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February 11, 1998

REPLY TO: PAOLI

James J. McNulty, Esquire
Prothonotary
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FEB 11 1998

PA PUBLIC UTILITY COMMISSION
PROTHONOTARY'S OFFICE

**Re: Application of Pennsylvania Power & Light Company
For Approval of Its Restructuring Plan
Docket No. R-00973954**

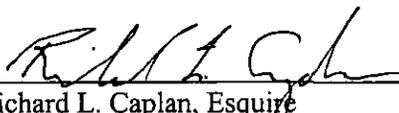
Dear Mr. McNulty:

Enclosed for filing in the above-referenced proceeding, please find an original and nine (9) copies of the Brief of Schuylkill Energy Resources, Inc. and Gilberton Power Company in Opposition to the Application of Pennsylvania Power & Light Company For Approval of Its Restructuring Plan.

Kindly date stamp and return the additional copy of the first page in the self-addressed envelope provided.

Very truly yours,

CAPLAN & LUBER, LLP.


Richard L. Caplan, Esquire

RLC\dmf

Enclosures

cc: Honorable George M. Kashi
All parties on Certificate of Service

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Pennsylvania Power & :
Light Company for Approval of Its :
Restructuring Plan Under Section 2806 :
of the Public Utility Code :

Docket No. R-00973954 **RECEIVED**

FEB 11 1998

PA PUBLIC UTILITY COMMISSION
PROTHONOTARY'S OFFICE

**BRIEF OF SCHUYLKILL ENERGY RESOURCES, INC. AND
GILBERTON POWER COMPANY IN OPPOSITION TO THE
APPLICATION OF PENNSYLVANIA POWER & LIGHT COMPANY
FOR APPROVAL OF ITS RESTRUCTURING PLAN**

DOCKETED
FEB 13 1998

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The Electricity Journal (Vol. 11 No 1-January/February, 1998) 28

Schuylkill Energy Resources, Inc. (“SER”) and Gilberton Power Company (“Gilberton”), collectively identified hereinafter as “objectors,” by and through their counsel, respectfully submit this brief in opposition to the restructuring plan (the “plan”) filed by Pennsylvania Power & Light Company (“PP&L”).

I. INTRODUCTION.

Section 2804 of the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§2801 — 2812 (the “Act”), articulates sixteen “interdependent standards” that the Public Utility Commission (the “commission”) is charged with applying to assess the compliance of each public electric utility’s restructuring plan with the express requirements and broad policy objectives of the Act. In fashioning this comprehensive mission statement, the legislature has directed that the commission “allow customers to choose among electric generation suppliers *in a competitive generation market* through direct access . . . ,” 66 Pa. C.S. § 2804 (2) (emphasis added), “require that restructuring of the electric utility industry be implemented in a manner that does not unreasonably discriminate against one customer class to the benefit of another,” 66 Pa. C.S. § 2804 (7), and “approve a competitive transition charge for the recovery of transition or stranded costs it determines to be *just and reasonable to recover from ratepayers.*” 66 Pa. C.S. § 2804 (13) (emphasis added).

By failing to respond adequately to these and other policy imperatives of the Act and by materially deviating from applicable standards established by the commission’s recent adjudication in the PECO restructuring proceeding, Docket Nos. R-00973953 and P-00971265, PP&L’s proposed plan would impede the Commonwealth’s “transition from regulation to greater competition in the electricity generation market to benefit all classes of customers and to protect

this Commonwealth's ability to compete . . . ,” 66 Pa. C.S. § 2802 (7), and would belie the Commonwealth's commitment to “resolve certain transitional issues in a manner that is fair to [all] affected parties.” 66 Pa. C.S. § 2802 (8). Therefore, the commission should require PP&L to amend its plan to bring it into scrupulous compliance with the tenets of the Act. At the very least, the commission must reconcile the substantial discrepancies between PP&L's plan and parallel aspects of the PECO restructuring.

II. PP&L'S PROPOSED TARIFF CONTAINS UNACCEPTABLE ANTI-COMPETITIVE PROVISIONS.

PP&L's proposed tariff contains a number of provisions that will inhibit free competition in the electric energy generation market. Each of these provisions provides an incentive to consumers to remain with PP&L rather than choose an alternative electric supplier. These anti-competitive provisions include, among others, the following:

- * PP&L's proposed tariff provides that certain classes of consumers who elect to purchase from an alternative supplier will be required to pay a dramatically higher Competitive Transition Charge (“CTC”) (*i.e.*, as much as 97% higher) than consumers who elect to continue to purchase energy from PP&L;
- * PP&L's proposed tariff attempts to preserve the allegiance of existing customers benefiting from economic development incentive rate riders by extending these programs without justification to the end of the transition period;
- * PP&L's proposed Basic Utility Supply Service (“BUSS” rate) would impermissibly skew the competitive market by allowing PP&L's Generation Supply Group to sell electricity at a detariffed, wholesale rate to those existing PP&L customers who either choose not to choose or who are not yet legally entitled to shop for electric service, thereby affording PP&L a distinct anti-competitive advantage over alternative energy suppliers by rewarding the least adventurous customers with the best available prices.

A. PP&L's Proposed Tariff Is Anti-Competitive Because It Financially Penalizes Certain Consumers Who Choose Alternative Energy Suppliers.

Certain provisions of PP&L's proposed retail tariff are transparently designed to foster PP&L's preservation of a dominant share of the large volume customer market at the expense of fair and open competition. The tariff provides that customers taking service from PP&L under at least six separate rate schedules would be saddled with substantially high monthly CTC payments, if they were to choose an alternative electricity generation supplier. These provisions would afford PP&L an unfair advantage in a nascent competitive retail market by giving its existing customers a substantial economic disincentive to shop.

On August 20, 1997, during the hearings in this matter, the attorneys for the objectors orally propounded to PP&L the following On-The-Record Data Request to which PP&L provided the following written response on August 29, 1997:

Q1. Under PP&L's proposal if an RTS customer shops for electricity, the customer will be changed to Rate Schedule RS. Please calculate the percentage CTC change for 1999 for an RTS customer billed under Rate Schedule RS. Also, please calculate the percentage CTC change for 1999 for an RTD customer billed under Rate Schedule RS.

A1.	Rate Schedule	% Change in CTC Under RS
	RTD	+15%
	RTS	+97%

PP&L Response to a On-The-Record Data Requests of the Schuylkill Energy Resources, Inc. and Gilberton Power Company dated August 20, 1997.

By PP&L's own calculations, those existing special residential rate customers who choose an alternative electric energy supplier would be penalized by having to pay a CTC that is as much as

97% higher than the one imposed if they refrained from exercising their right to competitively shop for service. Therefore, this provision is blatantly unreasonable and contrary to the pro-competitive intent of the Act.

PP&L's proposed tariff would impose a similar competitive disincentive upon existing customers taking interruptible service under the IS-1, IS-P or IS-T rate schedules. PP&L's witness, Dr. Susan Tierney, under cross-examination by the attorney for intervenor, PP&L Industrial Customer Alliance ("PPLICA"), admitted that interruptible service customers who choose alternative suppliers will no longer pay the CTC applicable to customers in that rate class. TR (8/19/97):852-853 (Tierney). Rather, their CTC would be calculated as though they were taking firm service under rate schedules LP-5 or LP-4. Both of these rates would produce substantially higher CTC's than those proposed for the interruptible rates, in some cases as much as 130% higher. PPLICA Statement 1-S at p. 14 (Baron). See also PP&L Exhibit OGK2 at 27, 27A, 28, 28A and 30 (formulae for calculating CTC).

B. PP&L's Proposed Extension Of Economic Development Rider Discounts To The End Of The Transition Period Would Be Anti-Competitive.

Proposed tariff changes to the Economic Development Initiative ("EDI") and Industrial Development Initiative ("IDI") similarly would serve to stifle competition. Under each of these programs, special, substantial "incentive" rate discounts have been offered to qualifying commercial customers. See Statement OSBA-1 (Knecht) at 49. All of these preferential rate classes were to expire on January 1, 2000. PP&L Exhibit OGK-1.

In its plan, PP&L has proposed extending these special programs (for existing participants only) through 2005. PP&L Exhibit OGK-2 (8/20/97). This extension would

transparently enhance existing customer loyalty at the expense of unfettered competition. Not content with merely creating a positive inducement to remain a PP&L customer, PP&L has erected yet another barrier to change by proposing to bar any customer within one of these programs, who opts to choose an alternative supplier and subsequently desires to again take service from PP&L, from reentering the program in which it was previously enrolled.

In an effort to rationalize extending the duration of these temporary incentive programs, PP&L has interpreted the rate cap provisions of the Act as mandating the continuation of the EDI and IDI programs. Statement OSBA-1 (Knecht) at 48 (8/19/97). However, as noted by Knecht, the customer beneficiaries of these incentive rates knew that the programs were intended to provide a temporary economic stimulus, responsive to specific public policy concerns, rather than a long term subsidy. *Id.* at 48-49. Therefore, “there is no economic development reason to continue the discounts beyond the pre-determined phase out period.” *Id.* at 49. Extending preferential rates beyond the time originally scheduled for their termination would permit PP&L’s regulated Electricity Delivery Group to undercut the future retail market, as evidenced by the fact that current EDI and IDI customers are paying rates today which approximate projected retail market prices. Statement OSBA-1, Direct Testimony of Knecht (8/19/97) at 49.¹

PP&L’s proposed Competitive Rate Rider (“CRR”) is even more egregious in its attempt to facilitate undercutting the market price in the context of regulated rates. The CRR would enable PP&L’s Electricity Delivery Group to discount delivery charges and CTC to maintain or

¹ The objectors note that PP&L witness Kasper has conceded PP&L’s willingness to phase out these EDI/IDI credits if the commission finds that this is permissible under the rate cap. PP&L Statement OGK 11-R at 11-12.

win back a customer who might otherwise opt for an alternative supplier. Statement OCA-4 (Smith) at p.8 (8/21/97). PP&L has countered that the CRR must be continued due to the rate caps. However, the objectors believe that the CTC must be non-bypassable or it provides PP&L with an unfair advantage. The only possible rationale for championing a rider that would facilitate a negotiated reduction of the CTC is to maintain market share. Such a provision is not only anti-competitive but violates the competitive spirit of the act.

C. PP&L's Proposed "BUSS" Rate Is Anti-Competitive Because It Would Both Subsidize PP&L's Generation Supply Group And Serve As A Disincentive To Shop.

Under section 2807 (e) (3) of the Act, either PP&L or another "commission approved alternative supplier" would have the obligation to provide electricity to any customers (authorized by law to shop) within PP&L's service territory who do not choose to purchase energy from a competitive source or have contracted for third party service which is not forthcoming. On the presumption that the commission will be predisposed to designate electric distribution companies as the suppliers-of-last resort, PP&L has proposed to sell and deliver energy to these classes of customers under a variable rate designated as Basic Utility Supply Service ("BUSS"). Rule 1 B(1) of PP&L's proposed Tariff No. 201 provides that BUSS will be supplied to four classes of customers: a) those not yet afforded the legal right to shop, b) those with this right who do not exercise it, c) those whose alternative supplier fails to deliver, and d) those who, after choosing an alternative supplier, return to PP&L and request BUSS service. PP&L Exh. OGK 2 at 5. Unfortunately, PP&L's chosen implementation strategy is both *ultra vires* and anti-competitive.

According to PP&L's witness, Joseph P. Kalt, customers not yet eligible for choice "would be served by PP&L's Generation Supply group, receiving bundled service . . . consisting of tariffed transmission, distribution, and other delivery services plus *market-priced* electricity." Exh. PP&L Statement 1-R at 46-47 (Kalt) (*emphasis added*). However, section 2807 (e) of the Act, which redefines the EDC's obligation to serve and, in subsection 3, arguably allows the supplier-of-last-resort to provide certain customers with electric energy at "market" rates, applies only "following restructuring *and the choice of alternative generation by a customer*" *Id.* (*emphasis added*). On its face, the section does not become effective until *after* a customer has acquired the legal right to choose. Therefore, PP&L is without legal mandate to offer supplier-of-last-resort service to customers awaiting their inclusion in the Act's two year phase-in of retail competition.² PP&L's proposal is not only at odds with the first paragraph of section 2807 (e), but also with the plain meaning of subsection (2), which requires the commission, only "[a]t the end of the transition period," to "promulgate regulations" defining the obligations imposed by subsection (3) "that will exist at the end of the phase-in period [i.e., *after* all customers have been afforded the right to choose alternative suppliers]." 66 Pa. C.S. §2807(e)(2).

PP&L's proposed treatment of customers awaiting their legal opportunity to shop is also anti-competitive because, rather than continuing to serve them through its regulated Electric Delivery Group, they would become customers of PP&L's unregulated Generation Supply

² The objectors note that in the PECO restructuring case, in the commissions' opinion and order dated December 11, 1997, at pp. 46-47, the commission, to spur the onset of competition, ordered that competition be opened to two-thirds of PECO's customers on January 2, 1999 and to 100% on January 1, 2000. As a consequence of the PECO order, it would be unjust for the PP&L phase-in to be incomparable with PECO's. To ensure fair and open competition, the objectors maintain that there should be a consistent statewide phase-in.

Group. Exh. PP&L Statement 1-R at 46-47 (Kalt); Exh. Enron Cross Exh. 1 (Interrogatory answer 16(a)). This provision would provide PP&L's allegedly independent marketing arm with a built-in customer base, affording it an unconscionable head start over third party competitors whose marketing efforts could not bear fruit until these captive customers were legally free to choose. Exh. Enron Statement 6.0 at 26-27 (Dirmeier).

PP&L's proposed treatment of customers who "choose not to choose" is equally aberrational. According to PP&L's witness, Kalt, these customers, which presumably will include commercial and industrial as well as residential accounts, "would be served by PP&L's Electric Delivery group under Rate Schedule RTD." Exh. PP&L Statement 1-R at 44 (Kalt). Unfortunately, the Rate Schedule RTD that appears in PP&L's proposed Tariff No. 201, PP&L Exh. OGK 2 at 22-22C, would apply only to "single phase residential service metered and billed to recognize time-of-day use" Id. at 22. This gives rise to an intolerable ambiguity as to the treatment which PP&L intends for industrial and commercial BUSS customers. Even for the residential BUSS customer, the proposed RTD rate is inadequate because it fails to define the mechanism by which PP&L proposes to determine the "market" energy price.

There is also a perverse illogic in PP&L's division of BUSS responsibility between its regulated and unregulated divisions or subsidiaries. As noted by Enron's witness, Dirmeier, PP&L proposes to delegate service responsibility for existing monopoly customers to its competitive Generation Supply Group while assigning customers with the right to choose to its monopoly service subsidiary. Exh. Enron Statement 6.1 at 31-32 (Dirmeier). Precisely the opposite strategy would appear to be in keeping with both the letter and spirit of the Act.

There is yet another significant ground for objection to PP&L's BUSS proposal, which arguably arises from an ambiguity in the language of section 2807 (e) (3) of the Act. 66 Pa. C.S. §2807(e)(3). Although this section imposes upon the supplier-of-last-resort the obligation to "acquire electric energy at prevailing market prices to serve [those customers eligible to receive this default service] and . . . recover fully all reasonable costs," *Id.*, it fails to define the mechanism by which the retail price charged for this electricity is to be determined or to identify the range of "reasonable costs" subject to recovery in that price.

It is evident from the testimony of PP&L's witness, Joseph P. Kalt, that PP&L proposes to acquire *and price* electricity for BUSS customers "at prevailing [wholesale] market levels." Exh. PP&L Statement 1-R at 45 (Kalt). This conclusion is consistent with Kalt's statement that "the electricity component of [BUSS] service . . . would be supplied on a direct pass-through (without mark-up) basis," *Id.*, given that a retail price usually includes some mark-up over wholesale cost. It is further reinforced by Kalt's admission on cross-examination that he was probably referring to "prevailing wholesale" price levels in his pre-filed testimony quoted above. TR(8/18/97): 460-62 (Kalt).

By pricing electricity at bulk wholesale cost, for those customers that either have yet to acquire the legal right to supplier choice, do not avail themselves of this right when they finally have it (or affirmatively elect to remain with PP&L's regulated subsidiary), or have been intentionally or negligently abandoned by their chosen alternative supplier, Exh. PP&L Statement 9 at 6 (Tierney), TR(8/19/97): 835 (Tierney), PP&L would stifle competition by economically rewarding those customers who remain tied to its monopoly service (whether by design or default) with the lowest conceivably sustainable prices in the marketplace. As

admitted by PP&L's own witness, such pass-through cost pricing would not allow the recovery of overhead costs, let alone return an operating profit. TR(8/18/97): 462 (Kalt). The commission need not look to the record to satisfy itself that no competitive supplier (bereft of the unearned income stream provided by stranded cost recovery) could viably sell electricity to PP&L's BUSS customers, *for a sustained period of time*, at prices below the prevailing wholesale spot market price. Furthermore, as cogently observed by Enron's witness, Dirmeier, allowing PP&L's regulated Electric Delivery Group to provide detariffed generation service to any class of customers would provide it with both the means and the incentive to dissuade monopoly-serviced consumers from exercising choice. Exh. Enron Statement 6.0 at 25-26 (Dirmeier).

PP&L's BUSS electricity pricing proposal also suffers from a lack of definition of what "reasonable costs" would be included in the final retail price, as contemplated by section 2807 (e) (3). 66 Pa. C.S. §2807(e)(3). Should PP&L fail to add to the wholesale acquisition cost of each unit of electricity all expenses reasonably incurred in performing the supplier-of-last-resort service (including, for example, a "buying group" service charge or commission), it would be guilty of predatory pricing that would impede fair competition. Although PP&L's retained expert witness, Susan F. Tierney, admitted on cross-examination that a portion of PP&L's general and administrative overhead was "conceptually" one of the incurred costs that would have to be factored into the BUSS energy rate, TR(8/19/97): 884-885 (Tierney), she deferred to other PP&L witnesses with regard to the specifics of the matter. Unfortunately, as noted by MAPSA witness, Donald E. Johnstone, Exh. MAPSA Statement 1 at 6 (Johnstone), none of PP&L's employee witnesses could define with specificity the allocated cost components of the proposed BUSS retail energy price or the method by which this price would be set on an annual

basis or otherwise. See, for example, Exh. PP&L Statement 10 at 11-12 (Krall); Exh. PP&L Statement 3-R at 37-41 (Kleha).

To avoid the anomaly of rewarding the least adventurous consumers (i.e., those for whom PP&L is the default service provider) with arguably the lowest priced electricity available in the marketplace, the commission should require that at no time may the BUSS energy price be set *below* the standard offer price for the same class of service marketed by PP&L's unregulated Generation Supply Group. This will ensure that the BUSS rate is a representative surrogate for retail energy prices set by free market forces rather than an unfairly subsidized artifact of cost of service rate making. In the alternative, the commission should specifically define which operating costs (in addition to direct bulk energy acquisition cost) must be factored into the BUSS energy price to achieve parity with prices set through competition. This would allow the legitimacy of the rate to be confirmed by audit.

III. PP&L'S PROPOSED CODE OF CONDUCT IS DEFICIENT AND WILL DO LITTLE TO ENSURE FAIR COMPETITION.

A. Purpose And Goal Of Codes Of Conduct And Competitive Access Rules.

In order to promote meaningful competition in the retail sale of electricity in Pennsylvania, it is essential that the commission adopt rigorous safeguards, including behavioral norms applicable to all competitors, to deter predatory as well as deceptive practices that would hamper robust development of the market. Given that any inroads in the market by new suppliers will be at the expense of the incumbent monopoly providers, it is reasonable that the commission anticipate that some vendors will be sorely tempted to engage in sharp practices to protect or obtain market share. It therefore comes as no surprise that, in its Opinion and Order on

Pilot Program Implementation, Docket No. P-00971183, the commission recognized the crucial role to be played by an industry code of conduct:

The Code of Conduct is an essential component of the retail competition pilot programs, and of the restructured competitive electric industry mandated by the Act. The standards enumerated in the Code of Conduct are mandatory. These standards are necessary to preserve the competitive relationship among the parties in the market. The Code of Conduct is intended to help, not hinder, parties with diverse and sometimes conflicting interests in the competitive area.

The objectors believe that all Pennsylvania regulated electric utilities should be required to adopt a uniform code of conduct incorporating the core provisions recommended in the Final Report to the Commission of the Competitive Safeguards Working Group filed on October 6, 1997. Because the elimination of exclusive geographic service territories will foster the development of an integrated retail electric market, it is essential that the competitive conduct of all EDCs and their affiliated generation suppliers be responsive to a single set of ethical precepts. To allow variation in the rigor of behavioral norms, as a consequence of independent restructuring proceedings, is to countenance loopholes through which incumbent EDC's can be expected to exercise monopoly power. Unfortunately, the commission's failure to date to impose a unified code requires the intervenors to expend potentially unnecessary resources to address the merits of PP&L's specific proposal.

PP&L has submitted a two page Code of Conduct as Exhibit RMG-3, attached to the direct testimony of Robert M. Geneczko. PP&L supplemented this by reference to its Standards of Conduct for Compliance with FERC Order 889 (pertaining to conduct in support of its open access transmission responsibilities) filed with the FERC. Exhibit RMG-2, TR (8/18/97) at 588.

PP&L's final work product is a revision of RMG-3, less than two and one-half pages in length, introduced by Mr. Geneczko as Exhibit RMG-4 (hereinafter the "Code").

The stated purpose of the Code is "to control dissemination of confidential customer information, restrict access to competitive information, prevent cross-subsidies between regulated and unregulated departments, and prevent discriminatory practices." Exhibit RMG-4 at p. 1. Although these goals are praiseworthy, the Code provisions intended to achieve them are either so perfunctory or lacking in specificity that one is hard pressed to find in them discrete standards of conduct amenable to rigorous enforcement. For the Code to provide uniform competitive rules that are meaningful, it must be expanded to minimize ambiguity and broaden its reach. It should not be approved in its present form.

B. Since Existing Prohibitions On Anti-Competition Or Discriminatory Behavior Are Inadequate, The Commission Should Require A Strong Code Of Conduct.

In support of adoption of the proposed Code, PP&L asserts that the Code need not be any more specific because existing prohibitions against anti-competitive behavior will suffice to protect the free market. PP&L would have the aggrieved competitor principally rely upon the antitrust laws and the FERC's enforcement powers for redress. The commission need only take administrative notice of the extreme delay and extraordinary cost habitually associated with the pursuit of either of these quixotic remedies to recognize that they represent no substitute for carefully crafted ethical standards that may be administratively enforced with minimal expense and delay. The crucial importance of seasonable, evenhanded enforcement of behavioral norms in ensuring an open, competitive market underscores PP&L's failure to articulate with

particularity its contemplated “Dispute Resolution Procedure” and justifies rejection of the Code for this deficiency alone.

C. The Deficiencies Of PP&L’s Proposed Code Of Conduct.

1) Segregation of and Restricted Access to Information.

Under this heading, the Code lists four (4) types of information it deems to be confidential and states that access “shall be limited to those employees involved in the administration of energy supply by alternative suppliers for the purpose of customer billing, supply scheduling and reconciliation, supplier payments, and customer assistance.” It further conditions supplier access to customer account and consumption information upon the customer’s written approval. Exhibit RMG-4 (8/18/97) at p. 1. However, these provisions fall far short of addressing all of the potential inequities inherent in PP&L’s preferential access to existing customer files.

The Code must be revised to require PP&L’s “Electricity Delivery Group” to provide customer information to every qualified, competitive electricity supplier on the same terms and conditions as such information may be made available to PP&L’s own “Generation Supply Group.” It must anticipate that many customers may prefer to merely acquiesce to the dissemination of their records (to facilitate obtaining competitive supply quotations) rather than go to the trouble of affirmatively authorizing such a release in writing. It must also prohibit the sharing with any supplier (including any PP&L marketing affiliate) of any information of potential use in marketing electricity that PP&L’s distribution entity may acquire in performing its regulated functions, unless such information is amenable to publication for use by all. In sum,

the Code must be revised to expressly outlaw the discriminatory exploitation of information, to which PP&L is privy as a consequence of its incumbence as a regulated electric utility, to advance its competitive marketing operations at the expense of competitors.

2) Assignment of Responsibilities.

The Code's effort to segregate employee responsibilities, to ensure that electric delivery and competitive supply functions are not performed by the same individuals, is facially deficient in a number of respects. The language is rendered conspicuously ambiguous by the qualification that it prohibits overlapping responsibilities only for employees "directly involved" in such tasks. PP&L is apparently loath to acknowledge that even those employees indirectly involved in competitively sensitive operations may be possessed of both the motive and opportunity to favor their employer over competitors. The provision as drafted also suffers from a failure to require the physical separation of employees performing segregated functions as well as its implicit toleration of cross subsidies inherent in any sharing of necessary resources (other than office space) that is not rigorously apportioned between segregated function areas. Physical separation is particularly appropriate in this case given PP&L's unwillingness to legally unbundle its regulated and competitive market operations. See Direct Testimony of Michael D. Dirmeier, Enron Statement 6.0.

Finally, this element of the Code does not prohibit the free exchange of employees between PP&L's distribution and supply groups, which could provide a conduit for the unregulated and undocumented interchange of otherwise protected information. This deficiency could be remedied by requiring that any employee transferees privy to sensitive information be

required to observe a “cooling off period” during which they would be barred from performing any tasks in their new assignments that might profit from such knowledge.

3) Accounting and Cost Allocations.

PP&L proposes to merely segregate the accounting of costs incurred by its delivery and supply groups and to ensure that inter-group charges for services are fair and non-discriminatory. These provisions are facially inadequate because they would countenance the pooling of income to support cross-subsidies. The Code should require that all books of account be separately maintained and that delivery group income not be diverted to support supply group marketing activities. Furthermore, the Code should dictate that, if PP&L’s delivery group affords the supply group any financial accommodations in obtaining regulated services (by way of discounts, rebates or fee waivers), the terms and conditions of such transactions be publicly disclosed (on a website for example) and be made available without discrimination to all competitive generation suppliers.

4) Joint Marketing.

While the proposed Code purports to forbid PP&L’s delivery group from favoring its supply group’s products in a marketing context, it fails to expressly bar joint marketing and advertising programs or the reciprocal promotion of affiliate services or products in other circumstances. The Code should prevent any representations by PP&L employees to any potential or existing customer, of preference or other benefits to that person in the receipt of regulated services, as a consequence of doing business with the supply group or obtaining last resort service from the supply or delivery group. The Code should also prevent both the delivery and supply groups from marketing last resort service as a competitive product.

5) Comparability.

Of the five prohibitions under this heading, the fifth (forbidding pointing or channeling customers to the supply group) should properly be subsumed within the proposed revisions to the Joint Marketing constraints. The first prohibition suggests tying arrangements and would profit from an express reference to tying as well as an expansion of its coverage to bar conditioning regulated services or rates upon the customer's acceptance of last resort service. The third affirmative provision would profit from an elaboration of the term "non-discriminatory manner" to expressly require that "requests" from all generation suppliers (including any PP&L affiliate) to the delivery group be processed on a first come/first served basis and that requests for the same type of service be handled within the same time period. It should also be expanded to apply to requests for any regulated services, rather than merely "access," and should require that the regulated services requested be provided in a non-discriminatory fashion both temporally and procedurally. Finally, any assurance of comparability must include a provision that PP&L's delivery group will not afford any preference or advantage to any customer, by virtue of the customer's choice of retail supplier or otherwise, or to any competitive or affiliated supplier.

6) Communication to Employees and Enforcement.

Of the five provisions under this heading, the fifth is the most troubling. PP&L's acknowledgment that written confidentiality agreements might be required of its employees "as deemed appropriate" belies its faith in the efficacy of other provisions of the Code to bar the improper disclosure or sharing of competitive or confidential information between PP&L operating groups. Either Code enforcement provisions will be sufficiently rigorous to preserve competitive information integrity or all employees with access to such information should be

required to execute confidentiality agreements providing extreme penalties for knowing violations. The Code lacks teeth by virtue of its failure to define the range of penalties to be imposed for, or the procedure for adjudicating, breaches of confidentiality or the improper commercial exploitation of sensitive information. It also fails to hold management accountable for the behavior of errant employees as would be accomplished by imposing suitable penalties upon PP&L itself and/or requiring the payment of compensation to the customer(s) or competitor(s) that may suffer commercial injury as a consequence of the Code violation.

The third provision, which proposes periodic Code compliance audits, is also inadequate in material respects. It fails to define the frequency of such audits, whether they would be performed by PP&L itself or an independent auditor and whether the results would be reported to the commission or otherwise made public. There is no commitment to modify policy in the event that systemic problems are uncovered or to change enforcement mechanisms in the face of repeated violations.

7) Dispute Resolution Process.

PP&L's commitment to implement an undefined dispute resolution procedure sometime in the future dramatically undermines the efficacy of the Code as a means to facilitate open and fair competition in the retail sale of electricity and ancillary services. PP&L's failure to set forth the procedural rules denies the intervenors a meaningful opportunity to assess whether aggrieved parties will be afforded an expeditious, cost effective and impartial mechanism for pursuing claimed violations of the Code. Without effective dispute investigation and adjudication procedures, the Code will be rendered a meaningless mantra and enforcement relegated to commission complaints. PP&L should be required to come forward with specifics proposals for

the resolution of disputes including logging, tabulation and statistical reporting as well as an elaboration of the discrete steps of the process.

IV. PP&L'S CLAIM FOR STRANDED COSTS IS INFLATED AS A CONSEQUENCE OF INACCURATE FORECASTS AND UNREASONABLE ASSUMPTIONS.

Through the testimony of Scott Jones and Joseph Schadt, PP&L has asserted that it is entitled to recover from consumers, through global imposition of a CTC during the restructuring period, \$4.2 billion in alleged stranded costs. However, the accuracy of this estimate has been challenged and discredited by witnesses from the Office of Trial Staff ("OTS"), Office of Consumer Advocate ("OCA") and the PP&L Industrial Customer Alliance ("PPLICA"). To approve recovery of this grossly inflated sum would provide PP&L with an unearned subsidy, which would skew the development of a robust competitive retail energy market and unfairly disadvantage PP&L's ratepayers.

PP&L's stranded cost calculations impermissibly augment its requested CTC in the following respects, among others:

- * PP&L's choice of a "regulatory model," driven by inherently unreliable forecasts of long term future market conditions, including fuel costs and PJM energy and capacity prices (which deviate substantially in PP&L's favor from values that the commission held to be reasonable and approved in its PECO restructuring order), renders its stranded cost calculations concomitantly unreliable, whereas an asset-based model, which measures stranded costs as the difference between the book value and the estimated market value of generating assets, would afford significantly greater reliability and empirically justify substantially reduced stranded costs.
- * PP&L's failure to propose an annual "true-up" procedure, to adjust the outstanding balance of approved stranded costs to prevent windfall recoveries attributable to future cost saving measures (e.g., favorable buyouts of NUG contracts or economic sales of generating assets) or greater income growth than

originally projected, exposes all CTC payers to the prospect of unwillingly subsidizing PP&L's defense of its incumbent monopoly of the retail market.

- * PP&L's estimate of stranded costs attributable to its purchase of electricity from NUGs, at above-market prices under long term supply contracts, assumes optimum, levelized plant productivity, which erroneously discounts the likely future decline in average NUG plant performance and availability due to equipment ageing (which may be accelerated by the novel technologies frequently involved), increases in future NUG production curtailments prompted by PJM system reliability concerns and the substantial likelihood that PP&L will be able to buy out or buy down additional NUG contracts on favorable terms after its restructuring plan is approved.

A. PP&L's Methodology For Estimating Generation Asset Stranded Costs Is Flawed And Incompatible With The Approach Sanctioned In The PECO Case.

Prudence dictates that the commission view PP&L's stranded cost computations with healthy skepticism because section 2808 of the Act, 66 Pa. C.S. §2808, provides no mechanism for dynamically adjusting the CTC to compensate for any inaccuracy in the gross amount of stranded costs initially awarded. While section 2804(4)(iii) would allow the rate caps imposed by the Act to be exceeded under exceptional circumstances, it does not countenance an increase or decrease in the CTC. Therefore, it is reasonable to assume that PP&L has built into its stranded cost claim such a substantial bias in its favor that, under the worst case scenario, it would still pocket a windfall profit. That this is likely is confirmed both by the questionable reliability of the method that PP&L has employed to estimate the "generation-related transition or stranded costs that may be recovered through the competitive transition charge," pursuant to section 2808(c)(3) of the Act, and by its use of significantly lower market price estimates (than

those validated by the commission's PECO restructuring order) for projecting the future income contribution of PP&L's generating assets.

There are at least three recognized methods for calculating stranded costs attributable to existing generation assets: the asset-based method, the regulatory method and the accounting method. Exh. PP&L Statement 8-R at 4 (Schadt); TR(8/26/97): 1540 (Schadt). PP&L relies on the regulatory method, which calculates stranded costs by comparing projected revenues that would be derived from its generating assets (through the sale of both energy and capacity), assuming continuation of the existing regulatory environment, with estimated revenues which these same assets would presumably produce when serving a competitive retail electric generation market. Exh. PP&L Statement 8-R at 4 (Schadt).

The validity of this model stands or falls upon the accuracy of PP&L's forecasts, over the remaining useful lives of its generating assets, of those variables contributing to this alleged revenue shortfall. The cost variables include fuel prices, variable operating and maintenance costs and regulatory costs (such as environmental compliance) associated with generation. The income variables are the wholesale price that PP&L would realized for energy, produced by its generating assets in a deregulated retail market, and the sale price for capacity attributable to these assets (the latter becoming a cost only if PP&L were subsequently to find itself capacity deficient). The validity of any final calculation by this method is further dependent upon the accuracy of PP&L's forecast of the future rate of inflation, which determines the discount rate applied to reduce the aggregate of estimated annual stranded costs to their present value as of January 1, 1999. See Exh. PP&L Statement 7-R (Jones).

PP&L's downplaying of its future income from generating assets is a predictable response to the opportunity, which the Act incidentally affords the incumbent utilities, to attempt to finance, through an over recovery of bogus stranded costs, efforts to drive "upstart" competitors from the retail market. To the extent that actual future market prices for energy and capacity produce revenues that exceed PP&L's contrived forecasts (or it achieves operating cost economies by projections), PP&L will obtain a windfall at the ratepayers' expense. Exh. OCA Statement 2 at 2-3 (D. Smith). This occurs because PP&L will have obtained its generating assets at virtually no cost (its capital expenditures having been fully reimbursed by the ratepayers through stranded cost recovery), but will continue to earn a meaningful financial return upon them (provided only that energy prices exceed variable production costs). Exh. OCA Statement 2 at 2-3 (D. Smith). In contrast, future developers of merchant plants will have to price their generation high enough to achieve sufficient gross margins to amortize long term construction debt.

Furthermore, the Act affords PP&L the opportunity to preserve the profitability of generating units experiencing extraordinary operating costs. A utility may file with the commission for an exception to its rate cap in the event that significant changes in the unit price of fuel would prevent the utility from earning a fair return. Exh. OCA Statement 1-S at 3 (LaCapra). Because the Act does not accord comparable protection to ratepayers, in the form of compulsory refunds or rate reductions, if currently unforeseen market conditions ultimately afford PP&L extraordinary operating profits from allegedly stranded assets, uncertainty in future fuel cost estimates and stranded cost calculations should be resolved in favor of the consumer

(i.e., any error should be in the direction of a more robust future market price forecast and concomitantly lower stranded cost estimates). Exh. OCA Statement 1-S at 4 (LaCapra).

In contrast to PP&L's regulatory calculation method, the asset-based method, which has been employed by PECO, approved by the commission and strongly favored by the bulk of the intervenors in this proceeding (including the objectors), compares the estimated present value of the future worth of PP&L's generating assets, which approximates the price a willing, arms length buyer would be prepared to pay for those assets if offered for sale today, with their book value as presently carried by PP&L for accounting purposes. Exh. PP&L Statement 8-R at 7 (Schadt); TR (8/26/97): 1541 (Schadt). Stranded costs would exist to the extent that the aggregate fair market value of these assets proved to be less than their current book value. The asset-based method, in reducing by half the dependence upon long term forecast variables, is inherently less prone to error and manipulation than PP&L's regulatory approach.

The inherent unreliability of any stranded cost methodology that relies upon long term projections of volatile economic variables is perhaps best illustrated by PP&L's own experience in setting the "Culm Rates" that it currently pays for electricity generated by certain NUGs within its service territory. In December, 1982, the commission promulgated final regulations implementing on a state level section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §824a-3 *et seq.* Section 210 of this federal law requires, among other things, that public utilities buy electricity for resale from those NUGs determined by the Federal Energy Regulatory Commission ("FERC") to be Qualifying Facilities ("QFs") under PURPA.

By both FERC and commission regulations, the price to be paid for QF-generated electricity could either be set dynamically, tracking but never exceeding the utility's "energy-

only avoided cost" (to self-generate or otherwise acquire that power), or could be "levelized," i.e., fixed at the utility's best estimate of the average of its highest future annual energy-only avoided costs during the term of the power purchase agreement. As a consequence, commission regulations required each Pennsylvania utility to file annually estimates of its highest cost sources of energy for the succeeding ten years as well as a levelization of that projection. This task was remarkably similar to the forecasting obligations imposed by the regulatory model that PP&L now employs to estimate generation related stranded costs. It is therefore reasonable to ask whether PP&L was successful a decade ago in accurately predicting its energy costs today. The answer is a resounding "no."

In the mid 1980's, PP&L found itself, under the impetus of PURPA, in negotiations with a large number of would-be developers of independent generating stations. These plants intended to burn as fuel an anthracite mine waste known as "culm" that was plentiful in a portion of PP&L's service territory. In May, 1986, PP&L and sixteen of these entrepreneurial project filed a Joint Petition with the commission seeking a declaratory order approving wholesale purchase rates which PP&L itself had developed. These "culm rates," which the commission approved in June, 1986 (under Docket no. P-860126), as reasonable and in the public interest, ranged from \$.05 to \$.066 per kWh.

History has demonstrated the "culm rates," and PP&L's avoided cost forecasts upon which they were based, to be wide of the mark by a factor of more than 300 percent. PP&L does not dispute this. Exh. PP&L Statement 2 at 11-12 (Hill). Therefore, the commission should question whether there is any reason to believe that PP&L's ability to predict the long term wholesale cost of electricity has dramatically improved in the ensuing eleven years. PP&L's

own expert witness, Jones, failed to identify any specific advances in forecasting methodology that might allow the commission to attach greater credibility to PP&L's current prognostications than its past efforts. TR (8/25/97): 1443-44 (Jones).

PP&L has fared no better in making credible estimates of future capacity prices, assuming that suppliers, in addition to the incumbent regulated utilities, will be competing for capacity to support their retail energy sales. On October 2, 1997, before any electricity flowed in PP&L's Retail Access Pilot Program, the commission was forced to deal with complaints that PJM's alleged glut of capacity, to which Mr. Jones had testified less than six weeks earlier, Exh. PP&L Statement No. 7-R at 82 (Jones), had mysteriously disappeared, when alternative suppliers sought to secure the capacity margins needed to serve retail load within PJM.

According to the commission's October 2 Order, instead of capacity prices approximating \$28.06 per kW year, the figure assumed by the commission in fixing the appropriate amount of pilot program energy/capacity credits, alternative suppliers had already been advised of capacity deficiency charges of \$58.40. Order, October 2, 1997, Docket No. P-009771183 at p. 2. But for the commission's timely intervention, the "free market" capacity price appeared poised to climb to more than twice PP&L's projected capacity price in the year 2016, See PP&L Exh. STJ8, TR (8/25/97): 1478 (Jones). This disquieting development, which came as no surprise to independent power producers and other potential PP&L competitors, is certainly not aberrational, considering that it is a product of competition addressed to only five percent of the total retail market. In sum, the commission is more than justified in dismissing as unrealistically low PP&L's forecasted capacity prices because they have already been dramatically discredited.

In a similar vein, the commission should not ignore the fact that actual oil prices have exceeded PP&L's forecasted "average" price of \$15.50/barrel for virtually all of the past 20 years. Exh. OCA Statement 2-S at 7 (D. Smith). Because fuel price assumptions will have the single largest impact on projected wholesale energy market-clearing prices, empirical evidence such as this, which undermines the credibility of cost variable forecasts, justifies viewing PP&L's low projection of future energy prices with a jaundiced eye. Exh. OCA Statement 2-S at 9 (D. Smith); See also PP&L Statement 7-R at 5 (Jones).

Perhaps the most compelling indictment of PP&L's stranded cost claim is the discrepancy exposed by recalculating the future economic value of its generating assets using the projected market prices for fuel, energy and capacity developed by OCA witness Smith and expressly approved by the commission in the PECO proceeding. Given that PECO and PP&L are similarly situated EDC members of PJM with adjacent service territories, there is every reason to believe that the commission will feel constrained to apply the PECO projections in this case because the record provides no credible grounds for distinguishing one PJM member from another with regard to access to pool-wide markets for energy and capacity. Other intervenors have performed this laborious recalculation which reduces PP&L's stranded cost claim by billions of dollars.

PP&L's stranded cost estimate must be recast to comport with the standard, articulated by the commission in the PECO restructuring, to ensure uniform treatment of all PJM member companies and prevent the inadvertent award of windfall subsidies, which will irreparably skew the competitive market during its most vulnerable formative years.

B. PP&L's Failure To Countenance Future Adjustments In The CTC, To Track The Amount Of Stranded Costs Actually Incurred, Threatens Fair Competition.

Although the Act does not expressly require that the amount of the CTC be periodically modified to reflect only an EDC's empirically confirmed stranded costs, rather than those initially approved for recovery in its restructuring proceeding, section 2808 confirms that such adjustments would be in order under certain circumstances. 66 Pa. C.S. §2808. If, for example, a generating facility, originally deemed to be uneconomical in a competitive market, was subsequently sold, despite having proven itself to be operationally profitable, section 2808 (a) would not countenance further CTC recovery for that asset:

The recovery of transition or stranded costs associated with existing generating facilities *is contingent on continued operation at reasonable availability levels* of the generation facilities for which recovery has been approved, except when the generation facility is uneconomic on a production cost basis because of the transition to a competitive market.

66 Pa. C.S. § 2808(a) (emphasis added).

The failure of PP&L's proposed restructuring plan to include a procedure for periodically conforming its approved CTC to future cost realities threatens to bias the resulting competitive market. As presently conceived, the Plan would permit PP&L, for example, to continue to recover the CTC component attributable to above-market NUG power purchase contracts even if PP&L were to succeed in the future in buying out or buying down those contracts on favorable terms. This anomalous consequence alone provides PP&L with a potent economic incentive to resort to predatory practices in dealing with its NUGs to force them to sell out or otherwise compromise their economic interests.

The absence of any realty testing “true-up” procedure, that would require more than the mere reconciliation, envisioned by section 2808 (f) of the Act, of actual CTC collections with authorized annual recoveries (approved but once at the outset of the process) also threatens to allow PP&L to retain millions of dollars in undeserved, anticompetitive subsidies, should its current projection of future operational economics prove to be erroneously pessimistic resulting in a discrepancy in its favor between estimated and actual stranded costs. For example, generating assets that PP&L claims, for purposes of this proceeding, to represent economic liabilities in a competitive market may, in fact, prove at auction to have asset values well in excess of book. The credibility of this scenario is enhanced by the recent sale by two California regulated electric utilities (which the commission may administratively notice) of fossil-fuel-fired generating units, representing more than 17,500 megawatts of capacity, at prices between 1.3 and 2.65 times their aggregate book values. See The Electricity Journal (Vol. 11 No. 1 - January/February 1998) at pp. 10-11. If PP&L were to sell comparable assets after restructuring and be permitted to retain both the potential sale profit and the previously recovered stranded costs attributed to these assets, the result would be both an unconscionable burden upon customers subject to the CTC and a windfall to PP&L that could only serve to delay the onset of fair competition in the market.

