Staff argued that this issue is closely connected to Matrix Issue No. 3(a) concerning trunking arrangements when Intrado provides the selective router to the PSAP. According to the Public Staff, including language stating that a "911 Trunk" is a trunk from AT&T's End Office in the ICA would incorrectly imply that traffic from an AT&T end office is directly routed to the Intrado selective router in those instances in which wire centers are split between PSAP jurisdictions. The Public Staff further noted that the resolution of that issue is currently disputed and is dependent upon whether the Commission adopts AT&T's primary/secondary selective router proposal or Intrado's "class marking" proposal. Although the Public Staff's discussion in this section of the Proposed Order does not explicitly state the Public Staff's preference, the Public Staff does find that AT&T's primary/secondary router proposal is more appropriate in its discussion of Matrix Issue No. 3. In accord with this finding, the Public Staff recommended that the term "End Office" should be excluded from the definition of a 911/E911-Trunk.

We note that this is a limited dispute between the parties involving language in the Appendix 911, Section 2.3, which concerns the definition of the term "911 Trunk" or "E911 Trunk." The current positions of the parties are succinctly reflected in the Revised Joint Issues Matrix, filed August 6, 2008. Specifically, Intrado proposes to define a 911 Trunk as running from either AT&T's End Office or Intrado's switch. AT&T has no objection to the proposed reference to Intrado's switch. However, AT&T contends that Intrado's proposed

reference to AT&T's End Office could be read to require AT&T to provide direct trunking from its end offices to Intrado's selective routers, even if this routing required AT&T to implement extensive network modifications to support class marking. We agree with AT&T that the language proposed by Intrado could be read in this fashion.

This interpretation could potentially conflict with our ruling on Matrix Issue No. 3(a), discussed above in which we determined that the ICA shall include provisions whereby AT&T will provide inter-selective routing as it does at present, i.e., by the designation of primary and secondary routers. Applying this process, there will likely be situations in which AT&T is the primary router. In these cases, trunks will run from the AT&T switch (*i.e.*, the selective router) to Intrado's switch (the selective router). Thus, the definition of "trunk" proposed by Intrado would be inconsistent with the practice we have ordered.

Moreover, running trunks from an AT&T end office to Intrado's switch in every instance could only be accomplished by the adoption of an alternative to the current practice, such as class marking or "line attribute routing", which this Commission rejected as part of our ruling on Matrix Issue No. 3(a). For these reasons, we believe that the language proposed by AT&T is preferable, as well as consistent with our decision on Matrix Issue No. 3(a). Therefore, we hereby adopt AT&T's proposed language. The term "End Office" should be excluded from the definition of a 911/E911-Trunk.

CONCLUSIONS

The Commission concludes that Intrado's proposed language regarding the definition of "911 Trunk" or "E911 Trunk" could inappropriately require AT&T to provide direct trunking from its end offices to Intrado's selective router, even if that required AT&T to implement extensive network modifications to support Class Marking or Line Attribute Routing. For this reason, we reject Intrado's proposed definition and adopt AT&T's proposed definition.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

ISSUE NO. 18 – MATRIX ISSUE NO. 13(a): What subset of traffic, if any, should be eligible for intercarrier compensation when exchanged between the Parties?

POSITIONS OF PARTIES

INTRADO: AT&T's proposed language improperly classifies the types of traffic subject to intercarrier compensation and imposes onerous terms and conditions on the parties' exchange of intercarrier compensation that are not consistent with the law. AT&T's proposed language limits the traffic eligible for compensation between the parties to "wireline" service or "dialtone".

AT&T: The parties disagree as to the proper definitions for "Section 251(b)(5) Traffic", "ISP-Bound Traffic" and "Switched Access Traffic" as those terms appear in the 13-state template. AT&T defines these terms with specificity to clearly articulate the conditions under which traffic is subject to intercarrier compensation.

PUBLIC STAFF: The Commission should require the parties to modify the definitions of Section 251(b)(5) Traffic, ISP-Bound Traffic, and Switched Access Traffic in the GTC section and the appendices to comport with current FCC decisions and orders consistent with the Commission's understanding of those decisions and orders. The Appendix Intercarrier Compensation and Appendix ITR should retain the references to "wireline" and "dialtone" service.

DISCUSSION

According to Intrado, this issue deals with the parties' exchange of non-911 traffic. Intrado stated that AT&T's language presents several problems and is not consistent with current FCC regulations.

First, Intrado stated that AT&T's language uses the term "local" to classify traffic subject to reciprocal compensation. Intrado observed that the FCC determined that AT&T's reliance on the characterization of traffic as local or non-local to determine whether reciprocal compensation obligations applied was incorrect. Intrado stated that the FCC determined that all telecommunications is subject to reciprocal compensation under Section 251(b)(5) of the Act except for those specific types of traffic carved out by Section 251(g) – exchange access, information access, and exchange services for such access. As a result of these findings the FCC removed the term local from its rules when describing the subset of telecommunications traffic that is subject to reciprocal compensation. Intrado also stated that the FCC determined that it should refrain from generically describing traffic as local traffic because the term local traffic is particularly susceptible to varying meanings and, significantly, is not a term in Section 251 (b)(5) or Section 251(g) of the Act. Intrado contended that AT&T's proposed definition for "Section 251(b)(5) Traffic" and its proposed definition for "ISP-Bound Traffic" requires the originating party and the terminating party to be located in the same ILEC Local Exchange Area or in an area that is subject to an Extended Area Service (EAS) arrangement. Intrado argued that this would require the call to be local and neither the FCC's *ISP Remand Order* nor Section 51.703 of the FCC's rules contain such qualifications because the FCC specifically found that Section 251(b)(5) applies to all traffic.

Second, Intrado stated that AT&T's proposed definition of "Switched Access Traffic" (i.e., traffic that is not subject to reciprocal compensation but instead is subject to higher access charges) includes "traffic that . . . (ii) originates from the End User's premises in IP format and is transmitted to the switch of a provider of voice communication applications or services when such switch utilizes IP technology." Intrado contended that this definition appears to encompass interconnected VoIP services. Intrado asserted that the FCC defines "access service" as services and facilities provided for the origination and termination of any interstate or foreign telecommunication service. Intrado stated that the FCC has not determined whether interconnected VoIP services are telecommunications services or information services, and thus has not determined that interconnected VoIP services are subject to switched access charges. Intrado further stated that this fact is borne out by AT&T's recent request to the FCC for a declaratory ruling that IP-based traffic such as VoIP is subject to access charges. Intrado argued that AT&T should not be permitted to impose obligations on Intrado in the context of an agreement that AT&T has admitted by its own pleadings to the FCC are not required. Intrado

suggested that AT&T's proposed language goes beyond the parameters of the FCC's current rules regarding switched access services.

Third, Intrado stated that AT&T's proposed language would limit reciprocal compensation to traffic determined to be "wireline" or "dialtone," neither of which is defined in the ICA. Intrado further stated that FCC Rule 51.703(a) and the *ISP Remand Order*, by contrast, speak in terms of telecommunications traffic, not wireline or dialtone and therefore, AT&T's arguments that these terms are proper because this is not a wireless agreement are unavailing. Intrado does not offer wireless services and thus believes it does not need an ICA covering "wireless" services. Intrado stated that, as interconnected co-carriers, it may deliver wireless traffic to AT&T to the extent Intrado is providing telecommunications services to a wireless provider, and that wireless provider's customers call an AT&T customer.

AT&T first noted that, specifically, the parties disagree as to the proper definitions for "Section 251(b)(5) Traffic", "ISP-Bound Traffic" and "Switched Access Traffic." Further, the parties disagree regarding the application of these terms to other provisions in the ICA.

AT&T witness Pellerin asserted that AT&T's proposed definition for Section 251(b)(5) traffic reflects the specific criteria that must be applied to determine what traffic is subject to reciprocal compensation. In pertinent part AT&T stated that, "Section 251(b)(5) traffic shall mean telecommunications traffic in which the originating End User of one Party and the terminating End User of the other Party are: (a) both physically located in the same ILEC Local Exchange Area. . . or (b) both physically located within neighboring ILEC Local Exchange Areas that are within the same common mandatory local calling area. . ."

AT&T commented that Intrado is incorrect in its claim that AT&T's proposed definition is inconsistent with Section 251(b)(5) traffic because the FCC does not use the term "local" in describing this traffic. However, AT&T stated that, "in the ISP Remand Order, the FCC dispensed with using "local" as the term for traffic subject to reciprocal compensation under 251(b)(5), but reaffirmed that Section 251(b)(5) reciprocal compensation only applies to traffic that originates and terminates in the same exchange." In addition, AT&T noted that FCC Rule 701(b) states that Section 251(b)(5) reciprocal compensation is inapplicable to traffic that is interstate or intrastate exchange access, information access, or exchange services for such access.

Regarding ISP-Bound Traffic, AT&T stated that it proposed the following definition, in pertinent part, for ISP-Bound Traffic: ISP-Bound Traffic shall mean telecommunications traffic exchanged between CLP and AT&T as defined in the ISP Compensation Order, in which the originating End User of one Party and the ISP served by the other Party are: (a) both physically located in the same ILEC Local Exchange Area. . . or (b) both physically located within neighboring ILEC Local Exchange Areas that are within the same common mandatory local calling area. . ." AT&T contended that its proposed definition of ISP-Bound Traffic clearly articulates what is intended.

Regarding Switched Access Traffic, AT&T commented that it has proposed specific language to define Switched Access Traffic, whereas, Intrado has proposed a general reference

to applicable law. AT&T proposed adding the following language to the definition of Switched Access Traffic:

> ". . . all traffic that originates from an End User physically located in one local exchange and delivered for termination to an End User physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling area as defined in AT&T's local exchange tariffs on file with the applicable state commission) including, without limitation, any traffic that (i) terminates over a Party's circuit switch, including traffic from a service that originates over a circuit switch and uses Internet Protocol (IP) transport technology (regardless of whether only one provider uses IP transport or multiple providers are involved in providing IP transport) and/or (ii) originates from the End User's premises in IP format and is transmitted to the switch of a provider of voice communication applications or services when such switch utilizes IP technology."

AT&T contended that its proposed definition was also previously adopted by the PUC of Ohio in the Telcove Arbitration proceeding.

Last, AT&T asserted that language in Section 1.2 clarifies that Appendix IC applies to Intrado's "wireline local telephone exchange (dialtone) service." AT&T stated that, because Intrado has requested a wireline ICA, it should not deliver wireless traffic to AT&T over local interconnection trunks pursuant to this Agreement.

In summary, AT&T noted that, it proposed language for the definitions of "Section 251(b)(5) Traffic", "ISP-Bound Traffic", and "Switched Access Traffic" is reasonable, and complies with federal law.

Regarding Section 251(b)(5) Traffic, the Public Staff noted that AT&T's proposed language, unlike Intrado's, reflected the position that the physical location of the originating and terminating callers is determinative of whether a call is subject to reciprocal compensation requirements. The Public Staff stated that, during cross examination, AT&T witness Pellerin acknowledged that the FCC and the D.C. Court of Appeals were still involved in a dispute over what constitutes Section 251(b)(5) traffic. Witness Pellerin contended that the FCC's prior rulings had not been vacated to date, and that they currently were still in effect.

The Public Staff noted that the Commission has ruled in a previous arbitration case involving Global NAPs and Verizon South that the traffic eligible for reciprocal compensation must include intraLATA traffic between calling and called parties within the same local calling area. However, the determination of whether the call was local (and therefore, subject to Section 251(b)(5) reciprocal compensation) was based on whether the originating and terminating NPA-NXX were assigned to the same exchange, or to exchanges that shared the same local calling area, as defined by the originating carrier. It was not necessary for the calling and called parties to be physically located within the same local calling area during the call.

Therefore, the Public Staff recommended that the Commission should conclude that the definition of Section 251(b)(5) traffic proposed by AT&T is inconsistent with the prior decision of the Commission and that it is appropriate to replace AT&T's proposed language with the following language:

> Section 251(b)(5) Traffic subject to intercarrier compensation obligations shall include all intraLATA telecommunications traffic in which the calling party's NPA-NXX and the called party's NPA-NXX are assigned to an exchange that share the same local calling area, as defined by the carrier originating the call.
>
> The parties should promptly amend this interconnection agreement to comply with any FCC or North Carolina Utilities Commission decisions that modify the parties' intercarrier compensation obligations with respect to Section 251(b)(5) Traffic.

With respect to the definition of ISP-Bound Traffic, the Public Staff commented that neither party provided meaningful support for its proposed definition of ISP-Bound Traffic. In light of the lack of evidence in the record and the apparent fact that the only significant FCC Order that has attempted to define the nature of ISP-Bound Traffic is the FCC's ISP Remand Order, previously cited by AT&T in support of its proposed language concerning Section 251(b)(5) Traffic, the Public Staff suggested the adoption of Intrado's proposed definition, which explicitly references the FCC Order. The Public Staff also suggested that the Commission should append the following sentence to Intrado's definition:

> The parties shall promptly amend this interconnection agreement to comply with any FCC or North Carolina Utilities Commission decisions that modify this definition or the parties' intercarrier compensation obligations with respect to ISP-Bound Traffic.

The Public Staff stated that AT&T's proposed definition for Switched Access Traffic conforms to the FCC's current views on what constitutes that class of traffic and provides solid guidance to the parties concerning the applicability of access charges to that traffic. The one exception to AT&T's definition is to remove the language which states that the end users are to be physically located in a local exchange to the end users having an NPA-NXX associated with a local exchange. AT&T's proposed definition of Switched Access:

> The parties shall promptly amend this interconnection agreement to comply with any FCC or North Carolina Utilities Commission decisions that modify this definition or the parties' intercarrier compensation obligations with respect to Switched Access Traffic.

Finally, the Public Staff noted that there remained contention over whether the proposed language would limit compensable traffic to wireline or dialtone traffic. The Public Staff stated that the parties should retain the references to wireline and dialtone traffic in Appendix IC and Appendix ITR of the ICA. The Public Staff asserted that these terms reflect the apparent understanding between the parties that the rates, terms, and conditions were meant to apply exclusively to wireline traffic.

As pointed out by the Public Staff, the Commission has ruled in a previous arbitration case involving Global NAPs and Verizon South that the traffic eligible for reciprocal compensation must include intraLATA traffic between calling and called parties within the same local calling area. As such, the determination of whether the call was local (and therefore, subject to Section 251(b)(5) reciprocal compensation) was based on whether the originating and terminating NPA-NXXs were assigned to the same exchange, or to exchanges that shared the same local calling area, as defined by the originating carrier. It was not necessary for the calling and called parties to be physically located within the same local calling area during the call. Therefore, for the reasons presented by the Public Staff, the Commission agrees with the classes of traffic as detailed and the related compensation scheme for each class of traffic.

The Commission concludes that definitions for Section 251(b)(5) Traffic, ISP-Bound Traffic, and Switched Access Traffic should be adopted and modified as suggested by the Public Staff as reflected in the above comments. The Commission also agrees that the ICA between the parties is for the exchange of "wireline" and "dialtone" local exchange traffic, as characterized by AT&T. The Commission agrees with the Public Staff that these terms reflect the traditional practice between service providers that the rates, terms, and conditions were meant to apply exclusively to wireline traffic.

CONCLUSIONS

The Commission concludes that the parties shall modify the definitions of Section 251(b)(5) Traffic, ISP-Bound Traffic, and Switched Access Traffic in the GTC section and the appendices to comport with current FCC decisions and orders and to be consistent with the Commission's understanding of those decisions and orders. Also, Appendix IC and Appendix ITR shall retain the references to "wireline" and "dialtone" service.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

ISSUE NO. 19 - MATRIX ISSUE NO. 13(b): Should the parties cooperate to eliminate misrouted access traffic?

POSITIONS OF PARTIES

INTRADO: Intrado is willing to work with AT&T to eliminate misrouted access traffic. AT&T's language does not accurately state the current requirements for Switched Access Traffic and would require Intrado to engage in unlawful steps such as self-help and blocking of calls.

AT&T: AT&T proposed that Intrado assist AT&T in taking action to remove Switched Access Traffic improperly routed over local interconnection trunks to switched access trunks.

PUBLIC STAFF: Language specifying the actions to be taken to remove Switched Access Traffic is appropriate for inclusion in Section 16.2 of Appendix IC of the parties' agreement. However, blocking of switched access traffic should not be included as an option.

DISCUSSION

Intrado stated that it has revised the language to indicate that the parties will cooperate to address misrouted access traffic consistent with FCC requirements. Intrado argued that AT&T's proposed language would require Intrado to agree to exercise "self-help" remedies or block misrouted access traffic. Intrado contended that the blocking of traffic is not in the public interest and if AT&T wants to take action against another carrier, then it should do so without requiring Intrado's involvement. Intrado stated that AT&T seeks to require it to engage in certain actions against third parties for misrouted access traffic.

AT&T stated that the parties disagree as to how to remedy a situation in which Switched Access Traffic is improperly routed to local interconnection trunks. AT&T contended that Intrado objects to language that would set forth specifically what this cooperation would entail, including jointly filing a complaint with this Commission. AT&T suggested adding language to the appropriate sections of the interconnection agreement to allow for the blocking of misrouted access traffic onto local interconnection trunks. AT&T commented that Intrado's proposal to address this problem without a defined process to do so would not provide AT&T with a means to prevent fraudulent behavior such as traffic washing and related access avoidance schemes by third parties for traffic Intrado delivers to AT&T.

The Public Staff stated that the parties should be encouraged to work together to ensure that toll traffic is identified and routed properly and in a manner that allows assessment of legitimate access charges. The Public Staff stated that blocking should not be considered an appropriate remedy for eliminating such traffic from local interconnections trunks. The Public Staff suggested that the parties adopt the following language in Section 16.2 of Appendix IC:

> If it is determined that such traffic has been delivered over Local Interconnection Trunk Groups, the terminating Party may object to the delivery of such traffic by providing written notice to the delivering Party pursuant to the notice provisions set forth in the General Terms and Conditions and request removal of such traffic. The Parties will work cooperatively to identify traffic with the goal of removing such traffic from the local Interconnection Trunk Groups. If the delivering Party has not removed or is unable to remove such Switched Access Traffic as described in Section 16.1(iv) above from the Local Interconnection Trunk Groups within sixty (60) days of receipt of notice from the other Party, the terminating Party may file a complaint or take other appropriate action with the applicable Commission in order to seek removal of the traffic from local trunk groups or appropriate compensation from the third party competitive local exchange carrier delivering such traffic.

After reviewing the record proper, the Commission is of the opinion that the Public Staff's proposed language on the management of misrouted access traffic is appropriate and should be added to the Parties' interconnection agreement. Further, we agree with the Public Staff that blocking is not an appropriate remedy for eliminating misrouted traffic. The Commission believes that the parties should work cooperatively to identify and eliminate misrouted access traffic to local interconnection trunk groups and to insure proper compensation to the terminating party.

CONCLUSIONS

For the reasons articulated previously, the Commission concludes that the Public Staff's proposed language specifying the actions to be taken to remove Switched Access traffic is appropriate for inclusion in Section 16.2 of Appendix IC of the parties' ICA. Also, the blocking of switched access traffic shall not be included in the ICA as an option.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 19

ISSUE NO. 20 – MATRIX ISSUE NO. 15: Should the ICA permit the retroactive application of charges that are not prohibited by an order or other change in law?

POSITIONS OF PARTIES

INTRADO: Intrado agreed that the ICA should include terms and conditions to address subsequent modifications to the ICA and changes in law. Intrado however, disagreed with AT&T's proposed language discussing how such modifications will be implemented. AT&T proposed language wherein retroactive compensation adjustments will apply "uniformly" to all traffic exchanged as "local'" calls under the agreement. According to Intrado, this broad language could allow AT&T to make retroactive compensation adjustments for traffic that is not affected by a change of law. Therefore, Intrado has proposed language that would apply retroactive compensation adjustments consistent with intervening law.

AT&T: The parties disagree on terms and conditions for retroactive treatment following modification or nullification of the compensation plan (ISP Compensation Plan) set forth in the FCC's *ISP Compensation Order*. AT&T proposed in Appendix IC Section 4.2.1 that retroactive treatment would apply to traffic exchanged as "local calls." AT&T stated that this is the appropriate classification of traffic to which a retroactive adjustment would apply. Intrado objected to this language, preferring a vague reference to intervening law, which is redundant and therefore unnecessary.

PUBLIC STAFF: The ICA should permit the retroactive application of charges that are not prohibited by an order or other change in law.

DISCUSSION

This issue was addressed by Intrado witness Clugy and AT&T witness Pellerin. Both parties appear to agree that the ICA should include terms and conditions to address subsequent modifications to the ICA and changes in law. The parties are seeking to include language in anticipation of a change of law regarding reciprocal compensation of "local" traffic pursuant to the *ISP Compensation Order*.[1] Intrado contended that AT&T's proposed language indicating that retroactive compensation adjustments will apply "uniformly" to all traffic exchanged as

[1] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131, CC Docket Nos. 96-98, 99-68 (rel. April 27, 2001) (*ISP Compensation Order*).

"local" calls under the agreement is so broad it could apply to traffic not affected by a change in law, and AT&T contended that Intrado's language is vague, redundant, and unnecessary. Further, Intrado stated that the ICA should limit the application of retroactive compensation adjustments to those specifically ordered by intervening law and that Intrado's language should be adopted.

By contrast, AT&T proposed that retroactive treatment would apply to traffic exchanged as "local calls." Witness Pellerin testified this is the appropriate classification of traffic to which a retroactive adjustment would apply. Intrado objected to retroactive treatment for local calls and advocated as an alternative the additional language "to which Intervening Law applies". AT&T argued that the contractual provision at issue already states that ". . . the Parties intend for retroactive compensation adjustments, *to the extent they are ordered, by Intervening Law,* to apply to all traffic." According to AT&T, including an additional reference to "Intervening Law" to the end of this sentence, as Intrado proposed, is redundant and, therefore unnecessary.

In its Proposed Order, the Public Staff stated that the ICA should provide for a possible change of law regarding reciprocal compensation. According to the Public Staff, the ICA language should be clear that any such change of law would only be effective as to the particular type of traffic affected by the change of law. Finally, the Public Staff stated that it does not believe that AT&T's language would be misinterpreted in the manner proposed by Intrado and that Intrado's proposed language is, therefore, unnecessary.

The Commission agrees with all parties that the ICA should provide for a possible change of law regarding reciprocal compensation. Certainly both parties should be clear that any such change of law would only be effective as to the particular type of traffic affected by the change of law. After carefully reviewing the contentions of the parties and the language proposed by AT&T, the Commission agrees with the reasoning advanced by the Public Staff that AT&T's language would not be interpreted so broadly that it could apply to traffic not affected by a change in law. Thus, Intrado's proposed language is unnecessary.

CONCLUSIONS

The Commission finds that Intrado's proposed language is redundant and unnecessary. We find that the AT&T-proposed language is the better alternative.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 20

ISSUE NO. 21 - MATRIX ISSUE NO. 18: (a) What term should apply to the interconnection agreement? (b) When should Intrado notify AT&T that it seeks to pursue a successor ICA?

POSITIONS OF PARTIES

INTRADO: Intrado stated that, in connection with the parties' negotiations for an Ohio ICA, they had agreed to contract language to govern the term and termination of the ICA. Intrado sees no reason to negotiate new generic provisions governing the term and termination for use in North Carolina when the parties have already reached an agreement on such provisions that are unaffected by generic provisions.

AT&T: AT&T noted in the Cover Letter to its Proposed Order that the parties had reached agreement on language to be placed in the 13-state template in Ohio and that there was therefore no need for any substantive consideration of Matrix Issue No. 18, subparts (a) and (b). The parties have agreed to a three-year term for the ICA and, after notice of expiration, a right to request a successor agreement from AT&T within 10 days. AT&T has agreed to modify its 9-state template language.

PUBLIC STAFF: There should be a three-year term for the ICA. When one party seeks to terminate the ICA, Intrado has the right to request a successor agreement from AT&T within 10 days.

DISCUSSION

Based on the record in this matter, the Commission finds that the parties have mutually agreed to use the language for Matrix Issue No. 18 that the parties negotiated in Ohio for insertion into their North Carolina interconnection agreement.

CONCLUSIONS

The Commission concludes that the parties have agreed to use the language negotiated in Ohio concerning Matrix Issue No. 18.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 21

ISSUE NO. 22 – MATRIX ISSUE NO. 20: What are the appropriate terms and conditions regarding billing and invoicing audits?

POSITIONS OF PARTIES

INTRADO: Intrado argued that the parties should utilize the provisions previously negotiated and agreed-upon for Ohio. Intrado asserted that AT&T has provided no reason why the provisions it found acceptable for use in Ohio are not acceptable for use in North Carolina.

AT&T: AT&T asserted in its cover letter to its Proposed Order that there are 11 issues that arise solely in the context of the 13-state template, and for which there are currently no substantive disputes, including Matrix Issue No. 20. AT&T stated that, for these issues, the parties reached agreement on language to be placed into the 13-state agreement in Ohio, and, accordingly, AT&T believes there is no need for any substantive consideration of these issues by the Commission. AT&T maintained that, if the Commission elects to use the 13-state template, then

the language that should be adopted on these issues is the same as that which the parties negotiated in Ohio. AT&T stated that, for this reason, its Proposed Order does not contain any substantive discussion or ruling on these issues.

PUBLIC STAFF: The Public Staff stated that the interconnection agreement should reflect the language agreed to by the parties in the Ohio interconnection agreement with respect to the terms and conditions regarding billing and invoicing audits.

DISCUSSION

Based on the record on this matter, the Commission finds that the parties have mutually agreed to use the language for Matrix Issue No. 20 that the parties negotiated in Ohio for insertion into their North Carolina interconnection agreement.

CONCLUSIONS

The Commission concludes that this issue has been resolved and that the parties have agreed to use the language negotiated in Ohio concerning Matrix Issue No. 20.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

ISSUE NO. 23 – MATRIX ISSUE NO. 22: Should Intrado be permitted to assign the ICA to an affiliated entity? If so, what restrictions, if any should apply if that affiliate has an effective ICA with AT&T?

POSITIONS OF PARTIES

INTRADO: Intrado argued that the parties should utilize the provisions previously negotiated and agreed-upon for Ohio. Intrado asserted that AT&T has provided no reason why the provisions it found acceptable for use in Ohio are not acceptable for use in North Carolina.

AT&T: AT&T asserted in its cover letter to its Proposed Order that there are 11 issues that arise solely in the context of the 13-state template, and for which there are currently no substantive disputes, including Matrix Issue No. 22. AT&T stated that, for these issues, the parties reached agreement on language to be placed into the 13-state agreement in Ohio, and, accordingly, AT&T believes there is no need for any substantive consideration of these issues by the Commission. AT&T maintained that, if the Commission elects to use the 13-state template, then the language that should be adopted on these issues is the same as that which the parties negotiated in Ohio. AT&T stated that, for this reason, its Proposed Order does not contain any substantive discussion or ruling on these issues.

PUBLIC STAFF: The Public Staff asserted that as long as an affiliate is properly certified in North Carolina and the Commission has received proper documentation, it is acceptable for the ICA to provide that it can be assigned to an affiliate if that affiliate's ICA has been terminated prior to such assignment.

DISCUSSION

Based on the record on this matter, the Commission finds that the parties have mutually agreed to use the language for Matrix Issue No. 22 that the parties negotiated in Ohio for insertion into their North Carolina interconnection agreement.

CONCLUSIONS

The Commission concludes that this issue has been resolved and that the parties have agreed to use the language negotiated in Ohio concerning Matrix Issue No. 22.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 23

ISSUE NO. 24 – MATRIX ISSUE NO. 23: Should AT&T be permitted to recover its costs, on an individual case basis, for performing specific administrative activities? If so, what are the specific administrative activities?

POSITIONS OF PARTIES

INTRADO: Intrado argued that the parties should utilize the provisions previously negotiated and agreed-upon for Ohio. Intrado asserted that AT&T has provided no reason why the provisions it found acceptable for use in Ohio are not acceptable for use in North Carolina.

AT&T: AT&T asserted in its cover letter to its Proposed Order that there are 11 issues that arise solely in the context of the 13-state template, and for which there are currently no substantive disputes, including Matrix Issue No. 23. AT&T stated that, for these issues, the parties reached agreement on language to be placed into the 13-state agreement in Ohio, and, accordingly, AT&T believes there is no need for any substantive consideration of these issues by the Commission. AT&T maintained that, if the Commission elects to use the 13-state template, then the language that should be adopted on these issues is the same as that which the parties negotiated in Ohio. AT&T stated that, for this reason, its Proposed Order does not contain any substantive discussion or ruling on these issues.

PUBLIC STAFF: The Public Staff stated that there appears to be no significant dispute between the parties with respect to the 13-state template language Intrado proposes to include in the North Carolina ICA. The Public Staff noted that this language is presented in Section 6.3 of the General Terms and Conditions of the December 18, 2007 draft agreement Intrado filed with its arbitration petition. The Public Staff recommended that the Commission require the parties to incorporate this language, suitably modified to reflect any North Carolina-specific requirements and terminology, into the ICA they file pursuant to the Commission's Order in this docket.

DISCUSSION

Based on the record on this matter, the Commission finds that the parties have mutually agreed to use the language for Matrix Issue No. 23 that the parties negotiated in Ohio for insertion into their North Carolina interconnection agreement.

CONCLUSIONS

The Commission concludes that this issue has been resolved and that the parties have agreed to use the language negotiated in Ohio concerning Matrix Issue No. 23.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 24 AND 25

ISSUE NO. 25 – MATRIX ISSUE NO. 24: What limitation of liability and/or indemnification language should be included in the ICA?

POSITIONS OF PARTIES

INTRADO: Intrado takes issue with AT&T's language that indicates that AT&T will not be liable to Intrado, Intrado's end user, or any other person for losses arising out of the provision of access to 911 service or any errors, interruptions, defects, failures, or malfunctions of 911. In Intrado's view, this is very broad language and gives AT&T unlimited protection from liability. AT&T should not have unlimited protection from liability, especially for actions that are attributable to AT&T.

AT&T: AT&T should not be liable to Intrado, Intrado's end user, or any other person for losses arising out of the provision of access to 911 service or any errors, interruptions, defects, failures, or malfunctions of 911. AT&T disagrees with Intrado's proposed language as vague and ambiguous.

PUBLIC STAFF: The word "customer" should not be substituted for the phrase "End User" when the limitation of liability also covers an expansive definition of "Person". AT&T may limit its liability for damages caused by unintentional or negligent acts or omissions, but not for liability for willful, wanton, or intentional acts or omissions.

DISCUSSION

This issue was addressed by Intrado witness Clugy and AT&T witness Pellerin.

The parties have reached resolution on the majority of the limitation of liability and indemnification provisions of the ICA in connection with their Ohio negotiations (either via a negotiated resolution or Intrado's acceptance of AT&T's originally proposed language). Two issues, however, remain for resolution.

The first issue is whether AT&T may limit its liability for losses arising from the provision of 911 services. AT&T's language indicates that it will not be liable to Intrado, Intrado's end user, or any other person for losses arising out of the provision of access to 911 service or any errors, interruptions, defects, failures, or malfunctions of 911. According to Intrado, this is very broad language and gives AT&T unlimited protection from liability. Intrado contended that carriers typically cannot limit their liability for errors that are caused by gross negligence or willful misconduct, but AT&T's language does just that. Intrado has, therefore, proposed language that would make AT&T liable for losses if the provision of access to

911 service or errors, interruptions, defects, failures, or malfunctions of 911 were attributable to AT&T. AT&T asserted that the language proposed by Intrado would allow Intrado and/or its customers to hold AT&T liable for personal injury, death, destruction of property for system and/or equipment errors, interruptions, defects, or malfunctions of 911 service that result from the normal course of doing business.

In its Proposed Order, the Public Staff asserted that the parties' positions lie on either end of the spectrum. Nevertheless, the Public Staff believes that it is appropriate to protect AT&T from liability for unintentional or negligent acts or omissions, but to potentially allow liability for willful, wanton, or intentional acts or omissions. The Public Staff reasoned that there are more likely to be "life or death" situations involved with the provision of 911 service, so it is important that the parties exercise the utmost degree of care to ensure that the service is of the highest quality.

As the Public Staff correctly observed, the parties' positions on this issue lie on either end of the spectrum. At one end of the spectrum, AT&T believes that it should bear no liability for any error, no matter how egregious the error. At the other end, Intrado believes that AT&T should bear unlimited liability for an error, no matter how simple or innocent. In this proceeding, Intrado and AT&T individually asked the Commission to choose either one or the other of the proposals. Both parties have advanced various arguments in support of their individual preference. After carefully reviewing the arguments of the parties and the evidence presented in this proceeding, we decline to adopt either of the options proposed by the parties and, instead, for the reasons more fully articulated below, adopt the more moderate alternative proposed by the Public Staff.

Our Supreme Court has held that carriers typically cannot limit their liability for errors that are caused by gross negligence or willful misconduct. *See, e.g., Jordan v. Eastern Transit & Storage Co.*, 266 N.C. 156, 162 (1966) ("[I]t has long been held that, in absence of statutory authorization, a common carrier or other public utility may not contract for its freedom from liability for injury caused by its negligence in the regular course of its business."); *Hall v. Sinclair Refining Co.*, 242 N.C. 707, 709 (1955) (finding that a contract provision that exempts a party from liability for harm resulting from its own negligence is not favored by North Carolina law). Similarly, this Commission has previously rejected interconnection agreement language that would completely absolve an ILEC from some continuing responsibility for its misconduct. (*See* Docket No. P-1262, Sub 2, *In re Petition for Arbitration of Time Warner Cable Information Services (North Carolina), LLC for Arbitration with LEXCOM Telephone Company, Recommended Arbitration Order* (Nov. 26, 2007). In the *LEXCOM* decision, we stated:

> In the absence of such negotiated agreement, the Commission firmly believes that it is unwise to allow LEXCOM to disclaim any and all liability for errors or omissions in its handling of directory listings, including errors and omissions that are a result of its negligence. Were it to do so, the Commission would be allowing LEXCOM to shift <u>complete</u> responsibility for ensuring the accuracy of the directory from LEXCOM, the entity that has statutory responsibility for providing the directory, to TWCIS, a party that is, by statute, entitled to nondiscriminatory

access to directory listings and, more importantly, a competitor with the ILEC in the telecommunications services market.

In accordance with this clearly articulated precedent, the Commission continues to believe that it is unwise to allow an ILEC such as AT&T to shift complete responsibility for any errors that AT&T commits to its competitor in the telecommunications market. We, therefore, reject AT&T's proposal which broadly insulates AT&T from liability for any acts or omissions, including willful, wanton, and intentional acts.

Although it is clear that our precedent favors exposing AT&T to some measure of liability for errors attributable to AT&T, we find Intrado's proposed language, which subjects AT&T to unlimited liability for any error, no matter how innocuous, equally objectionable to AT&T's efforts to absolve itself from any responsibility for its errors. In our opinion, subjecting AT&T to such open-ended liability for seemingly minor errors is not in the public interest. We believe, as AT&T contended, that this language, if adopted, would or could potentially make providing 911/E911 service cost-prohibitive, and that no carrier would reasonably be able (or willing) to provide 911 service without an exponential rate increase. Because of the unique importance of 911/E911 to the public, we dare not risk that either of those eventualities could occur. Thus, we also reject Intrado's proposed language that would expose AT&T to unlimited liability.

By rejecting both parties' solution, we are left with a dilemma as to how to resolve this open issue. The question is: How can we, consistent with our responsibilities under the Act, determine what liability each party should bear for errors and omissions committed by the other party in the implementation of an ICA? When faced with this situation in other arbitration dockets, the Commission has been reluctant to impose disputed limitation of liability and/or indemnification language on the parties when they have been unable to reach agreement through arms length negotiations. See *In re MCI Telecommunications*, Docket No. P-141, Sub 29, Order Ruling on Objections, Comments, Unresolved Issues and Composite Agreement, pp. 22-23, April 11, 1997, (1997 WL 233032), *In re MCImetro Access Transmission Services*, Docket No. P-474, Sub 10, Recommended Arbitration Order, pp. 107-109, April 3, 2001, (2001 WL 468490). Oftentimes, we have directed the parties to begin negotiations anew with the assistance of the Public Staff, a neutral and detached party. See *Sprint v. Randolph Arbitration*, Docket P-294, Sub 30, Recommended Arbitration Order, pp. 35-36, August 23, 2008. In the latter case, we required renewed, Public Staff-assisted negotiations when the fully developed record was not adequate to fashion a solution to the issue in question and the parties showed some willingness to resolve the dispute.

Without a doubt, the Commission would prefer the latter solution. This case, however, does not lend itself to that option. The record and the parties' positions on this issue are fully developed; the parties have not resolved their dispute even though they have engaged in extensive pre-trial (and, presumably, post-trial) arms-length negotiations; and, perhaps, most importantly, the Public Staff has taken a position in the current docket which is adverse to both AT&T and Intrado.

Thus, we are left with the choice of sending the parties back for further negotiations unassisted, imposing a Commission created solution on the parties, or adopting the "compromise" recommendation made by the Public Staff. After carefully examining the recommendation of the Public Staff and weighing the amount of time and effort that the parties and the Commission have expended in reaching this point in the proceeding, we choose the latter option. In doing so, we find that the Public Staff's recommendation protecting AT&T from liability for unintentional or negligent acts or omissions---but allowing potential liability for willful, wanton, or intentional acts or omissions---is nuanced, balanced and in the public interest. The recommendation relieves AT&T from the prospect of unlimited liability for errors and mistakes that are bound to occur during the course of a normal business operation providing 911/E911 emergency service and meets AT&T's concern that the cost of providing such service would be prohibitive as a result. At the same time, the Public Staff's proposal assures the public and Intrado that 911/E911 service is being responsibly provided by a service provider that is attentive to its business and mindful of the consequences of failing to provide the highest quality service.

Accordingly, we conclude that AT&T and Intrado shall include language in the ICA that limits AT&T's liability for losses arising out of the provision of access to 911 service or any errors, interruptions, defects, failures, or malfunctions of 911 that are the result of unintentional or negligent acts by AT&T and/or its agent. The ICA shall also state that AT&T may be liable for losses arising out of the provision of access to 911 service or any errors, interruptions, defects, failures, or malfunctions of 911 that are the result of gross negligence and /or willful misconduct.

The second, less difficult, issue deals with AT&T's proposal to change the term "End User" to the word "customer". The provision discussed by witness Pellerin not only limits the liability to "End Users", but also to "any other Person". The definition of "Person" appears to cover every type of entity, including "customers". With the limitation of liability applying to "any other Person", AT&T's liability should be appropriately limited. The word "customer" should not be substituted for the phrase "End User" when the limitation of liability also covers an expansive definition of "Person".

CONCLUSIONS

The Commission concludes that AT&T and Intrado shall include language in the ICA that limits AT&T's liability for losses arising out of the provision of access to 911 service or any errors, interruptions, defects, failures, or malfunctions of 911 that are the result of unintentional or negligent acts by AT&T and/or its agent. The ICA shall also state that AT&T may be liable for losses arising out of the provision of access to 911 service or any errors, interruptions, defects, failures, or malfunctions of 911 that are the result of gross negligence and/or willful misconduct. Finally, the Commission concludes that the word "customer" should not be substituted for the phrase "End User" when the limitation of liability also covers an expansive definition of "Person".

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 26

ISSUE NO. 26 – MATRIX ISSUE NO. 25:

(a) Should disputed charges be subject to late payment penalties?

(b) Should the failure to pay charges, either disputed or undisputed, be grounds for the disconnection of services?

(c) Following notification of unpaid amounts, how long should Intrado Comm have to remit payment?

(d) Should the parties be required to make payments using an automated clearinghouse network?

POSITIONS OF PARTIES

INTRADO: Intrado argued that the parties should utilize the provisions previously negotiated and agreed-upon for Ohio. Intrado asserted that AT&T has provided no reason why the provisions it found acceptable for use in Ohio are not acceptable for use in North Carolina.

AT&T: AT&T asserted in its cover letter to its Proposed Order that there are 11 issues that arise solely in the context of the 13-state template, and for which there are currently no substantive disputes, including Matrix Issue No. 25. AT&T stated that, for these issues, the parties reached agreement on language to be placed into the 13-state agreement in Ohio, and, accordingly, AT&T believes there is no need for any substantive consideration of these issues by the Commission. AT&T maintained that, if the Commission elects to use the 13-state template, then the language that should be adopted on these issues is the same as that which the parties negotiated in Ohio. AT&T stated that, for this reason, its Proposed Order does not contain any substantive discussion or ruling on these issues.

PUBLIC STAFF: The Public Staff stated that language in the agreement should specify that, for disputed charges put into the escrow account in a timely manner, the only fees owed would be the interest earned through the escrow account that is associated with the disputed charge.

DISCUSSION

Based on the record on this matter, the Commission finds that the parties have mutually agreed to use the language for Matrix Issue No. 25 that the parties negotiated in Ohio for insertion into their North Carolina interconnection agreement.

CONCLUSIONS

The Commission concludes that this issue has been resolved and that the parties have agreed to use the language negotiated in Ohio concerning Matrix Issue No. 25.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 27

ISSUE NO. 27 – MATRIX ISSUE NO. 29(a): What rounding practices should apply for reciprocal compensation usage and airline mileage?

POSITIONS OF PARTIES

INTRADO: Intrado argued that AT&T's proposed language to round reciprocal compensation up to the next whole minute and to round airline mileage up to the next mile does not represent current industry practice. Intrado proposed that reciprocal compensation usage be billed in six-second increments and that airline mileage be billed in one-fifth mile increments.

AT&T: AT&T asserted that its proposal to round airline mileage to the next mile is consistent with the industry standard practice, and should, therefore, be adopted by the Commission. AT&T further argued that its proposal to round reciprocal compensation up to the next whole minute is consistent with industry practice and should also, therefore, be adopted by the Commission.

PUBLIC STAFF: The Public Staff stated that airline mileage should be rounded to the next whole mile and that rounding for reciprocal compensation usage should be to the next whole minute in cases where actual usage is not available and the billing party relies on jurisdictional reporting factors.

DISCUSSION

Intrado witness Hicks provided the following testimony on this issue; this is the only evidence placed in the record by Intrado on this issue:

> Q. Does AT&T's proposed language reflect industry standard rounding practices?
>
> A. No. Per-minute charges are normally billed in six-second increments. AT&T, however, seeks to round-up charges to the next minute. Similarly, per-mile charges are normally billed in one-fifth mile increments. AT&T seeks to round-up to the next whole mile.

Intrado stated in its Proposed Order that its witnesses stated that industry practice calls for reciprocal compensation usage to be billed in six-second increments and airline mileage to be billed in one-fifth mile increments. Intrado asserted that AT&T's proposed language does not represent current industry practice.

Intrado maintained that AT&T has argued that its language does represent industry practices and that any financial impact to Intrado of such rounding is minimal.

Intrado recommended that the Commission agree with Intrado that many carrier-to-carrier agreements and carrier tariffs utilize six-second increments for per minute charges and one-fifth increments for per mile charges. Intrado noted that AT&T has pointed to no document or standard that supports its proposed rounding methods. Intrado stated that, while

AT&T argues that the financial impact to Intrado of such rounding is minimal, Intrado should not be required to pay AT&T more than it otherwise would owe to AT&T.

Intrado recommended that the Commission adopt its proposed language since it represents current industry standards and practices.

AT&T witness Pellerin stated in her rebuttal testimony that she cannot identify the basis for Intrado witness Hicks' conclusions about what is "normal" rounding practices for either reciprocal compensation or airline mileage. Witness Pellerin testified that Intrado's proposed rounding increments are not consistent with AT&T's experience in the industry.

Witness Pellerin noted that the language in dispute regarding mileage rounding is reflected in Pricing Section 2.3 as follows:

> When the calculation results in a fraction of a mile, AT&T will round up to the next **[Intrado:one-fifth (1/5)] [AT&T: whole]** mile before determining mileage and applying rates.

Witness Pellerin stated that the proper increment for rounding distance sensitive rates is one mile, which is standard in the industry for carrier interconnection. Witness Pellerin noted that this is reflected in the Multiple Exchange Carrier Access Billing (MECAB) Guidelines, ATIS-0401004-0009. She noted that Section 3.4 of those Guidelines states:

> 3.4 Transport or Mileage Charge Calculations
>
> The appropriate method for calculation of MPB for the distance sensitive portion of Local Transport (direct-trunk and tandem-switched), Channel Mileage (e.g. Special Transport), is as follows:
>
> 1. The Vertical and Horizontal (V&H) coordinates (filed in NECA Tariff FCC No. 4) are used to calculate the airline distance between two wire centers. Fractional mileage is rounded to the next whole number.

Witness Pellerin noted that, in addition, AT&T's North Carolina switched access tariff provides:

> To determine the rate to be billed, first compute the mileage using the V&H coordinates method for the points involved, then apply the per mile rate shown. If the calculation results in a fraction of a mile, always round up to the next whole mile before determining the mileage and applying the rates. (BellSouth Telecommunications, Inc. Access Services Tariff, Section E6.7.13)

Witness Pellerin noted that AT&T's North Carolina tariff also provides similar language in its section entitled "LATAs and Mileage Measurement Methodology", as follows:

> The resultant number is the airline miles between the wire centers. (Rounded to the next full mile.) (BellSouth Telecommunications, Inc. North Carolina Access Services Tariff, Section 10.4.2)

Witness Pellerin asserted that Intrado's proposed language to round mileage to the next one-fifth mile is inconsistent with industry standard and should be rejected. She maintained that AT&T's mileage rounding increment of one mile should be adopted.

Witness Pellerin testified that the appropriate rounding increment for calculation of conversation time is one minute, not six (6) seconds as Intrado proposes. Witness Pellerin noted that similar language appears in both Pricing Section 2.2 and Intercarrier Compensation Section 14.4[1]:

> For purposes of reciprocal compensation only, measurement of minutes of use over Local Interconnection Trunk Groups shall be in actual conversation seconds. The total conversation seconds over each individual Local Interconnection Trunk Group will be totaled for the entire monthly bill and then rounded **[Intrado: based on six (6) second intervals] [AT&T: to the next whole minute].**

Witness Pellerin stated that the parties agree that reciprocal compensation is calculated based on actual conversation seconds, as opposed to including non-conversation time (which is how access usage is calculated). Thus, witness Pellerin maintained, there is no reciprocal compensation charge for calls not completed. She noted that the parties also agree that usage is calculated on a trunk group basis.

Witness Pellerin maintained that the financial impact to Intrado by rounding reciprocal compensation to the next minute is truly *de minimus*. She noted that IC Section 14.4 provides that usage is accumulated on each trunk group for a month, and then rounded up before being billed at the agreed-upon reciprocal compensation rate of $0.0007 per minute. Witness Pellerin stated that, hypothetically, if Intrado had 100 trunk groups delivering Section 251(b)(5) usage to AT&T, and all were rounded up by a full minute (which would never happen), that would equate to 7 cents per month for all trunk groups together – or 84 cents per year. She noted that, even if Intrado had 1,000 trunk groups to AT&T, it is still only $8.40 per year. Witness Pellerin asserted that it is not even worth the arithmetic to be more accurate by backing out the fraction of a minute Intrado would pay based on six second rounding.

During cross-examination, witness Pellerin stated that this issue represents one of the fundamental differences between the 9-state template and the 13-state template; in the 9-state region, their switches do not have the capability (or current technology) to do the measurements and billing based on actual usage. She asserted that it would be a huge project to update the switches, update operational systems, and update billing systems to do the measurements and billing based on actual usage.

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[1] Witness Pellerin noted that the language dispute reflected in Pricing Section 2.2 and Intercarrier Compensation Section 14.4 is not present with the 9-state template and need not be addressed by the Commission unless it requires use of the 13-state template.

AT&T stated in its Proposed Order that this issue involves the appropriate rounding practices to apply in two different contexts: (1) airline mileage; and (2) reciprocal compensation.

AT&T noted that the dispute regarding rounding for reciprocal compensation is moot if the 9-state template is used. For airline mileage, AT&T stated that it proposes that mileage should be rounded up to the next whole mile, and Intrado proposes that mileage be rounded up to the next one-fifth of a mile. AT&T maintained that witness Pellerin testified that rounding up to one whole mile is the standard in the industry for carrier interconnection. AT&T asserted that this industry standard for mileage rounding is stated in the MECAB Guidelines, ATIS – 0401004-0009, Section 3.4. AT&T stated that, as an example of this standard practice, witness Pellerin quoted specific portions of AT&T's Switched Access Tariff and Dedicated Access Services Tariff, which incorporate the practice of rounding to the next whole mile.

AT&T stated that, as to rounding for reciprocal compensation, AT&T proposes a rounding increment of one minute, while Intrado proposes rounding in six second intervals. AT&T argued that, once again, AT&T made a proposal that tracks the standard industry practice for carrier billing, while Intrado has proposed an approach that deviates from this standard practice. AT&T noted that witness Pellerin also testified that AT&T's proposed rounding of reciprocal compensation usage to the next whole minute is utilized between other carriers.

AT&T asserted that, rather than accepting the standard industry practice, Intrado has proposed a much shorter rounding increment. AT&T argued that the difference, however, between the standard increment proposed by AT&T and the interval proposed by Intrado represents a financial impact that is minimal. AT&T noted that, to illustrate this point, witness Pellerin testified as to the hypothetical example in which Intrado would have 100 trunk groups dedicated to Section 251(b)(5) usage, and all were rounded up by a full minute, rather than the six seconds proposed by Intrado. AT&T maintained that, not counting any offset for traffic AT&T would terminate to Intrado, the resulting difference would be $.07 per month or 84 cents per year. AT&T stated that, for 1,000 trunk groups, the difference would be $8.40 a year. AT&T noted that, furthermore, AT&T does not currently have the technology that would permit it to measure and bill reciprocal compensation based on actual usage. AT&T asserted that, clearly, Intrado has offered no reasons, financial or otherwise, to deviate from the standard practice. AT&T recommended that the Commission adopt the language proposed by AT&T.

The Public Staff maintained in its Proposed Order that, while both parties contend their position is consistent with the industry standard, the Public Staff believes that AT&T has provided sufficient proof that its rounding factors represent the standard for purposes of carrier interconnection. The Public Staff noted that an additional complication with Intrado's position is that AT&T's switches and billing system are not designed to capture the actual usage. The Public Staff asserted that, thus, AT&T would have to incur the expense of implementing this capability for what appears to be, at most, a *de minimus* difference from AT&T's proposal. Therefore, the Public Staff argued, the Commission should conclude that reciprocal compensation should be rounded up to the next whole minute and that airline mileage should be rounded up to the next whole mile.

After reviewing the evidence of record on this issue, the Commission agrees with AT&T and the Public Staff and finds that it is appropriate to round airline mileage up to the next whole mile and round reciprocal compensation up to the next whole minute. As the record reflects, both Intrado and AT&T maintain that their rounding proposals are standard industry practice. However, AT&T has provided convincing evidence that its method constitutes standard industry practice, and the record shows that any financial harm suffered by Intrado as a result of AT&T's rounding proposal would truly be *de minimus*. In addition, AT&T has asserted that its current systems do not capture actual usage and that updates would need to be completed in order for AT&T to round as proposed by Intrado in this proceeding. Therefore, the Commission concludes that reciprocal compensation should be rounded up to the next whole minute and that airline mileage should be rounded up to the next whole mile.

CONCLUSIONS

The Commission concludes that reciprocal compensation should be rounded up to the next whole minute and that airline mileage should be rounded up to the next whole mile.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 28

ISSUE NO. 28 – MATRIX ISSUE NO. 29(b): Is AT&T permitted to impose unspecified non-recurring charges on Intrado Comm?

POSITIONS OF PARTIES

INTRADO: Intrado argued that AT&T should be required to notify Intrado of any charges prior to provisioning a service. Intrado maintained that any charges to be imposed on Intrado should be developed pursuant to the Section 251 and Section 252 process.

AT&T: AT&T asserted that services ordered and provided by AT&T that are not included in the interconnection agreement and for which there is no tariffed rate should be priced based on AT&T's standard generic contract rate.

PUBLIC STAFF: The Public Staff stated that the language proposed by AT&T is adequate to ensure that AT&T is paid for the services and products it provides to Intrado and that Intrado is not charged an unreasonable or discriminatory rate for receiving those services.

DISCUSSION

Intrado witness Hicks stated in his direct testimony that AT&T should be required to identify which and when services, functions, or facilities are subject to extraordinary charges, and notify Intrado if such charges will be applied. Witness Hicks noted that Intrado understands that some items must be individually billed as non-recurring charges depending on the specific request made by Intrado. Witness Hicks maintained that both parties, however, must identify any services to which such charges may apply and how those charges will be calculated.

Intrado stated in its Proposed Order that it opposes AT&T's ability to arbitrarily develop rates, post those rates on AT&T's website, and then impose those rates on Intrado without notice. Intrado argued that any rates developed by AT&T should be pursuant to the process established by Section 251 and Section 252 and subject to approval by the Commission.

Intrado noted that AT&T has claimed that it must be able to develop rates to ensure Intrado pays for services that might have been rendered for which no current rate exists. Intrado maintained that, in AT&T's view, AT&T's standard generic contract rate should be applied in these instances. Intrado asserted that the process that AT&T proposed to use to develop and impose those rates is arbitrary.

Intrado recommended that the Commission conclude that any rates to be imposed on it under the interconnection agreement should be developed through the Section 251 and Section 252 process with approval by the Commission. Intrado asserted that imposing some parameters on AT&T's ability to impose rates on Intrado is reasonable.

AT&T witness Pellerin stated in her rebuttal testimony that, in Pricing Section 1.9, the parties have agreed that AT&T's obligation to provide products and services to Intrado is limited to those for which rates, terms, and conditions are contained in the interconnection agreement. She noted that the parties also agreed in Section 1.9 that, to the extent Intrado ordered a product or service not contained in the interconnection agreement, AT&T would reject that order. Witness Pellerin stated that if the order was for a UNE, Intrado could submit a Bona Fide Request in accordance with Appendix UNE's Bona Fide Request provisions. She stated that if the order was for a product or service still available in AT&T's tariff, Intrado could seek to amend the interconnection agreement to incorporate relevant rates, terms, and conditions.

Witness Pellerin noted that Pricing Sections 1.9.1 and 1.9.2 address what happens if Intrado orders a product or service not contained in the interconnection agreement and AT&T inadvertently provisions it nonetheless. Witness Pellerin stated that the language in Sections 1.9.1 and 1.9.2 is as follows[1]:

> 1.9.1 CLEC [competitive local exchange company] shall pay for the Product or Service provisioned to CLEC at the rates set forth in AT&T's applicable intrastate tariff(s) for the Product or Service or, to the extent there are no tariff rates, terms or conditions available for the Product or Service in the applicable state, then ~~AT&T shall propose rates pursuant to the process required in Sections 251 and 252 of the Act.~~ **CLEC shall pay for the Product or Service at AT&T's current generic contract rate for the Product or Service set forth in AT&T's applicable state-specific generic pricing schedule as published on AT&T's CLEC website; or**
>
> **1.9.2 CLEC will be billed and shall pay for the product or service as provided in Section 1.9.1, above, and AT&T may, without further obligation, reject future orders and further provisioning of the product or service until**

[1] The language stricken through represents language proposed by Intrado and the language in bold and underlined represents language proposed by AT&T.

such time as applicable rates, terms and conditions are incorporated into this Agreement as set forth in this Section 1.9.

Witness Pellerin noted that AT&T's proposed language in Section 1.9 provides that Intrado will pay the standard generic rate that another CLP would pay for that same product or service (provided there is no tariff rate). She stated that Intrado's language requiring AT&T to propose rates pursuant to the Act should be rejected. Witness Pellerin argued that it is important to keep in mind that, in this example, Intrado has ordered, and AT&T has inadvertently provisioned, a product or service that is available to other CLPs in their interconnection agreements, but is not in Intrado's interconnection agreement. Witness Pellerin asserted that AT&T should not have to go through the process of proposing rates when it already has rates established. She stated that, moreover, Intrado has objected to AT&T's language in Section 1.9.2 that would require Intrado to actually pay for these services.

Witness Pellerin stated that AT&T's proposed language in Section 1.9.2 also provides that AT&T may reject other orders for the same product or service until rates, terms, and conditions are incorporated into the interconnection agreement. She argued that AT&T should not be expected or required to continue providing service outside the interconnection agreement simply because it inadvertently did so once.

Witness Pellerin maintained that AT&T's language is entirely appropriate when you consider that Intrado has ordered (and received the benefit of) a product or service for which it has no contract terms, but that AT&T inadvertently provisioned anyway.

Witness Pellerin further noted that AT&T objects to Intrado's proposed language in Pricing Section 1.10.1. She noted that Section 1.10.1 addresses any rates in the Pricing Schedule that are "TBD" (to be determined). She stated that the parties have agreed to most of the language regarding TBD rates, including retroactive application of generic prices "without the need for any additional modification(s) to this Agreement or further Commission action." She noted that Intrado then adds this conflicting language: "if the parties have reached mutual agreement of the specified rate and the Commission has approved pursuant to the following process." Witness Pellerin maintained that this language would require that (1) Intrado agrees to the prices, and (2) the Commission approves them. She argued that this language would improperly permit Intrado to object to prices even if the Commission had approved them. Witness Pellerin proposed that the Commission reject Intrado's proposed language in this regard.

During cross-examination, witness Pellerin explained that the parties have agreed that if there is a tariffed rate for a particular service, then that rate will be used. She stated that if, however, there is not a tariffed rate but there is a rate in AT&T's generic interconnection agreement that AT&T offers to other CLPs in North Carolina, then AT&T proposes that that rate would be applied to Intrado. Witness Pellerin noted that Intrado is proposing that AT&T come up with some other rate that AT&T proposes and the parties mutually agree on. She stated that AT&T believes that to be an unnecessary step given that AT&T has already developed a rate that it uses for other CLPs. Witness Pellerin explained that Intrado's proposed language ("AT&T shall propose rates pursuant to the process required by Sections 251 and 252") assumes that all of the prices in the pricing appendix are limited to unbundled network elements and

interconnection. She stated that the pricing section applies to the entire agreement so there may very well be services included in the generic agreement that are not necessarily TELRIC prices.

AT&T stated in its Proposed Order that this issue involves two provisions of the ICA, Pricing Section 1.9.1 and Section 1.9.2, which relate to the same dispute. AT&T noted that, specifically, the parties have agreed in Section 1.9 (Pricing) that AT&T is obligated only to provide products and services to Intrado for which there are rates, terms, and conditions in the ICA. AT&T maintained that Section 1.9.1 and Section 1.9.2 address the procedure to follow if Intrado orders a product that is not included in the ICA, and AT&T inadvertently provides the product or service (even though it is under no obligation to do so). AT&T noted that the parties have already agreed in Pricing Section 1.9.1 that, in these circumstances, Intrado will pay the tariffed rate if a tariff exists. AT&T stated that it further proposes that, if no tariff exists, the standard generic rate that any other CLP would pay for the same product or service would apply to Intrado.

AT&T maintained that Intrado, on the other hand, proposes that, under these circumstances, AT&T should be required to develop charges through the Section 252 process with approval by the Commission. AT&T stated that, thus, in the unlikely event that AT&T inadvertently provides services that are outside of the scope of the Agreement, it would have to propose and negotiate (and perhaps arbitrate) a rate for services that have already been rendered and for which generic CLP prices already exist. AT&T argued that this circumstance should occur rarely, if ever. AT&T maintained that, if it does occur, this occurrence would almost certainly be under circumstances that constitute a mutual mistake, i.e., a mistake by Intrado in ordering outside of the interconnection agreement, and a mistake by AT&T in providing the service in spite of its being improperly ordered. AT&T stated that, in these limited circumstances, AT&T should be allowed to charge Intrado the going rate for the service it has ordered (outside of the interconnection agreement), without the prospect of protracted price negotiations or arbitration. AT&T proposed that the Commission approve the language proposed by AT&T.

AT&T noted that it proposed Section 1.9.2 as a companion to Section 1.9.1. AT&T stated that this section would provide that, under the circumstances identified in Section 1.9.1, Intrado would be billed for, and would be required to pay for, the product or service. AT&T maintained that its proposed language would also state that AT&T's one-time provision of a service that is not within the scope of the interconnection agreement would not bind AT&T to provide the service in the future and that these provisions would only arise when Intrado ordered something that is outside of the interconnection agreement (and AT&T inadvertently provides the product, even though it is under no obligation to do so). AT&T asserted that, under these circumstances, it only makes sense that Intrado should be required to pay for what it has ordered, and AT&T should have no obligation to provide the product again unless the interconnection agreement is amended to include associated rates, terms, and conditions. AT&T argued that Section 1.9.2 simply creates a mechanism to achieve this reasonable objective and proposed that the Commission adopt AT&T's language in this regard.

The Public Staff stated in its Proposed Order that the language proposed by AT&T for this issue would require Intrado to pay the standard generic rate that another CLP would pay for

the same product or service, assuming there is no rate in AT&T's tariff. The Public Staff noted that Intrado's proposed language would require AT&T to propose a rate for Intrado's acceptance, even though this rate may be already contained in an effective ICA for another CLP. The Public Staff maintained that, additionally, Intrado has objected to language that would require Intrado to pay for these improperly ordered services at all.

The Public Staff recommended that the Commission find that the language proposed by AT&T is adequate to ensure that AT&T is paid for the services and products it provides to Intrado and that Intrado is not charged an unreasonable or discriminatory rate for receiving those services. The Public Staff stated that, as noted by AT&T, this provision will come into play only if Intrado orders a product or service not offered in the ICA and it is inadvertently provided by AT&T.

This issue centers around language disputes for the Appendix Pricing, Sections 1.9.1 and 1.9.2, as follows:

Intrado's proposed language

Section 1.9.1: CLEC shall pay for the Product or Service provisioned to CLEC at the rates set forth in AT&T's applicable intrastate tariff(s) for the Product or Service or, to the extent there are no tariff rates, terms or conditions available for the Product or Service in the applicable state, then AT&T shall propose rates pursuant to the process required in Sections 251 and 252 of the Act.

Section 1.9.2: AT&T's provisioning of orders for such Products or Services is expressly subject to this Section 1.9 and in no way constitutes a waiver of AT&T's right to charge and collect payment for such Products and/or Services.

AT&T's proposed language

Section 1.9.1: CLEC shall pay for the Product or Service provisioned to CLEC at the rates set forth in AT&T's applicable intrastate tariff(s) for the Product or Service or, to the extent there are no tariff rates, terms or conditions available for the Product or Service in the applicable state, then CLEC shall pay for the Product or Service at AT&T's current generic contract rate for the Product or Service set forth in AT&T's applicable state-specific generic pricing schedule as published on AT&T's CLEC website; or

Section 1.9.2: CLEC will be billed and shall pay for the product or service as provided in Section 1.9.1, above, and AT&T may, without further obligation, reject future orders and further provisioning of the product or service until such time as applicable rates, terms and conditions are incorporated into this Agreement as set forth in this Section 1.9.

After reviewing the record of evidence on this issue, the Commission agrees with AT&T and the Public Staff that AT&T's proposed language is appropriate. As noted by both AT&T

and the Public Staff, the issue in dispute here does not come into play unless Intrado, presumably inadvertently, or in error, orders a product or service which it is not entitled to receive under the express terms of the ICA and AT&T, inadvertently, or in error, provides the product or service. Based on AT&T's proposed language, under such a circumstance, Intrado would be billed at: (1) the rates set forth in AT&T's applicable intrastate tariff(s) or; (2) to the extent there are no tariffed rates, then Intrado will pay AT&T's current generic contract rate as set forth in AT&T's applicable state-specific generic pricing schedule as published on AT&T's CLEC website. Under AT&T's proposed Section 1.9.2, AT&T may then reject future orders until such time as appropriate rates for such services are incorporated into the Intrado/AT&T interconnection agreement. The Commission agrees with AT&T that it is inappropriate and unnecessary to require AT&T to propose some other rate that the parties mutually agree on when AT&T has already got a rate that it uses for other CLPs. The Commission concludes that AT&T's proposed language is appropriate and reasonable and, therefore, should be adopted for inclusion in the parties' interconnection agreement.

CONCLUSIONS

The Commission concludes that AT&T's proposed language for Appendix Pricing Section 1.9.1 and Section 1.9.2 is appropriate and should be adopted for inclusion in the parties' interconnection agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 29

ISSUE NO. 29 – MATRIX ISSUE NO. 33: Should AT&T be required to provide UNEs to Intrado Comm at parity with what it provides to itself?

POSITIONS OF PARTIES

INTRADO: Intrado argued that the parties should utilize the provisions previously negotiated and agreed-upon for Ohio. Intrado asserted that AT&T has provided no reason why the provisions it found acceptable for use in Ohio are not acceptable for use in North Carolina.

AT&T: AT&T asserted in its cover letter to its Proposed Order that there are 11 issues that arise solely in the context of the 13-state template, and for which there are currently no substantive disputes, including Matrix Issue No. 33. AT&T stated that, for these issues, the parties reached agreement on language to be placed into the 13-state agreement in Ohio, and, accordingly, AT&T believes there is no need for any substantive consideration of these issues by the Commission. AT&T maintained that, if the Commission elects to use the 13-state template, then the language that should be adopted on these issues is the same as that which the parties negotiated in Ohio. AT&T stated that, for this reason, its Proposed Order does not contain any substantive discussion or ruling on these issues.

PUBLIC STAFF: The Public Staff stated that it is unnecessary to require that the ICA explicitly state that, to the extent technically feasible, the quality of the UNEs and access to such UNEs shall be at least equal to what AT&T provides to itself and to other telecommunications carriers requesting access to the UNEs, because AT&T is already subject to this legal obligation.

DISCUSSION

Based on the record on this matter, the Commission finds that the parties have mutually agreed to use the language for Matrix Issue No. 33 that the parties negotiated in Ohio for insertion into their North Carolina interconnection agreement.

CONCLUSIONS

The Commission concludes that this issue has been resolved and that the parties have agreed to use the language negotiated in Ohio concerning Matrix Issue No. 33.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 30

ISSUE NO. 30 – MATRIX ISSUE NO. 34:

(a) How should a "non-standard" collocation request be defined?

(b) Should non-standard collocation requests be priced based on an individual case basis?

POSITIONS OF PARTIES

INTRADO: Intrado argued that, once AT&T provides one carrier with a certain collocation arrangement, it should no longer be considered "non-standard" and subject to varying costs based on AT&T's independent determination.

AT&T: AT&T asserted that a non-standard collocation request is any collocation request that is beyond the terms and conditions set forth in the interconnection agreement. AT&T recommended that the Commission conclude that Intrado is required to pay for the collocation arrangements based on the specific criteria of the request. AT&T recommended that the Commission reject Intrado's proposal to pay the same as other carriers have paid for "similar" work because: (1) the term "similar" is too vague in this context; and (2) older "similar" arrangements may reflect obsolete costs.

PUBLIC STAFF: The Public Staff stated that Intrado's proposed additional language goes beyond the implied intent of Section 2.22 in the Physical Collocation Appendix and should not be adopted.

DISCUSSION

Intrado witness Hicks stated in his direct testimony that AT&T has proposed language that would permit it to charge Intrado for "non-standard" collocation requests made by Intrado. He asserted that AT&T should not be permitted to impose "non-standard" charges on Intrado for arrangements that AT&T has provided to other service providers. Witness Hicks maintained that, once AT&T provides one provider with a certain arrangement, it should no longer be considered "non-standard" and subject to varying costs based on AT&T's independent determination. Witness Hicks stated that it is his understanding that the FCC has found that if a particular method of interconnection is currently employed between two networks or has been

used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures and ILECs bear the burden of demonstrating technical infeasibility. Witness Hicks argued that AT&T should not be permitted to impose arbitrary costs on Intrado when AT&T has already provided a similar arrangement to another provider.

Intrado asserted in its Proposed Order that witness Hicks explained that Intrado should be entitled to the same collocation arrangements that AT&T provides to other carriers at the same rates, terms, and conditions. Intrado maintained that once AT&T provides one carrier with a certain arrangement, it should no longer be considered "non-standard" and subject to varying costs based on AT&T's independent determination.

Intrado maintained that AT&T has contended that Intrado should be required to pay for non-standard collocation arrangements based on the specific criteria of the request. Intrado asserted that, in AT&T's view, while another carrier might have what Intrado would characterize as "similar" to what Intrado requests, it may actually be different.

Intrado recommended that the Commission conclude that AT&T should not be permitted to impose "non-standard" charges on Intrado for arrangements that AT&T has provided to other carriers. Intrado maintained that the FCC has found in Paragraph 204 of its *Local Competition Order* that, if a particular method of interconnection or collocation is currently employed between two networks or has been used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures and ILECs bear the burden of demonstrating technical infeasibility. Intrado proposed that the Commission find that AT&T should not be permitted to impose arbitrary costs on Intrado when AT&T has already provided a similar arrangement to another provider.

AT&T witness Pellerin stated in her rebuttal testimony that there is no language in dispute regarding the definition of a "non-standard" collocation request. She stated that, however, the determination of what constitutes a non-standard collocation request is important to the context of the parties' pricing dispute in Matrix Issue No. 34(b).

Witness Pellerin maintained that the parties have agreed in the Physical Collocation Appendix - Section 2.22 that a non-standard collocation request is any collocation request that is beyond the terms, conditions, and rates set forth in Appendix Physical Collocation. She stated that the parties have also agreed to the definition of "Custom Work Charge", as follows:

> Denotes the charge(s) developed solely to meet the construction requirements of the Collocator, (e.g., brighter lighting above the Collocator's cage, circular cage, different style tile within the cage). [Appendix Physical Collocation, Section 2.8]

Witness Pellerin stated that, because custom work such as that described above is provided for by Appendix Physical Collocation, it would be considered a "standard" (rather than "non-standard") collocation request.

Witness Pellerin maintained that Intrado proposed additional language, to which AT&T objects, as set forth in bold italics below:

> Appendix Physical Collocation – Section 2.22 - Non-Standard Collocation Request (NSCR) – AT&T-[STATE] may seek to impose non-standard charges for requirements based on requests from a Collocator that are beyond the terms, conditions, and rates established in this Appendix; ***provided, however, that NSCR charges shall not apply to CLEC requests for collocation or interconnection for which AT&T-(STATE) has existing similar arrangements with other communications service providers. The charges for such similar existing arrangements requested by CLEC shall be in parity with AT&T-(STATE) charges for existing similar arrangements.***

Witness Pellerin argued that Intrado should be required to pay for non-standard collocation arrangements (i.e., beyond the terms and conditions set forth in the interconnection agreement) based on Intrado's specific collocation arrangement. She stated that the term "similar" is sufficiently vague in the context of physical collocation requests as to be fraught with potential for dispute. Witness Pellerin maintained that, while another carrier might have what Intrado would characterize as an arrangement "similar" to what Intrado requests, such arrangement may actually be quite different and may impose on AT&T different provisioning costs. Witness Pellerin asserted that another carrier's collocation arrangement may have been engineered and provisioned for several years prior to Intrado's request, making any associated pricing obsolete and inappropriate for application to Intrado. She stated that, if Intrado objects to AT&T's NSCR charges because it believes them to be discriminatory, it may invoke dispute resolution pursuant to the interconnection agreement. Witness Pellerin argued that individual case basis pricing is appropriate for any non-standard collocation arrangement; therefore, Intrado's proposed language should be rejected.

AT&T asserted in its Proposed Order that the parties are fundamentally in agreement as to the definition of a "non-standard" collocation request. AT&T noted that, specifically, they have agreed to language in Section 2.22 of the Physical Collocation Appendix that a "non-standard collocation is any collocation request that is beyond the terms, conditions, and rates set forth in Appendix Physical Collocation." AT&T stated that the parties also seem to be in general agreement that pricing for non-standard collocation should be determined on a case-by-case basis. AT&T maintained that, thus, the only real dispute is language that Intrado seeks to include in the Appendix to limit the parameters of this individual-case-basis pricing.