In sum, the only mechanism that will counterbalance the Act’s predisposition to elicit grossly exaggerated stranded cost claims is to require that all such claims be tested annually against actual operating results, as influenced by presently unanticipated (or affirmatively concealed) extraordinary transactions, and the CTC adjusted prospectively to ensure a fair recovery.

C. PP&L's Stranded Cost Calculations Erroneously Measure The Value Of NUG Contracts.

PP&L is permitted to recover as stranded costs certain above-market cost obligations associated with NUG contracts. PP&L has overstated its future cost of power by utilizing an unreasonably high forecast of future NUG production and by relying on an excessively low estimate of future market prices, thereby overstating the above-market costs of NUG generation. Exh. OCA Statement 1 at 10 (LaCapra).

PP&L has erroneously assumed that all of the NUGs whose contracts have not been bought down or restructured will continue to operate at a production level equal to their 1994-1996 output levels throughout the balance of the contract terms. Exh. OCA Statement 1 at 11-12 (LaCapra). For most NUG projects, however, capacity factors during the 1994-1996 period were very high, reflecting the fact that the projects were new, but were beyond their start-up phases. In other words, during that time period most NUG projects were at the peak of the production they would experience throughout their entire lifetime. Exh. OCA Statement 1 at 11-12 (LaCapra). There is very little likelihood, therefore, that these capacity factors will be exceeded during the remainder of the contract lives, while there is a significant possibility that actual performance will be substantially less than this forecast. Exh. OCA Statement 1 at 11-12 (LaCapra). A reasonable approach would factor in the potential for degradation of performance with age or the possibility of extended outages due to technical or other factors. Exh. OCA Statement 1 at 11-12 (LaCapra).

Mr. Schadt, on behalf of PP&L, acknowledged that the NUG contracts do not require NUGs to maintain a 90% output. TR (8/26/97): 1567 (Schadt). He further admitted that PP&L

had made no assessment of the likelihood that the NUGs would maintain a 90% availability level throughout the contract lives. TR (8/26/97): 1566 (Schadt).

As an example of the inaccuracy of the 90% availability assumption, PP&L has assumed that it will be required to purchase 659,688 mWh annually from Gilberton, one of the largest projects under contract. This is equivalent to an annual capacity factor of more than 95% for this 79 MW facility. PP&L, however, has purchased this level of energy in only one of the nine years that it has been purchasing power from Gilberton. Exh. OCA Statement 1 at 11-12 (LaCapra). PP&L similarly assumes that it will continue to purchase 605,228 MWH annual from SER. PP&L ignores, in its analysis, the fact that it recently initiated a FERC proceeding to revoke SER's status as a qualifying facility, which could reduce the price and/or volume of purchases PP&L is required to make under its contract with SER. Exh. OCA Statement 1 at 11-12 (LaCapra); TR (8/26/97): 1570 (Schadt). Should PP&L prevail in its request, the payments made by PP&L to SER could be reduced after having received full stranded cost recovery for this project. TR (8/26/97): 1570-1 (Schadt). Mr. Schadt stated that he had not considered returning any windfall from such a circumstance to the ratepayers. TR (8/26/97): 1571-72 (Schadt).

A more accurate estimate of NUG contract costs would be based on an assumed annual average capacity factor for each NUG of about 80% for the balance of their contract lives. Exh. OCA Statement 1 at 11-12 (LaCapra).

V. PP&L'S PROPOSED CONSUMER EDUCATION PROGRAM IS DEFICIENT.

PP&L's proposed customer education program falls far short of fulfilling its obligation, under section 2807 (d) (3) of the Act, to "provide consumers with information necessary to help

them make appropriate choices as to their electric service.” 66 Pa. C.S. §2807(d)(3). PP&L’s approach is substantially deficient in the following respects:

- * It is inadequately funded;
- * It fails to anticipate participation in any statewide education effort while relegating too much of the local educational responsibility to community based organizations without evidence that this strategy will accomplish the expeditious dissemination of intelligible and unbiased information to all of the 1.2 million current PP&L customers;
- * It requires the customer to affirmatively request access to educational information in lieu of making that information directly available through mass mailings and media campaigns;
- * It excludes without justification representatives of competitive energy suppliers from the proposed “advisory committee” that would have a voice in determining the final content, format and method of dissemination of educational materials;
- * It lacks specific goals and schedule milestones against which its efficacy could be measured;
- * Its draft educational materials are colored by inaccuracies and an undue emphasis upon PP&L’s vested goodwill and the role it will play in the competitive marketplace, which suggests that, if left to its own devices, PP&L would not be adverse to manipulating consumer education to preserve market share.

These deficiencies undermine the credibility of PP&L’s unqualified assertion that it is “in everybody’s best interest that customers are educated,” TR(8/29/97): 1969 (Lennon), and its professed intent to achieve a customer “awareness goal” of 100 percent. TR(8/29/97): 2013-14 (Lennon). By impeding the exercise of fully informed customer choice, the deferred and anemic educational efforts contemplated can only delay the onset of vigorous competition to the benefit of PP&L as the incumbent monopoly service provider. Only by ordering PP&L to modify or supplement its restructuring plan to address these concerns can the commission hope to avoid a result at odds with the intent of the Act.

A. PP&L's Preliminary Customer Choice Education Budget Is Woefully Inadequate

PP&L's proposed budget for consumer education through the year 2001 is in the record as Exhibit DGL 2. In total, PP&L proposes to spend less than one dollar per existing customer on education efforts over five years. As confirmed by the testimony of OCA witness Barbara Alexander, even the largest annual budgeted expenditure (\$467,500 in 1998) represents but .002 percent of PP&L's annual revenues. Exh. OCA Statement 5-S at 4 (Alexander).

One need only compare PP&L's paltry \$ 1,113,500 customer education budget to PECO's commitment of \$ 24 million over three years (commended and approved by the commission) to conclude that, despite PP&L's admission that "[i]n a competitive electric generation market, it will be critical for *all* consumers to have access to up-to-date information . . .," Exh. PP&L Statement 17 at 3 (Lennon), it is not prepared to "put its money where its mouth is." See PECO Restructuring Order at 150. Assuming that the commission were to require PP&L to match PECO's total level of funding (\$ 16 per customer), its education budget should approximate \$ 19.2 million (assuming 1.2 million customers served).

In light of this monumental discrepancy between PECO's and PP&L's assessments of the level of funding required to mount a consumer education program that complies with the Act, the commission should summarily reject PP&L's education plan because it fails to envision the *sustained application of substantial resources* required to achieve acceptable levels of consumer awareness and sophistication.

PP&L's education budget is also suspect in its proposed funding levels for different activities. Despite PP&L's intent that community leaders and community based organizations play the dominant role in educating the public regarding retail electricity supply competition,

TR(8/29/97): 1970, 2009-10 (Lennon), the bulk of the proposed funding (more than 60%) is earmarked for production and support of PP&L's Customer Choice Handbook, which PP&L is *not* presently proposing to distribute to all of its current customers. Exh. PP&L Statement 17 at 7 (Lennon); TR: 1974 (Lennon). Over the five budgeted years, PP&L proposed to spend only \$110,000 on "Community Workshops/Adult Education." Exh. DGL 2. This substantial discrepancy between function and funding casts further doubt as to the bona fides of PP&L's entire educational strategy.

B. PP&L's Dismissal Of Statewide Media Campaigns In Favor of Grassroots Education Spearheaded by Community Based Organizations Is Shortsighted.

PP&L's proposal, by eschewing the mass media and other "broad brush" communication strategies, which recommend themselves without regard to EDC service territories, places undue reliance on community groups and individual community leaders to implement the local educational effort. If the commission chooses to be guided in this case by its final pronouncements in PECO's restructuring proceeding, PP&L would be required instead to commit sixty-five percent (65%) of its total education budget to support a comprehensive, statewide consumer education strategy reliant upon mass media outlets.

PP&L has demonstrated no unique circumstances that might justify the commission to modify the educational expectations articulated in its PECO restructuring order. PP&L has performed no studies to assess whether its proposed, parochial approach would likely succeed in disseminating useful information to substantially all of PP&L's current customers. TR(8/29/97): 1970-71 (Lennon). It has made no effort to estimate how many of its customers will likely be

contacted by community based organizations or will acquire and read the Customer Choice Handbook. TR(8/29/97): 2011-12, 2022-23 (Lennon). It has not even contacted any of its purported targeted community group leaders to see if they are prepared to participate in, or have any reservations concerning the efficacy of, grassroots education unsupported by a mass media campaign. TR(8/29/97): 2024 (Lennon). Therefore, the commission has absolutely no empirical evidence within the record from which it might reasonably conclude that PP&L's plan will meet the broad based educational obligations imposed by the Act.

C. PP&L's Approach Is Insufficiently Pro-Active.

Although PP&L intends to spend the bulk of its own educational efforts and budget on the development, production and evaluation of a Customer Choice Handbook, it has no present intention of placing the document in the hands of all of its customers simultaneously. Rather, customers will have to request to receive a copy. Exh. PP&L Statement 17 at 7 (Lennon); Exh. PP&L Statement 17-R at 9 (Lennon). PP&L also has no plans to provide to all of its ratepayers the more limited version of the Handbook applicable to its pilot program, even though it acknowledges that any ratepayer can choose to participate, TR(8/29/97): 1972-73 (Lennon), and therefore could profitably use the information. Unfortunately, PP&L has not endeavored to estimate in either case the number of customers who would be sufficiently motivated to avail themselves of this less-than-convenient source of information. TR(8/29/97): 2011 (Lennon). Without statistical support in the record, the commission has no choice but to reject PP&L's self-help strategy as inherently incapable of responding to the informational needs of the majority of consumers.

Similarly, PP&L has presented no studies or other empirical evidence which support its contention that “[u]se of the media is not the way to educate people” TR(8/29/97): 1970 (Lennon). The commission should recognize, as testified to by OCA’s witness Alexander, that only through a coordinated, multi-media campaign will the bulk of customers become receptive to the details of competitive electric supply. Exh. OCA Statement 5-S at 5 (Alexander). PP&L’s aversion to exploiting mass media to present the facts is both self-serving and readily explained by the tendency of more efficient communication methods to prompt customers in greater numbers to shop earlier in the transition process. The commission should reject PP&L’s education plan because it fails to address these valid concerns.

D. PP&L’s Exclusion Of Competitive Industry Representatives From Its Educational “Advisory Committee” Is Suspect And Unjustified.

PP&L has no present intention of allowing representatives of any energy market competitors to serve in its proposed “Customer Choice Education Advisory Committee.” TR(8/29/97): 1974 (Lennon). However, the record is silent as to PP&L’s grounds for this exclusion. One would suspect that, in PP&L’s view, a hand picked group of community leaders, unschooled in the nuances of the transition to customer choice, would be more malleable and accommodating to PP&L’s tacit commercial objectives if it were insulated from the critical insights of competitive industry representatives.

PP&L’s parochial approach bespeaks a fear that scrutiny of PP&L’s proposed educational materials and delivery strategies by other energy providers, with an overriding interest in ensuring that customer education remains competitively neutral, may, in fact, achieve that result. No proprietary concerns can credibly rationalize excluding competitive voices from the process.

Similarly, the fact that customer education materials must ultimately pass muster with the commission is of little comfort if, upon submission, they prove to be so biased as to require substantial revision which delays their introduction and use (to PP&L's inherent benefit as the current monopoly provider).

In sum, the commission should either require PP&L to commit to exclusively using educational tools developed on a state-wide level under commission auspices, which PP&L has indicated that it is not prepared to do, TR(8/29/97): 1993 (Lennon), or ensure that any advisory panel which PP&L relies upon includes a representative cross-section of market participants.

E. PP&L's Draft Educational Materials Confirm The Need For Industry Oversight.

A cursory review of PP&L's May 7, 1997 draft of its pilot program Customer Choice Handbook, Exh. DGL 3, demonstrates the shortcomings of PP&L's insular editorial process. The test includes a number of factual distortions and misleading turns of phrase which collectively serve to promote PP&L's existing special relationship with its customers. For example, under the heading "How to choose an electricity supplier" (which appears on page 4 of the exhibit), the reader is informed that "PP&L will give pilot program participants a list of qualified electricity suppliers. It is then up to you to get information on prices and terms of service from *other* electricity suppliers." (emphasis added). The insertion of the word "other" creates a significant ambiguity: are the suppliers from whom prices and terms may be sought other than those on the list? The text does not clarify this.

The first of the "[q]uestions and answers about PP&L's pilot program" (which appears on page 6 of the exhibit) includes language which advises that, if you participate in the pilot program, PP&L "will offer you *first choice* when full-scale customer choice begins, as early as

1999.” (emphasis added). Aside from the fact that “first choice” is not defined, the text misrepresents PP&L as the party offering the customer some benefit when, in fact, uninterrupted choice of supplier by pilot program participants is mandated by the commission [citation to order] rather than PP&L. As written, this arguably inadvertent misinformation enhances PP&L’s stature as perceived by its monopoly customer base.

PP&L’s draft handbook also manipulates the truth by strategic omission. The most telling example of this is its failure to inform the reader at any point that PP&L, through a competitive marketing division or subsidiary, intends to be one of the “[e]lectricity suppliers [that] may call you to try to sell their services.” Exh. DGL 3 at 8. It is clearly to PP&L’s competitive benefit to attempt to distance itself from those undefined “electricity suppliers” that may invade the customers’ privacy in furtherance of competition. Were PP&L to candidly indicate that it intends to aggressively compete with itself for retail energy business, it would likely add credibility to the marketing efforts of its competitors and prompt more customers to shop. A truly objective educational message would not further PP&L’s commercial interests in this subtle but significant way.

These textual biases, as well as other anomalies of lesser potential impact, dramatize the need for comprehensive competitor scrutiny of all proposed consumer education messages developed by fellow market participants. They also add weight to the opinion, voiced by Enron’s witness, Raymond W. Bowen, Jr., that

the only meaningful separation [between marketing activity and the customer education process] which has any chance of being enforced is to preclude both utilities and suppliers from engaging in the preparation or dissemination of customer education information or materials . . . --it makes the most sense to have this educational information prepared and disseminated on a centralized basis to consumers throughout

the state by the Commission or an independent third party under the Commission's supervision, rather than dividing the preparation and dissemination . . . on a utility service territory by territory basis.

Exh. Enron Statement 5.0 at 28-29 (Bowen). The need for coordinated, commission-led efforts to ensure the production and comprehensive distribution of objective and effective consumer educational aids is echoed in the testimony of OCA witness Barbara Alexander, who found support for it even in the preliminary results of PP&L's initial focus group research. Exh. OCA Statement 5-S at 9-12 (Alexander); see also Exh. OCA Statement 5 at 17-20. In light of this, PP&L's refusal to participate in and financially contribute to a unified, state-wide strategy, Exh. PP&L Statement 17-R at 16 (Lennon) cannot be reasonably justified (unless one assumes that its insistence upon pursuing an independent effort is motivated by the expectation that this will achieve a competitive advantage).

F. PP&L's Education Plan Lacks Firm Performance Objectives And Schedule Milestones.

PP&L has failed to counter the significant criticism, voiced by OCA's witness, Barbara Alexander, that its consumer education proposal "does not have any time lines or interim goals and objectives to determine whether the program is achieving its objectives." Exh. OCA Statement 5 at 5 (Alexander). Although PP&L attempts to pass off six "key principles," Exh. PP&L Statement 17 at 4-5 (Lennon), originally identified as underlying its customer choice education program, as "interim objectives," Exh. PP&L Statement 17-R at 7, it will be extremely difficult to determine whether they have been achieved on a timely basis because they are expressed in the broadest possible terms and are not associated with any discrete performance milestones. This shortcoming is compounded by PP&L's intent to rely for guidance in the

establishment of program goals, methods and tangible materials upon input from its proposed “Customer Choice Education Advisory Council,” which will not be convened for the first time until *after* all proceedings in PP&L’s restructuring case are completed. Exh. PP&L Statement 17-R at 12. At the earliest, this will not occur until February, 1998, which suggests that no actual customer education efforts will begin until substantially later in that year. This delay is both intolerable and unnecessary. Furthermore, PP&L’s failure to commit to a firm performance schedule will prevent the commission from assessing whether PP&L is moving aggressively forward in good faith or is dragging its feet to impede the transition to a competitive marketplace. The commission should therefore require PP&L to amend its proposal to provide detailed program objectives and schedule commitments.

VI. CONCLUSION.

For the above reasons, SER and Gilberton request that approval of PP&L's Restructuring Plan be denied. In the alternative, SER and Gilberton respectfully ask that PP&L be ordered to submit substantial revisions to the many provisions of its Plan that would impede rather than advance the achievement of the Act's competition promoting goals.

Respectfully submitted,
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Dated: February 11, 1998

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In the Matter of Pennsylvania Power & Light Company's Restructuring Plan :
: Docket No. R-00973954

CERTIFICATION OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing documents upon the participants, listed below, in accordance with the requirements of §1.54 (relating to service by a participant):

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of PP&L for Approval of :
its Restructuring Plan Under Section 2806 : Docket No. R-00973954
of the Public Utility Code :

UNREPORTED DECISIONS OF COMPETITIVE INTERVENORS

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Decision 97-05-039 May 6, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's
Proposed Policies Governing Restructuring
California's Electric Services Industry and Reforming
Regulation.

R.94-04-031
(Filed April 20, 1994)

Order Instituting Investigation on the Commission's
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I.94-04-032
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OPINION ON THE UNBUNDLING OF REVENUE CYCLE SERVICES

Summary

In an effort to promote retail competition for the provision of electric services to all customers, many interested parties have urged this Commission to allow competitive firms to provide their own consolidated billing, metering and other related services. In this decision, we conclude that competing energy service providers should be allowed to present consolidated bills that reflect the full cost of providing service. We establish that energy service providers that utilize consolidated billing are responsible for all payments, including payments of the Competition Transition Charge and the Public Goods charge regardless of whether they receive payment from their end-use customer. This decision also allows energy service providers to provide for their customers meters other than those commonly furnished by the utility distribution company. Many also argue that customers should not be required to pay the utility distribution company for the costs that the utility does not face when competing retail energy service providers are presenting consolidated bills, providing meters or fulfilling other related functions. Here, we conclude that in our unbundling proceeding, we will determine the appropriate way to separately identify these cost savings. Where the energy service provider furnishes the meter, that meter must be consistent with reasonable standards of open architecture and satisfy the distribution company's need for accurate calibration, appropriate installation, and the provision of information that is sufficient and reliable. By the same token, the distribution company will have to adhere to the same standards if it decides to adapt or replace its existing meters. In our direct access proceeding, we will determine rules for the development of open architecture standards. In that proceeding, we will also develop rules that will guide the energy service providers and distribution utilities in creating service agreements that will define the way the information needs of each entity will be met, no matter which one provides the meter.

In this decision, we also re-affirm the commitment in the Preferred Policy Decision (D.95-12-063 as modified by D.96-01-009) to bring the benefits of the hourly-

pricing of electricity created in the Power Exchange (PX) to as many customers as possible. Competitive provision of metering services furthers that goal by allowing the market to respond to customers' desires to tap the benefits of real-time pricing provided by the PX's hourly price signals.

Just as importantly, however, we will permit utilities to modify their existing meters, on a system-wide scale, with automated meter reading (AMR) technology. Such adoption would provide all customers—if they choose—with information about their hourly consumption patterns, and allow them to use that information, in conjunction with the PX's hourly energy prices and an hourly-rate tariff, to lower their bills. The decision to install AMR is left up to the utilities. However, in the spirit of this decision, only those utility customers who take advantage of the AMR option are required to reimburse the utility for its cost. The utility's shareholders are at risk for the full recovery of AMR costs, as will be discussed below.

Furthermore, we articulate the means by which the Commission can ensure that energy service providers utilizing unbundled services do so in a manner consistent with Commission consumer protection rules and in accordance with established standards and protocols.

Background

The Commission encouraged the creation of working groups to recommend means of implementing the policies it had adopted for restructuring the electric industry. The Ratesetting Working Group is such a group. Among other things, it set out to identify the highest priority steps for the Commission to take in unbundling utility rates prior to January 1, 1998. In discussing this issue, the group found itself at a disadvantage because the Commission had not determined, as a matter of policy, what aspects of utility service needed to be unbundled before 1998 in order to allow for meaningful retail competition at that time. The members of the working group were unable to agree on an answer. In order to prompt a determination by the Commission on this point, the Ratesetting Working Group presented a report dated August 26, 1996 that offered five options (see Decision (D.) 96-10-074 for a summary of these options).

The controversy centers on the fate of services and costs related to metering, billing and other information services. For convenience, we sometimes refer to these as Revenue Cycle Costs. Some say that these costs should be included in the bundled charge for distribution services. Others argue that these costs should be separately identified to allow some customers to elect not to buy these services from the distribution company. Of those who support unbundling, many argue that the costs must be separated now so that customers can begin choosing whether or not to pay the distribution company for these services in January 1998. They assert that a failure to do so will reduce the availability of direct access opportunities to residential and small business customers. Others argue that the parties and the Commission should take more time before allowing unbundling to occur to allow for further study of communication and information needs.

Reflecting on the Ratesetting Working Group report and comments filed in response to it, the Commission issued D.96-10-074, in which it recognized the importance of resolving this issue and asked parties to address specific issues in additional comments that were submitted on December 20, 1996. The Commission held a full-panel evidentiary hearing on January 15, 1997, receiving sworn statements from 26 witnesses representing the full spectrum of interests. The Commission received additional information in comments that were filed on January 21, 1997 and, in response to a request from Southern California Edison Company (Edison), received final rebuttal comments on February 7, 1997. Numerous parties filed comments on the Proposed Decision on March 6, 1997 and reply comments on March 11, 1997. We have reviewed the comments and made changes or additions to this order where appropriate.

The following is a simplified summary of the models for unbundling revenue cycle costs and services proposed by various parties.

The PG&E Model

Pacific Gas and Electric Company (PG&E) proposes that a direct access suppliers be allowed to choose among three billing options:

1. **Consolidated Supplier Billing**, under which the distribution company would bill the energy supplier for the services provided directly by the distribution company to the customer and the supplier in turn would provide a consolidated bill to the customer,

2. **Consolidated Distribution Company Billing**, under which distribution company would place the supplier's energy charge on a distribution bill, or

3. **Dual Billing**, under which the energy supplier and the distribution company would bill separately for their own services.

In addition, PG&E asks the Commission to adopt one of two metering options:

1. **System-wide Deployment of Automated Meter Reading (AMR)**, where the distribution company would retrofit almost all existing meters to allow for remote meter reading through radio transmission. The distribution company would have the sole right to install, calibrate and maintain the meter and would be allowed to recover the implementation costs from its ratepayers, or

2. **Customer Choice**, where competitive suppliers could furnish, for their customers, any meter technology meeting the utility's standards, so long as the utility would maintain the sole right to install, calibrate and maintain the meter to ensure that the utility's standards for safety, reliability and accuracy were met. This meter would replace the existing utility meter for all metering purposes.

PG&E has not expressed a preference of one metering option over the other. In either event, certain conditions would apply. First, only one meter would be needed at each point of service connection. Second, only one entity would read the meter. The energy supplier and the distribution company would share data-base level information about usage. Third, PG&E joins every other party in supporting the development of open architecture, or interoperability standards, which would allow meters with varying levels of functionality to connect to the network communications and data infrastructures. As is true of all other parties, PG&E believes that the market participants could develop the standards themselves. Finally, PG&E supports the use of

load profiling (i.e., the use of template load shapes) to provide direct access for residential customers that do not have an hourly meter.

PG&E does not speak either for or against the separation of costs that would allow customers to avoid paying for services that they are not buying from the distribution company. However, PG&E does argue that in some instances, the savings due to customers who choose third-party service options may be small or non-existent and that the distribution company should not have to provide cost reductions to customers if the distribution company does not actually avoid any costs.

The SDG&E Model

San Diego Gas & Electric Company's (SDG&E) approach to the unbundling of revenue cycle costs and services differs from that of PG&E in two significant ways. First, SDG&E recommends that the Commission not order the broad implementation of AMR technology, arguing that it would be too expensive, would limit entry of competitive suppliers and would limit technological innovation. Second, SDG&E recommends that the Commission require the distribution companies to provide a bill credit to reflect savings to the distribution company that result when energy suppliers provide revenue cycle services.

The Edison Model

Edison agrees with PG&E, SDG&E and most other participants that energy suppliers should be allowed to provide consolidated billing. In addition, Edison argues that it is acceptable for an energy supplier to install an additional meter in order to measure its sales and provide value-added services. However, Edison proposes keeping its own meter in place even where an energy supplier chooses to install one. A customer that chooses to use a meter other than the one offered by the utility would have two meters. Edison argues that it has the right to make its own usage measurements and that it should not be asked to trust the accuracy of another company's measurements or record keeping.

Edison would not be reducing its costs, because it would continue to meter each of its customers. Thus, it would have no savings to pass on to customers that

elect to use a meter provided by an energy supplier. The utility also argues that any savings it would face if the energy supplier provides billing or other related services would be insignificant, but that it would be unlawful to reduce a customer's distribution charges even though these services are avoided by the utility. Edison asserts that it does not cost the same to serve each customer, so that any reduced charges based on the average cost of service would harm the utility. Edison envisions that energy suppliers would seek out the customers whom it costs less to bill (the ones with below-average costs) and leave the utility with the more expensive customers (the ones with above-average costs).

Finally, Edison proposes adding AMR technology to the meters of 85% of its customers and charging its future distribution customers for the resulting net cost. Edison argues that this would be the fastest and cheapest way of making hourly pricing available to all customers, and that this would improve the opportunities for direct access providers.

Models Offered by Other Energy Businesses

All of the potential energy suppliers participating in this proceeding argue that direct access will not be available to all customers unless energy suppliers can offer revenue cycle services and unless the utilities reduce customer charges to reflect the resulting savings. None of these participants agree with Edison that it is appropriate for the utility to install AMR technology throughout its service territory at ratepayer expense. Instead, they would allow each customer to choose its own metering approach. This could enable energy suppliers to also offer value-added services to their electricity customers. The possibility of offering value-added services improves the incentive for energy suppliers to offer direct access opportunities to the lower usage customers (residential and small business) who provide less of an opportunity for the profitable sales of electric energy alone.

The Position of Ratepayer Groups

Most ratepayer representatives support the rapid unbundling of revenue cycle services and costs. This includes the Office of Ratepayer Advocates, The Utility

Reform Network (TURN), Utility Consumer Action Network (UCAN), the California Farm Bureau Federation, the Department of General Services, the University of California, the California State University, Pacific Bell, and the Robinsons-May Department Stores. An exception is the California Small Business Association, which is not opposed to the unbundling of these services per se, but encourages the Commission to place adequate consumer protections in place before launching competition for meters and meter reading. In addition, none of these groups supports the system-wide addition of AMR technology to existing meters at ratepayer expense. The California Large Electric Consumers Association and the California Manufacturer's Association join others in specifically opposing Edison's metering proposal.

Discussion

The question, here, goes to whether or not energy suppliers should be allowed to provide their customers with retail services that include consolidated billing, metering and related services and, if so, whether the distribution utility should reduce its charges to reflect any resulting savings. Parties raise various issues that relate to the implementation of such a policy. Those implementation questions would be addressed in our direct access proceeding, to the extent that they concern rules and standards, and in the rate unbundling proceeding to the extent that they concern costs and savings. We will address the fundamental policy questions here, in order to determine what additional work, if any, needs to be undertaken in those other proceedings.

There are long-run issues that might motivate this Commission to consider the merits of allowing energy suppliers to offer these services some time in the future. What prompts us to ask these questions now is a concern that direct access opportunities to residential and small commercial customers in 1998 might be severely limited if we fail to allow energy providers to provide these services and to offer their customers the resulting savings.¹

¹ See the discussion section of D.96-10-074.

Billing

Among the participants, there is near unanimity in support of allowing energy suppliers to provide consolidated electric bills, if they choose to do so. The advantages of a consolidated bill are self-evident. Customers may find it more convenient to receive, analyze and pay a single bill. There is at least an opportunity for savings, since it might cost less to prepare, mail and process a single bill than it would cost to similarly handle separate bills from the energy supplier and the distribution company. By allowing the energy supplier to provide the single bill, the energy supplier has an opportunity to seek added value by reinforcing its business identity, combining billing for various services, or using the bill to advertise other business offerings. These opportunities may help encourage suppliers to serve the residential and small commercial markets, where the lower volumes provide less of an opportunity to profit through sale of electric energy alone. PG&E has described three different options that could be made available to customers and energy service providers (relying on dual bills, or consolidated bills provided either by the distribution company or the energy supplier). SDG&E and Edison endorse these options. We will direct each of the utilities to accommodate each of these options in a manner consistent with rules that we will develop in our direct access proceeding.

Energy service providers that utilize consolidated supplier billing will be responsible for payment of the billed amounts regardless of their ability to collect from their customers. The energy service provider will, in effect, be billed by the distribution company for the distribution services, Competition Transition Charge and Public Goods Charge associated with their customers usage and will be responsible to pay the distribution company the appropriate amount. It is then the responsibility of the energy service provider to recover those amounts from its customers. In this manner, the distribution company is indifferent to the collection ability of an energy service provider utilizing bill consolidation and its revenue stream is protected.

Because the energy service provider utilizing bill consolidation is responsible to make the payments for the services billed to customers, it is appropriate for the distribution company to be allowed to impose reasonable creditworthiness

requirements on energy service providers utilizing bill consolidation. By reasonable, we mean creditworthiness requirements that are the same as those required of a similarly-sized and situated customers. This may decrease the risk of uncollectibles to the distribution company and will certainly maintain the security of the utilities revenue stream. We would not expect an energy service provider with \$100,000 in monthly consolidated billings to be treated any differently from any other \$100,000 a month customer of the distribution company. On the other hand, we would not expect the distribution company to do business with an energy service provider that is not creditworthy, just as we do not require a utility to do business with uncreditworthy customers. Utilities shall file their credit requirements by advice letter within 60 days of the effective date of this decision. These credit terms will further guard the revenue stream of the distribution company.

Furthermore, we will require energy service providers utilizing consolidated supplier billing to describe the distribution companies' charges on their bills in a manner consistent with the bill reporting standards we set for the distribution companies. As part of their providing unbundled billing service to energy service providers, distribution companies will set terms and conditions that will ensure this uniformity of bill-reporting standards. How rates will be unbundled will be addressed in our unbundling proceeding. But uniformity of bill reporting is an important consumer protection issue and will be taken up in the consumer protection phase of our direct access proceeding.²

Meters and Meter Reading

There is less agreement about the involvement of energy suppliers in the furnishing of meters, meter reading and other related services. Most agree that the

² For example if the Commission requires that the Public Access Charge will be separately stated and described as a "State Mandated Public Goods Charge," all firms utilizing bill consolidation would have to list it on the bill the same way.

energy supplier should be able to install and monitor its own meters.³ However, Edison asks the Commission to allow it to install AMR technology for 85% of its customers at ratepayers' expense. In addition, Edison asks to be allowed to double-meter all of its customers who choose to use an energy supplier's meter.

Edison argues that if it provided almost all of its customers with time-of-use capability, it would be doing the best thing possible to enable those customers to purchase from direct access providers. Underlying this is Edison's assumption that a customer must have a time-of-use meter in order to take advantage of direct access opportunities. The record does not support this assumption. Energy providers, customers and representatives of other utilities have all stated that load profiles could be used to determine the billing patterns for customers that do not have time-differentiated metering capability.

At the same time, however, the implementation of AMR may promote our goal of spreading the benefits of real-time pricing to as many customers as possible. In the Preferred Policy Decision we noted our concern that smaller customers' ability to use real time pricing "is inhibited by existing technologies" (*Id.*; mimeo at p. 78). AMR potentially offers a solution to this problem by providing a simple technology with sufficient economies of scale to bring it within the reach of many customers. Edison assumes that the greatest societal benefit can be achieved by capturing the economies of scale that would result if all customers used the same metering system. It does appear likely that if everyone uses a given metering approach, the cost of producing that system per customer would be lower than if only a smaller set of customers uses it. However, other factors besides cost can be important to customers. Customer choice among competing providers may foster technological innovation, provide value-added services, and act to keep prices low.

³ This is consistent with the Commission's existing policy in this area. See D.95-12-063, Conclusion of Law 28, in which the Commission stated, "[s]uppliers or third-party intermediaries may install metering equipment on behalf of a customer so long as the meter meets standards adopted for the distribution utility."

Lucent Technologies argues that in a competitive environment a utility's investment in AMR should be viewed as a strategic business decision that potentially could create barriers to competition by other energy suppliers. They argue that such a decision should not be dictated as a matter of public policy, nor financed with ratepayer funds. These concerns expressed by Lucent and others carry great weight. We want to ensure, among other things, that the additional costs created by AMR do not discourage customers from investing in competing technologies. It also would be important to ensure that new meter-reading technology did not reduce the ability of competing energy providers to offer value-added services to customers. This is important, because we see the potential to offer such services as a means of encouraging the market to offer Direct Access to smaller customers, including such services as real-time pricing.

For all of these reasons, we do not find it appropriate to direct the distribution utilities to install AMR or any other type of advanced metering system throughout their service territories at additional cost to ratepayers. Nor do we require that customers purchasing retail service from a competing energy provider maintain two meters on site, as Edison proposes. Instead, we will permit a distribution company to decide whether it wants to seek the Commission's approval of a proposal to adopt AMR or similar technology subject to the following conditions:

- utility customers will have the choice of deciding whether they want to use the real-time metering capability offered by the technology
- only customers electing to use the real-time pricing capability of AMR will be required to pay for the costs of that technology
- utility shareholders will be at risk for the full recovery of the technology's costs
- at the same time, the utility installing AMR would not be required to lower its revenue requirement associated with metering as a result of cost savings achieved from adopting the technology
- balances risk and reward between ratepayers and shareholders
- a utility deciding to adopt AMR would provide the Commission with a deployment plan showing how the technology would be geographically deployed, and on what timetable

These conditions address the competitive concerns expressed earlier by not obligating ratepayers to pay for AMR if they do not want it. This subjects AMR to a market test. To the extent its reputed cost advantages are as significant as Edison claims—and providing customers see a need for the real-time pricing capability it offers—it will be used. Shareholders of a utility adopting AMR assume the risk that such benefits may turn out to be smaller than predicted. Customers preferring to adopt an alternative supplier's meter would not be discouraged from such an option by having to pay the cost of the utility's AMR, and in fact would be advantaged by receiving a credit that would include among other things the utility's revenue requirement for meter reading and related activities. And finally, the requirements we lay out below for the sharing of information between the utility and alternative suppliers will prevent a utility from using AMR to restrict the ability of alternative suppliers to compete for its customers.

However, any system that is used by a regulated distribution company must comply with applicable standards of open architecture and provide opportunities for value-added uses to all competitors on an equal basis. We find that it is preferable to allow energy suppliers to provide and customers to choose the billing and metering systems that are best for their purposes.

This position in support of an open architecture and interoperability is consistent with this Commission's policy in telecommunications. In the Commission's Infrastructure Report to the Governor, *Enhancing California's Competitive Strength: A Strategy for Telecommunications Infrastructure* (November 1993), which Governor Wilson adopted, we established a clear policy preference for interconnected and interoperable communications networks and have long supported open platforms.⁴

⁴ *Enhancing California's competitive Strength: A Strategy for Telecommunications Infrastructure, A Report to the Governor*; California Public Utilities Commission, November 1993; page 16, 47.

In that report the Commission stated, "simply put, telecommunications infrastructure is a hostile environment for conventional public planning. The astounding rate, vast scope and unpredictable nature of technological innovation strongly suggest that any public strategy which is preoccupied with direct technology planning faces a high probability of failure."⁵

As support for this position, the Commission cited a telecommunications industry representative and former state regulator who said:

"If you could today wave a magic wand and decide that instantaneously a new or specific technology would be deployed in the State of California, you should definitely resist the temptation, because it has been proven time and time again that as technology deploys itself further and further, deeper and deeper into markets, it always improves along the way. To make any investment into a single technology now would be to deprive consumers of improved technologies of tomorrow."

AMR technologies are, at heart, communications technologies, and it is incumbent upon this Commission to ensure that the deployment of this network is consistent with our existing telecommunications infrastructure policies. In that report we clearly and persuasively argued for open platforms and hence it is appropriate to require that the AMR networks deployed also allow California to reap the diversity and innovation such an open model engenders.

Nonetheless, we must address legitimate concerns about the information needs of the various participants and the interchangeableness of metering systems.

When a customer chooses to purchase retail service from a firm other than the utility, the energy supplier and the distribution utility each have a strong interest in receiving information about usage that is reliable in terms of quality and accuracy. Each distribution utility and energy supplier may not have the same information needs but both need to be assured of the accuracy of the information they receive. Rather than

⁵ Id.; p 26.

establish a single standard for data quality and access, we will direct those energy suppliers that wish to offer their own metering services to enter into a service agreement with the distribution company specifying the nature of the information to be collected, the means for sharing data, and a reasonable approach for ensuring that the metering equipment is installed, calibrated and maintained properly. The distribution utility may not unreasonably refuse to enter into such an agreement. The Commission will review each agreement to determine that it is not discriminatory or anti-competitive. If the parties are unable to reach an agreement, the Commission will resolve the remaining disputes. In our direct access proceeding, we will establish the rules affecting this process and the conditions under which the distribution utility will provide billing information to all energy suppliers.*

We want not only to encourage direct access, but also preserve the vitality of competition after the customer makes an initial choice. If a customer obtains a meter that is not easily used by other energy suppliers, another barrier to competition has been erected. All participants agree that in order to avoid constructing such a barrier, those who plan to participate in the market place must agree upon standards for open architecture for meters and communication. This is consistent with the Commission's requirement, as articulated in the our Telecommunications Infrastructure Strategy, that communication networks be interoperable. This refers to creating specifications that will ensure that all meters will provide information and communicate via an open architecture. Many participants expressed confidence that open platform standards could be developed within several months. What is required is a direction from this Commission for the parties to do so. In this decision, we direct the participants to begin this process and to report back to the Commission no later than July 25, 1997 within the direct access proceeding with the standards that the participants propose to be adopted.

* In developing and administering this process, we will draw on our experience in arbitrating and reviewing interconnection agreements for local telecommunications services. In comparison, the subject matter of the agreements contemplated here is far more limited and discreet.

The California Energy Commission supports the unbundling of Revenue Cycle Costs and Services. However, it would have the utilities separately identify the costs for the various components of Revenue Cycle Services now and would allow firms other than the distribution utility to compete for the provision of these services only at some later date. Its stated goal in delaying the start of competition would be to allow time for a stakeholder working group to develop a retail information management plan that specifies information management arrangements, infrastructure and protocols for the restructured industry. The Energy Commission argues that while large consumers may be well positioned to take advantage of competitive offerings, smaller consumers are not, creating the concern that large consumers might invest in unique technology that will inhibit and perhaps prevent a universal infrastructure that all customers and suppliers may use. Thus, the Energy Commission encourages this Commission to put detailed rules and standards in place before allowing any customers to receive competitively-provided revenue cycle services. In addition, before competition for these services begins, the Energy Commission asks that this Commission consider a system of randomly assigning an energy provider to those customers that fail to choose a provider.

We agree with the Energy Commission that it is important to create standards to ensure open architecture, but are persuaded by the testimony of others that much of this work can be done in the next few months. With the meter and communication protocols and service agreements discussed above, there is no apparent reason that the participants, with assistance of this Commission, cannot ensure the use of technology that would make direct access options available to customers in all classes.

It is important for all current and potential energy service providers to begin planning for an environment in which they will have the opportunity to offer meters of their own choice. However, we are concerned that to encourage such offerings as early as January 1, 1998 could prompt hasty choices by competitors, thus increasing the likelihood of consumer dissatisfaction. For all but the largest customers (20 kilowatts (kW) or greater), we prefer to use the time available through 1998 to

encourage a more studied movement through the various steps that must precede such a new commercial offering: the development of standards for open architecture, the completion of service agreements between service providers and distribution companies, and the selection of appropriate technologies. For these reasons, we will defer the initiation of competitive offerings of meters and meter reading until January 1, 1999 for customers below 20 kW.

Cost Separation

Currently, PG&E and Edison propose to bundle all revenue cycle service costs with their distribution charges. SDG&E and many other participants propose separately identifying the cost savings realized by the distribution utilities when other firms provide revenue cycle services in order to ensure that customers can benefit from the resulting savings. Those who oppose removing these redundant charges rely on three fundamental arguments. First, as discussed above, they argue that the cost differences are too small to affect business decisions. This assertion is unproven both because the Commission has yet to determine the level of cost savings and because the record does not demonstrate that even a small savings would not affect business decisions.

Second, PG&E and Edison assert that billing and metering costs are not the same for all customers and that while it would be most practical to identify those costs on an average cost basis, this would enable energy suppliers to focus on the low cost customers and leave the distribution utility without the revenues needed to serve the remaining customers. We believe that these arguments are more appropriately addressed in our unbundling proceeding, and we make provisions below to do that. The arguments do not affect the threshold question whether or not appropriate costs savings should be reflected in a customer's bill, which is our concern here. We want to determine these costs accurately as possible and to that end are open to proposals that would "deaverage" costs.

In determining these costs accurately it is entirely appropriate to consider the net reduction in costs to the utilities that occur as a result of unbundling and the

provision of certain functions by entities other than the utilities. It would be unfair and inaccurate to consider costs that are reduced while not considering costs that may be increased in order to provide the function on an unbundled basis.

Parties have raised one threshold issue about cost separation that does need to be addressed here. This involves Public Utilities Code Section 368(b), which, it is argued, might prohibit reflecting these cost savings in the customer's bill. This section states, in part, that "[t]he separation of rate components...shall be used to ensure that customers of the electrical corporation who become eligible to purchase electricity from suppliers other than the electrical corporation pay the same unbundled component charges, other than energy, a bundled service customer pays." Some argue that this language requires charging direct access customers for all services, whether they buy them or not (and whether the utility incurs costs to provide them to a given customer or not). We do not read this section to require customers to pay for services that they elect not to buy. Instead, we understand this section to mean that direct access customers must pay the same amount as bundled customers pay for the services that they do buy.

There is no persuasive reason to cause customers to pay for costs that are not incurred just as there is no persuasive reason to excuse customers from paying for costs incurred on their behalf. We will direct the administrative law judge in our unbundling proceeding to set a schedule for separately identifying the net cost savings resulting from a customer's election to receive certain revenue cycle services from another service provider and to reduce distribution charges where appropriate. We ask parties in that proceeding to pay special attention to the question of how to identify metering costs for a utility that elects to adopt AMR under the conditions we have specified above.

Other Services

In addition to billing, meters and meter reading, there are costs related to customer service inquiries and uncollectibles that are logically related to revenue cycle services. It is appropriate to consider whether the utilities will realize net cost savings if some customer inquiries are handled by other energy suppliers. We recognize that

utility customer service representatives respond to many types of inquiries and we do not intend to take any action that will reduce the utilities' ability to respond to outages and other emergencies. Accordingly, the utilities should separately identify net customer service inquiry savings to be used to reduce customer charges in those situations where an energy supplier chooses to handle customer service inquiries. We will direct the utilities to do so. TURN objects to separately identifying costs related to uncollectibles out of concern that without the protection of a universal uncollectibles pool, businesses may be motivated to avoid serving areas which are perceived to have customers who pose a higher credit risk. This is a valid concern that suggests a need for caution. We will ask parties to separately identify the costs in the unbundling proceeding.