AT&T asserted that Intrado's proposed language would restrict AT&T to charging Intrado for requested physical collocation arrangements at the same rate as it charged other carriers that have obtained "similar" arrangements at any point in the past.

AT&T argued that the difficulty with Intrado's proposal is that a particular request by Intrado would or would not cost the same as an arrangement previously provided to another carrier based on an assessment of whether the two requests are "similar". AT&T noted that, thus, as its witness Pellerin testified, "while another carrier might have what Intrado characterizes as an arrangement 'similar' to what Intrado requests, such arrangement may actually be quite different and may impose on AT&T different provisioning costs." AT&T stated that, further, as witness Pellerin noted, "another carrier's collocation arrangement may

have been engineered and provisioned several years prior to Intrado's request, making any associated pricing obsolete and inappropriate for application to Intrado."

AT&T maintained that, accordingly, the adoption of Intrado's limitation that the pricing must be the same as "similar" past requests will do little or nothing to provide a useful pricing guide and will instead create the likelihood of future disputes as to what does or does not constitute a "similar" request. AT&T argued that the better approach would be for AT&T to price non-standard collocation requests by Intrado based on the specific request, and the specific circumstances that pertain at the time of the request. AT&T asserted that, if Intrado objects to the charges AT&T proposes, then it always has the option of invoking dispute resolution pursuant to the interconnection agreement. AT&T recommended that the Commission adopt AT&T's proposed language.

The Public Staff stated in its Proposed Order that Intrado witness Hicks, when asked on cross-examination by the Public Staff what would justify a non-standard collocation request, opined that AT&T wanted to be protected from anything out of the ordinary requested by a CLP. The Public Staff noted that, while he understood AT&T's position, he argued that Intrado also wants to be treated fairly, and if AT&T has previously provided a similar collocation arrangement, then the pricing should be equivalent.

The Public Staff maintained that, if AT&T deployed equipment, witness Hicks stated that AT&T and Intrado should jointly make a determination of the appropriate charges, taking into account whether a similar deployment had been performed previously. The Public Staff asserted that, otherwise, Intrado would have to merely presume that AT&T was charging Intrado fairly. The Public Staff stated that, if Intrado subsequently learned that another collocator had installed similar equipment at a much lower rate than that offered to Intrado, Intrado would consider taking corrective action under the provisions of the ICA.

The Public Staff noted that witness Hicks contended that AT&T should not be permitted to impose arbitrary, "non-standard" charges on Intrado for arrangements AT&T has provided previously to other service providers. The Public Staff maintained that, for example, if AT&T has developed pricing for work for another collocator, then Intrado should be subject to that same pricing rather than special, higher pricing. The Public Staff stated that witness Hicks contended that arrangements should no longer be considered non-standard and subject to varying costs based on AT&T's independent determination. The Public Staff noted that witness Hicks also stated that the FCC has found that if a particular method of interconnection is currently employed between two networks, or has been used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures.

The Public Staff stated that it agrees with AT&T that a non-standard collocation request is any collocation request beyond the terms and conditions set forth in the ICA. The Public Staff further stated that it agrees that Intrado should be required to pay for non-standard collocation arrangements based on the specific criteria of the request (i.e., on an individual case basis). The Public Staff asserted that, while Intrado might characterize another collocator's arrangement as "similar" to what Intrado requests, it may actually be very different. The Public Staff maintained

that, for example, these "similar" collocation arrangements may have been engineered and provisioned several years ago, making any associated costs obsolete. The Public Staff asserted that individual case basis pricing is appropriate for any non-standard collocation arrangement. The Public Staff maintained that, if Intrado objects to AT&T's NSCR charges as discriminatory, it may seek dispute resolution pursuant to the ICA.

The Public Staff recommended that the Commission find that using the 13-state template without the proposed additional language provided by Intrado in Section 2.22 of the Physical Collocation Appendix is appropriate.

In this issue, Intrado proposes to include the following language shown in bold and underlined in Section 2.22 of the Physical Collocation Appendix:

> 2.22 Non-Standard Collocation Request (NSCR) – AT&T-[STATE] may seek to impose non-standard charges for requirements based on requests from a Collocator that are beyond the terms, conditions, and rates established in this Appendix**; provided, however, that NSCR charges shall not apply to CLEC requests for collocation or interconnection for which AT&T-[STATE] has existing similar arrangements with other communications service providers. The charges for such similar existing arrangements requested by CLEC shall be in parity with AT&T-[STATE] charges for existing similar arrangements**.

The Commission agrees with AT&T and the Public Staff that Intrado's proposed language is not appropriate. The phrase "existing similar arrangements" is much too subjective, and, as noted by AT&T, would, instead, create the likelihood of future disputes as to what does or does not constitute a "similar" request. Non-standard collocation requests should be priced based on an individual case basis and the language from the 13-state template without the additional language proposed by Intrado would achieve this result. In addition, as noted by both AT&T and the Public Staff, if Intrado is aggrieved by a particular individually-priced non-standard collocation request, it can invoke the dispute resolution provision in the interconnection agreement. Therefore, the Commission finds it appropriate to exclude the language proposed by Intrado and, instead, adopt the exact language from the 13-state template for Section 2.22 in the Physical Collocation Appendix.

CONCLUSIONS

The Commission concludes that it is appropriate to use the language in Section 2.22 of the Physical Collocation Appendix from the 13-state template without the additional language proposed by Intrado.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 31

ISSUE NO. 31 - MATRIX ISSUE NO. 35: Should the Parties' interconnection agreement reference applicable law rather than incorporate certain appendices which include specific terms and conditions for all services?

POSITIONS OF PARTIES

INTRADO: Intrado explained that, in connection with their Ohio negotiations, the Parties had agreed that certain appendices should be included in the ICA rather than indicating that the services governed by those appendices would be provided pursuant to applicable law. Thus, the Parties agreed to incorporate certain appendices into the Ohio ICA governing such services as local number portability, rights-of-way, numbers, directory assistance, and the like. Intrado wants the same provision as in Ohio to be included in the North Carolina ICA.

AT&T: In its Cover Letter to its Proposed Order, AT&T maintained that Matrix Issue No. 35 was an issue that arises solely in the context of the 13-state template. For this issue, AT&T represented that the Parties had reached agreement on the language to be placed into the 13-state agreement in Ohio and, accordingly, AT&T does not believe there is a need for any substantive consideration of this issue by the Commission.

PUBLIC STAFF: Any attachments should be incorporated into the ICA rather than incorporated by reference.

DISCUSSION

Based on the record in this matter, the Commission finds that the parties have mutually agreed to use the language for Matrix Issue No. 35 that the parties negotiated in Ohio for insertion into their North Carolina interconnection agreement.

CONCLUSIONS

The Commission concludes that this issue has been resolved and that the parties have agreed to use the language negotiated in Ohio concerning Matrix Issue No. 35.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 32

ISSUE NO. 32 – MATRIX ISSUE NO. 36: Should the terms defined in the ICA be used consistently throughout the agreement?

POSITIONS OF PARTIES

INTRADO: The ICA defines certain terms, but AT&T's language does not consistently capitalize those terms throughout the agreement. To the extent a term has been defined, it should be capitalized throughout the agreement in recognition that it is a specifically defined term.

AT&T: AT&T asserted that defined terms should be appropriately capitalized throughout the ICA based on the use of the terms.

PUBLIC STAFF: If a term is specifically defined in the ICA, it may be capitalized only when it is used in a manner consistent with the definition.

DISCUSSION

This issue was addressed by Intrado witness Clugy in her direct testimony and AT&T witness Pellerin in her rebuttal testimony.

Witness Clugy testified that the ICA defines certain terms, but AT&T has not consistently capitalized those defined terms throughout the ICA. She recommended that, if a term has been defined, it should be capitalized throughout the ICA. AT&T witness Pellerin agreed that defined terms should be capitalized throughout the ICA, but only when the defined terms are used in a manner consistent with their definition. She proposed that, if the parties have a disagreement as to whether a particular word should be capitalized, they should seek the Commission's assistance.

In its Proposed Order, the Public Staff stated that, if a term is specifically defined in the ICA, it may be capitalized only when it is used in a manner consistent with the definition.

It appears that the parties may not actually disagree as to whether a previously defined term should be capitalized when used in a manner consistent with its definition, but disagree as to whether terms such as "end user" are being used consistently with their definition and therefore should be capitalized. However, no specific instances of disagreement have been brought before the Commission. The Commission finds that, if a term is specifically defined in the ICA, it may be capitalized only when it is used in a manner consistent with the definition. Any further disputes over capitalization, definitions, or the proper language for inclusion in the ICA may be brought to the Commission.

CONCLUSIONS

The Commission concludes that if a term is specifically defined in the ICA, it may be capitalized only when it is used in a manner consistent with the definition. Any further disputes over capitalization, definitions, or the proper language for inclusion in the ICA may be brought to the Commission.

IT IS, THEREFORE, ORDERED as follows:

1. That Intrado and AT&T shall prepare and file a Composite Agreement in conformity with the conclusions of this *Order* no later than Monday, June 8, 2009. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 *Order* in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (*Arbitration Procedure Order*), as amended by the Commission's *Order Modifying Composite Agreement Filing Requirements* dated November 3, 2000.

2. That, not later than Tuesday, May 26, 2009, a party to the arbitration may file objections to this *Order* consistent with paragraph 3 of the *Arbitration Procedure Order*.

3. That, not later than Tuesday, May 26, 2009, any interested person not a party to this proceeding may file comments concerning this *Order* consistent with paragraphs 5 and 6, as applicable, of the *Arbitration Procedure Order*.

4. That, with respect to objections or comments filed pursuant to decretal paragraphs 2 or 3 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages single-spaced or three pages double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of any party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

5. That parties or interested persons submitting Composite Agreements, objections, or comments shall also file those Composite Agreements, objections, or comments, including the executive summary required in decretal paragraph 4 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in Microsoft Word.

ISSUED BY ORDER OF THE COMMISSION.
This the 24th day of April, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Commissioner Culpepper separately concurs with the Majority's decisions in Findings of Fact Nos. 8, 9, 10, and 11.

bp042309.01

Appendix A

Sprint/Randolph Arbitration Proceeding
Docket No. P-1187, Sub 2

Act	Telecommunications Act of 1996
ALI	Automatic Location Identification
ANI	Automatic Number Identification
ASR	Access Service Request
AT&T	BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina
ATIS	Alliance for Telecommunications Industry Solutions
CLEC	Competitive Local Exchange Company
CLP	Competing Local Provider
CMRS	Commercial Mobile Radio Service (wireless)
Commission	North Carolina Utilities Commission
EAS	Extended Area Service
FCC	Federal Communications Commission
GTC	General Terms and Conditions
ICA	Interconnection Agreement
ILEC	Incumbent Local Exchange Company

Intrado	Intrado Communications Inc.
IP	Internet Protocol
LATA	Local Access and Transport Area
MSAG	Master Street Address Guide
MECAB	Multiple Exchange Carrier Access Billing
NENA	National Emergency Number Association
OSS	Operational Support Systems
POI	Point of Interconnection
PSAP	Public Safety Answering Point
PSTN	Public Switched Telephone Network
Public Staff	Public Staff – North Carolina Utilities Commission
RAO	Recommended Arbitration Order
SR	Selective Router
TELRIC	Total Element Long Run Incremental Cost
UNE	Unbundled Network Element
VoIP	Voice over Internet Protocol

DOCKET NO. P-1187, SUB 2

Commissioner William T. Culpepper, III, concurring:

While I fully concur with the Commission's Findings of Fact Nos. 8, 9, 10 and 11 and the large majority of the discussion explaining the rationale therefor, I write separately to reiterate and further expound on that which I stated in my concurring opinion in *In re the Petition of Ellerbe Telephone Co. et al for Arbitration with Alltel Communications et al,* Docket Nos. P-21, Sub 71 et al, *Order Ruling on Objections and Requiring the Filing of Composite Agreements* (*Objections to RAO*).

The Commission correctly notes herein that:.

(1) When a non-ILEC telecommunications carrier, such as a CLP or a CMRS Provider, requests interconnection with an ILEC, the ILEC's obligation is prescribed by Section 251(c)(2) of the Act which gives the CLP/CMRS Provider the option to choose a single technically feasible location within the ILEC's network upon which to interconnect, with the parties being bound by that choice unless they voluntarily agree to do otherwise[1];

(2) Under the auspices of Section 252(a) of the Act, when a requesting CLP seeks interconnection with an ILEC, the parties may agree to establish a single POI or multiple POIs, at any location or number of locations, without regard to the requirements of Section 251(c); and

(3) When an ILEC requests interconnection with a CLP or any other carrier, the interconnection is pursuant to Section 251(a) of the Act and, again, the parties may agree to

[1] As noted in footnote 14 on page 41 of this RAO, the FCC has interpreted Section 251(c)(2) to mean that competitive LECs have the option to interconnect at a single point of interconnection (POI) per LATA.

establish a single POI or multiple POIs at any location or number of locations (emphasis supplied).

However with respect to the third principal above cited (Section 251(a)), this RAO goes on to say:

> If, however, the parties cannot agree voluntarily upon either the location or number of POI, the Commission *may*, in its discretion, determine both the number and location(s) of the POI.[1]

This conclusion is based on the following dictum contained in the *Objections to RAO* majority opinion:

> Unlike the language of Section 251(c)(2), Section 251(a)(1) does not specify the number of POIs or where the POI or POIs should be located. As a result, the literal language of Section 251(a)(1), in an arbitration in which an RLEC seeks interconnection with a CMRS Provider, would seem to provide the Commission with the discretion to determine how many POIs there should be and where they should be located.[2]

I do not subscribe to or agree with the foregoing dictum insofar as it suggests that the Commission has the discretion, under Section 251(a), to **require** more than a single point of interconnection. This is in keeping with my concurring opinion in the *Objections to RAO,* in which I stated:

> In other words, it is my belief that in all instances there is required to be but a single POI between two interconnecting telecommunications carriers and, in the event they are unable to agree as to its location, then that issue is one to be properly decided by the Commission based upon facts and equities presented to it, and the law applicable thereto, in the course of a Section 252 arbitration proceeding.[3]

Put another way I do not believe that the obligations of a CLP or other carrier to a requesting ILEC under Section 251(a)(1) are greater than the obligations of an ILEC to a requesting non-ILEC under Section 251(c)(2) with respect to the number of **required** POI (i.e. a single POI).

\s\ William T. Culpepper, III
Commissioner William T. Culpepper, III

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[1] Page 41

[2] *Objections to RAO,* p.11

[3] *Objections to RAO,* Culpepper concurring opinion, p.1.

DOCKET NO. P-55, SUB 1767

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Tariff Filing by AT&T North Carolina to Modify	)	
Delivery of Asheville, Charlotte, Greensboro,	)	ORDER AUTHORIZING PILOT
Raleigh, Wilmington, and Winston-Salem White	)	PROGRAM IN CHARLOTTE
Pages Directories	)	

BY THE COMMISSION: On March 13, 2009, AT&T North Carolina (AT&T or Company) filed a tariff that would permit the Company, at its discretion, to provide residential white pages listings in Raleigh, Charlotte, Greensboro, Winston-Salem, Wilmington, and Asheville via an internet site, provided that printed copies of the residential white pages listings, or a CD-ROM containing these listings, will be distributed upon customer request. In the transmittal letter accompanying the tariff, AT&T identifies www.RealPagesLive.com as the website it uses to provide electronic versions of its directories, and said that all of the existing directory information is available on this site, including residential and business white pages listings, government listings, the Customer Guide Section, and AT&T's Real Yellow Pages. The letter further explained that customers would automatically receive a directory which will contain Customer Guide Pages, Community Pages, Government Pages (blue), Business White Pages, EAS listings, and Yellow Pages. Residential White Pages listings will be distributed upon customer request, and customers may request a published residential directory or CD-ROM. AT&T states that the directory, or the CD-ROM, will be delivered to customers within 7 to 10 days after their requests, and that customers will be given a toll free telephone number they can use to request the residential white pages listings. The residential listings, or the CD-ROM, will be provided at no charge to customers. In explanation for these changes, AT&T stated that based on data gathered in two trials conducted during the fall of 2008 in Austin, Texas, and Atlanta, Georgia, less than 1% of customers in Atlanta requested the residential directory and approximately 2% of customers in Austin requested the residential directory.

This matter came before the Regular Commission Conference on April 13, 2009. The Public Staff noted that this tariff is similar to a tariff filing AT&T submitted in September, 2007, which was docketed in Docket No. P-55, Sub 1718. That filing went before the Commission at a Commission Conference on October 15, 2007. On October 19, 2007, AT&T filed a motion asking the Commission to hold the tariff filing in abeyance until AT&T resubmitted its proposal. On October 23, 2007, the Commission issued an Order Dismissing Tariff Filing Without Prejudice.

While this tariff filing and the 2007 filing are similar, the Public Staff pointed out that there are a few significant differences between the filings. The 2007 filing proposed to change the distribution of Raleigh and Charlotte residential white pages listings, while this filing will affect those listings, plus the additional residential white pages listings for Greensboro, Winston-Salem, Wilmington, and Asheville. Therefore, this filing will impact customers across the state. As with the 2007 filing, this proposed directory change will also impact subscribers in

neighboring exchanges that receive these directories. Using the Raleigh directory as an example, it is also delivered to customers in the Apex, Cary, Wendell, Knightdale, and Zebulon exchanges, so this change will impact a much wider area than the six named exchanges, and instead will impact a large percentage of AT&T's customers. Another significant difference, in this case a positive difference, is that in this filing AT&T proposes to include EAS listings, both residential and business, in the directory that will be automatically delivered. This change addresses a major concern the Public Staff had with the 2007 filing as to potential discriminatory treatment regarding business listings for home and foreign exchanges.

The Public Staff stated that its primary concern with AT&T's current proposal is that it constitutes a reduction in service, since customers would no longer automatically receive the residential white pages directory listings. Instead, customers would be required to take action in order to receive the same level of service that they have received in the past. It is also a reduction in service to customers who prefer to have their names and numbers distributed to all subscribers, since both business and residence service includes a free white pages directory listing. Technically, the value of that portion of their service would be diminished with each directory that is not distributed.

The Public Staff acknowledged that customers now have a number of additional sources for directory information, and it is certainly plausible, as AT&T claims, that customers increasingly rely on electronic directories to substitute for the traditional white pages listings. However, not all customers have access to computers and the Internet, and some who have access to this technology may still prefer to rely on the traditional white pages directory listings. Therefore, the Public Staff continued to believe that reaction from the public to the proposed change in directory distribution will be mixed. While some subscribers will appreciate the environmental benefits and fewer directories, others will object to the reduction in service and the inconvenience of having to take action to maintain their current level of service.

The Public Staff noted that it has historically opposed changes that require customers to take action to maintain their current level of service. Instead, its position has been that, assuming no action is taken on the part of the customer, the current level of service should be maintained, and that customers who want to initiate a change should be the ones taking action. Therefore, the Public Staff believed the optimal solution would be for this change to be structured so that customers could "opt out" of receiving the residential white pages listings, as opposed to requiring customers to "opt in" in order to continue receiving their current level of service.

The Public Staff also expressed concern about customer notification. AT&T stated in the transmittal letter that the business white pages listings/yellow pages directory, which it will continue to automatically distribute, will "prominently display" information on how customers can receive either a published residential directory or CD-ROM. However, there is no mention of how customers will be informed about the link to the website the Company suggests as an alternative to the published directory. The Public Staff noted that the current AT&T directory displays the name of the yellow pages website in a prominent position on the cover of the directory. Similarly, the AT&T and BellSouth websites prominently display a link to the yellow pages website, but fail to provide a link to the white pages directories. The Public Staff believes that similar treatment of the white pages directory listings website would provide a real benefit for consumers.

Accordingly, the Public Staff recommended that the tariff be allowed to become effective on April 14, 2009, provided that the tariff be modified to reflect that customers may "opt out" of receiving a directory, and that customers who do not "opt out" will continue to receive both business and residential white pages directory listings; and (2) that the white pages directory listings website be added to the front cover of the directory, and be prominently listed on the Company's websites.

Mr. Robert Smith of AT&T responded to the Public Staff's comments and recommendations as well as to Commission questions. He emphasized that the changing telecommunications environment meant that there were many more options by which customers could obtain telephone numbers and that a reduction in the number of white pages directories that would need to be printed – and, hence, would need to be disposed of – would be an environmentally friendly policy. At the same time, customers who desired residential white pages can easily obtain them simply by contacting AT&T.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration of the proposed tariff and the comments of AT&T and the Public Staff, the Commission concludes that good cause exists to allow AT&T to conduct a pilot program testing the proposal it has outlined in this docket with respect to the 2009 Charlotte white pages directory only. The CD-ROMs and white pages directories which AT&T has agreed to provide to Charlotte-area customers upon request shall, of course, be provided free of charge. No shipping or handling charges shall apply and a local or toll free number shall be available for use by affected customers who request delivery of a CD-ROM or white pages directory. In addition, the development and implementation of adequate and timely customer notice provisions, including things such as media releases, are essential in order to ensure the most comprehensive and complete level of effective customer education and understanding. If possible, any customer who requests a CD-ROM or white pages directory should be given the option to automatically continue to receive that media for at least two additional years without having to renew such request each year, unless the customer specifically makes only a one-year request. AT&T's proposal represents a major departure in the way that white pages directories are compiled and distributed and, as such, should only become the norm for larger metropolitan areas after a thorough vetting of the relevant facts by way of a pilot program.

To that end, the Commission requests that the Public Staff, Attorney General, and AT&T confer together as soon as practicable as to the precise parameters of the pilot program, customer notice procedures, and the data that should be collected and present same to the Commission for its review and approval at a Regular Commission Staff Conference not later than May 18, 2009. The results of the pilot program in Charlotte shall be filed with the Commission not later than December 31, 2009, so that the Commission can then decide whether to continue, modify, expand, terminate or make permanent AT&T's pending white pages directory proposal.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.
This the 15th day of April, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

Pb041509.01

DOCKET NO. T-4422, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Violation of State Statutes and/or Commission Rules	)	
and Regulations by Ben Uvino, Robert Jackson, and	)	ORDER TO CEASE
Tom Edmondson d/b/a Modern Movers, 6701	)	AND DESIST AND
Woodmere Drive, Raleigh, North Carolina 27612	)	TO ASSESS PENALTIES

HEARD: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on Thursday, July 9, 2009, at 9:30 a.m.

BEFORE: Commissioner Bryan E. Beatty, Presiding; Commissioner Lorinzo L. Joyner; and Commissioner William T. Culpepper, III.

APPEARANCES:

For the Public Staff:

Tab C. Hunter, Staff Attorney, Public Staff - North Carolina Utilities Commission, Dobbs Building, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For the Respondents:

Ben Uvino, (Pro se)
Tom Edmondson, (Pro se)

BY THE COMMISSION: On June 9, 2009, the Commission issued an Order Scheduling Show Cause Hearing in the above-captioned docket ordering Ben Uvino, Robert Jackson, and Tom Edmondson d/b/a Modern Movers (Modern), to appear and show cause why Modern (1) should not be found to be operating as a de facto public utility in the State of North Carolina; (2) should not be found to be operating as a moving company within North Carolina without a Certificate of Exemption from the Commission; and (3) should not be subject to sanctions provided by statute, including monetary penalties levied by the Commission. The hearing was scheduled for July 9, 2009, at 9:30 a.m., in the Dobbs Building, 430 North Salisbury Street, Commission Hearing Room 2115, Raleigh, North Carolina and the Public Staff was requested to participate in this matter as a party and prosecute this show cause proceeding.

On June 24, 2009, the Public Staff filed a Notice of Affidavit and the Affidavit of Renné Vance, Chief Clerk of the North Carolina Utilities Commission, attesting that neither Modern nor any of the before-named individuals Ben Uvino, Robert Jackson, or Tom Edmondson have a Certificate of Exemption from the Utilities Commission.

On July 9, 2009, the hearing for Respondents to show cause was held in the Commission Hearing Room as scheduled. Respondents Tom Edmondson and Ben Uvino appeared pro se, waived formal service of process, and consented to the Commission's jurisdiction. Robert Jackson, however, did not appear at the hearing nor did anyone make an appearance on his behalf.

On July 9, 2009, the Public Staff, Tom Edmondson, and Ben Uvino (collectively, Parties) filed a Stipulation resolving all show cause issues as related to Mr. Edmondson and Mr. Uvino. The Public Staff offered the Stipulation into evidence, and the Commission accepted it, without objection. The Public Staff also presented the testimony of Tom Edmondson, Ben Uvino, Sally Page, and Carol Kimball Stahl, Director, Public Staff Transportation Rates Division.

On the basis of the Commission's records, the Stipulation, and other evidence of record, the Commission is of the opinion that the provisions of the Stipulation are just and reasonable and that the Commission should make the following:

FINDINGS OF FACT

1. The Commission has jurisdiction over public utilities, including those engaged in the intrastate transportation of Household Goods (HHG) for compensation in North Carolina, as defined by G.S. 62-3(7) and (15).

2. The Commission has authority to issue Certificates of Exemption to applicants for the purpose of intrastate transportation of HHG for compensation in North Carolina, pursuant to G.S. 62-261(8) and Commission Rule R2-8.1.

3. Mr. Edmondson and Mr. Uvino are properly before the Commission, pursuant to Commission Rule R1-4(3). Robert Jackson did not appear at the hearing.

4. Tom Edmondson, Robert Jackson and Ben Uvino are the owners and/or operators of Modern, an unincorporated business organized and advertised for the purpose of intrastate transportation of HHG for compensation in North Carolina.

5. On August 2, 2008, Tom Edmondson, Robert Jackson, and Ben Uvino d/b/a Modern Movers, engaged in the intrastate transportation of the household goods of Robert and Sally Page for compensation from a residence in Raleigh, North Carolina, to a residence in Cary, North Carolina.

6. Tom Edmondson, Robert Jackson, and Ben Uvino d/b/a Modern Movers have never been granted a Certificate of Exemption from the Commission.

7. Tom Edmondson and Ben Uvino have agreed to immediately cease and desist from owning and/or operating any business organized and advertised for the purpose of intrastate transportation of HHG for compensation in North Carolina, unless granted a Certificate of Exemption from the Commission, and to assist the Public Staff in securing personal jurisdiction over Robert Jackson.

8. Tom Edmondson and Ben Uvino, jointly and severally, agreed to remit $2,000, in twelve (12) equal monthly installments, into the Office of the Chief Clerk, certified funds or United States currency to the Commission, commencing thirty (30) days following the issuance of this Order and every subsequent thirty (30) days thereafter until said $2,000 has been paid in full.

9. The Parties agreed to waive appeal of their respective right of appeal from a final order of the Commission incorporating the matters in the Stipulation.

10. The Stipulation contained a provision whereby the Public Staff, Tom Edmondson and Ben Uvino agreed that the positions or matters reflected in the Stipulation shall not have any precedential value nor shall they otherwise be used in any subsequent proceedings before this Commission or any other regulatory body as proof of the matter in issue.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-10

The evidence for these findings of fact is found in the Commission records, the Stipulation between the Public Staff, Tom Edmondson, and Ben Uvino, filed on July 9, 2009, which is incorporated by reference herein, and the testimony of Public Staff witnesses Sally Page and Carol Kimball Stahl, and Respondents Tom Edmondson and Ben Uvino.

Based upon the foregoing findings of fact, evidence, the Stipulation between the Public Staff, Tom Edmondson, and Ben Uvino, which is incorporated by reference herein, and the entire record in this proceeding, the Commission concludes that it has jurisdiction over Respondents Edmondson and Uvino.

It has long been determined that the Commission has authority to regulate motor carriers of household goods as "public utilities." G.S. 62-3(23)a.4. The Commission has been unequivocal about its exercise of authority over these types of motor carriers. The Commission has squarely looked at the actions of noncertificated movers to find jurisdiction. The Commission has previously stated the following:

> "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."

(quoting, In Weathers Bros. Transfer Co, Inc. d/b/a Weathers Moving and Distribution v. Movers at Demand, Inc, Docket Nos. T-4176, Sub 1 and T-4171, Sub 2 (May 11, 2004)).

In this docket, the Commission is of the opinion that Tom Edmondson, Robert Jackson, and Ben Uvino d/b/a Modern Movers, operated as a de facto public utility by holding themselves out as common carriers of HHG, as set forth in G.S. 62-3(7), by engaging in intrastate commerce as set forth in G.S. 62-3(15), and by performing intrastate transportation of HHG for compensation in North Carolina, without a Certificate of Exemption, as required in G.S. 62-261(8) and Commission Rule R2-8.1. Specifically, the facts show that Tom Edmondson, Robert Jackson, and Ben Uvino d/b/a Modern Movers moved the household goods of Bob and Sally Page on August 2, 2008, from a residence in Raleigh, North Carolina to a residence in Cary, North Carolina for monetary compensation.

As a result of their actions, the Commission is also of the opinion that Tom Edmondson and Ben Uvino should be assessed financial penalties, pursuant to G.S. 62-310(a), for their violation of state statutes and Commission Rules. The Parties' agreed upon a penalty of $2,000 (based upon the single offense of Tom Edmondson and Ben Uvino engaging in the intrastate transportation of HHG, in violation of G.S. 62-261(8) and Commission Rule R2-8.1, at $1,000 per offense, per Respondent, pursuant to G.S. 62-310(a)), payable in certified funds or United States currency to the Commission in twelve (12) equal monthly installments into the Office of the Chief Clerk, commencing thirty (30) days following the issuance of this Order and every subsequent thirty (30) days thereafter until satisfied. The Commission believes that this is a just and reasonable settlement of the show cause issues and violations, as related to Mr. Edmondson and Mr. Uvino, and should be approved.

The Commission is further of the opinion that the July 9, 2009 hearing only resolved the show cause issues as related to Mr. Edmondson and Mr. Uvino, and not Robert Jackson.

IT IS, THEREFORE, ORDERED as follows:

1. Tom Edmondson and Ben Uvino shall immediately cease and desist to own and/or operate any business organized and advertised for the purpose of intrastate transportation of household goods for compensation in North Carolina, unless granted a Certificate of Exemption from the Commission.

2. Pursuant to G.S. 62-310(a), Tom Edmondson and Ben Uvino d/b/a Modern Movers, jointly and severally, shall remit $2,000 in certified funds or United States currency to the Commission (made payable to the North Carolina Department of Commerce/Utilities Commission), in twelve (12) equal monthly installments of $166.66 into the Office of the Chief Clerk, commencing thirty (30) days following the issuance of this Order and every subsequent thirty (30) days thereafter until said $2,000 is paid in full, for operating as a de facto public utility by holding themselves out as common carriers of HHG, as set forth in G.S. 62-3(7), by engaging in intrastate commerce as set forth in G.S. 62-3(15), and by performing intrastate transportation of HHG for compensation in North Carolina, without a Certificate of Exemption, as required by G.S. 62-261(8) and Commission Rule R2-8.1.

3. The Commission will seek to recover the total penalty in an action instituted in the Superior Court of Wake County, North Carolina, pursuant to G.S. 62-310 should Tom Edmondson and/or Ben Uvino fail to remit a payment within ten (10) days following each scheduled payment due date.

4. That the Stipulation between the Public Staff, Tom Edmondson, and Ben Uvino, incorporated by reference herein, is hereby approved.

5. That neither the Stipulation entered into on July 9, 2009, nor shall this Order be cited or treated as precedent in any subsequent proceedings before this Commission or any other regulatory body as proof of the matter in issue.

6. That the Chief Clerk shall serve this Order on the Respondents by United States Certified Mail, return receipt requested.

ISSUED BY ORDER OF THE COMMISSION.
This the 27th day of July, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

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DOCKET NO. W-893, SUB 1
DOCKET NO. W-1276, SUB 0
DOCKET NO. W-1288, SUB 0
DOCKET NO. W-1289, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. W-893, SUB 1

In the Matter of
Pied Piper Resort, Inc., Murphy, Cherokee County, North Carolina – Appointment of Emergency Operator to Furnish Water Service in Piper Village, Sierra Village, and Piper Hamlet Subdivisions

DOCKET NO. W-1276, SUB 0

In the Matter of
Application by Pied Piper Water Association, Inc. for Recognition as an Owner Exempt from Regulation

DOCKET NO. W-1288, SUB 0

In the Matter of
Application by Pied Piper Water Association II, Inc. for Recognition as an Owner Exempt from Regulation

DOCKET NO. W-1289, SUB 0

In the Matter of
Application by Pied Piper Water Association III, Inc. for Recognition as an Owner Exempt from Regulation

ORDER RECOGNIZING OWNERS EXEMPT FROM REGULATION AND RELIEVING EMERGENCY OPERATOR FROM FURTHER OBLIGATIONS

BY THE COMMISSION: On April 19, 1989, in *State ex rel. Utilities Commission v. Pied Piper Resort, Inc.*, Docket No. 89CVS89, the Superior Court of Cherokee County declared an emergency pursuant to G.S. 62-118(b) and appointed an emergency operator to operate and maintain the water system serving customers in the Pied Piper Resort. This action was taken upon petition of the Commission.

On March 29, 1993, upon petition of the Commission, the court discharged the emergency operator who was then providing service and appointed Miller Well Drilling, Inc. (Miller), as the new emergency operator.

Miller continued to serve as emergency operator until June 30, 2003, when, upon petition of the Commission, the court discharged Miller and appointed Michael J. Ladd, d/b/a Earth Environmental Services, as the new emergency operator.

Since 2003, the residents of the Pied Piper Resort have organized three nonprofit corporations: Pied Piper Water Association, Inc., Pied Piper Water Association II, Inc., and Pied Piper Water Association III, Inc. (collectively the Associations).

Applications for exemptions from Commission regulation pursuant to G.S. 62-110.5, accompanied by a request for discharge of the emergency operator, were filed by the Associations on July 24, 2009.

On November 16, 2009 Mr. Ladd filed with the Chief Clerk a letter stating that he had ceased operating the Pied Piper water system as of June 30, 2009, and that he had been paid in full for his services.

Although the Associations' applications for exemption from regulation were originally filed pursuant to G.S. 62-110.5, the basis on which they now seek exemption is that they have fewer than 15 customers and consequently are not public utilities as defined in G.S. 62-3(23)(a)(2).

The Public Staff stated that in 2005 Pied Piper Water Association, Inc. (Association I), purchased the existing well serving the Pied Piper Resort, and in 2006 Association I acquired an easement ensuring access to the existing water storage facility. In 2008, the residents of the Pied Piper Resort elected to divide the system into three separate systems, each of which would serve fewer than 15 customers. To carry out this plan, Pied Piper Water Association II, Inc. (Association II), and Pied Piper Water Association III, Inc. (Association III), were organized. In 2009, Association II purchased an additional, previously drilled well, and Association III purchased a well site and drilled a well there. Associations II and III have installed storage facilities in close proximity to their wells. This reorganization of water services at the Pied Piper Resort was carried out with the cooperation of Mr. Ladd.

The Public Staff further stated that as a result of this reorganization, there are now three physically separate water systems serving the Pied Piper Resort, each with its own well and storage facility; that each of the three separate systems is served by one of the Associations; and that none of the systems has as many as 15 customers. Additionally, the Public Staff stated that Buddy Melton, a representative of the North Carolina Division of Environmental Health (DEH), inspected the three new and separate systems on June 17, 2009, and determined that they are no longer subject to regulation by DEH, as each system serves fewer than 15 customers.

The Public Staff recommended that the Commission recognize the Associations as owners exempt from regulation, and that the Commission make such filings as are appropriate in the Superior Court of Cherokee County to have the emergency operator discharged and close the emergency operatorship proceeding.

The Commission, having carefully considered the matter, finds that the recommendations of the Public Staff should be adopted.

IT IS, THEREFORE, ORDERED as follows:

1. That the Associations are recognized as owners of the three water systems serving the Pied Piper Resort in Cherokee County, North Carolina.

2. That the Associations, none of which has as many as 15 customers, are not public utilities as defined in G.S. 62-3(23)(a)(2) and therefore are exempt from Commission regulation.

3. That, effective as of the date of this Order, the Commission no longer has jurisdiction over the Associations.

4. That the Commission Staff is hereby instructed and authorized to apply to the Superior Court of Cherokee County for an order terminating the emergency operator appointment.

5. That, until such time as he is discharged by order of the Superior Court, Mr. Ladd is relieved of any further obligations as Emergency Operator.

ISSUED BY ORDER OF THE COMMISSION.
This the 22nd day of December, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

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Commissioner Robert V. Owens, Jr., did not participate.

DOCKET NO. W-1054, SUB 12

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Environmental Maintenance Systems, Inc., Post Office Box 1355, Cullowhee, North Carolina 28723 - Appointment of an Emergency Operator of the Holly Hills Subdivision Water System in Jackson County, North Carolina	)))))	ORDER DISCHARGING EMERGENCY OPERATOR, APPOINTING NEW EMERGENCY OPERATOR, AND REQUIRING CUSTOMER NOTICE

BY THE COMMISSION: On November 18, 2009, The Public Staff-North Carolina Utilities Commission (Public Staff) filed a verified Motion to Replace Emergency Operator in the above-captioned matter. The Motion requests that the Commission issue an order discharging Wike Operations, Inc., and appointing Environmental, Inc., as the emergency operator of the Holly Hills Subdivision in Jackson County, North Carolina. The verified motion also stated that Environmental, Inc., has the necessary ability and is willing to perform the emergency service in Holly Hills Subdivision. The Public Staff also recommended conditionally

approving the same rates as are currently approved for water utility service in Holly Hills Subdivision and requiring customer notice.

Based upon the verified motion and the record in Docket No. W-1054, Sub 11, the Commission makes the following

FINDINGS OF FACT

1. By Order dated January 27, 1995, in Docket No. W-1054, Sub 0, Environmental Maintenance Systems, Inc. (EMS), was granted a Certificate of Public Convenience and Necessity to provide water utility service in Holly Hills Subdivision in Jackson County, North Carolina.

2. By letter filed with the Commission on December 11, 2007, Al Wike, President of EMS notified the Commission that as of January 1, 2008 he would no longer be Operator in Charge of the system and that for health reasons he could not continue to operate the system. He further recommended that Alva Gary Wike Jr., of Wike Operations Inc., become the emergency operator of the system.

3. By Order dated January 28, 2008, in Docket No. W-1054, Sub 11, the Commission appointed Wike Operations, Inc., as emergency operator of the Holly Hills Water System (Holly Hills). The Order approved the continuation of the rates previously approved for EMS.

4. By Order dated June 3, 2008, the Commission approved a one-time surcharge of $118 per customer for testing fees, and an assessment of $13.88 for 18 months for proposed capital improvements to the Holly Hills system.

5. On October 15, 2009, the Public Staff received a copy of a letter from the North Carolina Department of Environment and Natural Resources (NCDENR) listing several deficiencies at Holly Hills and noting that the emergency operator, Alva Wike, Jr., of Wike Operations, Inc., had moved to the east coast of North Carolina. The letter from NCDENR also stated that the Rules Governing Water Treatment Facility Operators require that the operator in responsible charge reside within 50 miles of the facility and be readily available for consultation. The letter further added that if the current operator is not capable of providing the services, a different operator should be provided. Additionally, the NCDENR requested that certain improvements be made within 180 days of its letter.

6. Wike Operations, Inc., has informed the Public Staff that it wishes to be replaced as emergency operator.

7. Environmental, Inc., has the ability to perform the necessary emergency service and is willing to perform the emergency service to Holly Hills Subdivision.

8. The Public Staff will need to perform a final audit of the records of Wike Operations, Inc., to ensure an appropriate accounting transition from one emergency operator to another.

9. There is imminent danger of losing adequate water utility service due to the lack of a regulated utility company or individual in responsible charge, justifying the appointment of another emergency operator in accordance with G.S. 62-116(b).

10. It is appropriate at this time to approve the same rates previously approved for EMS for service in Holly Hills Subdivision. These rates should be approved on a provisional basis, subject to true-up upon subsequent review and approval of the actual cost of operating the water system.

CONCLUSIONS

Based upon the foregoing, the Commission is of the opinion that an emergency exists with the water system serving Holly Hills Subdivision; that there is an imminent danger of losing adequate water utility service, constituting an emergency pursuant to G.S. 62-116(b). The Commission further finds and concludes that Wike Operations, Inc., the emergency operator previously appointed is unable to continue as emergency operator and a new emergency operator should be appointed; and that the new emergency operator should be allowed to charge the rates reflected on Appendix B attached hereto, on a provisional basis subject to quarterly review, and that customer notice should be given.

IT IS, THEREFORE, ORDERED as follows:

1. Environmental, Inc. of Post Office Box 954, Cullowhee, North Carolina 28723, is hereby appointed as the emergency operator of the water utility system serving Holly Hills Subdivision in Jackson County, North Carolina.

2. That the Notice to Customers attached as Appendix A, be mailed with sufficient postage or hand delivered by Environmental, Inc., to all customers in Holly Hills Subdivision no later than 15 days after the date of this Order; and that Environmental, Inc., submit to the Commission the attached Certificate of Service properly signed and notarized not later than 30 days after the date of this Order.

3. That the Schedule of Rates, attached as Appendix B, is approved on a provisional basis for water utility service provided by the emergency operator of the Holly Hills Subdivision water system, subject to true-up upon subsequent review and approval of the actual cost of operating the water system.

4. That the following provisions are adopted by this Order:

a. That EMS is hereby ordered to offer all reasonable assistance to the emergency operator and shall not dispose or divest itself of any utility property, real or personal, without the prior written consent of the Commission.

b. That the emergency operator shall maintain full records of receipts and expenses and shall file with the Commission and Public Staff by the end of the subsequent month, a summary financial report on a quarterly basis.

c. That at a date and time to be established, approximately six months after the date of appointment of the emergency operator, the revenues and expenses of the emergency operator will be evaluated for the purpose of adjusting the approved provisional interim rate, as necessary. If it is determined that the rate approved herein exceeds the rate which would have been necessary to cover the emergency operator's reasonable and prudent operating expenses plus a reasonable return, the difference shall be either refunded or applied to necessary capital improvements as appears appropriate, and a new rate shall be approved for service rendered thereafter. If it is determined that the rate approved herein is less than the rate which would have been necessary to cover the emergency operator's reasonable and prudent operating expenses and provide a reasonable return, the difference shall be collected through a surcharge, and a new rate shall be approved for service rendered thereafter.

d. That the emergency operator shall have charge of the daily operation of the water system in Holly Hills Subdivision, and the emergency operator's duties and responsibilities shall include, among others, the following:

(i) Regular inspections and testing of the water system;
(ii) Billing of all customers and collection of bills;
(iii) Routine and emergency maintenance and repair;
(iv) System renovations and additions necessary to maintain adequate water service;
(v) Quarterly accounting to the Utilities Commission and the Public Staff of all rates collected, expenses incurred, checks written, and all monies spent; and
(vi) Providing a telephone number to customers for routine and emergency calls and his mailing address.

e. That the emergency operator may contract with any person or corporation to carry out any of the duties necessary for operation and repair of the water utility system, but the emergency operator shall have the ultimate, sole responsibility to see that such duties are carried out.

f. That the emergency operator, in the performance of its duties, shall be free to seek assistance from customers of the water system, plumbers, engineers, attorneys, and such other persons as may be necessary for the performance of his duties and responsibilities.

g. That the emergency operator shall, when it becomes necessary in the performance of its duties, seek the assistance of the Division of Environmental Health, the North Carolina Utilities Commission, and the Public Staff of the Utilities Commission, and the Jackson County Health Department.

h. That the emergency operator shall collect from the customers of the water system such rates and assessments as may be approved by the North Carolina Utilities Commission and shall be fully authorized to bill and collect said rates and assessments and to disburse those funds as may be necessary to provide safe, reliable, and adequate water utility service to the customers. Any customer who fails to pay the bill(s) authorized by this paragraph shall be disconnected by the emergency operator as provided by the orders, rules, and regulations of the Utilities Commission.

i. That the emergency operator shall be entitled to all available records relating to the water utility system, and those records shall include, but not be limited to, a list of customer names, addresses, and billing records.

j. That the emergency operator shall keep records of all monies collected through the rates and assessments, and all monies expended in the operation of the water system. In order to protect the customers' interests in the water utility system, the emergency operator is required to keep a separate record of all monies and assessments collected from customers and expended on improving and upgrading the water utility system, including, but not limited to, construction of new wells or water treatment or storage facilities, and the cost of labor associated with those improvements whether performed by the emergency operator or a contractor hired by the emergency operator.

k. That the emergency operator shall pay only those liabilities incurred by the emergency operator on and after the date of the appointment of the emergency operator. Those liabilities shall be defined as the liabilities arising from the emergency operator's operation of the Holly Hills Subdivision water system pursuant to Commission Order. The disbursements by the emergency operator shall be made from the separate account set up by the emergency operator; the emergency operator shall account for any funds advanced by it for the operations.

l. That the appointment of the emergency operator shall continue until terminated by an Order of the Commission finding that the emergency has ended and that the emergency operator is no longer required pursuant to G.S. 62-118(b) to provide water public utility service to the customers of the Holly Hills Subdivision water system.

m. That the emergency operator may petition the Commission at any time to be discharged as the emergency operator herein; and the emergency operator, prior to its discharge, shall provide an acceptable accounting to the Utilities Commission of all monies collected and disbursed during its tenure as emergency operator, as well as the amounts due and owing the emergency operator at the time of its discharge for its services performed as emergency operator. The emergency operator filing a petition for discharge shall also mail a copy of said petition to the Jackson County Health Department and the Division of Environmental Health.

n. That this docket shall remain open for further motions, reports, etc., of the parties, the emergency operator, the Jackson County Health Department, the Division of Environmental Health, and for further Orders of the Commission.

5. That, if requested by the emergency operator, a representative of Wike Operations, Inc., shall meet with the emergency operator at a mutually acceptable time and place in order to review the system and simplify the transfer of duties.

6. That the following items of information be made available to the emergency operator:

a. Customer information for each residence connected to the system, containing at a minimum, customer name, service address, billing address, contact phone numbers (home and work), and billing records.

b. A copy of the latest electrical power bill for the pump house (needed for transfer of service).

c. A copy of system plans and specifications with any noted discoveries or changes by current owner for the past 12 months.

d. Copies of all monitoring reports and evaluation completed by current operator for the past 12 months.

7. That the emergency operator shall keep a separate checking account for emergency operations at Holly Hills Subdivision water system.

ISSUED BY ORDER OF THE COMMISSION.
This the 23rd day of November, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

rb112009.01

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

APPENDIX A
PAGE 1 OF 2

DOCKET NO. W-1054, SUB 12
NOTICE TO CUSTOMERS
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

NOTICE IS HEREBY GIVEN that the Public Staff - Utilities Commission has requested that Wike Operations, Inc., be replaced as emergency operator of the Holly Hills Subdivision in Jackson County, North Carolina, and that Environmental, Inc., be appointed as the replacement emergency operator.

The Commission has concluded that an emergency exists with the water system serving Holly Hills Subdivision; that there is an imminent danger of losing adequate water utility service, constituting an emergency pursuant to G.S. 62-116(b); and the Commission has appointed a replacement emergency operator of the system. The contact information for the new emergency operator is as follows:

The contact information for the emergency operator is as follows:

Environmental, Inc.
50 West Sylva Shopping Area
Sylva, North Carolina 28779
Tel: 828-586-5588

The monthly metered rate at this time will remain the same as previously approved in 1999 for Environmental Maintenance Systems, Inc., as follows:

Base charge, zero usage	$20.00
Usage charge, per 1,000 gallons	$ 2.75

The Public Staff is authorized by statute to represent consumers in proceedings before the Commission. Written statements to the Public Staff concerning the appointment of the emergency operator should be addressed to Mr. Robert Gruber, Executive Director, Public Staff, 4326 Mail Service Center, Raleigh, North Carolina, 27699-4326. Written statements can also be faxed to (919) 715-6704 or e-mailed to jerry.tweed@psncuc.nc.gov.

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The Attorney General is also authorized by statute to represent consumers in proceedings before the Commission. Statements to the Attorney General should be addressed to The Honorable Roy Cooper, Attorney General, c/o Utilities Section, 7001 Mail Service Center, Raleigh, North Carolina, 27699-7001.

This the 23rd day of November , 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

APPENDIX B

SCHEDULE OF RATES

for

ENVIRONMENTAL MAINTENANCE SYSTEMS, INC.
(Environmental, Inc., Emergency Operator)

for providing water utility service in

HOLLY HILLS SUBDIVISION

Jackson County, North Carolina

Residential Metered Monthly Rates:

Base charge, zero usage	$ 20.00
Usage charge, per 1,000 gallons	$ 2.75

Connection Charge: $1,750 per connection

Reconnection Charge:

If water service cut off by utility for good cause:	$10.00
If water service cut off by utility at customers request:	$ 5.00

Bills Due: On billing date

Bills Past Due: 15 days after billing date

Billing Frequency: Shall be monthly for service in arrears

Finance Charges for Late Payment: 1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date.

Issued in Accordance with Authority Granted by the North Carolina Utilities Commission in Docket No. W-1054, Sub 12, on this the 23rd day of November, 2009.

WATER AND SEWER – EMERGENCY OPERATOR

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-1054, Sub 12, and the Notice was mailed or hand delivered by the date specified in the Order.

This the ____ day of ________________, 2009.

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-1054, Sub 12.

Witness my hand and notarial seal, this the ____ day of ____________, 2009.

____
Notary Public

____
Address

(SEAL) My Commission Expires: ______________________________
Date

DOCKET NO. W-218, SUB 274
DOCKET NO. W-224, SUB 15

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application by Aqua North Carolina, Inc., Fairways Utilities, Inc., Glynnwood Water Systems, Inc., Mountain Point Utilities, Inc., Rayco Utilities, Inc., Willowbrook Utility Company, Inc., Heater Utilities, Inc., and Mobile Hill Estates, 202 MacKenan Court, Cary, North Carolina 27511, for Authority to Increase Rates	ORDER GRANTING PARTIAL RATE INCREASE AND REQUIRING CUSTOMER NOTICE

HEARD IN: Chamber Conference Room (CH-14), Charlotte-Mecklenburg Government Center, 600 East Fourth Street, Charlotte, North Carolina on Tuesday, October 28, 2008, at 7:00 p.m.

Courtroom #4, Henderson County Courthouse, 200 North' Grove Street, Hendersonville, North Carolina on Wednesday, October 29, 2008, at 1:00 p.m.

Courtroom B, District Court Building, 111 Main Avenue NE, Hickory, North Carolina on Thursday, October 30, 2008, at 7:00 p.m.

Village Hall, Assembly Room, 395 Magnolia Road, Pinehurst, North Carolina on Friday, November 21, 2008, at 1:00 p.m.

Superior Courtroom, Judicial Building, Third Floor, 314 Princess Street, Wilmington, North Carolina on Monday, November 24, 2008, at 7:00 p.m.

Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Monday, December 1, 2008, at 7:00 p.m.

Meeting Room, Holiday Inn Express, 1713 NC Highway 67, Jonesville, North Carolina on Monday, December 8, 2008, at 7:00 p.m.

Boardroom, Greensboro Cultural Center, 200 North Davie Street, Greensboro, North Carolina on Tuesday, December 9, 2008, at 7:00 p.m.

Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Tuesday, February 3, 2009, at 9:00 a.m.

BEFORE: Commissioner William T. Culpepper, III, Presiding; Chairman Edward S. Finley, Jr.; and Commissioner Lorinzo L. Joyner

APPEARANCES:

For Aqua North Carolina, Inc.:

Jo Anne Sanford, Sanford Law Office, PLLC, Post Office Box 28085, Raleigh, North Carolina 27611-8085

C. Blythe Clifford, Clifford Law Firm, PLLC, Post Office Box 37458, Raleigh, North Carolina 27627

For the Using and Consuming Public:

Elizabeth A. Denning (formerly Elizabeth Denning Szafran), Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

Margaret A. Force, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629

BY THE COMMISSION: On December 7, 2006, Aqua North Carolina, Inc. (Aqua[1]), Fairways Utilities, Inc., d/b/a Aqua North Carolina (Fairways), Glynnwood Water Systems, Inc., d/b/a Aqua North Carolina (Glynnwood), Mountain Point Utilities, Inc., d/b/a Aqua North Carolina (Mountain Point), Rayco Utilities, Inc., d/b/a Aqua North Carolina (Rayco), and Willowbrook Utility Company, Inc., d/b/a Aqua North Carolina (Willowbrook), filed a joint letter of intent notifying the Commission of their intent to file general rate case applications as required by Commission Rule R1-17(a).[2] On April 18, 2007, Heater Utilities, Inc. (Heater), filed a letter of intent notifying the Commission of its intent to file a general rate case application.[3]

On February 29, 2008, Aqua, Fairways, Glynnwood, Mountain Point, Rayco, Willowbrook, Heater, and Mobile Hill Estates (Mobile Hill)[4] (collectively referenced as Joint

[1] In this Order, the referencing of Aqua North Carolina, Inc. as Aqua, is being used to denote the premerger entity; that is, the entity that operated in North Carolina under the name Aqua North Carolina, Inc. prior to the December 5, 2008 Order Approving Merger.

[2] Such joint notice was filed in Docket Nos. W-218, Sub 274; W-787, Sub 38; W-1032, Sub 11; W-989, Sub 11; W-899, Sub 39; and W-981, Sub 13. On December 5, 2008, the Commission issued an Order Approving Merger of Fairways, Glynnwood, Mountain Point, Rayco, Willowbrook, and Heater Utilities, Inc. (Heater) into Aqua NC in Docket Nos. W-218, Sub 273; W-787, Sub 38; W-1032, Sub 11; W-989, Sub 11; W-899, Sub 39; W-981, Sub 13; and W-274, Sub 687. Consequently, subsequent filings related to such rate case applications have been accumulated in Docket No. W-218, Sub 274.

[3] Such notice was filed in Docket No. W-274, Sub 623.

[4] Heater was appointed to be the emergency operator for Mobile Hill, effective on October 16, 1995, per Commission Order issued on that date in Docket No. W-224, Sub 9. Subject to the completion of the merger approved on December 5, 2008, in Docket Nos. W-218, Sub 273, et. al., Aqua NC is currently the Commission-approved, emergency-appointed operator of Mobile Hill, and as such, Mobile Hill is also an applicant in the present rate case proceedings. Matters concerning the present general rate case application for Mobile Hill have been accumulated in Docket No. W-224, Sub 15.

Applicants, Aqua NC[1], or Company) filed updated letters of intent to file a general rate case notifying the Commission that due to local management changes, a revised filing date was anticipated. In addition, such letters included a notice of substitution of counsel, for the Joint Applicants, to Jo Anne Sanford of the Sanford Law Office, PLLC.

On July 18, 2008, the Joint Applicants filed applications with the Commission seeking authority to increase rates for water and/or sewer utility service in all of their service areas in North Carolina, with the exception of the Brookwood and LaGrange service areas. The Joint Applicants serve approximately 55,600 water customers and 13,700 sewer customers in these service areas.

On July 23, 2008, the Public Staff filed a copy of a letter to the Joint Applicants' attorney, Jo Anne Sanford, which stated that the Public Staff had reviewed the applications filed on July 18, 2008, and had determined that additional information was needed in order to complete the NCUC Form W-1 as required by Commission Rule R1-17.

On July 29, 2008, the Public Staff and the Joint Applicants executed a Suspension Stipulation providing that the rate case applications would be suspended until the Joint Applicants filed certain additional NCUC Form W-1 information and that information was determined by the Public Staff to be complete and to satisfy the application requirements of Commission Rule R1-17. Such Stipulation included the provisions that the statutory maximum suspension period of 270 days and the six-month period after which temporary rates may be put into effect would not begin to run until the Public Staff informs the Commission that it deems the applications to be complete. On July 29, 2008, the Public Staff filed a letter and a joint proposed order requesting that the Commission issue such joint proposed order and hold the applications in abeyance. In its letter, the Public Staff indicated that the Joint Applicants were in agreement with such request. On August 5, 2008, the Commission issued an Order Holding Applications in Abeyance pending further order.

On August 8, 2008, C. Blythe Clifford of the Clifford Law Firm, PLLC, filed a Notice of Appearance on behalf of Aqua North Carolina, Inc., stating that she would be working jointly with Jo Anne Sanford of the Sanford Law Office, PLLC, in matters regarding the rate increase applications.

On September 9 and 11, 2008, the Joint Applicants filed the additional information requested by the Public Staff. At the Commission's Staff Conference held on September 29, 2008, the Public Staff recommended that the applications no longer be held in abeyance; that the proposed effective date of the Joint Applicants' new rates be deemed to be October 11, 2008; that the statutory 270-day suspension period begin on October 11, 2008; and that the Commission issue an order establishing general rate case, suspending rates, scheduling the evidentiary hearing and the customer hearings, and requiring customer notice.

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[1] In this Order, the referencing of Aqua North Carolina, Inc., as Aqua NC, is being used to denote the merged entity that resulted pursuant to the December 5, 2008 Order Approving Merger; whereas, as previously indicated, references to Aqua refer to the premerger entity that previously operated in North Carolina under the name Aqua North Carolina, Inc.

By Order dated October 2, 2008, the Commission declared the above-captioned proceedings to be a general rate case pursuant to G.S. 62-137; suspended the proposed new rates for a period of up to 270 days pending further investigation and hearing; scheduled customer hearings in Charlotte, Hendersonville, Hickory, Pinehurst, Wilmington, Raleigh, Jonesville, and Greensboro, North Carolina; and scheduled an evidentiary hearing in Raleigh, North Carolina. The Joint Applicants were required to provide customer notice of the hearings and the proposed rate increase to all affected customers. On October 10, 2008, the Joint Applicants filed their Certificates of Service indicating that customer notice was provided as required by the October 2, 2008 Order.

On October 21, 2008, the Ad Hoc Water and Sewer Users Group (AHWSUG)[1] filed a petition to intervene, which was granted by the Commission by Order dated October 31, 2008.

On October 28, 2008, a public hearing for the purpose of receiving customer testimony was held in the Chamber Conference Room (CH-14), Charlotte-Mecklenburg Government Center, 600 East Fourth Street, Charlotte, North Carolina as scheduled. Twenty-nine customers presented testimony at the public hearing.

On October 29, 2008, a public hearing for the purpose of receiving customer testimony was held in Courtroom #4, Henderson County Courthouse, 200 North Grove Street, Hendersonville, North Carolina as scheduled. Three customers presented testimony at the public hearing.

On October 30, 2008, a public hearing for the purpose of receiving customer testimony was held in Courtroom B, District Court Building, 111 Main Avenue NE, Hickory, North Carolina as scheduled. Fourteen customers presented testimony at the public hearing.

On November 3, 2008, Aqua NC customer James W. Currin prefiled his direct testimony in these dockets without an attachment, and on November 6, 2008, the Public Staff filed Mr. Currin's testimony, along with his Attachment A.

On November 6, 2008, the Attorney General's Office (Attorney General) filed his notice of intervention in the above-captioned proceedings.

On November 13, 2008, public witness Currin filed a letter with the Commission indicating that based upon a discussion with the Public Staff that his testimony previously planned for the Wilmington, North Carolina hearing may best be presented at the evidentiary hearing on February 3, 2009, in Raleigh, North Carolina.

[1] The AHWSUG represents the interests of property owners across North Carolina that receive water and sewer utility service from Aqua NC. At the time of intervention in these proceedings, the AHWSUG membership was composed of property owners in the Olde Beau development located in Alleghany County, North Carolina although AHWSUG was actively soliciting membership with other Aqua NC customers and customer groups throughout Aqua NC's service areas with the objective to spread the costs of such intervention.

On November 21, 2008, a public hearing for the purpose of receiving customer testimony was held in the Village Hall, Assembly Room, 395 Magnolia Road, Pinehurst, North Carolina as scheduled. One customer presented testimony at the public hearing.

On November 24, 2008, a public hearing for the purpose of receiving customer testimony was held in the Superior Courtroom, Judicial Building, Third Floor, 314 Princess Street, Wilmington, North Carolina as scheduled. Thirty-four customers presented testimony at the public hearing.

On November 25, 2008, the Town of Oak Ridge filed a statement of consumer position letter and complaint against Aqua America, Inc. (Aqua America), and its subsidiary, Aqua North Carolina, Inc.

On December 1, 2008, a public hearing for the purpose of receiving customer testimony was held in the Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina as scheduled. Twenty-six customers presented testimony at the public hearing.

On December 2, 2008, the Commission issued an order granting the Joint Applicants' oral motion for a two-week extension of time to file updates and supporting data to the Public Staff. According to the Joint Applicants, the Public Staff did not oppose such extension of time.

On December 4, 2008, a confidential settlement communication dated August 15, 2008 between Aqua America Inc.'s president and the mayor of the Town of Oak Ridge was filed. On that same date, attachments related to the Town of Oak Ridge's complaint against Aqua America, Inc., and its subsidiary, Aqua North Carolina, Inc. were filed.

On December 5, 2008, in Docket Nos. W-218, Sub 273; W-787, Sub 38; W-1032, Sub 11; W-274, Sub 687; W-989, Sub 11; W-899, Sub 39; and W-981, Sub 13; the Commission issued an Order Approving Merger of Fairways, Glynnwood, Mountain Point, Rayco, Willowbrook, and Heater into Aqua NC. As a result of the December 5, 2008 Order, Aqua NC now serves as the emergency operator for the Mobile Hill service area, a subdivision previously emergency-operated by Heater.

On December 5, 2008, Aqua NC filed the testimony and exhibits of Thomas J. Roberts, President and Chief Operating Officer, Aqua North Carolina, Inc.; Stephen F. Anzaldo, Treasurer, Aqua Services, Inc.; Gary S. Prettyman, Principal, AUS Consultants; David P. Smeltzer, Chief Financial Officer, Aqua America, Inc.; Dean R. Gearhart, Controller, Aqua North Carolina, Inc.; and William C. Packer, Manager of Rates, Aqua Mid Atlantic Group, a subsidiary of Aqua America, Inc.

On December 8, 2008, a public hearing for the purpose of receiving customer testimony was held in the Meeting Room, Holiday Inn Express, 1713 NC Highway 67, Jonesville, North Carolina as scheduled. Five customers presented testimony at the public hearing.

On December 9, 2008, a public hearing for the purpose of receiving customer testimony was held in the Boardroom, Greensboro Cultural Center, 200 North Davie Street, Greensboro, North Carolina as scheduled. Twenty customers presented testimony at the public hearing.

On December 11, 2008, an attorney representing the Town of Oak Ridge filed a letter requesting that the statement of position letter and complaint from the Town of Oak Ridge filed on November 25, 2008 be withdrawn.

On December 17, 2008, the Joint Applicants and the Public Staff entered and filed a Partial Settlement Agreement which stipulated to the appropriate capital structure and cost rates on the components of the capital structure and return on rate base for the above-captioned dockets.

On December 18, 2008, the Public Staff filed Radar Exhibits 1 through 12, on behalf of public witness Michael Rader and Mr. Rader's wife, Paula Rader, as directed by Presiding Commissioner Culpepper in open hearing on December 9, 2008, in Greensboro, North Carolina.

On January 9, 2009, the Public Staff filed a motion for extension of time requesting that the Commission grant additional time to file testimony. On January 14, 2009, the Commission issued an Order Granting Motion for Extension of Time.

On January 15, 2009, public witness Currin filed his supplemental testimony. On January 15, 2009, the Commission issued an order admitting into evidence Radar Exhibits 1 through 12, on behalf of public witness Michael Rader and Mr. Rader's wife, Paula Rader.

On January 15, 2009, the Public Staff requested a second extension of time until January 23, 2009, for the prefiling of Public Staff and Intervenor direct testimony, which was granted by the Commission on January 20, 2009.

On January 23, 2009, the Public Staff filed its third motion for extension of time, reporting to the Commission that a comprehensive settlement agreement in principal had been reached between the Public Staff and Aqua NC, as the result of extensive settlement negotiations. The Public Staff requested an extension of time until January 27, 2009, for the prefiling of Public Staff and Intervenor direct testimony and for the filing of the aforementioned settlement agreement. The Public Staff requested an extension of time until January 30, 2009, for the filing of rebuttal testimony, if any. The Public Staff stated that Aqua NC supported the request and that the other parties to these proceedings have no objection. On January 23, 2009, the Commission issued an Order Granting Final Extension of Time to File Testimony.

On January 26, 2009, Aqua NC filed a report addressing the service-related concerns expressed at the eight public hearings held by the Commission prior to that date.

On January 27, 2009, Aqua NC, the Public Staff, and the AHWSUG (Stipulating Parties) filed a Joint Stipulation that settled their outstanding issues. On that same date, the Public Staff filed the testimony and exhibits of Katherine A. Fernald, Water Supervisor, Public Staff Accounting Division, David C. Furr, Utilities Engineer, Public Staff Water Division, and Babette

K. McKemie, Utilities Engineer, Public Staff Water Division. Also on January 27, 2009, Aqua NC filed a motion to substitute Stan F. Szczygiel, Regional Controller for Aqua America Inc.'s Southern Region, for Aqua NC witness Dean R. Gearhart at the February 3, 2009 evidentiary hearing.

On January 29, 2009, Aqua NC filed a letter requesting that the testimony of Aqua NC witnesses Stephen Anzaldo, Gary Prettyman, and David Smeltzer be accepted into evidence without the need for those witnesses to appear in person at the evidentiary hearing on February 3, 2009. In its letter, Aqua NC further requested that the testimony of public witness James W. Currin be admitted into evidence without examination, and indicated that witness Currin and all parties to this proceeding were in agreement with such request.

On January 30, 2009, the Commission issued an order (1) allowing Aqua NC to substitute Stan F. Szczygiel for Dean R. Gearhart as a witness for the February 3, 2009 evidentiary hearing; (2) excusing Aqua NC witnesses Anzaldo, Prettyman, and Smeltzer from appearing at the evidentiary hearing and entering their testimony into the record as if given orally from the stand; and (3) admitting the testimony of public witness James W. Currin into evidence as if given orally from the stand.

On February 2, 2009, the Public Staff filed a chart which sets forth, for residential water and sewer customers having a meter size less than one inch, a comparison of the existing rates, the Company's proposed rates, and the stipulated rates related to the various service areas included in these proceedings. Such chart also presented the average monthly water and sewer bill for such residential customers under existing, proposed, and stipulated rates and provided the percentage increase or decrease to existing rates if the stipulated rates are ultimately approved by the Commission. On that same date, Aqua filed an amended report regarding service-related concerns expressed by customers at public hearings held by the Commission prior to that date.

On February 3, 2009, 15 customers offered testimony at the evidentiary hearing held in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina. The Joint Applicants presented the testimony of Aqua NC witnesses Roberts, Szczygiel, and Packer as a panel. Also, presented as a panel, the Public Staff presented the testimony of Public Staff witnesses Fernald, Furr, and McKemie.

On February 10, 2009, Aqua NC, the Public Staff, and the Attorney General filed, pursuant to a request by the Presiding Commissioner, a confirmation of their agreement (hereinafter called the AGO Agreement), that was presented orally at the February 3, 2009 hearing, regarding certain rate design reporting requirements described in Provision Nos. 48 and 49 of the Joint Stipulation. As set forth in Provision No. 7 of the AGO Agreement, such agreement is separate from and in addition to the Joint Stipulation entered and filed on January 27, 2009, and does not change the fact that the Attorney General neither supports nor opposes the Partial Settlement Agreement filed December 17, 2008 and the Joint Stipulation filed in the above-referenced dockets.

On February 17, 2009, Aqua NC filed a supplemental report addressing the service-related concerns expressed by customers at the February 3, 2009 evidentiary hearing.

On February 23, 2009, Aqua NC and the Public Staff filed late-filed exhibits in the form of two charts showing (1) the dates that the entities/service areas included in these proceedings were acquired by Aqua NC and the date that the present rates for such entities/service areas were established; and (2) a comparison, with respect to commercial water and sewer customers, of existing rates to the stipulated rates for the various water and sewer utility service areas included in these proceedings. Such chart also presented the percentage increase or decrease to the existing unmetered flat rate monthly bill and the monthly metered bill for meters less than one inch if the stipulated rates are ultimately approved by the Commission.

On March 9, 2009, Aqua NC filed its response, including a confidential filing, to the Commissioners' questions from the February 3, 2009 evidentiary hearing.

On March 13, 2009, Aqua NC and the Public Staff filed a Joint Proposed Order. Such Joint Proposed Order reflected a revision to Aqua NC's tariff to amend the grinder pump installation fee in the Governors Club Subdivision in Chatham County, North Carolina[1] and also reflected the contiguous extension of sewer utility service from Woodland Farms Subdivision into Vista Park Apartments in Mecklenburg County, North Carolina.[2]

On March 13, 2009, the Attorney General filed a letter with the Commission indicating that Ordering Paragraph Nos. 19 and 20 of such Joint Proposed Order, which sets forth Aqua NC's commitment to prepare and file a report on the impact of an inclining block rate structure for water utility service rates and a report on metered rates for sewer utility service, were consistent with the AGO Agreement. Further, the Attorney General stated in his letter that the Attorney General did not support or oppose the Joint Stipulation and Partial Settlement Agreement nor does the Attorney General support or oppose the Joint Proposed Order.

On the basis of the applications, the Partial Settlement Agreement, the Joint Stipulation, the AGO Agreement, and the other evidence of record, the Commission is of the opinion that the provisions of the Partial Settlement Agreement, the Joint Stipulation, and the AGO agreement are just and reasonable and the Commission should make the following

FINDINGS OF FACT

General Matters

1. Aqua NC is a corporation duly organized under the laws of and authorized to do business in the State of North Carolina. Aqua NC is a franchised public utility providing water and/or sewer utility service to customers in North Carolina.

2. Aqua NC is properly before the Commission, pursuant to Chapter 62 of the General Statutes of North Carolina, for a determination of the justness and reasonableness of its

[1] On February 26, 2009 in Docket No. W-218, Sub 277, the Commission issued an Order Approving Tariff Revision.

[2] On March 6, 2009, in Docket Nos. W-899, Sub 37 and W-218, Sub 291, the Commission issued an Order Recognizing Contiguous Extension and Approving Rates.

proposed rates and charges for all of its water and sewer operations in North Carolina, excluding its Brookwood and LaGrange service areas.[1]

3. By Order issued December 5, 2008, in Docket Nos. W-218, Sub 273; W-787, Sub 38; W-1032, Sub 11; W-989, Sub 11; W-899, Sub 39; W-981, Sub 13; and W-274, Sub 687, the Commission approved the merger of Fairways, Glynnwood, Mountain Point, Rayco, Willowbrook, and Heater into Aqua NC.[2] Subject to the completion of such merger, Aqua NC is the Commission-appointed emergency operator for the Mobile Hill Estates system, which is included in the rate increase request filed in these proceedings.

4. The test year appropriate for use in these proceedings is the 12-month period ended December 31, 2007.

Agreements Among Parties

5. The Partial Settlement Agreement was entered and filed on December 17, 2008, by and between Aqua NC and the Public Staff. The Joint Stipulation was entered and filed on January 27, 2009, by and between Aqua NC, the Public Staff, and the AHWSUG. The AGO Agreement was announced at the February 3, 2009 evidentiary hearing and it was filed on February 10, 2009, by and between Aqua NC, the Public Staff, and the Attorney General. The Partial Settlement Agreement, the Joint Stipulation, and the AGO Agreement are either supported or not opposed by all parties in these dockets.

6. The Partial Settlement Agreement, the Joint Stipulation, and the AGO Agreement, read collectively, settle all matters in these dockets as to all parties.

Customer Concerns and Service

7. Aqua NC serves approximately 55,600 water customers and 13,700 sewer customers in its service areas in North Carolina, excluding the Brookwood and LaGrange service areas.

8. A total of 147 customers testified at the public hearings, with 68 of those customers expressing service-related concerns. The service-related concerns related to utility service included, but were not limited to, call center access and performance; aging infrastructure and attendant problems, including leaks; high concentration of naturally-occurring minerals in the water; billing issues; and property maintenance issues. Several customers from Aqua NC's Northgate Subdivision testified at the hearings in Raleigh, North Carolina and expressed concerns regarding discolored water; chlorine odor in the water; skin rashes and eye irritations resulting from high levels of chlorine and/or trichloroethylene in the water; stains on fixtures,

[1] Utility service rates for the Brookwood and LaGrange service areas were established by Order issued on January 29, 2008, in Docket No. W-218, Sub 251.