Impact of AB 1890

Although AB 1890 provides guidance and direction on a multitude of topics, it does not directly address revenue cycle unbundling. However, there are several aspects of the legislation which should be considered in our decision in order to assure ourselves and the public that we have a proper context for making this decision.

Section 366(a) directs the Commission to "take actions as needed to facilitate direct transactions between electricity suppliers and end use customers." The term "direct transactions" is used in the Code as a synonym for what we have termed "direct access." Many parties have commented that direct access can best be facilitated by allowing competitive electricity suppliers and customers to have the option to use various billing and metering options, including options which utilize the incumbent utility and options which do not. In our judgment, today's decision is an action that is needed to facilitate direct access. By allowing the competitive offering of revenue cycle services, we will increase both customer's and supplier's options. Further, it is appropriate for us to consider incipient supplier's comments that many would, in fact, not choose to enter the market (at least the small customer market) at all if they could not provide revenue cycle services. We cannot facilitate direct access if we do not take actions to allow the necessary players to enter the market. Facilitating the competitive

offering of revenue cycle services, as described in this decision, is a fair and appropriate action that is fully consistent with Section 366(a).

Section 375 states that "in order to mitigate potential negative impacts on utility personnel directly affected by electric industry restructuring" transition charge recovery should be allowed for "reasonable employee related transition costs." This section is relevant because of our concern that revenue cycle unbundling could have a negative impact on utility employees. We do not have any specific information in the record in this case as to the magnitude of impacts on utility employees; however, we acknowledge that some impact is possible. We have taken into consideration the comment of the Coalition of Utility Employees in this proceeding on this and other matters. We find that there are likely to be significant benefits to the public due to revenue cycle unbundling, and that there may be negative impacts, on a lesser cumulative scale, on certain employees. On balance, the public interest is better served by enabling competing firms to provide revenue cycle services, especially since Section 375 provides for mitigation of the negative impacts on employees. We defer the question of what employee-related transition costs may arise as a result of this decision to the transition charge track of the electric restructuring proceeding.

Section 370 requires that direct access customers must pay their transition charge obligations "directly to the electrical corporation providing electricity service in the area where the customer is located." Outside of our formal record, some of those offering comments have interpreted this section to forbid the Commission from allowing for competitive billing arrangements such as those proposed by PG&E. There is no support for this position on the record in this case. Each of the major utilities, as well as many parties, have advocated the three billing options outlined in this decision. We believe that the intent of Section 370 is to ensure that the utility receives the transition charge payment from each customer. The payment can be made in one step "directly" from the customer to the utility, or in multiple steps "directly" from the customer to the utility through intermediaries. Certainly, there are situations today in which utilities receive payments through intermediaries, such as when the bill is provided to and paid by an authorized agent of the customer. If properly structured, such transactions are seamless

and result in "direct" payment of appropriate utilities charges. We see no inconsistency between this decision and Section 370.

Responses to Various Other Specific Comments on the Proposed Decision

Several of the comments offered by parties in response to the Proposed Decision merit a response here. Many questions raised in those comments will be addressed in our direct access proceeding. For instance, Edison questions the merits of issuing this decision if it fails to define entry requirements for potential competitors and establish a dispute resolution mechanism. These are issues that we do intend to address in our direct access proceeding. While they are an important part of the restructuring process, it is not necessary to resolve them before making the threshold decisions addressed here. We also plan to address, in the direct access proceeding, a question raised by Los Angeles County about the information that should be made available to customers to assist them in verifying the accuracy of their bills. That proceeding will also be the forum for considering consumer protection rules as suggested by the Center for Energy Efficiency and Renewable Technologies and Edison.

Section 366(a) specifies that a customer that does not make a positive written declaration to switch to a new provider shall continue to be served by the existing utility distribution company. PG&E asks the Commission also to specify that the distribution utility should be the "default" biller when there is no other clear choice. Others argue that the distribution company need not be the default biller. Whichever firm provides energy services to a particular customer will be able to choose a billing method. Therefore, where the distribution utility continues to provide energy service to a customer, it will be able to bill that customer or choose another entity to provide the billing service. We do not need to determine whether the utility is the "default" biller at this time.

Various parties raise issues that relate to the appropriate way to identify the cost savings to the distribution company when certain revenue cycle services are provided by a third party. Edison and PG&E argue that such things as the cost of changing accounts, removing meters and replacing meters may offset the cost savings. Others ask

the Commission to specify the costing approach (marginal versus fully-allocated costs, for example) that will be used to calculate the savings. We will address all of these questions in our rate unbundling proceeding. Our goal remains to separately identify real savings. We will not determine the appropriate way to do this until we have heard from all the parties.

PG&E's notes in its comments that the Proposed Decision correctly concludes that customers should not have to pay the distribution company for revenue cycle service costs which the distribution company avoids because an energy service provider provides those services. PG&E argues, however, that distribution company's avoided costs should be set on a "net" cost basis and that the net avoided costs consists not only of costs not incurred by the distribution company but also the distribution company costs that are incurred as a result of unbundling. We agree.

Several parties have suggested that the process for developing standards of open architecture should be more tightly prescribed, or that the deadlines should be altered. We will look to the parties to inform us collectively when there is a need for further guidance. For the time-being, we are most concerned that interested parties get to work and strive to meet the deadlines set forth in this order.

Edison discusses the need to ensure that third-party billers are held responsible for paying the amounts billed for the distribution company, including the competitive transition charges. We emphasize that under the consolidated billing approach adopted herein, the distribution company will bill the energy service provider for all charges (including the transition costs) and the energy service provider will then bill its customers. In this circumstance, the energy service provider is responsible for paying the distribution company's charges, even if the customer is delinquent or fails to pay. In order to provide further assurance that it will be paid, Edison asks us to impose a bonding requirement on all energy service providers choosing to issue consolidated bills. We will allow distribution companies to impose the same creditworthiness requirements on those carriers that the distribution company would impose on similarly-sized customers. We are committed to taking all reasonable steps to protect the distribution company's revenue stream in such circumstances.

In its comments, Edison raises the concern that if the Rate Reduction bonds are to be assured credit ratings equivalent to the rating they would obtain if the billing remained entirely in the hands of the distribution company, the financial community must be confident that the distribution company's will obtain payment of their charges. By allowing the distribution company to impose reasonable creditworthiness requirements, the Commission will ensure that there is no diminution in the security of the revenue stream upon which the Rate Reduction bonds are based. By imposing these reasonable credit tests, unbundling will not reduce the security of the revenue stream. Because energy service providers may have greater creditworthiness than the average customer they serve, the security of the revenue stream may be enhanced.

Edison also expresses concern that the proposed decision asserts the need for creating standards, but never explains the source of our authority to require energy service providers to meet those standards. As noted earlier, the Commission can make the provision of a service to an energy service provider contingent on the energy service provider abiding by specific terms and conditions contained in the tariff or service agreement for that service. In this way, the Commission can and will ensure compliance with the standards by energy service providers.

The California Small Business Association (the Association) expressed concerns about the potential for tampered meters, defective or non-performing meters and energy theft. The Association is concerned that service providers may sell or use tampered meters which report higher or lower than actual energy consumption. It is also concerned that service providers may knowingly use defective or non-performing meters with the intent of defrauding customers. The Association also raises the concern that energy theft may be facilitated because meters and meter reading are unbundled. Regardless of the Commission's jurisdiction, the use of tampered, defective or non-performing meters by energy service providers with the intent to defraud either the end-use customer or the utility is prohibited by existing state law. It is against the law to defraud customers and this Commission routinely assists local law enforcement, local District Attorneys and the Attorney General's office to investigate and prosecute those

individuals or firms that engage in such illegal behavior in the other industries we regulate.

As metering and meter reading are unbundled, we expect the distribution companies and energy service providers to ensure that metering and meter reading equipment meet the same standards of reliability that we demand today from utility owned meters. In the service agreements, the metering provider and the distribution company should specify standards for accuracy, installation, and maintenance. Failure to meet those requirements would be a breach of the agreement and could, if allowed under the agreement, result in the termination of the interconnection agreement and could result in a termination of unbundled service to the energy service provider.

Most disputes between the distribution company and an energy service company providing its own metering service regarding the accuracy of metering data would be resolved in the context of the service agreement between the distribution company and the energy service provider. We encourage the distribution companies and energy service providers to include alternative dispute resolution (ADR) processes in their service agreements. In addition, if any customer or distribution company felt that the meters employed by energy service providers did not meet the standards for accuracy, they could file a complaint, formal or informal, with the Commission just as they may do today if they have concerns regarding the utility's meter.

If a service provider's meters were inaccurate, a distribution company could file a complaint with the Commission alleging a violation of the terms of the service agreement between the distribution company and the provider and could ask the Commission for the authority to terminate unbundled service to that provider or to require the provider to install appropriate metering. In addition, the distribution company would retain the ability to back-bill the customer or provider to recover under-collected revenues. Customers, too could file a complaint with the Commission regarding the metering accuracy of a provider and ask that the Commission find the provider in violation of its service agreement and require the provider to resolve the problem or face termination of its service agreement with the distribution company. In this way the Commission can assure that the accuracy of the meter is enforced.

CelNet faulted the Proposed Decision for failing to "state the conditions under which utilities can proceed with AMR." It notes that stating these conditions is in the public interest because there are scale economies available to utilities that will result in access to low-cost, detailed usage information by consumers, utilities and energy service providers. In response, we now provide additional guidance to the utilities regarding their ability to adopt AMR technologies. The utilities may modify their existing meters, on a system-wide scale with AMR. However, only those utility customers who take advantage of the AMR hourly incremental pricing and other services offered by AMR, are required to reimburse the utility for its cost. The utility shareholders are at risk for the full recovery of AMR costs.

Edison comments that the proposed decision is silent on consumer protection issues. Edison seems confused as to where the issues related to consumer protection should be addressed. There is a separate proceeding in our restructuring effort designed to develop consumer protection issues. On October 30, 1996, the Direct Access Working Group Protection and Education Report was filed. The Commission will promulgate consumer protection rules in an upcoming consumer protection decision. It is in that decision that we will address consumer protection issues related to our restructuring of the electric market, including those raised by the issue of revenue cycle unbundling.

The Decision on Direct Access addresses some consumer protection issues. In particular, it requires the use of third-party verification and written positive declaration for aggregation before a small commercial or residential consumer could be changed from one service provider to another. Furthermore the Commission on March 31, 1997 in D.97-03-069, spelled out an aggressive and multi-faceted consumer education program based, in part, on recommendations found in the Direct Access Working Group Report on Consumer Education. Consumer education and consumer protection rules are necessary regardless of the Commission's policy on unbundling. Hence, these issues are being addressed in a more comprehensive fashion in our Direct Access and Consumer Protection portion of the proceeding.

CellNet faulted the Proposed Decision for failing to "state the conditions under which utilities can proceed with AMR." It notes that stating these conditions is in the public interest because there are scale economies available to utilities that will result in access to low-cost, detailed usage information by consumers, utilities and energy service providers. In response, we now provide additional guidance to the utilities regarding their ability to adopt AMR technologies. The utilities may modify their existing meters, on a system-wide scale with AMR. However, only those utility customers who take advantage of the AMR hourly incremental pricing and other services offered by AMR, are required to reimburse the utility for its cost. The utility shareholders are at risk for the full recovery of AMR costs.

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There is no debate regarding the importance of consumer protection rules and a determined consumer education program. In its reply comments, Enron states that "consumer protection rules are important and must be addressed". We are determined that prior to the provision of unbundled revenue cycle services, including implementation of bill consolidation, the Commission's consumer education program (which includes the utilities Joint CEP, the Commission's own outreach efforts and the formation of an Electric Education Trust) will be in place and that effective consumer protection rules will have been promulgated.

Furthermore, we have noted in this decision how the terms and conditions a distribution company sets for providing unbundled billing service can be used to ensure that an energy service provider conforms to our bill reporting standards. As we pursue our consumer protection efforts, we may explore how to generalize this concern of using our jurisdiction over distribution service to safeguard consumers from unfair market practices of any entity - another energy service provider, a distribution company affiliate, or the distribution company itself.

Edison also faults the Proposed Decision because it fails to mandate the reciprocal unbundling of the gas industry. Enron agrees, but notes that this should not retard the implementation of direct access and unbundling of revenue cycle services for the electric industry. We have generally allowed the regulatory policies in these two industries to evolve independently. Although natural gas utilities were required to provide retail wheeling to large customers in the 1980's, electric utilities were not. However, we agree with Edison that the time for us to consider unbundling of the revenue cycle in the gas industry is now. We direct the Commission's Division of Strategic Planning to include this area as a topic to be incorporated into the development of the Commission's new gas industry strategy. Edison should pursue its arguments for revenue cycle unbundling for gas utilities in gas industry proceedings where it will undoubtedly find allies for its position.

Edison is legitimately concerned that the competitive position of electric and gas companies might not be fair and equal if only the gas company can provide consolidated energy billing. We note that a gas utility would need our approval before

it could offer electric service or other energy service. This Commission would also review any effort by a natural gas utility to provide billing services for an unregulated affiliate. Our recently-opened rulemaking and investigation concerning affiliate transactions for energy utilities is the proper forum to raise these issues.

Conclusion

We will move ahead expeditiously in our direct access proceeding to set forth the rules governing consolidated billing and metering activities and to further consider the redlining concern raised by TURN. In addition, we will direct the administrative law judge in the unbundling proceeding to set a schedule for separately identifying the cost savings resulting when energy suppliers provide revenue cycle services. The following table reflects our current goals related to the services and cost separation discussed in this order.

Goal	Target Date
Participants Submit Agreement on Open Architecture for Meters and Metering	July 25, 1997
Distribution Utilities Facilitate Three Billing Options (Consolidated Supplier Billing, Consolidated Distribution company Billing and Dual Billing)	January 1, 1998
Rules in Effect Governing Service Agreements Between Energy Service Providers and Utility Distribution Companies	January 1, 1998
Submission of Utility Cost Studies and Testimony Addressing the Separate Identification of Various Revenue Cycle Services Cost Components	November 3, 1997
Approval of Unbundled Rates for Various Revenue Cycles Services Cost Components	January 1, 1999
Commencing Competitive Meter and Meter Reading Services for the Largest Customers	January 1, 1998
Allow Competitive Meter and Meter Reading Services for All Customers	January 1, 1999

Findings of Fact

1. It would be advantageous to customers and consistent with the Commission's efforts to promote retail competition for the provision of electric services if competing electric service providers were able to offer consolidated billing for all aspects of electric service.

2. The option of offering consolidated bills may help encourage competing energy services providers to serve the residential and small commercial markets, where the lower volumes provide less of an opportunity to profit through sale of electric energy alone.

3. Some competing electric service providers may choose to provide a bill for supplying energy that is separate from the charge for transmission and distribution services or may choose to ask the distribution company to provide a consolidated bill.

4. Energy providers, customers and representatives of some utilities have all stated that load profiles could be used to determine the billing patterns for customers that do not have time-differentiated metering capability.

5. Where there is customer choice, there may be greater incentive for technological innovation, greater opportunity for providing value-added services, and a greater likelihood that competitive forces will help keep prices low.

6. A proprietary, utility-owned, radio-based metering system could create barriers to entry.

7. Many energy suppliers see an opportunity to add value to the products they sell if they can bill the customer directly and if they can offer a meter or metering communication service that provides the opportunity to exchange information and offer products in addition to retail electric service.

8. It is consistent with this Commission's goal of promoting competition for retail electric services to offer competitors the opportunity to add value to their services in order to encourage those competitors to offer retail electric services to a wider range of customers.

9. It is not necessary for a distribution company to maintain its own permanent, separate usage meter on the premises of a customer that is using an appropriate meter provided by a competing energy service provider.

10. When a customer chooses to purchase retail service from a firm other than the utility, the energy supplier and the distribution utility each have a strong interest in receiving information about usage that is sufficient and appropriate and reliable in terms of quality and accuracy.

11. If a customer obtains a meter that is not easily used by other energy suppliers, another barrier to competition has been erected.

12. In order to avoid constructing a barrier to competition, those who plan to participate in the market place must agree upon standards for open architecture for meters and communication.

13. There is no persuasive reason to cause customers to pay the distribution company for billing, metering and other related costs when those costs are not incurred because the services are provided by another firm.

14. Concerns have been raised that without the protection of a universal uncollectibles pool, businesses may be motivated to avoid serving areas which are perceived to have customers who pose a higher credit risk.

15. Energy service providers that utilize consolidated supplier billing will be responsible for payment of the billed amounts regardless of their ability to collect from their customers.

16. The use of tampered, defective or non-performing meters by energy service providers with the intent to defraud either the end-use customer or the utility is prohibited by existing state law.

17. Consumer education and consumer protection rules are necessary regardless of the Commission's policy on unbundling.

18. It is important to pursue the goals discussed in this order on a timely basis in order to promote the provision of competitive retail electric services to all classes of customers.

9. Utilities should include any proposed tariff modifications required by this decision in their pro forma tariffs to be filed in the direct access proceeding.

This order is effective today.

Dated May 6, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

I will file a written concurrence.

/s/ JESSIE J. KNIGHT, JR.
Commissioner

WRIGHT & TALISMAN
SAN FRANCISCO

MAY 8 1997
RECEIVE

R. 94-04-031 / I. 94-04-032

D. 97-05-039

Commissioner Jessie J. Knight, Jr., Concurring:

Unbundling bottleneck facilities has played a key component in regulation of the telecommunications industry and was an important part of the Commission's efforts to ensure that full and fair markets properly develop. Access to bottleneck facilities and the unbundling of potentially competitive services allows greater innovation in services, a more customer focused marketplace and an important check on the ability of a dominant provider to leverage market power into adjacent markets. This decision takes this important lesson and applies it to the revenue cycle services of the electric industry.

A competitive world is evolving where artificial regulatory boundaries that separated one type of utility service from another are quickly falling. Southern California Edison raised the possibility that failure to unbundle revenue cycle services for the gas industry could have major anti-competitive implications. I believe that the Commission must take steps to assure that no utility can unfairly leverage its market dominance in a one market and translate that dominance into a competitive advantage in another market. This is true whether the utility delivers electricity, telecommunications, water or gas. Unbundling, combined with effective affiliate transaction rules and an appropriately designed incentive or performance-based regulatory framework, provides an protection against this anti-competitive leveraging.

Unfortunately, the issue of unbundling natural gas revenue cycle services cannot be addressed in this proceeding dealing with the restructuring of the electric industry. However, it is of utmost importance to embrace the belief that such an unbundling policy could play a key role in this Commission's future regulation of the natural gas industry. It can play a key role in providing a springboard for full and fair competition to develop and allow the unbundling of services to lead to a more dynamic marketplace.

Dated May 6, 1997 in San Francisco, California.

/s/ Jessie J. Knight, Jr.

Jessie J. Knight, Jr.

Commissioner

17TH OPINION of Level 1 printed in FULL format.

Application of Palmerton Long Distance Company for approval to begin to offer, render, furnish or supply services as an interexchange reseller to the public in the Commonwealth of Pennsylvania

A. 310147

PENNSYLVANIA PUBLIC UTILITY COMMISSION

1993 Pa. PUC LEXIS 217

April 29, 1993

PANEL:

[*1] Commissioners Present: David W. Rolka, Chairman; Joseph Rhodes, Jr., Vice Chairman; John M. Quain, Dissenting - Statement attached John Hanger

OPINION:

ORDER

BY THE COMMISSION:

By application filed on January 28, 1993, Palmerton Long Distance Company (PLDC or the Applicant), Palmerton, PA, seeks a certificate of public convenience pursuant to Section 1101 of the Public Utility Code, 66 Pa. C.S. § 1101, evidencing Commission approval to resell interexchange telecommunication service in Pennsylvania. Proofs of service and publication were submitted by Applicant. No protests, motions or petitions were filed and no hearing was held.

The Applicant is a Pennsylvania corporation. The Applicant and Palmerton Telephone Company are both subsidiaries of Penncor Services, Inc. (Penncor). PLDC's business office is located at 471 Delaware Avenue, Palmerton, Pennsylvania, and its statutory agent is Donald G. Reinhard.

PLDC plans to provide interexchange message toll service statewide and will initially market its services to residential and business customers in the service territory of Palmerton Telephone Company, which is converting to equal access effective May 1, 1993. The Applicant projects that [*2] approximately 50% of Palmerton Telephone Company's customers will eventually utilize PLDC's services. Consumers may utilize the Applicant's service through presubscription or by dialing the appropriate access code for any given call.

Attached to the application was a proposed tariff which contained rates in compliance with Commission regulations at 52 Pa. Code § 63.114(b) establishing maximum rates for resellers of interexchange telecommunication service.

At Public Meeting of April 21, 1993, the Commission considered the application and by a 3-1 vote (Commissioner Quain dissenting) adopted the motion of Chairman Rolka which conditionally granted PLDC's application. The Chairman's motion provided as follows in relevant part:

I support the approval of this Application with one modification. The long

distance subsidiary should be precluded from using the word "Palmerton" in its name. The use of the name "Palmerton" in marketing long distance service to the public within the service territory served by Palmerton Telephone Company, a local exchange company, may provide an unfair competitive advantage. The Applicant could market long distance service by advertising, implicitly or explicitly, [*3] the relationship with its LEC affiliate and the advantage of having only one phone company service all of a given customer's needs. Deleting the word "Palmerton" from the name of the long distance subsidiary alleviates this concern.

On April 27, 1993, PLDC supplemented its application with proposals to restrict the marketing of its service so as to avoid any customer being misled into believing that PLDC is the same company as Palmerton Telephone Company. The three restrictions proposed by PLDC are as follows:

1. PLDC will not use the logo of Palmerton Telephone Company or Penncor in any marketing activity;
2. PLDC will not engage in any activity which reasonably could confuse or mislead customers into believing PLDC and Palmerton Telephone Company are the same entity; and
3. PLDC may use the word "Palmerton," (in reference to Palmerton Long Distance Company), in marketing activities; however, in each instance where the word "Palmerton" is used, PLDC must affirmatively inform customers or prospective customers that PLDC and Palmerton Telephone Company are not the same company.

These restrictions are proposed by PLDC as an alternative to the Commission directive [*4] to prohibit altogether PLDC's use of the word "Palmerton."

Overall, it appears that PLDC's proposed alternative provides adequate protections to prevent anti-competitive practices and assure that customers are not misled in choosing their long distance provider. Accordingly, we will reconsider our action of April 15, 1993. We hereby conclude that the Applicant has met all the requirements for certification as a reseller of interexchange telecommunication service, and will grant PLDC's application as supplemented on April 27, 1993;

THEREFORE,

IT IS ORDERED:

1. That the application of Palmerton Long Distance Company as supplemented on April 27, 1993 is hereby approved.
2. That the restrictions on marketing activities proposed by PLDC in its April 27, 1993 supplement constitute adequate protections to prevent anti-competitive behavior and assure that customers are not misled in choosing their long distance provider.
3. That a certificate of public convenience be issued authorizing applicant to furnish service in Pennsylvania as a reseller of interexchange telecommunications service.

1993 Pa. PUC LEXIS 217, *4

4. That consistent with this order an original and one copy of the proposed tariff as supplemented [*5] should be filed with the Secretary to be effective upon one day's notice.

CONCURBY:

QUAIN

CONCLUR:

STATEMENT OF COMMISSIONER JOHN M. QUAIN

The proposed policy before us today lessens the impact of the majority's April 15, 1993 action regarding Palmerton Long Distance Company at Docket No. A-310147. I appreciate the work of my colleagues in fashioning a policy in an effort to achieve its unanimous support.

However, I remain philosophically opposed to the approach. The policy remains overly intrusive in one important area. It restricts the use of corporate logos in marketing communications. I believe this restriction to be ill-advised given the fact that insufficient evidence exists to support the need for any such actions. Like the selection of a corporate name, the use of corporate logos remains a matter squarely within management's prerogatives. This is particularly true where there is little or no empirical evidence to support the fact that the adoption of this policy will have any impact upon the development of a competitive reseller market.

While I applaud the majority's desire to foster competition, I am of the firm opinion that this policy goes beyond a reasonable exercise of our authority. [*6] The development of a competitive interexchange reseller market is far better served by focusing our attention upon the manner in which local exchange carriers accommodate all resellers (affiliated and non-affiliated alike) to ensure equal access to their systems; rather than the manner in which resellers choose to identify themselves.

DATED 4-29-93

JOHN M. QUAIN, COMMISSIONER

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held May 23, 1996

Commissioners Present:

John M. Quain, Chairman, Dissenting in part - Statement attached
Lisa Crutchfield, Vice Chairman
John Hanger,
David W. Rolka, Statement attached
Robert K. Bloom

In Re: Implementation of the
Telecommunications Act of 1996

Docket No.
M-00960799

O R D E R

BY THE COMMISSION:

A. Introduction

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996 (Act) into law. As the first legislative reform of the nation's telecommunications industry in 62 years, the Act is a landmark piece of legislation designed to establish a national policy framework to lead the United States into the 21st century. While the Act is generally consistent with the Public Utility Code, including Chapter 30, which, in 1993, provided for telecommunications regulatory reform at the state level, the Act is far reaching and requires all 50 states to take action to accommodate and implement its provisions.

In recognizing the Act's immediate impact, this Commission acted quickly and on March 14, 1996, entered a Tentative Decision at M-00960799 identifying a variety of issues pertaining to the effects and necessary implementation of the Act. While as to some

issues the Act's effects seemed relatively clear, the Commission felt it was appropriate to seek comment from interested parties on all issues before finalizing our view on any issue. In the Tentative Decision, the Commission stated as follows:

Within this scenario, there are many provisions of the Act which raise questions as to what steps, if any, the Commission must take to assure that its regulation of the telecommunications industry is fully consistent with federal law. These provisions of the Act can be divided into two categories for purposes of discussion. First, there are preemptive provisions which appear to eliminate or restrict the ability of the Commission to regulate or act in a certain manner. Second, there are enabling provisions of the Act which assign new areas of activity to the states and appear to assign new responsibilities to the Commission in participating in the implementation of the national policy framework.

In this regard, although the ultimate goal of the Act is to move toward a deregulated, competitive environment, the transition process envisioned by the Act is clearly one involving very complex and far reaching regulatory activity by both the FCC and various state commissions -- regulatory activity which appears, at least on its face, to be more complex and resource and time consuming than previously encountered by the Commission in some areas. While ultimately, through development of a fully competitive business environment in all telecommunications markets, the Commission's and FCC's regulatory roles should start to significantly decrease, the period of transition involves a quickly changing but extremely active role by the Commission in participating in the implementation of both state and federal law.

In issuing the Tentative Decision, the Commission solicited public comment in two separate formats. First, on April 3, 1996, the Commission held a public forum on all Federal Act

implementation issues. Many interested parties actively participated in the public forum and provided a lively discussion of the Tentative Decision and surrounding issues.

Second, the Tentative Decision was published on March 30, 1996 at 26 Pa.B. 1456 and established a 30-day public comment period from the date of publication. Comments to the Tentative Decision were filed by the Office of Small Business Advocate (OSBA), GTE North, Inc. (GTE), the Pennsylvania Telephone Association (PTA), the Office of Consumer Advocate (OCA), the Pennsylvania Cable and Telecommunications Association (PCTA), the Telecommunications Resellers Association (TRA), Vanguard Cellular Systems, Inc. (Vanguard), Teleport Communications Group, Inc. (TCG), AT&T Communications of Pennsylvania, Inc. (AT&T), the Competitive Telecommunications Association (CompTel), Nextlink Pennsylvania, L.P. (Nextlink), Eastern Telelogic Corporation (ETC), MFS Intelenet of Pennsylvania, Inc. (MFS), The United Telephone Company of Pennsylvania and Sprint Communications Company, L.P. (Sprint/United), the Central Atlantic Payphone Association (CAPA), ALLTEL Pennsylvania, Inc. (ALLTEL), MCI Telecommunications Corporation (MCI) and Bell Atlantic - Pennsylvania, Inc. (Bell). Generally speaking, the comments were well developed and were extremely responsive to the issues and concerns raised by the Commission.

The Tentative Decision structured the debate over implementation of the Act into nine separate sections. We will

structure this order similarly in addressing the comments of the parties and in finally resolving these issues.

B. Discussions of Issues

1. **Entry**

a. **Traditional Procedures**

Historically, the Commission has regulated the entry of telecommunications carriers through review of entry applications filed under Section 1101 of the Public Utility Code, 66 Pa. C.S. §1101. Notice of filing is required to be published in the Pennsylvania Bulletin and newspapers of general circulation in the proposed service territory pursuant to Commission regulations at 52 Pa. Code §5.14(a).¹

Pursuant to 52 Pa. Code §5.14(b), upon publication, applications are subject to a 15-day protest period. If no protests are filed, the application is reviewed by the Commission on the documents. If one or more protests is filed, the application is referred to the Office of Administrative Law Judge for oral hearing. In either case, the Commission ultimately formally adjudicates the applications at Public Meeting and, by statute, may not approve an application unless it finds that grant of the application is "necessary or proper for the service,

¹ In 1993, an exception to this general rule was established through exercise of 52 Pa. Code §5.14(a)(4) for interexchange resellers. Under this exception, resellers' applications are not required to be published and the only required notice is service on the OCA and OSBA.

accommodation, convenience or safety of the public." 66 Pa. C.S. §1103(a).

In applying the "necessary or proper" standard, the Commission has traditionally reviewed the fitness of the entrant (both technical and financial) to provide the proposed services in the application area and the need for the service, taking into account public policy concerns pertaining to the appropriate amount of competition, if any, in various telecommunications markets. Under this scenario, there has historically been two distinct types of protests brought before the Commission -- fitness protests challenging the fitness of the application and competitive protests challenging the need or the appropriateness of the service proposed by the applicant.

Under these procedures, applications decided on the documents typically were adjudicated at Public Meeting 90-120 days from the date of filing. Applications decided through the oral hearing process typically were adjudicated at Public Meeting 7-12 months from the date of filing.

b. Provisions of the Federal Act

In the Tentative Decision, we acknowledged the likelihood that the Act would require some modification of traditional entry procedures applicable to telecommunications carriers. We noted that interpretation of the extent of required modification was focused on the interplay between Section 253(a) of the Act and Section 253(b) of the Act. In this regard, Section 253(a) of the Act provides as follows:

(a) IN GENERAL.-No state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

As read together with Section 253(b) which provides:

(b) STATE REGULATORY AUTHORITY.-Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, 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 on consumers.

Upon initial review of these subsections, we suggested that Section 253(a) could be accommodated through conversion of the traditional certification process to a registration process and requested comment on this issue. Virtually all commenters provided input on the entry issue. The recommendations covered a wide range of potential modifications to the Commission's entry process and contained many helpful suggestions.

OSBA, AT&T, MCI, TRA and ETC opine that Section 253(a) has preempted the certification process and that the Commission must convert to a registration process. Bell, Sprint/United, GTE, ALLTEL and PTA take the position that the certification process can survive as long as the Commission takes steps to abbreviate and streamline entry procedures. OCA argues that certification procedures should not be modified and that a full fitness review and adjudication should continue as a service condition, on a competitively neutral basis. All carriers argue that even if the

Commission converts to a registration process, existing carriers should not have to file any additional forms.

c. New Entry Procedures

After careful consideration, we believe that a proper balance can be achieved which accommodates Section 253(a)'s prohibition against entry barriers while still safeguarding consumers from potential predatory and illegal practices by irresponsible carriers. The entry procedures we will adopt for all interexchange carrier entrants (both facilities based and resellers) and all local service entrants to non-rural service areas² (both facilities based and resellers) are as follows:

1. New entrants seeking to commence the provision of intrastate service in Pennsylvania will file an application with the Commission following the form of application attached as Appendix A to this order. The form of application contains the information required by the Commission to monitor the carrier's activities on an ongoing basis. The form of application includes a fitness affidavit in which the carrier must swear and affirm its ability and commitment to providing the proposed service in full compliance with all provisions of Pennsylvania law. The application shall be accompanied by a proposed or interim tariff, consistent with Commission tariff rules and regulations.
2. An original and two copies of the application must be filed with the Commission's Secretary accompanied by a check for payment of a filing fee in the amount of \$250.
3. The new entrant will serve a copy of the application on the OCA, the OSBA, the Commission's Office of Trial Staff and the Attorney General's Bureau of Consumer Protection.
4. The new entrant may commence the provision of service included in the application immediately upon filing and service.

² Procedures for carriers seeking local service entry into rural service areas will be discussed subsequently.

5. Each application will initially be assigned to the Secretary's Office.
6. Consistent with 52 Pa. Code §5.14(b), a 15-day protest period will be established commencing on the day the application is filed and served. Any interested party may file a protest to an application. However, protests or interventions may only be filed if the protesting party is contesting the fitness of the entrant. Competitive protests or protests opposing other aspects of the entrant's provision of service may not be filed and, if submitted, will be returned by the Commission. Protests shall fully comply with 52 Pa. Code §5.52(a) and shall "set out clearly and concisely the facts from which the alleged" challenge to the fitness of the applicant is based. An applicant may file an answer to the protest within 10 days of filing. Protests which do not fully comply with Section 5.52(a) will not be accepted for filing by the Commission's Prothonotary. The Commission may consider the imposition of sanctions for parties who are found to intentionally attempt to misuse the protest process.
7. If no legitimate protest is received, the Secretary's Office will schedule the application for consideration by the Commission at Public Meeting as soon as possible with a recommendation that the Commission adopt a Secretarial Letter which issues a certificate of public convenience to the new entrant consistent with the application.
8. Upon approval by the Commission, the Secretarial Letter and a certificate of public convenience will be issued to the carrier. Within 10 days of receiving a certificate of public convenience, the carrier shall file a final tariff which is identical in content to the proposed or interim tariff with the Commission's Tariffs Division.
9. Following the filing of a protest, the application shall be assigned to the appropriate bureau. Staff shall review the protest and determine if the protest raises legitimate concerns as to the fitness of the new entrant. If legitimate concerns as to the fitness are not present, the staff will prepare a recommendation for Commission consideration dismissing the protest and granting the application. If legitimate concerns are raised, the application shall be transferred to the Office of Administrative Law Judge for the conduct of hearings.
10. Any party desiring to oppose either an applicant's proposed or interim tariff or the entrant's final tariff may file a complaint with the Commission which will be

treated consistent with existing procedures except as set forth in the following paragraph.

11. The applicant may continue to operate during the pendency of Commission consideration of the application or interim tariff unless the presiding administrative law judge or the Commission determines that public safety and welfare or the protection of consumer rights requires that the applicant cease operations.

Overall, it is clear to us that these new entry procedures strike a fair balance between Section 253(a) and Section 253(b). These procedures cannot reasonably be considered barriers to entry, but maintain adequate procedures to allow the Commission to exercise its very important residual authority. To the extent any of the procedures established today may be viewed as inconsistent with any provision of the Public Utility Code or Commission regulations, we find that continued compliance with such provisions would result in inconsistency with or violation of the Federal Act.

d. Effect on Pending Applications

There are presently several telecommunications carrier applications pending before the Commission for which either protests or interventions have been filed. To the extent any pending protest or intervention is not contesting the fitness of the new entrant, the protestant or intervenor shall withdraw the protest or intervention within five days of the date this order is entered. If the protest or intervention is intended to contest fitness, the protestant or intervenor shall file a motion within five days of the date this order is entered setting forth specific factual allegations which form the basis for the fitness challenge.

If withdrawal of protests or interventions results in a given application becoming unopposed, the application should be treated consistent with the new entry procedures contained herein. If any pending applications remain contested, the applications shall be referred to staff to determine if the protests or interventions contain legitimate fitness issues. In either case, the applicants may commence operations immediately pending administrative review. Carriers which have not filed proposed tariffs with their applications shall do so within 10 days of the date this order is entered.

e. Rural Telephone Company Exemption.

In our March 14, 1996 Tentative Decision, we discussed in significant detail the provisions of the Federal Act which specifically address rural telephone companies as follows:

Another important exception to the removal of intrastate entry barriers by Section 253(a) is found at Section 253(f) of the Act. Section 253(f) appears to establish a limited exception to the preemptive provisions of Section 253(a) applicable only to telephone companies as defined in the Act. Section 253(f) provides in relevant part as follows:

(f) RURAL MARKETS-It shall not be a violation of this section for a state to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements of section 214(e)(1) for designation as an eligible telecommunications carrier for that area being permitted to provide such service .

...

Section 214(e)(1), referenced in Section 253(f), establishes a designation of eligibility process for universal service funding purposes, as will be discussed in more detail hereafter, which requires carriers to offer basic universal service throughout a given service

area and advertise the availability of such service offerings to the consuming public in the service area.⁹ Subsection (e)(1) expressly incorporates by reference the requirements contained in subsections (e)(2) and (e)(3). Section 214(e)(2) provides as follows:

(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS-A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) designated by the State commission. Upon request and consistent with the public interest, a State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional carrier meets the requirements of paragraph (1). Before designating an additional telecommunications carrier for an area served by a rural telephone carrier, the State commission shall find that the designation is in the public interest.

Accordingly, in addition to the obligation to serve commitment required as a prerequisite to universal service support eligibility under subsection (e)(1), subsection (e)(2) requires the state commission to find, for rural telephone companies, that designation is in the public interest.

Finally, Section 251(f) exempts rural telephone companies [footnote omitted] from interconnection requirements and procedures, the details of which will be discussed hereafter, until such time as the rural telephone company receives a bona fide request for interconnection, at which time the state commission is apparently directed to conduct an inquiry to determine whether to require the rural telephone company's compliance with general interconnection requirements. In reaching its determination, the state commission is to consider whether the request for interconnection is unduly economically burdensome, technically feasible and consistent with universal service principles -- a public interest type standard [footnote omitted]. The Commission, at least with regard to the interconnection determination under Section 251(b), is required to act upon the request within 120 days.

While for non-rural telephone companies universal service funding eligibility is considered independently from entry, for rural telephone companies it appears that universal service eligibility and interconnection requirements may be merged into consideration of the appropriateness of entry into a rural telephone company's local service and access service markets as an exception to the entry preemption [footnote omitted]. Under the provisions of the Act cited above, it appears a state commission could consider competitive entry into a rural telephone company's local and access markets at the same time and under the same standard (a public interest finding) as interconnection and universal service funding eligibility for the competitive local exchange carrier seeking to service the rural area.¹³ Under this scenario, in applying the public interest standard, the Commission would include in its consideration the "economically burdensome," "technically feasible" and universal service criteria expressed in Section 251(f)(1)(B).

While there may be a variety of ways to administer the rural telephone company exception to the removal of entry barriers, one of the simplest and most logical ways would be to maintain the existence of rural telephone certificates of public convenience (assuming other §1101 certificates are cancelled) and to require new entrants into rural telephone company local and access service markets to file an application under Section 1103 which would be reviewed by the Commission within the context of the "necessary or proper" or public interest standard as appears to be required by the Act. Interconnection and universal service funding eligibility for the new entrant would be evaluated through the same application process.¹⁴ The public interest standard employed by the Commission in the consolidated proceeding would be consistent with all express considerations required by the Act as discussed above.

⁹ Section 253(f) is a permissive provision, not a mandatory provision. However, the Act appears to envision a potential situation in which entry to a rural service market would be linked to a readiness to serve throughout the service area.

¹³ This view is supported by Section 252(g) of the Act which expressly authorizes state commissions to consolidate entry, interconnection and universal service funding eligibility proceedings for rural telephone companies, "to reduce administrative burdens on telecommunications carriers, other parties to the

proceedings, and the State Commission in carrying out its responsibilities under this Act."

¹⁴ It appears that the 120-day time limitation of Section 251(b) would not be applicable to a consolidated proceeding. Parties should comment on this issue.

In the PTA's comments to the Tentative Decision, the PTA formally informed the Commission that all Pennsylvania incumbent local exchange carriers, with the exception of GTE and Bell, qualified as rural telephone companies under Section 3 of the Federal Act.³ The PTA further indicated that 32 of the remaining 36 companies qualified because they were companies eligible for streamlined regulation under 66 Pa. C.S. §3006 in that they served less than 50,000 access lines. The other four carriers, ALLTEL, Commonwealth Telephone Company (Commonwealth), North Pittsburgh

³ Under Section 3(a)(47)(A), a rural telephone company is a local carrier which provides service to an area which does not include:

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

Telephone Company (North Pittsburgh) and United claimed qualification under one or more of the three remaining standards in the definition. Three of the four, ALLTEL, Commonwealth and United, claimed qualification only under subsection 47(D) on the basis that by their assessment, each company had "less than 15 percent of its access lines in communities of more than 50,000" on the date of enactment.

In order to resolve this issue, the Commission issued a Secretarial Letter on May 3, 1996 to ALLTEL, Commonwealth, North Pittsburgh and United requiring each carrier to supplement the PTA's comments and "to explain in detail the grounds on which rural telephone company status is claimed." The Commission further required that, to the extent the carrier was relying on subsection 47(D), the carrier should specifically identify how the company defined the term "communities" and to identify all communities served by the carrier which exceeded the subsection 47(D) standard. The carriers were required to serve their responses on all active parties at this docket.

On May 8, 1996, United, Commonwealth and North Pittsburgh each filed responses which indicated that they had defined "communities" as the municipalities listed in their respective tariffs and that under this standard, none of the companies served any community with more than 50,000 inhabitants. ALLTEL filed a response on May 10, 1996 which contained a similar explanation.

On May 17, 1996, AT&T, ETC, MCI and OCA filed responses to the supplemental comments. Both AT&T and OCA contest the ILEC

interpretation and application of the definition and argue that the definition should be interpreted more restrictively.

We have closely reviewed the Act's definition of "rural telephone company" and find it extremely difficult to identify the intent of the express language. The language of the definition is poorly drafted and arguably internally contradictory. We understand that this is a significant issue and are reluctant to interpret the provision and apply it on a Pennsylvania specific basis at this time, given that we may benefit from additional clarity that may become available as the implementation effort proceeds. It does not appear necessary to reach a definitive conclusion at this time. Furthermore, it will be valuable to monitor the actions of other states in addressing this issue.

Overall, we are satisfied that North Pittsburgh qualifies as a rural telephone company; however, we will defer a decision on the remaining ILECs and, when appropriate, will issue an order resolving this issue either at this docket or at the Universal Service docket. In the meantime, interested parties may provide additional input on this issue provided such information is served on all parties on the service list at this docket.

With the exception of the issue of which carriers qualified for rural telephone company status, the comments to the Tentative Decision either accepted or favored the Commission's proposed consolidated procedures under Section 252(g) for review of entry, interconnection and universal service eligibility. We continue to believe that use of such consolidated procedures when appropriate

is in the best interests of administrative efficiency and is otherwise in the public interest. However, at least at this time, we are not convinced that use of consolidated procedures for the larger rural telephone companies is appropriate and believe the consolidated procedures should initially be applied only to the carriers with under 50,000 access lines.⁴

This does not mean that any other rural telephone companies do not receive the general benefits of rural telephone company status as expressly set forth in Sections 251, 253 and 254.⁵ It merely means that we will not exercise the option provided state commissions under Section 252(g) for these carriers at this time.

Accordingly, we will adopt our discussion in the Tentative Decision, as recited previously, for all rural telephone companies with less than 50,000 access lines (small LECs). Under these consolidated procedures, a carrier seeking entry into the service territory of a LEC that is eligible for streamlined regulation must file a bona fide request for interconnection under Section 251(f)(1)(A) with the small LEC and a request for universal service eligibility designation under Section 214(e)(2) committing to an

⁴ This decision is supported by Chapter 30 which sets forth the legislative interest in establishing more streamlined regulation for carriers with less than 50,000 access lines. 66 Pa. C.S. §3006.