[2] Decretal Paragraph No. 5 of the December 5, 2008 Order required that Aqua NC provide written notification to the Commission within 10 days after the merger has been completed. As of the date of this Order, such notification has not been received.

toilets, and bathtubs; lengthy flushing schedules and inadequate flushing notices; and trichloroethylene levels above the State's maximum contaminant level. In addition, many customers objected to the flat-rate sewer design, indicating a preference for a metered sewer rate design and some customers expressed opposition to uniform rates as opposed to system-specific rates.

9. Aqua NC filed a report with the Commission on January 26, 2009, addressing the service-related concerns expressed by the public witnesses who testified at the customer hearings prior to that date. Such report described each of the witnesses' specific service-related concern(s), the Joint Applicant's response, and how each concern was addressed, if applicable. In addition, on February 2, 2009, Aqua NC filed an amended report on service-related concerns expressed by customers to correct its response related to the concern expressed by a customer residing in Willowcreek Subdivision that attended the Charlotte, North Carolina public hearing. In its amended report, Aqua NC stated that it had applied to the Commission for approval to serve the New Birth Church; thereby correcting its original statement that such approval had been previously granted. On February 17, 2009, Aqua NC filed a supplemental report addressing the service-related concerns expressed by the public witnesses who testified at the February 3, 2009 hearing in Raleigh, North Carolina. Such report described each of the witnesses' specific service-related concern(s), the Joint Applicant's response, and how each concern was addressed, if applicable.

10. The overall quality of service provided by Aqua NC to its customers is adequate.

Rate Base

11. Aqua NC's original cost rate base at December 31, 2007 is:

Water Operations	
Fairways & Beau Rivage	$ 1,841,937
All other water operations	71,642,349
Sewer Operations	
Fairways & Beau Rivage	1,881,670
Windsor Oaks	112,435
All other sewer operations	17,563,638
Total Combined Operations	$ 93,042,029

12. Aqua NC had the following water and sewer plant in service amounts at the end of the test year, including pro forma adjustments:

Water Operations	
Fairways & Beau Rivage	$ 5,588,180
All other water operations	162,474,627

Sewer Operations	
Fairways & Beau Rivage	4,004,260
Windsor Oaks	420,209
All other sewer operations	69,634,883
Total Combined Operations	$242,122,159

13. Accumulated depreciation at the end of the test year, including pro forma adjustments, consisted of the following balances for water and sewer operations:

Water Operations	
Fairways & Beau Rivage	$ 1,071,519
All other water operations	55,209,053
Sewer Operations	
Fairways & Beau Rivage	749,897
Windsor Oaks	270,165
All other sewer operations	17,715,077
Total Combined Operations	$ 75,015,711

14. Contributions in aid of construction (CIAC) reduced by accumulated amortization of CIAC; Advances for Construction (AFC) reduced by accumulated amortization of AFC; and Acquisition Adjustments (AA) reduced by accumulated amortization of AA; total to the following water and sewer amounts at the end of the test year, including pro forma adjustments:

Water Operations	
Fairways & Beau Rivage	$ 2,524,522
All other water operations	33,936,531
Sewer Operations	
Fairways & Beau Rivage	1,286,064
Windsor Oaks	43,146
All other sewer operations	32,707,976
Total Combined Operations	$ 70,498,239

15. The North Carolina portion of allocated information technology (IT) assets net of accumulated depreciation of IT assets; and the North Carolina portion of allocated common assets net of accumulated depreciation of common assets; total to the following water and sewer amounts at the end of the test year, including pro forma adjustments:

Water Operations	
Fairways & Beau Rivage	$ 109,495
All other water operations	(716,334)

Sewer Operations	
Fairways & Beau Rivage	72,301
Windsor Oaks	4,256
All other sewer operations	514,776
Total Combined Operations	$ (15,506)

16. It is appropriate to impute tap fees[1] for Fairways in determining original cost rate base for use in these proceedings, as stipulated.

17. It is appropriate to remove costs of plant items for which supporting documentation could not be produced in determining original cost rate base for use in these proceedings, as stipulated.

Revenues

18. Aqua NC's present water and sewer utility service rates produce the following service revenues:

Water Operations	
Fairways & Beau Rivage	$ 782,103
All other water operations	23,055,540
Sewer Operations	
Fairways & Beau Rivage	518,412
Windsor Oaks	43,775
All other sewer operations	6,422,454
Total Combined Operations	$30,822,284

19. Aqua NC requested an increase in its water and sewer utility rates that would produce the following additional service revenues:

Water Operations	
Fairways & Beau Rivage	$ 1,849,672
All other water operations	6,612,195
Sewer Operations	
Fairways & Beau Rivage	1,366,448
Windsor Oaks	32,063
All other sewer operations	3,362,266
Total Combined Operations	$ 13,222,644

[1] Tap fees were imputed to recognize that the tap fees authorized by the Commission should have been collected based on the increased number of Fairways customers for the years 1999 through 2007.

Expenses

20. Aqua NC's total operating revenue deductions under present rates are:

Water Operations	
Fairways & Beau Rivage	$ 714,864
All other water operations	20,677,837
Sewer Operations	
Fairways & Beau Rivage	658,381
Windsor Oaks	43,844
All other sewer operations	6,830,201
Total Combined Operations	$28,925,127

21. Aqua NC is entitled to total rate case expense of $475,290, as stipulated; consisting of $111,000 in legal fees; $80,500 in consulting fees; $140,000 in service company costs; $102,402 for postage for mailing notices to customers and paper stock for customer notices; $12,000 for travel expenses; $750 in miscellaneous costs; and $28,638 in costs from the Docket No. W-218, Sub 251 proceeding. The Stipulating Parties agree that rate case costs should be amortized over three years, resulting in annual rate case expenses of:

Water Operations	
Fairways & Beau Rivage	$ 6,828
All other water operations	122,435
Sewer Operations	
Fairways & Beau Rivage	4,515
Windsor Oaks	202
All other sewer operations	24,450
Total Combined Operations	$ 158,430

22. It is reasonable and appropriate to calculate regulatory fees using the statutory rate of 0.12%.

23. It is reasonable and appropriate to calculate gross receipts taxes based on the approved levels of revenues and the statutory rates of 4% for water operations and 6% for sewer operations.

24. It is reasonable and appropriate to calculate the state and federal income taxes based on the corporate rates of 6.9% for state income taxes and 35% for federal income taxes.

Overall Cost of Capital

25. The appropriate overall rate of return on rate base is 8.09%, which is based upon a capital structure of 50% long-term debt with an embedded cost of debt of 5.72%, and 50% common equity with a return on common equity of 10.45%.

Rate Design and Other Matters

26. It is appropriate to increase Aqua NC's reconnection fees, returned check charges, and new account fees as requested in the Joint Applicants' applications, as stipulated.

27. Aqua NC should continue to charge the availability rates previously approved by the Commission, as stipulated.

28. Aqua NC is entitled to changes in water and sewer rates that will produce the following total operating revenues, as stipulated:

	Service Revenues	Other Revenues & Uncollectibles	Total Operating Revenues
Water Operations			
Fairways & Beau Rivage	$ 818,463	$ 60,250	$ 878,713
All other water operations	27,907,394	544,716	28,452,110
Sewer Operations			
Fairways & Beau Rivage	891,934	5,503	897,437
Windsor Oaks	58,030	(396)	57,634
All other sewer operations	8,865,726	131,968	8,997,694
Total Combined Operations	$38,541,547	$ 742,041	$39,283,588

29. Based upon the agreed-upon level of service revenues under present rates as provided in the Stipulation, at Provision No. 27, and the agreed-upon level of service revenues that Aqua NC is entitled to, as provided in the Stipulation, at Provision No. 31, the rates should produce the following additional service revenues:

Water Operations	
Fairways & Beau Rivage	$ 36,360
All other water operations	4,851,854
Sewer Operations	
Fairways & Beau Rivage	373,522
Windsor Oaks	14,255
All other sewer operations	2,443,272
Total Combined Operations	$ 7,719,263

30. Aqua NC's total operating revenue deductions under the stipulated rates are as follows for water and sewer operations:

<u>Water Operations</u>	
Fairways & Beau Rivage	$ 729,793
All other water operations	22,659,826
<u>Sewer Operations</u>	
Fairways & Beau Rivage	745,305
Windsor Oaks	48,543
All other sewer operations	7,577,674
Total Combined Operations	$31,761,141

31. It is appropriate for uniform rates to be approved for all of Aqua NC's water operations except for Fairways, Beau Rivage, and the purchased water systems in Chatham County, as stipulated. It is appropriate for the combined Fairways and Beau Rivage systems, which are large interconnected systems in the Wilmington area, to have a separate water rate, and for the purchased water systems in Chatham County to have the same uniform base rate as other Aqua NC systems, but have separate usage rates based on the rates charged by their supplier of purchased water, as stipulated.

32. It is appropriate for uniform rates to be approved for all of Aqua NC's sewer operations except for Fairways, Beau Rivage, and the Windsor Oaks purchased sewer system, as stipulated. It is appropriate for the combined Fairways and Beau Rivage systems to have a separate sewer rate, and for the Windsor Oaks purchased sewer system to continue to have a separate, metered sewer rate, as stipulated.

<u>Rates, Refund Plan, and Accounting and Reporting Requirements</u>

33. Aqua NC should investigate and report to the Public Staff the rate impact of a grinder pump surcharge on the established rates, as stipulated. Aqua NC should provide such information in a report format mutually agreeable to the Public Staff and Aqua NC, as stipulated. Such report should include 12 months of expense analyses and be submitted at least six months prior to Aqua NC's next general rate case filing, as stipulated.

34. Aqua NC should investigate and report to the Commission and the Public Staff the impact of an inclining block rate structure for water rates, as stipulated. Aqua NC should provide such information in a report format mutually agreeable to the Public Staff, the Attorney General, and Aqua NC, as stipulated. Such report should include 12 months of billing analysis and be submitted at least six months prior to the next Aqua NC or Fairways/Beau Rivage general rate case filing or within 12 months from the date of this Order, whichever comes first, as stipulated.

35. Aqua NC should investigate and report to the Commission and the Public Staff a volumetric sewer rate that would provide the sewer utility service revenues approved herein, as

stipulated. Aqua NC should provide such information in a report format mutually agreeable to the Public Staff, the Attorney General, and Aqua NC, as stipulated. Such report should include 12 months of billing analysis and be submitted at least six months prior to the next Aqua NC or Fairways/Beau Rivage general rate case filing or within 12 months from the date of this Order, whichever comes first, as stipulated.

36. The rates and charges agreed to by Aqua NC, the Public Staff, and the AHWSUG, as provided in Stipulation Exhibit 1, and included in Appendix A, attached hereto, are just and reasonable and should be approved.

37. Aqua NC should adopt a consistent, accurate, and complete accounting system for its detailed plant records that maintains its plant records in compliance with the Uniform System of Accounts, as stipulated. Furthermore, such accounting system should keep plant additions on a system-specific basis, as required by Order issued on January 29, 2008, in Docket No. W-218, Sub 251.[1] Such accounting system should be in place prior to the Company filing another general rate case application for any of its operations in North Carolina, as stipulated. If Aqua NC files a general rate case for any of its operations based upon a test year in which the plant records have not been brought into compliance, any additional rate case costs due to inadequate records should not be borne by the ratepayers, as stipulated.

38. Aqua NC should reconcile the balances for each plant account from its detailed listing of plant assets to the balances on the general ledger, and should also have a procedure in place by March 31, 2009, to continue such reconciliation process on a routine basis, as stipulated.

39. Aqua NC should review its procedures and safeguards to determine what additional steps need to be taken to prevent construction work in progress for one accounting unit from being erroneously coded to the construction work in progress for another accounting unit and file a report within 90 days of the issuance date of this Order, as stipulated.

40. Aqua NC should review its procedures for determining when projects are completed and should be closed and file its recommended changes to its procedures within 90 days of the issuance date of this Order, as stipulated.

41. Aqua NC should make any changes necessary to its construction work in progress system so that the utility plant account or accounts to which each project is charged or credited and the amounts charged or credited are readily available, as stipulated.

42. Aqua NC should file a depreciation study with the Commission at least 90 days before the Company files another general rate case for any of its operations in North Carolina,

[1] In the Joint Stipulation, at Provision Nos. 34, 36, 41, and 42, the Stipulating Parties have referenced certain explicit requirements that were required or ordered by the Commission in Docket No. W-274, Sub 251. The Commission believes that this reference is in error and that the correct reference should actually be Docket No. W-218, Sub 251, which is in regard to the Brookwood and LaGrange general rate case proceeding. Docket No. W-274, Sub 251, is in the matter of a Heater request filed in 1999 to expand water utility service into Willow Bluffs Subdivision, Phase 3 in Wake County.

with the exception of the Brookwood and LaGrange service areas. The depreciation rates previously established by the Commission should not be changed until the depreciation study is filed and the new rates are allowed by the Commission, as stipulated.

43. Aqua NC should file a retirement policy in conjunction with the depreciation study, as stipulated.

44. Aqua NC has not fully complied with the Commission's Order issued on January 29, 2008, in Docket No. W-218, Sub 251, the general rate case application filed by Aqua NC for its Brookwood and LaGrange service areas. In the present proceedings, the Public Staff has made the following two accounting recommendations concerning certain requirements set forth in the January 29, 2008 Order: (1) Aqua NC should record the Aqua Services, Inc., and North Carolina corporate charges in the specific accounts to which they pertain and (2) Aqua NC should book costs in a consistent and appropriate manner and should file, within 90 days of the issuance date of this Order, confirmation that corrective action has been taken. Aqua NC should be required to immediately comply with these two requirements as set forth in the Commission's January 29, 2008 Order issued in Docket No. W-218, Sub 251, as stipulated.

45. Aqua NC should refund the unauthorized new account fees that it collected and file a refund plan within 30 days of the issuance date of this Order, as stipulated.

46. On May 20, 1999, in Docket No. W-274, Subs 233, 234, 235, 236, and 237, the Commission approved certain rate base treatment for a portion of the acquisition adjustment for the Mid South systems. With the merger of Heater into Aqua NC, Aqua NC should be allowed to continue to include a portion of the remaining balance of the Mid South purchase price for water in rate base for each new water customer added to (1) existing Heater systems in the Mid South 19-county service area that are eligible for the acquisition adjustment and (2) Aqua NC's new developer systems in the Mid South 19-county service area, including those in contiguous extensions, as stipulated. Transfer of existing water and sewer systems within the Mid South 19-county service area, and any customers added to any systems outside the Mid South 19-county service area will continue to not be eligible for treatment under such acquisition adjustment.

47. On December 5, 2008, in Docket No. W-274, Sub 687, the Commission approved the merger of Heater into Aqua NC. As a result of such merger, the amounts, criteria, and limitations for the Heater Acquisition Incentive Account should continue as set forth by the Commission in Docket No. W-274, Sub 465,[1] as stipulated.

48. Aqua NC should file an annual report on June 30th of each year on the status of the Heater Acquisition Incentive Account systems, as stipulated. Such report should include all improvements made to date, an accounting of all money spent, a detailed description of the improvements still to be made, and a timeframe for the remaining improvements to be made, as stipulated.

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[1] On May 26, 2004, the Commission issued an Order Approving Joint Stipulation and Transfer of Stock in Docket Nos. W-274, Sub 465; W-200, Sub 45; and W-177, Sub 50, the 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.

49. The Partial Settlement Agreement provides that Aqua NC and the Public Staff agreed that none of the positions, treatments, figures, or other matters reflected in said Agreement should have any precedential value, nor should they otherwise be used in any subsequent proceedings, other than those referenced in this Agreement, before this Commission or any other regulatory body as proof of the matter of issue.

50. The Joint Stipulation provides that the Stipulating Parties agreed that the settlement of any issue reflected in said Stipulation should not be cited as precedent by any of the Stipulating Parties in any other proceeding or docket before this Commission and that no Stipulating Party waives the right to assert any position in any future docket before this Commission. Further, the Stipulating Parties agreed that no portion of such Stipulation should be binding on the Stipulating Parties unless the entire Stipulation is accepted by the Commission. The Joint Stipulation contained the statement that the terms and conditions set forth in such Stipulation represent, in full, the agreement of the Stipulating Parties.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 THROUGH 4

The evidence supporting these findings of fact is contained in the applications and in the Commission's records. These findings are primarily jurisdictional and informational and are uncontested.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 5 AND 6

These findings of fact are supported by the Partial Settlement Agreement, the Joint Stipulation, and the AGO Agreement and by representations of counsel for the various parties to these proceedings at the February 3, 2009 hearing of these matters. Such agreements and representations by counsel were entered into evidence at the February 3, 2009 hearing and are either supported or not opposed by all parties to these dockets.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 7 THROUGH 10

The evidence supporting these findings of fact is contained in the applications; in the testimony of public witnesses; in the testimony of Public Staff witnesses McKemie and Furr; in the testimony of Company witness Roberts; in Aqua NC's Report on Customer Concerns From Public Hearings filed on January 26, 2009; in Aqua NC's Amended Report on Customer Concerns From Public Hearings filed on February 2, 2009; in Aqua NC's Supplemental Report on Customer Concerns From Public Hearings filed on February 17, 2009; and Aqua NC's Response to Commission Questions From Evidentiary Hearing filed on March 9, 2009 (Response to Commission Questions).

Eight public hearings were held across the State and the evidentiary hearing was held in Raleigh and, in total, at those nine hearings 147 customers testified objecting to the rate increase and/or describing service-related concerns as follows:

Hearing	Public Witnesses
Charlotte (10/28/08)	29
Hendersonville (10/29/08)	3
Hickory (10/30/08)	14
Pinehurst (11/21/08)	1
Wilmington (11/24/08)	34
Raleigh (12/1/08)	26
Jonesville (12/08/08)	5
Greensboro (12/9/08)	20
Raleigh (2/3/09)	15
Total	147

Of Aqua NC's 55,600 water customers and 13,700 sewer customers in 42 North Carolina counties (not including the customers in its Brookwood and LaGrange service areas in Cumberland and Hoke Counties, which were not included in these proceedings), 68 customers expressed service-related concerns at the nine hearings. The majority of the public witnesses objected to the magnitude of the increase and/or to the flat rate sewer design, and some expressed opposition to uniform rates as opposed to system-specific rates. The latter issue is addressed in the Evidence and Conclusions for Findings of Fact Nos. 31-36.

The service-related complaints fell primarily into three categories: (1) call center access and performance; (2) aging infrastructure and attendant problems, such as leaks; and (3) high concentration of naturally occurring minerals being present in the water. Billing issues and issues with property maintenance comprised the majority of the remaining comments. In addition, several customers from Aqua NC's Northgate Subdivision testified at the hearings held in Raleigh, North Carolina and expressed concerns regarding discolored water; chlorine odor in the water; skin rashes and eye irritations resulting from high levels of chlorine and/or trichloroethylene in the water; stains on fixtures, toilets, and bathtubs; lengthy flushing schedules and inadequate notice; and trichloroethylene levels above the State's maximum contaminant level.

In response to the customers' complaints, Aqua NC made three filings that were verified by Company President Thomas J. Roberts: a 32-page initial report filed January 26, 2009; a 4-page amendment to the first filing filed February 2, 2009; and an 11-page supplemental report filed February 17, 2009 (collectively referenced as Reports on Customer Concerns), describing the systems from which the service-related concerns originated and providing explanations for and responses to the problems raised by the customers. In addition, such reports provided certain details regarding numerous operational and/or capital improvements that have been made to the systems or set forth the improvements which are planned to be made in the near future.

In the Reports on Customer Concerns, Aqua reported that it had contacted, or attempted to contact, every customer who presented a service-related concern. The Company described its efforts at correction where remedial acts were warranted, and reported in some instances that the Company's records and the customers' testimony were different.

With respect to customer concerns regarding call center access and performance, some customers expressed dissatisfaction with being routed to the call centers in Pennsylvania and Illinois, preferring that their problems be dealt with in the Southern Call Center located in Cary, North Carolina. A few customers were dissatisfied with the caliber of the responses they received from the Customer Service Representatives (CSRs), and a smaller number of customers complained that their calls were not returned when they left messages.

In the Reports on Customer Concerns and Response to Commission Questions, Aqua NC reported that the redundancy provided by three, interconnected call centers, geographically dispersed across the country, benefits customers in several ways. Aqua NC explained that in the event of unavoidable outages or weather-related closings, an interconnected system is more efficient, more reliable, and thus less costly than having separate call centers for each state. The ability to reroute calls in the event of a particularly high localized call volume allows greater responsiveness. The opportunity to standardize training and share best practices across a network has advantages, and the dispersed call center approach is an efficient, accepted practice for large multi-state utilities.

Further, in its Reports on Customer Concerns and Response to Commission Questions, as well as in the testimony of Company witness Roberts, Aqua NC indicated that most of the calls from North Carolina customers are processed at the Southern Call Center in Cary, North Carolina, which could be considered by North Carolina customers to be an advantage. The Cary facility employs 26 people in North Carolina and provides service in Spanish. According to Aqua NC, call center hours have been expanded from the former 8:00 a.m. – 4:00 p.m. schedule to the current schedule of 7:30 a.m. - 5:00 p.m., in order to better accommodate customers' personal schedules. Additionally, the Company reported that it has focused on call center performance in 2008 by adding to the personnel complement, initiating a quality assurance program, launching an internal call center communication tool, and implementing a new CSR training program. According to Aqua NC, training is supported by a centralized team which travels from its parent company's headquarters in Bryn Mawr, Pennsylvania on a regular basis to the three separate call centers.

Aqua NC provided, on a proprietary basis, as exhibits to its Response to Commission Questions, its internal documentation regarding the improvements in various metrics used to measure call center performance and has agreed to report the data it collects periodically to the Commission, if that is deemed a useful tool.

With respect to the service-related concerns expressed by customers at the public hearings associated with high concentrations of minerals in some of the sources of water, Aqua NC reported that naturally occurring minerals, such as iron and manganese, are unfortunately attributes of some groundwater, and that these minerals can cause discolored water and require persistent and varied methods of treatment. According to Aqua NC, customer objection is understandable but it is difficult to totally avoid the impact of these attributes. Further, Aqua NC reported that it is in compliance with the applicable water quality laws and described the treatment, filtration, and flushing protocols which it uses to attempt to deal with these issues. Aqua NC observed that some of the remedial measures have their own adverse consequences, such as odor (from chlorine) or color (from flushing), yet are required in order to maintain

drinking water quality standards. Aqua NC described its ongoing efforts to find enhanced methods of treatment for these minerals, including the drilling of new wells.

Aqua NC stated in its Reports on Customer Concerns that some of its systems, acquired from various providers across the State over the past eight years, are old and some were constructed to standards inferior to those employed by the Company. Many of the acquired systems have problems associated with aging pipe, in particular breakages and leaks. Aqua NC has invested capital in repairs of aging pipe, in excess of the amount allowed in acquisition adjustments, and the Company states that it continues to invest in infrastructure improvements. Aqua NC reported the priority protocol it uses with respect to dispatching crews to repair leaks, which addresses the following:

(1) The size/flow of the leak;
(2) Whether the leak is disturbing normal operations of the system (no water, low pressure, etc.);
(3) Whether the leak is causing damage to roads or property; and
(4) Whether the leak is affecting other utilities, such as gas, cable, etc.

A few customers expressed concerns regarding the status of repair of some of the Aqua NC facilities, Public Staff witness Furr listed seven specific items that he believed needed attention, and Chairman Finley inquired at the February 3, 2009 hearing about the appearance of the fence and building[1] at the Briarwood wastewater treatment plant. Aqua NC reported that it has either repaired or given a timetable for remediation of all work cited in these proceedings that is within the Company's scope of control. Additionally, Aqua NC reported that it has taken steps to clean and improve at least one objectionable site that it does not own, for the sake of community enhancement.

In regard to the service-related concerns expressed by customers from the Northgate Subdivision located near Fuquay-Varina, North Carolina, Aqua NC indicated in its Reports on Customer Concerns and through the testimony of Company witness Roberts that, to address contamination caused by a third-party, the Company has undertaken a range of remedial treatment measures designed to provide safe water to these customers, including filtration, sequestration, flushing, and additional monitoring. Additionally, Aqua NC stated that at one point it had offered to pay the tap-on fee to connect these customers to the Town of Fuquay-Varina's (Town's) water system, but the customers were unwilling to agree to terms deemed necessary by the Town, which required that all customers voluntarily petition for annexation into the Town. Aqua NC stated that chlorine levels in the water meet, and have met under its watch, the applicable Division of Environmental Health (DEH) standards. Aqua NC testified that it has never been cited for a water quality violation regarding this system, and water quality has improved since the most recent change in treatment protocol.

A few customers expressed concerns about a billing issue, noting that some sewer-only customers had not been billed. Aqua NC stated in its Reports on Customer Concerns that it had discovered that some sewer customers in Wellesley Place, Salem Glen, Salem Quarters, and

[1] As stated in its March 9, 2009 Response to Commission Questions, Aqua NC plans to paint the building during the summer of 2009.

other systems had not been billed because, during the time such systems were being operated by a contract operator, Aqua NC was not being made aware of new houses being built and new connections coming on line. Aqua NC reported that it has corrected such billing issue and is now billing all customers. Furthermore, at the February 3, 2009 evidentiary hearing, witness Roberts testified that Sterling Farms is a new sewer-only subdivision and that the Company needs to attend to its processes to become better informed of when new homes become occupied in that subdivision as well. In order to address such billing issues, Aqua NC stated that it would perform a field audit every six months of all sewer-only systems that are not built out, to ensure that the Company is billing all sewer-only customers.

A number of customers objected to the flat-rate mechanism for recovery of sewer costs. Such issue was addressed in Aqua NC's Reports on Customer Concerns and in the testimony of Public Staff witness McKemie, and is addressed in the Evidence and Conclusions for Findings of Fact Nos. 31-36.

Furthermore, a number of customers expressed opposition to uniform rates as opposed to system-specific rates. Such issue was addressed in the prefiled testimony of Aqua NC witness Smeltzer and in the testimony of Public Staff witnesses McKemie and Furr, and is addressed in the Evidence and Conclusions for Findings of Fact Nos. 31-36.

Finally, Public Staff witness Furr testified in his prefiled testimony and reaffirmed on cross-examination by the Commission that, with few exceptions, Aqua NC was providing adequate water and sewer service and that where problems exist the Company has either corrected such problems or was working actively to do so. Witness Furr stated that the common facilities, such as well houses and tanks, were well maintained and functioning properly and that the improvements underway would add to the reliability and consistency of water quality and service.

The Commission has reviewed the Reports on Customer Concerns and Response to Commission Questions filed by Aqua NC and believes that such reports adequately address the service-related concerns expressed by the public witnesses. In its review of such reports, the Commission observed that, although the Company provided a response to each specific service-related concern expressed by the public witnesses, some pending matters related to the ultimate resolution of some of those concerns remain to be addressed. The Commission requires Aqua NC to continue its efforts to address the pending matters expressed in its Reports on Customer Concerns related to the service-related concerns expressed by the public witnesses and to address the pending recommended water system improvements set forth in the testimony of Public Staff witness Furr and to pursue such actions as timely as practicably possible. Further, Aqua NC should continue to address water quality and infrastructure issues as they are encountered.

With respect to the billing issue expressed by a few customers regarding the Company's failure to bill some customers residing in newly-constructed homes in sewer-only systems, the Commission instructs Aqua NC to perform a field audit every six months of all sewer-only systems that are not built out, as indicated by the Company, to ensure that Aqua NC is appropriately billing all sewer-only customers in the future.

Based upon the number of concerns expressed by customers regarding call center access and performance, the Commission finds and concludes that Aqua NC should file monthly monitoring reports on its call center operations and such reports should continue for a period of 12 months, unless extended by further order of the Commission. These reports should be filed on the last day of the month and provide information for the preceding month and all subsequent monthly reports should provide the monthly data as previously reported for comparative purposes, i.e., the first report should be filed on June 30, 2009 for reporting the performance of the call centers during the month of May 2009, the second report should be filed on July 31, 2009 for the months of May and June 2009, and so forth. Such reports should provide and explain the metrics that have been established by Aqua America to track and evaluate internally the call centers' performance, including but not limited to, call volume received per center and per CSR, calls answered, abandon rate, answertime, and handle time, as well as any other information that would be helpful in informing the Commission regarding the North Carolina customers' access to and performance from the Aqua America call centers. In addition, the monthly North Carolina call volume from each of Aqua America's three call centers should be provided in such report.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 11 THROUGH 24 AND 26 THROUGH 30

The evidence supporting these findings of fact is contained in the testimony of Public Staff witnesses McKemie, Fernald, and Furr; Company witnesses Roberts and Packer; and the Joint Stipulation.

As set forth in the provisions of the Joint Stipulation, Aqua NC, the Public Staff, and the AHWSUG agreed that the levels of rate base, revenues, and expenses set forth in Fernald Exhibit I attached to the prefiled testimony of Public Staff witness Fernald are the appropriate levels for use in these proceedings. The Stipulating Parties also agreed that (1) Aqua NC plans on researching the collection of tap fees for Fairways, and may dispute the adjustment to impute tap fees for Fairways in future proceedings based on its findings; and (2) Aqua NC plans on pursuing missing plant documentation and may dispute the adjustment to remove these costs in future proceedings based on its findings. The Public Staff's prefiled testimony and exhibits, including Fernald Exhibit I, detail the adjustments made to arrive at the stipulated amounts.

Public witness Currin testified that in his opinion there were two problems with the calculation of revenues in these proceedings: (1) the calculation ignored continued growth in Aqua NC's customer base, and (2) there was a severe drought that restricted water usage during 2007.

The Commission concludes that the level of revenues set forth in the Joint Stipulation is the appropriate level for use in these proceedings. Such revenues are based upon the number of customers as of December 31, 2007, the end of the test year in these proceedings. In North Carolina, rates are set based upon a historical test year adjusted for actual and known changes. Public Staff witness Fernald testified that post-test-year additions related to new developer systems and other customer growth were not included in plant in service. The Commission finds and concludes that it would be inappropriate to increase revenues for customer growth, as

suggested by public witness Currin, without making the corresponding adjustments to rate base and expenses.

With respect to public witness Currin's contention that test year consumption would have been understated due to the 2007 Drought, the Commission finds that such position is not supported by the evidence in these proceedings. Company witness Packer testified that 2007 was an above normal year for consumption, which is supported by the monthly consumption data shown on Exhibit F of the Company's rate increase applications. During a drought, water customers typically use more water, mainly due to irrigation, unless they are required to restrict their water usage. In 2007, the water restrictions on all regulated water companies in North Carolina did not go into effect until November 1, 2007, as set forth in the Commission's Order issued on October 24, 2007, in Docket No. W-100, Sub 46. Prior to that time, the only system under mandatory water restrictions was Heater's Bayleaf master system, for which an Order Restricting Water Use was issued by the Commission on August 13, 2007, in Docket No. W-274, Sub 645.

Based upon the foregoing findings of fact and the entire record in this proceeding, the Commission is of the opinion that the provisions of the Joint Stipulation between Aqua NC, the Public Staff, and the AHWSUG, entered and filed on January 27, 2009, which are incorporated by reference herein, are just and reasonable and should be approved. Consequently, the levels of rate base, revenues, and expenses as set forth in the Joint Stipulation and included in Fernald Exhibit I are appropriate for use in these proceedings.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 25

The evidence supporting this finding of fact is contained in the direct and supplemental testimony of public witness Currin and in the Partial Settlement Agreement filed on December 17, 2008.

The Partial Settlement Agreement contained the provision that provided the level of service being provided by Aqua NC in all of its service areas in North Carolina (with the exception of the Brookwood and LaGrange service areas, which were addressed in Docket No. W-218, Sub 251) is found to be adequate, the components of rate of return should be as follows:

a. Long-Term Debt Ratio:	50.00%
b. Common Equity Ratio:	50.00%
c. Embedded Cost of Debt:	5.72%
d. Return on Common Equity:	10.45%
e. Overall Weighted Rate of Return:	8.09%

Such provision also stated that Aqua NC and the Public Staff agreed to the following: (1) the capitalization ratios reflect a hypothetical capital structure; (2) the embedded cost of debt reflects the rate filed by the Company in these dockets, reduced for the interest income on the long-term debt portion of the 2007 cash patronage distribution from CoBank; and (3) the return on common equity is based upon an estimate.

Further, as reflected in the Partial Settlement Agreement, Aqua NC agreed to conduct routine (at least annual) analyses of the terms of its debt issues for opportunities to reduce its embedded cost of debt rate through debt refunding, refinancing, or any other reasonable means that may be economically feasible and to take action to achieve such opportunities. The Company agreed to report on these activities annually to the Commission.

Public witness Currin opined in his direct testimony that the overall rate of return should be 6.47%. Witness Currin explained that such overall return was derived from a debt ratio of 65%, with a 5.87% embedded cost of debt rate and a common equity ratio of 35%, with a return on common equity of 7.58%. Witness Currin's explanation for the debt ratio of 65% was that "the cost of debt will likely decrease for the next few years in the current economic climate." The common equity ratio of 35% is the reciprocal of the debt ratio. Witness Currin provided no justification for the common equity ratio. Witness Currin testified that he accepted the Company's embedded cost of debt of 5.87%. Witness Currin derived his proposed return on common equity of 7.58% by doubling the current return of 3.79%. Witness Currin asserted that, as a natural monopoly, Aqua NC has limited risk and that "equity risk is only slightly more than that associated with debt."

In his supplemental testimony, public witness Currin advocated a revised overall rate of return of 5.44%. Such return was based upon a debt ratio of 65%, with a 5.00% embedded cost of debt rate and a common equity ratio of 35%, with a return on common equity of 6.25%. Witness Currin's capitalization ratios remained the same in his supplemental testimony as in his initial recommendation. Witness Currin supplemented his original recommendation with a review of 2008 data for Aqua America, the parent company of Aqua NC, and his view that Aqua America could distribute $354 million, which would be all of its equity retained earnings to its stockholders and; thereby, lower its common equity ratio. Witness Currin's revised embedded cost of debt of 5.00% was based on a projected average interest rate for 2009 by Aqua America and a current rate for the Lehman US Aggregate Bond Index. He revised his return on common equity to be 6.25%, based upon his recommendation that the equity rate should be 25% higher than his debt rate of 5.00%, with no further explanation.

The Commission has carefully reviewed the evidence relating to the stipulated capital structure, the return on common equity, and the overall rate of return and concludes that the provisions of the Partial Settlement Agreement, entered and filed on December 17, 2008, which is incorporated by reference herein, are just and reasonable and should be approved. Such stipulated overall rate of return will allow the Company the opportunity to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they now exist; to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchises; and to compete in the market for capital funds on terms which are reasonable and fair to its customers and its existing investors. Witness Currin's capitalization ratios and return on equity recommendations are not supported by relevant analysis. Based upon our experience in setting rate of return components, the Commission concludes that witness Currin's recommendations would restrict, and likely preclude, Aqua NC's access to new external capital.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 31 THROUGH 36

The evidence supporting these findings of fact is contained in the testimony of Public Staff witnesses McKemie and Furr; in the testimony of Company witnesses Smeltzer, Roberts, and Packer; in the Joint Stipulation; and in the AGO Agreement.

Company witnesses Smeltzer and Roberts testified regarding Aqua NC's proposal to consolidate its various rate structures[1] in these proceedings. Witness Smeltzer testified that Aqua NC's proposal involved two separate, but related concepts: (1) a uniform tariff price for water and wastewater and (2) a single cost of service for water and wastewater. Witness Smeltzer explained that a single cost of service refers to treating Aqua NC's operations as one entity, instead of many separate systems, for purposes of establishing the Company's overall revenue requirement. Witness Smeltzer further explained that the rationale behind the single cost of service is that, similar to gas, electric, and telephone companies, there are many similar services being provided to individual water and wastewater systems, such as the same group of employees, transportation vehicles, management, engineering, water quality experts, and accountants, and that the Company's costs and expenses should be tracked by water and wastewater functions, rather than by each of the individual systems. Witness Smeltzer testified that Aqua NC was proposing that the rates charged to all of its systems (except for its Brookwood and LaGrange service areas) be uniform, so that all customers pay the same rates for similar service, without regard to where such water and wastewater systems are located.

Witnesses Smeltzer and Roberts testified to the benefits of a consolidated rate structure for Aqua NC's customers, regulators, and the Company. These witnesses testified that, consolidation facilitates the affordability of rates for all customers; supports ease of administration; promotes clarity for customers and fairness across the customer base; avoids rate shock in the event of significant capital investment; is more transparent for regulators because review is less confusing, costly, and fractured; supports rate and revenue stability; enhances predictability for the utility and the customers; enables better planning and budgeting for needed infrastructure investment; and facilitates future acquisition of troubled systems. Witness Smeltzer referenced a previous docket[2] in which Heater successfully argued to the Commission that a uniform rate structure can operate as an "insurance umbrella" to protect all customers, especially those of the smaller and more isolated systems, from the rate shock that would otherwise occur in the event of repairs necessitated by a natural disaster or a massive system failure or upgrade. Witness Smeltzer indicated that, under the consolidated company approach, all customers share the risk of significant capital infusion, and likewise all customers share in the benefit associated with a spreading of that risk across the larger body of ratepayers.

Public Staff witnesses McKemie and Furr testified in agreement regarding Aqua NC's proposal to consolidate its various rate structures in these proceedings, citing such benefits to the Company's customers as long-term protection from rate shock, spreading costs across a larger

[1] Aqua NC's various present and proposed rate structures were collectively compiled and provided in the Notices to Customers set forth in the appendices attached to the Order Establishing General Rate Case, Suspending Rates, Scheduling Hearings, and Requiring Public Notice issued on October 2, 2008 in these dockets.

[2] Docket No. W-274, Sub 478 regarding a Heater general rate case proceeding.

base, and reduction in risk. Witness Furr testified that across the State, the majority of Aqua NC's water systems have the same characteristics, such as similarity in design, capacity of wells, types of hydro storage tanks, nonpressurized storage tanks, mains and meters, and that all of these characteristics support having uniform rates. However, witnesses McKemie and Furr testified as to specific reasons for some Aqua NC systems to not be included in uniform rates, where the characteristics of those systems vary from the majority of Company's systems, such as having high cost purchased water or high-yield wells.

After analyzing the rates as "standalone" versus "uniform," witness McKemie testified that she found that a uniform rate structure was not justified in the Fairways and Beau Rivage systems due to the relative low operating costs of these systems, and that these two systems have been interconnected (The Cape Master Water System) and should be treated as one system for rate design purposes. Witness Furr testified that the high-yield wells are a unique characteristic for The Cape Master Water System, and that Aqua NC is able to serve a large number of customers with a much lower number of wells, which reduces the cost of service for those customers. Witness Furr indicated that the Brookwood and LaGrange service areas are the only other areas served by Aqua NC which have a similar situation with high-yield wells. Witness McKemie recommended that The Cape Master Water System should have standalone rates. In the Joint Stipulation, Aqua NC agreed to standalone rates for The Cape Master Water System; and Company witnesses Roberts and Packer testified that the cost characteristics of that system, in terms of rate base and O&M expenses, made that an appropriate rate design.

In regard to the purchased water systems in Chatham County, witness McKemie testified that the rates were designed to pass through the purchased water charges directly to the customers and to charge the uniform base charge and that, after analyzing the rates in these purchased water systems in Chatham County as standalone versus uniform, she recommended that the base rate be the uniform system base rate throughout Aqua NC's system and that the usage rate for these purchased water systems remain the purchased water cost. Additionally, with respect to the Windsor Oaks sewer system, witness McKemie recommended that the rate design remain a metered sewer rate and that such system have standalone rates. In the Joint Stipulation, Aqua NC agreed to a metered, system-specific rate design for the Windsor Oaks sewer system.

Further, witness McKemie testified that Carolina Meadows has rates that were established between Aqua NC and the previous owner, which are lower than the uniform sewer rates. Witness McKemie stated that the remaining Aqua NC customers should not pay higher rates for sewer service as a result of Aqua NC's contractual agreement. Witness McKemie, therefore, recommended treating Carolina Meadows as a standard metered customer for Aqua NC in calculating rates. Witness McKemie explained that Aqua NC may continue to charge the contractual rates to customers in Carolina Meadows, but any difference between the contractual rates and the imputed rates for Carolina Meadows would have to be absorbed by the Company. In response to Commission questions, witness McKemie clarified that for purposes of rate setting, Carolina Meadows was treated as if it was paying uniform rates, which was imputed; however, Aqua NC will continue to charge Carolina Meadows customer(s) at the reduced contractual bulk rate.

With respect to matters concerning water conservation, witness McKemie testified that the Public Staff plans to thoroughly investigate the effects of a rate design that could promote water conservation, including an inclining block, tiered rate structure for water rates. Witness McKemie further testified that the Public Staff found that at this time there was not enough specific information available to evaluate the impact of an inclining block rate design. Witness McKemie, therefore, recommended that the Company investigate and report to the Public Staff the impact of rate design to promote water conservation, including an inclining block rate structure for water rates, and Aqua NC agreed to such a provision in the Joint Stipulation.

In regard to the flat-rate sewer design, Witness McKemie testified that Aqua NC's current sewer rates are primarily flat rates and that customers provided substantial feedback concerning such a rate structure, indicating that they believe flat rates do not encourage conservation and are not fair to smaller households or part-time residents. Witness McKemie explained that sewer costs are primarily fixed costs and, while a resident may occupy a residence only on a limited basis, the sewer plant runs and incurs costs daily. Witness McKemie stated that the Public Staff would like to be able to more thoroughly investigate the effects of a metered sewer rate structure and that, because the existing rate structure is flat, there was not enough information to determine the effects of a metered sewer rate. Witness McKemie, therefore, recommended that the Company investigate and report to the Public Staff a metered sewer rate that would provide the stipulated sewer service revenues, and Aqua NC agreed to do so in the Joint Stipulation. Aqua NC's verified Reports on Customer Concerns addressed the rationale for this rate design, including the high percentage of fixed costs associated with sewer service. Noting some difficulties attendant upon using a volumetric rate design when the customer is sewer-only, Aqua NC observed that the flat-rate sewer mechanism is and has been widely used by companies across the State as the preferred rate design model.

Throughout these proceedings, the Attorney General has manifested its interest in rate design, reflecting its focus on the impact of various design mechanisms both on equity among ratepayers and on conservation. In the AGO Agreement, Aqua NC agreed to investigate and report to the Commission and the Public Staff regarding (1) the impact of an inclining block rate structure for water rates, and (2) a metered sewer rate that would provide the stipulated sewer service revenues. Aqua NC further agreed to provide this information in a report format mutually agreeable to the Public Staff, the Attorney General, and Aqua NC, and that such report would include 12 months of billing analysis and be submitted at least six months prior to the next Aqua NC or Fairways/Beau Rivage general rate case filing or within 12 months from the date of this Order, whichever comes first.

Finally, witness McKemie testified that the Public Staff would like to more thoroughly investigate the effects of the increased costs of grinder pump stations on the rate structure and the impact on rates of a possible grinder pump surcharge. Witness McKemie testified that the Public Staff found that at this time there was not enough information to evaluate a grinder pump surcharge. Based upon witness McKemie's recommendation, in the Joint Stipulation, Aqua NC agreed to investigate and report to the Public Staff the impact of a grinder pump surcharge on the established sewer rates. Aqua NC further agreed to provide such information in a report format mutually agreeable to the Public Staff and Aqua NC, and that such report should include

12 months of expense analyses and be submitted at least six months prior to Aqua NC's next general rate case filing.

Based on the foregoing findings of fact and the entire record in this proceeding, the Commission concludes that the stipulated rates should be approved and that Aqua NC should investigate the above-referenced matters and provide such reports as discussed hereinabove. The Commission is concerned about the issues raised by flat-rate sewer versus volumetric sewer and is mindful of a high level of customer focus on that issue. Consequently, the Commission concludes that the report regarding sewer rate design should address the broader category of volumetric sewer rates, instead of limiting the focus to strictly a meter-based technology.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 37 THROUGH 45

The evidence supporting these findings of fact is contained in the testimony of Public Staff witnesses Fernald and McKemie; in the testimony of Company witnesses Roberts, Szczygiel, and Packer; and in the Joint Stipulation.

Public Staff witness Fernald testified that in her opinion, Aqua NC 's plant records since its acquisition of Hydraulics are inadequate, both in the maintenance of adequate documentation and in the booking of the plant additions to the correct accounts and entities. In her prefiled testimony, witness Fernald discussed numerous adjustments that she made to reclassify plant costs to the appropriate company and plant account. Further, witness Fernald testified that the Company was unable to provide documentation supporting numerous plant additions and several entries to contributions in aid of construction, including the entry made to contributions in aid of construction and advances for construction at the recommendation of Smart Associates, an outside consultant retained by Aqua NC. Witness Fernald stated that in some instances, the Company had changed its depreciation lives or used different depreciation lives without filing a depreciation study or rate case with the Commission. Consequently, witness Fernald made seven accounting recommendations in her testimony to address these issues found with the Company's accounting records for plant in service, including construction work in progress, and depreciation rates. Specifically, in this regard, in the Joint Stipulation the parties agreed that Aqua NC should do the following:

(1) Aqua NC should adopt a consistent, accurate, and complete accounting system for its detailed plant records that maintains its plant records in compliance with the Uniform System of Accounts. Furthermore, such accounting system should keep plant additions on a system-specific basis, as required by Order issued on January 29, 2008, in Docket No. W-218, Sub 251. Such accounting system should be in place prior to the Company filing another general rate case application for any of its operations in North Carolina. If Aqua NC files a general rate case for any of its operations based upon a test year in which the plant records have not been brought into compliance, any additional rate case costs due to inadequate records should not be borne by the ratepayers.

(2) Aqua NC should reconcile the balances for each plant account from its detailed listing of plant assets to the balances on the general ledger, and should also have a procedure

in place by March 31, 2009, to continue such reconciliation process on a routine basis.

(3) Aqua NC should review its procedures and safeguards to determine what additional steps need to be taken to prevent construction work in progress for one accounting unit from being erroneously coded to the construction work in progress for another accounting unit and file a report within 90 days of the issuance date of this Order.

(4) Aqua NC should review its procedures for determining when projects are completed and should be closed and file its recommended changes to its procedures within 90 days of the issuance date of this Order.

(5) Aqua NC should make any changes necessary to its construction work in progress system so that the utility plant account or accounts to which each project is charged or credited and the amounts charged or credited are readily available.

(6) Aqua NC should file a depreciation study with the Commission at least 90 days before the Company files another general rate case for any of its operations in North Carolina, with the exception of the Brookwood and LaGrange service areas. The depreciation rates previously established by the Commission should not be changed until the depreciation study is filed and the new rates are allowed by the Commission.

(7) Aqua NC should file a retirement policy in conjunction with the depreciation study.

Further, witness Fernald testified that Aqua NC had not complied with the Commission's Order issued on January 29, 2008, in Docket No. W-218, Sub 251, with respect to two additional accounting recommendations as follows:

(1) Aqua NC should immediately comply with the requirement from Docket No. W-218, Sub 251, that Aqua NC record the Aqua Services, Inc., and North Carolina corporate charges in the specific accounts to which they pertain.

(2) Aqua NC should review its procedures and file confirmation with the Commission that it has corrected the problems noted in Docket No. W-218, Sub 251, concerning the failure to book costs in a consistent and appropriate manner within 90 days of the issuance date of this Order.

Witness Fernald also testified that Aqua NC had charged new account fees for some of its companies, such as Rayco and Fairways, where the Commission had not authorized such fees. Witness Fernald recommended that Aqua NC refund these unauthorized charges, and that Aqua NC file a refund plan within 30 days of the issuance date of this Order.

Finally, witness Fernald recommended that the Company should file a report every three months on the status of its compliance with the accounting recommendations included hereinabove in Findings of Fact Nos. 37 – 45. Such report should contain for each specific accounting recommendation: (1) whether the Company has complied with the item, (2) a

detailed description of the steps taken to comply, and (3) if Aqua NC has not yet complied, the remaining steps to be taken and the expected date of completion.

Aqua NC agreed to the aforementioned accounting recommendations in the Joint Stipulation, as well as through the testimony of Company witnesses Roberts, Szczygiel, and Packer.

Based upon the foregoing findings of fact and the entire record in this proceeding, the Commission concludes that such accounting recommendations are appropriate and that Aqua NC should comply with them. Further, with regard to Aqua NC's noncompliance with the Commission's Order issued on January 29, 2008, in Docket No. W-218, Sub 251, the Commission finds that such compliance is the responsibility of management. The Commission observes that Aqua NC is the largest provider of water utility service and the second largest provider of sewer utility service in North Carolina that is regulated by this Commission. As such, the Commission expects, at a minimum, full compliance with its orders in a timely manner from a utility the size of Aqua NC. Further, the Commission would expect its largest provider of water utility service and its second largest provider of sewer utility service to keep its books in compliance with the Uniform System of Accounts and to have an integrated accounting system that provides the level of detail and accuracy needed for rate case application analyses and review. The Commission determines that Aqua NC must take all the necessary steps to address the accounting recommendations agreed to in the Joint Stipulation, which are incorporated by reference herein, and to complete such actions within the agreed-upon time periods. Further, the Commission determines that the Commission will not tolerate failure by Aqua NC to comply with the Commission's orders or with the Uniform System of Accounts.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 46 THROUGH 48

The evidence supporting these findings of fact is contained in the testimony of Public Staff witnesses Fernald and McKemie; in the testimony of Company witnesses Roberts, Szczygiel, and Packer; and in the Joint Stipulation.

In her prefiled testimony, witness Fernald addressed the Mid South acquisition adjustment. In Docket No. W-274, Subs 233, 234, 235, 236, and 237, the Commission approved certain rate base treatment for a portion of the acquisition adjustment for the Mid South systems. Witness Fernald recommended that with the merger of Heater into Aqua NC, Aqua NC should be allowed to continue to include a portion of the remaining balance of the Mid South purchase price for water in rate base for each new water customer added to (1) existing Heater systems in the Mid South 19-county service area that are eligible for the acquisition adjustment and (2) Aqua's new developer systems in the Mid South 19-county service area, including those in contiguous extensions. Transfer of existing water and sewer systems within the Mid South 19-county service area and any customers added to any systems outside the Mid South 19-county service area will continue to not be eligible for treatment under this acquisition adjustment. The existing Heater systems eligible for this acquisition adjustment are listed on Schedule 2-4(b)(2), Pages 1 – 4, of Fernald Exhibit I, attached to the prefiled testimony of Katherine A. Fernald.

Public Staff witnesses Fernald and McKemie also made recommendations concerning the Heater Acquisition Incentive Account. Witness Fernald recommended that with the merger of Heater into Aqua NC, the amounts, criteria, and limitations for the Heater Acquisition Incentive Account should continue as set forth by the Commission in its May 26, 2004 Order Approving Joint Stipulation and Transfer of Stock in Docket Nos. W-274, Sub 465; W-200, Sub 45; and W-177, Sub 50. Witness McKemie recommended that Aqua NC file an annual report on June 30th of each year on the status of the Heater Acquisition Incentive Account systems that Aqua NC is still working on. The report should include all improvements made to date, an accounting of all money spent, a detailed description of the improvements still to be made, and a timeframe for the remaining improvements to be made.

Aqua NC agreed with the aforementioned recommendations concerning the Mid South acquisition adjustment and the Heater Acquisition Incentive Account in the Joint Stipulation.

Based upon the foregoing findings and the entire record in this proceeding, the Commission finds and concludes that the aforementioned, agreed-upon accounting recommendations are appropriate and that Aqua NC should comply with such recommendations.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 49 AND 50

The evidence supporting these findings of fact is contained in the testimony of Public Staff witnesses Fernald, Furr, and McKemie; in the testimony of Company witnesses Roberts, Szczygiel, and Packer; in the Partial Settlement Agreement, and in the Joint Stipulation. Based on the foregoing findings and rulings and the entire record in this proceeding, the Commission concludes that all of the provisions of the Partial Settlement Agreement and the Joint Stipulation, taken together, are just and reasonable under the circumstances of these proceedings and should be approved.

IT IS, THEREFORE, ORDERED as follows:

1. That the Schedule of Rates, attached hereto as Appendix A, and the water and sewer connection fees set forth in Appendix A-1, are hereby approved and deemed to be filed with the Commission pursuant to G.S. 62-138.

2. That the Schedule of Rates is hereby authorized to become effective for service rendered on and after the issuance date of this Order.

3. That the Notice to Customers, attached hereto as Appendices B-1, B-2, B-3, and B-4, shall be mailed with sufficient postage or hand delivered to all affected customers in each relevant service area, respectively, by Aqua NC in conjunction with the next regularly scheduled billing process.

4. That Aqua NC shall file the attached Certificate of Service, properly signed and notarized, not later than 45 days after the issuance date of this Order.

5. That the Partial Settlement Agreement between Aqua NC and the Public Staff, the Joint Stipulation between Aqua NC, the Public Staff, and the AHWSUG, and the AGO Agreement between Aqua NC, the Public Staff, and the Attorney General, incorporated by reference, herein, are hereby approved.

6. That neither the Partial Settlement Agreement entered on December 17, 2008, the Joint Stipulation entered on January 27, 2009, nor this Order shall be treated or cited as precedent in future proceedings.

7. That Aqua NC shall conduct routine (at least annual) analyses of the terms of its debt issues for opportunities to reduce its embedded cost of debt rate through debt refunding, refinancing, or any other reasonable means that may be economically feasible and shall take action to achieve such opportunities. Further, Aqua NC shall file an annual report with the Commission regarding such activities, with the first report due on or before January 29, 2010, and each subsequent report shall be due on the last business day of January for each year thereafter until further order of the Commission.

8. That Aqua NC shall adopt a consistent, accurate, and complete accounting system for its detailed plant records that maintains its plant records in compliance with the Uniform System of Accounts. Furthermore, such accounting system should keep plant additions on a system-specific basis, as required by Order issued on January 29, 2008, in Docket No. W-218, Sub 251. Such accounting system shall be in place prior to the Company filing another general rate case for any of its operations in North Carolina. If Aqua NC files a general rate case for any of its operations based upon a test year in which the plant records have not been brought into compliance, any additional rate case costs due to the inadequate records shall not be borne by the ratepayers.

9. That Aqua shall reconcile the balances for each plant account from its detailed listing of plant assets to the balances on the general ledger, and shall also have a procedure in place by March 31, 2009, as stipulated, to continue such reconciliation process on a routine basis.

10. That Aqua shall review its procedures and safeguards to determine what additional steps need to be taken to prevent construction work in progress for one accounting unit from being erroneously coded to the construction work in progress for another accounting unit and file a report within 90 days of the issuance date of this Order.

11. That Aqua shall make any changes necessary to its construction work in progress system so that the utility plant account or accounts to which each project is charged or credited and the amounts charged or credited are readily available.

12. That Aqua shall review its procedures for determining when projects are completed and should be closed and file its recommended changes to its procedures within 90 days of the issuance date of this Order.

13. That Aqua shall file a depreciation study with the Commission at least 90 days before the Company files another general rate case for any of its operations in North Carolina, with the exception of the Brookwood and LaGrange service areas. The depreciation rates previously established by the Commission should not be changed until the depreciation study is filed and the new rates are approved by the Commission.

14. That Aqua NC shall file a retirement policy in conjunction with the aforementioned depreciation study.

15. That Aqua NC shall immediately comply with the requirement of the Order issued on January 29, 2008, in Docket No. W-218, Sub 251, which required Aqua NC to record the Aqua Services, Inc., and North Carolina corporate charges in the specific accounts to which they pertain.

16. That Aqua NC shall immediately comply with the requirement of the Order issued on January 29, 2008, in Docket No. W-218, Sub 251, which required Aqua NC to begin booking costs in a consistent and appropriate manner. Aqua NC shall review its procedures and file, within 90 days of the issuance date of this Order, confirmation that it has corrected such problems noted in Docket No. W-218, Sub 251.

17. That Aqua NC shall refund the unauthorized new account fees which it collected. Aqua NC shall file a refund plan within 30 days of the issuance date of this Order.

18. That Aqua NC shall file a report every three months on the status of its compliance with Decretal Paragraph Nos. 8 through 17, as set forth hereinabove. Such report shall contain for each item: (1) whether the Company has complied with the item; (2) a detailed description of the steps taken to comply; and (3) if Aqua NC has not yet complied, the remaining steps to be taken and the expected date of completion. The first quarterly report shall be due on June 30, 2009.

19. That Aqua NC shall file an annual report on June 30th of each year on the status of the Heater Acquisition Incentive Account systems. Such report shall include all improvements made to date, an accounting of all money spent, a detailed description of the improvements still to be made, and a timeframe for the remaining improvements to be made.

20. That Aqua NC shall investigate and report to the Commission and the Public Staff the impact of an inclining block rate structure for water rates. Aqua shall provide such information in a report format mutually agreeable to the Public Staff, the Attorney General, and Aqua NC. Such report shall include 12 months of billing analysis and be submitted at least six months prior to the next Aqua NC or Fairways/Beau Rivage general rate case filing or within 12 months from the date of this Order, whichever comes first.

21. That Aqua NC shall investigate and report to the Commission and the Public Staff a volumetric sewer rate that would provide the sewer utility service revenues approved herein. Aqua NC shall provide such information in a report format mutually agreeable to the Public Staff, the Attorney General, and Aqua NC. Such report shall include 12 months of billing

analysis and be submitted at least six months prior to the next Aqua NC or Fairways/Beau Rivage general rate case filing or within 12 months from the date of this Order, whichever comes first.

22. That Aqua NC shall investigate and report to the Commission and the Public Staff the impact of a grinder pump surcharge on its established sewer rates. Aqua NC shall provide such information in a report format mutually agreeable to the Public Staff and Aqua NC. Such report shall include 12 months of expense analyses and be submitted at least six months prior to Aqua NC's next general rate case filing.

23. That Aqua NC shall file monthly monitoring reports on its call center operations and such reports shall continue for a period of 12 months, unless extended by further order of the Commission. Such reports shall provide and explain the metrics that have been established by Aqua America to track and evaluate internally the call centers' performance, including but not limited to, call volume received per center and per CSR, calls answered, abandon rate, answertime, and handle time, as well as any other information that would be helpful in informing the Commission regarding the North Carolina customers' access to and performance from the Aqua America call centers. In addition, the monthly North Carolina call volume from each of Aqua America's three call centers shall be provided in such report. These reports shall be filed on the last day of the month. The first monthly monitoring report shall be filed on June 30, 2009 for reporting the performance of the call centers during the month of May 2009. All subsequent monthly reports shall include, for comparative purposes, the current month to be reported upon as well as the information for each of the previously reported months.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of April, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

fb040809.01

APPENDIX A
PAGE 1 OF 9

SCHEDULE OF RATES

for

AQUA NORTH CAROLINA, INC.

for providing water and sewer utility service in

ALL ITS SERVICE AREAS IN NORTH CAROLINA AND THE EMERGENCY OPERATION OF MOBILE HILL ESTATES

Except - water utility service in the Brookwood and LaGrange service areas in Cumberland and Hoke Counties

WATER AND SEWER – RATE INCREASE

WATER UTILITY SERVICE

All Aqua NC systems except as noted below

Monthly Metered Service (residential and commercial customers):

Base facility charge (zero usage, based on meter size)

<1" meter	$ 15.18
1" meter	$ 37.92
1½" meter	$ 75.85
2" meter	$ 121.44
3" meter	$ 227.70
4" meter	$ 379.50
6" meter	$ 759.00
8" meter	$1,214.40

Usage charge, per 1,000 gallons $4.76

Monthly Unmetered Service (flat rate): [1/]

Residential customers	$48.18
Commercial customers	$68.18

APPENDIX A
PAGE 2 OF 9

Chapel Ridge Master System – Chatham County

Monthly Metered Service (residential and commercial customers):

Base facility charge (zero usage, based on meter size)

<1" meter	$ 15.18
1" meter	$ 37.92
1½" meter	$ 75.85
2" meter	$ 121.44
3" meter	$ 227.70
4" meter	$ 379.50
6" meter	$ 759.00
8" meter	$1,214.40

Usage charge, per 1,000 gallons $7.26

WATER AND SEWER – RATE INCREASE

Monthly Unmetered Service (flat rate): 1/

Commercial customers	$68.18

Cole Place Development Subdivision (formerly North Chatham) and all other service areas where water is purchased from Chatham County for resale

Monthly Metered Service (residential and commercial customers):

Base facility charge (zero usage, based on meter size)

<1" meter	$ 15.18
1" meter	$ 37.92
1½" meter	$ 75.85
2" meter	$ 121.44
3" meter	$ 227.70
4" meter	$ 379.50
6" meter	$ 759.00
8" meter	$1,214.40

Usage charge, per 1,000 gallons

0 - 5,000 gallons	$ 7.00
5,000 - 8,000 gallons	$ 8.50
Over 8,000 gallons	$10.00

Monthly Unmetered Service (flat rate): 1/

Commercial customers	$68.18

Fairways and Beau Rivage Service Area – New Hanover County

Monthly Metered Service (residential and commercial customers):

Base facility charge (zero usage, based on meter size)

Meter	Charge
<1" meter	$ 7.04
1" meter	$ 17.60
1½" meter	$ 35.20
2" meter	$ 56.32
3" meter	$105.60
4" meter	$175.99
6" meter	$351.99
8" meter	$563.18

Usage charge, per 1,000 gallons $1.36

Specific Service Area Connection Charges and Capacity Fees: [2/]
(see attached Appendix A-1)

Connection in All Other Service Areas:

<1" meter

For taps made to existing mains installed inside franchised service area — $800.00

For individual connections installed outside franchised service area[3] — Actual cost of installation [4/]

1" meter or larger — 120% of actual cost of making tap, including setting meter and box

Meter Installation Fee: $70.00

(The fee will be charged only where cost of meter installation is not otherwise recovered through connection charges.)

APPENDIX A
PAGE 4 OF 9

Production and Storage Contribution in Aid of Construction Fee: [3/]

For individual connections outside franchised service areas where lot owner has made no contribution in aid of construction toward production and storage facilities — $1,700 per residential equivalent unit (REU)

Reconnection Charges: [5/]

If water service cut off by utility for good cause	$35.00
If water service discontinued at customer's request	$15.00

Billing Service Charge: [6/] $2.00 per month per bill

New Customer Account Fee: $20.00

SEWER UTILITY SERVICE

All Aqua systems except as noted below

Monthly Unmetered Service (flat rate):

Residential customers	$63.33
Commercial customers (per REU)	$87.87

Monthly Metered Service (commercial customers):

Base facility charge (zero usage, based on water meter size)

<1" meter	$ 23.13
1" meter	$ 55.81
1½" meter	$ 111.62
2" meter	$ 178.60
3" meter	$ 334.87
4" meter	$ 558.12
6" meter	$1,156.38
8" meter	$1,850.40

Commercial usage, per 1,000 gallons $8.04

APPENDIX A
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Fairways and Beau Rivage Service Area – New Hanover County

Monthly Unmetered Service (flat rate):

Residential customers	$33.15
Commercial customers (per REU)	$43.90

Monthly Metered Service (commercial customers):

Base facility charge (zero usage, based on water meter size)

<1" meter	$ 11.44
1" meter	$ 28.60
1½" meter	$ 57.20
2" meter	$ 91.52
3" meter	$171.60
4" meter	$286.00
6" meter	$572.00
8" meter	$915.20

Usage charge, per 1,000 gallons $4.33

Windsor Oaks Subdivision – Wake County (based on water usage)

Monthly Metered Service (residential customers):

Base charge, zero usage	$41.65
Usage charge, per 1,000 gallons	$ 2.79

(No sewer charge for water usage over 6,000 gallons per month.)

Carolina Meadows (Bulk) – Chatham County: (See Docket No. W-218, Sub 216)

Residential usage charge, per 1,000 gallons $2.50

Vista Park Apartments (VPA) – Mecklenburg County: (See Docket No. W-899, Sub 37)

Base facilities charge (to be collected from VPA and delivered to Bradfield Farms Water Company for treatment of the VPA wastewater)	$18.45 per month per REU [7/]
Collection service/commodity charge (based on Charlotte Mecklenburg Utilities Department's master meter reading), per 1,000 gallons	$4.49

Specific Service Area Connection Charges and Capacity Fees:[2]
(See attached Appendix A-1)

Connection in All Other Service Areas:

None when tap and service line installed by developer.

Actual Cost if Aqua NC makes tap or installs service line.

Sewer Plant Capacity Fee per GPD (DENR Design Requirements) – River Park Development:

Sewer Plant Capacity Fee per GPD $10.00
(See Docket No. W-218, Sub 143)

Reconnection Charges: [5/]

If sewer service cut off by utility for good cause Actual Cost

Grease Traps:

The Utility may require installation and/or proper operation of grease traps on grease producing commercial facilities. Failure to properly operate grease traps will result in disconnection of service pursuant to Commission Rule R10-16.

New Customer Account Fee: $20.00

(If customer receives both water and sewer utility service from Aqua NC, then the customer shall only be charged a new account fee for water.)

Grinder Pump Installation Fee – Governors Club Subdivision: Actual Cost
(See Docket No. W-218, Sub 277)

The homeowner or house builder shall be required to prepay in full to the outside contractor installing the grinder pump the entire cost of the installation, including the applicable engineering inspection fee, as specified in Aqua NC's Grinder Pump Installation In-house Procedures, a copy of which is filed with the Commission.

Once the grinder pump is initially installed, it will be the responsibility of Aqua NC to maintain, repair, and replace the grinder pump. However, if damage to a grinder pump is shown to be due to homeowner negligence, the homeowner will be liable for the cost of the repair or replacement of the grinder pump.

Collection Service Only: $9.45 per month per REU

This is a charge where the Utility collects the wastewater at an 'entry point' adjacent to or near the Utility's existing collection mains and allows the wastewater to be transferred to another entity for treatment via the Utility's existing collection facilities. The Utility shall not be responsible for any maintenance or repairs of the collection facilities prior to the 'entry point'. The Utility may also charge and collect for the treatment provided by the

other entity. That rate will be the rate established by the Commission for the other entity and will be turned over to the other entity once collected.

OTHER MATTERS

Returned Check Charge:	$25.00
Bills Due:	On billing date
Billing Frequency:	Monthly for service in arrears
Bills Past Due:	15 days after billing date
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 A
PAGE 8 OF 9

Availability Rates:

Woodlake Subdivision:
Water $5.00 per month
Sewer $3.75 per month

Governors Village Subdivision, Governors Forest Subdivision, Governors Village Townhomes:
Sewer only $150.00 per year per residential lot

Governors Club:
Sewer only $20.00 per month

Notes:

1/ The Utility, at its expense, may install a meter and charge the metered rate.

2/ In most areas, connection charges do not apply pursuant to contract and only the $70.00 meter installation fee will be charged to the first person requesting service (generally the builder). Where Aqua NC must make a tap to an existing main, the charge will be $800.00, and where main extension is required, the charge will be 120% of the actual cost.

3/ Individual connections outside franchised service areas may be made pursuant to this tariff in the following circumstances: (1) upon request of a bona fide customer as that term is defined in Commission Rule R7-16(a)(1); (2) the customer shall be located either within 100 ft. of a Franchised Service Area or located within 100 ft. of an existing Aqua NC main; and (3) the request may come from no more than two customers located in the same area (requests for more than two connections require an application for a new franchise or a request for approval of a contiguous extension). To connect such a customer, Aqua NC shall file a notice with the Commission in Docket No. W-218, Sub 177, at least 30 days before it intends to make the tap. This notice shall include an explanation of the circumstances requiring the tap and an 8.5" x

11" map showing the location of the tap in relation to Aqua NC's existing main. If the Public Staff does not object to the tap within the 30-day period, or upon written notice within that period from the Public Staff that it will not object, Aqua NC may proceed with the connection.

4/ Actual cost for such a connection shall include installation of a 6" or smaller main extension (if necessary), tap of the main, service line, road bore (if necessary), meter box, meter, backflow preventer (if necessary), and Aqua NC's direct labor costs. Aqua NC shall give a written cost quote to the customer(s) applying for connection before actually beginning the installation work.

5/ When service is disconnected and reconnected by the same unit owner within a period of less than nine months, the entire flat rate and/or base charge rate will be due and payable before the service will be reconnected.

If sewer disconnection is required, after all reasonable efforts by the Utility to encourage the customer to comply with the provisions of the tariff have been made, the Utility may install a valve or other device appropriate to cut off or block the customer sewer line.

Prior to disconnection, the Utility shall give the customer written notice at least seven days prior to disconnection. Said notice shall include, at the minimum, a copy of this reconnect provision and the estimated cost to make the cut off and install the valve or other device.

In the event that an emergency or dangerous condition is found or fraudulent use is detected, sewer service may be cut off without notice. In such an event, notice as described above, will be given as soon as possible.

Upon payment of outstanding balance, actual cost of termination and reconnection and other fees (for example, deposit if required by the Utility), the Utility shall restore the service within three business days.

6/ Aqua NC is authorized to include on its monthly water bill the charges resulting from sewer service provided by the Town of Cary, the Town of Fuquay-Varina, Wake County, and various Commission appointed emergency operators where specifically approved by the Commission. Aqua will bill the Town of Cary, the Town of Fuquay-Varina, Wake County, or emergency operator $2.00 per month per bill for providing this service.

7/ Each apartment building will be considered 92.42% occupied on an ongoing basis for billing purposes as soon as the certificate of occupancy is issued for the apartment building.

Issued in Accordance with Authority Granted by the North Carolina Utilities Commission in Docket Nos. W-218, Sub 274 and W-224, Sub 15 on this the 8th day of April, 2009.