⁵ Under Section 254(f)(2), local exchange carriers with fewer than 2% of the nation's subscriber lines, which likely would include North Pittsburgh, ALLTEL and Commonwealth, may petition the Commission for suspension or modification of interconnection requirements, including otherwise mandatory unbundled access, resale and collocation. The Commission's review of any such petitions must be completed within 180 days of filing and is subject to a public interest type standard.

obligation to serve throughout the small LEC's service territory with the entry application.⁶ Entry applications for small LECs will be subject to normal procedures under 66 Pa. C.S. §§1101 and 1103, with publication notice requirements and broader ability to protest, as traditionally utilized.⁷ The result will be the degree of protection envisioned by both Congress and our General Assembly for these small, rural carriers.

Implementation of these procedures will have an effect on pending applications. Presently, the Commission has several statewide local service applications pending before it. In order to comply with these procedures, these applicants must either withdraw the portion of their applications which seek entry into small carrier service territories or, in the alternative, supplement their applications with bona fide interconnection requests for each small LEC and a request for universal service eligibility designation for each small LEC's service territory. If an applicant chooses to supplement its application, the statewide application must be bifurcated to accommodate the different

⁶ Under Section 253(f)(1), consolidation of universal service support eligibility designation with an entry application to serve areas which are served by rural LECs is not appropriate if the rural LEC obtains exemption from the resale requirements of Section 254(c)(4). Accordingly, we will not utilize consolidation procedures for streamlined LECs which obtain a resale requirement exemption.

⁷ Consolidated procedures will not be subject to the 120-day time limitation addressed by Section 251(f)(1)(B) of the Act since consolidated procedures will address a wide variety of issues justifying greater time for administrative review.

procedural requirements and review standards for the small company service area component of the application.

An applicant withdrawing the small LEC service area part of its pending application shall do so within 10 days of the date this order is entered. An applicant supplementing its application shall provide notice of filing of the supplement within 10 days of entry and shall file a supplement within 30 days of entry.

f. Terms and Conditions of Service --
Obligation to Serve in Non-Rural
Service Areas and Joint Marketing

On October 4, 1995, the Commission entered an order in Application of MFS Intelenet of Pennsylvania, Inc. et al., (MFS), A-310203F.002, which for the first time certificated four carriers, MFS, MCI, TCG and ETC, to compete in Pennsylvania local service markets. All four certificates restricted the provision of local service to all or part of Bell's service territory. In granting these four applications, the Commission imposed on the carriers a certificated area wide obligation to serve and prohibited "joint package" marketing of their telecommunications services. In our Tentative Decision, we requested comment as to whether these two requirements should be preserved, post enactment of the Federal Act, as terms and conditions of service under Section 253(b).

Many parties filed comments and provided discussion at the public forum on these two issues. The comments can generally be divided into two categories. Predictably, the IXC/CLEC community opined that under the Federal Act, the obligation to serve could not be imposed as an entry requirement for non-rural LEC service

territories and could not be included as a mandatory term and condition until such time as the entrant seeks universal service support eligibility under Section 214(e)(2). The IXC/CLECs also argued that the Commission is preempted from imposing "joint package" marketing restrictions as an entry requirement and that imposing such restrictions as a term or condition of service was generally inconsistent with the Federal Act. Just as predictably, ILEC commenters argued that the Commission could impose both obligation to serve and "joint package" marketing restrictions on all CLECs as entry requirements.

We have carefully considered both of these issues and have determined that in both cases, our prior policies should be modified. As to the obligation to serve, we stated as follows in our October 4, 1995 order at A-310203,F.002:

In conclusion, MFS must expend the same effort to serve a residential customer who requests service as a business customer to whom MFS' marketing strategy is targeted. This shall be characterized as a conditional obligation to serve, pending completion of the incumbent LEC's unbundling of its local loops. Once the local loop is unbundled so that MFS and co-carriers can lease facilities to serve customers, they [all competitive local exchange carriers] should have an unconditional obligation to serve.

While there are important public policy concerns reflected in requiring and promoting obligation to serve commitments, which concerns are shared by the Federal Act -- the Federal Act imposes obligation to serve commitments in a different manner than under our initial policy -- at least for non-rural LEC service areas. Under the Federal Act, the obligation to serve is expressly

divorced from the entry process and is not included as a mandatory initial service commitment. Instead, the obligation to serve commitment is addressed through universal service support eligibility procedures. Under the Federal Act it is envisioned, if not required,⁸ that carriers be permitted to initially compete in non-rural service areas without an obligation to serve commitment. An obligation to serve would only be required as a prerequisite to receiving universal service support.⁹

Whether or not we have any option to do otherwise, we will adopt the federal approach, reconsider and rescind the language imposing an obligation to serve as an entry requirement and as a term and condition of service in our October 4, 1995 order at A-310003, F.002 and address the obligation to serve commitment in the universal service eligibility context.¹⁰

⁸ Section 253(f), as recited previously, expressly indicates that it is not a violation of the Federal Act to impose the obligation to serve requirements of Section 214(e)(1) in the entry process for rural telephone company markets unless the rural telephone company has obtained a resale requirement exemption. The natural inference drawn from such language is that it would be a violation of the Act to impose obligation to serve requirements on carriers entering non-rural markets.

⁹ It is unlikely that in the long run a carrier could compete effectively in rural serving areas without being eligible for universal service support.

¹⁰ As to rural telephone companies with over 50,000 access lines, where Section 253(f) expressly authorizes the Commission to include the obligation to serve as an entry requirement but where we have initially determined not to utilize consolidated procedures, we will refrain from deciding whether we will impose an obligation to serve as a mandatory term and condition and will address this issue at the time a carrier makes a bona fide request for interconnection to these ILECs.

As to "joint package" marketing restrictions, in our October 4, 1995 order at A-310203, F.002 we stated that, "Upon the grant of co-carrier status pursuant to this Opinion and Order, MFS [and other CLECs] shall be subject to the same restrictions on interLATA toll service packaging . . . applicable to the other LECs in Pennsylvania absent a specific waiver."¹¹ Such a marketing restriction was designed to obviate the advantages of CLEC "joint marketing" activities for local, intraLATA and interLATA toll services, since certain ILECs, including Bell, were prohibited from providing interLATA toll services.

The purpose of past imposition of marketing restrictions on LEC long distance reseller affiliates was to decrease any competitive advantage over other long distance carriers a LEC affiliated reseller had with the LEC's customers -- particularly since in a monopoly setting the LEC completely controls the presubscription interexchange carrier (PIC) process and has the ability to influence consumer decisions through incomplete or inaccurate disclosure. Upon further review, it appears to us that such a concern becomes less significant as local competition develops. Furthermore, we must keep in mind that in a competitive environment our objective is to decrease regulation for all

¹¹ Historically, the Commission has readily accepted the structural separation between ILECs and their reseller affiliates or subsidiaries that offer interLATA and intraLATA toll services. Furthermore, the Commission has established and imposed competitive safeguards requiring LEC interLATA affiliates to market services in a manner that conveys to current and potential customers that the long distance entity is a separate and distinct company from the local carrier.

carriers rather than impose existing requirements on new carriers, except where the requirements are imposed by statute or remain necessary to the public interest.

Of course, we have a desire to treat all carriers competing in a given market fairly. However, pertaining to marketing restrictions, such an objective can be achieved by eliminating any relevant marketing restrictions on a LEC or its affiliate at the time a competing local carrier or carriers enters the LEC's service territory. Such an approach is consistent with both principles of fairness and our desire to reduce regulation where appropriate. Accordingly, we will adopt such an approach in the future and will not impose mandatory restrictions on CLECs entering LEC service territories.

The present marketing restrictions imposed in our MFS order raise different concerns because those restrictions only apply to carriers competing in Bell's service territory. Of course, at the present time, Bell cannot provide interLATA service and eliminating marketing restrictions on Bell would be a meaningless gesture.

However, in addressing the issue of whether carriers competing in Bell's local service markets should be subject to continuing market restrictions it is helpful to evaluate the approach taken by the Federal Act in addressing this issue. In this regard, Section 271(e)(1) of the Act provides as follows:

Until a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is

earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with ~~interstate~~ services offered by that telecommunications carrier.

Accordingly, in addressing the exact issues governing competitive fairness, Congress determined that it was only appropriate and necessary to impose marketing restrictions on carriers competing in Bell's local service territory if the carrier serves greater than 5% of the nation's presubscribed access lines. While we do not believe we are required to adopt such an approach, upon review, such an approach appears to be wise and adequately addresses our concerns with competitive fairness. Therefore, we will adopt the federal approach and will modify the language in our MFS order to be consistent with the discussion herein.

g. Chapter 63 and 64 Requirements

In the Tentative Decision, the Commission requested parties to identify any provision of Chapter 63 or 64 which is subject to potential preemption by the Federal Act. No commenter identified any provision which could be reasonably viewed as subject to preemption. We agree.

h. Equity Transfers and other Financial Transactions

In the Tentative Decision, we requested interested parties to comment on whether the Act has a preemptive effect on the regulatory approval of equity transfers and other financial transactions required by the Public Utility Code. No party has argued that the Federal Act has any preemptive effect on these

required regulatory approvals. Several parties argue that existing procedures should be streamlined. Sprint/United argues that although not preempted, affiliated interest transaction approvals should be eliminated as unnecessary.

Whether or not affiliated interest transaction review by the Commission continues to be necessary, such review is required by statute and remains mandatory absent legislative intervention.¹² As to abbreviation of procedures, we will continue to evaluate ways to streamline existing procedures consistent with our enabling statute.

2. Interconnection

One of our areas of increased responsibility under the Federal Act involves review of interconnection agreements between carriers. As discussed in detail in the Tentative Decision, Commission development and Commission review of interconnection agreements is divided into three phases: 1) the negotiations phase, 2) the arbitration phase and 3) the adjudication phase.¹³

a. The Negotiations Phase

The development of an interconnection agreement commences on the day a carrier receives a request for interconnection from another carrier (day 1). It is absolutely essential, and through this order we will require that each carrier requesting an

¹² Unlike the FCC, the Commission has not been given forbearance authority.

¹³ Under Section 251(f) of the Act, separate procedures are established for carriers seeking to interconnect with a rural telephone company.

interconnection agreement from another carrier shall file a copy of the request with the Commission at the requesting carrier's A-docket. If the requesting carrier does not have an A-docket, an A-docket shall be assigned by the Commission's Secretary at the time of filing of the interconnection agreement.

The negotiations phase, as established by the Act, is the first 135 days of development of the interconnection agreement. From our perspective, the negotiations phase must be restricted to the contracting parties. Under Section 242(a)(2), at any point during the negotiations, either of the parties may request the Commission "to participate in the negotiations and to mediate any differences arising in the course of the negotiations." The Act gives no further guidance as to how the role of mediator should be accomplished.

The formal role of mediator is a new role for the Commission for which we have little prior experience although the Commission does engage in similar type activity through its alternative dispute resolution process. GTE and TRA suggest that the Commission adopt provisions of existing mediation and arbitration rules to structure the dispute resolution process. Both parties have suggested reference to the American Arbitration Association (AAA) Commercial Mediation and Commercial Arbitration Rules.

Upon review of AAA Commercial Mediation Rules, we are satisfied that adoption of many of its provisions will serve us well. Consistent with the AAA rules, we will adopt the following

procedures applicable to Commission mediation of interconnection disputes:

1. Under Section 252(a)(2), either of the contracting parties may file a formal request for mediation with the Commission. The request shall be filed at the A-docket of the carrier seeking an interconnection agreement.
2. (AAA Commercial Mediation Rule # 3) A request for mediation shall contain a brief statement of the nature of the dispute and the names, addresses and phone numbers of all parties to the dispute and those who will represent them, if any, in the mediation. The initiating party shall file an original and two copies of the request with the Commission and shall serve a copy of the request on the other party to the dispute.
3. The Commission will designate a member of Commission staff or an outside party to fulfill the role of mediator on its behalf.
4. The mediator will schedule mediation sessions.
5. (AAA Commercial Mediation Rule # 9) At least ten days prior to the first scheduled mediation session, each party shall provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. At the discretion of the mediator, such memoranda may be mutually exchanged by the parties. At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented. The mediator may require any party to supplement such information.
6. (AAA Commercial Mediation Rule # 10) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution or the dispute between the parties. If the mediator determines that the mediation should be terminated, the mediator shall prepare and submit a report to the Commission providing a summary of the mediation and explaining the reasons why the mediation was not completely successful. The report should also be provided to the parties.

7. (AAA Commercial Mediation Rule # 7) Mediation sessions are private. The contracting parties and their representatives and members of Commission advisory staff may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

8. (AAA Commercial Mediation Rule # 12) Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversarial proceeding or judicial forum. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:
 - (a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
 - (b) admissions made by another party in the course of the mediation proceedings;
 - (c) proposals made or views expressed by the mediator; or
 - (d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

9. (AAA Commercial Mediation Rule # 13) There shall be no stenographic record of the mediation process.

10. (AAA Commercial Mediation Rule # 14) The mediation shall be terminated:
 - (a) by the execution of an agreement by the parties which is subsequently approved by the Commission;
 - (b) by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or
 - (c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

11. If a settlement agreement is reached and executed, the mediator shall prepare and submit a report to the Commission summarizing the mediation and explaining and making recommendations regarding the terms of the settlement. The report shall be made public and shall be provided to the parties to the mediation. The parties shall jointly file an interconnection agreement which reflects the terms of the settlement agreement, the settlement agreement, the mediator's report and a petition requesting Commission approval of the settlement agreement and the interconnection agreement with the Commission within 30 days of execution of the settlement agreement.

12. Notice of the filing of the above-referenced documents will be published in the Pennsylvania Bulletin. Interested parties may file comments to the interconnection agreement within 20 days of publication. The Commission will adjudicate the petition for adoption of the settlement agreement and will either approve or reject the interconnection agreement within 90 days of the filing pursuant to Section 252(e)(4).¹⁴

These procedures appear to be efficient and effective in carrying out the Commission's mediation role and commencing and adjudicating negotiated interconnection contracts. Accordingly, we are satisfied that these rules will suffice in fulfilling our mediation responsibilities as envisioned in the Federal Act.

b. The Arbitration Phase

Pursuant to Section 252(b), if the parties are unsuccessful in negotiating an interconnection agreement, with or without mediation, either party may file a petition with the Commission from day 135 to day 160 to arbitrate the contractual dispute. The arbitration process is intended only to address those issues which have not been negotiated by the parties. Pursuant to Section

¹⁴ We will also follow these procedures for interconnection agreements which are negotiated without the use of Commission mediation.

252(b)(2), the petitioner must submit with its petition "all relevant documentation concerning -- (i) the unresolved issues; (ii) the position of the parties with respect to those issues; and any other issue discussed and resolved by the parties." The petition must be served on the other negotiating party on the filing date. Pursuant to Section 252(b)(3), responses to the petition must be filed with the Commission within 25 days of the filing date. The Commission may require the parties to provide any information relevant to resolving the disputed issues. Pursuant to Section 252(b)(4)(c), the Commission must arbitrate and resolve all disputed issues within 270 days of the date of the interconnection request.¹⁵

In the Tentative Decision, the Commission requested comment from interested parties regarding the appropriate procedural details of the arbitration process which will be required to carry out the express statutory provision. Much of the discussion in the comments pertained to the openness of the arbitration process and who should be permitted to participate. Generally speaking, the OCA and the competitive industry recommended an open process in which all interested parties could participate actively in any given arbitration. In contrast, the ILEC industry supported a more closed process in which only the contracting parties could

¹⁵ The amount of time the Commission actually has to arbitrate an interconnection agreement is dependent upon when in the 25-day window between day 135 and day 160 the arbitration petition is filed. In the worst case scenario, if the petition is filed on day 160, the Commission will only have 110 days to complete its arbitration.

participate. Upon review, we will establish a process which attempts to accommodate the views of all parties and also satisfies our very serious concerns regarding the short timeframes established by Congress for state commission arbitration.

After careful consideration, we will establish the following procedures to govern all arbitrations:

1. Each contracting party shall file a report with the Commission at the A-docket number of the party seeking interconnection, no later than day 125 from the date of the interconnection request, which provides the status of the negotiations and provides an assessment of whether each party believes it will be necessary to petition for arbitration.
2. Either contracting party may file an original and two copies of a petition with the Commission requesting arbitration of disputed issues in the 25-day window from day 135 to day 160 from the date of the interconnection request. Petitions must comply with Section 252(b)(2)(A) of the Act. Petitioning parties should err on the side of providing too much documentation rather than not enough documentation. Petitions which do not include adequate documentation may be dismissed by the Commission. The petition shall be filed at the A-docket number of the party requesting an interconnection.
3. The arbitration petition shall be served on the other contracting party, the OCA, the OTS and the OSBA on the day of filing. We recognize the statutory right of the OCA, OTS and OSBA to participate throughout the arbitration process. No other party may participate in the arbitration process until later in the process as described hereafter. However, at the same time, all arbitration proceedings will be public in nature. The contracting parties, the OCA, the OTS and the OSBA may file answers with the Commission within 25 days of the filing date consistent with Section 252(b)(3).

4. The Commission will designate a member of Commission staff or an outside party to fulfill the role of arbitrator on its behalf.
5. The arbitrator will schedule a preliminary conference to identify and discuss the issues to be resolved, to stipulate to uncontested facts and to consider any other matters designed to expedite the arbitration proceedings. If no party raises disputed facts or if the arbitrator determines that the disputed facts raised are not material, the remainder of the arbitration will be conducted on the documents consistent with a schedule established at the preliminary conference by the arbitrator.
6. If disputed, material facts are present, the arbitrator will schedule oral arbitration proceedings required to resolve the disputed material facts. Oral arbitration proceedings shall be strictly confined to the material facts disputed by the parties. Other advocacy or evidence will not be permitted. Any oral arbitration proceedings shall be transcribed.
7. Regarding oral arbitration proceedings, the arbitrator is delegated authority to determine the format for conduct of the proceedings. The format and conduct of the proceedings shall be designed with the primary objective of decreasing the time and resources associated with the proceedings. The authority delegated to the arbitrator shall include but not be limited to determinations as to whether evidence must be submitted under oath, whether evidence should be prefiled, whether preliminary documentary statements should be required and whether memoranda or briefs are necessary.
8. Parties to the arbitration proceeding shall submit evidence in support of their position regarding material, disputed facts consistent with the procedural format adopted by the arbitrator.
9. The arbitrator shall be the sole judge of the relevance and materiality of the evidence pertaining to resolution of material, disputed facts. Conformity to legal rules of evidence shall not be necessary.

10. Following the proceedings as directed by the arbitrator, the arbitrator shall prepare a recommended decision which, as required by Section 252(b)(4)(c) of the Act, "resolves each issue set forth in the petition and the response[s], if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues" ¹⁶ The recommended decision shall be concise and is not required to provide unnecessary discussion of the background of the proceedings or the positions of the parties. The recommended decision shall specifically identify and discuss each disputed, material fact and the arbitrator's recommended resolution of the factual dispute as well as the effect of the resolution on the terms and conditions of the interconnection agreement. The recommended decision will be issued no later than day 220 from the date of the request for interconnection.
11. The recommended decision shall be served on the parties to the proceeding. A notice of the issuance of the recommended decision shall also be served on each party on the service list at this docket (M-00960799). Interested parties desiring to receive notice of interconnection agreement recommended decisions shall enter their appearance at this docket.
12. Any interested party, including parties which have not participated in the arbitration proceeding previously, may file exceptions to the recommended decision within 15 days of the date of issuance of the recommended decision. No reply exceptions will be permitted.
13. The Commission will issue an arbitration order which finally resolves all material disputed facts and finally arbitrates all disputed terms and conditions of the interconnection agreement by no later than day 270 from the date of the interconnection request.

¹⁶ The standards for arbitration to be applied by the arbitrator are extensive and are set forth at Section 252(c).

Again, we are satisfied with these procedures in that they balance the concerns of all interested parties. While fulfilling our new responsibilities pertaining to arbitration of interconnection agreements will undoubtedly be difficult, we are convinced that adoption of these arbitration procedures will further our ability to address these important issues in a timely fashion.

c. Adjudication Phase

Although not specifically addressed in Section 252, it is clear that the Act envisions that upon resolution of all terms and conditions of interconnection, whether through negotiation and mediation or arbitration, the contracting parties must reduce the agreement to writing and execute the agreement.¹⁷ Pursuant to Section 252(e), the executed agreement must then be filed with the state commission to conduct the adjudication phase of the proceeding.

The Act does not give any express guidance as to when agreements must be filed with the state commission. However, since the period for negotiations concludes on day 160, we conclude that an executed, negotiated interconnection agreement accompanied by a joint petition for adoption of the agreement shall be filed by no later than 30 days following the close of the negotiations phase or by day 190 following the request for interconnection. As to

¹⁷ Since state commission arbitration is expressly compulsory and binding by law, the contracting parties must reduce arbitrated agreements to writing and execute each agreement even if one or both of the parties is not satisfied with the arbitration.

arbitrated agreements, the executed agreement accompanied by a joint petition for adoption shall be filed with the Commission no later than 30 days following the entry of the Commission order finally arbitrating the agreement. In either case, although an original and two copies of the papers shall be filed with the Commission at the A-docket of the party requesting interconnection, the papers shall also be served on all parties on the service list at this docket.

Pursuant to Section 252(c)(4) of the Act, the Commission must approve or reject the agreement, consistent with the standard set forth in Section 252(e) by no later than 90 days from filing for negotiated agreements and 30 days from filing for arbitrated agreements. To accommodate these time deadlines, we will establish a 20-day response period for the filing of comments by interested parties to negotiated agreements and a 7-day response period for the filing of comments by interested parties to arbitrated agreements. The Commission will issue an order approving or rejecting each agreement within the required timeframe established by the Act. Pursuant to Section 252(h), the Commission will make each approved agreement available for public inspection and copying within ten days of the entry date of the Commission's order finally approving the agreement. Although we will not establish a fee schedule or fee requirement for interconnection agreement proceedings at this time, our normal copying charges will be applied to requests for a copy of any interconnection agreement.

3. Statement of Generally Available Terms

Under Section 252(f) of the Act, Bell may file and seek approval of a statement of generally available interconnection terms and conditions with the Commission. The statement must be reviewed by the Commission and may not be finally approved unless the statement complies with Section 252(d), as quoted previously, Section 251, any FCC regulations promulgated under Section 251 and any relevant state law requirements. Pursuant to Section 252(f)(3), if the Commission does not complete its review of the statement within 60 days of filing or within the time extension agreed to by Bell, the Commission must allow the statement to become effective subject to further review.

In our Tentative Decision, we suggested that filing and review of these statements appeared to be consistent with existing tariff filing procedures as provided for by 66 Pa. C.S. §1308(a) and (b) and requested interested party comment on the appropriateness of use of existing tariff procedures. Many of the parties objected to the use of Section 1308(a) and (b) procedures for different or even opposite reasons.

However, upon further review, we find that the Act's procedural requirements for filing and review of a generally available terms statement by Bell are virtually identical to existing tariff procedures. Accordingly, we will formally adopt Section 1308(a) and (b) procedures for filing and review of a Bell statement under Section 252(f) of the Act with the single modification that the Commission may not suspend the terms

statement during the 60-day review period and must allow the statement to become effective if review is not completed.

4. Resale Restrictions

In our Tentative Decision, we requested comment on the meaning of the resale restriction imposed by Section 251(c)(4) of the Act. Since the issuance of the Tentative Decision, this issue has come before us in a different docket, R-00963578, and we will address this issue at that docket.

5. Pre-enactment Interconnection Agreements

One of the most controversial issues we must resolve is how to implement Section 252(a) of the Act pertaining to filing of pre-enactment interconnection agreements. Section 252(a) provides as follows in relevant part:

. . . The agreement [any negotiated interconnection agreement], including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection(e) of this section.

Section 252(e), as discussed previously, would require the Commission to review each agreement for compliance with the standards set forth in Section 252(c)(2)(A) and issue a decision approving or rejecting the agreement within 90 days of filing.

The Tentative Decision concluded that Section 252(a) appeared to include existing EAS agreements and cellular or mobile carrier interconnection contracts with ILECs and requested comments as to how to best manage implementation of the apparent requirements and procedures. The comments focused a great deal of attention on this

issue. The competitive industry favors immediately requiring filing of all pre-enactment agreements, including EAS and cellular carrier interconnection agreements with ILECs.¹⁸ The ILEC commenters just as strongly opposed requiring the filing of any pre-enactment interconnection agreement as being inconsistent with the policies and objectives underlying the Act.

We focus our attention on this issue with great caution since the outcome could create a very significant administrative burden for our agency. Although we have carefully reviewed the comments of the ILECs on this issue, in the end we can only return to the clear language of Section 252(a) which is difficult to reasonably interpret other than as requiring the filing and approval of all pre-enactment interconnection agreements.

All of the ILECs argue that only competitive, pre-enactment interconnection agreements be interpreted as subject to Section 252(a)'s requirements because competitive scenarios are the clear focus of Section 251.¹⁹ However, no such qualification can be drawn from the express language of Section 252(a). Furthermore, we

¹⁸ Vanguard, the only cellular provider filing comments, strongly recommended that the Commission require the filing of all cellular interconnection contracts with ILECs.

¹⁹ GTE points out that the Conference Report accompanying Senate Bill 652 indicates that the review of interconnection agreements was not intended to include Section 201 agreements governing the provision of interexchange service. We agree. However, EAS contracts involve the provision of local service not interexchange service and are not Section 201 agreements. GTE also argues that the Section should be interpreted to only apply to agreements which were negotiated pre-enactment but were not executed until after enactment. However, the clear language of Section 252(a) does not support such an interpretation.

are mindful of Section 252(i) which requires that the terms and conditions of all interconnection agreements approved by the Commission, including pre-enactment interconnection agreements, be made available to any other requesting telecommunications carrier.²⁰ Accordingly, it appears that Congress intended that Section 251 require the elimination of pre-existing agreements which do not meet the Act's requirements to assure that agreements between all carriers, except Section 201 agreements, including agreements between ILECs, are competitively neutral and are made generally available.

While acknowledging the express language of Section 252(a), this issue is complicated further by a number of factors. First, it appears there may be hundreds of pre-enactment interconnection agreements between ILECs and between ILECs and wireless carriers in the Commonwealth. Furthermore, it appears possible, if not likely, that requiring filing of these contracts, particularly EAS contracts, would not result in filing but would result in cancellation of many of the contracts.²¹ Such a situation would have a serious impact on the continued provision of service,

²⁰ Bell makes the argument that if the filing of pre-enactment contracts are required and approved by the Commission for EAS contracts that the terms and conditions in each agreement be made generally available only for the specific route(s) governed by each respective agreement. While such an interpretation is not unreasonable, we will defer resolution of interpretation of Section 252(i) until such time as we fully understand the complexities of this issue.

²¹For example, Ameritech, one of the seven Regional Bell Operating Companies, has exercised certain contractual rights to cancel EAS compensation agreements between its ILEC subsidiaries and other ILECs.

particularly in EAS situations.²² While we are aware that several states have taken action to require filing of all pre-enactment agreements, we are reluctant to resolve this issue and to take substantive action until we fully understand the potential administrative burden and repercussions caused by any potential action.

Accordingly, we will require the submission of further information on this subject. Within 30 days of the date this order is entered, all interested parties, including all carriers potentially subject to the filing of pre-enactment interconnection agreements under Section 252(a), shall file with the Commission at this docket an original and nine copies of a statement which includes the following:

1. A list of all pre-enactment interconnection agreements. In preparing the list, the term "interconnection agreement" should be interpreted broadly to include EAS agreements, collocation agreements, cellular and mobile carrier agreements, shared network facilities agreements (SNFAs) and others.
2. Discussion of why specific agreements or specific types of agreements identified on the list should not be included as interconnection agreements for purposes of implementation of Section 253(a).
3. Discussion of proposals for scheduling or planning of the filing and review of pre-enactment agreements.
4. Identification and discussion of which agreements or types of agreements the carrier would consider cancelling if filing were required and when such cancellations might

²²Such interruptions of service will not be tolerated by this Commission under existing applicable regulations.

occur and whether such cancellation may impact the continuous provision of telecommunications services to the public in a transparent fashion.

5. Discussion of the potential ramifications of cancellation of any contracts or other ramifications resulting from potential implementation of Section 253(a).
6. Discussion of the issues that may arise if the Commission does not evaluate and review pre-enactment agreements.

We expressly direct all carriers to be forthright and complete in preparation of their statements. Only through such disclosure can the Commission resolve this issue in an orderly well-balanced fashion consistent with the public interest.

6. Collocation Policy Statement

In our Tentative Decision, we raised the issue of whether the Commission's policy statement at 52 Pa. Code §69.311 governing collocation for intrastate special access was affected by enactment of Section 251(c)(6) of the Act. Section 251(c)(6) requires that all collocation, both intrastate and interstate and special and switched, be made available on a physical basis unless the local carrier demonstrates to the Commission that "physical collocation is not practical for technical reasons or because of space limitations."

While several commenters, without rational reason, argued that our collocation policy statement was unaffected by Section 251(c)(6), Bell's comments provide the most reasonable approach to this issue. Bell argues that the collocation policy statement is either preempted or irrelevant. Bell informs the Commission that

it intends to file an intrastate collocation tariff with the Commission in the near future which will make proposals pertaining to which central offices require physical collocation exemptions and that for Bell this issue should be comprehensively addressed at that future docket.

We agree that Bell's approach to this issue is a wise one and would encourage other ILECs to address this issue in comprehensive rather than in piecemeal fashion.²³ As to our policy statement, we will act to rescind our policy statement at 52 Pa. Code §69.311, attached as Annex A hereto, upon publication of this Order.

7. Universal Service

We raised many issues regarding the Act's effects on our pending universal service dockets. All parties submitted relatively comprehensive comments on the universal service issues. We will address these issues at our pending rulemaking and investigative dockets at L-00950105 and I-00940035.

8. In-Region InterLATA Services for Bell

In the Tentative Decision, we also discussed the Commission's role in the FCC's review of any future application filed by Bell or its affiliate to provide in-region interLATA services. Under Section 271(d)(2)(B) of the Act, the FCC must "consult with the state commission that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)" which establishes a competitive

²³ Smaller ILECs may also seek general exemption from Section 251(c)(6) pursuant to Section 251(f)(2).

checklist which must be met before a Bell in-region interLATA service application can be approved by the FCC.

In addressing this issue in the Tentative Decision, we stated as follows:

Review of any future Bell affiliate in-region interLATA application before the FCC, given the expected highly contentious nature of any such application, is placed on an extremely fast track and will involve statutorily required consultation between the Commission and the FCC -- an unprecedented process -- to address whether the competitive checklist has been met. Accordingly, interested parties should provide comment identifying how it is envisioned this process will operate and should address what factors should be considered by the Commission in reviewing whether the Bell affiliate has complied with the competitive checklist. Commenters should specifically address what input, if any, should be received by the Commission from interested parties during the application process in developing the Commission's positions for purposes of consultation with the FCC. If outside input is warranted, commenters should address how the opportunity for input should be procedurally structured.

Many of the commenters comprehensively addressed this issue. Most commenters requested some type of formal proceeding by the Commission to allow the Commission to develop its position for purposes of consultation with the FCC. Bell commented that "consultation" is a very informal process which does not require any formal Commission review.

Upon review, we will withhold making a final determination on this issue at this time. Clearly, the Act envisions that formal review and consideration of third party input occur at the federal level. As for the level and intensity of state review, we should

coordinate our efforts in interpreting this provision with our FCC colleagues. It appears that the structure of the consultation process should be designed to the mutual satisfaction of the states and the FCC, to maximize the effective implementation of the statutory framework of review contemplated under Section 271.

This does not mean that the Commission is restricted in collecting information and considering the views of interested parties in its role of FCC consultant. Pursuant to normal procedures under authority of 66 Pa. C.S. §§505 and 506, the Commission can collect the required information to fulfill its role. Furthermore, the Commission or its staff can confer with interested parties on an informal basis to understand various views of Bell's competitive checklist compliance.

We must be mindful that the time constraints imposed by the Act must be a governing consideration of the state consultative process. Pursuant to Section 271(d)(3) of the Act, the FCC must make a final determination within 90 days of the filing of an application by Bell. The consultation process with the state commission must be accommodated within that 90 days.

9. Bell IntraLATA Imputation Requirement

Under Section 271(e)(2) of the Act, Bell must make intraLATA presubscription available to all of its customers prior to or at the time its in-region interLATA affiliate commences the provision of interLATA services. At the state level, Bell is required to

implement intraLATA presubscription by no later than June 30, 1997. Investigation into IntraLATA Interconnection Arrangements, I-00940034 (December 14, 1995). Accordingly, it appears likely that Bell will attempt to secure FCC approval of an in-region interLATA application and commence interLATA business through an affiliate by June 30, 1997, or at the time it implements intraLATA presubscription.

In our IntraLATA Investigation order, we refrained from imposing an imputation requirement on Bell and other LECs providing intraLATA toll services at the time intraLATA presubscription becomes available and significant intraLATA competition becomes a reality. However, Section 272(e)(3) of the Act imposes an imputation requirement on Bell for all services which utilize its own access services, including intraLATA toll services. In the Tentative Decision, the Commission requested comment on whether the IntraLATA Investigation Order required modification to be consistent with federal law.

All parties commenting on this issue except for Bell support modification of our prior order and imposition of an imputation requirement on Bell's provision of intraLATA toll services. Bell argues that modification is unnecessary since the imputation requirement does not become effective until Bell, through an affiliate, commences the provision of interLATA services.²⁴

²⁴In addition, we note that the imputation requirement for Bell is an issue that is being addressed by this Commission in the Competitive Safeguards proceeding at Docket No. M-00940587.

However, as indicated previously, Bell will likely attempt to commence the provision of interLATA services at the same time as intraLATA presubscription becomes available and our decision not to apply an imputation requirement becomes effective. Such a scenario would clearly create inconsistency between state and federal requirements. Even if Bell experiences undesirable delay in receiving FCC approval to provide interLATA services, our IntraLATA Investigation Order does not accommodate the requisite imposition of an imputation requirement at whatever time its affiliate commences service. Accordingly, through this order, we will reconsider and modify our December 14, 1995 order at I-00940034 so as to impose an imputation requirement on the provision of intraLATA services on Bell, consistent with that imposed by Section 272(e)(3) of the Act, at the time Bell's affiliate commences the provision of in-region interLATA services.

Furthermore, although the Federal Act does not require it, we now find that all noncompetitive intraLATA toll services provided by any local carrier should be subject to an imputation requirement at the time intraLATA presubscription becomes available in that service territory -- either in July of 1997 or the close of 1997, depending on the size of the ILEC serving a given area. Accordingly, we will modify our IntraLATA Investigation Order to impose an imputation requirement on noncompetitive intraLATA toll services consistent with the foregoing discussion.

10. InterLATA EAS for Bell and GTE

In the Tentative Decision, the Commission raised the issue of the effect of the Act's supersession of the AT&T and GTE consent decrees on prior Commission regulatory requirements in the EAS context. More specifically, 52 Pa. Code §63.75(6) requires GTE and Bell to seek consent decree waivers when necessary to implement interLATA EAS. Since consent decree waivers are no longer pertinent, Section 63.75(6) is clearly outdated and obsolete. Accordingly, we will act to rescind the regulation through incorporation of this issue into our pending docket, Rulemaking to Rescind Obsolete Regulations Regarding Telephone Service, at L-00960113. However, nothing in this Order should be interpreted to relieve GTE and Bell from seeking any federal regulatory approvals which may be necessary to implement interLATA EAS at any given time.

11. Interexchange Service Rate Deaveraging

Section 254(g) of the Act enacts a general prohibition against interexchange service rate deaveraging which is to be implemented by the FCC through the adoption of rules or regulations. In this regard the FCC has opened a rulemaking docket to implement Section 254(g) at CC Docket No. 96-61.

Although, in the Tentative Decision, the Commission requested comment regarding interpretation of this provision, the Commission acknowledged that it was the FCC, not the Commission, which Congress has assigned implementation responsibility. The Commission has filed comments with the FCC regarding the rate

averaging issue and has advocated the approach taken by 66 Pa. C.S. §3008(d) under which interexchange rate deaveraging should be broadly prohibited with the flexibility for the FCC or state commission to permit temporary or permanent service offerings, which could be viewed as including rate deaveraging terms, on a case-by-case basis. The Commission will await the outcome of the FCC's rulemaking docket and will interpret the rate deaveraging prohibition consistent with the FCC's ultimate approach.

12. Health Care Providers, Libraries and Education Providers

In the Tentative Decision, the Commission requested comment on how it should fulfill its responsibilities under Section 254(h) of the Act pertaining to reasonably comparable universal service rates for rural health care providers and discounted universal service rates for libraries and education providers. Although we emphasized our desire for comprehensive comment on these issues, very little useful comment was received.

We remain particularly concerned regarding our responsibility under Section 254(h)(1)(B) to establish the level of discounts to intrastate rates to be made available to libraries and educational providers. If necessary, we will consider the establishment of a generic docket in the foreseeable future to address these important issues.

13. Marketing Practices and Consumer Education

Another issue should be raised in context with enforcement of the Commission's service quality regulations, which requirements are clearly preserved by Section 253(b) as necessary to protect the

public welfare, ensure the continued quality of services and safeguard the rights of consumers. Undoubtedly, consumers will face many potentially confusing decisions as more service providers enter the telecommunication markets and engage in potentially high pressure marketing activities. No parties in this proceeding commented on what role service providers have in consumer education.

Clear, consistent and unambiguous marketing language should be adopted by all entities marketing telecommunication services in Pennsylvania. Local exchange companies (LECs) and interexchange carriers are already required to submit language for certain communications with their customers to the Bureau of Public Liaison for a plain language review. Such a procedure will be too burdensome with the addition of many new entrants in a highly competitive atmosphere.

To be better informed and educated, telecommunications customers must have accurate complete and comparable information about products, prices and quality when making choices in the competitive telecommunications marketplace. The definition of basic service for one service provider must be the same for all service providers. The definition of marketing terminology must be mutually understandable for consumers and service providers to minimize customer confusion or inevitably Formal Complaints will follow.

To avoid these problems and the very real burden that a large increase in complaints would have on Commission resources, a task

force consisting of representatives of the Commission's Bureau of Public Liaison, the Bureau of Consumer Services, and the telecommunications industry will be established immediately. The task force will be organized and administered by the Bureau of Public Liaison and shall be charged with developing definitions of marketing terminology that will be universally accepted and, more importantly, used in the actual marketing of telecommunication services.

14. Payphone Issues

Although not raised in the Tentative Decision, CAPA filed comprehensive comments addressing and requesting Commission attention to the effects of the Act on the provision of payphone services by Bell and independent payphone providers. Specifically, CAPA focuses on Section 276 of the Act which establishes various requirements and competitive safeguards on Bell's provision of payphone service and its service offerings to independent payphone providers.

Under Section 276, the FCC is required to promulgate regulations implementing Congressional payphone requirements and policies within nine months of enactment. Under Section 276(c), state payphone requirements which are inconsistent with the FCC's regulation will be preempted. Accordingly, it is premature for the Commission to consider modification of its requirements applicable to payphones until the FCC finalizes its regulations. However, upon final promulgation, the Commission invites CAPA to file a petition with the Commission advocating modifications to payphone

requirements or Bell service offerings which, in its view, are inconsistent with the FCC's regulations.

15. Notice of FCC Filings

In the Tentative Decision, the Commission voiced concern with its need to keep abreast of federal issues as they progress at the FCC and suggested that all FCC filings be copied on the Commission. Many parties commented that requiring service of all FCC filings was unnecessary and costly.

Upon further review, we will modify our tentative approach and attempt to accommodate the views of the parties. We will, through issuance of this Order, direct all jurisdictional carriers to serve the Commission with a copy of all FCC filings made under Title II of the Communications Act. However, as to other filings, we will merely require that carriers file with the Commission a one-page notice of filing which includes the docket number of the filing and a description of the document filed.

All of these documents shall be filed at this docket. In order to administer the receipt of these documents, we will direct the Prothonotary to segregate this docket into subdockets and to establish corresponding document folders for each ILEC, CLEC, facilities-based IXC, and one for all other carriers.

C. Conclusion

Overall, we are satisfied that, through this Order, we have accomplished the important objective of taking the initial steps necessary to implement the Federal Act in an orderly and timely fashion. While undoubtedly this will not be our last action

pertaining to implementation, the comprehensive nature of our action today will result in timely coordination with the federal government of the Congressional national policy framework; THEREFORE,

IT IS ORDERED:

1. That entry procedures described in the body of this Order are hereby adopted for all telecommunications carriers.

2. That our Opinion and Order entered October 4, 1995 in Application of MFS Intelenet of Pennsylvania, Inc., et al. at A-310203F.002 is hereby modified consistent with the discussion herein.

3. That any joint marketing restrictions presently imposed on incumbent local exchange carriers by prior Commission orders will be rescinded upon the entry and interconnection of any competing local carrier in the incumbent local exchange carrier's service territory.

4. That the procedures discussed herein governing development and review of interconnection agreements are hereby adopted.

5. That procedures for continued Commission evaluation pre-enactment interconnection agreement filings are adopted consistent with the discussion herein.

6. That a policy statement proceeding is hereby instituted at this docket.

7. That the Commission's policy statements are hereby amended by deleting Section 69.311 to read as set forth in Annex A.

8. That the Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.

9. That the Secretary shall deposit this order and Annex A with the Legislative Reference Bureau for publication in the Pennsylvania Bulletin effective immediately.

10. That our Order entered December 14, 1995 in Investigation into IntraLATA Interconnection Agreements at I-00940034 is hereby modified consistent with the discussion herein.

11. That rescission of 52 Pa. Code §63.75(6) is incorporated into our pending rulemaking docket, Rulemaking to Rescind Obsolete Regulations Regarding Telephone Service at L-00960113.

12. That a task force is hereby established consisting of representatives of the Bureau of Public Liason, the Bureau of Consumer Services and the telecommunications industry to develop definitions of marketing technology that will be universally accepted and used in the marketing of telecommunications services. The task force shall be organized and administered by the Bureau of Public Liason.

12. That the Secretary's Office is directed to serve this Order on all parties on the Executive Director's telecommunications mailing list which are not parties on the service list for this docket.

BY THE COMMISSION,



John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: May 23, 1996

ORDER ENTERED: JUN 3 1996

ANNEX A
TITLE 52. PUBLIC UTILITIES
PART 1. PUBLIC UTILITY COMMISSION
Subpart C. FIXED UTILITY SERVICES
CHAPTER 69. GENERAL ORDERS, POLICY
STATEMENTS AND GUIDELINES ON FIXED
UTILITIES

§69.311. (Reserved).

*Sample Application Form for Parties Wishing to Offer,
Render, Furnish, or Supply Telecommunication Services to
the Public in the Commonwealth of Pennsylvania.*

You may use the attached form to make your application. (Remove this instruction sheet prior to filing.) If you need more space that is provided on this form or if you are attaching exhibits, attach additional pages and exhibits immediately following the page containing the item(s) being addressed. If you retype the application, please repeat each item in conjunction with your answers.

To file an application with the Pennsylvania Public Utility Commission, file a signed and verified original of your application and attachments with two copies with the Commission's Secretary's Office in Harrisburg, Pennsylvania:

*B-20, North Office Building
< or >
P.O. Box 3265, Harrisburg, PA 17105.*

IF YOUR ANSWER TO ANY OF THESE ITEMS CHANGES DURING THE PENDING OF YOUR APPLICATION OR IF THE INFORMATION RELATIVE TO ANY ITEM HEREIN CHANGES WHILE YOU ARE OPERATING WITHIN THE COMMONWEALTH OF PENNSYLVANIA, YOU ARE UNDER A DUTY TO SO INFORM THE COMMISSION AS TO THE SPECIFICS OF THE CHANGE. Additionally, if you plan to cease doing business within the Commonwealth of Pennsylvania, you are under a duty to request authority from the Commission for permission prior to ceasing business.