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE - SEWER
Former Hydraulics/River Park/Aqua		
Allendale	$500.00	
Amy Acres	$500.00	
Applegate	$500.00	
Apple Grove	$500.00	
Arbor Run	$500.00	
Armfield, Phases 1A and 1B	$500.00	
Ashebrook Woods	$500.00	
Ashton Park	$500.00	
Auburndale	$500.00	
Bakersfield	$500.00	
Ballard Farm	$500.00	
Beechwood Cove	$500.00	
Belews Landing	$500.00	
Bethel Forest	$500.00	
Betts Brook	$500.00	
Bexley Place	$500.00	
Blue Water Cove	$500.00	
Bonaire	$500.00	
Briar Creek	$500.00	
Bridle Wood	$500.00	
Cameron Point	$500.00	
Candy Creek	$500.00	
Cannonsgate		$2,500.00
Canterbury Trails	$500.00	
Castle Bay	$500.00	$500.00
Cedar Chase	$500.00	
Cedar Creek	$500.00	
Charles Place at Arbor Run	$500.00	
Chatham	$500.00	
Clarendon Gardens (includes main extension)	$1,125.00	
Collybrooke	$500.00	

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Country Crossing	$750.00 Phases I, II and III $670.50 Phases IV and V	
Countryside	$500.00	
Crabtree II	$500.00	
Creekside	$500.00	
Crestview	$500.00	
Cross Creek	$500.00	
Crutchfield Farms	$500.00	
Deer Path	$500.00	
Deerwood	$500.00	
Dorsett Downs	$500.00	
Eagle Landing	$500.00	
East Gaston MHP	$500.00	
Enoch Turner	$500.00	
Epes Trucking	$500.00 per REU	
Ethan's Glen	$500.00	
Ferguson Village	$500.00	
Fleetwood Falls and Fleetwood Falls, Section 15	$500.00	
Forest Pines	$500.00	
Foxbury	$500.00	
Foxbury Meadows	$500.00	
Gates at Ethan's Glen	$500.00	
Glencroft	$500.00	
Governors Club		$4,500.00
Governors Forest		$4,500.00
Governors Village		$4,500.00
Graystone Forest	$500.00	$350.00
Greenwood	$500.00	
Happy Valley	$500.00	
Hartman Farms	$500.00	
Heartwood	$500.00	
Heritage West	$500.00	
Hickory Creek (houses on Basswood Way only)	$500.00	

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Hickory Ridge	$500.00	
Hidden Hills	$500.00	
Hidden Valley	$500.00	
Hilltop	$500.00	
Holiday Hills	$500.00	
Hoyles Creek	$500.00	
Huntcliff	$500.00	
Hunters Mark	$500.00	
Hunters Ridge	$500.00	
Hunting Ridge	$500.00	
Huntwood	$500.00	
Ingram Estates	$500.00	
Interlaken	$500.00	
Jamestowne	$500.00	
Kendale Woods	$940.00	
Kimberly Courts	$500.00	
Knollview	$500.00	
Kynwood	$500.00	
Lakeridge	$500.00	
Lancer Acres	$500.00	
Laurel Acres	$500.00	
Laurel Woods	$500.00	
Lennox Woods	$500.00	
Linville Oaks	$500.00	
Love Point	$500.00	
Mallard Crossing	$500.00	
Mar-Lyn Forest	$500.00	
Meadow Creek	$500.00	
Meadow Ridge	$500.00	
Meadow Run	$500.00	
Mineral Springs	$500.00	
Monticello Estates	$500.00	
Morris Grove	$500.00	
Mountain Creek	$500.00	
Nantucket Village	$500.00	

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Neuse River Village	$500.00	$500.00
New Chartwell	$500.00	
Normandy Glen	$500.00	
Parkwood	$500.00	
Peabody Forest	$500.00	
Pearman Estates	$500.00	
Pepper Ridge	$500.00	
Pheasant Ridge	$500.00	
Piedmont Estates	$500.00	
Pine Knolls	$500.00	
Pine Meadows	$500.00	
Pineview	$500.00	
Polk's Landing	$500.00	
Polk's Trail	$500.00	
Ponderosa	$500.00	
Providence North	$500.00	
Quail Meadows	$500.00	
Quail Oaks	$500.00	
Quail's Nest	$500.00	
Red Mountain	$500.00	
Richwood Acres	$500.00	
Ridgecrest	$500.00	
Ridgeway Courts	$500.00	
Ridgewood	$500.00	
River Oaks	$500.00	
River Park	$1,500.00 per REU	$10 per gallon of capacity
River Run	$500.00	
Riverside at Oak Ridge	$500.00	
Riverview	$500.00	
Rolling Hills	$500.00	
Sanford's Creek	$500.00	
Seagate I	$500.00	
Seagate IV	$500.00	
Shade Tree	$500.00	

WATER AND SEWER – RATE INCREASE

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Shadow Oaks	$500.00	
Shiloh	$500.00	
Smoke Ridge	$500.00	
Smokerise	$500.00	
South Bourne	$500.00	
South Fork	$500.00	
Springdale	$500.00	
Springfield Estates	$500.00	
Sprinkle	$500.00	
Sterlingshire	$500.00	
Stoneridge	$500.00	
Sturbridge Village	$500.00	
Summerfield Farms	$500.00	
Summerwind	$500.00	
The Vineyards	$500.00	
Triple Lakes	$500.00	
Twelve Oaks	$500.00	
Twin Oaks	$500.00	
Valley Dale	$500.00	
Village Woods	$500.00	
Walker Estates	$500.00	
Wellington	$500.00	
Willard Run/San Siro	$500.00	
Willow Creek		$500.00
Winding Forest	$500.00	
Woodbridge	$500.00	
Woodland Bay	$70.00	
Wright Beaver	$500.00	
Former Rayco		
Mountain Point	$350.00	
Former Piedmont		
Brickfield	$400.00	
Forest Ridge	$500.00	
Freemont Park	$500.00	
Grayson Park	$500.00	

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Heritage Farms	$500.00	
Hidden Creek	$500.00	
Hillsboro	$500.00	
Homestead-Catawba	$500.00	
Kings Acres	$500.00	
Knolls Phases I and II only	$500.00	
Mallardhead	$500.00	
Meadowbrook	$500.00	
Pleasant Gardens	$500.00	
Regency Village	$500.00	
River Ridge Run	$500.00	
Sherwood Forest	$500.00	
Snow Creek	$500.00	
Valley Acres	$500.00	
Westside Hills	$500.00	
Woodland Hills	$500.00	
Former Heater/Aqua		
Bennett Place		$1,000.00
Brights Creek	$500.00	$500.00
Eastlake	$850.00	$1,000.00
Hasentree		$2,500.00
Knoxhaven	$500.00	
Magnolia Place	$850.00	$1,000.00
Neuse Colony	$2,000.00	$1,000.00
Park South Station	$700.00	
Parkway Crossing	$700.00	
The Gardens at Flowers	$850.00	$1,000.00
Weatherstone	$350.00	
Westfall		$2,500.00
Wilson Farm	$500.00	
Woodford (Hawks Ridge)	$570.00	
Woodlake	$800.00	$800.00
Woodlake-irrigation meter	$300.00	

WATER AND SEWER – RATE INCREASE

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Former Alpha Utilities		
Altice Estates	$800.00	
El Camino	$800.00	
Fairview Wooded Acres	$800.00	
Hanover Downs	$800.00	
Little River Run	$800.00	
Myrtlewood	$800.00	
Phillips Landing	$800.00	
Robinfield	$800.00	
Rolling Meadows	$800.00	
Stoney Brook	$800.00	
Former Mid South		
Ashe Plantation	$725.00	
Balls Creek	$800.00	
Barkwood Lane	$1,200.00	
Brafford Farms	$800.00	
Bridgeport	$800.00	
Carmel Park	$800.00	
Catawba Shores	$800.00	
Cedar Grove	$800.00	
Chapelwood Acres	$800.00	
Cliftwood West	$800.00	
Clubview Estates 1	$800.00	
Country Acres	$800.00	
Country Acres MHP	$800.00	
Country Knolls	$800.00	
Country Meadows	$800.00	
Country Woods	$800.00	
Crestview	$800.00	
Edgewood Acres I	$800.00	
Edgewood Acres II	$800.00	
Fairfax	$800.00	
Fallscrest	$800.00	
Fairview Park	$800.00	
Fontain Village	$800.00	

WATER AND SEWER – RATE INCREASE

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Fountain Trace	$800.00	
Fox Ridge	$800.00	
Fox Run	$800.00	
Green Acres MHP	$800.00	
Heather Acres	$800.00	
Herman Acres	$800.00	
Hidden Valley	$800.00	
High Meadows	$725.00	
Hollywood Acres	$800.00	
Lakewood	$800.00	
Long Shoals	$800.00	
Lynmore	$800.00	
MacGregor Downs	$800.00	
Maplecrest	$800.00	
Morningside Park	$800.00	
Moss Haven	$800.00	
Mountainbrook	$800.00	
Murray Hills	$800.00	
Oak Harbor (excludes Knox Realty)	$1,750.00	
Old Providence	$800.00	
Paradise Point	$800.00	
Pinewood Acres	$800.00	
Raintree	$800.00	
Riverton Place	$800.00	
Riverwoods	$800.00	
Saddlewood	$800.00	
Satterwythe	$800.00	
Shangri-la	$800.00	
Sherwood Forest	$800.00	
Silverstone	$800.00	
South Forest	$800.00	
South Hill	$800.00	
South Hill Estates	$800.00	
Southgate	$800.00	
Southampton	$800.00	

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Southwood	$800.00	
Spencer Road Acres	$800.00	
Spinnaker Bay	$800.00	
Springhaven	$800.00	
Spring Hill/Springdale	$800.00	
Spring Shores	$800.00	
Spring Valley	$800.00	
Sunset Bay (3 digit lot #s on Roundstone Road)	$2,500.00	
Sunset Hills	$800.00	
Sunset Park	$800.00	
Swiss Pine Lake	$800.00	
Tuxedo	$800.00	
Willow Oaks	$800.00	
Windwood Acres	$800.00	
Woodlawn	$800.00	
Woodleigh	$800.00	
Former Cregg Bess, Ralph Falls, Ruff and Lewis Water Systems		
Alan Acres	$800.00	
Autumn Acres	$800.00	
Bayberry	$800.00	
Beacon Hills	$800.00	
Beverly Acres	$800.00	
Brook Forest	$800.00	
Carmel Hills	$800.00	
Castlewood	$800.00	
Cedar Valley	$800.00	
Copperfield	$800.00	
Craig Gardens	$800.00	
Dalewood/Monteray	$800.00	
East Chestnut	$800.00	
Farmwood	$800.00	
Fleetwood Acres I	$800.00	
Forest Acres	$800.00	
Forest Cove	$800.00	

WATER AND SEWER – RATE INCREASE

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Fox Fire	$800.00	
Gallagher Trails	$800.00	
Green Meadows	$800.00	
Idlewild Park	$800.00	
Keltic Meadows	$800.00	
Lamar Acres	$800.00	
Magnolia Springs	$800.00	
Oak Hill	$800.00	
Oakley Park	$800.00	
Providence Acres	$800.00	
Ridgeview Park	$800.00	
Rustic Trials	$800.00	
Skyland Drive	$800.00	
South Fork	$800.00	
South Point Landing	$800.00	
Starland Park	$800.00	
Tablerock	$800.00	
Watts	$800.00	
Wesley Acres	$800.00	
Yorkwood Park	$800.00	
Former ABC/Beau Rivage		
Beau Rivage	$969.00	$822.00
Beau Rivage Market Place	$70.00	
Beau Rivage Market Place Shopping Center	$1,000.00 per REU	
Cane Bay	$500.00	$500.00
River Point at Beau Rivage	$969.00	$822.00
The Village at Motts Landing	$1,000.00	
Willow Glen at Beau Rivage	$500.00	$500.00
Former Fairways (The Cape)		
Capeside Village	$750.00	$1,000.00
Cassimir Commons	$750.00	$1,000.00
Dolphin Bay		$1,000.00
East Bank	$750.00	$1,000.00

SYSTEM NAME	CONNECTION FEE - WATER	CONNECTION FEE- SEWER
Inlet Point Harbor	$750.00	$1,000.00
Inlet Watch	$750.00	$1,000.00
Inlet Watch-irrigation meters	$300.00	
Island Bridge Way	$750.00	$1,000.00
Lighthouse Village	$750.00	$1,000.00
Nautical Green	$750.00	$1,000.00
Old Cape Cod	$750.00	$1,000.00
River Oaks	$750.00	
Roland Place	$750.00	$1,000.00
Roland Place extension	$1,000.00	
Seabreeze	$750.00	$1,000.00
Sedgley Abby	$750.00	$1,000.00
Shipwatch	$750.00	$1,000.00
Sopanos Point	$750.00	$1,000.00
Telfair Forrest	$750.00	$1,000.00
The Cape	$750.00	$1,000.00
The Cape, Section B	$750.00	$1,000.00
The Sanctuary	$750.00	$1,000.00
Tidelands on the River	$1,000.00	
Windspray	$750.00	$1,000.00
Windswept	$750.00	$1,000.00
Windswept 2		$500.00

APPENDIX B-1
PAGE 1 OF 4

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-218, SUB 274
DOCKET NO. W-224, SUB 15

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application by Aqua North Carolina, Inc., Fairways Utilities, Inc., Glynnwood Water Systems, Inc., Mountain Point Utilities, Inc., Rayco Utilities, Inc., Willowbrook Utility Company, Inc., Heater Utilities, Inc., and Mobile Hill Estates, 202 MacKenan Court, Cary, North Carolina 27511, for Authority to Increase Rates) **NOTICE TO CUSTOMERS**

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission has issued an Order authorizing Aqua North Carolina, Inc. (Aqua NC), to charge increased rates for water and sewer utility service in all of its service areas in North Carolina and Mobile Hill Estates, with the exception of the Brookwood and LaGrange service areas in Cumberland and Hoke Counties. The new approved water and sewer rates for Aqua NC customers, excluding the Fairways/Beau Rivage service area in New Hanover County, the Chatham County purchased water systems, and the Windsor Oaks service area in Wake County, are as follows:

WATER RATES AND CHARGES

Monthly Metered Service (residential and commercial customers):

Base facility charge (zero usage, based on meter size)

Meter	Charge
<1" meter	$ 15.18
1" meter	$ 37.92
1½" meter	$ 75.85
2" meter	$ 121.44
3" meter	$ 227.70
4" meter	$ 379.50
6" meter	$ 759.00
8" meter	$1,214.40

Usage charge, per 1,000 gallons $4.76

Monthly Unmetered Service (flat rate): [1/]

Residential customers	$48.18
Commercial customers	$68.18

Reconnection Charges: [2/]

If water service cut off by utility for good cause	$35.00
If water service discontinued at customer's request	$15.00

SEWER RATES AND CHARGES

Monthly Unmetered Service (flat rate):

Residential customers	$63.33
Commercial customers [per residential equivalent unit (REU)]	$87.87

Monthly Metered Service (commercial customers):

Base Facility Charge (zero usage, based on water meter size)

<1" meter	$ 23.13
1" meter	$ 55.81
1½" meter	$ 111.62
2" meter	$ 178.60
3" meter	$ 334.87
4" meter	$ 558.12
6" meter	$1,156.38
8" meter	$1,850.40

Commercial usage, per 1,000 gallons	$8.04

Reconnection Charges: [2/]

If sewer service cut off by utility for good cause	Actual Cost

Collection Service Only: $9.45 per month per REU

This is a charge where the Utility collects the wastewater at an 'entry point' adjacent to or near the Utility's existing collection mains and allows the wastewater to be transferred to another entity for treatment via the Utility's existing collection facilities. The Utility shall not be responsible for any maintenance or repairs of the collection facilities prior to the 'entry point'. The Utility may also charge and collect for the treatment provided by the other entity. That rate will be the rate established by the Commission for the other entity and will be turned over to the other entity once collected.

OTHER MATTERS

Returned Check Charge: $25.00

Bills Due: On billing date

Billing Frequency: Monthly for service in arrears

Bills Past Due: 15 days after billing date

Finance Charges for Late Payment: 1% per month will be applied to the unpaid balance of all bills still past due 25 days after billing date

Availability Rates:

Woodlake Subdivision:

Water	$5.00 per month
Sewer	$3.75 per month

Governors Village Subdivision, Governors Forest Subdivision, Governors Village Townhomes:

Sewer only	$150 per year per residential lot

Governors Club:

Sewer only	$20.00 per month

APPENDIX B-1
PAGE 4 OF 4

Notes:

1/ The Utility, at its expense, may install a meter and charge the metered rate.

2/ When service is disconnected and reconnected by the same unit owner within a period of less than nine months, the entire flat rate and/or base charge rate will be due and payable before the service will be reconnected.

If sewer disconnection is required, after all reasonable efforts by the Utility to encourage the customer to comply with the provisions of the tariff have been made, the Utility may install a valve or other device appropriate to cut off or block the customer sewer line.

Prior to disconnection, the Utility shall give the customer written notice at least seven days prior to disconnection. Said notice shall include, at the minimum, a copy of this reconnect provision and the estimated cost to make the cut off and install the valve or the device.

In the event that an emergency or dangerous condition is found or fraudulent use is detected, sewer service may be cut off without notice. In such an event, notice as described above, will be given as soon as possible.

Upon payment of outstanding balance, actual cost of termination and reconnection and other fees (for example, deposit if required by the Utility), the Utility shall restore the service within three business days.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of April, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

APPENDIX B-2
PAGE 1 OF 3

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-218, SUB 274
DOCKET NO. W-224, SUB 15

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application by Aqua North Carolina, Inc., Fairways	)
Utilities, Inc., Glynnwood Water Systems, Inc., Mountain	) **NOTICE TO CUSTOMERS**
Point Utilities, Inc., Rayco Utilities, Inc., Willowbrook	) **FOR THE CHATHAM**
Utility Company, Inc., Heater Utilities, Inc., and Mobile	) **COUNTY PURCHASED**
Hill Estates, 202 MacKenan Court, Cary, North Carolina	) **WATER SYSTEMS**
27511, for Authority to Increase Rates	) **SERVICE AREAS**

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission has issued an Order authorizing Aqua North Carolina, Inc. (Aqua NC), to charge increased rates for water and sewer utility service in all of its service areas in North Carolina and Mobile Hill Estates, with the exception of the Brookwood and LaGrange service areas in Cumberland and Hoke Counties. The new approved water and sewer rates for the Chatham County purchased water systems are as follows:

WATER RATES AND CHARGES

Monthly Unmetered Service (flat rate): [1/]

Commercial customers	$ 68.18

Monthly Metered Service (residential and commercial customers):

Base facility charge (zero usage, based on meter size)

<1" meter	$ 15.18
1" meter	$ 37.92
1½" meter	$ 75.85
2" meter	$ 121.44
3" meter	$ 227.70
4" meter	$ 379.50
6" meter	$ 759.00
8" meter	$1,214.40

WATER AND SEWER – RATE INCREASE

Usage charge, per 1,000 gallons:

Chapel Ridge Master System	$7.26

Cole Place Development Subdivision (formerly North Chatham) and all other service areas where water is purchased from Chatham County for resale

0 - 5,000 gallons	$7.00
5,000 - 8,000 gallons	$8.50
Over 8,000 gallons	$10.00

Reconnection Charges: [2/]

If water service cut off by utility for good cause	$35.00
If water service discontinued at customer's request	$15.00

SEWER RATES AND CHARGES

Monthly Unmetered Service (flat rate):

Residential customers	$63.33
Commercial customers (per residential equivalent unit)	$87.87

Monthly Metered Service (commercial customers):

Base facility charge (zero usage, based on water meter size)

<1" meter	$ 23.13
1" meter	$ 55.81
1½" meter	$ 111.62
2" meter	$ 178.60
3" meter	$ 334.87
4" meter	$ 558.12
6" meter	$1,156.38
8" meter	$1,850.40

Commercial usage, per 1,000 gallons	$8.04

Reconnection Charges: [2/]

If sewer service cut off by utility for good cause	Actual Cost

APPENDIX B-2
PAGE 3 OF 3

OTHER MATTERS

Returned Check Charge:	$25.00
Bills Due:	On billing date
Billing Frequency:	Monthly for service in arrears
Bills Past Due:	15 days after billing date
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

Notes:

1/ The Utility, at its expense, may install a meter and charge the metered rate.

2/ When service is disconnected and reconnected by the same unit owner within a period of less than nine months, the entire flat rate and/or base charge rate will be due and payable before the service will be reconnected.

If sewer disconnection is required, after all reasonable efforts by the Utility to encourage the customer to comply with the provisions of the tariff have been made, the Utility may install a valve or other device appropriate to cut off or block the customer sewer line.

Prior to disconnection, the Utility shall give the customer written notice at least seven days prior to disconnection. Said notice shall include, at the minimum, a copy of this reconnect provision and the estimated cost to make the cut off and install the valve or the device.

In the event that an emergency or dangerous condition is found or fraudulent use is detected, sewer service may be cut off without notice. In such an event, notice as described above, will be given as soon as possible.

Upon payment of outstanding balance, actual cost of termination and reconnection and other fees (for example, deposit if required by the Utility), the Utility shall restore the service within three business days.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of April, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

APPENDIX B-3
PAGE 1 OF 3

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-218, SUB 274
DOCKET NO. W-224, SUB 15

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application by Aqua North Carolina, Inc., Fairways Utilities, Inc., Glynnwood Water Systems, Inc., Mountain Point Utilities, Inc., Rayco Utilities, Inc., Willowbrook Utility Company, Inc., Heater Utilities, Inc., and Mobile Hill Estates, 202 MacKenan Court, Cary, North Carolina 27511, for Authority to Increase Rates	**NOTICE TO CUSTOMERS IN FAIRWAYS AND BEAU RIVAGE SERVICE AREAS**

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission has issued an Order authorizing Aqua North Carolina, Inc. (Aqua NC), to charge increased rates for water and sewer utility service in all of its service areas in North Carolina and Mobile Hill Estates, with the exception of the Brookwood and LaGrange service areas in Cumberland and Hoke Counties. The new approved water and sewer rates for the Fairways and Beau Rivage service areas in New Hanover County are as follows:

WATER RATES AND CHARGES

Monthly Metered Service (residential and commercial customers):

Base facility charge (zero usage, based on meter size)

Meter	Charge
<1" meter	$ 7.04
1" meter	$ 17.60
1½" meter	$ 35.20
2" meter	$ 56.32
3" meter	$105.60
4" meter	$175.99
6" meter	$351.99
8" meter	$563.18

Usage charge, per 1,000 gallons $1.36

Reconnection Charges: [1/]

If water service cut off by utility for good cause	$35.00
If water service discontinued at customer's request	$15.00

SEWER RATES AND CHARGES

Monthly Unmetered Service (flat rate):

Residential customers	$33.15
Commercial customers (per residential equivalent unit)	$43.90

Monthly Metered Service (commercial customers):

Base facility charge (zero usage, based on water meter size)

<1" meter	$ 11.44
1" meter	$ 28.60
1½" meter	$ 57.20
2" meter	$ 91.52
3" meter	$171.60
4" meter	$286.00
6" meter	$572.00
8" meter	$915.20

Usage charge, per 1,000 gallons $4.33

Reconnection Charges: [1/]

If sewer service cut off by utility for good cause Actual Cost

OTHER MATTERS

Returned Check Charge:	$25.00
Bills Due:	On billing date
Billing Frequency:	Monthly for service in arrears
Bills Past Due:	15 days after billing date

APPENDIX B-3
PAGE 3 OF 3

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

Note:

1/ When service is disconnected and reconnected by the same unit owner within a period of less than nine months, the entire flat rate and/or base charge rate will be due and payable before the service will be reconnected.

If sewer disconnection is required, after all reasonable efforts by the Utility to encourage the customer to comply with the provisions of the tariff have been made, the Utility may install a valve or other device appropriate to cut off or block the customer sewer line.

Prior to disconnection, the Utility shall give the customer written notice at least seven days prior to disconnection. Said notice shall include, at the minimum, a copy of this reconnect provision and the estimated cost to make the cut off and install the valve or the device.

In the event that an emergency or dangerous condition is found or fraudulent use is detected, sewer service may be cut off without notice. In such an event, notice as described above, will be given as soon as possible.

Upon payment of outstanding balance, actual cost of termination and reconnection and other fees (for example, deposit if required by the Utility), the Utility shall restore the service within three business days.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of April, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

APPENDIX B-4
PAGE 1 OF 3

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-218, SUB 274
DOCKET NO. W-224, SUB 15

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application by Aqua North Carolina, Inc., Fairways	)	
Utilities, Inc., Glynnwood Water Systems, Inc., Mountain	)	
Point Utilities, Inc., Rayco Utilities, Inc., Willowbrook	)	**NOTICE TO CUSTOMERS**
Utility Company, Inc., Heater Utilities, Inc., and Mobile	)	**IN WINDSOR OAKS**
Hill Estates, 202 MacKenan Court, Cary, North Carolina	)	**SERVICE AREA**
27511, for Authority to Increase Rates	)	

NOTICE IS HEREBY GIVEN that the North Carolina Utilities Commission has issued an Order authorizing Aqua North Carolina, Inc. (Aqua NC), to charge increased rates for water and sewer utility service in all of its service areas in North Carolina and Mobile Hill Estates, with the exception of the Brookwood and LaGrange service areas in Cumberland and Hoke Counties. The new approved water and sewer rates for the Windsor Oaks service area in Wake County are as follows:

WATER RATES AND CHARGES

Monthly Metered Service (residential and commercial customers):

Base facility charge (zero usage, based on meter size)

Meter	Charge
<1" meter	$ 15.18
1" meter	$ 37.92
1½" meter	$ 75.85
2" meter	$ 121.44
3" meter	$ 227.70
4" meter	$ 379.50
6" meter	$ 759.00
8" meter	$1,214.40

Usage charge, per 1,000 gallons $4.76

Reconnection Charges: [1/]

If water service cut off by utility for good cause	$35.00
If water service discontinued at customer's request	$15.00

SEWER RATES AND CHARGES

Monthly Metered Service (residential customers):

Base charge, zero usage	$41.65
Usage charge, per 1,000 gallons	$ 2.79

(No sewer charge for water usage over 6,000 gallons per month.)

Reconnection Charges: [1/]

If sewer service cut off by utility for good cause	Actual Cost

OTHER MATTERS

Returned Check Charge:	$25.00
Bills Due:	On billing date
Billing Frequency:	Monthly for service in arrears
Bills Past Due:	15 days after billing date
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

Note:

1/ When service is disconnected and reconnected by the same unit owner within a period of less than nine months, the entire flat rate and/or base charge rate will be due and payable before the service will be reconnected.

If sewer disconnection is required, after all reasonable efforts by the Utility to encourage the customer to comply with the provisions of the tariff have been made, the Utility may install a valve or other device appropriate to cut off or block the customer sewer line.

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PAGE 3 OF 3

Note 1/ (con't):

Prior to disconnection, the Utility shall give the customer written notice at least seven days prior to disconnection. Said notice shall include, at the minimum, a copy of this reconnect provision and the estimated cost to make the cut off and install the valve or the device.

In the event that an emergency or dangerous condition is found or fraudulent use is detected, sewer service may be cut off without notice. In such an event, notice as described above, will be given as soon as possible.

Upon payment of outstanding balance, actual cost of termination and reconnection and other fees (for example, deposit if required by the Utility), the Utility shall restore the service within three business days.

ISSUED BY ORDER OF THE COMMISSION.
This the 8th day of April, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

WATER AND SEWER – RATE INCREASE

CERTIFICATE OF SERVICE

I, ______________________________, mailed with sufficient postage or hand delivered to all affected customers the required Notices to Customers (Fairways/Beau Rivage service area, Chatham County purchased water systems, Windsor Oaks service area, and all other service areas) issued by the North Carolina Utilities Commission in Docket Nos. W-218, Sub 274 and W-224, Sub 15 and the Notices were mailed or hand delivered by the date specified in the Order.

This the _____ day of ________________, 2009.

By: ____

____

Name of Utility Company

The above named Applicant, ____,
personally appeared before me this day and, being first duly sworn, says that the required Notices to Customers were mailed or hand delivered to all affected customers, as required by the Commission Order dated ______________________________________ in Docket Nos. W-218, Sub 274 and W-224, Sub 15.

Witness my hand and notarial seal, this the _____ day of ____________, 2009.

____

Notary Public

____

Address

(SEAL) My Commission Expires: ____

Date

DOCKET NO. W-1143, SUB 12
DOCKET NO. W-1282, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application by Pluris, LLC, 26000 Commercentre Drive, Lake Forest, California, to Acquire the Assets of North Topsail Utilities, Inc. in Onslow County, North Carolina and for Transfer of Certificate of Public Convenience and Necessity) ORDER APPROVING TRANSFER

HEARD IN: North Topsail Beach Town Hall, 2008 Loggerhead Court, North Topsail Beach, North Carolina, on Wednesday, April 1, 2009, at 10:00 a.m.

BEFORE: Commissioner William T. Culpepper, III, Presiding, and Commissioners Bryan E. Beatty, and Susan W. Rabon.

APPREARANCES:

For North Topsail Utilities, Inc. and Pluris, LLC.:

Christopher J. Ayers, Hunton & Williams, LLP., Post Office Box 109, Raleigh, North Carolina 27602

For the Town of North Topsail Beach, Saint Moritz Homeowners Association, Herschell E. Godwin, Jr., Al Schippert and Judy Parker:

Stephon J. Bowens, Jr., Blanchard, Miller, Lewis & Styers, P.A., 1117 Hillsborough Street, Raleigh, North Carolina 27603

For Blue Marlin, LLC:

M. Gray Styers, Jr., Blanchard, Miller, Lewis & Styers, P.A., 1117 Hillsborough Street, Raleigh, North Carolina 27603

For the Using and Consuming Public:

William E. Grantmyre, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On August 26, 2008, Pluris, LLC (Pluris) and North Topsail Utilities Inc., (NTUI) filed joint application for authority to transfer the sewer utility system assets and franchise for the North Topsail Beach and Sneads Ferry service area in Onslow County, North Carolina, from NTUI to Pluris.

On September 16, 2008, the Town of North Topsail Beach (Town), Saint Moritz Homeowners Association, Herschell E. Godwin, Jr., Al Schippert and Judy Parker (collectively Intervenors), jointly filed a petition to intervene.

On October 3, 2008 the Commission issued an Order Granting Intervenors' Petition to Intervene.

On February 25, 2009, the Commission issued an Order Scheduling Hearing, Scheduling Testimony Filing Dates, and Requiring Customer Notice.

On March 3, 2009, Pluris filed the direct testimony of Managing Member, Maurice Gallarda.

On March 3, 2009, NTUI filed the direct testimony of Regional Director, Martin Lashua.

On March 6, 2009, NTUI filed a Certificate of Service stating that the public notice had been provided in accordance with the Commission's February 25, 2009 Order.

On March 12, 2009 Blue Marlin LLC, (Blue Marlin), the developer of Mimosa Bay subdivision, filed a petition to intervene.

On March 17, 2009, the Public Staff filed the testimonies of Sonja Johnson, Staff Accountant, Accounting Division; Jerry Tweed, Utilities Engineer, Water and Sewer Division; and Calvin Craig, Financial Analyst, Economic Research Division.

On March 17, 2009, the Town of North Topsail Beach filed the direct testimonies of Mayor Donald Martin and Alderman Richard Farley.

On March 26, 2009 NTUI filed the rebuttal testimony of Martin Lashua and Pluris filed the rebuttal testimony of Maurice Gallarda.

On March 26th and 27th 2009, the Commission issued Errata Orders to clarify text that was inadvertently left out of the body of the Order Granting Intervenor Status issued by the Commission on October 3, 2008.

On March 31, 2009, the Commission issued an Order Granting Blue Martin's Petition to Intervene in the docket.

On April 1, 2009, the evidentiary hearing was held as scheduled in the Town of North Topsail Beach. The following public witnesses testified at this evidentiary hearing:

> Linda Upperman-Smith, Rudy Lanier, Duane Seward, Jeff Pearson, Richard Baker and Celinda James.

In addition to the public witnesses, each of the witnesses who prefiled written testimony appeared at the evidentiary hearing and presented testimonies. This also included the admission of witness exhibits into the record.

On the basis of the application, the testimonies and the entire record in this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. NTUI is a duly organized public utility operating under the laws of the State of North Carolina subject to the jurisdiction of the North Carolina Utilities Commission. NTUI is a wholly owned subsidiary of Utilities, Inc.

2. Pluris is a limited liability company duly organized under the laws of the State of Nevada.

3. NTUI owns a wastewater treatment plant (WWTP) and holds a Certificate of Public Convenience and Necessity to provide wastewater utility service to residential and commercial customers in the North Topsail Beach and Sneads Ferry service area of Onslow County, North Carolina. NTUI's WWTP is authorized by the North Carolina Department of Environment and Natural Resources (DENR) to provide 873,500 gallons of flow per day (gpd).

4. On April 3, 2006, the Commission issued an Order in Docket No. W-1000, Sub 11 (Hydro Star Order), by which the Commission approved the transfer of the stock of Utilities, Inc. to Hydro Star, LLC, subject to certain conditions. The provisions of the Hydro Star Order that specifically relate to NTUI and the WWTP were based upon a stipulation filed in the Sub 11 docket on February 21, 2006, between Utilities Inc., Hydro Star, LLC, The Town of North Topsail Beach, Saint Moritz Homeowners Association Inc. and Herschell E. Godwin (Hydro Star Stipulation).

5. The Hydro Star Order contains detailed provisions regarding expansion plans for the NTUI WWTP; requires NTUI to have access to sufficient equity and debt capital to enable it to fund the subject capital improvement plan; and further requires NTUI to enter into good faith discussions and to cooperate with any other entity that would be able to provide the necessary infrastructure and capacity additions to the WWTP if NTUI is unable to do so.

6. NTUI developed plans for construction of a 2 million gpd membrane bioreactor wastewater treatment plant (MBR Plant), but determined in 2008 that, due to the $18.0 million construction costs, the expansion plans were not economically feasible.

7. Upon determining that the plant expansion plans were economically unfeasible, NTUI began investigating the potential sale of the WWTP. As a result of this investigation, NTUI entered into negotiations with Pluris.

8. In the Utility Asset Acquisition Agreement dated May 12, 2008, executed by NTUI and Pluris, (Acquisition Agreement), Pluris has agreed to purchase the assets of NTUI for $8.3 million.

9. The average daily flow for the NTUI WWTP in 2008 was 365,000 gpd. The average daily flow during the peak usage month of July 2008 was 572,000 gpd.

10. There are other potential sources of wastewater treatment capacity available to the NTUI system through interconnection with other wastewater treatment systems.

11. DWQ Rule 15A NCAC 02T.0118 Demonstration of Future Wastewater Treatment Capacity (DWQ Rule 2T.0118) provides that "Prior to exceeding 80 percent of the wastewater treatment system's permitted hydraulic capacity (based on the average flow of the last calendar year), the permittee must submit an approvable engineering evaluation of their future wastewater treatment, utilization, and disposal needs....." The rule further provides that "Prior to exceeding 90 percent of the wastewater treatment, utilization, or disposal systems permitted hydraulic capacity, (based on the last calendar year), the permittee must obtain all permits needed for the expansion of the wastewater treatment, utilization, or disposal system and, if construction is needed, submit approvable final plans and specifications for expansion including a construction schedule."

12. Pluris intends to construct a new 1.0 million gpd footprint MBR Plant with an initial capacity of 500,000 gpd. An additional 500,000 gpd unit can be added as future demand requires.

13. Establishment of a fixed time frame for expanding the capacity of the NTUI WWTP by the construction of the MBR Plant is not appropriate.

14. The reasonable level of net plant and construction work in progress as of December 31, 2008 is $3,469,744.

15. Based on the purchase price of $8.3 million, the appropriate acquisition adjustment is $4,830,256 ($8,300,000 - $3,469,744) and this amount should be excluded from Pluris' rate base.

16. The sole member of Pluris, Mr. Brian Pratt, has committed to utilize his personal net worth to ensure that Pluris is financially fit to provide wastewater utility service to the North Topsail Beach and Sneads Ferry service area.

17. Pluris has the technical, managerial, and financial capacity to own and operate the sewer utility system serving the North Topsail Beach and Sneads Ferry service area. Pluris plans to utilize the existing operations staff and re-establish a local customer service representative at the North Topsail office which should result in a seamless transition of the operation of the facility.

18. Pluris should be required to furnish a bond in the amount of $200,000 conditioned upon providing adequate and sufficient service within the subject franchised area.

19. The requirement of a construction bond, in addition to the aforementioned service bond, would be inappropriate and imprudent.

20. NTUI has approximately $1.0 million in engineering costs associated with the expansion of the WWTP project included as Construction Work in Progress (CWIP) on its books at December 31, 2008. The appropriate ratemaking treatment for these costs should be determined in a future proceeding.

21. It is appropriate to increase Contributions in Aid of Construction (CIAC) by $535,282 to reflect the amount of the escrow funds transferred to NTUI pursuant to the Commission Order in Docket No. W-1000, Sub 5 dated January 6, 2000.

22. The transfer of the franchise and assets from NTUI to Pluris should be conditioned upon the six Regulatory Conditions recommended by the Public Staff.

23. The transfer of the franchise and assets from NTUI to Pluris is in the public interest and should be approved as ordered hereby.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 – 3

The evidence supporting these findings of fact is contained in the Joint application of NTUI and Pluris filed with the Commission on August 26, 2008, and in the Commission's records. These findings are informational and are not contested.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4 – 13

The evidence supporting these findings of fact is contained in the Hydro Star Stipulation and Hydro Star Order in Docket No. W-1000, Sub 11, the testimonies of NTUI witness Martin Lashua, Pluris witness Maurice Gallarda, Town witnesses Mayor Donald Martin and Alderman Richard Farley, Public Staff witness Jerry Tweed, and the entire record in this Docket.

The Hydro Star Stipulation and Hydro Star Order in Docket No. W-1000, Sub 11 provides for the phased expansion of the WWTP if the expenditures were determined by the Commission to be reasonable and prudent and also provided that NTUI would be allowed to recover these costs through rates. After developing plans for expansion, NTUI concluded the $18.0 million capital cost for the 2.0 million gpd WWTP expansion was not financially feasible, and entered negotiations for sale of the system to Pluris.