As noted herein, you should file a separate application for each category of operation. If you are filing multiple applications simultaneously, the applications should cross reference each other. At the time of filing, you may petition the Commission, pursuant to Section 5.43 of the Commission's Regulations, 52 Pa. Code §5.43, to waive the provisions of Sections 1.34 and 1.43, 52 Pa. Code §§1.34 & 1.43, which require a separate application fee for each application (i.e., multiple fees), and to seek authorization for the payment of one application fee. Additionally, pursuant to Sections 1.57 and 1.58 of the Commission's Regulations, 52 Pa. Code §§1.57 & 1.58, you must attach Proof of Service of the Application and attachments upon certain parties as specified in the Sample Application. Upon review of the Application, further notice may be required pursuant to Section 5.14 of the Commission's Regulations, 52 Pa. Code §5.14.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of _____,
d/b/a _____, for approval to
offer, render, furnish, or supply
telecommunication services as a(n) _____ [as
specified in Item 9 below] _____ to the public
in the Commonwealth of Pennsylvania.

Application Docket No.

_____ F _____
199 _____

To the Pennsylvania Public Utility Commission:

1. **IDENTITY OF THE APPLICANT:** The name, address, telephone number, and FAX number of the Applicant are:

Please identify any predecessor(s) of the Applicant and provide other names under which the Applicant has operated within the preceding five (5) years, including name, address, and telephone number.

2. **CONTACT PERSON:** The name, title, address, telephone number, and FAX number of the person to whom questions about this Application should be addressed are:

3. FICTITIOUS NAME:
(select and complete appropriate box.)

_____ The Applicant will be using a fictitious name or doing business as
("d/b/a"):

Attach to the Application a copy of the Applicant's filing with the Commonwealth's
Department of State pursuant to 54 Pa.C.S. §311, Form PA. - 953.

< or >

_____ The Applicant will not be using a fictitious name.

4. BUSINESS ENTITY and DEPARTMENT OF STATE FILINGS:
(select and complete appropriate box.)

_____ The Applicant is a sole proprietor.

If the Applicant is located outside the Commonwealth, provide proof of compliance with 15 Pa.C.S. §4124 relating to Department of State filing requirements.

<or>

_____ The Applicant is a:

- _____ domestic general partnership (*)
- _____ domestic limited partnership (15 Pa.C.S. §8511)
- _____ foreign general or limited partnership (15 Pa.C.S. §4124)
- _____ domestic limited liability partnership (15 Pa.C.S. §8201)
- _____ foreign limited liability general partnership (15 Pa.C.S. §8211)
- _____ foreign limited liability limited partnership (15 Pa.C.S. §8211)

Provide proof of compliance with appropriate Department of State filing requirements as indicated above.

Give name, d/b/a, and address of partners. If any partner is not an individual, identify the business nature of the partner entity and identify its partners or officers.

* _____ If a corporate partner in the Applicant's domestic partnership is not domiciled in Pennsylvania, attach a copy of the Applicant's Department of State filing pursuant to 15 Pa.C.S. §4124.

<or>

_____ The Applicant is a:

- _____ domestic corporation (none)
- _____ foreign corporation (15 Pa.C.S. §4124)
- _____ domestic limited liability company (15 Pa.C.S. §8913)
- _____ foreign limited liability company (15 Pa.C.S. §8981)

Provide proof of compliance with appropriate Department of State filing requirements as indicated above.

Give name and address of officers.

The Applicant is incorporated in the state of _____.

5. AFFILIATES AND PREDECESSORS WITHIN PENNSYLVANIA:
(select and complete appropriate box.)

_____ Affiliate(s) of the Applicant doing business in Pennsylvania are:

Give name and address of the affiliate(s) and state whether the affiliate(s) are jurisdictional public utilities. Give the docket numbers for the authority of any jurisdictional affiliate(s).

_____ If the Applicant or an affiliate has a predecessor who has done business within Pennsylvania, give name and address of the predecessor(s) and state whether the predecessor(s) were jurisdictional public utilities. Give the docket numbers for the authority of any jurisdictional predecessors(s).

< or >

_____ The Applicant has no affiliates doing or predecessors which have done business in Pennsylvania.

6. AFFILIATES AND PREDECESSORS RENDERING PUBLIC UTILITY SERVICE OUTSIDE PENNSYLVANIA: (select and complete the appropriate box.)

<p>_____ Affiliate(s) of the Applicant rendering public utility service in any jurisdiction other than Pennsylvania are:</p> <p>Give name and address of the affiliate(s).</p> <p>_____ Predecessor(s) of the Applicant which rendered public utility service in any jurisdiction other than Pennsylvania are:</p> <p>Give name and address of the predecessor(s).</p>
--

< or >

<p>_____ The Applicant has no affiliates rendering or predecessors which rendered public utility service outside Pennsylvania.</p>
--

7. TRANSACTIONS WITH AFFILIATES:
(select and complete the appropriate box.)

_____ Identify any affiliate(s) which provide services to or receive services from the Applicant. Describe the nature of the services and how the transactions between or among affiliates will be handled.

< or >

_____ The Applicant has no affiliates providing service to or receiving services from the Applicant.

8. APPLICANT'S PRESENT OPERATIONS:
(select and complete the appropriate box.)

The Applicant is presently doing business in Pennsylvania as a jurisdictional public utility pursuant to authority at Docket No. _____ as a:

Reseller of Toll Services, e.g., MTS. 1+, 800 & 888, Out WATS, Travel Cards, Debit Cards, etc.

Competitive Access Provider, e.g., dedicated point-to-point service or IXC transporter.

Interexchange Carrier, e.g., providing toll services as a facilities-based carrier.

Competitive Local Exchange Carrier, e.g., providing local exchange service as a facilities-based carrier or as a reseller in an area previously served by an incumbent local exchange carrier.

Local Exchange Carrier, providing local exchange service as a facilities-based carrier within a defined service territory.

Other. (Identify the nature of public utility service being rendered.)

<or>

The Applicant is not presently doing business in Pennsylvania as a public utility.

9. APPLICANT'S PROPOSED OPERATIONS: The Applicant proposes to operate as a:

- Reseller of Toll Services, e.g., MTS, 1+, 800 & 888, Out WATS, Travel Cards, Debit Cards, etc.
- Competitive Access Provider, e.g., dedicated point-to-point service or IXC transporter.
- Interexchange Carrier, e.g., providing toll services as a facilities-based carrier.
- Competitive Local Exchange Carrier, e.g., providing local exchange service as a facilities-based carrier or as a reseller.
- Other. (Identify the nature of public utility service to be rendered.)

The Applicant should file a separate application for each category of operation. If the Applicant files multiple applications simultaneously, the applications should cross reference each other. At the time of filing, the Applicant may petition the Commission, pursuant to Section 5.43 of the Commission's Regulations, 52 Pa. Code §5.43, to waive the provisions of Sections 1.34 and 1.43, 52 Pa. Code §§1.34 & 1.43, which require a separate application fee for each application (i.e., multiple fees), and to seek authorization for the payment of one application fee.

10. PROPOSED SERVICES: Describe the services which the Applicant proposes to offer.

11. **SERVICE AREA:** Describe the geographic service area in which the Applicant proposes to offer services.

Additionally, the Applicant asserts that it <will or will not> be a rural telephone company. State which provision of the federal Telecommunication Act of 1996 is applicable to the Applicant's status if the Applicant is a rural telephone company.

12. **MARKET:** Describe the customer base to which the Applicant proposes to market its services.

13. INITIAL TARIFF: Attach to the Application a proposed Initial Tariff setting forth the rates, rules, and regulations of the Applicant. The tariff shall state on its cover sheet the nature of the Applicant's operations as identified in Item 9, above.

14. FINANCIAL: Provide a general description of the Applicant's capitalization and, if applicable, its corporate stock structure.

Attach to the Application a tentative operating balance sheet and a projected income statement for the first year of operation within the Commonwealth of Pennsylvania.

The name, title, address, telephone number, and FAX number of the Applicant's custodian for its accounting records and supporting documentation are:

The Applicant's accounting records and supporting documentation are, or will be, maintained at:

15. **START DATE:** The Applicant proposes to begin offering services on _____
(approximate date.)
16. **FURTHER DEVELOPMENTS:** Attach to the Application a statement of further developments, planned or contemplated, to which the present Application is preliminary or with which it forms a part, together with a reference to any related proceeding before the Commission.

The Applicant is under a continuing obligation to amend this Application if any matter asserted herein changes during the pendency of the Application or while the Applicant is providing public utility service within the Commonwealth.

17. **NOTICE:** Pursuant to Section 5.14 of the Commission's Regulations, 52 Pa. Code §5.14, serve a copy of the signed and verified Application with attachments on the following:

Irwin A. Popowsky
Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Bernard A. Ryan, Jr.
Small Business Advocate
Commerce Building, Suite 1102
300 North Second Street
Harrisburg, PA 17101

Office of Trial Staff -- 1 copy
Office of Special Assistants -- 1 copy
Bureau of Consumer Services -- 1 copy
Bureau of Fixed Utility Services -- 1 copy
Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105

Office of the Attorney General
Bureau of Consumer Protection
Strawberry Square, 14th Floor
Harrisburg, PA 17120

Pursuant to Sections 1.57 and 1.58 of the Commission's Regulations, 52 Pa. Code §§1.57 & 1.58, attach Proof of Service of the Application and attachments upon the above named parties. Upon review of the Application, further notice may be required pursuant to Section 5.14 of the Commission's Regulations, 52 Pa. Code §5.14.

18. **ATTORNEY:** If applicable, the name, address, telephone number, and FAX number of the Applicant's attorney are:

19. AFFIDAVIT: Attach to the Application an affidavit as follows:

AFFIDAVIT

< Commonwealth/State > of _____ :
County of _____ : ss.

_____, Affiant, being duly < sworn/affirmed > according to law, deposes and says that:

< He/she is the _____ (Office of Affiant) of _____
(Name of Applicant); >

< That he/she is authorized to and does make this affidavit for said corporation; >

That _____, the Applicant herein, acknowledges that < he/she/it > may have an obligation to serve or to continue to serve the public by virtue of the Applicant commencing the rendering of service pursuant to this Application consistent with the Public Utility Code of the Commonwealth of Pennsylvania, Title 66 of the Pennsylvania Consolidated Statutes; with the federal Telecommunications Act of 1996, signed February 6, 1996; or with other applicable statutes or regulations;

That _____, the Applicant herein, asserts that < he/she/it > possesses the requisite technical, managerial, and financial fitness to render public utility service within the Commonwealth of Pennsylvania and that the Applicant will abide by all applicable federal and state laws and regulations and by the decisions of the Pennsylvania Public Utility Commission.

That the facts above set forth are < true and correct/are true and correct to the best of his/her knowledge, information, and belief > and that he/she < expects/expects said corporation > to be able to prove the same at any hearing hereof.

Signature of Affiant

Sworn and subscribed before me this _____ day of _____, 19__.

Signature of official administering oath

My commission expires _____.

20. Federal Telecommunications Act of 1996: State whether the Applicant claims a particular status pursuant to the federal Telecommunications Act of 1996. Provide supporting facts.

21. COMPLIANCE: State specifically whether the Applicant, an affiliate, a predecessor of either, or a person identified in this Application has been convicted of a crime involving fraud or similar activity. Identify all proceedings, limited to proceedings dealing with business operations, in the last five (5) years, whether before an administrative body or in a judicial forum, in which the Applicant, an affiliate, a predecessor of either, or a person identified herein has been a defendant or a respondent. Provide a statement as to the resolution or present status of any such proceedings.

22. CONTACT FOR RESOLVING COMPLAINTS: Provide the name, address, telephone number, and FAX number for the person and an Alternate person responsible for addressing customer complaints. These persons will ordinarily be the initial point(s) of contact for resolving complaints and queries filed with the Public Utility Commission or other agencies.

23. FALSIFICATION: The Applicant understands that the making of false statement herein may be grounds for denying the Application or, if later discovered, for revoking any authority granted pursuant to the Application. This Application is subject to 18 Pa.C.S. §§4903 and 4904, relating to perjury and falsification in official matters.

24. CESSATION: The Applicant understands that if it plans to cease doing business within the Commonwealth of Pennsylvania, it is under a duty to request authority from the Commission for permission prior to ceasing business.

Applicant: _____

By: _____

Title: _____

VERIFICATION

< Commonwealth/State > of _____ :
County of _____ : ss.
:

_____, Affiant, being duly < sworn/affirmed > according to law,
deposes and says that:

< He/she is the _____ (Office of Affiant) of _____ (Name of
Applicant); >

< That he/she is authorized to and does make this affidavit for said corporation; >

That the facts above set forth are < true and correct/are true and correct to the best of
his/her knowledge, information, and belief > and that he/she < expects/expects said
corporation > to be able to prove the same at any hearing hereof.

Signature of Affiant

Sworn and subscribed before me this ____ day of _____, 19__.

Signature of official administering oath

My commission expires _____.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105

IN RE: IMPLEMENTATION OF THE
TELECOMMUNICATIONS ACT OF 1996

PUBLIC MEETING-
MAY 23, 1996
MAY-96-L-45*
M-00960799

DISSENTING STATEMENT OF CHAIRMAN JOHN M. QUAIN

I support the Order which the Commission issues today except for one determination reached by the majority. Generally speaking, the Order which we issue represents an extremely important step in implementation of the Telecommunications Act of 1996 (Federal Act) at the state level. The Order will allow us to fulfill our new responsibilities under the Federal Act in an orderly and timely fashion.

However, I cannot support the majority's determination that incumbent local exchange carriers (ILECs), other than Bell, should be subject to an imputation requirement applicable to their provision of intraLATA toll services at the time presubscription becomes available. While I acknowledge that the Federal Act requires modification of our decision in the IntraLATA Investigation Order to include an imputation requirement on Bell, no such modification is required, or even suggested, by the Federal Act for the provision of intraLATA services by ILECs other than Bell.

I generally favor the notion of regulatory parity and would support an imputation requirement if the Commission had authority to impose it on the provision of all intraLATA services by all carriers. However, as I stated in my Motion issued in consideration of the IntraLATA Investigation Order, such uniform application is not possible under state law since intraLATA services provided by interexchange carriers are classified as competitive and are removed from any Commission price oversight, including enforcement of an imputation requirement. In this context, expanding the application of the imputation requirement to ILECs other than Bell, as a matter of state policy and not as a matter of federal law, is not consistent with my notion of regulatory parity since, generally speaking, ILECs, particularly small ILECs, will not be competing with each other in the foreseeable future.

Instead, application of an imputation requirement on smaller ILECs will merely place unnecessary pressure on the pricing strategies of the smaller ILECs without any significant corresponding benefit. It is clear to me that the Commission should complete the generic dockets currently pending which pertain to the development of local competition prior to considering whether such an imputation requirement is necessary or desirable

for ILECs other than Bell. Accordingly, I dissent from the majority's determination on this issue.

5-23-91
Date

John M. Quain
JOHN M. QUAIN, CHAIRMAN

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

IN RE: IMPLEMENTATION
OF THE TELECOMMUNICATIONS
ACT OF 1996

PUBLIC MEETING
MAY 23, 1996
MAY-96-L-1
DOCKET NUMBER

STATEMENT OF COMMISSIONER DAVID W. ROLKA

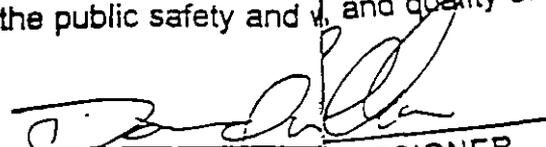
This Order reflects this agency's commitment to prompt implementation of our responsibilities under the Telecommunications Act. This new law promotes competition in all segments of the telecommunications industry. At the same time, the law recognizes that regulatory oversight is required to ensure a fair and prompt transition to competition. The Implementation Order recognizes that the Federal Act required some modifications to our present policies to assure consistency between the federal and state rules. In addition, this Order signals that we have in place that will enable this agency to undertake our new responsibilities under the Act. The Order also acknowledges that additional information is needed to develop appropriate policies for the certain classifications of rural telephones and for the review of pre-enactment interconnection agreements. Clearly the implementation of this landmark legislation will be an evolving process at both the state and federal level, which must be coordinated.

One key area of concern to the states is Section 253(a) and its relationship to the preservation of state authority set forth in Section 253(b). The streamlined entry procedures set forth in this Order strike an appropriate balance contemplated by these subsections. The Joint Conference Report provides some guidance:

Existing State laws or regulations that reasonably protect telecommunications activities of a monopoly utility designed to protect captive utility ratepayers from the harms caused by such activities are not preempted under this section. However, explicit provisions on entry by a utility in telecommunications are preempted under this section.

Chapter 30 expressly removed any express prohibition against local telephone competition and sets forth that a public interest standard governs such entry. The procedures set forth in this Order give effect to the public interest standard and provide a competitively neutral framework for assuring the preservation of the public safety and reliability and quality of service.

5-23-96
DATED


DAVID W. ROLKA
COMMISSIONER

POOR ORIGINAL

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA. 17105-3265

Public Meeting held September 5, 1996

Commissioners Present:

John M. Quain, Chairman
Lisa Crutchfield, Vice Chairman
John Hanger Dissenting - Statement attached
David W. Rolka Concurring & Dissenting in part
Robert K. Bloom

Affiliated Interest Agreements
between GTE North Incorporated
and GTE Card Services Inc. d/b/a
GTE Long Distance

G-00960494

AT&T Communications of Pennsylvania
v.
GTE North Incorporated and GTE Card
Services Inc. d/b/a GTE Long Distance

C-00968172

OPINION AND ORDER

BY THE COMMISSION:

MATTER BEFORE THE COMMISSION

On May 17, 1996, GTE North Incorporated ("GTE North" or "Company") filed an Application requesting the Commission's approval of a Sales Agent Agreement, two Billing and Collection Services Agreements, and a ChoiceBilling Billing Services Agreement. These Agreements were entered into by GTE Telephone Operating Companies ("GTOCs"), including GTE North¹ and GTE Card

¹ A listing of the affected GTE Telephone Operating Companies is included in the appropriate appendices and/or attachments of each Agreement.

Services Inc. d/b/a GTE Long Distance ("GTELD"). Under the Agreements, GTOCs will provide GTELD with sales agent services and billing and collection services.

By Opinion and Orders entered on June 6, 1996, and August 23, 1996, at Docket No. G-00960494, we subsequently extended the statutory consideration period for these Agreements until August 24, 1996, and September 6, 1996, respectively. See 66 Pa. C.S. §2102(b).

On July 17, 1996, AT&T Communications of Pennsylvania, Inc. ("AT&T") filed a Formal Complaint against GTE's Affiliated Interest Agreement filing at Docket No. G-00960494.

On July 25, 1996, GTE North filed an Answer to AT&T's Formal Complaint and a Motion to dismiss AT&T's Formal Complaint. Also, on July 25, 1996, GTELD filed an Answer to AT&T's Formal Complaint and a Motion to Dismiss and/or Strike AT&T's Formal Complaint.

On July 31, 1996, AT&T filed its Answer to GTELD's Motion to Dismiss and/or Strike Formal Complaint.

DISCUSSION

A. The Filing

The Company has indicated that it has filed the above stated Agreements at this time for the following reason:

Section 601(a)(2) of the Telecommunications Act of 1996 (the "Act")² nullified the provisions of the GTE Consent Decree that had prohibited the GTE operating companies (such as GTE North) from offering interLATA or interstate long distance services to its local

² Consistent with this designation, we shall alternately refer to the Telecommunications Act of 1996 as "the Act".

exchange customers or jointly marketing its local and intraLATA toll services with interLATA services. The Act encourages competition in telecommunications services and supports customer choice in selecting such services and providers. The Company and GTELD will, through the arrangements discussed in this Application, offer GTE's local exchange customers and all other consumers in Pennsylvania another option in purchasing long distance service.

See Application of GTE, Paragraph No. 4, p. 2.

A detailed discussion of the Sales Agent Agreement, the two Billing and Collection Services Agreements, and the ChoiceBilling Billing Services Agreement follows.

1. Sales Agent Agreement

Under the Sales Agent Agreement, GTOCs, including GTE North, will become non-exclusive sales agents to market and sell GTELD's telecommunications services to end-users within the territory assigned to GTOCs. GTELD's telecommunications services to be sold will include Long Distance Message Telecommunications Service, Directory Assistance, Business and Residence Line 800/888 Services, Prepaid Calling Service, and GTELD's Discount Calling Plans. GTELD will provide GTOCs with the rates, charges, and categories of GTELD's telecommunications services to be presented to end-users.

Compensation for the services rendered will be determined in accordance with the applicable Appendix enclosed with the Agreement.

This Agreement will have a three (3) year term, beginning on April 16, 1996.³ It may be extended by the parties for two additional one-year terms.

The terms and conditions regarding the following matters are also set forth in this agreement: Relationship of the Parties; Territory; Regulatory Matters; Rates; Payment to Agent; Agent's and GTELD's Responsibilities; Reports; Indemnities; Limitation of Liability; Force Majeure; Dispute Resolution; Right to Audit; Default and Termination; Confidential Information; Notice; and General Provisions.

2. Billing and Collection Services Agreements

Services provided by GTE North and other GTOCs to GTELD under these Agreements will include the BillingPlus Services, PrimeTarget Services, and Billing Analysis Services. BillingPlus Services will include: Billing Adjustment, Long Distance Service Adjustment, Telegram(s), Call(s) Re-billed, Timing Adjustment, Denied Knowledge of Call(s), etc. PrimeTarget Services will include communications to end-users in the form of Direct Mail, Bill Inserts, Bill Message Page, Marketing Messages, and Bill Phrases. Billing Analysis Services will include Detection Service, Investigative Service, and Deterrence Service (detailed descriptions of these services are included in the applicable Attachments of the Agreements).

The rates, charges and payments for the billing and collection services rendered will be determined in accordance with the applicable Attachments enclosed with the Agreements.

³ For GTE North, this Agreement will only become effective on the first business day after this Commission's approval of the Agreement. See Paragraph 4.2 of the Agreement.

These Agreements will have a three (3) year term, beginning on March 1, 1996, and terminating on February 28, 1999.

The terms and conditions regarding the following matters are also set forth in the agreements: Scope and Effect of the Agreement, Termination, End User Denial and Blocking of Service, Confidentiality and Publicity, Notification to End-users, Minimum Charges, Late Payment Charge, Transfer of Fund, Audit by GTOCs and GTELD, Taxes, Data Retention, Claim Resolution, Claims Limitation, Dispute Resolution, Limitation of Liability, Independent Contractors, Remedies Cumulative, Assignment, Force Majeure, Severability, Third Party Beneficiaries, Governing Law and Venue, Multiple Counterparts, Headings, Attachments, Entire Agreement, Amendments and Waivers, Construction, Execution, Notices and Demands, Change Request Procedures, No Common Principals, and No Offer.

3. ChoiceBilling Billing Services Agreement

The ChoiceBilling Agreement will allow GTE North and other GTOCs to provide Interexchange Carrier Billing Service to GTELD. Interexchange Carrier Billing Service will consist of the processing, packaging, and distribution of billing records or invoices to LECs for end-users' billing (also known as the LEC Billing Option) and/or the processing of billing records, bill rendering, and collection of payments (also known as the Direct Billing Option) when it becomes available.

Rates and charges for the services will be determined in accordance with the applicable Attachments enclosed with the Agreement.

This Agreement will have a three (3) year term, beginning on January 1, 1996,⁴ and terminating on December 31, 1999.

Terms and conditions regarding the following matters are also set forth in the agreements: Scope of this Agreement and Relations to Other Documents, Cancellation or Termination of the Agreement and Attachments, Confidentiality and Publicity, Notification to End-users, Minimum Charges, Late Payment Charge, Transfer of Fund, Audit by GTOCs and GTELD, Taxes, Data Retention, Claim Resolution, Claims Limitation, Dispute Resolution, Limitation of Liability, Independent Contractors, Remedies Cumulative, Assignment, Force Majeure, Severability, Third Party Beneficiaries, Governing Law and Venue, Executed in Counterparts, Headings, Attachments, Entire Agreement, Amendments and Waivers, Construction, Execution, Notices and Demands, Change Request Procedures, and Regulatory and Legislative Action.

In support of this filing, the Company offered, among other things, the following representations:

(1) GTE North is a corporation organized under the laws of the State of Wisconsin, with its principal place at 100 Executive Drive, Marion, Ohio 43302. It is a public utility within the meaning of Section 102 of the Pennsylvania Public Utility Code. GTE North owns and operates telephone facilities serving various cities and rural areas in Pennsylvania and has been duly authorized to own and operate its properties. It is a subsidiary of GTE Corporation, and all of its common stock is owned by GTE Corporation.

(2) GTELD is a general business corporation organized in the State of Delaware. GTELD is a non-facilities based reseller of certain interLATA and interstate long distance

⁴ For GTE North, this Agreement will only become effective on the first business day after this Commission's approval of the Agreement. See Section 30.1 of the Agreement.

telecommunications services. GTELD is a wholly owned subsidiary of GTE Information Services Incorporated, a Delaware corporation, which is also a wholly owned subsidiary of GTE Corporation.

(3) The Telecommunications Act of 1996 (the "Act"), among other things, repealed the provisions of the GTE Consent Decree that barred GTE Operating Companies, such as GTE North, from offering interLATA or interstate long distance services to their local exchange customers, or jointly marketing their local and intraLATA toll services with interLATA services. The Act also promotes telecommunications services competition and supports customers' choice in selecting telecommunications services and service providers. The Sales Agent Agreement is being proposed in light of these changes.

(4) Under the Sales Agent Agreement, GTE North will become an agent of GTELD to market GTELD's long distance communication services, along with the Company's local and intraLATA toll services. GTE North will promote and sell GTELD's long distance services at rates, charges, and categories to be set by GTELD. The Company will comply with all legal requirements in documenting customers' decisions to obtain long distance services through the Company.

(5) Through the sales agent services, GTE North and GTELD will be able to provide GTE North's local exchange customers and all other consumers in Pennsylvania with another choice in purchasing long distance services. Customers in GTE North's certified areas will also be able to choose to have all of their local and long distance services (intraLATA, intrastate interLATA, and interstate services) provided through one arrangement with the Company.

(6) The prices the Company will charge GTELD for the sales agent services are not tariffed. Compensation for GTE North will be based on the market value of sales and distribution capabilities for interLATA services. This level of compensation is comparable to the cost that GTELD would incur for a sales and

distribution department developed internally. The compensation plan under the Sales Agent Agreement is comparable to other firms in the industry. Prices charged to GTELD for the sales agent services cannot be compared with prices charged to non-affiliate customers since the Company does not have any similar agreement with a non-affiliate customer.

(7) Prices the Company charges GTELD for the sales agent services do not contain a specific profit margin. A profit margin would not have any effect on the regulated ratepayers since all revenues and expenses resulting from this agreement will be charged to non-regulated accounts. Any revenue shortcomings will be borne by the shareholders, not the regulated ratepayers.

(8) The two Billing and Collection services Agreements are similar and consistent with each other. However, the first agreement will apply for billing customers of the GTOCs that are parties to this agreement. The second will be for rendering bills to customers that are not within the GTOCs' certified local areas. Since the second agreement will involve only GTELD services and only GTELD services will be reflected on the bills, GTELD will pay all costs under this agreement.

(9) The ChoiceBilling Services may include the processing, packaging, and distribution of billing records or invoices to other local exchange companies for billing their customers or for the direct billing and collection from those customers. The ChoiceBilling platform is necessary for billing of GTELD messages both within and outside the GTOCs' franchise areas because GTELD was a proprietary billing record format and ChoiceBilling converts these records to an industry standard billing format. ChoiceBilling also rates the GTELD messages.

(10) Prices charged under the three billing and collection services agreements are not tariffed. Billing and Collection services are not tariffed in Pennsylvania. Rates were developed based on billing and collection costs that were attributable to interexchange carrier billing and its associated functions.

Costs were also estimated based on existing agreements for similar services provided to non-affiliated customers. The rates charged to the affiliate, therefore, are the same with rates for non-affiliate customers with similar volumes of billing data and requirements for the services.

(11) An appropriate contribution margin was also added to the costs to determine rates to the customers.

(12) Revenues and expenses resulting from the three billing and collection agreements will be accounted for as regulated revenues and expenses. There should be a positive effect on the Company regulated operation since revenues should exceed expenses.

(13) The billing and collection services provided by the GTOCs to GTELD under these Agreements are, and will continue to be, provided to other long distance service providers on substantially similar terms.

(14) The GTOCs will not be responsible for uncollectible accounts related to GTELD services. It will also not terminate local services for failure to pay GTELD charges, except within the GTOCs' certified areas and in accordance with State rules governing such matters.

(15) The Company will maintain adequate procedures and controls to identify and track expenses associated with these Agreements. Transactions with affiliates will be retained and maintained as mandated by any FCC and PA P.U.C. Orders.

(16) The Agreements are reasonable and consistent with the interest of the Company's ratepayers in that services provided by the Company under these Agreements will also result in more choice and savings for the ratepayers in the purchase of long distance services. In addition, customers will now be able to receive just one bill for all local, intraLATA, and interLATA services, without incurring any additional charges or expenses.

B. AT&T's Formal Complaint

AT&T has indicated that it is limiting its Complaint with regard to the provision in GTE's Application which provides, in pertinent part, that GTE North would "become an agent of GTELD for the purpose of jointly marketing the Company's [GTE's] local and intraLATA toll services along with GTELD's long distance telecommunications services." AT&T indicates that the agreement also provides for the provision of other services to GTELD by GTE which are not relevant to its Complaint. As a result, AT&T respectfully requests that the Commission "issue an order denying GTE's application, disapproving the Agreement and submitting [prohibiting - sic] GTE from engaging in joint marketing activities." See AT&T Formal Complaint, p. 6.

In support of its request that we deny GTE's application, AT&T references our June 3, 1996 Order at Docket No. M-00960799, Implementation of the Telecommunications Act of 1996 ("June 3, 1996 Order"), wherein we stated the following:

As to "joint package" marketing restriction, in our October 4, 1995 order at A-310203, F.002 we stated that, "Upon the grant of co-carrier status pursuant to this Opinion and Order, MFS [and other CLECs] shall be subject to the same restrictions on interLATA toll service packaging ... applicable to the other LECs in Pennsylvania absent a specific waiver."¹¹ Such a marketing restriction was designed to obviate the advantages of CLEC "joint marketing" activities for local, intraLATA and interLATA toll services, since certain ILECs, including Bell, were prohibited from providing interLATA toll services.

The purpose of past imposition of marketing restrictions on LEC long distance reseller affiliates was to decrease any competitive advantage over other long distance carriers a LEC affiliated reseller had with the LEC's customers -- particularly since in a monopoly setting the LEC completely controls the presubscription interexchange carrier (PIC)

process and has the ability to influence consumer decisions through incomplete or inaccurate disclosure. Upon further review, it appears to us that such a concern becomes less significant as local competition develops. Furthermore, we must keep in mind that in a competitive environment our objective is to decrease regulation for all carriers rather than impose existing requirements on new carriers, except where the requirements are imposed by statute or remain necessary to the public interest.

Of course, we have a desire to treat all carriers competing in a given market fairly. However, pertaining to marketing restrictions, such an objective can be achieved by eliminating any relevant marketing restrictions on a LEC or its affiliate at the time a competing local carrier or carriers enters the LEC's service territory. Such an approach is consistent with both principles of fairness and our desire to reduce regulations where appropriate. Accordingly, we will adopt such an approach in the future and will not impose mandatory restrictions on CLECs entering LEC service territories.

The present marketing restrictions imposed in our MFS order raise different concerns because those restrictions only apply to carriers competing in Bell's service territory. Of course, at the present time, Bell cannot provide interLATA service and eliminating marketing restrictions on Bell would be a meaningless gesture.

However, in addressing the issue of whether carriers competing in Bell's local service markets should be subject to continuing market restrictions it is helpful to evaluate the approach taken by the Federal Act in addressing this issue. In this regard, Section 271(e)(1) of the Act provides as follows:

Until a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region state, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier, a telecommunications carrier that serves greater than

5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.

Accordingly, in addressing the exact issues governing competitive fairness, Congress determined that it was only appropriate and necessary to impose marketing restriction on carriers competing in Bell's local service territory if the carrier serves greater than 5% of the nation's presubscribed access lines. While we do not believe we are required to adopt such an approach, upon review, such an approach appears to be wise and adequately addresses our concerns with competitive fairness. Therefore, we will adopt the federal approach and will modify the language in our MFS order to be consistent with the discussion herein.

11 Historically, the Commission has readily accepted the structural separation between ILECs and their reseller affiliates or subsidiaries that offer interLATA and intraLATA toll services. Furthermore, the Commission has established and imposed competitive safeguards requiring LEC interLATA affiliates to market services in a manner that conveys to current and potential customers that the long distance entity is a separate and distinct company from the local carrier.

Order at pp. 21-22.

On the basis of the above-quoted language, AT&T argues that under our June 3, 1996 Order, a LEC is expressly prohibited from joint marketing local and interexchange services provided by the LEC or its affiliates until such time as a competing local carrier or carriers enter the LEC's service territory.

AT&T also states that CLECs cannot enter and commence the provision of local service in GTE's service territory until the CLEC is authorized by the Commission through issuance of a certificate of public convenience and secures a Commission approved interconnection agreement with GTE. AT&T argues that, to date, although AT&T has a pending application before the Commission to

offer local service in GTE's service territory, there are no CLECs presently authorized by the Commission to provide local service in GTE's service territory. Also, AT&T notes that before a CLEC begins to offer local service in GTE's service area, it would be necessary for the CLEC to establish an interconnection arrangement with GTE. AT&T asserts that, to date, no CLEC has secured a Commission approved interconnection agreement with GTE which would allow the CLEC to actively commence the provision local service in GTE's territory. AT&T does mention, however, that it did make a bona fide request for an interconnection agreement to GTE but that it believes any potential agreement between AT&T and GTE is likely to be six to nine months away from obtaining Commission approval.

AT&T further alleges that the activity that would occur under GTE's affiliated interest agreement is expressly prohibited by our June 3, 1996 Order and is thus, unreasonable and inconsistent with the public interest. AT&T argues that the affiliated interest agreement is anti-competitive since it permits GTELD to secure an unfair competitive advantage over AT&T in GTE's service territory by taking advantage of the name recognition of GTE in its marketing activities. Therefore, AT&T requests that we disapprove the Agreement.

C. GTE's Answer to AT&T'S Formal Complaint

In its Answer, GTE denies that the instant Agreement is either unreasonable or inconsistent with the public interest. GTE also denies that its Agreement is inconsistent with recent Commission pronouncements regarding generic standards governing joint marketing activities.

In addition, GTE denies that a LEC is expressly prohibited from joint marketing local and interexchange services provided by the LEC or its affiliates until such time as competing local carrier or carriers enter the LEC's service territory.

With regard to AT&T's statement pertaining to a bona fide request for an interconnection made by AT&T to GTE, GTE admits this averment, but is unable to agree with AT&T's claim that any potential interconnection agreement between AT&T and GTE is likely to be six to nine months away from Commission approval. GTE characterizes this assertion as speculative.

GTE also denies AT&T's allegations that: (1) GTE's attempts to joint market its local and intraLATA service with GTELD's long distance services through the Agreement is expressly prohibited by the Commission's June 3, 1996 Order; (2) the instant affiliated interest agreement is unreasonable and inconsistent with the public interest; and (3) the instant affiliated interest agreement is anti-competitive since it permits GTELD to secure an unfair competitive advantage over AT&T in GTE's service territory by taking advantage of the name recognition of the LEC in its marketing activities.

Finally, GTE responds to AT&T's statement that the Agreement is discriminatory because GTE does not offer its marketing services to other interexchange carriers operating within the Commonwealth under the same terms and conditions contained in the Agreement. GTE states that "GTE North will joint market its services with other interexchange carriers operating in the Commonwealth under the same terms and conditions that are contained in the agreement for GTELD." However, GTE adds that AT&T has not requested such a joint marketing effort from GTE North.

In conclusion to its Answer, GTE requests that AT&T's Formal Complaint be dismissed.

D. GTE's Motion To Dismiss AT&T's Formal Complaint

GTE purports that AT&T is mistaken in its assumption that the joint marketing restrictions described in our June 3, 1996 Order apply to GTE North or GTELD because the Telecommunications Act of 1996 has relieved GTE North and all other GTE operating companies of joint marketing restrictions. Moreover, GTE states that Congress has, with respect to joint marketing by a GTE operating company, preempted this field from state regulation. Consequently, asserts GTE, the Pennsylvania Public Utility Commission lacks jurisdiction over the subject matter of AT&T's Complaint.

In support of its argument, GTE quotes Section 601(a)(2) of the Act as follows:

GTE CONSENT DECREE. - Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

GTE notes that the GTE Consent Decree, entered at United States of America v. GTE Corporation, Civil Action No. 83-1298 (December 21, 1984), prohibited, among other things, the provision of interLATA telecommunications services by a GTOC and the joint marketing of telecommunications services offered by the GTOCs and their affiliates offering interexchange services. GTE further states that the federal Act did not impose any further restrictions and obligations on a GTOC's jointly providing or jointly marketing its telecommunications services and those of an affiliate.

GTE further notes that the federal Act is not silent with respect to joint marketing restrictions. The only limitations

contained in the Act on the joint marketing of local and long distance services are limited to Bell operating companies.

GTE then goes on to provide legal argument as to why the federal Act preempts the Commission's June 3, 1996 Order. GTE relies upon the Supremacy Clause of the United States Constitution as interpreted by the Courts in the cases of Louisiana Public Service Com. v. FCC, 476 U.S. 355 (1986), Jones v. Rath Packing Co. 430 U.S. 519 (1977), Free v. Bland, 369 U.S. 663 (1962), Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), Shaw v. Delta Air Line Inc., 463 U.S. 85 (1983), Rice v. Santa Fe Elevator Corp. 331 U.S. 218 (1947), and Hines v. Davidowitz 312 U.S. 52 (1941).

Generally, Congress may preempt a state statutory scheme in a number of ways. Preemption may occur when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, Jones v. Rath Packing Co.; where there is outright or actual conflict between federal and state law, Free v. Bland; where compliance with both federal and state law is in effect physically impossible, Florida Lime & Avocado Growers, Inc. v. Paul; where there is implicit in federal law a barrier to state regulation, Shaw v. Delta Air Line Inc.; where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, Rice v. Santa Fe Elevator Corp.; or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, Hines v. Davidowitz.

In this instance, preemption is obvious, argues GTE, on the basis of the following:

If Congress had done nothing more than remove the restriction and obligations of the GTE Consent Decree, there would be some argument that the Commission could impose joint

marketing restrictions on GTE North. However, Congress went further and added to §601(a)(2) that any formerly proscribed conduct or activity under the Consent Decree shall prospectively "be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act." By doing so, Congress clearly expressed its intent to legislate comprehensively regarding activities formerly prohibited by the Consent Decree and left no room for states to supplement federal law. This is undoubtedly an instance where Congress has acted so unequivocally as to make clear that it intends no regulation except its own. Bethlehem Steel Corp. v. New York State Labor Relations Bd., 330 U.S. 767 (1947). Where the federal government has enacted a complete scheme of regulation, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. Hines v. Davidowitz, 312 U.S. (1941). Because the Commission's joint marketing restrictions would clearly produce a result inconsistent with the objectives of the Act, it is preempted by federal law. Hill v. Florida, 325 U.S. 538 (1945).

GTE asserts that in light of Congress' intent to move toward a pro-competitive deregulated telecommunications market, its decision to remove joint marketing restrictions from the GTOCs cannot be interpreted as an invitation to the states to impose similar restrictions. GTE is of the opinion that a Commission imposed requirement that GTE North abide by joint marketing restrictions would clearly be an impermissible obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, supra.

In concluding, GTE requests that the Commission dismiss AT&T's complaint because the said complaint is merely an attempt to embroil the Commission in a relatively narrow matter that has been completely resolved by the Act. The only purpose of AT&T's Complaint, states GTE, would be to delay the introduction of a

competitive alternative to interexchange service now offered by AT&T.

E. GTELD's Answer and Motion to Dismiss

GTELD provides similar responses to those provided by GTE North. We shall highlight those positions of GTELD's Answer which are not wholly repetitive of those of GTE.

GTELD believes that AT&T inexplicably adds further conditions precedent on GTE North than were originally intended by our June 3, 1996 Order, as now AT&T claims it must not only have entered the local market but also must commence the provision of local service before GTE North and GTELD can jointly market the services which they are legally entitled and authorized to provide.

In its Motion, GTELD also states that there is no statutory or regulatory requirement that the offering of toll service be undertaken by GTE Corporation through separate affiliates, although prior regulatory policy has sometimes tended to favor a separate affiliate for accounting reasons. GTELD is of the opinion that had GTE Corporation sought to provide interLATA toll service directly in the name of its operating companies, GTE North would have marketed all services, both local and toll, at one time. Therefore, GTELD believes that it is only the establishment of a separate affiliate which creates a debate over "joint" marketing.

1. The Scope of Joint Marketing Restrictions

GTELD asserts that there is no prohibition on the joint marketing of services as averred by AT&T. This is so although there are certain restrictions upon the scope of advertising. GTELD references the language in our June 3, 1996 Order regarding the elimination of joint marketing restrictions for incumbent local exchange carriers ("ILECs") "at such time as a competing local exchange carrier [{"CLEC"}] or carriers enters the LEC's service

territory." Slip Op. at 22. GTELD, however, argues that the Order does not identify the nature of the restrictions, but simply references the Commission's Order at Docket No. A-310203F0002, Application of MFS Intelenet of Pennsylvania, Inc., et al. (Order entered October 4, 1995) ("MFS Phase I Order"). See GTELD Motion, at p. 7. GTELD further argues that the language contained in our MFS Phase I Order, where the Commission announced that new local exchange carriers shall be subject to the same restrictions on intraLATA toll service packaging as incumbent local carriers absent a specific waiver, connoted the restrictions stated by in our April 29, 1993, Order at Docket No. A-310147, Application of Palmerton Long Distance Company. GTELD further explains that the restrictions contained in our Palmerton Long Distance Company Order were primarily designed to differentiate the operations of Palmerton Long Distance Company from those of its affiliate Palmerton Telephone Company (a conventional Pennsylvania ILEC), and to safeguard the interests of end-user consumers.

Thus, GTELD concludes that in "light of this history, there is no basis on which AT&T can claim that there is a 'prohibition' in Pennsylvania against joint marketing." Id., ¶¶ 15-18, at 7-8.

GTELD does state, however, that there "is no statutory or regulatory requirement that the offering of toll service be undertaken by GTE Corporation through separate affiliates (although prior regulatory policy has sometimes tended to favor a separate affiliate for accounting reasons)." Id., ¶ 6, at 3. Furthermore, GTELD argues that the joint marketing agreement filed here is part of a nationwide, 28 state arrangement between GTELD and the various telephone operating affiliates of GTE Corp. GTELD attached to its Motion certain recent decisions of Virginia and California which, according to GTELD, permit joint marketing by GTELD and GTE North. Id., ¶¶ 4-5, at 3.

GTELD alleges that, in the event of Commission disapproval of the affiliated interest agreement at issue, GTELD will be unable to operate since there will be no billing and collection agreement with GTE North in place. GTELD also alleges that if the joint marketing agreement were to be denied, "GTELD and GTE North are excluded from meaningful participation in the market and the use of all the competitive tools which Congress intended GTE Corporation to possess." *Id.*, ¶ 12, at 6.

2. Federal Preemption

GTELD largely repeats the arguments of GTE's Motion to Dismiss in support of the collective GTE and GTELD position that this Commission is preempted from imposing any joint marketing restrictions on GTE and GTELD as a result of the enactment of the Act.

3. Standing

GTELD asserts that AT&T does not possess a sufficient interest in this matter to participate and the issues raised by AT&T are clearly related to its interests as a competitor of GTELD. According to GTELD, in order to have standing, the litigant must have a legally recognizable interest in the subject matter which is: (a) substantial in its individual adverse effect; (b) immediate in terms of the nature and proximity of the action; and (c) direct with respect to the harm caused as to be actually aggrieved or adversely affected by the conduct at issue. See GTELD Motion citing Apple v. Commonwealth Department of Insurance, 60 Pa. Cmwlth. 492, 431 A.2d 1183 (1981). GTELD argues that the only effect averred by AT&T in its Complaint is that the Agreement is generally anti-competitive since it permits GTELD to secure an unfair competitive advantage over AT&T in GTE's service territory by taking advantage of the name recognition of the LEC and its marketing activities. GTELD concludes that "...the regulatory scheme established by the affiliated interest provisions of the Public Utility Code does not protect AT&T from the use of a

corporate name by a competing affiliate" and "AT&T has not plead such a result nor could one be construed." Id.

3. Limitation on Opportunity to Participate

GTELD further alleges that the "filing and approval of affiliated interest agreements before the Commission is a routine administrative matter, which provides no opportunity for the filing of complaints or intervention" and that "[s]imply stated, participation by third parties is not contemplated under the Public Utility Code." GTELD, however, recognizes that "...participation by a third party in an affiliated interest filing may be a matter of first impression" but, GTELD "is not aware of any prior ruling by this Commission which would permit the type of participation sought here by AT&T." Id., ¶¶ 37; 38, at 15. In support of its argument, GTELD states that "...in the highly analogous field of securities filings, this Commission has denied third parties the opportunity to participate in the registration process. Securities Certificate of Pennsylvania Gas and Water Company, S-910151, Order entered September 5, 1991 ("PG&W"); Re Philadelphia Electric Company, 54 Pa. PUC 353 (1980)." Id., ¶ 39, at 15-16. GTELD goes on to argue that the "very same legislative design which led the Commission to conclude in PG&W that securities registrations do not lend themselves to intervention is exhibited in the affiliated interest chapter of the Public Utility Code as a result of the following observations:

- Only 30 days of initial review is provided.
- In the absence of an order of rejection, the matter is deemed approved.
- There is no direct or immediate impact on service, facilities or rates associated with the approval of the filing.
- No provision for notice is included in the Code (which the General Assembly would have provided had public participation been contemplated).

- The statutory Chapter does not mention public participation, 'but instead references only the utility making the filing and the Commission.' PG&W at 4.
- The Code section clearly states that the registration/approval may not be construed to imply full recovery in a rate case. Id. at 4-5; Compare 66 Pa. C.S. §1903(b) with §2106." Id., ¶ 40, at 16-17.

4. Issues Outside Chapter 21

GTELD also advances the general argument that "...the purpose and scope of Chapter 21 deals with a relatively narrow scope of issues and does not provide the Commission with unlimited discretion and authority over affiliated interests." Further, according to GTELD, the Commission's discretion extends over the treatment of the costs of the affiliated interest agreement in question. GTELD asserts that AT&T has only made an argument that the GTE North and GTELD affiliated interest agreement at hand is "anticompetitive," but it has not attacked the compensation arrangements between GTE North and GTELD. Thus, GTELD asserts that the Commission cannot address AT&T's alleged concerns regarding the "anticompetitive" nature of the GTE North-GTELD agreement within the narrow scope of Chapter 21. Id., ¶¶ 41-44, at 17-18.

GTELD seeks the dismissal of the AT&T Complaint, or, in the alternative, to have this Commission strike "the portion of the Complaint of AT&T Communications of Pennsylvania, Inc. which includes entry of the Complaint at the pending affiliated interest docket and approve the affiliated interest agreement as filed." Id., at 19-20.

F. AT&T's Answer to GTELD's Motion To Dismiss

Taking issue with GTELD's Motion and requested relief, AT&T initially argues that the proposed affiliated interest agreement between GTE North and GTELD is: (1) prohibited by prior Commission Order; (2) is discriminatory in that GTE has not offered its joint marketing services to other carriers, including AT&T; and

(3) generally, anticompetitive, and therefore inconsistent with the public interest, since it permits GTELD to secure an unfair competitive advantage over AT&T in GTE's service territory by taking advantage of the name recognition of the LEC in its marketing activities. See AT&T Answer, ¶ 3, at 2-3, referencing original AT&T Complaint ¶17.

AT&T points out that 26 states have not permitted joint marketing by GTE and GTELD and that such an arrangement is under investigation in various states other than Virginia and California. Id., ¶ 5, at 3. AT&T goes on to state that because of the nature of regulatory requirements imposed by the Federal Communications Commission ("FCC"), GTE has no choice but to provide interLATA services through a separate affiliate. According to AT&T, since the FCC determined that independent local exchange carriers (those other than Bell companies) were required to structurally separate their interLATA services from their local services in order to be regulated as a non-dominant carrier, the advantages of being regulated by the FCC as a nondominant carrier are so great that GTE has no real choice other than to structurally separate its operations.⁵ AT&T references a currently pending rulemaking in which the FCC "... is re-evaluating whether structural separation for independent LECs remains necessary as a precondition to non-dominant status. In the Matter of Policy and Rules Concerning the Interstate, Interchange [sic] Marketplace, CC Docket No. 96-0661." Id., ¶ 6, n. 2, at 3.

AT&T does not oppose the Billing and Collection Agreement (a completely separate agreement from the Sales Agent and Marketing

⁵AT&T cites Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefrom (Competitive Carrier), CC Docket No. 79-252. According to AT&T, the "Competitive Carrier docket remained pending for over six years and includes many FCC and appellate decisions." AT&T Answer, n. 1, at 3.

Agreement) and has no objection to Commission approval of said agreement.

AT&T takes strong issue with GTELD's interpretation of the Commission's restrictions for joint marketing by ILECs. AT&T argues that since the Commission has never authorized the joint marketing of services between an ILEC and its long-distance affiliate, and since there has been no such activity for the Commission to restrict, "...joint marketing was effectively prohibited." *Id.*, ¶ 15, 18, at 6, 7. AT&T references our Palmerton decision at Docket No. A-310147, and states that the concerns expressed in Palmerton are also "particularly relevant to the ILECs [*sic*] conduct of equal access balloting and to its role of 'gatekeeper' for the presubscription process." AT&T argues that it "is critical that a customer's ability to make a PIC [(Primary Interexchange Carrier)] change be insulated through the LEC from misleading and biased influences in the customer contact." AT&T further argues that if "GTE is permitted to 'rig' the presubscription process by misleadingly attempting to merge GTE with GTELD or by actively and jointly marketing each customer which contacts GTE in its role of presubscription 'gatekeeper,' this presubscription process will be undermined."⁶ *Id.*, ¶ 18, at 8.

AT&T also vigorously attacks GTELD's federal preemption arguments. Although AT&T admits that the federal Telecommunications Act of 1996 eliminated the joint marketing restrictions that were included in GTE's Consent Decree, it argues that "...the FCC

⁶ AT&T cites to our June 3, 1996 Order, where we stated that: "The purpose of past imposition of marketing restrictions on LEC long distance reseller affiliates was to decrease any competitive advantage over other long distance carriers a LEC affiliate reseller had with the LEC's customers -- particularly since in a monopoly setting the LEC completely controls the presubscription interexchange carrier (PIC) process and has the ability to influence consumer decisions through incomplete or inaccurate disclosure." AT&T Answer, n. 4, at 8.

continues to impose a structural separation requirement on GTE, over its serious objection, even though any structural separation requirements contained in GTE's Consent Decree have been eliminated and despite the fact that, as with joint marketing restrictions, the only structural separation requirements expressly provided for in the Federal Act are imposed only on Bell Operating Companies." *Id.*, ¶ 22, at 9, citing § 272 of the federal Act.

AT&T, states that § 253(b) of the federal Act "...continues to expressly authorize state commissions to impose requirements, like structural separation requirements or joint marketing restrictions, to protect the public interest as long as the requirements are imposed on a competitively neutral basis." Referencing our relevant language in our June 3, 1996 Order, AT&T puts forward the proposition that state "regulatory requirements, like joint marketing restrictions, fall squarely within the intendment of Section 253(b) since they have a direct impact on the provision of intrastate service to customers.": *Id.*

AT&T also responds to its standing to prosecute its Formal Complaint. In support of its standing in the instant proceeding, AT&T indicates that it possesses a more than sufficient interest in this proceeding as a competitor of GTELD and a future competitor of GTE, and that it is GTELD's and GTE's attempt to engage in anti-competitive behavior which creates a direct, immediate and substantial interest on the part of AT&T. *Id.*, ¶¶ 30, 33, at 11. Similarly, AT&T asserts that while Chapter 21 does not expressly address third party intervention, 66 Pa.C.S. §701 expressly provides the procedural opportunity for public utilities, like AT&T, to file a complaint against other public utilities alleging illegal and improper activity. *Id.*, ¶ 37, at 12. AT&T also attacks GTELD's reliance on the Commission's past treatment of third party interventions in "parallel" security registration cases. AT&T distinguishes the cases cited by GTELD on

the basis that "the Commission relied on the fact that approval of a potentially unreasonable securities filing can be corrected in a subsequent rate case," where here, "the potential damage to AT&T cannot be remedied in a future rate case since, through anti-competitive behavior, GTE and GTELD will have caused AT&T revenue losses which can not be recovered." *Id.*, ¶ 39, at 12. Furthermore, AT&T argues that the "purpose of Chapter 21 is to assure that 'sweetheart' relationships between affiliates do not adversely affect the public interest." *Id.*, ¶ 42, at 13.

G. Analysis

We believe that the language in our June 3, 1996 Order, governs our actions in the instant proceeding. To that extent, we conclude that the Act does not preempt our directives contained in the June 3, 1996 Order and prior Orders relative to joint marketing. GTE and GTELD's arguments are unpersuasive in this regard.

1. Federal Preemption

The Communications Act of 1934, as amended, specifically preserves state jurisdiction over matters pertaining to the regulation of intrastate wire or radio communications. *See* § 152(b). Similarly, the language of §§ 261(b) and 261(c) in the Act reinforces the notion that this Commission is not preempted in its efforts to implement the pro-competitive statutory directives of the federal act and those contained in Pennsylvania's Chapter 30, 66 Pa. C.S. §§3001-3009. What GTE and GTELD fail to acknowledge is that, absent an intent to completely occupy a field (we do not find such an intent with respect to the issue at hand), this Commission's concern over joint marketing is in line with the express purpose of the federal scheme of regulation; that is, to promote competition in the provision of telecommunications services, and among service providers, where monopoly conditions had persisted in the past.

Characteristically, § 261(c) of the 1996 federal Act explicitly states:

ADDITIONAL STATE REQUIREMENTS. -- Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part of the Commission's [FCC's] regulations to implement this part. (Emphasis added).

Similarly, § 253(b) of the Act specifically states that:

STATE REGULATORY AUTHORITY. -- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, 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. (Emphasis added).

Consequently, the cases standing for the proposition that Congress has entirely occupied the field are inapposite to the clear preservation of state authority consistent with the objectives of the Telecommunications Act of 1996.

2. The Scope and Intent of Joint Marketing Restrictions

Since the Act is not preemptive of our ability to engage in joint marketing restrictions, we conclude that our consideration of the instant Agreement will turn on the issue of fact concerning what our June 3, 1996 Order contemplated with respect to what constitutes competition in the LEC service territory.

The restrictions against joint marketing for a LEC or its affiliate that were stated in our June 3, 1996 Order, are

indeed competitively neutral. They apply equally to all LEC long-distance affiliates where local exchange competition is not yet present. Further, such restrictions effectively police the competitive neutrality of the long-distance services marketplace, as Pennsylvania's LECs are moving towards the implementation of our directives in our December 14, 1995 Order at Docket No. I-00940034, Investigation Into IntraLATA Interconnection Arrangements (the "IntraLATA Presubscription Order"), regarding "1+" IntraLATA presubscription and toll services competition.

While the affiliated interest agreements that are the subject of this proceeding do not appear to contain the elements of "price packaging" of GTE's own services with the long-distance services of GTELD, e.g., the offering of GTE's and GTELD's services at a single price, it is obvious that the activities contemplated by these agreements will constitute joint marketing. GTE will be the marketing agent for GTELD's toll services, as well as for GTE's own "...local and intraLATA toll services..." See GTE North Application, ¶ 5, at 2. Essentially then, GTE and GTELD would be able to implement a "one stop shopping" joint marketing strategy for their services.

In our June 3, 1996 Order, we stated, in revising and streamlining entry standards, that new entrants need not await the issuance of a certificate of public convenience prior to commencing service, but could start providing service as soon as an application was filed. Because the putative CLEC need not wait for the Commission's final disposition, but is authorized to provide service immediately upon filing an application, the question becomes whether this fact constitute the requisite "entry" of competition into the LEC service territory. If we were to so determine, we observe that AT&T currently has an application to provide local exchange service before the Commission for consideration and could, under this analysis, be said to have "entered" GTE North's service territory.

In reviewing the proper occasion in which entry of competition into a LEC service territory has occurred, we find it appropriate to define entry of competition into the LEC territory as occurring on the date when an Order is entered certificating a CLEC by this Commission. We also recognize the AT&T position which would have us engage in a more restrictive conclusion as to when competitive entry is achieved in an ILEC territory by linking this to an interconnection agreement. However, we note that competitive service providers may render service through interconnection with existing facilities, resale of wholesale services, or the construction of their own facilities.

We do note, however, that GTE North has commenced the implementation of our intraLATA "1+" presubscription implementation directives.⁷ However, the full and complete implementation of intraLATA Presubscription by GTE and by other ILECs will not be accomplished immediately. Until intraLATA Presubscription, among other initiatives which this Commission has taken in furtherance of the objectives of the federal Act, is implemented, the restrictions on joint marketing activities contained in our June 3, 1996 Order are designed to facilitate the development of competition in the intraLATA toll services market in a competitively neutral manner.

On the basis of the foregoing, we shall direct GTE to delay the joint marketing of basic local service with GTELD's toll services until such time as a CLEC has entered GTE North's service territory.

⁷ See generally, IntraLATA Presubscription Order Docket No. I-00940034, (Order entered August 1, 1996 granting waiver to GTE North from our December 14, 1995, IntraLATA Presubscription Order); Pennsylvania Public Utility Commission v. GTE North Incorporated, Docket No. R-00963672, Order entered July 19, 1996 (approval of intraLATA "1+" conversion equal access recovery charge for GTE North).

GTE and GTELD shall be permitted to joint market interLATA and intraLATA toll services since there exists competition in the toll market. We note that on July 18, 1996, we approved a GTE proposal to initiate wholesale resale rates for IntraLATA Message Toll Service. The retail rates were reduced by 5%. AT&T, therefore, could purchase GTE's IntraLATA Toll MTS at wholesale rates and joint market this service with its InterLATA and Interstate Message Toll Service. Also, on July 18, 1996, we approved a GTE proposal to change its method for the recovery of "1+" presubscription conversion costs from a per access line basis to a minutes of use basis. Along with that approval, GTE North proposed to expedite its implementation of IntraLATA "1+" Presubscription to a time frame ranging from September 1996 to March 1997.

3. Other Contentions of GTE and GTELD

To the extent consistent with this Opinion and Order, we shall reject, without extensive elaboration, the contentions of GTE and GTELD regarding the scope of proceeding under Chapter 21 of the Public Utility Code, and the requisite standing of AT&T in this matter.

CONCLUSION

Upon our review and analysis of the GTE North Application regarding the Sales Agent Agreement between GTE North and GTE Long Distance, said Agreement needs to be modified so as to comply with our June 3, 1996 Order, at Docket No. M-00960799 regarding the joint marketing activities between LECs and their long distance affiliates.

Under the proposed "joint marketing" provision proposed in the instant Sales Agent Agreement, GTE North would market its Local Basic Service and intraLATA Message Toll Service with GTE Long Distance's interLATA and Interstate Message Toll Service.

Based on the foregoing discussion, our analysis of the federal Act reveals and we shall take appropriate notice that specific sections of the Act preserves the states' rights to act in a manner consistent with, and in furtherance of the federal regulatory scheme pertaining to joint marketing. We conclude that the Communications Act of 1934, as amended, specifically preserves state jurisdiction over matters pertaining to the regulation of intrastate wire or radio communications. Sections 261(b) and 261(c) reinforces the notion that the Commission is not preempted in efforts to implement the pro-competitive directives of the federal Act and those contained in the Pennsylvania's Chapter 30 of the Public Utility Code. In addition to the above referenced Sections, Section 253(b) of the Telecommunications Act of 1996 adds further support to the preservation of our authority in this area.

Also, having determined that federal preemption does not pertain to this instant case, we shall direct GTE to submit a revised Sales Agent Agreement, consistent with the discussion contained in this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the provisions of the affiliated interest Agreement between GTE North, Inc. and GTE Long Distance pertaining to Billing and Collection Services be, and are, hereby, approved.

2. That the provisions pertaining to GTE North and GTE Long Distance joint marketing of interLATA and intraLATA toll service contained in the Sales Agent Agreement is authorized.

3. That the affiliated interest Sales Agent Agreement, to the extent that it pertains to joint marketing of local basic service with toll service, shall be amended so as to eliminate the provision of joint marketing of such services until such time as a

Competitive Local Exchange Company has entered GTE North's, service area as defined in this Opinion and Order.

4. That GTE shall file, within ten (10) days of the date of entry of this Opinion and Order, an amended Sales Agent Agreement, consistent with the directives contained in this Opinion and Order. Upon the filing of the amended agreement, the affiliated interest agreement shall be deemed approved. If the amended Sales Agent Agreement is not filed in ten (10) days, the Sales Agent Agreement shall be deemed rejected, in its entirety.

5. That the Motions filed by GTE North Incorporated and GTE Long Distance be, and hereby are, granted and denied, in part, consistent with this Opinion and Order.

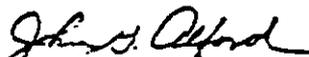
6. That AT&T shall inform the Commission's Secretary, within twenty (20) days of the entry date of this Opinion and Order, of its desire to pursue the allegations set forth in its Formal Complaint. In the event that AT&T chooses to pursue its Formal Complaint, the matter shall be referred to the Office of Administrative Law Judge for such further proceedings as may be appropriate.

7. That approval of this affiliated interest agreement does not constitute a determination of the reasonableness of any charges incurred thereunder for ratemaking purposes.

8. That a copy of this Opinion and Order be served upon GTE North, Inc., GTE Long Distance, AT&T Communications of Pennsylvania, Inc., the Office of Consumer Advocate, the Office of

Small Business Advocate, the Office of the Administrative Law
Judge, and the Office of the Trial Staff.

BY THE COMMISSION


John G. Afford
Secretary

(SEAL)

ORDER ADOPTED: September 5, 1996

ORDER ENTERED: SEP 6 1996 -

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

GTE NORTH INCORPORATED

PUBLIC MEETING -
SEPTEMBER 5, 1996
AUG-96-FUS-533*
DOCKET NO. G-00960494;
C-00968172

STATEMENT OF COMMISSIONER JOHN HANGER

GTE North, Inc., has filed an Affiliated Interest Agreement with the Commission that would allow GTE to perform certain services for the affiliate, GTE Long Distance. These services include billing and collection services and a sales agent agreement allowing GTE North to market and refer long distance customers to GTE Long Distance.

AT&T has filed a Complaint alleging that the sales agent agreement portion of the filing would violate the Commission's June 3rd Order concerning the implementation of the 1996 Telecommunications Act (Telco Act). The June 3rd Order prohibited the joint marketing of local and toll services by all local telephone companies until local telephone companies have local exchange competition. It said:

...We have a desire to treat all carriers competing in a given market fairly. However, pertaining to marketing restrictions, such an objective can be achieved by eliminating any relevant marketing restrictions on a LEC (local exchange company) or its affiliate at the time a competing local carrier or carriers enters the LEC's service territory. Such an approach is consistent with both the principles of fairness and our desire to reduce regulation where appropriate...(Slip Op. at page 22.)

By this decision on GTE's tariff, the Commission is redefining when "entry" occurs by a competitor. Now the Commission concludes that simply an approved certificate of service means that competition exists. Yet, until important issues such as interconnection arrangements are decided, the mere granting of a certificate does not create competition in reality.

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held December 4, 1997

Commissioners Present:

John M. Quain, Chairman , Statement attached
Robert K. Bloom, Vice Chairman , Dissenting - Statement attached
John Hanger
David W. Rolka
Nora Mead Brownell

Pennsylvania Public Utility Commission	R-00963858
Robin Kerns	R-00963858C0001
Eleanor Boettcher	R-00963858C0002
Elizabeth Bachy	R-00963858C0003
Margaret Grandjacques	R-00963858C0004
Thomas Huston	R-00963858C0005
City of Pittsburgh	R-00963858C0006
Irwin A. Popowski, Consumer Advocate	R-00963858C0007
Office of Small Business Advocate	R-00963858C0008

v.

The Equitable Gas Company

OPINION AND ORDER

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I. HISTORY OF THE PROCEEDING

On February 28, 1997, Equitable Gas Company, a division of Equitable Resources, Inc., (Equitable or Company) filed with this Commission its Tariff No. 21 proposed to become effective May 1, 1997, calculated to increase its annual revenues by \$28,236,983.00. The filing was subsequently suspended by operation of law and an investigation of the proposed general rate increase was assigned to presiding Administrative Law Judge (ALJ) Michael A. Nemecek for the litigation portion. ALJ Fred Nene was assigned as the Settlement Judge.¹ Equitable subsequently, extended the proposed effective date of its tariff until December 5, 1997.

Pursuant to a duly convened prehearing conference, Enron Capital & Trade Resources Corporation, (Enron) and CNG Retail Services Corporation (CNG Retail or CNG) sought and were granted intervenor status specifically with regard to Equitable's proposed Customer Choice Program.

On August 15, 1997, the Commission's Office of Trial Staff (OTS), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), Enron, CNG Retail and the City of Pittsburgh entered into a stipulation on the non-revenue related issues. The stipulation presents proposed terms and conditions and a proposed tariff for Equitable's so-called Customer Choice Program. Equitable did not participate in the drafting of the stipulation.

¹ A prehearing conference was held before Settlement Judge Nene on April 29, 1997, followed by several sessions, including two on July 15 and 16, 1997, before Commission Mediator Charles Hilmer, Jr. On July 22, 1997, the parties arrived at an agreement in principle on the revenue requirement issues which agreement was the subject of a Recommended Decision filed September 5, 1997 in the first phase of this proceeding. A final Commission Opinion and Order approving the settlement of the revenue requirements issues was entered October 14, 1997.

The proposed revenue settlement was reviewed, along with the objections to it, in a Recommended Decision filed September 5, 1997.² The purpose of the Further Recommended Decision was to review the record on the remaining issues and provide proposed resolutions of the disputed matters particularly those matters pertaining to the propose Customer Choice Program of the Company.

Because Equitable, the moving party and the party with the burden of proof, was not a signatory to the non-revenue issues stipulation, ALJ Nemec would not consider the stipulation under the Commission's regulations on settlements in general rate cases, 52 Pa. Code §69.406. Consequently, he directed the parties to proceed with the briefing schedule already established in the prehearing order. We note this proceeding has gone forward in a bifurcated manner, the revenue portion of the case having proceeded distinct from the customer choice section. Main Briefs have been filed by Equitable, OTS, OCA, the City, Enron and CNG Retail. Reply Briefs have been filed by Equitable, OCA, Enron and CNG Retail.

On October 16, 1997, the Further Recommended Decision (R.D.) was issued. Exceptions (Exc.) were filed by the Company, the OCA, CNG Retail, and Enron.³

² By letter dated September 11, 1997, the City of Pittsburgh asked to withdraw its objections to the revenue settlement.

³ Enron's Exceptions were, due to computer malfunction, received one day out of time.

II. EQUITABLE'S PROPOSAL

We liberally cite from the description of Equitable's proposal as taken from pages 3-9 of the R.D.

Equitable has voluntarily proposed a Customer Choice Program which will give all customers, large and small, the ability to buy natural gas from a supplier other than Equitable. (See R.D., p. 3 citing Equitable Tariff No. 21). A customer who chooses to buy gas from a supplier other than Equitable will then use Equitable to transport or, using the terminology of Tariff No. 21, "deliver" its natural gas supply to its premises. Currently, only customers who have annual usage above 5,000 Mcf or who, with no more than nine other customers, form a buyer's group that uses in the aggregate at least 5,000 Mcf annually, qualify for delivery service. (Equitable St. No. 1 at 12).

Equitable designed its Customer Choice Program with the following objectives:

- Continued reliability of service to essential human needs residential customers;
- Full recovery of prudently incurred FERC-approved upstream pipeline capacity costs, i.e. avoidance of stranded costs;
- The creation of a schedule of services which will make Equitable and its customers indifferent as between sales and delivery service and not subject remaining Section 1307(f) sales customers to harm as customers migrate to delivery service.

Equitable stressed that its Customer Choice Program is a voluntary proposal on the part of the Company and that the Program is not required by the Public Utility Code, or by this Commission's regulations or orders. (R.D., p. 4).

Before proposing its Tariff No. 21 in early 1997, Equitable states it considered many proposals that could effectuate open access. The Company contends in its Main Brief that it created its proposed Customer Choice Program to maximize the benefits of choice for all customers while safeguarding the Company from any unnecessary stranding of costs or threats to service reliability as the gas industry moves to a fully competitive market. Each provision of the Company's program is designed to fit with another, with the goal of accomplishing a transition that welcomes new players while not harming those already existing. Equitable also states that it cannot be singled out to establish a Customer Choice Program created by competing marketers interested in their own profits. If a Customer Choice Program opposed by Equitable is to be imposed by the Commission, it must be done so on a statewide basis applicable to all Local Distribution Companies (LDC's), not just one. If common tariff terms and conditions are to be imposed by Commission order, they must be imposed on a basis consistent with the requirements of due process applicable to all regulated LDC's. Equitable's initial proposal in its proposed Tariff 21 may be found in its Exhibit IV and V, Volume 1 of 1. The proposed Tariff 21 covers some ninety-four pages with single spaced print.

Equitable's Customer Choice Program includes three new delivery service rate schedules: Rate FDS - Firm Delivery Service, Rate GDS - General Delivery Service and Rate DDS - Daily Delivery Service.

Rate FDS - Firm Delivery Service is intended for those customers who require or desire the assurance of upstream services. FDS will always be backed up with the Company's firm standby service or with an allocated share of the capacity that is currently used to serve firm customers. This service is the key to the Company's Customer Choice Program because it addresses two of the primary concerns related to it: reliability of service and stranded costs. FDS will be offered only in conjunction with the Company's Firm Pooling Service. (R.D., p. 5 citing Equitable St. No. 1 at 13-17).

Rate GDS - General Delivery Service is intended for non-essential human needs commercial and industrial customers who have previously migrated from Equitable's firm sales and firm standby services and do not require the same level of service reliability as an FDS customer. GDS will be offered in conjunction with Equitable's General Pooling Service ("GPS") or to individual customers with annual usage of more than 5,000 Mcf and who do not desire to be in an aggregation pool. (Id.).

Rate DDS - Daily Delivery Service is similar to current Optional Daily Balancing Service. It is intended for nonessential human needs commercial and industrial customers who are able to match gas deliveries to gas usage without the use of Company resources and who have the ability to withstand an interruption. These generally will be high load factor, process applications' customers. (Id.).

Equitable's Customer Choice Program also includes two new pooling service rate schedules: Rate FPS - Firm Pooling Service and Rate GPS - General Pooling Service.

Rates FPS and GPS are customer aggregation services whereby a credit-worthy third-party, the pool administrator (marketer), takes assignment on behalf of a delivery service customer of the customer's nomination and balancing responsibilities and, under separate contractual agreement with Equitable, aggregates the customer's gas deliveries and consumption with those of other delivery service customers for the purposes of calculating imbalances on the Company's system. (Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original pages 68 and 72). Equitable's proposed pooling service Rates FPS and GPS are set forth in Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original pages 68 through 73.

Equitable considers Rate FPS to be a crucial component of Equitable's Customer Choice Program. Indeed, customer choice for small customers would not be

possible absent the proposed Rate FPS pooling service which allows third-party natural gas suppliers to aggregate small customers for gas balancing purposes and for the purpose of qualifying for access to the Company's upstream pipeline services, i.e., transportation and storage. Equitable's Customer Choice Program, therefore, provides that every Rate FDS customer participates in a Rate FPS pool. A minimum of 50 customers or 5,000 Mcf annual usage is required to establish a FPS pool. Each customer in a pool will have an assigned Maximum Daily Quantity (MDQ) equal to the customer's design day usage.

Equitable states in its Main Brief that it designed its proposed delivery and pooling service rate schedules with two objectives always in mind: continued reliability of service and avoidance of stranded costs. Continued reliability of service is obviously extremely important because customer choice will, for the first time, make delivery service available to essential human needs residential customers. These customers require a firm supply of gas and the combination of the firm standby/capacity assignment component and the RNQ component of Rate FPS assures that the third-party natural gas supplier of essential human needs residential customers will have the resources needed to provide that firm service and the obligation to deliver gas as it is needed. In addition, Equitable proposes to implement an Operational Flow Order ("OFO") procedure, similar to those adopted by interstate pipelines, whereby Equitable may direct that third-party gas is flowed to specific receipt points on Equitable's system to the extent that operational reliability requires it. Equitable expects that this combination will result in an alternative delivery service that will be as reliable as Equitable's current sales service. Equitable St. No. 1 at 15.

As for avoidance of stranded costs, Equitable points out that its upstream pipeline capacity costs are approved by the FERC. The contract entitlement levels which Equitable has with its upstream pipelines were acquired through FERC-approved restructuring pursuant to FERC Order No. 636. This Commission has, on more than one

occasion, found those entitlement levels to have been prudently acquired. Equitable, thus, has no stranded costs and its Customer Choice Program appropriately provides for the full recovery of upstream capacity costs through the mandatory capacity assignment provision, thereby avoiding any stranding of costs. The costs of providing firm service would be collected from firm customers on the system and allow marketers access to the capacity as opposed to a mandatory standby.

Finally, an important part of Equitable's proposal is found in its proposed tariff Rule 11. Equitable has proposed to provide delivery and pooling services in accordance with a comprehensive set of tariff rules found in proposed Rule 11. Proposed Rule 11 has 22 subparts and covers topics from the application process through standards of conduct and creditworthiness of pool administrators. Proposed Rule 11 comprises seven pages of Equitable's Tariff No. 21 and is set forth at Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original Pages Nos. 25 through 31.

III. SETTLEMENT BETWEEN UNITED INTERVENORS REGARDING RETAIL CHOICE ISSUES

All active parties to this matter, with the exception of Equitable, presented an alternative proposal in the form of a full proposed tariff. On August 15, 1997 a Settlement Between United Intervenors Regarding Retail Choice Issues (United Intervenors' Stipulation, or alternately UI Settlement), was presented to the presiding ALJ for consideration.

The United Intervenors' Stipulation resolved all issues between the OCA, the OTS, the OSBA, Enron, CNG Retail, and the City of Pittsburgh pertaining to Equitable's proposal to modify its tariffs pertaining to delivery service in order to promote customer choice for its residential and small commercial customers. The United Intervenors' Stipulation provides alternative resolution of issues pertaining to: (1) the rate design for transportation/delivery services and pooling services; (2) the treatment of interstate pipeline capacity and associated capacity costs for capacity currently held to serve sales customers who decide to migrate to delivery service under the retail choice program; (3) the rates and rate design for firm standby service; (4) balancing requirements and cash-out procedures for delivery service customers; (5) billing options available under the retail choice program; (6) charges for pooling service; (7) charges for transfers of imbalances between pools; (8) terms and conditions under which the Company may continue to offer agency service; (9) determination of the migration rider rate; (10) sign-up procedures for customers in the retail choice program; (11) requirements for customer service agreements; (12) appropriate creditworthiness criteria for pool administrators and their implementation; (13) acceptable business practices for marketers, (14) affiliate marketer standards; and (15) dispute resolution procedures. (R.D., pp. 9-10). Appendix A to that Stipulation provides tariff language setting forth the United Intervenors' resolution of these issues in detail and further refines the tariff to promote customer choice on Equitable's system while maintaining reliability. (R.D., p. 10).

The United Intervenors' Stipulation consists of a complete rewrite of Equitable's proposal. Equitable agreed to some modifications that were suggested by the United Intervenors and, consistent with its acceptance of certain of those changes, requested that an amended version of its Customer Choice program be adopted. (R.D., p. 10 citing to the version supported by Equitable in its Appendix A to its Main Brief.) However, Equitable was, generally opposed to the United Intervenors' Stipulation.

Additionally, the Parties reached an agreement on the migration rider issue that was embodied in a stipulation attached as Appendix B to the Recommended Decision.

IV. DISCUSSION

A. Introduction

Consistent with the ALJ's approach, we shall address the details of the Customer Choice proposal seriatim. Miscellaneous issues are included in Section V of this Opinion and Order.

B. Burden of Proof

The parties have, at various times, disputed which party had the burden of proof. Equitable acknowledged its burden of proof for its proposed tariff. However, it argued that it need not defend its so-called agency program, the program having been approved in the past by this Commission. (R.D., p. 12). Further, Equitable argued that because the parties did not seek in a timely manner discovery on the agency program, proposals to modify it are improper. (*Id.*, citing Equitable Main Brief, pp. 61-62). As regards to the proposed "settlement" or stipulation of UI revising Equitable's Customer Choice Program, all of the active parties with the exception of Equitable, contended that it cannot be singled out from among the other LDC's for the creation of an unbundled service program involuntarily.

As regards to its position on its agency program, Equitable relied on two (2) Commonwealth Court decisions for the proposition that the burden of proof is on Enron and CNG Retail. Equitable cited Brockway Glass Company v. Pa. P.U.C., 437 A.2d 1067 (Pa. Cmwlth. 1981) and Zucker v. Pa. P.U.C., 401 A.2d 1377 (Pa. Cmwlth. 1979), for the proposition that a party seeking to overturn an existing tariff provision has the burden of proof. Also see 66 Pa. C.S.A. §§ 316, 332(a). ALJ Nemec observed that this Commission may, at its discretion, place the burden of proof on the utility to support the

validity of existing provisions. 66 Pa. C.S.A. §315(a). (R.D., p. 12) The Commission did so in its Order entered March 31, 1997, in paragraph 3. (Id.).

ALJ Nemec also discussed the Company's contentions relative to the burden of proof and the Commission's general authority to consider the issues raised by its Customer Choice program. Unless specifically noted, we shall adopt the ALJ recommendation on these preliminary matters.

C. Equitable's Customer Choice

Equitable's position in the proceeding at P-00961138, similar to those of the other LDC's, was that its operational requirements mandated terms and conditions applicable to its Pennsylvania operations and, as result, it would be unreasonable, and confusing to customers, to require one set of rules for the pilot program and then change them to suit Equitable's operations. Equitable's position statement was attached here as Appendix C to the R.D. for the sake of convenience. The Company's response also contains a useful definition and starting point for unbundling:

Unbundling is generally defined as the separate identification of all services with their related costs. By identifying each service component(,) the consumer may choose which service components are desired from each provider of service. As to what or who will determine the services retained by the LDC, LDC's should be permitted to provide services related to the distribution of gas and to provide optional services to marketers. Regulators may also require that certain services(,) such as balancing services and backup service to indigent customers, are to be provided by the LDC.

Position Statement of Equitable Gas Company, Appendix C, p. 6. (Punctuation provided)

As noted above, Equitable's proposal substitutes "delivery" for "transportation" and creates three new rate schedule/service classes: Rate FDS - Firm Delivery Service, Rate GDS - General Delivery Service and Rate DDS - Daily Delivery Service. All of the rate schedules proposed in Tariff No. 21 include:

Rate RS - Residential service
Rate GSS - General Service Small
Rate CSL - Commercial Service Large
Rate ISL - Industrial Service Large
Rate CSF - Contract Service Firm
Rate CSI - Contract Service Interruptible
Rate GL - Gas Lights
Rate FDS - Firm Delivery Service
Rate GDS - General Delivery Service
Rate DDS - Daily Delivery Service
Rate FPS - Firm Pooling Service
Rate GPS - General Pooling Service
Standby Service

In addition to the rate schedules, Equitable proposes a new Rider B, labeled the Transportation Migration Rider. (Rider A is for purchased gas cost and Rider C is the transition cost recovery surcharge.)

Equitable's proposals, followed by the United Intervenors' respective changes and/or revisions are discussed and resolved, below.

1. Standby Reservation Charges

Equitable presently provides firm standby service to those customers who request it and to all Rate 8 customers and essential human needs Rate GTS customers. Equitable Exhibit No. IV, Item IV-B-6, Tariff No. 20, Fifth Revised Page No. 55. The rate is redetermined during the course of Equitable's Section 1307(f) proceeding. Equitable did not propose a redesign of its rates in its April 1, 1997 Section 1307(f) Filing.

In Equitable's 1997 Section 1307(f) proceeding at Docket No. R-00973895 (September 30, 1997), we directed that the issue of standby reservation charges be resolved within the context of the instant proceeding. In Tariff No. 21, Equitable proposes that Firm Standby service be mandatory for customers served under Rate CSF (the successor rate to rate 8) and for essential human needs customers served under any delivery service rate schedule (except where the delivery service customer has received an assignment of the Company's upstream pipeline capacity). (Equitable Exhibit No. IV, Item IV-B-6, Tariff No. 21, Original Page No. 74.) Equitable's standby service rate design, volumetric for small volume customers and MDQ for large volume customers, was established as part of the Company's 1990 base rate proceeding. Equitable has not proposed a redesign of its rates in this proceeding.

The UI Stipulation replaces Equitable's volumetric rates for standby service with a standby demand charge based on estimated design day requirements for each individual standby service customer. The demand charge would be calculated by the use of Equitable's weighted average cost of capacity. Further, winter season standby charges would be eliminated. Standby charges would be reconciled annually to the actual capacity costs incurred. (UI Settlement, Appendix A, p. 2, ¶1.)

First, the OCA submitted that the Company's winter-only standby service should be eliminated because it is not designed to collect an appropriate level of costs for this service and results in a subsidization of this service by retail sales customers. Second, the OCA submitted that charges for this service should be designed as demand charges rather than the current volumetric charges and that the various size and load factor groups should, therefore, be eliminated. (OCA Main Brief, pp. 34-40.)

The United Intervenor tariff adopted the OCA's proposals to replace the Company's current volumetric rates for standby service with a standby demand charge based on the estimated design day requirements of the individual standby service customers and the use of the Company's weighted average cost of capacity, to eliminate winter season standby charges, and to reconcile standby charges annually to actual capacity costs incurred. (See, Appendix A, p. 2, ¶1.) OCA argued that this treatment eliminates the unreasonable subsidy to winter season standby customers and ensures that standby service is neither subsidized by, nor subsidizes, PGC service. The OCA maintained that elimination of this alleged subsidy is necessary to provide for the development of a competitive market for gas supply service for Equitable's residential and small commercial customers, while remaining fair to the Company as indicated in the United Intervenor Settlement. (Appendix A, p. 5, ¶10.)

The ALJ recommended the adoption of Equitable's proposals on rate design and the requirements for standby service. The ALJ reasoned that Equitable knows its system best and should be afforded the opportunity to implement the services that are compatible with its system.. The ALJ adds that the rates can be modified as appropriate and as supported by substantial evidence and based on the Commission's developing experience with unbundling of natural gas service

The OCA excepts to the ALJ's recommendation, arguing that the ALJ erred in recommending the adoption of Equitable's proposed standby charges which are not

based on the record evidence. The OCA contends that Equitable's existing volumetric rates for small and medium volume standby service customers should be redesigned on a demand only basis. The OCA also maintains that Equitable's winter-only stand by service is subsidized by retail sales customers and should be eliminated. The OCA further posits that the ALJ improperly concluded that the resolution of the issue of Equitable's standby reservation charges rates would affect the Company's day-to-day operations.

In its Reply Exceptions, the Company refutes the OCA's contention that Equitable's existing volumetric rates for small and medium volume standby service customers should be redesigned on a demand only basis. Equitable points out that the OCA's argument is not supported by the record evidence and that the OCA's witness conceded that his recommendations regarding standby service would not prevent the Company from charging customers for standby service on a volumetric basis. With respect to the OCA's argument that its winter-only standby service should be eliminated, Equitable emphasizes that the OCA has raised this argument in other proceedings. Equitable submits that the OCA has not presented any new or novel argument or evidence to warrant the Commission's modification of its November , 1990 decision approving Equitable's current winter-only standby service. Finally, Equitable disagrees with the United Intervenors' proposal to make standby service optional for essential human need customers. Equitable takes the position that by reducing standby service to optional status would affect day-to-day operations by impairing its ability to maintain necessary operations in a safe and reliable fashion.

We will deny the OCA's Exception on this issue. In our view, there is nothing in the record evidence of this proceeding which warrants a mandated redesign of Equitable's standby reservation service rate.

2. Capacity Assignment

A key component of Rate FPS, and possibly the primary component to the entire Customer Choice Program, is the assignment of upstream firm pipeline capacity to Rate FPS pools. For capacity assignment purposes, Rate FPS separates Rate FPS pools into three tiers as follows (Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original page 68):

Pools with Maximum Daily Quantities (MDQs) less than 1,000 dekatherms (Dth) per day

Pools with MDQs between 1,000 and 3,000 Dth per day

Pools with MDQs greater than 3,000 Dth per day

A Rate FPS pool with aggregate MDQs of up to 1,000 Dth per day (Dthd), the first tier, will have no capacity assigned to it but will instead be subject to Equitable's firm standby charge. The standby service charge will be billed to the pool administrator. This category will encompass a pool serving up to approximately 667 average residential customers. (Equitable ST. Nos. 1 at 13-14 and 15-1 at 5 and Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original page 68).

A Rate FPS pool with aggregate MDQs of 1,000 through 3,000 Dthd, the second or middle tier, will receive an assignment of Equitable's upstream firm transportation capacity equal to the pool's maximum daily demand in lieu of subscribing to firm standby service. To the extent that it is operationally feasible, Equitable states that it will assign capacity on those pipelines and on the specific legs of the pipelines that the shipper requests. To the extent that honoring such a request is not feasible, or if no request for specific capacity is made, upstream capacity will be assigned on a pro rata basis. (Equitable St. Nos. 1 at 14 and 15-1 at 5 and Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original pages 68 and 69).

A Rate FPS pool with aggregate MDQs of more than 3,000 Dthd will receive an assignment of Equitable's upstream capacity, with firm transportation capacity representing 50% of the assignment and firm storage representing the other 50%. Again, Equitable states that it will honor requests for specific firm transportation capacity where feasible. Storage services will be assigned on a pro rata basis. (Equitable St. Nos. 1 at 14 and 15-1 at 5 and Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original page 69).