Pluris estimated the cost of the 2.0 million gpd WWTP expansion at $12.0 million. According to Public Staff witness Tweed, rate treatment on that amount of additional rate base would increase the rates to the 2,600 current customers by approximately $61 per month per customer. This would represent an approximate 200% increase in the currently approved rates.

As stated in the transcript, Town witness Alderman Farley testified that its citizens "would not be supportive in having their rates raised in order to pay for Pluris' investment."

The Commission concludes that the cost of a 2.0 million gpd WWTP expansion, if allowed into the rates of Pluris, would have a significant adverse upward impact upon the customers' rates. Given the current uncertainty of the timing and need for a specific amount of additional capacity, it is not reasonable or prudent for the Commission to require a 2.0 million gpd expansion at this time. Furthermore, if the Commission were to require such an expenditure of capital as reasonable, pursuant to G.S. 62 – 133 the Commission would be required to allow rate making treatment on that Commission ordered investment.

The Commission is aware that DWQ Rule 2T.0118 requires Pluris to obtain approval and submit a construction schedule prior to the average daily flow for the last calendar year exceeding 90 percent of its DWQ permitted capacity of 873,500 gpd (90% x 873,500 = 785,700 gpd). According to Public Staff witness Tweed, the most current average daily flow as outlined in DWQ Rule 2T.0118 for the 12 months of 2008, is 365,000 gpd, which is only 42% of the DWQ permitted capacity. This leaves a capacity cushion of 420,700 gpd (785,700 – 365,000). It is Mr. Tweed's opinion that there is no immediate need for additional capacity. Mr. Tweed further testified that using the average daily flow in the peak month of July 2008 of 572,000 gpd, results in a cushion of 213,700 gpd (785,700 – 572,000). In addition to the capacity available in the existing 873,500 gpd facility, Pluris witness Maurice Gallarda testified regarding an additional wastewater plant in the area capable of treating 118,080 gpd, for which amendments to an executed purchase agreement were being negotiated.

The Commission agrees with the Public Staff's recommendation that Pluris should work with DWQ regarding the efficient timing for construction of additional WWTP facilities to protect against the installation of overbuilt WWTP facilities that may deteriorate prior to being used. Mr. Tweed was convincing in his testimony that there is still sufficient time for Pluris to coordinate with DWQ on the timing of any expansion required by DWQ rules and ensure that there will be no new capacity limitations resulting in denial or postponement of service to any new customer.

Both Public Staff witness Tweed and Pluris witness Gallarda testified regarding the possibility of phasing WWTP expansion in smaller increments than the initially planned 2.0 million gpd expansion to avoid an overbuilt WWTP plant situation. Witness Tweed testified that the plant could probably be constructed in increments as small as 100,000 gpd, although he indicated increments that small may not be feasible. Mr. Gallarda testified that Pluris' revised intent, to avoid an overbuilt plant situation, is to initially build a 1.0 million gpd footprint and only install the first 500,000 gpd treatment cell, resulting in a capacity of 1,373,000 gpd (873,000 + 500,000). He said the installation of a second 500,000 gpd cell would require only a 16 week lead time. Mr. Gallarda further testified it was Pluris' intent to ultimately install additional WWTP phases and phase out the existing 873,500 gpd lagoon treatment system.

While the Commission recognizes the Town's desire to have available sufficient wastewater treatment capacity to serve a potential explosion of growth in the area, the

Commission must balance potential requirements for expansion with the impact of expansion on the rates of current and future customers.

Based upon the evidence in this proceeding, the Commission concludes that this balance can be best achieved through Pluris incrementally adding capacity in a timely manner pursuant to DWQ requirements to ensure continued offering of service as growth occurs, without significantly overbuilding the facility, and unduly burdening the ratepayers at any point in time. Therefore, the Commission will not order a specific time schedule for WWTP expansion. Contributions in aid of construction that Pluris can obtain from developers for expansion of the facility will help achieve this balance.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

The evidence supporting this finding of fact is included in the testimony of Public Staff witness Johnson and is uncontroverted by NTUI, Pluris, and the Town. As discussed elsewhere in this Order, the issue of whether CWIP will be considered used and useful will be determined in a future proceeding.

The Commission concludes that the amount of net plant and CWIP at December 31, 2008 is $3,469,744 consisting of the following components:

Utility plant in service	$12,473,530
Accumulated depreciation	(4,260,095)
Construction work in progress	1,086,595
Contributions in aid of construction	(5,830,286)
Net plant and construction work in progress	$3,469,744

Based on the March 24, 2009 amended direct testimony of Martin Lashua, as of February 2009 there has been additional CIAC collected in the form of connection fees by NTUI. The amounts of the additional connection fees have not been considered in the December 31, 2008 calculation of net plant and CWIP. The Public Staff recommended in its proposed order that the actual amounts of the rate base at the time of transfer should be provided by NTUI to the Commission.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

The evidence supporting this finding of fact is included in the application and testimony of Public Staff witnesses Johnson and Tweed, and Pluris witness Gallarda.

According to the Acquisition Agreement, Pluris is paying $8.3 million for the system. The Public Staff testified the December 31, 2008 amount of net plant and CWIP is approximately $3,469,744. Based on the purchase price of $8.3 million, the appropriate acquisition adjustment is $4,830,256 ($8,300,000 - $3,469,744). It is the Public Staff's position that Pluris should not be allowed to include any portion of this acquisition adjustment in rate base. The Public Staff's position on the acquisition adjustment is that the approval of an acquisition adjustment is not in the public interest since the benefits to customers resulting from the allowance of rate base treatment in this case would not outweigh the resulting significant rate

increase burden to the customers. In addition, the existing operation of the North Topsail system cannot be shown to be financially or operationally troubled.

In rebuttal testimony, Pluris witness Gallarda stated that Pluris did not intend to seek inclusion of any portion of the acquisition adjustment in rate base.

Based on the foregoing, the Commission concludes that it would be inappropriate to include an acquisition adjustment in rate base.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 16 – 17

The evidence supporting these findings of fact is included in the application, the testimonies of Public Staff witnesses Calvin Craig and Jerry Tweed, and Pluris witness Maurice Gallarda.

Pluris witness Gallarda testified that no one had expressed a concern that Pluris lacks the ability to finance an expansion of the sewer system. Mr. Gallarda also testified that Mr. Brian Pratt, the principal of Pluris, has pledged to use his net worth, as necessary, to secure financing for the construction of the MBR WWTP once the plant is needed.

Public Staff Financial Analyst Calvin Craig testified that he had evaluated the financial and accounting information in this docket including: the Application; the testimonies of witnesses for Pluris and North Topsail; financial statements for North Topsail, Pluris, and Mr. Brian Pratt; and responses from Pluris to data requests. Witness Craig also testified that he had received written assurance from Christopher J. Ayers, the attorney for Pluris, that Mr. Pratt was committed to utilizing his personal net worth, as needed, to provide or secure financing for both the purchase of the system and the construction of an MBR plant, if said plant was deemed feasible and necessary.

The Commission concludes that Mr. Brian Pratt and Pluris have committed sufficient financial resources to ensure that Pluris is financially fit to provide sewer utility service to the North Topsail Island and Sneads Ferry service area.

Pluris witness Gallarda testified that Pluris intends to use the existing operations personnel and supplement them with the addition of a local customer service representative. He further testified of Pluris' intent to comply with the Commission and DWQ requirements regarding the needed expansion of the facilities, and to ensure that the growth needs of the area are met. Mr. Gallarda further testified that he is the managing member of Pluris and is a Civil Engineer with extensive experience with water and wastewater operations including ten years with Southwest Water Company, a regulated water and wastewater company. Public Staff witness Tweed testified that Pluris' operational plan should result in a seamless transition of the operation of the facility.

The Commission concludes that Pluris has the technical, managerial, financial and operational capacity to provide adequate sewer utility service to the North Topsail Beach and Sneads Ferry service area, and that the transfer of the franchise from NTUI should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

The evidence supporting this finding of fact is contained in the testimony of Public Staff witness Jerry Tweed and the Commission's Rules.

Commission Rule R10-24 requires that sewer companies post bond in an amount not less than ten thousand dollars ($10,000). One of the acceptable securities for the bond is an irrevocable letter of credit. Rule R10-24(e)(4). Witness Tweed testified that Utilities Inc. (NTUI's Parent Company) is currently using letters of credit as surety for Commission required bonds at a cost of one and a half percent. This would result in an annual cost of $3,000 on a $200,000 bond (1.5% x $200,000).

Witness Tweed further testified that he recommends Pluris post a $200,000 bond. This is the same amount posted by NTUI, which in his opinion had similar risks. He also testified that the impact on customers rates of a higher bond and the fact that there is a lot of land owned by the utility reducing the risk of having to purchase additional land for expansion, were factors that influenced his recommendation. He testified that the bond could only be forfeited if the Commission appointed an emergency operator, which requires a showing of imminent danger of loss of adequate sewer service or constructive abandonment. He testified that with Pluris investing $8.3 million to purchase the system, it is not likely Pluris will walk away from or constructively abandon the system.

The Commission concludes that the risk of having to appoint an emergency operator under Pluris' ownership is no greater than under NTUI ownership, and that the bond requirement should remain at $200,000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 19

The evidence supporting this finding of fact is contained in the testimonies of Town witnesses Martin and Farley, public witness Jeff Pearson of ONWASA, Public Staff witnesses Craig and Tweed, Pluris witness Gallarda, and NTUI witness Lashua.

The Town and ONWASA witnesses support a requirement that Pluris be required to post a $12.0 million bond to ensure that the proposed 2.0 million gpd WWTP is built on a specific time schedule. On the other hand, Public Staff witnesses Craig and Tweed, and Pluris witness Gallarda oppose that recommendation and believe that a mandated schedule is unnecessary and burdensome.

The Commission agrees with the Public Staff that a bond in the amount of $12.0 million would be burdensome and unnecessary. Public Staff witness Tweed testified that if a $12.0 million bond were required by the Commission, it would be appropriate to include the cost of that bond in the rates of the customers. If the costs were at one and a half percent, which is the current bond premium paid by NTUI for NTUI's Commission required bond, this would result in an annual cost of $180,000 for the $12.0 million bond. Public Staff witness Tweed further testified, when the $180,000 cost is divided among the existing 2,600 customers, the annual cost would be $69 per customer, plus the 6% gross receipts tax.

Neither Town witnesses Martin and Farley, nor public witness Jeff Pearson presented any evidence as to the cost of the bond they recommended, the bond availability, or the impact of the bond on customer rates.

Witness Tweed further testified that if the Public Staff supported a bond requirement which established a strict deadline for construction, it would be supporting the construction deadline itself, the overbuilt plant, and the resulting materially adverse rate impact to the customers, none of which were supported by the Public Staff or the Town.

The Commission understands that Town Alderman Farley cites the Frontier Utilities of North Carolina, Inc. (Frontier) bond discussed in the Commission's July 20, 1995 interim order in Docket No. G-38, Sub 0 as precedent. However, the Commission agrees with the Public Staff that the facts and circumstances in the Frontier docket are different from the current docket.

Unlike Frontier, this docket does not involve the development of a new service area. In this docket, sewer service already exists in the North Topsail/Sneads Ferry service area. Moreover, there is evidence in the record showing that Pluris possess sufficient capital and has the desire to improve and expand the system.

Furthermore, Public Staff witness Craig testified that the North Topsail Beach and Sneads Ferry service area sewer utility is an on-going business entity, with a known level of demand and known customer base. He also testified that the risks for the Frontier and Pluris dockets are very different. In his assessment, the risk in the Pluris docket is much less, because if for any reason Pluris would abandon the system, then the expense that would be incurred would be to fund the appointment of an emergency operator to continue operations; whereas in the Frontier case, if Frontier abandoned the project, another franchisee would need to be found to come in and literally build a gas system from scratch.

Public Staff Financial Analyst Craig testified he believed the construction type bond requested by the Town is unwarranted. He testified that he examined the total amount of bonds posted by all water companies with the Commission, which combined was a little over $20 million. He testified the $12.0 million bond requested by the Town would be disproportionate and unnecessary. Like Public Staff witness Tweed, he testified that if Pluris were required to post the $12.0 million bond, it would greatly increase the costs to the ratepayers and result in current customers paying to attract future customers.

Based on the forgoing, the Commission concludes it is not appropriate to order Pluris to post a $12.0 million construction performance bond or a lesser dollar amount construction performance bond in these dockets. As previously noted herein, the Public Staff has recommended that the Commission approve a $200,000 bond pursuant to G.S. 62–110.3 and Commission Rule R10-24, which would be forfeited upon the appointment of an emergency operator as stated in G.S. 62–110.3(d).

For the Commission to order the construction performance bond requested by the Town, the Commission would have to order the construction of the WWTP expansions by a date certain, which the Commission has rejected due to the uncertainty of the timing of the need for

the WWTP expansion as testified by Public Staff Utilities Engineer Tweed. In addition, the Commission's ordering the construction of a major WWTP expansion would significantly raise the rates of current customers, to pay for plant to serve future customers. The uncontradicted evidence presented by Public Staff witness Tweed was that if the Commission ordered the construction of a WWTP expansion totaling $12.0 million, that the rate increase for each of the current 2,600 customers would be $61 per month. The Commission concludes that Pluris should work with DWQ to comply with DWQ requirements for the expansion of the WWTP, rather than the Commission setting arbitrary WWTP expansion capacity increments, and arbitrary construction completion deadlines.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 20

The evidence supporting this finding of fact is contained in the testimony of Public Staff witness Johnson, NTUI witness Lashua, and Pluris witness Gallarda.

NTUI's accounting records show that it has invested a significant amount in plans to expand the WWTP. Specifically, NTUI has approximately $1.0 million in engineering costs associated with the expansion of the WWTP project included as Construction Work in Progress (CWIP) on its books at December 31, 2008. However, it is not clear to the Public Staff how NTUI's engineering plans related to the 2.0 million gpd MBR WWTP expansion will be used in construction of the expanded plant by the acquiring company, Pluris. The Public Staff proposed that the appropriate ratemaking treatment of these engineering costs, as well as any abandoned plant costs after the construction of the facilities, should be determined in a future proceeding.

According to NTUI, these engineering costs were reclassified on NTUI's financial records from CWIP to plant in service in February 2009. In rebuttal testimony, Pluris witness Gallarda stated that Pluris would use the engineering design information as well as complete some additional design and hydrogeological studies necessary for permitting.

The Commission concludes that the appropriate ratemaking treatment of the approximately $1.0 million engineering costs, as well as any abandoned plant costs after the construction of the facilities, should be determined in a future proceeding after the utility plant has been constructed.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 21

The evidence supporting this finding of fact is contained in the testimony of Public Staff witness Johnson and is not contested.

In her testimony, Public Staff witness Johnson stated that the Public Staff increased CIAC by $535,282. Pursuant to Commission Order dated January 6, 2000, in Docket No. W-1000, Sub 5, an escrow account was to be used by Utilities, Inc. as a source of funds to upgrade the sewer system. According to the Public Staff, the corresponding adjustment for the use of the escrow funds would be a credit (increase) in CIAC, but that NTUI informed the Public Staff that NTUI did not increase the amount of CIAC on NTUI's financial records, even though all funds were depleted from the escrow account.

The Commission concludes that the $535,282 increase has been appropriately accounted for in the Public Staff's calculation of CIAC.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

The evidence supporting this finding of fact is contained in the Hydro Star Order in Docket No. W-1000, Sub 11 and the testimony of Public Staff witness Jerry Tweed. These conditions have not been opposed by any of the parties involved in the proceedings.

Docket No. W-1000, Sub 11 involved the transfer of all the stock of Utilities, Inc. to Hydro Star, LLC. NTUI is a wholly owned subsidiary of Utilities, Inc. In that case, the Commission imposed a large number of Regulatory Conditions associated with the Utilities, Inc. statewide water and wastewater operations. In this case, the Public Staff recommends inclusion of six of the Regulatory Conditions that were included in the Hydro Star Order as follows:

1. All records of Pluris should be physically available as required by North Carolina law.

2. All costs of the acquisition incurred by Pluris, including compensation costs, should be recorded to account number 426 (Miscellaneous Non Utility Expense) and treated for accounting and ratemaking purposes so that they do not affect the water and sewer rates and charges to the customers.

3. Any acquisition adjustment that results from the acquisition should be excluded from Pluris' utility accounts and treated for accounting and ratemaking purposes so that it does not affect water and sewer rates and charges to the customers.

4. Pluris should maintain its books and records in accordance with the NARUC Uniform System of Accounts for Class A Wastewater Utilities, as revised in 1996, and all subsequent revisions.

5. Pluris should file all proposed contracts pertaining to affiliated transactions with the Commission and get approval for the North Carolina operating subsidiary to pay compensation to an affiliate in advance of effectiveness, as required under G.S. 62-153.

6. The books and records of Pluris and any other affiliated companies transacting business with Pluris, will be made available for inspection as required under G.S. 62-51.

The Commission concludes all these Regulatory Conditions are reasonable, in the public interest, and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 23

Based on the application, testimony and exhibits contained in the record, the Commission concludes that the transfer of the franchise and assets of NTUI to Pluris is in the public interest and should be approved.

IT IS, THEREFORE, ORDERED as follows:

1. That the transfer of the franchise to provide sewer utility service to the North Topsail Beach and Sneads Ferry service area of Onslow County, North Carolina from North Topsail Utilities, Inc. to Pluris, be and the same is hereby approved, contingent upon Pluris complying with decretal paragraph 2 below.

2. That Pluris shall complete a bond pursuant to Commission Rule 10-24 in the amount of $200,000, and return said bond with the appropriate surety and commitment letter to the Commission.

3. That, upon Commission approval of the bond, surety and commitment letter, a further Order shall be issued granting a Certificate of Public Convenience and Necessity to Pluris approving a Schedule of Rates, and requiring public notice.

4. That Pluris is ordered to fully comply with the six Regulatory Conditions stated in the Evidence and Conclusions for Finding of Fact No. 22.

5. That NTUI shall file with the Commission journal entries for the transfer of assets to Pluris within 30 days of the transfer closing.

ISSUED BY ORDER OF THE COMMISSION.
This the 10th day of July, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Patricia Swenson, Deputy Clerk

Kc071009.01

DOCKET NO. W-1079, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Christmount Christian Assembly, Inc., for Authority to Make Emergency Special Assessment to Ratepayers	))))	ORDER APPROVING SPECIAL ASSESSMENT AND REQUIRING CUSTOMER NOTICE

BY THE HEARING EXAMINER: On March 18, 2009, Christmount Christian Assembly, Inc. (Applicant or CCA), filed a Revised Petition (Application) requesting that the Commission authorize it to make emergency special assessments to generate funding needed to address serious deficiencies threatening the continued operation of its existing water distribution and wastewater collection systems in the Christmount Christian Assembly Subdivision (Subdivision) in Buncombe County, North Carolina, and requesting the Commission to set this matter for an expedited hearing.

On April 1, 2009, the Public Staff filed a Motion requesting the Commission to issue an order requiring customer notice and stating that the matter may be determined without public hearing if no significant protests are received subsequent to customer notice. On April 6, 2009, the Commission issued an Order Requiring Customer Notice. The Order specified that the Commission could decide the matter without a public hearing if no significant protests were received from consumers within 30 days. On April 13, 2009, the Applicant filed its Certificate of Service indicating that the Commission-required Notice was served as required by the April 6, 2009, Order. No customers or lot owners have filed protests to the request for authorization for special assessments within the 30-day period specified by the Commission. On May 13, 2009, the Applicant and Public Staff filed a Joint Proposed Order Approving Special Assessment and Requiring Customer Notice.

The Application states that because of the age and deterioration of its galvanized water distribution mains and its failing Orangeburg wastewater collection lines, the Applicant confronts an emergency with regard to its continued ability to provide water and wastewater treatment service, as defined in G.S. 62-118(b), as it faces "the imminent danger of losing adequate water or sewer utility service." The Application states that there is no reasonable probability of obtaining the capital necessary to improve or replace its water distribution and wastewater collection facilities from sources other than its customers, who are: (1) current Christmount residents, (2) owners of lots in Christmount who will require water and sewer service from the Applicant in the future, and (3) CCA's offices, physical plant, accommodations, and recreational facilities. As a result, it will be impossible to improve or replace these systems unless the Commission authorizes the Applicant to assess its customers, to provide the funding necessary to address these inadequacies.

The Applicant estimates that approximately $124,904 (in 2008 dollars) will be required to repair and replace portions of its water distribution system and that approximately $179,327 (in 2008 dollars) will be required to repair and replace portions of its wastewater collection

system. The Applicant further estimates that its total engineering, permitting, and legal costs for both the water and sewer repair or replacement will be at least $10,275.

In order to minimize the cost of repairing and replacing portions of these water distribution and sewer collection lines and facilities, the Applicant plans to perform the work itself, under the supervision of Don Knibb, P.E., and Chair of the Christmount Utility Management Commission. Mr. Knibb, the retired Assistant Director of Public Works for the City of Greensboro, managed Greensboro's water and sewer systems for 25 years.

The Applicant seeks authority to make special assessments totaling $314,506 to customers. The Applicant proposes that the assessments be based on the size of the meter that serves (or in the case of the unbuilt lots, would serve) each such location. Each meter size used at CCA has a rated capacity, per the American Water Works Association, as follows:

⅝-inch	20 GPM (gallons per minute)
1-inch	50 GPM
1½-inch	100 GPM

The residences in the Subdivision are served (and the unbuilt lots will be served) with ⅝-inch meters. Individual facilities owned or operated by CCA are served with meters of different sizes, 5 by ⅝-inch, 4 by 1-inch, and 3 by 1½-inch meters. Based on flow capacity, and the corresponding ability to generate wastewater, CCA proposes to allocate the assessments based on meter sizes as follows:

⅝-inch	$30 per month
1-inch	$75 per month
1½-inch	$150 per month

To the extent that a different sized meter is installed, then the monthly assessment will be increased or decreased accordingly.

The proposed assessments will yield total annual funding of $46,440 and reduce the required time to raise the $314,506 to 6.8 years (81 months). This funding would enable the Applicant, over the next six years, to eliminate the most serious threats to reliable water and sewer utility service, starting with the most acutely threatening problems and then working toward making all of the remaining necessary improvements and replacements.

The Applicant also proposes that current residential customers, lot owners and CCA be able to elect to prepay their assessments in a lump sum for the period elected and, in return for the lump sum prepayment, to receive a discount that appropriately recognizes the time value of the money paid before it is otherwise due.

The Applicant has agreed that if its water and sewer system is sold after the requested assessments have been made, then the customers will have a proprietary interest in the system, to the extent of the funds assessed, as provided for in G.S. 62-118(c). It has also agreed that all funding collected through the requested assessments will be placed in a separate interest bearing

bank account, and that it will file quarterly reports with the Public Staff in a mutually agreed upon format regarding the funds collected through the proposed assessments and the amount of assessed funds on hand. It has further consented that if the assessments are approved by the Commission, the Commission can review the assessments in any future rate proceeding relating to Christmount Christian Assembly, Inc. The Applicant has also consented that in the event actual costs to repair and replace portions of the water distribution and wastewater collections systems are less than the projected costs, any excess assessments will be refunded to CCA customers and lot owners.

WHEREUPON, the Commission now reaches the following

CONCLUSIONS

Based upon the foregoing, the Commission finds and concludes that the Applicant's request to make special assessments totaling $314,506 to residents currently being served by CCA, the owners of the lots who will require service from CCA in the future, and CCA itself is reasonable, is in the public interest based on the unique circumstances in this case, and should be approved for repair and replacement of the Applicant's water distribution and sewer collection systems.

IT IS, THEREFORE, ORDERED as follows:

1. That authority shall be, and hereby is, granted to the Applicant to make special assessments totaling $314,506 to residents currently being served by CCA, the owners of the lots in the Subdivision who will require service from CCA in the future, and CCA itself to repair and replace its failing water distribution and wastewater collection systems.

2. The assessments shall be allocated based on meter sizes as follows:

⅝-inch	$30 per month
1-inch	$75 per month
1½-inch	$150 per month

To the extent that a different sized meter is installed, then the monthly assessment will be increased or decreased accordingly.

3. The Applicant may collect the assessment for a period of 6.8 years (81 months).

4. Current residential customers, lot owners and CCA may elect to prepay their assessments in a lump sum for the period elected and, in return for the lump sum prepayment, receive a discount that appropriately recognizes the time value of the money paid before it is otherwise due, consistent with the methodology set forth in paragraph 21 of Applicant's Revised Petition.

5. If the Applicant's water and sewer system is sold after the requested assessments have been made, the customers shall have a proprietary interest in the system, to the extent of the funds assessed, as provided for in G.S. 62-118(c).

6. All funding collected through the authorized assessments shall be placed in a separate interest bearing bank account.

7. The Applicant shall file quarterly reports with the Public Staff in a mutually agreed upon format regarding the funds collected through the assessments and the amount of assessed funds on hand.

8. The Commission may review the assessments in any future rate proceeding relating to Christmount Christian Assembly, Inc.

9. If the Applicant's actual costs to replace and repair the portions of the water distribution and sewer collection systems described in the Application and exhibits thereto are less than the projected costs for such work, then the Applicant will refund any excess assessments to all parties paying the assessments.

10. The Applicant is authorized to disconnect any existing residential customer that fails or refuses to pay the assessment authorized by the Commission (as provided for in G.S. 62-118(c)), and is likewise authorized to refuse to connect any of the unbuilt lots to the Applicant's water and sewer system, unless the authorized assessments associated with such residences or unbuilt lots, and all accrued finance charges assessed pursuant to Commission Rule R12-9, have been paid.

11. That a copy of this Order shall be mailed with sufficient postage or hand delivered by the Applicant to all customers in the Christmount Christian Assembly Subdivision no later than ten days after the date of this Order; and that the Applicant shall submit to the Commission the attached Certificate of Service properly signed and notarized no later than 15 days after the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.
This the 19th day of May, 2009.

NORTH CAROLINA UTILITIES COMMISSION
Gail L. Mount, Deputy Clerk

rb051909.01

WATER AND SEWER – TARIFF REVISION FOR PASS-THROUGH

CERTIFICATE OF SERVICE

I, ____, mailed with sufficient postage or hand delivered to all affected customers a copy of the Order issued by the North Carolina Utilities Commission in Docket No. W-1079, Sub 10, and such Order was mailed or hand delivered by the date specified in the Order.

This the _____ day of ___________________ 2009.

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 copy of the Commission Order was mailed or hand delivered to all affected customers, as required by the Commission Order dated ______________ in Docket No. W-1079, Sub 10.

Witness my hand and notarial seal, this the ______ day of ____________ 2009.

____
Notary Public

____
Address

(SEAL) My Commission Expires: ______________________________
Date

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RESALE OF WATER AND SEWER – Certificate

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BBR/Fairington, LLC (The Fairington Apts.)	WR-952, SUB 0 WR-59, SUB 45	(09/01/2009)
BES Chapel Hill Fund VII, LLC (The Pointe at Chapel Hill Apts.)	WR-937, SUB 0 WR-703, SUB 3	(05/21/2009)
CLNL Acquisition Sub, LLC		
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WMCI Raleigh V, LLC (Bexley at Carpenter Village Apts.)	WR-949, SUB 0 WR-482, SUB 2	(09/02/2009)

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Ivy Hollow Apartments, LLC	WR-299, SUB 3	(09/10/2009)
Kayser Enterprises Two, LLC	WR-435, SUB 2	(02/04/2009)
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Koury Corporation	WR-595, SUB 4	(04/29/2009)
Kubeck, Bruce A		
(Grove Mobile Home Park)	WR-310, SUB 18	(08/17/2009)
(Interstate Mobile Home Park)	WR-310, SUB 19	(08/17/2009)
(Dogwood Circle Mobile Home Park)	WR-310, SUB 20	(08/17/2009)
Lake Brandt Triad Apt. Portfolio, LLC		
(Lake Brandt Apartments)	WR-495, SUB 1	(01/13/2009)
(Lake Brandt Apartments)	WR-495, SUB 2	(10/27/2009)
Lake Cameron, LLC	WR-546, SUB 1	(03/09/2009)
Lakeshore Apartments, LLC	WR-649, SUB 1	(03/09/2009)
Lees Chapel Partners, LLC		
(Cross Creek Apartments)	WR-875, SUB 2	(03/09/2009)
(Chapel Walk Apartments)	WR-875, SUB 3	(03/13/2009)
Legacy Matthews, LLC	WR-568, SUB 3	(08/03/2009)
Lincoln Green Apartments, LLC	WR-527, SUB 2	(10/27/2009)

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LVP Eastchase LLC		
(Beacon Eastchase Apartments)	WR-716, SUB 1	(04/27/2009)
(Beacon Eastchase Apartments)	WR-716, SUB 2	(07/20/2009)
LVP Glen LLC	WR-718, SUB 1	(04/29/2009)
LVP Timber Creek LLC		
(Beacon Timber Creek Apartments)	WR-717, SUB 1	(04/27/2009)
(Beacon Timber Creek Apartments)	WR-717, SUB 2	(07/20/2009)
LVP Wendover LLC	WR-719, SUB 1	(04/29/2009)
Lynndale Apartments, Inc.	WR-627, SUB 2	(09/28/2009)
Mid-America Apartments, L.P.		
(Hermitage at Beechtree Apartments)	WR-22, SUB 29	(11/24/2009)
(Waterford Forest Apartments)	WR-22, SUB 33	(11/24/2009)
Magnolia Station Apts., LLC	WR-661, SUB 2	(09/10/2009)
Mallard Glen Apartments, LLC	WR-662, SUB 2	(09/10/2009)
Matthews Reserve, LLC	WR-557, SUB 1	(03/09/2009)
MB Remington Place, LLC	WR-461, SUB 3	(03/02/2009)
MB The Timbers, LLC	WR-462, SUB 3	(03/02/2009)
Mebane Apartments Associates		
(Ashbury Square Apartments)	WR-485, SUB 1	(02/10/2009)
(Ashbury Square Apartments)	WR-485, SUB 2	(11/10/2009)
Midtown Crossing PML LLC	WR-900, SUB 1	(10/29/2009)
Mission Battleground Park LeaseCo, LLC	WR-696, SUB 2	(02/03/2009)
Mission Matthews Place LeaseCo, LLC	WR-858, SUB 1	(07/29/2009)
Mission Millbrook LeaseCo, LLC	WR-857, SUB 1	(07/29/2009)
Mission Stadler Place LeaseCo, LLC	WR-701, SUB 2	(02/03/2009)
MP Creekwood, LLC	WR-738, SUB 1	(12/28/2009)
MP Cross Creek, LLC	WR-736, SUB 1	(12/28/2009)
MP Hunt Club, LLC	WR-735, SUB 1	(12/28/2009)
MP Regency Place, LLC	WR-714, SUB 2	(03/02/2009)
MP The Pointe, LLC	WR-733, SUB 1	(12/28/2009)
MP The Regency LLC	WR-740, SUB 1	(12/29/2009)
MP Winterwood, LLC	WR-739, SUB 1	(12/28/2009)
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MV/ALG River Crossing Limited	WR-164, SUB 3	(06/08/2009)
MV/ALG Steele Creek Limited	WR-227, SUB 2	(06/09/2009)
MV/ALG Twin Cedars Limited	WR-226, SUB 2	(07/07/2009)
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NNN Enclave Apartments, LLC, et al.	WR-560, SUB 2	(03/17/2009)
NNN Landing Apartments, LLC	WR-545, SUB 2	(03/17/2009)
NNN Springfield Apartments, LLC, et al.	WR-663, SUB 1	(03/17/2009)
NNN/Mission Mallard Creek LeaseCo, LLC	WR-364, SUB 2	(07/29/2009)
NNN/Mission University Place LeaseCo, LLC	WR-363, SUB 2	(07/29/2009)

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North Timbers Associates Limited Partnership	WR-285, SUB 3	(08/12/2009)
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Oak Park at Briar Creek, LLC	WR-807, SUB 1	(08/17/2009)
Prudential Insurance Co. of America	WR-38, SUB 5	(08/25/2009)
Almer Apartments Realty, LLC	WR-720, SUB 1	(01/29/2009)
Park Forest Triad Apt. Portfolio, LLC		
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Patriot's Pointe, LLC	WR-297, SUB 3	(04/08/2009)
Piper Charlotte Apts. Limited Partnership	WR-941, SUB 1	(12/22/2009)
Pleasant Garden Apartments	WR-742, SUB 1	(03/09/2009)
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(Pines of Ashton Apartments)	WR-834, SUB 3	(12/29/2009)
Princeton Park Apartments, LLC	WR-541, SUB 3	(08/03/2009)
Providence Park Apartments I, LLC	WR-284, SUB 4	(11/30/2009)
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RAIA Properties NC-2, LLC	WR-839, SUB 2	(12/21/2009)
RAIA Self-Storage Montville, LLC et al.		
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REBA Reafield, LLC et al.	WR-793, SUB 1	(10/07/2009)
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(Retreat at McAlpine Creek Apts.)	WR-561, SUB 2	(02/17/2009)
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RWJF Associates, L.L.C.	WR-835, SUB 2	(08/13/2009)
Star Invest. of Cary; Century Oaks Apts., d/b/a		
(Century Oaks Apartments, Phase II)	WR-5, SUB 3	(02/16/2009)
(Century Oaks Apartments, Phase II)	WR-5, SUB 4	(11/10/2009)
Stratford Apartment Properties, LLC		
(Stratford Apartments)	WR-523, SUB 1	(01/13/2009)
(Stratford Apartments)	WR-523, SUB 2	(10/27/2009)
Sagebrush Andover Woods Apartments	WR-693, SUB 2	(08/03/2009)
Sagebrush Courtney Oaks Apartments, LLC	WR-567, SUB 3	(08/03/2009)
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Southpoint Crossing Apt. Properties, et al.	WR-185, SUB 5	(10/05/2009)
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Southwood Realty Company		
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(Quail Woods Apts.)	WR-910, SUB 3	(04/01/2009)
Steele Creek Apts. Limited Partnership	WR-228, SUB 2	(07/07/2009)
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Steeplechase Triad Apt. Portfolio, LLC		
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(Steeplechase Apts.)	WR-497, SUB 2	(10/27/2009)
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The Carlisle Apartments, LP	WR-923, SUB 1	(08/27/2009)
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Treybrooke Village Apartments, L.L.C.	WR-379, SUB 4	(03/03/2009)
Trinity Commons Apartments, LLC	WR-415, SUB 4	(08/06/2009)
Twin Cedars Limited Partnership	WR-225, SUB 2	(06/09/2009)
VAC LLLP		
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(Kingswood Apartments)	WR-831, SUB 20	(08/14/2009)
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Westdale Poplar Place, LLC	WR-816, SUB 2	(11/16/2009)
Westdale Sabal Point NC, LLC	WR-636, SUB 2	(07/21/2009)
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(Bexley at Brier Creek Apartments)	WR-754, SUB 3	(07/27/2009)
(Bexley at Brier Creek Apartments)	WR-754, SUB 4	(12/29/2009)
WMCi Raleigh V, LLC	WR-949, SUB 1	(10/19/2009)
Woodberry Asheville Apartments, LLC	WR-791, SUB 2	(12/22/2009)
Woodlake Downs Associates L.P.	WR-286, SUB 3	(09/21/2009)
Woodlands at Wakefield Plantation	WR-372, SUB 1	(02/04/2009)
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(The Lodge at Southpoint Apts.)	WR-268, SUB 4	(03/04/2009)
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ELPF Station Nine, LLC - WR-724, SUB 1; Errata Order (03/12/2009)
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FC Meadowbrook LLC - WR-280, SUB 2; Errata Order (08/04/2009)
Fund IX PR Durham, LLC - WR-518, SUB 2; Errata Order (03/04/2009)
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Mission Matthews Place LeaseCo, LLC - WR-858, SUB 1; Errata Order (08/03/2009)
MRWR, LLC - WR-832, SUB 1; Errata Order (03/12/2009)
Star Investments of Cary, LLC - WR-5, SUB 3; Errata Order (02/27/2009)
Southwood Realty Company - WR-910,
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Westdale Peppertree Ltd. - WR-815, SUB 1; Errata Order (07/23/2009)
Westridge Place, LLC - WR-637, SUB 1; Errata Order (06/15/2009)
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