In the Settlement Regarding Retail Choice, the United Intervenors present the following positions concerning capacity assignment:

2. For all customers currently taking sales service or transportation service with standby, and switching to transportation service without standby, capacity assignment will be mandatory for all customers switching on and after the effective date of this Settlement. Capacity will be assigned on a pro rata basis of all firm interstate pipeline capacity and storage services held by Equitable Gas Company. To the extent that Equitable's contracts with its pipeline suppliers expire, are renewed, or reduced, customers or their respective Pool Administrators will no longer be required to take assignment of such capacity. All pools will be treated on an equal basis with respect to capacity assignment.
3. Except for Equitrans Storage and associated Equitrans FTS service, and Equitrans No-Notice service, capacity will be assigned at the market value of the capacity, except to the extent that market value falls below the minimum rates for assignment specified in Appendix A. With respect to Equitrans Storage and associated Equitrans FTS service, and Equitrans No-Notice Service, this capacity will be assigned at the full pipeline tariff rates. The difference between pipeline tariff rates paid by Equitable to its suppliers and market value will be recovered through a surcharge to be applied across non-competitive transportation throughput, *i.e.*, throughput that is not, for all practical purposes, subject to economic competition

from an alternate fuel or bypass by another LDC or interstate pipeline. This charge is set forth in Rider D to the appended tariff and is termed the "Capacity Realignment Surcharge."

Although the United Intervenors agree with Equitable that capacity should be assigned on a mandatory basis, the method of assignment remains a major issue and will be discussed under several different subtopics as follows.

a. Pro Rata Assignment of All Firm Interstate Pipeline Capacity and Storage Services

The ALJ summarized the positions of the parties in the Recommended Decision, pages 19-24. We repeat that summary below.

The United Intervenors recommend that all of Equitable's firm upstream pipeline capacity and storage services, including no-notice service, be assigned to pool administrators on a pro rata basis. In contrast, Equitable states that its Customer Choice Program allows Administrators of middle and third tier pools to identify or "elect" the capacity to be assigned to them. If the Administrator makes no capacity election or if the election made by the Administrator could jeopardize Equitable's sales service, then the pool administrator, under Equitable's Program, would receive a pro rata assignment of capacity excluding no-notice service. (Equitable Main Brief, p.37).

Equitable goes on to observe that the position of the United Intervenors would include no-notice service in the capacity to be assigned to pool administrators. By including no notice service with the capacity to be assigned through the Customer Choice Program, the United Intervenors threaten the continued reliability of service to Equitable's remaining sales customers as well as its delivery service customers. In cases where gas supplies are not delivered in sufficient quantities, at the right time, to the proper portions of the system, Equitable states that it is no-notice service which makes up for this variance to the extent operationally feasible. This may occur for a number of reasons.

Examples include supplier failure, pipeline failure, or something as innocuous as an inaccurate weather forecast. (Equitable St. No. 15-1 at 10-11; Equitable Main Brief, pp. 37-38).

Further, Equitable states it will use a statistical model to forecast FPS pool consumption. Every statistical model will have an inherent statistical error. Equitable provides an example based on a 3% error in forecasting that demonstrates a serious shortfall in the amount of gas available to meet customers' needs. (Equitable Main Brief, p.38).

Equitable argues that this example also shows that, although its capacity assignment procedure does not explicitly assign no-notice service, implicitly pool administrators use this service. Similarly, although its proposed FPS terms governing Daily Gas Deliveries do not provide for a tolerance related to delivery of the RNQ, as noted and criticized by CNG Retail witness Meadows, the statistical error inherent in its RNQ formula implicitly provides a tolerance level. Allowing an additional tolerance on top of the inherent statistical error tolerance is not operationally feasible. (Equitable St. No. 15-1 at 11; Equitable Main Brief, p.39).

The OCA states in its main brief that while Equitable may have a valid point with respect to the operational control of no-notice service during peak periods, there is still no good reason why no-notice cannot be assigned while allowing for such control. More specifically, Equitable's assertion that statistical error in its forecast may result in a shortfall of resources relative to demand does not prevent it from requiring pool operators to dispatch their no-notice capacity on short notice to meet shortfalls in demands, or from making no-notice subject to limited recall provisions when service to core customers is threatened by a shortfall in supply. Indeed, the OCA contends, Equitable's tariff provides for numerous protective measures to ensure that it is able to meet core needs, including curtailments, operational flow orders, and the ability to take

non-core customer gas in a supply shortage situation. Moreover, there is now a market for gas delivered to Equitable's city-gate, through which Equitable could meet requirements if transportation customers failed to comply with operational flow orders or if supply was otherwise insufficient to meet demand. (OCA Main Brief, pp. 15-16).

The OCA notes that in his testimony, OCA witness Homby recommended, as an alternative to an assignment of no-notice capacity, that no-notice should form the basis for an unbundled firm daily balancing service if assignment of the resource poses a reliability problem. (OCA St. 3 at 15-16; OCA St. 3-S at 8). OCA submits that for the reasons discussed above, and consistent with the requirements set forth in the United Intervenor tariff that assignment of no-notice service with the protections afforded by the tariff offer sufficient protection from concerns over reliability. Specifically, the tariff provides that the "pool administrator and the Company shall mutually establish terms and conditions regarding the pool administrator's use of No-Notice service." (United Intervenor Settlement, Appendix A, p.20 (§ 3.1)). Further, in connection with the use of no notice service, the tariff provides that "[r]equirements will be established to ensure the Company's system reliability can be properly managed." OCA submits that these provisions will help to ensure that mutually satisfactory terms for the use of assigned no-notice service are established. Consequently, OCA submits that a pro rata assignment of all firm resources is appropriate as set forth in that tariff. (OCA Main Brief, p.16).

Both CNG Retail and Enron briefly argue similarly to OCA. Both argue that the United Intervenor's Settlement proposals are superior to those of Equitable. (See CNG Retail Main Brief, pp. 9-15; Enron Main Brief pp. 7-9).

Equitable argues, in its reply brief, that matters which effect system reliability should not be left open for further negotiation with pool administrators. Since Equitable has a valid point in respect to its desire to maintain operational control of

no-notice service, no-notice service should simply not be assigned to pool administrators. (Equitable Reply Brief, pp. 25-26).

Equitable goes on to state that two additional points are ignored by the United Intervenors. First, Equitable relies exclusively on its no-notice service to handle imbalances between deliveries and consumption. Unlike other LDC's, it has no storage assets on its system which it might use in conjunction with no-notice service to handle imbalances. Equitable must, therefore, retain its no-notice service in order to maintain the safe and reliable service to which its essential human needs customers are accustomed. At this stage of customer choice, pool administrators have no history of being able to handle adverse weather conditions, nor do they have any history of being able to respond to operational flow orders. So long as Equitable is the supplier of last resort, it is critical that it retains its no-notice capacity. This is Equitable's last line of defense should a marketer not deliver supply on a critical day. The United Intervenor Settlement position places all customers at risk and jeopardizes system integrity. (Equitable Reply Brief, p.26).

Equitable goes on to state that its second point is that its contract with Columbia Transmission will expire on October 31, 1998. With the anticipated commencement of customer choice on April 1, 1998, pool administrators would not be allocated sufficient resources to serve their essential human needs customers during the first winter heating season under the United Intervenors' capacity assignment proposal. This shortfall of approximately 36,000 Dthd would occur without Equitable or this Commission gaining any experience on pool administrator performance during the winter heating season. (Equitable Reply Brief, p.27).

Finally, on page 12 of its Main Brief, the OCA, in further support of pro rata assignment, presents an analysis of the cost of capacity assigned to each tier and claims that Equitable's proposed three tier approach will discourage competition from

small and medium size pools. Equitable contends that this analysis is misleading. The analysis is based on rates that went into effect one year ago and will be revised as part of Equitable's pending Section 1307(f) proceeding. Updating the OCA's cost analysis to reflect the actual cost which pool administrators could expect to incur show that there is only a \$0.02/Dth difference between the cost to a large pool administrator (MDQ > 3,000 Dthd) and the cost to a small pool administrator (MDQ < 1,000 Dthd). (Equitable St. No. 15-2 at 34; Equitable Reply Brief, pp. 27-28).

The OCA states in its reply brief that Equitable's argument against a pro rata assignment of capacity can be reduced to its view that an assignment of no-notice service would threaten the continued reliability of service to Equitable's remaining sales customers and its delivery service customers. The OCA states that Equitable and pool administrators can develop mutually agreeable rules for the use of no-notice capacity that meet concerns over reliability. For example, pool operators could be required to dispatch no-notice service capacity on short notice or no-notice service could be made subject to limited recall provisions. Additionally, the OCA would emphasize that Equitable's tariff provides for numerous protective measures to ensure that Equitable is able to meet core needs, including curtailments, operational flow orders and the ability to take non-core customer gas in a supply shortage situation. Furthermore, since there is now a market for gas delivered to Equitable's city-gate through which Equitable could meet requirements if there was still a shortfall in supply relative to demand, it is not clear that Equitable couldn't meet requirements in the absence of its current level of no-notice service. (OCA Main Brief, pp. 15-16).

With regard to Equitable's proposal for its tiered capacity assignment which provides different pieces of capacity to different size pools, OCA agrees that small and large pool operators may have different needs. However, small aggregators should certainly not be required to pay for higher cost capacity than large aggregators simply because they want a different degree of administrative simplicity. If anything, they

should have the option of taking standby service at a higher cost than capacity assignment, but they should not be required to take capacity assignment. (OCA Main Brief pp. 13-14; Reply Brief pp. 18-20. *Id.*). Clearly, the correct approach here is to assign a weighted average mix of capacity regardless of pool size.

Finally, it should be noted that Equitable emphasizes the flexibility provided in its tariff which allows it, at the customer's election, to assign specific capacity to a pool operator. (Equitable Main Brief at 37). The United Intervenor tariff retains this provision and flexibility. (United Intervenor Settlement, Appendix A, §3.1 (¶1)).

The ALJ recommends that Equitable's proposed method of capacity assignment be adopted for now subject to review once some history exists to review just how well it did or did not work noting that, in a perfect world, a computer model would exist that would allow the results of the competing models to be reviewed and that, in the instant proceeding, we have Equitable's proposal versus a complete rewrite of the proposal. (R.D., p.25).

The OCA, CNG Retail and Enron filed Exceptions to the ALJ's recommendation. They argue that Equitable's three tier approach to capacity assignment is discriminatory and propose that all capacity, including Equitable's no-notice service, be assigned on a pro-rata basis. Although the OCA acknowledges that the assignment of no-notice service would create legitimate reliability concerns for Equitable, it argues that the proposed United Intervenor tariff provides for the establishment of terms and conditions for pool administrators to use no-notice service and to ensure system reliability.

In its Replies to Exceptions, Equitable argues that its proposed method of capacity assignment is neither discriminatory nor unfairly favorable to Equitable's retail services. It argues that the separation of Rate FPS pools into three tiers for capacity

assignment purposes is designed to eliminate a barrier to entry into the small customer supply market and recognizes that small aggregators have different needs for assets in providing services to their customers. It further claims that, if one updates the OCA's cost analysis to reflect the costs approved in its recently concluded Section 1307(f) proceeding, there is only a \$0.02/Dth difference between the cost to a large pool administrator (MDQ > 3,000 Dthd) and the cost to a small pool administrator (MDQ < 1,000 Dthd). Equitable claims that large pool administrators will be able to use their expertise and resources in managing the assigned capacity to offset this small disparity. It again contends that it needs its no-notice capacity to assure continued reliability of service to remaining sales customers as well as to delivery service customers and no-notice service, therefore, must be excluded from the capacity assigned to pool administrators.

Upon review of the record with respect to this issue, we agree with the ALJ that Equitable should be allowed to implement its proposed method of capacity assignment for now, subject to later review. Equitable is concerned that the assignment of no-notice service could affect system reliability and the OCA acknowledges that Equitable has a legitimate concern. We are likewise concerned.

Equitable relies exclusively on its no-notice service to handle imbalances between deliveries and consumption. It has no storage assets on its system which it might use in conjunction with no-notice service to handle imbalances and imbalances could be significant on peak winter heating days. As the supplier of last resort, Equitable must retain its no-notice service capacity in order to ensure system reliability.

The OCA would deal with our legitimate reliability concern by creating tariff provisions which require pool administrators and Equitable to establish mutually agreeable terms and conditions regarding the pool administrator's use of no-notice service. We are uncomfortable, however, with the idea of leaving matters which affect

system reliability open for further negotiation between Equitable and pool administrators. Since Equitable has a legitimate concern in respect to its desire to maintain operational control of no-notice service, the ALJ's recommendation should be adopted. No-notice service should not be assigned to pool administrators.

Finally, we are not persuaded that Equitable's three tier approach to capacity assignment is discriminatory. There will be only a \$0.02/Dth difference between the cost to a large pool administrator (MDQ > 3,000 Dthd) and the cost to a small pool administrator (MDQ < 1,000 Dthd) under Equitable's proposed method of capacity assignment. This is not discriminatory and large pool administrators may very well be able to use their expertise and resources in managing the assigned capacity to offset this small disparity. Moreover, it seems reasonable to expect small aggregators to have different needs for capacity to serve their customers. The three tier approach attempts to accommodate the differing needs of aggregators.

(b) Timing of Capacity Assignment

The Company proposed that capacity be assigned once a year, effective April 1st. CNG Retail (CNG) opposed the once a year assignment and appeared to support a monthly assignment of capacity. The United Intervenors have adopted the CNG position and propose in Rate PS that capacity be assigned "every 15 days prior to the calendar month in which service is to be provided." Equitable contends that monthly capacity release will not work because it is administratively burdensome to the Company and is impossible without subsidies from merchant service customers. (Equitable Statement No. 15-1, p.7; Equitable Main Brief, p. 39).

The administrative burden stems from the fact that Equitable's residential and small commercial customers have their meters read and are billed on a cyclical basis. Equitable alleges that it does not have the capability to read all of its meters and issue all

bills at the beginning of the month and to properly match gas deliveries with usage, gas deliveries must commence on the beginning of the customer's billing cycle. A monthly capacity assignment would require that Equitable modify its capacity release to pool administrators on a daily basis depending on how many customers the pool administrator adds or loses. Equitable would have to recalculate a new MDQ and a new capacity release for each pool and communicate this to the pool administrators on a daily basis. (Equitable Main Brief, pp. 39-40).

The subsidies would result from balancing the pool administrators' calendar month deliveries against billing cycle pool consumption. Equitable used as an example a hypothetical pool where all customers are in a billing cycle which runs from the 15th to the 15th of each month. The pool administrator would deliver gas during the calendar month of January which would be balanced against pool consumption during December 15 through January 15, the cycle billing month. Any variance between customer usage and natural gas prices during December 15 through December 31 as compare to January 15 through January 31 would be subsidized by merchant service customers. (Equitable Statement No. 15-1, pp. 7-8; Equitable Main Brief, p. 40).

Under Equitable's proposal, if a customer wishes to switch to transportation service on any date other than April 1st of each year (the beginning of the Company's storage cycle), then the customer must take firm standby service. CNG and Enron both took exception to this proposal, arguing that it requires the customer (or the marketer serving them) to pay twice for capacity costs, once through standby service and a second time through the costs of delivering gas to Equitable's city-gate. (CNG St. 1 at 3, 12-14; Enron St. 1 at 24). OCA agreed with CNG and Enron that the capacity assignment program incorporated in the United Intervenor Settlement eliminates this requirement. Further, the Settlement addresses Equitable's concern that customers switching at times other than April 1st may interfere with the its storage cycle by requiring those customers

to purchase a proportionate share of storage gas. (United Intervenor Stipulation, Appendix A, Rate PS, §3.1).

CNG argues that the use of monthly billing cycles makes the correspondence between capacity assignment and customer billing imprecise but it is something that simply cannot be avoided, regardless of whether capacity assignment is monthly or annual. Moreover, the variances associated with customers whose monthly billing cycle begins before the calendar month and those that occur after the start of the month will tend to offset each other, and could actually subsidize sales customers rather than migrating customers. (CNG Main Brief, pp. 21-22).

CNG also objects to the once a year capacity assignment proposal on the basis it is unworkable and is a pilot program approach that will not work in the marketplace. It also notes that a residential customer can sign-up for merchant service at any time and argues that the Customer Choice Program should not be any different. (CNG Main Brief, pp. 20-21).

The ALJ recommends that we adopt Equitable's position on the timing of capacity assignment. Should timing work to be a barrier to full competition on Equitable's system, the timing issue should be revisited once some experience is gained with unbundled service

The OCA, CNG Retail and Enron filed Exceptions to the ALJ's recommendation. They argue that customer choice is unworkable unless capacity is assigned monthly; i.e., every 15 days prior to the calendar month in which service is to be provided. They further contend that the burdens which Equitable claims would be created if capacity is assigned on a monthly basis are entirely reasonable in a competitive environment and are, in fact, necessary to facilitate entry and exit from the competitive marketplace.

In its Replies to Exceptions, Equitable claims that monthly capacity assignment is not necessary for customer choice to work. It claims that the annual capacity assignment feature of its Customer Choice Program is identical to the annual capacity assignment feature of the unbundling program being successfully offered by Columbia Gas of Pennsylvania, Inc. It also claims that marketers, like CNG and Enron, presently provide almost 6.5 Bcf annually to firm standby customers under Equitable's present transportation tariff which contains a capacity allocation window similar to that proposed by Equitable in its Customer Choice Program. It questions whether it could accommodate monthly capacity assignment with its present level of staffing and resources and, finally, asserts that, if monthly capacity assignment is required, it will be put in the unacceptable position of having to guess about its customers' firm requirements when it plans its purchasing decision.

Upon review of the record with respect to this issue, we reject the ALJ's recommendation adopting the arguments of Equitable and we adopt the argument of the OCA.

In particular, we agree with the OCA's argument in its Exceptions that, while its proposal would result in some additional administrative burden, the burden is not an unreasonable burden and is one of the costs of doing business in a competitive environment. Further, Equitable's concerns regarding the non-concurrence of capacity assignments with billing cycles and the non-concurrence of billing cycles with service periods will occur regardless of whether capacity assignments are made monthly or annually. As a result, Equitable's arguments in this regard are not persuasive.

While we reject the ALJ's recommendation on this issue, we do agree with Equitable that having twelve (12) capacity assignments instead of one (1) is not necessary for customer choice to work. But, while it may not be necessary for customer choice to

work, it will give customer choice a better chance to work at the expense of a reasonable increase in administrative burden to Equitable.

Finally, we also note that the United Intervenor Stipulation addresses the issue of the treatment of gas in storage when customers switch at times other than the beginning of the storage cycle by requiring customers to purchase a proportional share of storage gas at the time of switching.

For all of the above reasons, we will reject the ALJ's recommendation and adopt the OCA's proposal.

(c) Tiered Capacity Assignment

The ALJ summarized the positions of the parties in the Recommended Decision. We repeat that summary below.

Equitable's proposed Rate FPS separates Rate FPS pools into three tiers for capacity assignment purposes. Only the OCA and CNG opposed the tiered capacity assignment in their evidentiary presentations. The OCA argued that by varying the capacity mix and weighted average cost of capacity with pool size, planning and marketing by pool operators may be inhibited, thereby inhibiting the exercise of customer choice. CNG argued that the tiered approach provides Equitable's retail service a competitive advantage by assigning the highest cost capacity to marketers. (Equitable St. No. 15-1 at 5-6).

The separation of Rate FPS pools into three tiers for capacity assignment purposes are designed to eliminate a barrier to entry into the small customer supply market. Equitable's capacity assignment plan recognizes that small aggregators have different needs for assets in providing services to their customers. Larger aggregators

with significant support personnel and expertise in supply planning can handle and possibly even benefit from procedures that make the scheduling, tracking, and planning of gas supplies unduly complex and administratively burdensome for smaller aggregators. (Equitable St. No. 15-1 at 6).

For the reasons set forth in preceding sections of the Recommended Decision, the ALJ recommends that Equitable's proposal on pool sizes be adopted.

We need not address this issue any further since it has been resolved by our adoption of the ALJ's recommendation with respect to the pro rata assignment of all firm interstate pipeline capacity and storage services as discussed above.

(d) Phasing Out of Capacity Assignment

The ALJ summarized the positions of the parties in the Recommended Decision. We repeat that summary below.

The United Intervenor Settlement adopts CNG's proposal that the capacity assignment obligation should diminish as Equitable's contracts for capacity come up for renewal. (CNG Retail St. 2 at 14-15; United Intervenor Settlement, ¶ 2; Appendix A, p.20 (§ 3.1)). Mr. Meadows described his proposal in this regard as follows:

CNG Retail is not opposed to recovery of existing capacity contracts entered into by Equitable when it was the exclusive supplier, although the cost is very high. However, as additional customers move into transportation markets, they should be treated no differently than those who have previously opted for transportation. That is, there should be a recognition that the number of mcfs (both commodity and demand) are diminished and the capacity which Equitable has under contract should also be smaller. In other words, the supply and capacity contracting functions should continue to

shift to the competitive marketplace, so long as it can be demonstrated that reliability is firm.

(CNG Retail St. 2 at 15; CNG Retail Main Brief, pp. 17-18).

As Equitable's existing pipeline contracts expire, and/or are renewed and/or the utility reduces its contract entitlements, pool administrators would not be required to take a mandatory pro rata share of that capacity which expires, is renewed or is reduced. Equitable contends that the proposal is too broad and ignores that, at least under current law, it still shoulders the obligation to serve its customer, which obligation includes having adequate pipeline capacity irrespective of who supplies the natural gas.

(Equitable Main Brief, p.41).

Equitable provided the following examples to show how the United Intervenors' proposal has an unreasonable reach. Assume that Equitable has the opportunity to reduce its entitlement level on a pipeline by 5% and further assume that pool administrators have taken assignment of 10% of Equitable's capacity on that pipeline. Under this scenario, Equitable concludes that there is absolutely no reason that the entitlement reduction should relieve pool administrators from any more of their capacity responsibility on that pipeline than their pro rata share of the entitlement reduction or, in other words, 10% of the 5% reduction. (Equitable Main Brief, pp. 41-42).

Next, assume the same facts except that the pipeline contract expires and is renewed at 95% of the previous entitlement level. Once again, Equitable concludes that there is absolutely no reason that the entitlement renewal should relieve pool administrators of any more of their capacity responsibility on that pipeline than their pro rata share of the entitlement reduction. Just as importantly, assuming that Equitable's renewal of the contract at 95% of the previous entitlement level would be prudent in relation to its merchant responsibilities at that time for any customers who switch to delivery service after the renewal of that contract the pool administrator for those

customers should take an assignment of an appropriate share of the renewed capacity. The United Intervenors' proposal would relieve the pool administrator of assignment responsibility in each of these situations. (Equitable Main Brief, pp. 41-42).

Equitable argues that as its pipeline capacity contracts expire, are renewed and/or are reduced, pool administrators should still be required to take a proportionate share of the firm resources used in providing safe and reliable service to firm customers. In addition, while Equitable retains the traditional obligation to serve, it cannot be eliminated from the capacity planning and acquisition process. Should pool administrators not secure the appropriate level of firm gas supply resources in the right locations at the right times, Equitable would have no alternative but to fulfill its obligation to serve its firm customers by acquiring the resources necessary to maintain safe and reliable service. If this happens, these contracts would also be assigned to pool administrators on a proportionate basis. (Equitable Main Brief, pp. 42-43).

The OCA argues that the United Intervenor Settlement proposal is reasonable and appropriate and, because Equitable's contracts come up for renewal over an extended period of time, will allow for further evaluation of the ability of marketers to meet firm requirements. (OCA Main Brief, pp. 21-22).

The ALJ recommends that Equitable's proposal be adopted pending a fuller review of Equitable's pipeline contracts and a resolution of how the issue of the supplier of the last resort will be resolved in Pennsylvania.

The OCA filed an Exception to the ALJ's recommendation claiming that the capacity assignment obligation should diminish as Equitable's contracts for capacity come up for renewal. Equitable should not, in other words, renew capacity entitlements for load served by other natural gas suppliers. The OCA further claims that, in the future, natural gas suppliers, not the local distribution company, will have the responsibility for

getting gas to the city-gate and that tariff provisions will exist to ensure that brokers/marketers deliver on a reliable basis to meet the firm load requirements of their customers.

In its Reply Exceptions, Equitable argues that it remains to be seen whether brokers/marketers will ultimately bear the responsibilities and burdens of supplier of last resort. Until that issue is resolved, capacity assignment should not be phased out.

In light of the fact that as Equitable's contracts come up for renewal over an extended period of time, as stated by the OCA, there will be ample opportunity for reviewing the ability of marketers to meet firm requirements and, as a result, the concerns raised by the ALJ in his disposition of this issue can be minimized. Therefore, we will reject the ALJ's recommendation and grant the OCA's Exceptions on this issue. Further, the concern raised by Equitable with respect to who will be the supplier of last resort, while a legitimate concern, is not, in our opinion, sufficient on its face to warrant not phasing out capacity assignments at this time.

(e) The Implicit Creation of Stranded Costs Through the Assignment of Upstream Pipeline Capacity at Market Rates and Creation of "Capacity Realignment Surcharges"

The OCA has generally supported the concept of mandatory capacity assignment in this proceeding and continues to support that concept. (R.D., p. 30). The reason for OCA's position in that regard was succinctly summarized in OCA witness Hornby's Rebuttal Testimony in response to Enron's witness Catherine Schellhammer and CNG witness Thomas Meadows. (*Id.*, citing OCA St. 3-R at 6). As discussed there, Ms. Schellhammer proposed that capacity assignment not be required and Mr. Meadows proposed that the capacity of migrating customers should be assigned at market rates, and that the difference between market value and tariff rate be recovered across all throughput. In response, OCA witness Hornby testified as follows:

Those proposals are not fair to customers who choose to remain on sales service. Those customers will be worse off under the proposals recommended by Ms. Schellhammer and Mr. Meadows than if Equitable did not implement FDS. Not only will customers who remain on sales service continue to pay a rate based on Equitable's cost of upstream capacity, they would also pay for capacity rendered excess by migrating customers.

(OCA Main Brief, p.17).

OCA goes on to state that in the United Intervenor Settlement, the intervenors have reached a compromise on this issue that will protect remaining sales customers while providing for potential capacity cost savings to migrating customers. Specifically, the United Intervenor Settlement provides for assignment of capacity at market value, with the difference between pipeline tariff rate and market value ("stranded costs") to be recovered via a "capacity realignment surcharge." (United Intervenor Settlement, ¶2; Appendix A, pp. 19-20, 27 (§3.1 and Rider D)). The combination of capacity assignment and the capacity realignment surcharge will allow for full recovery of the Company's capacity costs. Furthermore, since the stranded capacity costs are to be recovered across all noncompetitive transportation throughput, OCA's concern that these stranded costs would fall on remaining sales customers under the proposals set forth by Ms. Schellhammer and Mr. Meadows are avoided. (OCA Main Brief, pp. 17-18).

The OCA contends that the proposal to spread stranded costs across all noncompetitive transportation throughput is fair and Equitable and will enhance the incentive of marketers to compete for retail gas load on Equitable's system. This incentive is brought about by the ability of marketers to generate savings for their customers because of the lower capacity costs associated with market valuation, as compared to full tariff rate valuation. Further, since recovery of stranded capacity costs

is spread across all noncompetitive transportation throughput, only a portion of these costs are spread back to migrating customers. (OCA Main Brief, p. 18).

Furthermore, since imposition of the capacity realignment surcharge will impact newly migrating customers to the same extent that it impacts existing transportation customers, marketers' incentive to attract new customers will be directly related to their ability to offer savings to old, as well as new, customers which it will be limited by the level of the surcharge. Since the surcharge will grow as new customers with capacity assignment obligations are added, marketers will have to be careful about the level of new customers which are added and the impact of the capacity realignment surcharge on the savings they can offer to all of their customers. For this reason, OCA submits that the proposal for a capacity realignment surcharge allocated across a transportation throughput will fit well into the current marketplace for transportation service, and provide a fair balancing of the costs associated with customers switching to transportation service. (OCA Main Brief, p.19).

In addition to marketers' incentive to limit the capacity realignment surcharge, the surcharge is also limited by market prices for the capacity and the minimum release rates specified in the proposed tariff. (United Intervenor Settlement, ¶3; Appendix A, pp. 19-20 (§3.1)). More specifically, the proposed tariff provides for minimum release rates of 20% in the summer months (April through October), and 70% in the winter months (November through March) for both Equitrans non-storage Firm Transportation and upstream interstate pipeline capacity. Additionally, Equitrans storage, Equitrans storage-related Firm Transportation, and No-Notice service are assigned at 100% of the maximum tariff rate. Together, these minimum release rates assure that Equitable will recover at least 62% of annual costs of assigned pipeline capacity and storage from the transportation customers to whom the capacity is assigned, based on OCA's estimate from data in the Company's PGC-97 filing. (OCA Main Brief, pp. 19-20).

The amount of the capacity realignment surcharge will be affected by factors such as the number of customers migrating to transportation service, the amount of capacity assigned to those customers, the cost of the capacity being assigned at maximum rates, the market value of the capacity in the capacity release market, the volumes across which the costs are to be spread, and the minimum cost for assigned capacity as set forth in the Stipulation. (OCA Main Brief p.20).

CNG witness Thomas Meadows testified that it is important for the development of a competitive market to mitigate capacity costs:

Capacity charges need to be mitigated. Equitable's capacity charge levels will be approximately \$2.50/mcf (starting with the new PGC in October, 1997), where other customers in Pennsylvania pay less (+/- \$1.00/mcf). Small customers should be given the choice of a plan which gives them a long term opportunity for savings, especially in the level of capacity charges they pay.

(CNG Retail St. 2 at 12; OCA Main Brief, p.20).

Similarly, Enron witness Schellhammer testified that mandatory capacity release "will severely affect a customer's ability to receive savings under transportation service" and will discourage the participation of suppliers. She stated further her view that she would not expect customers or suppliers to participate in the Customer Choice Program unless suppliers have the option of acquiring their own capacity. (Enron St. 1.0 at 22-23; OCA Main Brief, p. 20).

Equitable construes the proposal as a recommendation that Equitable's upstream pipeline capacity on Tennessee Gas Pipeline Company and Texas Eastern Transmission Corporation and Equitrans non-storage Firm Transportation be assigned at "market value" as established in the capacity release or secondary market, subject to

certain minimum rates set forth in the United Intervenor's proposed tariff. Equitable has contracted for and purchased capacity directly from the pipelines, a primary market transaction, and pays the FERC-approved rate. The difference between the primary market FERC-approved rates for this capacity and the secondary market "market value" would then be recovered by Equitable through a Capacity Realignment Surcharge to be applied across a noncompetitive transportation throughput. In effect, what the United Intervenor's propose to do is "strand" a portion of Equitable's upstream pipeline capacity charges previously found by this Commission to have been prudently incurred. (Equitable Main Brief, p. 43).

Equitable's upstream pipeline capacity costs are approved by the FERC. The contract entitlement levels which Equitable has with its upstream pipelines were acquired through FERC-approved restructuring pursuant to FERC Order No. 636. This Commission has, on more than one occasion found those entitlement levels to have been prudently acquired. Equitable contends that it has no stranded costs and the proposal of the United Intervenor's which implicitly declares a portion of Equitable's upstream pipeline capacity costs to be stranded and set aside for recovery through a surcharge is wholly inappropriate. (Equitable Main Brief, p. 44).

Perhaps most significant for Equitable, the proposed capacity realignment charge would, moreover, apply to all noncompetitive transportation throughput, including interruptible customers who are not responsible for capacity costs. As a result, interruptible customers will subsidize firm customers if a Capacity Realignment Surcharge is applied to them. It is entirely inappropriate and, indeed; ironic that in a service restructuring proceeding where services are being unbundled and separately priced, that all intervenor's would propose to assign costs to one customer class - interruptible transport - that are totally unrelated to their service. Coincidentally, this customer group is the one that is unrepresented in this proceeding. Rather than pay a new surcharge, Equitable believes that interruptible customers will either use less gas or leave the system. Either

way, Equitable, as a result of the proposed Capacity Realignment Surcharge, will experience a decrease in costs recovered from interruptible customers which will then require that rates to firm customers be increased to make up the shortfall. (Equitable Main Brief, p. 44).

Equitable goes on to argue that there is no justification for recovering any upstream capacity costs through a surcharge as proposed by the United Intervenors. Equitable's upstream capacity costs are prudently incurred FERC-approved costs. Equitable does not pay a secondary market "market price" for this capacity. In fact, the lower price of the secondary market capacity - indeed, the secondary market's very existence - derives from the fact that FERC Order No. 636 compelled LDC's like Equitable to purchase their needed capacity at full tariffed rates. It is this price, not a secondary market price, which should be assigned to pool administrators through the mandatory capacity assignment program. (Equitable Main Brief, p. 45).

Equitable states that it is important that the Commission understand that only marketers will benefit by the assignment of capacity at less than the FERC-approved rate. If capacity is assigned at less than the full rate, marketers receive capacity at less than cost. That is obvious. What is perhaps not so obvious is what happens next. As explained by Equitable witness Yacko (Equitable Statement No. 15-1, p.5), in fact, what will occur is that Equitable's end-users will receive no net benefit. Referring to an example offered by CNG Retail witness Meadows, Mr. Yacko explained that if \$9 million in capacity costs are removed from Equitable's PGC rate and \$1 million is recovered in the capacity release to the pool administrators, then the remaining \$8 million subsidy to the pool administrator would be spread across and recovered from Equitable's end-users, producing no net benefits for Equitable's customers. Moreover, if the pool administrator would remarket the capacity through off system sales or capacity release and not flow the revenues through to its customers, then Equitable's end-users would actually be negatively impacted by this procedure. Once the marketers receive the

capacity for less than the full rate, they then will access the secondary capacity market through capacity release and reduce their overall costs to basically nothing. The revenue that they receive accrues to their shareholders. Under Equitable's proposal, on the other hand, the revenue that it would receive for capacity released at the full rate or used for off-system sales, would be credited to the PGC customers. (Equitable Main Brief pp. 45-46).

OCA responds by stating that what the United Intervenors have proposed to do is to assign capacity of migrating customers at current market value, and then recover the difference across noncompetitive transportation throughput, including the throughput of the migrating customers. While OCA had argued against leaving capacity costs on sales customers, the United Intervenor proposal prevents this and, at the same time, provides a certain amount of equity by charging existing transportation customers who were able to migrate without the capacity assignment requirement a portion of the non-economic capacity costs associated with the continuing migration of customers to transportation service. (OCA Main Brief, pp. 17-19).

OCA retorts that the Company argument, without any foundation, that interruptible customers will either use less gas or leave the system if they have to pay this surcharge is sheer speculation and ignores the proposed application of the surcharge only to noncompetitive volumes. The Company also points out that existing transportation customers are not represented in this proceeding. Certainly, that is by their own choice since they were given notice of this proceeding and are sophisticated consumers for the most part, and their absence should not influence this Commission's decision. (OCA Reply Brief, p. 23).

The OCA believes that Equitable's position is hypocritical. On the one hand, Equitable defends existing transportation customers who were not required to take assignment of capacity in any amount and left costs on remaining sales customers. On the

other hand, Equitable would require full assignment of all capacity costs to newly migrating customers and won't agree to allocate any of these costs to an existing transportation throughput. Clearly, despite the Company's proposal of a retail choice program in this case, it is primarily interested in defending its existing transportation market from having to pay any additional costs even though they were never required to bear capacity costs when they shifted to transportation service. (OCA Reply Brief, p. 24).

The OCA argues that Equitable largely ignores the minimum prices for capacity assignment specified in the United Intervenor tariff that will ensure that at least 62% of assigned capacity costs are recovered. (OCA Main Brief, pp. 19-20; Reply Brief, p. 24).

The OCA also notes that Equitable also asserts that PGC customers will have reduced credits from capacity release under the United Intervenor proposal. (Equitable Main Brief, pp. 45-46). This is simply not the case. The full cost of capacity which is assigned to migrating customers will be removed from the PGC and recovered via capacity assignment and/or the capacity realignment surcharge. There will be no costs assigned to PGC customers and, therefore, no capacity release credits to the PGC associated with this capacity. Moreover, Equitable's suggestion that marketers will be able to "reduce their overall costs to basically nothing", is absurd and unsupported. If this is the case, Equitable would be able to reduce its purchased gas costs to basically nothing too. Instead, marketers will have to use most of this capacity to serve their customers and releases will be able to be made only at market clearing rates when the capacity is otherwise not necessary to meet RNQ's. Usually, this will be in the summer, when pipeline capacity is not needed to meet RNQ's and when market clearing rates are extremely low. It is unlikely that marketers will be able to reduce their costs significantly through release of this capacity. However, that is one of the intended benefits of a capacity assignment program and should not be denied to marketers.

Contrary to Equitable's position, OCA submits that the capacity assignment provisions of the United Intervenor tariff fairly balance the interests of Equitable in full recovery of capacity costs, the interests of marketers in reducing the non-economic costs of competition, and the competing interests of existing and newly migrating transportation customers, while preventing any harm to PGC customers. (OCA Reply Brief, p. 25).

The ALJ recommends that Equitable's proposals for assignment of capacity be adopted as follows:

I believe that the OCA arguments here points out one of the problems with the UI Settlement. One whole class of customers, interruptible transportation, was not represented here. The settlement would, in essence, recover any unrecovered capacity charges from that class. What the UI Settlement does not address, at least to my understanding, is just what happens if the interruptibles take their business elsewhere. What happens if Equitable only recovers 62% of its capacity costs? What class will make up the 38% difference? Just what guarantees are there that pool administrators will pass on savings to their customers if the UI Settlement proposal is adopted? I am not equipped by knowledge or experience to answer these questions. It would appear that to the extent Equitable is required to buy gas at FERC-established rates, it will attempt to recover those costs in some manner from some customer class.

Another point - did the interruptible transportation class not participate because Equitable did not propose to increase their costs as part of its filing? Does consideration of the UI Settlement proposal affect the interruptible transportation class's due process rights?

At this juncture, I recommend adoption of Equitable's proposals for assignment of capacity.

The OCA, CNG and Enron filed Exceptions to the ALJ's recommendation arguing that capacity should be assigned at market rates, subject to certain minimum release rates, with the difference between the full tariff rate and the market rate recovered through a "capacity realignment surcharge" spread across non-competitive transportation throughput. They argue that the assignment of capacity at market rates, as they propose to do, would enable marketers to generate savings for their customers and do so in a way which is fair to all.

In its Reply Exceptions, Equitable claims that the assignment of capacity at less than the full FERC-approved rate would result in an inappropriate subsidization of customer choice for residential and small commercial customers by existing transportation customers. It characterizes this alleged subsidization as a reallocation of pipeline capacity costs away from those customers who caused Equitable to incur them. It claims further that the argument presented by the other parties in support of this reallocation of costs is no different in substance than the "excess" capacity argument which the OCA unsuccessfully made in Equitable's recently concluded 1997 Section 1307(f) proceeding. Finally, Equitable contends that there is no guarantee that pool administrators will pass on the reallocated cost "savings" to customer choice participants. In contrast, under the capacity assignment proposal recommended by the ALJ, the revenue received by the Company for the capacity released to marketers at the full rates or used for off-system sales, would be credited to the PGC customers, an obvious benefit to sales customers who decide not to migrate to delivery service.

Based on our review of the record before us, we conclude that the ALJ correctly recommended adoption of Equitable's proposals for assignment of capacity. The ALJ raises valid questions with respect to Interruptible customers and we share the concerns of the ALJ in this regard. Moreover, we agree with Equitable that, if we were to adopt the United Intervenors position, existing transportation customers would end up subsidizing customer choice for residential and small commercial customers. Anything

we do that results in the subsidization of one or more classes of customers by another class of customer will not foster an environment within which the benefits of competitive gas supply prices and services can be realized. House Bill No. 1068 currently before the Legislature recognizes the benefits of competition in the natural gas supply industry and we do not believe it to be in the best interests of all customers to take actions that may be contrary to that initiative. As a result, we will adopt the ALJ's recommendation on this issue as well as grant the Reply Exceptions of Equitable to the extent consistent with this rationale.

3. Balancing

OCA witness Hornby described the purpose of balancing as follows:

The need for balancing service arises from the fact that transportation customers and Equitable acting on behalf of its merchant service customers, must forecast their requirements at least a day in advance in order to nominate, or schedule the delivery of those volumes on their upstream transportation and storage services. Upstream pipelines almost always deliver the volume nominated, hence there is seldom an imbalance between actual deliveries on a day and the volume nominated for that day. However, actual consumption on a given day is almost always different from the forecast of daily requirements for that day. As a result, on every day there is some level of imbalance or difference between the volume of gas that customers actually consume and the volume of gas delivered into Equitable's system on their behalf.

OCA St. 1 at 19.

Equitable proposed a new Rate GDS - General Delivery Service as part of its Customer Choice Program. Rate GDS would be available to commercial and industrial customers who do not qualify for or elect service under Rate FDS and whose full commodity requirements are supplied through a single aggregation pool pursuant to the Company's General Pooling Service. A Rate GDS customer who uses more than

5,000 Mcf annually would not be required to take General Pooling Service. Rate GDS customers who do not take standby service would pay a Swing Charge of \$0.07 per Mcf to compensate Equitable for the cost of gas resources used to make up the difference between the gas consumed by the customer and the gas actually delivered to the customer on a daily basis. Rate GDS customers are also subject to monthly balancing provisions similar to those presently in effect in Equitable's existing Rate GTS. (R.D., p. 40 referencing Equitable Exhibit No. IV, Item IV-B-6, Tariff No. 21, Original Page No. 62-64; Equitable Main Brief, pp. 46-47).

The United Intervenors proposed that all balancing for transportation customers be done on a daily basis. This would eliminate a monthly balancing option for large commercial and industrial customers. Except for customers with daily measurement meters, the United Intervenors would measure customer imbalances as the difference between the RNQ and the actual amount of gas delivered into Equitable's system. Equitable objected, contending that this modification would, in other words, require it to calculate an RNQ for each commercial and industrial transportation customer. The United Intervenors would also eliminate swing service as well as all other differences between Rate GDS and Rate FDS. Further, the United Intervenors would eliminate differences between Rate DDS and Rate FDS, except that Rate DDS imbalances would be actual, rather than estimated, due to the availability of daily meter reading data. (R.D., p. 40).

Equitable defended its proposal to retain the monthly balancing option for large commercial and industrial customers by noting that every local distribution company in Western Pennsylvania has a monthly balancing option available to its transportation customers and that this is a service that this Commission has traditionally required LDC's to offer. Equitable, for example, has such a service option in its currently effective Rate GTS.

Equitable also argues that eliminating the monthly balancing option removes a service from Equitable's customers at a time when unbundling should bring more options to customers. The Company noted that no one has opposed the terms and conditions of Rate GDS which imposes a \$0.07 swing charge and monthly cash in and cash out tolerances with any credible evidence. (Equitable Main Brief, p. 48). Therefore, Equitable presents the question as one of having customers provided the option of RNQ service or monthly balancing. With other LDC's providing monthly balancing, Equitable argued that it would be at a significant competitive disadvantage. Equitable theorized that customers would leave the system for more favorable terms and conditions on other Western Pennsylvania LDC's systems and, consequently, Equitable would not be able to earn its authorized rate of return. (Id.).

OCA witness Hornby recommended and the United Intervenors also proposed that Equitable eliminate the \$0.07 per Mcf swing service charge and switch to RNQ's for its commercial and industrial delivery service customers. This proposal requires that Equitable forecast an RNQ for each of its commercial and industrial delivery service customers. Commercial and industrial delivery service customers have traditionally been responsible for forecasting and nominating their daily gas requirements. The United Intervenors' proposal would shift the forecasting responsibility to the Company. Equitable responded that it's Gas Management Department simply does not have the staff necessary to determine RNQ's for each commercial and industrial customer. Load forecasting service for this type of customer mix is cumbersome and burdensome. GDS customers are not essential human needs (EHN) customers and are not likely to have usage patterns consistent with that of weather-sensitive, EHN customers who will be served under FDS. Their usage is likely to be less impacted by weather conditions than FDS customers and more impacted by non-weather variables, particularly those behind the meter such as equipment failures and production variances. For these reasons, usage for these customers is more difficult to forecast, and Equitable

expects the accuracy of the forecast to suffer. (R.D., p. 42, citing Equitable St. No. 14-1 at 4; Equitable Main Brief, p. 49).

To support the elimination of swing service and the switch to RNQ's for GDS customers, Mr. Hornby argued that Equitable does not have the ability to curtail specific GDS customers. Curtailment should always be a last resort. Contrary to Mr. Hornby's contention, Equitable does, indeed, have the ability to curtail, has curtailed customers in the past and will do so again if and when necessary. Equitable believes, however, that the Company's proposed terms and conditions for Rate GDS, which include new Operational Flow Order provisions, will limit, if not obviate, the need for any curtailments. Ability to curtail is not relevant to this issue. The United Intervenors' proposal should be rejected. (Equitable St. No. 14-1 at 5; Equitable Main Brief, pp. 49-50.)

Presumably, the reason for eliminating the swing service and related charge is Mr. Hornby's belief that customers satisfying an RNQ requirement will be matching deliveries with usage and will not need to use the Company's no-notice service to cover the difference between deliveries and usage. (Equitable St. No. 14-1 at 5). However, due to the added difficulty of forecasting commercial and industrial customers' usage as explained above, one should expect more forecast error with these customers than with essential human needs Rate FDS customers, and the forecast error would have to be covered by the Company's no-notice service. Likewise, the daily tolerance that these customers will enjoy, without charge (2.5% under Mr. Hornby's original proposal and up to 50% under the United Intervenors' proposal), would also have to be covered by no-notice service. As a result, Mr. Hornby's premise that GDS customers will not use no-notice service is unfounded. Mr. Hornby's proposal also relieves customers of the obligation to forecast usage, makes the Company's load forecasting available to them free of charge, relieves them of the swing service payment obligation, and provides a margin

for variance from the RNQ with no allocation of costs for that service. (Equitable St. No. 14-1 at 5-6; Equitable Main Brief, p. 50).

Equitable states that RNQ's were proposed for FDS customers as a way of matching gas deliveries for EHN-type customers with gas usage without the need for installation of system-wide daily metering. The Company never intended that load forecasting service be provided to any other customers. Equitable is not aware of any other LDC in the Commonwealth that is offering this free service or has proposed to offer such a service either in a pilot or a full-blown Customer Choice Program. In his Rebuttal Testimony on this issue, Company witness Babatunde Fapohunda testified that it is difficult and costly to estimate the consumption of GDS customers, and that while Equitable may be able to make such a forecast, it is "currently not adequately staffed to provide such a value-added service." (Equitable St. 14-1 at 4-6; Equitable Main Brief, pp. 50-51.)

ALJ Nemeč reasoned as follows concerning the United Intervenors' Stipulation regarding balancing:

On the surface, the United Intervenors' proposal appears to require suppliers serving any delivery service customer to deliver gas equal to a pool's or a customer's RNQ. See Section 3.6 of proposed Rate PS which specifically provides that a pool administrator is required to deliver its RNQ. However, the very next sentence provides that a variance between deliveries and the RNQ of up to 2.5% of the RNQ will be free of cost to the pool administrator. Moreover, the following sentences provide that differences beyond the cost free tolerance will be cashed out at the highest cost of gas available to the Company on that day or cashed in at the lowest cost of gas available to the Company on that day. In other words, there is absolutely no penalty for not delivering volumes equal to the RNQ. When considered in conjunction with the provisions found in the seventh unnumbered paragraph of Section 3.1 - that assigned capacity can be recalled only in the event that a pool administrator

fails to deliver at least 50% of the RNQ in the winter months - it becomes apparent that there is no requirement to deliver any more than 50% of the RNQ in the winter months, absolutely no floor on deliveries in the summer months, and no ceiling (other than the MDQ) on deliveries at anytime during the year. Equitable Reply Brief, pp. 28-29.

(R.D., pp. 43-44).

Equitable argues that tolerances like these would be hard to defend with regard to service to customers with interruptible-type service requirements. They are absolutely indefensible with regard to service to essential human needs customers. Remember that these provisions were intended to cure the less stringent balancing requirements that Equitable would impose on GDS/GPS customers - namely: daily deliveries no greater than the pool's aggregate MDQ, a monthly balancing tolerance of 2.5%, cash-out penalties for exceeding the tolerance - and a provision for an economic operational flow order where undue cost shifting would be reasonably expected if deliveries are allowed to vary from expected usage. Equitable submits that its proposed GDS/GPS provisions are, in fact, more stringent than the alleged "daily" balancing provisions proposed by the United Intervenors and that they will provide more reliable deliveries to Equitable's system. (Equitable Reply Brief, pp. 28-29.)

Based on his consideration of the positions of the parties, ALJ Nemec recommended the following:

The parties have briefed the balancing issue extensively. I conclude it would be inconsistent and confusing to approve the UI Settlement provisions on balancing while recommending acceptance of Equitable's program's terms on other matters. As Equitable points out, pool administrators will be taking on upstream capacity that will have balancing provisions built in. See, Equitable's Reply Brief at pp. 29-33. To reiterate, I suggest that

Equitable's proposal be given a try and as experience is gained, changes can be made.

(R.D., pp. 44-45).

The OCA filed Exceptions to the ALJ recommendation to reject the balancing proposal of the United Intervenors' Stipulation, which, in turn, adopted the OCA position in this respect.

The OCA, while incorporating by reference its earlier positions as raised in its Main and Reply Briefs, stresses three points in its Exceptions.

First, the OCA argues that, contrary to the ALJ's conclusion, it would not be inconsistent or confusing to require the same daily balancing requirements for all delivery service customers, notwithstanding that other portions of the United Intervenors' Stipulation were not adopted. The OCA contends that it proposed this modification to the Customer Choice proposal of Equitable prior to the consummation of the United Intervenor Stipulation.⁴

The OCA continues its Exceptions by asserting that unbundling should be done on a comparability of service basis. This is consistent with its previously articulated position that having more stringent balancing requirements for residential and small commercial customers than for large commercial and industrial customers is unduly discriminatory. It states, "If a monthly balancing option is available for service to large commercial and industrial customers, it should also be available to residential and small commercial customers. To do otherwise is unreasonably discriminatory." (OCA Exc., p. 23).

⁴ This does not address, in our view, the observation of the presiding ALJ regarding the need to consider the interrelationship of the various provisions of a Customer Choice proposal when such a program is implemented.

Also, the OCA takes the position that fairness and equity support its position as the more stringent balancing requirements are imposed on those customers who bring firm supplies into the system rather than on those customers who bring interruptible supplies on the system. (Id.). Because interruptible customers would normally be more likely to fail to deliver sufficient supplies to meet their requirements, the Customer Choice's balancing provision for these customers should be more stringent in order to ensure that these supplies do not adversely affect system imbalance. (Id.).

Finally, the OCA takes issue with the ALJ's rationale for rejecting the United Intervenor's Stipulation based on the fact that pool administrators will be taking on upstream capacity that will have balancing provisions contained therein. It notes that the ALJ's point is difficult to discern as the balancing on upstream pipeline capacity has nothing to do with balancing on the LDC's system. Also, notes the OCA, upstream balancing does not provide any insight into why large commercial and industrial interruptible customers should have less stringent balancing provisions than residential and small commercial firm customers. (Id.).

CNG Retail filed Exceptions to several portions of the Customer Choice proposal concerning balancing of deliveries. CNG Retail excepted to Equitable's rule which provides for a zero tolerance for failure to exactly match the actual deliveries by the supplier with the published RNQ from Equitable. Instead, CNG Retail asserts that the United Intervenor's Stipulation which supports a 2.5% tolerance, with cashin/cashout penalties, based upon the lowest/highest cost of gas available to it on that day is reasonable. (CNG Retail Exc., p. 22).

Also, CNG Retail seeks the release of the RNQ calculation 3 hours sooner, or within 27 hours in advance of the delivery day. CNG Retail states that it is critical that the Company provide these figures sufficiently in advance for the Pool Administrator to

schedule deliveries. A reasonable period of time is needed, explains CNG Retail, to allow the Pool Administrator to order sufficient gas supply, issue pipeline nomination, and attempt to re-sell any unneeded capacity. (CNG Retail Exc., p. 23, also n. 17 citing CNG St. 2.1 at 7).

Finally, CNG Retail objects to Equitable's refusal, and the failure of the presiding ALJ to so recommend, access to an electronic version of the model or the algorithm used to calculate the RNQ, which could be used by the Pool Administrator to undertake its own efforts to project gas demand in the same manner that Equitable does. (Exc., p. 24).⁵ Similar to the Exceptions of the OCA, CNG Retail complains that the ALJ did not describe why the United Intervenors proposal could not be adopted on this point and that other aspects of the Stipulation could not be merged into other remaining aspects of Equitable's proposal. (CNG Retail, Exc., pp. 24-25).

In its Replies, Equitable refers this Commission to its prior exposition of the reasons for its balancing proposals. Here, it stresses that the United Intervenors' counter proposals would have a tendency to denigrate service reliability.

Initially, we determine that the fundamental question presented by the Company's proposal, which would retain more favorable monthly balancing for large commercial and industrial customers, is whether such difference results in undue discrimination. We conclude that Equitable has presented a sufficient operational basis and has adequately explained the interplay between the use of its swing charge versus the RNQ to account for the disparity in balancing. Therefore, we conclude that the difference does not constitute undue discrimination.

⁵ The United Intervenors' Stipulation states that Equitable will make available either the forecasting software or the algorithms by which it forecasts RNQ levels."

The proposal of the United Intervenors represents a premature attempt to eliminate all differences among classes of transportation users, absent the proper consideration of operational experience with the type of unbundling presented by Equitable's Customer Choice proposal. We agree with the Company that the United Intervenors' Stipulation would entail it having to calculate RNQ for each commercial and industrial customer, a task we conclude would be too administratively burdensome based on this record. Commercial and industrial delivery service customers have traditionally been responsible for forecasting and nominating their daily gas requirements. (See Equitable Main Brief, p. 49). Also we agree with Equitable's observations that:

"GDS customers are not essential human needs ("EHN") customers and are not likely to have usage patterns consistent with that of weather sensitive, EHN customers who will be served under FDS. Their usage is likely to be less impacted by weather conditions than FDS customers and more impacted by non-weather variables, particularly those behind the meter such as equipment failures and production variances. For these reasons, usage for these customers is more difficult to forecast, and Equitable expects the accuracy of the forecast to suffer." (Equitable Main Brief at 49).

We find that the use of the RNQ is, based on the record, adequately supported by the operational considerations and administrative practicality. Consequently, we shall adopt the ALJ recommendation in its result. Further, we agree with the Company's observation that load forecasting, as a service, was not intended to be offered for free, but is an accommodation to enhance the ability of Equitable to provide adequate service to its customers. Thus, we do not, at this time, find it necessary to further consider the request of CNG Retail to have access to the electronic version or model of the algorithm used by the Company to calculate the RNQ so that the Pool Administrator may perform the same calculations as does Equitable. To this extent, the Exceptions of the OCA and CNG Retail are denied.

4. Billing

In the rebuttal testimony of Equitable witness Crawford, Equitable agreed to modify the manner in which it would bill customers under its proposed Customer Choice Program. For billing beginning April 1, 1998, the start of the Customer Choice Program, the Company would offer customers two billing choices: (1) the Company will bill all charges to the customer; or (2) both the marketer and the Company will bill their portion of charges to the customer separately. Under either option, the marketer must assume responsibility for nonpayment of the marketer's portion of the bill. (R.D., p. 46). Equitable would not terminate service to customers, however, for failure to pay a marketer's bill. (Id., citing Equitable St. 1-2 at 38-39).

Also, at the recommendation of OCA witness Hornby, the Company proposed language agreed to in its Pleasant Hills Pilot that would provide for the crediting of partial payments on a consolidated bill first to the LDC's portion of the bill because the LDC retains the obligation to serve. (Equitable St. No. 1-2 at 23.)

The United Intervenors agreed with the Company's offer of the two billing choices outlined above. However, they also believed that a third option should be available by April 1, 1999, i.e., the Pool Administrator should have the option of rendering a single bill to the customer that includes the Company's charges for delivery service. This proposal is consistent with the testimony of CNG Retail witness Butler that separate bills from Equitable and the marketer will discourage customer choice since customers are familiar with one bill and that the two bill system may produce customer confusion because of variances between the billing periods of the LDC and the marketer. Also, it was stated that Columbia Gas of Pennsylvania and Peoples Natural Gas Company offer a consolidated billing service. (R.D., p. 47).

Equitable proposed that partial payments on a consolidated bill would be credited first to the LDC's portion of the bill since the LDC retains the obligation to serve. The OCA, while conceding that Equitable's position was similar to OCA witness Hornby's initial proposal, nonetheless urged that the United Intervenor Stipulation be adopted. The Stipulation provides for pro rata crediting of partial payments between the Company's portion of the bill and the marketer's portion of the bill. (See OCA Main Brief, pp. 59-60; CNG Retail Main Brief, pp. 37-38.)⁶

ALJ Nemeec noted the following with regard to the billing proposal under consideration:

At this time, however, Equitable does not have the information system capability to support third-party billings. Moreover, while third-party billing for utility services may well be the next step in the unbundling process, there are many unresolved issues related to third-party billing, primarily in the area of compliance with Chapter 56 of the Commission's regulations. It is speculative to project that these issues will be resolved by April 1999, and it is, therefore, premature to include a tariff provision stating a fixed start-up date for third-party billing. Equitable Reply Brief, p. 6).

(R.D., p. 47).

Based on the foregoing, he recommended that the Company's position, as amended, be adopted.

The OCA filed the sole exception to the ALJ recommendation on this issue. In its view, the Stipulation reached among the United Intervenor reflects a reasonable

⁶ In response to Equitable's proposal, CNG witness Butler conceded that "certain regulatory issues need to be addressed if the marketer is providing a single bill [and] the marketer may be willing to assume the LDC's regulatory responsibilities/liabilities for the customers that it bills." (CNG Retail St. No. 1.1 at 6.)

compromise because: (a) it would not allow marketers to offer a single bill until after April 1, 1999. By that time Equitable should have worked out any problems with its billing system that make it difficult to process currently; (b) two critical issues are resolved pertaining to the terms under which combined billing will occur - namely, the Stipulation prevents unreasonable discrimination in billing services between third party marketers and Equitable's affiliates and its agency service and the Stipulation provide for the pro rata crediting of partial payments between the Company's portion of the bill and the marketers' portion. The OCA also presses its concern that the United Intervenors' position, which would permit marketers to send a combined bill, is the most desirous and cost-effective means for a marketer to reach its customers. (OCA Exc., p. 25).

Finally, and most important for our consideration of the issue in this filing, is the OCA's reference to the United Intervenor proposed tariff which clearly specifies the billing requirements applicable to Pool Administrators. In the OCA's opinion, this would ensure that the Pool Administrators follow the same billing guidelines as the Company. (OCA Exc., p. 26).

In its Replies, Equitable repeats that the combined billing request, effective April, 1999, is premature. It states that there are numerous unresolved issues pertaining to the Commission's regulations at Chapter 56, 52 Pa. Code §56.1, et seq., and problems pertaining to the release of confidential customer information that would be necessary to implement combined, third party billing. (Equitable R. Exc., p. 15).

On consideration of the positions of the parties, we are constrained to agree with the Company on this question and shall adopt the ALJ recommendation. We are particularly concerned that any movement toward combined, third party billing by the Pool Administrator, marketer, or other entity not having a statutory obligation to serve, be implemented after full consideration of the impact on the Public Utility Code, and the Commission's Chapter 56 regulations. Also, movement toward this end must include

effective consumer education initiatives. This record simply does not address those considerations sufficient for us to adopt the United Intervenors' Stipulation on this question. While these issues may be resolved by April 1999, the target date of the United Intervenors' Stipulation, it is speculative to so assume. Further, we would need a more comprehensive forum to address these complex issues, among which are the circumstances under which confidential customer information would be released.

On the basis of the foregoing, we conclude that Equitable's proposal on billing, as revised, strikes the proper balance between the interests of the Company, the consumer, and marketers, at this time.

5. Agency Service

Equitable, under its Commission approved tariff, is permitted to act as agent, at the ratepayer's request, in securing storage services and transportation capacity on transmission pipelines. (Equitable Main Brief, p. 59 referring to its Tariff No. 20, sixth revised page no. 490.)

The OCA, CNG Retail and Enron opposed the continuation of Equitable's agency program. Their positions, in varying degrees, each focused on the potential anti-competitive position of the Company with respect to other marketer/brokers, and alleged opportunity for cross-subsidization of resources from the regulated operations to the unregulated agency side of the Company's operations.

CNG witness Butler observed that Equitable has not presented any meaningful information regarding its agency program. Mr. Butler noted that independent gas suppliers would be required to accept mandatory capacity assignment at full tariff rates, while Equitable may offer at its own discretion under its agency program the same

service at lower, market-based rates by using upstream capacity that Equitable acquires specifically for its agency customers. (R.D., p. 49.)

In addition, CNG Retail commented that under Equitable's tariff, there is no requirement that Equitable's agency program adhere to the other rules that also apply to independent marketers, such as balancing, pool aggregation, migration costs, etc. By giving Equitable advantages that cannot be matched by a competitive independent supplier, Equitable is effectively in the role of both competitor and rule maker. Accordingly, CNG witness Butler recommends that the agency program be eliminated because Equitable has said that it will be used to compete with independent suppliers for Priority One customers in the Customer Choice Program. (CNG St. 1, pp. 20-22.)

Enron witness Schellhammer recommended that, ideally, the Commission should prohibit Equitable from offering agency service because of the inherent advantages possessed by the Company. (Enron St. 1.0, p. 3-8).

As an attempt toward compromise of the matter involving the Company's agency service, the United Intervenors submitted an extensive redraft of Rule 11.7 which provides that Equitable may provide agency service only under certain specified conditions. In general, the Company's use of agency service would be strictly limited to retaining load that otherwise could be lost due to physical bypass, to a customer's use of alternative fuel, to retaining a customer's full contribution to upstream capacity costs that otherwise could be lost with the customer's switch to interruptible service, or where a customer is payment troubled. Further, under this provision, the commodity cost of gas for agency service would be completely divorced from purchased gas costs recovered through the Section 1307(f) process, and the Company would have to document, on a monthly basis, all agency service transactions using separate books and records. In addition, the Company would include with its annual purchased gas cost (PGC) filing a report on the cost of gas acquired for agency service customers so that parties may review

the appropriateness of the use of gas supplies for agency service rather than for PGC rate service. (R.D., pp. 49-50.)

The United Intervenors' Stipulation also provided that Equitable may not assign contracts of customers who receive agency service to an affiliate without giving all third-party suppliers an equal opportunity to bid for such customers. Finally, upon approval of Tariff No. 21, all customers physically receiving agency service from the Company as of February 28, 1997 and who do not meet the eligibility requirements specified in the second paragraph of this Rule 11.7 are eligible to continue receiving agency service only until the initial or currently effective term expires in the agency agreement with the Company, at which time the Company shall cease agency service. (R.D. at 50).

In response, Equitable contends that Enron's and CNG Retail's factual assertions regarding Equitable's agency program are unsupported, unfounded and, at their worst, appear, especially on the part of CNG Retail, to be attempts to place Equitable at a competitive disadvantage in an increasingly competitive marketplace. Specifically, as identified by Equitable witness Crawford, CNG Retail and Enron made the following errors and unsupported statements in disparaging the Company's agency program:

1. Enron's claim that Equitable subsidizes its agency program by recovering agency gas costs from Section 1307(f) customers is unsubstantiated and patently untrue.
2. CNG Retail's claim that Equitable does not apply its transportation tariff rules to its agency program is unfounded and incorrect.

3. Enron's and CNG Retail's claims that Equitable's agency program has a competitive advantage and inhibits customer choice is unsubstantiated and simply not true.

(R.D., p. 51 citing Equitable St. No. 1-2, pp. 32-33; Equitable Main Brief, p. 63).

Equitable concludes its defense of its agency program by stating that in the nearly ten years that have passed since Equitable first instituted this tariff provision, the Company has undergone two general base rate cases, eight Section 1307(f) purchase gas cost proceedings, and multiple investigations and complaint proceedings (e.g., the ATOC complaint proceeding at Docket No. P-00940886 and the Commission Investigation into Revenue Allocation Among Transportation Customers at Docket No. I-900009). Despite these multiple opportunities, Equitable states that the Commission has not ever found that its agency service is misused or abused, or serves any purpose other than to allow Equitable to satisfy its customers by meeting competition and maximizing recovery of fixed costs. Therefore, no evidence justifies a different conclusion in this proceeding. (R.D., p. 54).

On consideration of the positions of the parties, ALJ Nemecek recommended that no changes be made to Equitable's agency program. While he believed that many of the proposals set forth in the United Intervenor's Stipulation had value and should be considered, he felt they should be considered as part of a statewide policy imposed uniformly on all LDC's. (*Id.*).

In its Exceptions, the OCA would draw attention to the absence of any valid criticism of the United Intervenor's proposed language revising Rule 11.7. Thus, the OCA argues that its language is a reasonable compromise only designed to insure that Equitable's agency service is not subsidized and not used to compete unfairly in the newly emerging competitive market for such services. (OCA Exc., pp. 28-29). The OCA is critical of Equitable's defense of the continuation of its agency program without

based on the argument that there is lack of evidence that its agency service has harmed customers in the past. (OCA Exc., p 28).

Enron also filed Exceptions to the ALJ recommendation. It argues that, initially, the deferral of the agency issue to generic LDC proceedings is at odds with other recommendations of the ALJ in this matter, particularly those pertaining to capacity release. Thus, Enron complains that the Company cannot have it both ways, i.e. defense of its capacity release proposal based on the notion that the United Intervenor's Stipulation proposal is at odds with other LDCs, and rejection of the agency issue in favor of statewide consideration. (Enron Exc., p. 15).

Enron, thereafter, explains the benefits of the restrictions placed on Equitable's agency service in the United Intervenor's Stipulation. It takes the position that the agency service under which the Company now operates interferes with customer choice as Equitable can target customers, contact the customer by mail or phone and sign the customer for an extended period. (Enron Exc., p. 16). Further, Enron makes a claim of subsidization as follows:

Equitable's agency program takes advantage of winter-only standby service to offer lower rates to agency customers. The agency customer purchase [sic] gas delivered to the city gate. That gas need not be delivered on a firm basis, even for an essential human needs customer. Equitable arranges for its agency customers to pay standby charges to back-up non-firm supplies, but only for the five winter months. In contrast, Equitable's capacity release proposal, as noted above, requires delivery service customers to use Equitable's capacity at maximum rates on a year-round basis to bring gas to the city gate. Equitable's agency customers are not paying for seven months worth of standby service. The cost of upstream capacity held by Equitable to provide standby service in the seven summer months is paid for by the § 1307(f) customers. The

agency customers contribute only 5/12ths of the annual cost. The remainder is subsidized by the § 1307(f) customers. Tr. 324-327.

(Enron Exc., pp. 16-17).

Enron further argues that Equitable's agency service is subsidized by paying for the costs of a single billing, an advantage that will not be offered to delivery service customers served by other suppliers until April 1, 1998; and the costs associated with the operation of Equitable's agency pool, (8 Bcf) operated by at least one Equitable employee are borne by all other customers. (Enron Exc., p. 17).

Enron additionally refutes the Company's claim that its agency service preserves fixed cost contribution by avoiding bypass. It notes that if a customer stays on Equitable's system, i.e. becomes a delivery service customer, Equitable remains whole. (Id.).

In conclusion, Enron vigorously asserts that there is no valid rationale for Equitable to offer agency service in competition with other gas suppliers whose customers will continue to ship gas on the LDC's system. Enron states that the limitations represented by the United Intervenors' Stipulation will not interfere with the Company's goal of maximizing recovery of fixed costs and avoiding bypass by limiting the availability and use of agency by the LDC to demonstrably competitive situations. Enron would bring to this Commission's attention the limitations of Rates 8 and 9 reached in the ATOC settlement for the proposition that this approach illuminated the cross-subsidies. Enron states that Equitable switched many of these same Rate 8 and Rate 9 customers to agency service where it continues to use its monopoly status to undercut non-utility suppliers. (Enron Exc., p. 19).

CNG Retail shares the view of the OCA and Enron in its Exceptions. It states that under the Customer Choice proposal, Equitable will be in a very important

position as the incumbent LDC to whom independent suppliers will be required to submit competitively sensitive details about their operations, including sources of gas, upstream capacity, creditworthiness, customer identity and billing and pricing information. (CNG Retail Exc., p. 27). This creates an inherent conflict. (Id.).

CNG Retail notes that after the instant rate case was filed, Equitable, in approximately 1700 letters sent to retail customers, began solicitation under its agency service in anticipation of the Customer Choice opportunities. Equitable signed approximately 500 customers under proposed 18 month terms. (CNG Retail Exc., p. 28 citing CNG Exh. DR-2).

Also, CNG Retail observes that the only two bases on which the Company expressed opposition to any change or reformation of its agency program were addressed by the United Intervenors' Stipulation. Thus, CNG Retail implies that there is no sound reason other than competition for the Company to oppose such restrictions. Also, rather than assist Equitable's customers, CNG Retail avers that the agency program, in fact, harms them. It refers to the testimony of Mr. Meadow who calculated the market value of a one year release versus the full FERC rate reflected in Equitable's \$2.80/Mcf charge at approximately 61%. Therefore, argues CNG Retail, if release onto the open market, this capacity would have a value of \$1.71/Mcf ($\$2.80 \times .61$) as compared to the \$.54-\$.88/Mcf standby rates. Thus, the standby rates collected from Equitable's agency customers are substantially less than the comparable demand charges included in the purchase gas cost rate. (CNG Retail Exc., p. 29 citing Tr. 424; 426).

In summary, CNG Retail holds that the Stipulation fairly resolves the contentious agency issues so as to retain the benefits touted by Equitable and avoid the anti-competitive exploitation described by the marketers and the OCA. (CNG Retail Exc., p. 30).

On consideration of the positions of the parties, we shall deny the Exceptions of Enron, the OCA and CNG Retail and adopt the recommendation of the ALJ in substance. We direct that Equitable should be permitted to continue to offer agency service, subject to certain conditions. We conclude that the agency program of the Company should be treated as any other pool operator on Equitable system. As such, the pool and its customers shall be subject to the rates, terms and conditions placed upon other pool operators under the Company's proposed tariff. Further, this condition should apply to all new customers of the agency pool and to old customers which renew agency service agreements.

In a competitive regime brought about by the Company's Customer Choice program, and similar initiatives of other LDCs, we are extremely concerned with preserving the benefits of full competition for all customers. We are also cognizant that to the extent Equitable continues to operate an agency service, that such service should be treated in like manner as other Pool Administrators on Equitable system as to rates, terms and conditions. We caution that the agency pool should not obtain advantage over other pools by virtue of its affiliated status.

While we are sympathetic to the positions of the Intervenors in the development of full competition, we shall deny their Exceptions as unsupported by the record herein. On balance, we conclude that the possible preventive impact of the restrictions on the Company's agency service are not appropriate for implementation at this time, in light of no demonstrated abuse.

Last, we would not limit the eligibility, nor impose the enhanced reporting requirements on the Company as recommended by the United Intervenors.

6. Migration Rider

In Tariff No. 21, Equitable proposed a Transportation Migration Rider which provides a method under Section 1307(f) of the Public Utility Code for Equitable to recover experienced net over/under collections of purchased gas costs from ratepayers who shift from retail service to transportation service on or after the effective date of the rider. (Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original Page No. 93; Equitable St. No. 1 at 18.)

In their Settlement, the United Intervenors proposed that a Transportation Migration Rider which equaled Equitable's current Section 1307(f) rate less the C-Factor approved in the Company's most recent annual Section 1307(f) proceeding, including all E-Factor adjustments to the rate resulting from the Company's quarterly recalculation of natural gas costs. Revenue recovered through the Migration Rider would be credited against purchased gas costs in the Company's Section 1307(f) proceeding.

In a Stipulation filed with the Commission on September 30, 1997, the OTS and Equitable reached an agreement on the terms to be included in Equitable's Migration Rider. The ALJ recommended the adoption of the OTS/Equitable Stipulation on the Migration Rider.

Enron excepts to the ALJ's recommendation and argues that the ALJ failed to consider Enron's evidence in opposition to the Migration Rider. Enron points out that while it agreed to the Rider as an integrated component of the Settlement, it did so because the Settlement provided other benefits which outweighed the anticompetitive impacts of the Rider on customer choice. Enron maintains that if the Settlement is not adopted wholesale, there is no agreement among the parties, as represented by the ALJ, with respect to Equitable's Migration Rider and the Migration Rider should be rejected.

We will adopt the ALJ's recommendation on this issue. We note at the outset that we have approved other Migration Riders similar to that proposed by Equitable for other utilities such as The Peoples Natural Gas Company, National Fuel Distribution Corporation and Columbia Gas of Pennsylvania. (Equitable Cross Examination Exhibit 1; Tr. at 600-601.) While it appears due to an oversight that the ALJ failed to discuss in his Further Recommended Decision Enron's opposition to the Migration Rider, the rebuttal evidence presented by the OTS and the subsequent Migration Stipulation reached by the OTS and Equitable adequately addresses the concerns cited by Enron.

With respect to Enron's concern that the quarterly calculation of the Migration Rider would reflect unrecovered purchased gas costs associated with the period when transportation customers were only receiving transportation service, Equitable's Migration Rider has been modified by the Stipulation to provide that the switching customer will only be responsible for natural gas over/under collections associated with the time period that the customer received retail service. (OTS St. No. 5R.) In fact the new language of the Rider as modified by the Stipulation insures that the E Factor used to the Rider rate will pertain only to the switching customer for the months prior to switching from retail service to transportation service. (OTS Reply Exceptions, p. 5.)

The Migration Stipulation also addresses Enron's contention that the Rider violates cost causation principles. The Stipulation which incorporates the OTS' modification language provides that the switching customer is only charged a rate that is calculated using the E-factor attributable to the months the customer receives retail service and not any time period after the customer has left retail service. In our view, the Migration Rider Stipulation does not violate any rules associated with cost causation.

In response to Enron's argument that the Rider is unreasonable and anti-competitive, the OTS amply explains in the following excerpt that Enron's argument is flawed:

...[T]he migration rider is not anti-competitive nor does it promote competition. The migration rider tariff simply provides a mechanism to track natural gas costs and natural gas refunds. For example, if customer "A" decides not to select another natural gas supplier, but instead remains with Equitable as a retail service customer, that customer would be responsible for the E factor. Customer "A" would be responsible for the natural gas cost and would receive any natural gas refunds through the E factor. Under the migration rider, if customer "B" decides to select another natural gas supplier other than Equitable, then customer "B" will remain responsible for the E factor (natural gas cost and natural gas refunds) for the last twelve (12) months that customer "B" received retail gas service from Equitable.

From a practical viewpoint, when selecting a natural gas supplier, both customer "A" and "B" will evaluate the total bill under transportation service (which includes the unbundled components of the bill) versus the bundled total bill of retail service. The unbundled component of the bill that is variable is the commodity cost of natural gas at the well head (market price). OTS St. No. 5R at 15. Accordingly, customers "A" and "B" will be comparing the market price of the supplier(s) versus the market price that they pay under a bundled bill, all other costs (firm distribution, firm transportation, storage) will remain the same. Consequently, the migration rider should have no impact on customers determining whether to select Equitable or another supplier, such as Enron, as its supplier of natural gas. (OTS Reply Exceptions, pp. 6-7).

In our view, Equitable's Migration Rider, as modified by the OTS/Equitable Stipulation is reasonable and in the public interest. We note that the United Intervenors' Migration Rider is the same as the Migration Rider proposed in the OTS/Equitable Stipulation. Equitable does not object to the United Intervenors' Rider B

presented at page 26 of the Settlement. Accordingly, we will deny Enron's Exceptions and the OCA's Exceptions on the issue of Migration Rider.

7. Pooling

The ALJ summarized the positions of the parties in the Recommended Decision. We repeat that summary below.

In Tariff No. 21, Equitable proposed a Monthly Pool Operating Fee of \$0.10 per Mcf of gas delivered to the pool and an Inter-pool Transfer Fee of \$0.10 per Mcf of gas transferred from one pool to another. (Equitable Exhibit IV, Item IV-B-6, Tariff No. 21, Original pages 71 and 73). OCA witness Hornby, Enron witness Schellhammer and CNG witness Butler addressed Equitable's proposed pooling service fees in their testimony. OCA witness Hornby testified that Equitable did not provide adequate documentation to support the proposed fees and, thus, in his opinion, Equitable should not be permitted to charge for pooling service or inter-pool transfers. However, as an offset to the elimination of pooling service fee revenue, Mr. Hornby increased the revenue requirement of sales and delivery classes by the amount of the eliminated pooling service revenue. (OCA St. No. 3, pp. 30-33). Enron witness Schellhammer testified that costs incurred in providing pooling services should be included in a fixed administrative charge, rather than assessed volumetrically. As for Equitable's proposed inter-pool transfer fee, Ms. Schellhammer took the position that since there is no physical movement of gas associated with inter-pool transfers, there should be no inter-pool transfer fee. (Enron St. No. 1, pp. 27-28). CNG witness Butler did not oppose a pooling fee, but simply maintained that Equitable had not adequately substantiated a \$0.03 increase from the current rate of \$0.07 to the proposed rate of \$0.10. Instead, CNG witness Butler recommended a rate of \$0.08. (CNG St. No. 1, p. 15; Equitable Main Brief, p. 54).

As part of the Revenue Requirement Stipulation, the Stipulating Parties agreed to a pooling fee floor of no less than \$0.05 per Mcf and \$500.00 per month per pool, subject to results of litigation. (Revenue Requirement Stipulation, page 9, subparagraph 5). In their Stipulation, the United Intervenors propose that the pooling service fee be set at \$0.05 per Mcf and \$500.00 per month per pool and that the fee for transferring daily imbalances between pools be set at \$0.01 per Mcf transferred. (Settlement Regarding Retail Choice, Section II, Paragraphs 6 and 7).

Equitable argues that the fees for pooling service should be established at the level originally proposed by Equitable in Tariff No. 21: a Monthly Pool Operating Fee of \$0.10 per Mcf of gas delivered to the pool and an Inter-pool Transfer Fee of \$0.10 per Mcf of gas transferred from one pool to another. There is no question that Equitable will incur costs in providing pooling services (Tr. 465) where OCA witness Hornby recognizes that Equitable will, in fact, incur costs in providing pooling service. Those costs include costs associated with providing pool administrators with daily nominations and balancing, determination of MDQ's, monthly cash outs, and implementation of operational flow orders. In addition, Equitable's proposed Firm and General Pooling Services will result in costs for implementing a computer-based nomination and billing system. (Equitable St. No. 1-2, p. 11; Equitable Main Brief, pp. 55-56).

In Attachment 4 to Equitable Statement No. 1-2, Equitable presented the following cost analysis in support of the proposed \$0.10 pooling fee:

**Equitable Gas Company
Pooling Service Cost Analysis**

	<u>Future Test Year</u>
Total Mcf Pooling	11,729,700
Charge per Mcf	\$ 0.10
Projected Pooling Revenue	\$ 1,172,970
Pooling Cost of Service	\$ 2,317,600
<u>Pooling Cost Analysis</u>	
Pooling Administrative Labor Costs	\$ 598,000
Customer Service Telephone Center	\$ 676,265
Computer Programming	<u>\$ 120,000</u>
Total Non-Gas O & M	\$ 1,394,255
Depreciation Expense	\$ 510,000
Return & Taxes	\$ 413,345
Pooling Cost of Service	\$ 2,317,600

In the above analysis, Equitable estimated that it will receive calls associated with its Customer Choice Program from a minimum of 50% of its customers resulting in costs of \$676,255 annually. This estimate is based on its experience with its Pleasant Hills pilot program. Equitable has 676 customers in the Pleasant Hills area, assigned a dedicated 800 telephone number for calls from Pleasant Hills regarding Customer Choice and offered its program last fall. Through December 1996, more than 43.8% of the total number of Pleasant Hills customers called with questions and more than 34% of Equitable's customers signed up. With the increase in availability and advertising regarding customer choice, the Company fully expects an increase in the number of calls. As a result, Equitable believes that 50% may be understated. The cost associated with the call center directly benefits pool administrators through increased customer sign ups and, as such, the costs should be assigned to and paid by pool administrators. (Equitable St. No. 1-2 at 12; Equitable Main Brief, pp. 56-57).

OCA witness Hornby challenged Equitable's proposed 3 cent increase in the pooling fee, and also, apparently, the imposition of any fee at all on the basis that Equitable failed to adequately substantiate the fee. It is not clear whether Mr. Hornby realized that this fee, at its present seven cent rate, was already approved in a prior Equitable proceeding. Like OCA witness Hornby, CNG's witness Butler did not dispute that there are costs associated with pooling services, he merely opposed the increase proposed by Equitable. To support his opposition to a \$0.03 increase, CNG witness Butler contended that "[t]here appear to be numerous conceptional errors. . . we suspect [pooling costs are embedded elsewhere and] there appear to be claims for expenses which have not been incurred." Armed with these "suspicions" and "appearances," CNG witness Butler supported an increase of no more than \$0.01, to bring Equitable's pooling service fee to \$0.08, coincidentally, the same fee charged by Peoples in its untariffed pooling service. (CNG St. No. 1 at 15; Tr. 701; Equitable Main Brief, pp. 57-58).

Equitable argues that each witness opposing Equitable's proposals have chosen to ignore the substantial evidence of record that Equitable produced to support its minimal proposed increase to its pooling services fees. As demonstrated above, Equitable has presented detailed evidence supporting the reasons why as a result of its Customer Choice Program its costs will increase, and therefore, the costs associated with pooling under this program should likewise increase. In opposing the proposed increase, CNG presents no evidence to support the disallowance. CNG presents only its suspicions, clearly an insufficient basis upon which to accept that party's recommendation. Enron likewise presents no evidence to support rejection of the fee, merely opposition to the form of its collection. Enron totally misses the mark when it opposes an inter-pool transfer fee because there is no physical movement of gas. Gas does not have to physically move in order for Equitable to incur administrative costs in noting and tracking the transfers. As is the case with many costs, for example the customer costs which are

"fixed" but collected in large part on a "volumetric" basis, physical movement of gas is not the sole determinant in whether or to what extent the Company incurs costs. Equitable has, as Enron recommends, determined the actual cost of providing pooling service and has provided evidence of those costs in this proceeding. The Company cannot be denied the opportunity to recover those costs simply because Enron prefers they be in a fixed charge. (Equitable Main Brief, pp. 57-59).

The ALJ recommends that Equitable's request for an increase from \$0.07 to \$0.10/Mcf in its pooling fee be denied.

Equitable, the OCA and Enron filed Exceptions to the ALJ's recommendation. Equitable contends that the proposed increase to the pooling fee was adequately supported on the record. It contends further that the cost analysis which it presented shows projected pooling revenue of \$1,172,970 at the proposed fee of \$0.10 per Mcf. That analysis also shows pooling costs of \$2,317,600, approximately twice the projected revenue. With projected pooling service expense of \$2,317,600 and projected pooling service revenue of \$1,172,970, Equitable's cost analysis could be off by as much as 50% and the proposed \$0.10 per Mcf fee would still be cost justified.

The OCA and Enron oppose Equitable's proposed pooling fee but support the settlement pooling fee. They contend that the charge proposed by the Company is unsubstantiated and based on inflated cost projections. They further contend that the proposed pooling fee, if approved, would result in an overcollection of revenues. They submit the settlement pooling fee as a just and reasonable compromise.

Based on a review of the record in this proceeding on this issue, we reject the recommendation of the ALJ with respect to the pooling issue and we adopt the

position of the OCA. Once again, we are concerned that, as stated by the OCA in its Exceptions, failure to unbundle this charge appropriately means that cross-subsidization may occur and transportation customers may pay for pooling service twice. As stated previously in this Opinion and Order, the subsidization of one or more customer classes by another class is inappropriate and not in the best interests of customer choice.

8. Rule 11

In its Customer Choice Program, Equitable proposed Tariff Rule 11 which is a compilation of terms and conditions that are generally applicable to all of Equitable's proposed delivery service. (Equitable St. No. 1-2 at 22.) Proposed Rule 11 comprises seven pages of Equitable's Tariff No. 21 and is set forth in Equitable Exhibit IV, Item-B-6, Tariff No. 21, Original Pages Nos. 25 through 31.

The United Intervenors proposed in their Settlement specific tariff language for Rule 11. The United Intervenors' proposed changes to Rule 11 included changes in language pertaining to application requirements, customers service agreements, creditworthiness criteria, marketer standards of conduct, the delineation of acceptable business practices, the sharing of consumption information, pool administrator agreements, and dispute resolution procedures. The United Intervenors also proposed in their Settlement the implementation of affiliate marketer standards and a mechanism to enable customers to sign up for transportation service anytime during the year and to switch suppliers at a minimal cost.

In accordance with the Commission's policy encouraging settlements, Equitable reviewed the United Intervenors' Rule 11 proposal and revised its proposed Rule 11 to incorporate those of the United Intervenors' changes which it was able to

identify and change as part of its Customer Choice Program. (Equitable Main Brief, pp. 76-77, Appendix A.)

(a) Sections 11.1, 11.2 - Sign Up Procedures

The United Intervenors proposed that Rule 11.1 and 11.2 mandate specific procedures and documentation for customers requesting delivery service. Equitable opposed the specificity in the tariff but nevertheless proposed a general sign up procedure that would apply to customers desiring FDS service.

Under Equitable's proposed change to Rule 11.1 which is purposely limited to requests for FDS service, a customer should see no difference between his or her former firm sales service and FDS service. However, a switch to any other service would result in a change in the nature of the customer's service. Equitable Rule 11.1 reduces the time for processing customer application for FDS service to twenty (20) days; provides that Equitable will confirm the customer's request for delivery service; and eliminate unnecessary documentation by consolidating the application and service agreement into a single document.

The United Intervenors Settlement incorporates the recommendations of the OCA witness Hornby, CNG Retail witness Butler, and Enron witness Schellhammer to streamline customer sign-up procedures while providing sufficient protection against slamming. Specifically, Rule 11.1, retitled "Sign-Up Procedures," the customer or the pool administrator can initiate transportation service, and may do so by written, electronic, or telephonic notice, rather than the formal application required by Equitable. At the same time, in order to protect customers from slamming, pool administrators must obtain the customer's consent in a verifiable form before submitting notice to the

Company. Such consent must be available for review by the Company on 24-hours' notice. A customer's signature would be required only if the customer is applying directly to the Company for delivery service. Additionally, language regarding the Company's ability to provide service has been removed. The United Intervenors have also proposed the removal of the additional requirement that customers switching service not only have an agreement with the marketer, but also execute a transportation agreement with the Company.

Revised Rule 11 also addressed potential problems with suppliers who believe that they have signed up the same customer. Specifically, once a customer is buying gas from a pool administrator, the Company would contact the pool administrator if a notice to switch to another pool is received on behalf of a customer and consent is verified by the Company. As noted above, the pool administrator would be obligated to keep on file written evidence of each customer's enrollment, which shall be available for the Company's review at any time, upon 24-hours' notice. A further addition to this section would enhance the provision of information to the marketer, which is essential to their provision of service. Specifically, Equitable would provide to the pool administrator a confirmed list of added and deleted customers in that pool by the 15th of the month prior to each service month, and would provide the last 24 months of consumption information, including volumes, for new customers. (OCA Main Brief, pp. 46-47.)

Under the Intervenors' proposed language for Rule 11.2, service agreements would not be required for customers that consume less than 5,000 Mcf per year, or unless the customer has negotiated a transportation rate less than the maximum rate. (OCA Main Brief, p. 47.)

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